

D R A F T

FOR DISCUSSION ONLY

PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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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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May 24, 2011

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TABLE OF CONTENTS

| | |
|---|----|
| Prefatory Note..... | 1 |
| SECTION 1. SHORT TITLE | 3 |
| SECTION 2. DEFINITIONS..... | 3 |
| SECTION 3. APPLICABILITY OF CONTRACT LAW. | 5 |
| SECTION 4. GOVERNING LAW..... | 5 |
| SECTION 5. FORMATION REQUIREMENTS | 6 |
| SECTION 6. EFFECTIVE DATE OF AGREEMENT | 7 |
| SECTION 7. VOID MARRIAGE | 7 |
| SECTION 8. SCOPE OF AGREEMENT. | 7 |
| SECTION 9. ENFORCEMENT..... | 11 |
| SECTION 10. REVOCATION OF AGREEMENT | 12 |
| SECTION 11. LIMITATION OF ACTIONS..... | 13 |
| SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION..... | 13 |
| SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT..... | 13 |
| SECTION 14. SAVINGS CLAUSE..... | 13 |
| [SECTION 15. REPEALS]..... | 13 |
| SECTION 16. EFFECTIVE DATE..... | 14 |

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.

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by twenty-six jurisdictions, with a number 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. *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” (2011), *University of Houston Public Law and Legal Theory Series 2011-A-1*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753785.

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 have been far less settled and consistent. 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 offers the option of refusing enforcement based on a finding of unconscionability at the time of enforcement.

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

3 (8) “Separation” means a court-decreed separation of spouses which does not terminate
4 the marriage.

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

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

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

9 (10) “State” means a state of the United States, the District of Columbia, the
10 Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction
11 of the United States.

12 **Legislative Note:** *The extent to which this act applies to officially recognized non-marital*
13 *relationships, such as civil unions and domestic partnerships, is a matter for state law other than*
14 *this [act].*

15
16 **Comment**

17 With premarital agreements, the nature and timing of the agreement (between parties who
18 are about to marry) reduces the danger that the act’s language will accidentally include types of
19 transactions that are not thought of as premarital agreements and should not be treated as
20 premarital agreements. There is a greater concern with marital agreements, since (a) spouses
21 enter many otherwise enforceable financial transactions, most of which are not problematic and
22 should not be made subject to special procedural or substantive constraints; and (b) there are
23 significant questions about how to deal with agreements whose primary intention may not be to
24 waive one spouse’s rights at dissolution of the marriage or the other spouse’s death, but where
25 the agreement nonetheless has that effect. In terms of another uniform act, the purpose is to
26 exclude from coverage “acts and events that have significance apart from their effect” upon
27 rights at dissolution of the marriage or at the death of one of the spouses. See *Uniform Probate*
28 *Code*, Section 2-512 (“Events of Independent Significance”). Such transactions might include
29 (but are by no means limited to) the creation of joint and several liability through real estate
30 mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan
31 guaranties, joint income tax returns, creation of joint property ownership with a right of
32 survivorship, joint property with payment on death provisions or transfer on death provisions,
33 durable power of attorney or medical power of attorney, buy-sell agreements, agreements
34 regarding the valuation of property, the placing of marital property into an irrevocable trust for a

1 child, the drawing up of joint wills, etc.

2
3 The definition of “premarital agreement” is a slightly-modified version of the definition
4 used in the American Law Institute’s *Principles of the Law of Family Dissolution*. The shorter
5 definition of “premarital agreement” used by the Uniform Premarital Agreement Act (“an
6 agreement between prospective spouses made in contemplation of marriage and to be effective
7 upon marriage”) had the disadvantage of encompassing agreements that were entered by couples
8 about to marry but which were not intended to affect the parties’ rights and obligations upon
9 divorce or death, e.g. Islamic marriage contracts, with their deferred *mahr* payment provisions.
10 See Nathan B. Oman, “Bargaining in the Shadow of God’s Law: Islamic *Mahr* Contracts and
11 the Perils of Legal Specialization,” 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix,
12 “*Mahr* Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A
13 Comment on Oman,” 1 *Wake Forest Law Review Online* 61 (2011), available at
14 <http://lawreview.law.wfu.edu/articles/>.

15
16 **SECTION 3. APPLICABILITY OF CONTRACT LAW.** The common law of
17 contracts and principles of equity supplement this [act], except to the extent modified by this
18 [act] or another statute of this state.

