

DRAFT
FOR DISCUSSION ONLY

PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For November 5 – 6, 2010 Committee Meeting

Without Prefatory Note and with Comments

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ON UNIFORM STATE LAWS

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October 26, 2010

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PREMARITAL AND MARITAL AGREEMENTS ACT

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1 **PREMARITAL AND MARITAL AGREEMENTS ACT**

2
3 **ARTICLE 1**

4 **GENERAL PROVISIONS**

5
6 **SECTION 101. SHORT TITLE.** This Act may be cited as the “Uniform Premarital
7 and Marital Agreement Act (20**)”

8 **SECTION 102. DEFINITIONS.**

9 (1) “Marital agreement” means an agreement between spouses, not entered at a time
10 when they are legally separated or when a petition for legal separation or dissolution of the
11 marriage has been filed or is about to be filed, whose intention and effect is to modify one or
12 more of the following:

13 (A) the characterization of property during marriage as [marital or nonmarital]
14 [marital or separate] [community or separate];

15 (B) the financial rights of the spouses in case of divorce, annulment, or legal
16 separation, including property division, allocation of debt, and or alimony or spousal support; or

17 (C) the rights of a spouse against the other spouse’s estate, including but not
18 limited to inheritance, dower, curtesy, elective share, homestead allowance, exempt property,
19 and family allowance.

20 Marital agreements include agreements between spouses to modify or abrogate an
21 existing premarital agreement.

22 (2) "Premarital agreement" means an agreement between prospective spouses made in
23 contemplation of marriage and to be effective upon marriage.

24 **SECTION 103. APPLICABILITY OF CONTRACT LAW.** This state’s principles of

contract law apply, except to the extent that they are displaced by the provisions of this Act.

Commentary and Alternatives

Proposed Official Comments

Marital agreement: The definition is meant to exclude common daily transactions between spouses, which are not focused on altering spousal rights on divorce or the rights against a spouse's estate (e.g., designation of a spouse as an insurance beneficiary or agreement to purchase property under a tenancy by the entirety).

Alternatives to marriage: The extent to which this Act applies to official marriage-like statuses, like civil unions, domestic partnerships, registered partnerships, and committed intimate relationships, is a matter for state law.

Contract Law: Where this Act does not expressly displace common law contract rules and principles, they apply. 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, etc.. For example, agreements presented for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) likely presents a clear case of duress, and would (under most states' laws) be voidable for that reason.

Commentary and Alternatives (for Committee)

Definition of "premarital agreement":

(1) The proposed definition tracks the language of the Uniform Premarital Agreement Act, with only minor changes.

(2) The *ALI Principles* defines it the following way:

"A premarital agreement is an agreement between parties contemplating marriage that alters or confirms the legal rights and obligations that would otherwise arise under these Principles or other law governing marital dissolution." (7.01(1)(a))

Definition of "marital agreement":

(1) *ALI Principles*: "A marital agreement is an agreement between spouses who plan to continue their marriage that alters or confirms the legal rights and obligations that would otherwise arise under these Principles or other law governing marital dissolution." (7.01(1)(b))

Displacement of Contract Law: While Section 103 may not be strictly necessary, I think it would be very helpful, as a reminder to both judges and attorneys, that there are standard contract law defenses that can be applied to the enforcement of premarital and marital agreements. Pointing this out (in the text and commentary) allows the Act to focus on whatever additional requirements or defenses to enforcement we believe should be

1 specific to premarital and marital agreements (rather than mashing everything together in
2 some unhelpfully vague term like UPAA's "voluntariness").
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1 (c) A premarital agreement may not prescribe fault grounds for divorce, regulate behavior
2 during marriage, define the parties' rights of child custody, parenting time, access, visitation, or
3 relocation, or adversely affect a child's right to support.

4 **SECTION 204. ENFORCEMENT.**

5 (a) A premarital agreement is not enforceable if the party against whom enforcement is
6 sought proves that, before execution of the agreement, he or she was not provided fair and
7 reasonable disclosure of the property or financial obligations of the other party. "Full financial
8 disclosure" means a generally accurate description of the nature and value of available assets and
9 liabilities. Disclosure will qualify as "full" even if a value is approximate or difficult to
10 determine, and even if there are minor inaccuracies. A party's independent knowledge of the
11 nature and value of assets and liabilities, if sufficiently detailed, can substitute for disclosure.
12 However, the duty of disclosure cannot be waived.

13 (b) A premarital agreement will not be enforceable if the party against who enforcement
14 is sought did not have access to independent counsel prior to signing the agreement. "Access to
15 independent counsel" means that a party has had adequate time and the financial ability to
16 consult independent legal counsel before signing the agreement. The financial ability
17 requirement can be met by an offer by the other party to pay for counsel. The right to access to
18 independent legal counsel cannot be waived.

19 (c) A premarital agreement is not enforceable to the extent that enforcement will cause a
20 party to be eligible for support under a program of public assistance at the time of enforcement.
21 A court may refuse enforcement or exercise its equitable powers to modify the agreement's
22 terms, to avoid that outcome.

