

D R A F T
FOR DISCUSSION ONLY

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For May 16, 2012 Conference Call – Redline Draft
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~~For April 26—29, 2012 Committee on Style Meeting~~

With Prefatory Note and with Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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~~April-May~~ 9, 2012

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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 they 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 to allow at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements varied 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 16th century Statute of Uses, 227 Hen. VIII, c. IO, § 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 ~~agreements waiving rights at the death of the other spouse and the legal treatment of~~ marital agreements has ~~not~~ 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 ~~On~~ 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. ~~Regarding marital agreements, some states have neither case law nor legislation, while the remaining states have created a wide range of approaches.~~

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 support at the point of enforcement, 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 undue 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, a legislative note after section 9 offers 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: 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 the act and common law principles would be sufficient to deal with the likely problems with 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~~ intending to
8 remain married which affirms, modifies, or waives a marital rights or obligations during the
9 marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or
10 nonoccurrence of any other event. The term includes an amendment, signed after the ~~parties’~~
11 marriage spouses marry, of a premarital agreement or ~~an amendment of a prior~~ marital
12 agreement.

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

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

17 (Aa) spousal support;

18 (Bb) rights to property, including characterization, management, and ownership;

19 (Ce) responsibility for liabilities;

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

22 (Ee) allocation and award of attorney's fees and costs.

1 (5) “Premarital agreement” means an agreement between individuals ~~intending who~~
2 intend to marry which affirms, modifies, or waives ~~a~~ marital rights or obligations during the
3 marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or
4 nonoccurrence of any other event. The term includes an amendment, signed before the ~~parties’~~
5 marriage individuals marry, of a ~~prior~~ premarital agreement.

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

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

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

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

13 (Aa) to execute or adopt a tangible symbol; or

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

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

19 **Legislative Note:** ~~The extent to which this act applies to officially recognized~~ If your state
20 recognizes nonmarital relationships, such as civil unions and domestic partnerships, is a matter
21 for state law other than this [act]. consider whether these definitions need to be amended.

22 23 Comment

24
25 Through the definitions of premarital agreement and marital agreement, the drafting
26 committee hopes to clarify that this act is not intended to cover cohabitation agreements,
27 separation agreements, or conventional day-to-day commercial transactions between spouses.
28 Marital agreements and separation agreements are usually distinguished based on whether the

1 | couple at the time of the agreement intends for their marriage to continue or whether ~~legal-a~~
2 | ~~court-decreed~~ separation, ~~indefinite-permanent~~ physical separation or dissolution of the marriage,
3 | is planned or imminent. To avoid deception of the other party or the court regarding intentions,
4 | ~~some-one~~ jurisdictions ~~refuses~~ to enforce a marital agreement if it is quickly followed by an
5 | action for legal separation or dissolution of the marriage. *See, e.g., Minnesota Statutes* § 519.11,
6 | subd. 1a(d)(marital agreement presumed to be unenforceable if separation ~~or~~ dissolution sought
7 | within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement
8 | proves that the agreement was fair and equitable).

9 |
10 | While most premarital agreements and marital agreements will be stand-alone
11 | documents. A text can constitute a premarital agreement or marital agreement even if it is only a
12 | fragment of a writing that deals primarily with other topics could also constitute a premarital
13 | agreement or marital agreement for the purpose of this act.

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

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

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

2
3 | A premarital agreement or marital agreement may include other terms not in violation of
4 | public policy of this state, including terms relating to: (1) rights of either or both spouses to
5 | interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2)
6 | appointment of fiduciary, guardian, conservator, personal representative, or agent for person or
7 | property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5)
8 | choice of law governing validity, enforceability, interpretation, and construction of the
9 | agreement; or (6) formalities required to amend the agreement in addition to those required by
10 | this act.

11
12 | The definition of “separation” was meant to be broad enough to cover those jurisdictions
13 | where a legal separation or its equivalent is effected without the need of a court judgment.
14 | However, it is not meant to cover situations where a couple is simply living apart as a matter of
15 | convenience or preference, e.g., when the spouses have jobs in different cities.