19 **Comment**

20 Although this section is similar to Section 106 of the *Uniform Trust Code* and Section 1-
21 103(b) of the *Uniform Commercial Code*, the need to include such a provision in this act is still
22 under discussion. Because this act contains broad, amorphous defenses to enforcement like
23 “voluntariness” and “unconscionability” (section 9), there is a significant risk that parties, and
24 even some courts, might assume that other conventional doctrinal contract law defenses are not
25 available because preempted. This section is intended to make clear that common law contract
26 doctrine and principles of equity continue to apply where the act does not expressly displace
27 them. Thus, it is open to parties, e.g., to resist enforcement of premarital and marital agreements
28 based on legal incompetency, misrepresentation, duress, undue influence, unconscionability,
29 abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties
30 for the first time hours before a marriage (where financial commitments have been made and
31 guests have arrived from far away) clearly raises issues of duress, and might be voidable on that
32 ground. Rules of construction, including rules of severability of provisions, are also to be taken
33 from state rules and principles. Additionally, state rules and principles will govern the ability of
34 parties to include elevated formalities for the revocation or amendment of their agreements.

35
36 **SECTION 4. GOVERNING LAW.** The validity, enforceability, and construction of
37 the terms of a premarital or marital agreement are determined by:

38 (1) the law of the jurisdiction designated in the terms, [if that jurisdiction has a
39 significant relation to the agreement or either of the parties, and] unless the designation of that

1 jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most
2 significant relationship to the matter at issue; or
3 (2) in the absence of a controlling designation in the terms of the agreement, the law of
4 the jurisdiction having the most significant relationship to the matter at issue.

5 **Comment**

6 This section is taken from the *Uniform Trusts Act*, Section 107 [with the bracketed
7 section adding language taken from the Revised Article 1 of the *Uniform Commercial Code*,
8 Section 1-301]. It is consistent with *Uniform Premarital Agreement Act*, Section 3(a)(7), but
9 goes into greater detail. The section reflects traditional Conflict of Laws and choice of law
10 principles relating to the enforcement of contracts. See *Restatement (Second) of Conflict of*
11 *Laws*, Sections 186-188 (1971). These conflict of laws principles include the authority of courts
12 to refuse to enforce the rule(s) of another jurisdiction, even if that jurisdiction has the most
13 significant relationship to the agreement, if that other jurisdiction’s rules are contrary to the
14 strongly held public policy of the enforcing state. “Significant relation” and “strong public
15 policy” are to be understood under existing state principles relating to conflict of laws.

16
17 The bracketed terms are present for those states that prefer that parties be able to choose
18 law to govern their agreement only from those jurisdictions that have some significant
19 connection to the agreement (a restriction present, *e.g.*, in the *Uniform Commercial Code*).

20
21 **SECTION 5. FORMATION REQUIREMENTS.** A premarital or marital agreement
22 must be in a record and signed by both parties and is enforceable without consideration.

23 **Comment**

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

29
30 It is the consensus view of jurisdictions and commentators that premarital agreements are
31 or should be enforceable without (additional) consideration. In any event, those states that have
32 looked for consideration for the waiver promises in premarital agreements have concluded that
33 the other party’s agreement to marry or the act of marrying constitute valid legal consideration.
34 However, most modern approaches to premarital agreements have by-passed the consideration
35 requirement entirely: *e.g.*, *Uniform Premarital Agreement Act*, Section 2; American Law
36 Institute, *Principles of the Law of Family Dissolution*, Section 7.01, comment *c* (2002);
37 *Restatement (Third) of Property*, Section 9.4 (2003).

38

1 In some states, there is case-law raising issues relating to a consideration requirement for
2 marital agreements. The view of this act is that marital agreements, otherwise valid, should not
3 be made unenforceable on the basis of a purported lack of consideration. As the American Law
4 Institute wrote on the distinction (not requiring additional consideration for enforcing premarital
5 agreements, but requiring it for marital agreements): “This distinction is not persuasive in the
6 context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the
7 marriage altogether.” *Principles of the Law of Family Dissolution*, Section 7.01, comment c
8 (2002). On the conclusion that consideration should not be required for marital agreements, see
9 also *Restatement (Third) of Property*, Section 9.4 (2003) and *Model Marital Property Act*,
10 Section 10 (1983).

11
12 **SECTION 6. EFFECTIVE DATE OF AGREEMENT.** A premarital agreement is
13 effective on marriage. A marital agreement is effective on execution unless the agreement
14 provides otherwise.

15 **Comment**

16
17 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The
18 Committee took notice of the practice that parties sometimes enter agreements that are part
19 cohabitation agreement and part premarital agreement. This act deals only with the provisions
20 triggered by marriage, without undermining the enforceability of the cohabitation agreement
21 during the period of cohabitation.

22
23 **SECTION 7. VOID MARRIAGE.** If a marriage is determined to be void, a premarital
24 or marital agreement that would otherwise be enforceable under this [act] is enforceable to the
25 extent necessary to avoid an inequitable result.

