

DRAFT
FOR DISCUSSION ONLY

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For May 16, 2012 Conference Call – Clean Draft
Includes Committee on Style Edits

With Prefatory Note and with Comments

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ON UNIFORM STATE LAWS

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

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

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of 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 to remain
8 married which affirms, modifies, or waives a marital right or obligation during the marriage or at
9 separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence
10 of any other event. The term includes an amendment, signed after the spouses marry, of a
11 premarital agreement or marital agreement.

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

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

16 (A) spousal support;

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

18 (C) responsibility for liabilities;

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

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

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

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

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

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

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

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

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

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

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

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

19

20

Comment

21

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

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

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

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

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

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

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

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

4
5 The definition of “separation” was meant to be broad enough to cover those jurisdictions
6 where a legal separation or its equivalent is effected without the need of a court judgment.
7 However, it is not meant to cover situations where a couple is simply living apart as a matter of
8 convenience or preference, e.g., when the spouses have jobs in different cities.

9
10 **SECTION 3. SCOPE.**

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

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

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

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

18 (2) an agreement between spouses intending to obtain a marital dissolution or
19 court-decreed separation which resolves their marital rights or obligations and is entered into
20 when a proceeding for marital dissolution or court-decreed separation is anticipated or pending [;
21 or

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

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

1 **Comment**

2
3 This section distinguishes marital agreements, which are subject to this act, both from
4 agreements that parties might enter at a time when they intend to obtain a divorce or legal
5 separation or they intend to live permanently apart, and also from the conventional transfers of
6 property that may require under state law that one or both spouses waive rights that would
7 otherwise accrue at the death of the other spouse. Bracketed subsection (c)(3) is provided for
8 those jurisdictions which enforce such agreements without court approval.

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

12
13 In general, the enforceability of agreements listed above is left to other law in the state.
14 The category of agreement identified in bracketed subsection (c)(3), however, requires
15 independent legal representation to fall outside the act. Thus, if such an agreement were entered
16 into between spouses without independent legal representation, the act would govern.

17
18 **SECTION 4. GOVERNING LAW.** The validity, enforceability, interpretation, and
19 construction of a premarital agreement or marital agreement are determined:

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

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

25 **Comment**

26
27 This section is adapted from the *Uniform Trusts Code*, Section 107. It is consistent with
28 *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects
29 traditional Conflict of Laws and Choice of Law principles relating to the enforcement of
30 contracts. *See Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). These
31 Conflict of Laws principles include the authority of courts to refuse to enforce the law of another
32 jurisdiction, even if that jurisdiction has the most significant relationship to the agreement, if that
33 other jurisdiction's rules are contrary to the fundamental public policy of the enforcing state.
34 "Significant relation" and "fundamental public policy" are to be understood under existing state
35 principles relating to Conflict of Laws, and "contrary to ... fundamental public policy" means
36 something more than that the law of the other jurisdiction differs from that of the forum state.
37 *See, e.g., International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530,
38 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508 (Or. App. 2011) (court

1 refused to apply law under choice of law provision because contrary to “fundamental public
2 policy” of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th
3 ed., Foundation Press, 2010).

4
5 The limitation of choice of law provisions to jurisdictions having some connection with
6 the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which
7 restricts choice of law provisions to states with a reasonable relation to the transaction (this was
8 Section 1-105 under the UCC prior to the 2001 revisions; and Section 1-301 in the (2001)
9 Revised UCC Article 1).

10 For examples of choice of law and conflict of law principles operating in this area, see,
11 e.g., *Bradley v. Bradley*, 164 P.3d 567 (Wyo. 2007) (premarital agreement had choice of law
12 provision selecting Minnesota law; amendment to agreement held invalid because it did not
13 comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91 (Vt.
14 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*,
15 628 S.E.2d 546 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it
16 during short stay in the Virgin Islands before their wedding there; the agreement is covered by
17 Virgin Islands law, unless there is a clear party intention that Virginia law apply or Virgin Island
18 law is contrary to the forum state’s public policy); cf. *Davis v. Miller*, 7 P.3d 1223 (Kan. 2000)
19 (parties can use choice of law provision to choose the state version of the Uniform Premarital
20 Agreement Act to apply to a marital agreement, even though that Act would otherwise not
21 apply).

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

23
24 The common law of contracts and principles of equity supplement this [act], except to the extent
25 displaced by this [act] or another statute of this state.

26 **Comment**

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

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

8
9 Rules of construction, including rules of severability of provisions, are also to be taken
10 from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148 (N.M. App. 2010)
11 (premarital agreement that improperly waived the right to alimony and that contained no
12 severability clause deemed invalid in its entirety). Additionally, state rules and principles will
13 govern the ability of parties to include elevated formalities for the revocation or amendment of
14 their agreements.