16
17 | **SECTION 3. SCOPE.**

18 | (a) This [act] applies to a premarital agreement or a marital agreement entered into on or
19 | after [the effective date of this [act]].

20 | (b) This [act] does not affect any right, obligation, or liability arising under a premarital
21 | agreement or marital agreement entered into before [the effective date of this [act]].

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

23 | (1) an agreement between spouses affirming, modifying, or waiving marital rights
24 | ~~and~~ or obligations which requires court approval to become effective; [or]

25 | (2) an agreement between spouses intending to obtain a marital dissolution or
26 | court-decreed separation which resolves their marital rights or and obligations and is entered into
27 | when a proceeding for marital dissolution or court-decreed separation is anticipated or pending~~[-]~~
28 | [; or]

29 | ~~{~~(3) an agreement between spouses intending to separate permanently which
30 | resolves their marital rights or and obligations without court approval or affirmation, if each
31 | spouse had independent legal representation when the agreement was signed~~[-]~~.

1 | This section is adapted from the *Uniform Trusts Act*~~Code~~, Section 107. It is consistent
2 | with *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section
3 | reflects traditional Conflict of Laws and Choice of Law principles relating to the enforcement of
4 | contracts. See *Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). These
5 | ~~C~~onflict of ~~L~~aws principles include the authority of courts to refuse to enforce the ~~rule~~~~law(s)~~ of
6 | another jurisdiction, even if that jurisdiction has the most significant relationship to the
7 | agreement, if that other jurisdiction’s rules are contrary to the fundamental public policy of the
8 | enforcing state. “Significant relation” and “fundamental public policy” are to be understood
9 | under existing state principles relating to ~~C~~onflict of ~~L~~aws, and “contrary to ... fundamental
10 | public policy” means something more than that the law of the other jurisdiction differs from that
11 | of the forum state. See, e.g., *International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254
12 | N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508 (Or.
13 | App. 2011) (court refused to apply law under choice of law provision because contrary to
14 | “fundamental public policy” of forum state); Russell J. Weintraub, *Commentary on the Conflict*
15 | *of Laws* 118-125 (6th ed., Foundation Press, 2010).

16 |
17 | The limitation of choice of law provisions to jurisdictions having some connection with
18 | the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which
19 | restricts choice of law provisions to states with a reasonable relation to the transaction (this was
20 | Section 1-105 under the ~~old~~-UCC prior to the 2001 revisions; and Section 1-301 in the (2001)
21 | Revised UCC Article 1).

22 | For examples of choice of law and conflict of law principles operating in this area, see,
23 | e.g., *Bradley v. Bradley*, 164 P.3d 567 (Wyo. 2007) (premarital agreement had choice of law
24 | provision selecting Minnesota law; amendment to agreement held invalid because it did not
25 | comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91 (Vt.
26 | 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*,
27 | 628 S.E.2d 546 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it
28 | during short stay in the Virgin Islands ~~prior before~~ their wedding there; the agreement is
29 | covered by Virgin Islands law, unless there is a clear party intention that Virginia law apply or
30 | Virgin Island law is contrary to the ~~the~~-forum state’s public policy); cf. *Davis v. Miller*, 7 P.3d
31 | 1223 (Kan. 2000) (parties can use choice of law provision to choose the state version of the
32 | Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would
33 | otherwise not apply).

34 |
35 | ~~While parties are encouraged to include choice of law provisions that suit their needs,~~
36 | ~~attorneys choosing choice of law provisions for their clients should do so cautiously and only~~
37 | ~~after detailed research, as negligent selection of the law to be applied (e.g., choosing law that~~
38 | ~~unintentionally invalidates the agreement, cf. Bradley v. Bradley, above) could potentially harm~~
39 | ~~their clients’ interests and leave the attorneys subject to liability for doing so.~~

40 | 41 | **SECTION 5. COMMON LAW OF CONTRACTS; PRINCIPLES OF EQUITY.**

42 | ~~CONTRACT LAW AND EQUITABLE PRINCIPLES.~~ The common law of contracts and
43 | principles of equity supplement this [act], except to the extent displaced by this [act] or another

1 statute of this state.

