

Date: March 4, 2011
To: Drafting Committee for Uniform Premarital and Marital Agreements Act; ABA
Advisors; Observers
From: Barbara Atwood, Chair, & Brian Bix, Reporter
Re: Issues Memo for New Draft

The new draft of the UPMAA reflects our attempt to incorporate the majority views expressed at our last drafting committee meeting, November 5-6, 2010. This memo will walk you through some of the major points that we'll be discussing at our March 25-26 meeting in Washington, DC. As agreed, the Act maintains different articles for premarital and marital contracts. Although we may ultimately treat them identically under the Act, it is a cleaner process for the time being to keep the two contexts distinct. We really look forward to taking up this draft with you at the meeting at the end of the month.

1. Definitions, Section 102

The definitional section has been expanded. The most problematic definition will likely be the definition of "marital agreement." The draft uses language suggested at the last meeting that focuses on the intent of the agreement, in an attempt to exclude the myriad spousal transactions that can occur in a marriage. The commentary will include examples of agreements we intend to exclude.

The definition of "premarital agreement" has been tweaked to exclude religious marriage contracts that don't pertain to rights at death or divorce. Brian's commentary contains a helpful explanation of this.

Other questions to consider: Is the definition of "access to independent counsel" substantive and therefore more appropriately placed in the substantive sections? Are there other terms that we should define?

2. General provisions, Sections 103-105

The draft includes three new sections, modeled after the Uniform Trust Code. These are intended to clearly indicate that certain provisions of the Act are mandatory and cannot be waived by the parties, that ordinary contract principles govern unless modified by the Act, and that a contract's choice of law controls unless contrary to the strong public policy of a state with the most significant relationship to the issue in question. We need to look these carefully to determine if our wording works for premarital and marital contracts. In particular, please note the bracketed language in Section 105(1) that is intended to meet objections that were voiced as to a more open choice of law provision in the UCC.

3. Scope of agreement

Sections 203 and 302 set out, in almost identical form, the range of possible topics that can be covered by premarital and marital agreements. Section 302 differs in one minor respect – since it includes revocation or modification of a premarital agreement as a possible marital agreement. We've re-inserted all the items listed in the UPAA "Content" section, and we added in the items suggested at the meeting.

Subsections (b) and (c) of both sections limit the effectiveness or binding nature of certain terms (terms about child support, divorce grounds, conduct during marriage, and child custody/visitation).

4. Enforcement

The most important sections are those addressing enforcement of agreements. In general, the draft attempts to strengthen the requirements for procedural fairness while adhering to the UPAA position against a fairness review at enforcement. At the same time, we decided in November to include bracketed alternatives for a fairness review at enforcement in light of the large number of states that embrace such a position.

Sections 204 and 303 address the enforcement of premarital and marital agreements respectively. While they parallel each other in terms of substance, they differ in that Section 204 places the burden of proof on the party seeking to challenge a premarital agreement, while Section 303 places the burden of proof on the party seeking to enforce a marital agreement. The difference in burden of proof reflects a very close vote towards the end of the meeting in November, and we've drafted it this way for purposes of discussion only. The issue is obviously one that we will revisit multiple times in the future.

The new enforcement sections strengthen the requirements for procedural fairness (opportunity to consult counsel; general knowledge of rights being waived; and a decoupling of the elements of unconscionability and non-disclosure). As to knowledge of rights being waived, please look at Section 204(a)(5) and the bracketed alternative, as they represent two different approaches to this question.

The enforcement sections also contain a new provision on domestic violence (204(c) and 303(c)) permitting a court to refuse to enforce a waiver or modification of spousal support "as appropriate" where there is a history of domestic violence. This is a provision that we agreed on during our discussion in November but we may want to clarify it to some extent.

As agreed in November, we've included bracketed provisions for unconscionability review at enforcement. A bracketed subsection (b) permitting substantive fairness review at the time of enforcement has been included as an alternative for both premarital agreements (204) and marital agreements (303). These authorize review for undue hardship with a list of possible factors for courts to consider. We need to make sure these reflect the consensus of the Committee about the alternative.

5. Domestic violence screening

The Committee decided rather quickly that the draft should include some language similar to provisions from the Uniform Collaborative Law Act regarding a duty on lawyers to screen for domestic violence. Sections 205 and 304 set out such language. While such provisions are appropriate for an act governing the duties of lawyers (the Collaborative Law Act), they may be out of place in an act on premarital and marital agreements. Please look at this and think about whether it belongs in this Act!

6. Other provisions likely to be included

In November we didn't discuss a few provisions that are in the existing UPAA that we will probably want to include in our act. The provisions are Section 5, dealing with amendment and

revocation, Section 7, dealing with marriages determined to be void, and Section 8, dealing with statutes of limitations. I'll bring this up at the meeting for discussion.