15
16 **SECTION 6. FORMATION REQUIREMENTS.** A premarital agreement or marital
17 agreement must be in a record signed by both parties. The agreement is enforceable without
18 consideration.

19 **Comment**

20
21 This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all
22 jurisdictions currently require premarital agreements to be in writing. A small number of
23 jurisdictions have allowed oral premarital agreements to be enforced based on partial
24 performance. *E.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This act does not
25 authorize enforcement of oral premarital agreements on that basis.

26
27 It is the consensus view of jurisdictions and commentators that premarital agreements are
28 or should be enforceable without (additional) consideration (the agreement to marry or the act of
29 marrying is often treated as sufficient consideration). However, most modern approaches to
30 premarital agreements have by-passed the consideration requirement entirely: *e.g.*, *Uniform*
31 *Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family*
32 *Dissolution*, Section 7.01, comment *c* (2002); *Restatement (Third) of Property*, Section 9.4
33 (2003).

34
35 In some states, courts have raised concerns relating to the consideration for marital
36 agreements. The view of this act is that marital agreements, otherwise valid, should not be made
37 unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the
38 distinction (not requiring additional consideration for enforcing premarital agreements, but
39 requiring it for marital agreements): “This distinction is not persuasive in the context of a legal
40 regime of no-fault divorce in which either spouse is legally entitled to end the marriage
41 altogether.” *Principles of the Law of Family Dissolution*, Section 7.01, Comment *c* (2002). The
42 consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the
agreement, and the seriousness of the parties. *See, e.g.*, Lon L. Fuller, “Consideration and

1 Form”, 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in
2 this act directly by other provisions. On the conclusion that consideration should not be required
3 for marital agreements, see *Restatement (Third) of Property*, Section 9.4 (2003), and *Model*
4 *Marital Property Act*, Section 10 (1983).

5
6 **SECTION 7. WHEN AGREEMENT EFFECTIVE.** A premarital agreement is
7 effective on marriage. A marital agreement is effective on execution unless the agreement
8 provides otherwise.

9 **Comment**

10
11 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The Drafting
12 Committee took notice of the practice that parties sometimes enter agreements that are part
13 cohabitation agreement and part premarital agreement. This act deals only with the provisions
14 triggered by marriage, without undermining whatever enforceability the cohabitation agreement
15 has during the period of cohabitation.

16
17 **SECTION 8. VOID MARRIAGE.** If a court determines a marriage is void, a
18 premarital agreement or marital agreement is unenforceable except to the extent necessary to
19 avoid an inequitable result.

20 **Comment**

21
22 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example,
23 if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but,
24 unknown to Joan, John was still legally married to Martha, the marriage between John and Joan
25 would be void, and whether their premarital agreement should be enforced would be left to the
26 discretion of the court, taking into account whether enforcement in whole or in part would be
27 required to avoid an inequitable result.

28
29 **SECTION 9. ENFORCEMENT.**

30 (a) A premarital agreement or marital agreement is unenforceable if a party against
31 whom enforcement is sought proves any of the following:

- 32 (1) the party’s consent to the agreement was involuntary or the result of duress;
33 (2) the party did not have access to independent legal representation under
34 subsection (e);

1 (3) the agreement did not include a notice of waiver of rights under subsection (f)
2 or a clear explanation in the party's primary language of the marital rights or obligations being
3 modified or waived by the agreement unless the party was a lawyer or had independent legal
4 representation at the time the agreement was signed; or

5 (4) before signing the agreement:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Giving up your right to have your legal fees paid.”

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

1 meant to change the law. The drafting committee is aware of the (quite divergent) law that arose
2 under the "voluntariness" standard of the Uniform Premarital Agreement Act – *e.g.*, *compare*
3 *Marriage of Bernard*, 204 P.3d 90 (Wash. 2009) (finding agreement "involuntary" when
4 significantly revised version of premarital agreement was presented three days before wedding)
5 *with Brown v. Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement
6 presented agreement day before wedding; court held assent to be "voluntary"), *aff'd sub. nom* *Ex*
7 *parte Brown*, 26 So.3d 1222 (Ala. 2009); *see generally* Judith T. Younger, "Lovers' Contracts in
8 the Courts: Forsaking the Minimal Decencies," 13 *William & Mary Journal of Women and the*
9 *Law* 349, 359-400 (2007) (summarizing the divergent interpretations of "voluntary" and related
10 concepts under the UPAA); Oldham, "With All My Worldly Goods," *supra* (same). This act is
11 not intended either to endorse or override any of those decisions. The drafting committee does
12 emphasize that the presence of domestic violence will be of obvious relevance to any conclusion
13 about whether a party's consent to an agreement was "involuntary or the result of duress."
14