26 **Comment**

27
28 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For
29 example, if John and Joan went through a marriage ceremony, preceded by a premarital
30 agreement, but, unknown to Joan, John was still legally married to Martha, the marriage between
31 John and Joan would be void, and whether their premarital agreement should be enforced would
32 be left to the discretion of the court, taking into account whether enforcement in whole or in part
33 would be required to avoid an inequitable result.

34
35 **SECTION 8. SCOPE OF AGREEMENT.**

36 (a) Subject to subsection (b), a premarital or marital agreement may include terms
37 relating to:

- 1 (1) the rights and obligations of each of the parties in any of the property of either
2 or both of them, whenever acquired and wherever located;
- 3 (2) the characterization of property or debt during the marriage as
4 [community][marital] or separate;
- 5 (3) the right to buy, sell, use, transfer, exchange, lease, expend, assign, create a
6 security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- 7 (4) the disposition of property or debt on separation, marital dissolution, death, or
8 the occurrence or nonoccurrence of any other event;
- 9 (5) the modification or elimination of spousal support;
- 10 (6) the rights of either or both spouses to interests in trusts, inheritances, bequests,
11 gifts, and expectancies created by third parties;
- 12 (7) the making of a will, trust, beneficiary designation, or other governing
13 instrument to carry out the provisions of the agreement;
- 14 (8) the rights in property arising at or after the death of either party, including
15 inheritance, dower, curtesy, elective share, homestead allowance, exempt property, and family
16 allowance;
- 17 (9) appointment of a fiduciary, guardian, personal representative, or agent for
18 person or property;
- 19 (10) tax matters;
- 20 (11) methods for resolution of disputes arising under the agreement, including
21 arbitration, mediation, and collaborative law provisions;
- 22 (12) choice of law governing the validity, enforceability, and construction of the
23 agreement;

1 (13) amendment of a prior premarital or marital agreement between the parties;

2 (14) formalities required to amend or revoke the agreement in addition to those

3 required by this [act]; and

4 (15) any other matter not in violation of public policy or a statute imposing

5 criminal penalties.

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

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

8 (2) limits or expands the grounds for marital dissolution or separation otherwise

9 available under law of this state other than this [act];

10 (3) requires or forbids a court to evaluate marital conduct in determining the

11 economic consequences of separation, marital dissolution, or death, except as the term is

12 consistent with applicable law of this state other than this [act];

13 (4) penalizes a party for initiating the legal action leading to a decree of marital

14 dissolution or separation; or

15 (5) limits or restricts remedies available to a victim of domestic violence under

16 law of this state other than this [act].

17 (c) A term in a premarital or marital agreement that defines the rights and responsibilities

18 of the parties regarding child custody is not binding on a court, but a court may consider the term

19 in determining child custody.

20 **Legislative Note:** A state should select the appropriate term for subsection (a)(2): either
21 “marital” or “community.”

22

23

Comment

24 This section is adapted from *Uniform Premarital Agreement Act*, Section 3(a).

25 Subsection (b)(2), (3) & (4) are adapted from the American Law Institute, *Principles of the Law*
26 *of Family Dissolution*, Section 7.08.

1
2 Relating to subsection (a)(7), the Committee is aware that some states have provisions
3 that forbid or discourage agreements to make wills. This subsection is not intended to override
4 such state laws or principles.
5

6 Amendment and revocation of premarital and marital agreements is governed by a
7 number of provisions in this section and other sections of this act. Under section 3, the state's
8 general contract law rules and principles determine whether and how the parties can vary the
9 formalities or other requirements for amendment or revocation. Section 8(a)(14) reaffirms that a
10 provision establishing heightened formalities and other requirements for amendment or
11 revocation is a legitimate provision for a premarital and marital agreements. Actual modification
12 of a premarital agreement or prior marital agreement is a marital agreement (see section 8(a)(13))
13 falling under the constraints of section 8(b) and (c) and section 9. However, a revocation of an
14 agreement requires only a signed, written agreement (as long as the parties have not earlier
15 agreed to further requirements for a revocation). See section 10.
16

17 The Committee has taken notice of the general consensus in the case-law that courts will
18 not enforce premarital agreement provisions relating to topics beyond the parties' financial
19 obligations *inter se*. In particular, courts have concluded that the parties cannot waive their
20 children's right to child support payments (though some courts have held enforceable agreements
21 that would *increase* such payments beyond the amount set by state law). And while courts
22 generally refuse to enforce provisions in premarital and marital agreements that regulate (or
23 attach financial penalties to) conduct during the marriage, *e.g.*, *Diosdado v. Diosdado*, 118 Cal.
24 Rptr.2d 494 (App. 2002) (refusing to enforce provision in agreement imposing financial penalty
25 for infidelity); *Marriage of Dargan*, 13 Cal. Rptr. 522 (App. 2004) (refusing to enforce provision
26 that penalized husband's drug use by transfer of property), the act does not expressly deal with
27 such provisions (beyond subsection (a)(15), leaving issues of public policy to each state's
28 courts), in part because a few courts have chosen to enforce premarital agreements relating to
29 parties' cooperating in obtaining religious divorces or agreeing to appear before a religious
30 arbitration board. *E.g.*, *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983) (holding enforceable
31 religious premarital agreement term requiring parties to appear before religious tribunal and
32 accept its decision regarding a religious divorce).
33