2 **Comment**

3 This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of
4 the *Uniform Commercial Code*. Because this act contains broad, amorphous defenses to
5 enforcement like “voluntariness” and “unconscionability” (section 9), there is a significant risk
6 that parties, and even some courts, might assume that other conventional doctrinal contract law
7 defenses are not available because preempted. This section is intended to make clear that
8 common law contract doctrines and principles of equity continue to apply where this act does not
9 expressly displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital
10 agreements and marital agreements based on legal incompetency, misrepresentation, duress,
11 undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital
12 agreement presented to one of the parties for the first time hours before a marriage (where
13 financial commitments have been made and guests have arrived from far away) clearly raises
14 issues of duress, and might be voidable on that ground. *Cf. In re Marriage of Balcof*, 141
15 Cal.App.4th 1509, 47 Cal.Rptr.3d 183 (2006) (marital agreement held unenforceable on the basis
16 of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257 (Fla. App. 2007) (affirming trial
17 court conclusion that premarital agreement was voidable for undue influence).

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

25
26 Rules of construction, including rules of severability of provisions, are also to be taken
27 from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148 (N.M. App. 2010)
28 (premarital agreement that improperly waived the right to alimony and that contained no
29 severability clause deemed invalid in its entirety). Additionally, state rules and principles will
30 govern the ability of parties to include elevated formalities for the revocation or amendment of
31 their agreements.

32
33 **SECTION 6. FORMATION REQUIREMENTS.** A premarital agreement or marital
34 agreement must be in a record signed by both parties. The agreement is enforceable without
35 consideration.

36 **Comment**

37
38 This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all
39 jurisdictions currently require premarital agreements to be in writing. A small number of
40 jurisdictions have allowed oral premarital agreements to be enforced based on partial

1 performance. *E.g.*, In re *Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This act does not
2 authorize enforcement of oral premarital agreements on that basis.

3
4 It is the consensus view of jurisdictions and commentators that premarital agreements are
5 or should be enforceable without (additional) consideration (the agreement to marry or the act of
6 marrying is often treated as sufficient consideration). However, most modern approaches to
7 premarital agreements have by-passed the consideration requirement entirely: *e.g.*, *Uniform*
8 *Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family*
9 *Dissolution*, Section 7.01, comment *c* (2002); *Restatement (Third) of Property*, Section 9.4
10 (2003).

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

24
25 **SECTION 7. EFFECTIVE DATE OF AGREEMENT WHEN AGREEMENT**

26 **EFFECTIVE**. A premarital agreement is effective on marriage. A marital agreement is
27 effective on execution unless the agreement provides otherwise.

28 **Comment**

29
30 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The Drafting
31 Committee took notice of the practice that parties sometimes enter agreements that are part
32 cohabitation agreement and part premarital agreement. This act deals only with the provisions
33 triggered by marriage, without undermining whatever enforceability the cohabitation agreement
34 has during the period of cohabitation.

35
36 **SECTION 8. VOID MARRIAGE.** If ~~the a~~ court determines a marriage ~~to be~~ is void, a
37 premarital agreement or marital agreement is unenforceable except to the extent necessary to
38 avoid an inequitable result.

39 **Comment**

1
2 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example,
3 if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but,
4 unknown to Joan, John was still legally married to Martha, the marriage between John and Joan
5 would be void, and whether their premarital agreement should be enforced would be left to the
6 discretion of the court, taking into account whether enforcement in whole or in part would be
7 required to avoid an inequitable result.
8

9 **SECTION 9. ENFORCEMENT.**

10 (a) A premarital agreement or marital agreement is unenforceable if ~~the~~ a party against
11 whom enforcement is sought proves any ~~one~~ of the following:

12 _____ (1) the party's consent to the agreement was involuntary or the
13 result of duress; _____ (2) the party did not have access to
14 independent legal representation ~~consistent~~
15 ~~with~~ under subsection ~~(e)(1)~~;

