

DRAFT
FOR DISCUSSION ONLY

PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For November 11 – 12, 2011 Committee Meeting

With Prefatory Note and with Comments

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ON UNIFORM STATE LAWS

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October 13, 2011

DRAFTING COMMITTEE ON PREMARITAL AND MARITAL AGREEMENTS

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

BARBARA A. ATWOOD, University of Arizona, James E. Rogers College of Law, 1201 E. Speedway, P.O. Box 210176, Tucson, AZ 85721-0176, *Chair*

TURNEY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202

STANLEY C. KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903

KAY P. KINDRED, University of Nevada, Las Vegas, William S. Boyd School of Law, 4505 S. Maryland Pkwy., Box 451003, Las Vegas, NV 89154-1003

SHELDON F. KURTZ, University of Iowa College of Law, 446 BLB, Iowa City, IA, 52242

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138

HARRY L. TINDALL, 1300 Post Oak Blvd., Suite 1550, Houston, TX 77056-3081

SUZANNE B. WALSH, P.O. Box 271820, West Hartford, CT 06127

STEPHANIE J. WILLBANKS, Vermont Law School, 164 Chelsea St., P.O. Box 96, South Royalton, VT 05068

BRIAN H. BIX, University of Minnesota Law School, Walter F. Mondale Hall, 229 19th Ave., S., Minneapolis, MN 55455-0400, *Reporter*

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, *President*

GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave., Bismark, ND 58502-1013, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

CARLYN S. MCCAFFREY, 767 Fifth Ave., New York, NY 10153, *ABA Advisor*

LINDA J. RAVDIN, 7735 Old Georgetown Rd., Suite 1100, Bethesda, MD 20814-6183, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

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ON UNIFORM STATE LAWS

111 N. Wabash Ave., Suite 1010

Chicago, Illinois 60602

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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

1 enforce marital agreements. *See, e.g.*, Sean Hannon Williams, “Postnuptial Agreements,” 2007
2 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, “The ALI Principles and Agreements:
3 Seeking a Balance Between Status and Contract,” in *Reconceiving the Family: Critical*
4 *Reflections on the American Law Institute’s Principles of the Law of Family Dissolution* (Robin
5 Fretwell Wilson, ed., Cambridge: Cambridge University Press, 2006), pp. 372-391, at 382-387.
6 However, this act follows the American Law Institute, in its *Principles of the Law of Family*
7 *Dissolution* (2002), in treating the two types of agreements under the same set of standards.
8 While this act, like the American Law Institute’s *Principles* before it, recognizes that different
9 sorts of risks may predominate in the different transaction types – risks of unfairness based on
10 bounded rationality and changed circumstances for premarital agreements and risks of duress and
11 undue influence for marital agreements (*Principles of the Law of Family Dissolution*, Section
12 7.01, comment *e*), this act shares the American Law Institute’s view that the resources available
13 through the act and common law principles would be sufficient to deal with the likely problems
14 with either type of transaction.

1 **PREMARITAL AND MARITAL AGREEMENTS ACT**
2

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the “Premarital and Marital
4 Agreements Act.”

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Amendment” means a modification of the terms of a premarital or marital agreement
7 which does not result in the revocation of the agreement.

8 (2) “Child” means an unemancipated individual who
9 (A) has not attained [18 years of age]; or
10 (B) has attained [18 years of age] but is disabled and entitled to ongoing child
11 support.

12 (3) “Child custody” means the physical or legal custody of a child, visitation, access,
13 parenting time, or other form of custodial responsibility or decision-making for a child.

14 (4) “Marital agreement” means an agreement between spouses that affirms, modifies or
15 waives legal rights and obligations otherwise arising between them under applicable law during
16 the marriage, at separation, at marital dissolution, or at the death of one of the spouses by virtue
17 of their marital status. The term includes an amendment of a premarital agreement or prior
18 marital agreement. The term does not include a separation agreement, marriage settlement
19 agreement, or other agreement incident to marital dissolution or separation.

20 (5) “Marital dissolution” means the ending of a marriage by court decree. The term
21 includes divorce, dissolution, and annulment.

22 (6) “Premarital agreement” means an agreement between individuals contemplating
23 marriage that affirms, modifies or waives legal rights and obligations that would otherwise arise
24 between them under applicable law during the marriage, at separation, at marital dissolution, or

1 at the death of one of the spouses by virtue of their marital status.

2 (7) "Property" means all property, whether real, personal, or mixed, or tangible or
3 intangible, or any right or interest therein.

4 (8) "Record" means information that is inscribed on a tangible medium or that is stored in
5 an electronic or other medium and is retrievable in perceivable form.

