

Date: June 3, 2011

To: Commissioners

From: Barbara Atwood, Chair, Premarital and Marital Agreements Act Drafting Committee

Re: Memo for First Reading

I. Background

In 2008 the JEB/UFL and the JEB/UTEA jointly proposed to Scope and Program that a study committee be appointed to consider a uniform law addressing both premarital and marital agreements. State law varies with respect to both categories of agreements and with respect to enforcement at divorce and enforcement at death. While 26 states have enacted the Uniform Premarital Agreement Act, many of those states have modified the Act significantly with respect to enforcement standards. Among the states that have not adopted the UPAA, standards vary even more dramatically, with many states imposing a substantive fairness review at enforcement. With respect to marital agreements, the law is even more uncertain. Despite the popularity of such agreements, many states have no statutory law and little judge-made law on the topic.

A major impetus for the original proposal was that the ULC's own products contain different enforcement standards governing these agreements. As to marital agreements, § 10 of the Model Marital Property Act provides that a marital property agreement is not enforceable if the spouse challenging the agreement proves that the agreement was not executed voluntarily, that the agreement was unconscionable when made, *or* that there was lack of adequate financial disclosure. In contrast, under § 6 of the Uniform Premarital Agreement Act, an agreement is not enforceable if the party challenging the agreement proves that it was not executed voluntarily or that it was unconscionable when executed *and* that the party was not provided adequate financial disclosure. A similar standard can be found in § 2-213(b) of the Uniform Probate Code for waivers of property rights executed before or after marriage. On the other hand, § 2-213(d) of the UPC spells out the meaning of a waiver of "all rights," absent a different term in the waiver itself. In line with this provision, courts in the probate context generally require that individuals know what they are waiving by agreement. The UPAA, in contrast, does not expressly require that parties to a premarital agreement know the rights or interests they are waiving or altering by agreement.

The Committee strongly believes that uniformity of standards from state to state would be a significant benefit. Because of the mobility of the American population, parties to premarital and marital agreements who execute their agreements in State A may have moved to State B by the time of enforcement. If State A and State B have inconsistent approaches to enforceability, agreements may be invalidated at the time of enforcement without regard to the parties' original expectations. Even if the parties include a contractual choice of law clause selecting the law of State A, their choice of law may be disregarded if the agreement is contrary to the strong public policy of State B. Thus, the unpredictability created by differing state laws undermines the ability of individuals to rely on the validity of their agreements.

The Executive Committee appointed a Study Committee in 2009 and, on the recommendation of the Study Committee, appointed a drafting Committee in early 2010. Our two ABA Advisors, Carlyn McCaffrey (ABA Real Property, Trusts and Estates Section) and Linda Ravdin (ABA Family Law Section), have been invaluable in the drafting process.

II. Major Innovations of Current Draft

The proposed Act covers both premarital and marital agreements, imposes the same enforcement standards for each category of agreement, and does not differentiate between enforcement at divorce and enforcement at death. Some states have been more reluctant to enforce marital agreements than premarital agreements, reasoning that spouses are in a confidential relationship and owe one another a duty of good faith and that the law should protect vulnerable spouses from overreaching or coercion. In light of the vast range of marital agreements and negotiating contexts, however, the Drafting Committee concluded that blanket assumptions about the need for protective law were unfounded.

In Section 2, the definitions of “marital agreement” and “premarital agreement” are designed to include those agreements in which individuals are attempting to alter their rights during marriage, at divorce or separation, or at death, and to exclude the myriad transactions that couples frequently enter into for other reasons. Please read the Reporters Comment for an explanation of these definitions. The Act does not cover separation agreements incident to divorce. Also, the legislative note provides that the applicability of the Act to civil unions, domestic partnerships, and other non-marital relationships is a matter for state law.

Section 3 provides that common law doctrines of contracts and equity apply unless modified by the Act. The Drafting Committee believes this language is necessary to avoid the risk that courts will interpret the express enforcement standards of Section 9 to displace such common law doctrines. There is disagreement within the ULC about the need for such a provision.

Section 4 provides a standard for applying contractual choice of law terms, drawn from the Uniform Trust Act, and provides a choice of law provision to govern in the absence of a contractual term. There is no comparable provision in the UPAA. The Committee believes this section will be helpful in resolving the many choice of law disputes that can arise.

Sections 5 (Formation Requirements), 6 (Effective Date of Agreement), and 7 (Void Marriage) follow the model of the UPAA.

Section 8(a) expands on the topics that can be the subject of premarital and marital agreements in subsection (a). Importantly, subsection (b) identifies terms that are *not* enforceable, drawn in part from the UPAA and in part from court decisions. These include terms that adversely affect child support, limit or expand grounds for divorce, alter state law regarding the significance of marital fault, penalize a party for initiating a divorce action, or limit or restrict domestic violence remedies. Whether the Act should include other provisions

regarding domestic violence is an ongoing consideration for the Committee. In particular, we need to decide whether it would be appropriate to require lawyers to screen for domestic violence when representing parties to premarital or marital agreements, similar to the requirements in the Uniform Collaborative Law Act. Finally, subsection (c) provides that an agreement about child custody can be considered by a court but isn't binding.

Section 9 is the core provision of the Act. As compared to the UPAA and the UPC, it strengthens the procedural fairness standards for enforcement in a number of ways. First, subsection (b) decouples the requirement that agreements not be unconscionable at time of execution from the requirement that the parties make full and fair financial disclosure. The linking of these two requirements in the UPAA has sparked a great deal of criticism and has not been uniformly followed in states that have enacted the UPAA. The Committee concluded that the better approach would be to require agreements to meet each element independently. Subsection (b) also adds the requirement that parties have reasonable access to independent legal representation before signing an agreement if the other party is represented by counsel. Case law from UPAA and non-UPAA states shows that lack of access to counsel is a prime factor leading to invalidation of agreements. Note that this is *not* a requirement for legal representation. Rather, it is simply a requirement that a party have time and ability to consult counsel if the other party has a lawyer. Finally, subsection (b) adds the requirement that *unrepresented* parties be informed in plain language of the general nature of the rights being altered or waived before signing. This provision, which is not found in the UPAA, is intended to align the standards of the Act with the law governing testamentary waivers.

As to substantive fairness reviews at enforcement, Section 9 follows the model of the UPAA. A limited substantive fairness review is included in subsection (c), providing that an agreement is unenforceable to the extent that it limits income or property to an amount less than that allowed for need-based public assistance. This is similar but not identical to the existing UPAA. Significantly, a bracketed subsection (e) is included in light of the more rigorous standards imposed by numerous states when assessing the fairness of agreements at enforcement. This optional provision permits a court to refuse enforcement of an agreement to avoid undue hardship that would otherwise be unconscionable.

Section 10 permits revocation of an agreement by a writing, without consideration. The language of Section 10 is meant to distinguish revocation from modification of an ongoing agreement. Modifications must meet the ordinary enforcement standards of the Act.

Sections 11, 12, and 13 are drawn from the UPAA.