16 (3) the agreement did not include a notice of waiver of rights ~~consistent with~~ under
17 subsection ~~(f)(2)~~ or ~~an a clear~~ explanation in the party's primary plain language of the marital
18 rights or obligations being modified or waived by the agreement unless the party was a lawyer or
19 had independent legal representation at the time the agreement was signed; or

20 (4) before signing the agreement:

21 (A) the party did not receive a reasonably accurate description of the
22 ~~nature and value of the other party's~~ property, ~~and~~ liabilities, ~~and income and the amount~~ of the
23 other party-party's income;

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

26 (C) the party did not have adequate knowledge or a reasonable basis for
27 acquiring adequate knowledge of the property, liabilities, and ~~amount of~~ income of the other

1 party.

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

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

9 [(1)] ~~the term~~ was unconscionable at the time of signing~~[-]~~ [; or]

10 ~~[-]~~ (2) ~~the~~ enforcement ~~of the term~~ would result in undue hardship for a party
11 because of a substantial change in circumstances arising since ~~the time that~~ the agreement was
12 signed].

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

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

16 ~~(1) if the party has (1) “Access to independent legal representation”~~
17 ~~requires:~~

18 ~~(A) a reasonable time to decide whether to retain an independent lawyer before~~
19 ~~signing a premarital agreement or marital agreement;~~

20 (B2) ~~if the party decides to retain a lawyer, if the party decides to retain a lawyer,~~
21 ~~the party has~~ a reasonable time to locate an independent lawyer, obtain advice, and consider the
22 advice provided; and

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

4 (2f) A “Notice notice of waiver of rights” under this section requires language,
5 prominently displayed, ~~in a premarital agreement or marital agreement that is~~ substantially
6 similar to the following:

7 “If you sign this agreement, you may be:

8 (1) ~~giving~~ Giving up your right to be supported by the person you are marrying or
9 to whom you are married, ~~to~~;

10 (2) ~~giving~~ Giving up your right to ownership or control of money and property.;

11 (3) ~~agreeing~~ Agreeing to pay bills and debts of the person you are marrying or to
12 whom you are married ~~to~~;

13 (4) ~~giving~~ Giving up your right to money and property if you divorce your
14 marriage ends or the person to whom you are married ~~to~~ dies; ~~and~~.

15 (5) ~~giving~~ Giving up your right to have your legal fees paid.”

16 **Legislative Note 1:** The text places the burden of proof on the party challenging a premarital
17 agreement or a marital agreement. If a state that wants to place retain the burden of proof on
18 the party challenging a premarital agreement but wants to place the burden of proof on the party
19 seeking to enforce a marital agreement, the state should enact subsection (a), as subsection
20 (a)(1), renumber the subparts accordingly, and omit the reference to “marital agreement” in the
21 first line. The following alternative should be enacted as subsection (b)(2) and the remaining
22 subsections of this section should be renumbered accordingly:

23
24 (b2) A marital agreement is unenforceable unless the party seeking to enforce the
25 agreement proves all of the following:

26 (A1) the other party consented to the agreement voluntarily and without duress;

27 (B2) the other party had access to independent legal representation consistent

1 Law 349, 359-400 (2007) (summarizing the divergent interpretations of "voluntary" and related
2 concepts under the UPAA); Oldham, "With All My Worldly Goods," *supra* (same). This act is
3 not intended either to endorse or override any of those decisions. The drafting committee does
4 emphasize that the presence of domestic violence will be of obvious relevance to any conclusion
5 about whether a party's consent to an agreement was "involuntary or the result of duress."
6