6 (9) "Separation" means a court-decreed separation of spouses which does not terminate
7 the marriage.

8 (10) "Sign" means with present intent to authenticate or adopt a record:

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

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

12 (11) "State" means a state of the United States, the District of Columbia, Puerto Rico, the
13 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
14 the United States.

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

18 19 **Comment**

20 With premarital agreements, the nature and timing of the agreement (between parties who
21 are about to marry) reduces the danger that the act's language will accidentally include types of
22 transactions that are not thought of as premarital agreements and should not be treated as
23 premarital agreements. There is a greater concern with marital agreements, since (a) spouses
24 enter many otherwise enforceable financial transactions, most of which are not problematic and
25 should not be made subject to special procedural or substantive constraints; and (b) there are
26 significant questions about how to deal with agreements whose primary intention may not be to
27 waive one spouse's rights at dissolution of the marriage or the other spouse's death, but where
28 the agreement nonetheless has that effect. In terms of another uniform act, the purpose is to
29 exclude from coverage "acts and events that have significance apart from their effect" upon
30 rights at dissolution of the marriage or at the death of one of the spouses. See *Uniform Probate*

1 *Code*, Section 2-512 (“Events of Independent Significance”). Such transactions might include
2 (but are by no means limited to) the creation of joint and several liability through real estate
3 mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan
4 guaranties, joint income tax returns, creation of joint property ownership with a right of
5 survivorship, joint property with payment on death provisions or transfer on death provisions,
6 durable power of attorney or medical power of attorney, buy-sell agreements, agreements
7 regarding the valuation of property, the placing of marital property into an irrevocable trust for a
8 child, the drawing up of joint wills, etc.

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

20
21 This Act covers marital agreements but not separation agreements, for which all states
22 already have fairly well established (and relatively uniform) case-law. The two types of
23 agreements are usually distinguished factually based on whether the couple at the time of the
24 agreement intend for their marriage to continue or whether legal separation or dissolution of the
25 marriage are planned or imminent. To avoid deception of the other party or the court regarding
26 intentions, some jurisdictions will refuse to enforce a marital agreement if it is quickly followed
27 by an action for legal separation or dissolution of the marriage. See, e.g., *Minn. Stat.* § 519.11,
28 subd. 1a(d)(marital agreement presumed to be unenforceable if separation or dissolution sought
29 within two years; in such a case spouse seeking enforcement must prove that the agreement was
30 fair and equitable).

31
32 The restriction of “separation” to court-decreed separation was intended to avoid line-
33 drawing issues if mere de facto physical separations were included. This does raise
34 complications in jurisdictions which do not have judicially decreed legal separations, and those
35 jurisdictions may wish to alter this definition according to their own practices and case-law.

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37 **SECTION 3. CONTRACT LAW AND EQUITABLE PRINCIPLES.** The law of
38 contracts and principles of equity supplement this [act], except to the extent displaced by this
39 [act] or other law of this state.

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Comment

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*. Because this act contains broad, amorphous defenses to enforcement like “voluntariness” and “unconscionability” (section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrine and principles of equity continue to apply where the act does not expressly displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground. *Cf. In re Marriage of Balcof*, 141 Cal.App.4th 1509, 47 Cal.Rptr.3d 183 (2006) (marital agreement held unenforceable on the basis of undue influence and duress). Rules of construction, including rules of severability of provisions, are also to be taken from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148 (N.M. App. 2010) (premarital agreement that improperly waived the right to alimony and that contained no severability clause deemed invalid in its entirety). Additionally, state rules and principles will govern the ability of parties to include elevated formalities for the revocation or amendment of their agreements.

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

(1) the law of the jurisdiction designated in the terms, [if that jurisdiction has a significant relation to the agreement or either of the parties, and] unless the designation of that jurisdiction’s law is contrary to a strong public policy of the forum state [or of the jurisdiction having the most significant relationship to the matter at issue]; or

(2) in the absence of a controlling designation in the terms of the agreement, the law of the jurisdiction having the most significant relationship to the matter at issue.