34 While there appear to be scattered cases in the distinctly different context of separation
35 agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce
36 *e.g.*, *Masser v. Masser*, 652 A.2d 219 (N.J. App. Div. 1994) (and we are aware of no case law
37 enforcing an agreement to avoid *no-fault* grounds), taking into account the different context in
38 which premarital and marital agreements are entered, the Committee preferred the position of the
39 American Law Institute, that agreements affecting divorce grounds in any way should not be
40 enforceable.
41

42 The Committee took notice of the common practice of escalator clauses in premarital and
43 marital agreements, making parties' property rights vary with the length of the marriage.
44 Subsection (b)(4), which makes provisions unenforceable that penalize one party's initiating an
45 action that leads to the dissolution of a marriage, does not cover such escalator clauses.
46

1 Nothing in this provision is intended to affect the rights of parties who enter valid
2 covenant marriages in states that make that alternative form of marriage available.

3
4 **SECTION 9. ENFORCEMENT.**

5 (a) In this section:

6 (1) “Fair and reasonable financial disclosure” means a reasonably accurate
7 description of the nature and value of a party’s income, property, and liabilities.

8 (2) “Access to independent legal representation” means adequate time to retain
9 and consult an independent lawyer before signing a premarital or marital agreement and either
10 the financial ability to retain the lawyer or an offer from the other party to the agreement to pay
11 the costs of retaining and consulting the lawyer.

12 (b) A premarital or marital agreement is not enforceable if a party to the agreement who
13 claims that the agreement is not enforceable proves that:

14 (1) the party did not execute the agreement voluntarily;

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

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

17 (A) was not provided a fair and reasonable financial disclosure from the
18 other party;

19 (B) did not voluntarily and expressly waive, in a separate signed record, a
20 right to fair and reasonable financial disclosure beyond the disclosure provided; and

21 (C) did not have, or reasonably could not have had, adequate knowledge
22 of the income, property, or liabilities of the other party;

23 (4) the party did not have access to independent legal representation and the other
24 party was represented by a lawyer; or

25 (5) the party was not represented by a lawyer and the agreement did not state, in

1 plain language understandable by an adult of ordinary intelligence, the nature of any rights or
2 claims otherwise arising at separation, marital dissolution, or death which were altered or waived
3 by the agreement, and the nature of the alteration or waiver.

4 (c) A premarital or marital agreement is not enforceable to the extent that it would limit
5 the income or property available to a party to an amount less than that allowed for a person
6 eligible for need-based medical assistance or other form of public assistance in the state where
7 enforcement is sought.

8 (d) The court shall decide a question of unconscionability as a matter of law.

9 [(e) A court may modify or refuse to enforce a premarital or marital agreement to the
10 extent that enforcement would result in undue hardship for a party such that enforcement would
11 be unconscionable.]

12 **Legislative Note:** *The bracketed subsection is appropriate for a state opting to permit a*
13 *substantive fairness review of premarital or marital agreements at the time of enforcement.*

14
15

Comment

16 This section is adapted from *Uniform Premarital Agreement Act*, Section 6. Subsection
17 (b)(5) is adapted from the *Restatement (Third) of Property*, Section 9.4(3) (2003). Subsection (c)
18 as adapted from *N.D. Cent. Code* Section 30.1-05-07.

19
20
21
22

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.

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

26
27

27 **SECTION 10. REVOCATION OF AGREEMENT.** Unless the terms of a premarital
28 or marital agreement impose additional formalities, the agreement may be revoked after marriage
29 only in a record signed by the parties. The revocation is enforceable without consideration.
30 Revocation does not include the modification of only part of a premarital or marital agreement.

1 **Comment**

2
3 “Revocation” means the abnegation of the entire instrument. Any alteration short of an
4 entire abnegation will be a modification, and subject to the requirements of sections 8 and 9. As
5 indicated in section 8(14) and the comment to section 3, it is open to the parties, by express
6 agreement, to increase the formalities required to revoke an agreement.
7

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

12 **Comment**

13 This Section is adapted from *Uniform Premarital Agreement Act*, Section 8.
14

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

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

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

27 **[SECTION 15. REPEALS.** The following are repealed:

1 (1)

2 (2)

3 (3)]

4 **SECTION 16. EFFECTIVE DATE.** This [act] takes effect