7 The requirement of "access to independent counsel" in subsections (a)(2) and (d)(1)
8 represents the drafting committee's considered view that representation by independent counsel
9 is crucial for a party waiving important legal rights. The act stops short of requiring
10 representation for an agreement to be enforceable, *see California Family Code* § 1612(c)
11 (restrictions on spousal support allowed only if the party waiving rights consulted with
12 independent counsel); *California Probate Code* § 143(a) (waiver of rights at death of other
13 spouse unenforceable unless the party waiving was represented by independent counsel); *cf.*
14 *Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009) (*access* to independent counsel required, and
15 *presumption of validity* for premarital agreement available only where party challenging the
16 agreement *consulted* with independent counsel). When a party has an obligation to make funds
17 available for the other party to retain a lawyer, under subsection (d)(1)(C), this refers to the cost
18 of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as
19 many lawyers as the first party may have.
20

21 The notice of waiver of rights of subsections (a)(3) and (d)(2) is adapted from the
22 *Restatement (Third) of Property*, Section 9.4(3) (2003), and it is also similar in purpose to
23 *California Family Code* § 1615(c)(3). It creates a safe harbor by use of the designated warning
24 language of (d)(2), or language substantially similar, but also allows enforcement where there
25 has been an explanation in plain language of the rights and duties being modified or waived by
26 the agreement.
27

28 The requirement of reasonable financial disclosure of subsection (a)(4) pertains only to
29 assets of which the party knows or reasonably should know. There will be occasions where the
30 valuation of an asset can only be approximate, or may be entirely unknown, and this can and
31 should be noted as part of a reasonable disclosure. Disclosure will qualify as "reasonably
32 accurate" even if a value is approximate or difficult to determine, and even if there are minor
33 inaccuracies.
34

35 The act makes waiver of the right of financial disclosure (or the right of financial
36 disclosure beyond what has already been disclosed) possible only if the waiver is signed after
37 receiving legal advice. This reflects a view by a majority of the drafting committee that it is too
38 easy to persuade an unrepresented party to sign or initial a waiver provision, and that the party
39 waiving that right would then likely be ignorant of the magnitude of what is being given up.
40 Even when notified in the abstract of the rights being given up (consistent with subsection
41 | (d)(2)), it would make a great deal of difference if the party thinks ~~he or she~~ the party is giving up
42 a claim to a portion of \$80,000, when in fact what is being given up is a claim to a portion of
43 \$8,000,000. There was a concern that this requirement of legal advice for a waiver of the right to
44 (further) financial disclosure might effectively require legal representation for all premarital
45 agreements and marital agreements. However, it remains the case that when agreements are
46 entered into with adequate financial disclosure, the absence of a valid waiver would be no

1 defense to enforcement of an agreement under this act.

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

15
16 Subsection (c) includes a bracketed provision for states ~~who~~that wish to include a
17 “second look,” considering the fairness of enforcing an agreement relative to the time of
18 enforcement. The suggested standard is one of “undue hardship” based on a substantial change
19 of circumstances since the time the agreement was signed. There is no requirement that the
20 change in circumstances have been unforeseeable. This language broadly reflects the standard
21 applied in a number of states. *E.g., Connecticut Code § 46b-36g(2)* (premarital agreements);
22 *New Jersey Statutes § 37:2-38(b)* (premarital agreements); *North Dakota Code § 14-03.1-07*
23 (premarital agreements); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963-64 (Mass. 2010) (marital
24 agreements); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (marital agreements). However,
25 it should be noted that even in such “second look” states, case-law invalidating premarital
26 agreements and marital agreements at the time of enforcement almost universally regard rights at
27 divorce. There is little case-law invalidating waivers of rights arising at the death of the other
28 spouse grounded on the unfairness at the time of enforcement.

29
30 Subsection (c) characterizes questions of unconscionability (or undue hardship) as
31 questions of law for the court. This follows the treatment of unconscionability in conventional
32 commercial contracts. *See UCC § 2-302; Restatement (Second) of Contracts § 208*, comment f.
33 This subsection is not intended to establish or modify the standards of review under which such
34 conclusions are ~~reviewed~~considered on appeal under state law.

35
36 A notice of waiver of rights is “prominently displayed” for the purpose of subsection
37 (d)(2) when it is displayed in font larger than the rest of the document, in all capital letters, in
38 bold print or italics, or if it is presented to the other party in a separate document requiring
39 separate signature or initials.

