

**Date: December 16, 2019**  
**To: Scope and Program Committee**  
**From: Barbara Atwood, Chair, JEB Uniform Family Laws**  
**Re: Proposal for Study Committee to consider revising UPMAA**

The UPMAA received final approval from the ULC in 2013. Since that time, only two enactments have occurred: North Dakota and Colorado. The JEBUFL discussed the lack of enactments at its most recent meeting. The UPMAA replaced the Uniform Premarital Agreement Act, a uniform law that had come under substantial criticism since its promulgation because of the difficulty in challenging the validity of a premarital agreement under its terms. In particular, the UPAA combined unconscionability and failure to disclose financial status, requiring both to be established in order to challenge an agreement's enforceability. In other words, an agreement might be unconscionable at execution but that alone would not render the agreement unenforceable unless there was also a failure to disclose financial status. The act also did not include any provisions on access to counsel and did not require a showing that a party understood any rights being waived. The UPMAA addressed those aspects and significantly bolstered the criteria for an agreement's validity. It also included post-marital agreements and treated them in the same manner as premarital agreements. The UPAA, however, continues to be popular. At present about 27 states have enacted the UPAA.

JEB members believe that part of the reason for stalled enactment of the UPMAA is that states that have enacted the UPAA are comfortable with its standards. Lawyers and judges know how to apply it, and the UPMAA would expand the bases for challenging agreements in the UPAA states. In other words, the family law bar is not likely to advocate for a system that makes their work products (premarital and post-marital agreements) more vulnerable to being set aside by a court. In the states that have not enacted the UPAA, courts tend to adhere to flexible common law standards that permit assessments of fairness of premarital agreements at the time of enforcement – a bracketed alternative in the UPMAA.

Notably, most states do not have statutory frameworks for post-marital agreements and have varying common law standards for such agreements. In many states, spouses owe fiduciary duties to one another when modifying default property and support rules. These rules affect the validity of agreements entered into during marriage. In other states, post-marital agreements have different requirements or are treated like separation agreements under the law. As noted, the UPMAA treats premarital and post-marital agreements identically, a drafting choice that may have been ill-considered.

Linda Ravdin, the ABA Advisor for the UPMAA, compiled a statutory comparison of every state's statutory and common law in 2019 on premarital and post-marital agreements, including an assessment of how the UPMAA would change existing law. A Copy of Linda's research findings is attached. According to her data, the UPMAA would change the criteria for enforceability of post-marital agreements in at least 45 states, particularly with respect to the requirements governing access to counsel and notice of waiver of rights.

In considering this matter, the JEB concluded that a study committee should be appointed to investigate whether drafting new standards for post-marital agreements would result in greater enactability. The JEB discussed various approaches to the problem, including revising the UPMAA to distinguish the two categories of agreement or, alternatively, to leave the UPMAA as is and to draft a new uniform post-marital agreement act. The JEB therefore recommends that the ULC appoint a study committee to explore these options, with the goal of producing revised standards for post-marital agreements.