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Comment

This section is taken from the *Uniform Trusts Act*, Section 107 [with the bracketed section adding language taken from the Revised Article 1 of the *Uniform Commercial Code*, Section 1-301]. It is consistent with *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects traditional Conflict of Laws and choice of law principles relating to the enforcement of contracts. *See Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). These conflict of laws principles include the authority of courts to refuse to

1 enforce the rule(s) of another jurisdiction, even if that jurisdiction has the most significant
2 relationship to the agreement, if that other jurisdiction's rules are contrary to the strongly held
3 public policy of the enforcing state. "Significant relation" and "strong public policy" are to be
4 understood under existing state principles relating to conflict of laws, and they mean something
5 more than that the forum law differs. See, e.g., *International Hotels Corporation v. Golden*, 15
6 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); Russell J. Weintraub,
7 *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010),
8

9 The bracketed terms are present for those states that prefer that parties be able to choose
10 law to govern their agreement only from those jurisdictions that have some significant
11 connection to the agreement (a restriction present, e.g., in the *Uniform Commercial Code*). For
12 examples of choice of law and conflict of law principles operating in this area, see, e.g., *Bradley*
13 *v. Bradley*, 164 P.3d 567 (Wyo. 2007) (premarital agreement had choice of law provision
14 selecting Minnesota law; amendment to agreement held invalid because it did not comply with
15 Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91 (Vt. 2006)
16 (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628
17 S.E.2d 546 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during
18 short stay in the Virgin Islands prior to their wedding there; agreement will be covered by Virgin
19 Islands law, unless there is a clear party intention that Virginia law apply or if Virgin Island law
20 is contrary to the this forum state's public policy).
21

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

24 **Comment**

25 This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all
26 jurisdictions currently require premarital agreements to be in writing. A small number of
27 jurisdictions have allowed oral premarital agreements to be enforced based on partial
28 performance. E.g., *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This act does not
29 authorize enforcement of oral premarital agreements on that basis.
30

31 It is the consensus view of jurisdictions and commentators that premarital agreements are
32 or should be enforceable without (additional) consideration. In any event, those states that have
33 looked for consideration for the waiver promises in premarital agreements have concluded that
34 the other party's agreement to marry or the act of marrying constitute valid legal consideration.
35 However, most modern approaches to premarital agreements have by-passed the consideration
36 requirement entirely: e.g., *Uniform Premarital Agreement Act*, Section 2; American Law
37 Institute, *Principles of the Law of Family Dissolution*, Section 7.01, comment c (2002);
38 *Restatement (Third) of Property*, Section 9.4 (2003).
39

40 In some states, there is case-law raising issues relating to a consideration requirement for marital
41 agreements. The view of this act is that marital agreements, otherwise valid, should not be made
42 unenforceable on the basis of a purported lack of consideration. As the American Law Institute

wrote on the distinction (not requiring additional consideration for enforcing premarital agreements, but requiring it for marital agreements): “This distinction is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage altogether.” *Principles of the Law of Family Dissolution*, Section 7.01, comment c (2002). On the conclusion that consideration should not be required for marital agreements, see also *Restatement (Third) of Property*, Section 9.4 (2003) and *Model Marital Property Act*, Section 10 (1983).

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

Comment

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

SECTION 7. VOID MARRIAGE. If a marriage is determined to be void, a premarital or marital agreement is unenforceable except to the extent necessary to avoid an inequitable result.

Comment

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

SECTION 8. SCOPE OF AGREEMENT.

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

(1) the rights and obligations of each of the parties in any of the property of either

1 or both of them, whenever acquired and wherever located;

2 (2) the characterization of property or debt during the marriage as
3 [community][marital] or separate;

4 (3) the right to buy, sell, use, transfer, exchange, lease, expend, assign, create a
5 security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

6 (4) the disposition of property or debt on separation, marital dissolution, death, or
7 the occurrence or nonoccurrence of any other event;

8 (5) the modification or elimination of spousal support;

9 (6) the rights of either or both spouses to interests in trusts, inheritances, bequests,
10 gifts, and expectancies created by third parties;

11 (7) the making of a will, trust, beneficiary designation, or other governing
12 instrument to carry out the provisions of the agreement;

13 (8) the rights in property arising at or after the death of either party, including
14 inheritance, dower, curtesy, elective share, homestead allowance, exempt property, and family
15 allowance;

16 (9) appointment of a fiduciary, guardian, personal representative, or agent for
17 person or property;

18 (10) tax matters;

19 (11) methods for resolution of disputes arising under the agreement, including
20 arbitration and mediation;

21 (12) choice of law governing the validity, enforceability, and construction of the
22 agreement;

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

(14) formalities required to amend or revoke the agreement in addition to those required by this [act]; and

(15) any other matter not in violation of public policy.

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

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

(2) limits or expands the grounds for marital dissolution or separation otherwise available under law of this state other than this [act];

(3) requires or forbids a court to evaluate marital conduct in determining the economic consequences of separation, marital dissolution, or death, except as the term is consistent with applicable law of this state other than this [act];

(4) penalizes a party for initiating the legal action leading to a decree of marital dissolution or separation; or

(5) limits or restricts remedies available to a victim of domestic violence under law of this state other than this [act].

(c) A term in a premarital or marital agreement that defines the rights and responsibilities of the parties regarding child custody is not binding on a court.

