

To: Uniform Law Commissioners

From: Barbara Atwood, *Chair*, and Brian Bix, *Reporter*, Uniform Premarital and Marital Agreement Act Committee

Re: Issues Memo for Uniform Premarital and Marital Agreement Act

Date: June 4, 2012

The draft Uniform Premarital and Marital Agreements Act has undergone significant revision since the first reading in July 2011. This memo summarizes the most important issues that the Drafting Committee has addressed and identifies the major changes in the Act. We look forward to the consideration of the Act in Nashville.

(1) Section 2: A lot of work has gone into the definitions section, in particular the definitions of “premarital agreement” and (especially) “marital agreement.” Those definitions, along with Section 3, are intended to prevent the draft act from accidentally affecting mundane (commercial and non-commercial) agreements involving spouses. The Act now applies to agreements that waive or alter marital rights or obligations. “Marital right or obligation,” in turn, is a newly defined term. A related structural change in the Act is the elimination of the former “Scope of Agreement” section. The Committee determined that the laundry list of possible topics that could be addressed by agreements was unnecessary.

A separate change from the draft introduced at the 2011 Annual Meeting is the treatment of revocations of agreements. In response to comments during the first reading, the Committee decided to treat revocations and amendments of agreements similarly and to delete the separate standards for revocation.

(2) Section 3: This section – largely new since last year’s presentation to the Commissioners – continues the clarification of the draft act’s narrow application: that it does not apply to separation agreements, nor does it affect the rights of third parties when a spouse is involved in a transfer of property in which the other spouse’s waiver of rights is required.

(3) Section 4 affirms that normal principles of choice of law and conflict of laws apply to premarital agreements and marital agreements. Following the Uniform Commercial Code, choice of law provisions are limited to jurisdictions with a “significant relationship to the agreement or either party.” In addition, in response to comments during the first reading, the Committee has revised the section to give a more prominent role to forum law.

(4) Section 6’s declaration that both premarital agreements and marital agreements are enforceable without consideration would change the law for marital agreements in some

states, but it is consistent with the recommendations of the American Law Institute (in its *Principles of Law of Family Dissolution*), the most recent *Restatement of Property*, and the Model Marital Property Act. It reflects the modern approach that the concerns generally policed indirectly by a consideration requirement are better policed directly through procedural requirements and tests of unconscionability.

- (5) Section 9 establishes the enforcement standards, and it has understandably received most of the Drafting Committee's attention. Most importantly, the draft act removed one of the most controversial aspects of the 1983 Uniform Premarital Agreement Act (UPAA): the way in which agreements under that act could be enforceable even if found to be unconscionable. In conventional contract law, unconscionability is a full defense to the enforcement of an agreement; under the UPAA, to block enforcement one had to prove *both* unconscionability *and* some failure of financial disclosure. Under this draft act, unconscionability and failure of disclosure are *alternative* grounds for making an agreement unenforceable, each of them adequate on its own (under Subsections 9(a)(4) and 9(c)); additionally, enforcement will be refused if the agreement was entered involuntarily or as the result of duress, if the party challenging the agreement did not have access to independent legal representation, and if an unrepresented party did not receive a notice of waiver of rights or a clear explanation of the effect of the agreement (all of these are in Subsection 9(a)).
- (6) Regarding financial disclosure, the UPAA and most jurisdictions allow the duty of financial disclosure to be waived by the other party, whether or not that party is represented by a lawyer at the time. The draft act takes the view that waiver of disclosure should be allowed only when the party has legal representation (Subsection 9(a)(4)(B)). That position is based on the importance of disclosure for the knowing consent of the parties. It is not enough to know that one is giving up the right to half what the other party earns or owns, knowing whether that this is fifty thousand dollars or fifty million dollars seems crucial to making an informed decision whether to enter an agreement. And without legal representation, it seems too easy to get a party simply to waive the right to that crucial knowledge ("sign here, and here, and here – these are just formalities").
- (7) The draft act follows the view of a majority of jurisdictions and commentators in placing the burden of proof on the party seeking to challenge the enforceability of premarital and marital agreements. The Act also establishes the same procedural and substantive standards for premarital agreements and marital agreements, and for terms waiving or modifying rights at divorce and for terms waiving or modifying rights at the death of the other spouse. However, there are Legislative Notes at the end of Section 9 for jurisdictions that wish to distinguish between premarital and marital agreements and to impose the burden of proof on a party seeking to enforce the latter, and for those few jurisdictions that impose the burden of proof on parties seeking to enforce either a premarital or marital agreement. Additionally,

Subsection 9(c) contains bracketed language for those jurisdictions (currently 19 or so) that authorize courts to review the substantive fairness of agreements not only at the time the agreement was signed but also at the time of enforcement. Unlike the draft from last summer, the Act now places the provision on unconscionability at execution and the bracketed provision on “substantial hardship” at enforcement in the same subsection.

- (8) A new Section 10 (Unenforceable Terms) has been added to separately address provisions that are not enforceable or binding as a matter of public policy.