40
41 Waiver or modification of claims relating to a spouse’s pension is subject to the
42 constraints of applicable state and federal law, including ~~but not limited to~~ ERISA (Employee
43 Retirement Income Security Act of 1974, 19 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*, 666
44 F.Supp.2d 463 (D. N.J. 2009) (wife’s premarital agreement waiving her right to any of her
45 husband’s separate property did not qualify as a waiver of her spousal rights as beneficiary under
46 ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214 (App. Div. 2010) (waiver in premarital agreement

1 conforms with ERISA waiver requirement and is enforceable).

2
3 Some jurisdictions put the burden of proof on the party seeking enforcement of the
4 agreement. *See, e.g., Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996) (party seeking to
5 enforce premarital agreement had burden of showing, in general, that other party entered
6 agreement “knowledgeably”; in particular, that a full and fair disclosure of assets was given or
7 that it was not necessary due to the other party’s independent knowledge); *Stancil v. Stancil*, No.
8 E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13, 2012) (same); In re
9 *Estate of Cassidy*, 356 S.W.3d 339 (Mo. App. 2011) (parties seeking to enforce waivers of rights
10 at the death of the other spouse have the burden of proving that procedural and substantive
11 requirements were met). The language in the legislative note is offered for those jurisdictions
12 which want the burden placed on the party seeking enforcement, for either premarital
13 agreements, marital agreements, or both.

14
15 Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital
16 agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d
17 955 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011). Those jurisdictions view
18 agreements in the midst of marriage as being especially at risk of coercion (the analogue of “hold
19 up” in a commercial arrangement) or overreaching. Additionally, these conclusions are
20 sometimes based on the view that parties already married are in a fiduciary relationship in a way
21 that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin,
22 *Premarital Agreements: Drafting and Negotiation* 16-18 (American Bar Association, 2011).
23 Many other jurisdictions and The American Law Institute (in its *Principles of the Law of Family*
24 *Dissolution*, Section 7.01, Comment b (2002)) treat marital agreements under the same standards
25 as premarital agreements. This is the approach adopted by this act.

26 27 SECTION 10. UNENFORCEABLE TERMS.

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

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

- 31 (1) adversely affects a child’s right to support;
- 32 (2) limits or restricts a remedy remedies available to a victim of domestic violence
33 under ~~other~~ law of this state other than this [act];
- 34 (3) modifies the grounds for a court-decreed separation or marital dissolution
35 available under ~~other~~ law of this state other than this [act]; or
- 36 (4) penalizes a party for initiating a legal proceeding leading to a court-decreed

1 separation or marital dissolution.

2 (cb) A term in a premarital agreement or marital agreement that defines the rights or
3 duties of the parties regarding custodial responsibility is not binding on a court. "~~Custodial~~
4 ~~responsibility" means physical or legal custody, access, visitation, or other custodial right or duty~~
5 ~~with respect to a child.~~

6 **Legislative Note:** A state may vary the terminology of "custodial responsibility" to reflect the
7 terminology used in state law other than this ~~fact~~.

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Comment

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The definition of "custodial responsibility" is adapted from the *Uniform Collaborative Law Act*.

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There is a long-standing consensus that premarital agreements may ~~cannot~~ bind a court on matters relating to children – cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed *increase* of child support may be enforceable). *E.g.*, *In re Marriage of Best*, 901 N.E.2d 967, 970-971 (Ill. App. 2009); *cf. Pursley v. Pursley*, 114 S.W.3d 820, 823-825 (Ky. 2004) (agreement by parties in separation agreement to child support well in excess of guideline amounts is enforceable, not unconscionable or against public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

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The drafting committee has taken notice of the general consensus in the case-law that courts will not enforce premarital agreement provisions relating to topics beyond the parties' financial obligations *inter se*. And while some courts have generally refused to enforce provisions in premarital agreements and marital agreements that regulate (or attach financial penalties to) conduct during the marriage, *e.g.*, *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494 (App. 2002) (refusing to enforce provision in agreement imposing financial penalty for infidelity); *Marriage of Dargan*, 13 Cal. Rptr. 522 (App. 2004) (refusing to enforce provision that penalized husband's drug use by transfer of property); see also Brett R. Turner and Laura W. Morgan, *Attacking and Defending Marital Agreements* 379 (2nd ed., ABA Section on Family Law, 2012) ("It has been generally held that antenuptial agreements attempting to set the terms