15 The requirement of "access to independent counsel" in subsections (a)(2) and (d)(1)
16 represents the drafting committee's considered view that representation by independent counsel
17 is crucial for a party waiving important legal rights. The act stops short of requiring
18 representation for an agreement to be enforceable, *see California Family Code* § 1612(c)
19 (restrictions on spousal support allowed only if the party waiving rights consulted with
20 independent counsel); *California Probate Code* § 143(a) (waiver of rights at death of other
21 spouse unenforceable unless the party waiving was represented by independent counsel); *cf.*
22 *Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009) (*access* to independent counsel required, and
23 *presumption of validity* for premarital agreement available only where party challenging the
24 agreement *consulted* with independent counsel). When a party has an obligation to make funds
25 available for the other party to retain a lawyer, under subsection (d)(1)(C), this refers to the cost
26 of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as
27 many lawyers as the first party may have.
28

29 The notice of waiver of rights of subsections (a)(3) and (d)(2) is adapted from the
30 *Restatement (Third) of Property*, Section 9.4(3) (2003), and it is also similar in purpose to
31 *California Family Code* § 1615(c)(3). It creates a safe harbor by use of the designated warning
32 language of (d)(2), or language substantially similar, but also allows enforcement where there
33 has been an explanation in plain language of the rights and duties being modified or waived by
34 the agreement.
35

36 The requirement of reasonable financial disclosure of subsection (a)(4) pertains only to
37 assets of which the party knows or reasonably should know. There will be occasions where the
38 valuation of an asset can only be approximate, or may be entirely unknown, and this can and
39 should be noted as part of a reasonable disclosure. Disclosure will qualify as "reasonably
40 accurate" even if a value is approximate or difficult to determine, and even if there are minor
41 inaccuracies.
42

43 The act makes waiver of the right of financial disclosure (or the right of financial
44 disclosure beyond what has already been disclosed) possible only if the waiver is signed after
45 receiving legal advice. This reflects a view by a majority of the drafting committee that it is too
46 easy to persuade an unrepresented party to sign or initial a waiver provision, and that the party

1 waiving that right would then likely be ignorant of the magnitude of what is being given up.
2 Even when notified in the abstract of the rights being given up (consistent with subsection
3 (d)(2)), it would make a great deal of difference if the party thinks the party is giving up a claim
4 to a portion of \$80,000, when in fact what is being given up is a claim to a portion of \$8,000,000.
5 There was a concern that this requirement of legal advice for a waiver of the right to (further)
6 financial disclosure might effectively require legal representation for all premarital agreements
7 and marital agreements. However, it remains the case that when agreements are entered into
8 with adequate financial disclosure, the absence of a valid waiver would be no defense to
9 enforcement of an agreement under this act.

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

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

37
38 Subsection (c) characterizes questions of unconscionability (or undue hardship) as
39 questions of law for the court. This follows the treatment of unconscionability in conventional
40 commercial contracts. *See UCC § 2-302; Restatement (Second) of Contracts § 208*, comment f.
41 This subsection is not intended to establish or modify the standards of review under which such
42 conclusions are considered on appeal under state law.

43
44 A notice of waiver of rights is “prominently displayed” for the purpose of subsection
45 (d)(2) when it is displayed in font larger than the rest of the document, in all capital letters, in
46 bold print or italics, or if it is presented to the other party in a separate document requiring

1 separate signature or initials.

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

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

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

34 35 **SECTION 10. UNENFORCEABLE TERMS.**

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

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

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

40 (2) limits or restricts a remedy available to a victim of domestic violence under

1 law of this state other than this [act];

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

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

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

8 **Legislative Note:** *A state may vary the terminology of "custodial responsibility" to reflect the*
9 *terminology used in state law other than this act.*

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Comment

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

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

There is a long-standing consensus that premarital agreements may not 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.

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 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*

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

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

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

35 **Comment**

36 This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the
37 Comment to that Section stated: "In order to avoid the potentially disruptive effect of
38 compelling litigation between the spouses in order to escape the running of an applicable statute
39 of limitations, Section 8 tolls any applicable statute during the marriage of the parties
40 However, a party is not completely free to sit on his or her rights because the section does
41 preserve certain equitable 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. REPEALS.** The following are repealed:

- 11 (1) [Uniform Premarital Agreement Act]
- 12 (2) [Uniform Probate Code Section 2-213() (Waiver of Right to Elect and of Other
- 13 Rights)]
- 14 (3)
- 15 (4)
- 16 (5)]

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