Legislative Note: A state should select the appropriate term for subsection (a)(2): either "marital" or "community."

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 3(a). Subsection (b)(2), (3) & (4) are adapted from the American Law Institute, *Principles of the Law of Family Dissolution*, Section 7.08.

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

1 Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-
2 support obligation on step-parents.
3

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

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

32 While there appear to be scattered cases in the distinctly different context of separation
33 agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce
34 *e.g.*, *Masser v. Masser*, 652 A.2d 219 (N.J. App. Div. 1994) (and we are aware of no case law
35 enforcing an agreement to avoid *no-fault* grounds); *cf. Eason v. Eason*, 682 S.E.2d 804 (S.C.
36 2009) (agreement not to use adultery as defense to alimony claim enforceable), taking into
37 account the different context in which premarital and marital agreements are entered, the
38 Committee preferred the position of the American Law Institute, that agreements affecting
39 divorce grounds in any way should not be enforceable.
40

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

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

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

12 (b) A premarital or marital agreement is not enforceable against a party unless:

13 (1) the party executed the agreement voluntarily [and not as a result of duress];

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

15 (3) the party had access to independent legal representation if the other party was
16 represented by a lawyer or was a lawyer;

17 (4) the agreement stated in plain language understandable by an adult of ordinary
18 intelligence the nature of any rights or obligations otherwise arising at separation, marital
19 dissolution, or death which were altered or waived by the agreement, and the nature of the
20 alteration or waiver, unless the party was represented by a lawyer or was a lawyer; and

21 (5) before execution of the agreement, the party:

22 (A) was provided a fair and reasonable financial disclosure from the other
23 party;

24 (B) voluntarily and expressly waived, in a separate signed record, a right

1 to fair and reasonable financial disclosure beyond the disclosure provided; or

2 (C) had, or reasonably could have had, adequate knowledge of the income,
3 property, or liabilities of the other party.

4 (c) A premarital [or marital] agreement is unenforceable if the party opposing the
5 agreement proves that any of the requirements of subsection (b) was not met. [A marital
6 agreement is unenforceable if the party seeking to enforce the agreement fails to prove that all of
7 the requirements of subsection (b) were met.]

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

12 (e) The court shall decide a question of unconscionability as a matter of law.

13 [(f) A court may modify or refuse to enforce a premarital or marital agreement to the
14 extent that enforcement would be unconscionable because of undue hardship on a party.]

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

18 **Comment**

19 This section is adapted from *Uniform Premarital Agreement Act*, Section 6.

20
21 Under subsection (a)(5), disclosure will qualify as “fair and reasonable” even if a value is
22 approximate or difficult to determine, and even if there are minor inaccuracies.

23
24 Subsection (b)(4) is adapted from the *Restatement (Third) of Property*, Section 9.4(3)
25 (2003), and it is also similar in language and purpose to *California Family Code* §1615(c)(3). In
26 that section, reference to “plain language understandable by an adult of ordinary intelligence”
27 includes a requirement that the explanation be written in a language in which the party in
28 question understands.

29
30 Subsection (d) as adapted from *N.D. Cent. Code* Section 30.1-05-07. While a few states

1 have comparable rules, either by statute or case-law, for premarital agreements and for rights at
2 divorce, this Act expands coverage of the restriction by having it apply more generally, including
3 marital agreements and rights at the death of the other spouse.
4

5 Waiver or modification of claims relating to a spouse's pension are subject to the
6 constraints of applicable state and federal law, including but not limited to ERISA (Employee
7 Retirement Income Security Act of 1974, 19 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*,
8 666 F.Supp.2d 463 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her
9 husband's separate property did not qualify as a waiver of her spousal rights as beneficiary under
10 ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214 (App. Div. 2010) (waiver in premarital agreement
11 conforms with ERISA waiver requirement and is enforceable).
12

13 Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital
14 agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d
15 955 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011).
16

17 **SECTION 10. REVOCATION OF AGREEMENT.** Unless the terms of a premarital
18 or marital agreement impose additional formalities, the agreement may be revoked after marriage
19 only in a record signed by the parties. The revocation is enforceable without consideration.
20 Revocation does not include an amendment of a premarital or marital agreement.

21 **Comment**

22

23 "Revocation" means the abnegation of the entire instrument. Any alteration short of an
24 entire abnegation will be a modification, and subject to the requirements of sections 8 and 9. As
25 indicated in section 8(14) and the comment to section 3, it is open to the parties, by express
26 agreement, to increase the formalities required to revoke an agreement.
27

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

32 **Comment**

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

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 15. REPEALS.** The following are repealed:

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

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