1 | of behavior during the marriage are not enforceable” (footnote omitted)), the {act} does not
2 | expressly deal with such provisions, in part because a few courts have chosen to enforce
3 | premarital agreements relating to parties’ cooperating in obtaining religious divorces or agreeing
4 | to appear before a religious arbitration board. *E.g., Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y.
5 | 1983) (holding enforceable religious premarital agreement term requiring parties to appear
6 | before religious tribunal and accept its decision regarding a religious divorce). Also, wWhile
7 | there appear to be scattered cases in the distinctly different context of separation agreements
8 | where a court has enforced the parties’ agreement to avoid fault grounds for divorce, e.g.,
9 | *Massaer v. Massaer*, 652 A.2d 219 (N.J. App. Div. 1994); *cf. Eason v. Eason*, 682 S.E.2d 804
10 | (S.C. 2009) (agreement not to use adultery as defense to alimony claim enforceable); see
11 | generally Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* 111 (ABA, 2011)
12 | (“In some fault states, courts may enforce a provision [in a premarital agreement] that waives
13 | fault”), and the drafting committee is aware of no case law enforcing an agreement to avoid *no-*
14 | fault grounds; taking into account the different context in which premarital agreements and
15 | marital agreements are entered, the Drafting Committee preferred the position of the American
16 | Law Institute (*Principles of the Law of Family Dissolution*, Section 7.08 (2002)), that agreements
17 | affecting divorce grounds in any way should not be enforceable.

18
19 | The drafting committee took notice of the common practice of escalator clauses and
20 | sunset provision in premarital agreements and marital agreements, making parties’ property
21 | rights vary with the length of the marriage. *Cf. Peterson v. Sykes-Peterson*, 37 A.3d 173 (Ct.
22 | App. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable
23 | because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable
24 | that penalize one party’s initiating an action that leads to the dissolution of a marriage, does not
25 | cover such escalator clauses. Additionally, nothing in this provision is intended to affect the
26 | rights of parties who enter valid covenant marriages in states that make that alternative form of
27 | marriage available.

28
29 | **SECTION 11. LIMITATION OF ACTIONS.** A statute of limitations applicable to an
30 | action asserting a claim for relief under a premarital agreement or marital agreement is tolled
31 | during the marriage of the parties to the agreement, but equitable defenses limiting the time for
32 | enforcement, including laches and estoppel, are available to either party.

33 | **Comment**

34 | This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the
35 | Comment to that Section stated: "In order to avoid the potentially disruptive effect of
36 | compelling litigation between the spouses in order to escape the running of an applicable statute
37 | of limitations, Section 8 tolls any applicable statute during the marriage of the parties (~~contrast~~
38 | ~~*Dykema v. Dykema*, 412 N.E. 2d 13 (Ill. App. 1980) (statute of limitations not tolled where fraud~~
39 | ~~not adequately pleaded, hence premarital agreement enforced at death))-. . . .~~ However, a party is
40 | not completely free to sit on his or her rights because the section does preserve certain equitable
41 | defenses."

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

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

10 ~~**SECTION 14. SAVINGS CLAUSE.** This [act] does not affect any right, obligation, or~~
11 ~~liability arising under a premarital or marital agreement entered into before the effective date of~~
12 ~~this [act].~~

13 ~~**SECTION 145. REPEALS.** The following are repealed:~~

- 14 (1) [Uniform Premarital Agreement Act]
- 15 (2) [Uniform Probate Code Section 2-213() ~~& ()~~ (Waiver of Right to Elect and of Other
- 16 Rights)]
- 17 (3)
- 18 (4)
- 19 (5)]

20 **SECTION 156. EFFECTIVE DATE.** This [act] takes effect