23 (d) There is a strong presumption in favor of the enforceability of premarital agreements.

1 However, a court may modify, or refuse to enforce a premarital agreement, even one that meets
2 the procedural requirements of this Act, if the agreement's enforcement would result in "extreme
3 unfairness." The conclusion of "extreme unfairness" is an all-things-considered judgment,
4 which can take into account procedural unfairness at the time the agreement was signed, but
5 should focus primarily on the circumstances at the time of enforcement, including, but not
6 limited to the following factors:

7 (1) How long the marriage lasted.

8 (2) How different the outcome is under the agreement compared to the outcome
9 under state statutory and case-law.

10 (3) Whether the party against whom enforcement is sought has lost significant
11 income-earning ability due to work at home, child-care, disease, or disability.

12 (4) Whether the agreement was motivated by the intention to protect the interests
13 of third parties (e.g., children of a prior marriage), and whether enforcement of the agreement
14 would still have the effect of protecting those interests.

15 If the court is asked to declare an agreement unenforceable due to extreme unfairness, its
16 conclusion, either for or against enforcement, must be supported by detailed written findings.

17 (e) Unless the agreement expressly states otherwise, terms in the agreement should be
18 treated as divisible, such that the modification or non-enforcement of one provision will not
19 require the modification or non-enforcement of other provisions or the agreement as a whole.

20 (f) If there had been domestic violence at the time the premarital agreement was signed,
21 and the perpetrator is the party seeking enforcement, the victim can elect to void the agreement.

22 (g) If the agreement contains provisions that increase one party's property or alimony
23 rights based on the duration of the marriage, and that party is a victim of domestic violence

1 within the marriage, the court shall modify the agreement such that the victim can dissolve the
2 marriage and still receive the increased property or alimony rights, even though the time period
3 established by the agreement has not yet been reached.

4 (h) If the agreement contains a choice of law provision, the agreement should be enforced
5 under the terms of the chosen state's law. If there is no choice of law provision, the court should
6 apply the law of the state which has the strongest connection with the parties and their agreement
7 at the time the agreement was signed. In either case, the court may refuse to enforce another
8 state's laws to the extent that they are contrary to the state's own strong public policy.

9 **Commentary and Alternatives**

10 *Proposed Official Comments*

11
12
13 The general approach of this Act is that parties should be free, within broad limits, to
14 choose the financial terms on which they marry. The limits are those of due
15 process in formation, on one hand, and certain minimal standards of support
16 and substantive fairness at the point of enforcement.

17
18 Consideration: Generally, there have not been issues of consideration relating to the
19 enforcement of premarital agreements. Even if only one party was waiving his or
20 her rights, the other party could be said to be giving consideration by his or her
21 agreement to marry. The Act makes it clear that agreements will not be considered
22 unenforceable on consideration grounds.

23
24 Choice of Law: The justification for enforcing choice of law provisions is that if the
25 parties can choose the particular provisions that best serve their interests and needs,
26 why should they not be allowed to choose a package of provisions, as in the rules
27 of construction and validity given by a particular state? This choice is constrained
28 by the power of the enforcing court to refuse to enforce any rule or provision
29 contrary to the forum state's strong public policy; it is also constrained by the
30 Act's requirement that only states with some connection to the parties or their
31 marriage can be chosen.

32
33 Pensions: Waiver or modification of claims on a spouse's pension are subject to
34 the constraints of applicable state and federal law, in particular ERISA.

35
36 Religious Premarital Agreements: *Mahr* provisions in Islamic marriage contracts should be
37 treated no differently than other premarital agreements. Whether particular *mahr*
38 agreements are enforceable may then turn on various factors specific to the practices

1 and conventions of the religious community and the understandings of the parties
2 to the specific agreement: e.g., whether any deferred *mahr* payment is due (as some
3 traditions hold that the payment is due only for some types of divorces and not for
4 others), and whether the payment is thought to supplant or to supplement other financial
5 rights at divorce (e.g., division of property and alimony).
6
7

8 **Commentary and Alternatives (for Committee)**

9 Statute of Frauds: The few courts who have considered the question have disagreed
10 on whether “part performance” might make an oral premarital agreement enforceable
11 despite the absence of a sufficient writing. The Act does not currently speak to the
12 issue one way or the other.
13

14 Scope of Premarital Agreements Relating to Divorce:

15
16 Grounds for divorce: The language tracks much of the case-law, in which agreements
17 (premarital, marital or separation) in which the parties agree not to use *fault* grounds
18 tend to be enforced, while agreements not to use *no-fault* grounds are not enforced,
19 on the basis of public policy.
20

21 Issues Relating to Children: Courts generally refuse to enforce premarital agreements
22 relating to children (custody, visitation, child support, and relocation), claiming that this
23 invades the courts’ obligation to protect the best interests of children. Consistent with
24 this general approach, some courts, UPAA Section 3(b), and this Act, enforce provisions
25 relating to child support, as long as the effect of those provisions is *not to decrease* the
26 amount the child will receive.
27

28 Alimony: A few states refuse to enforce premarital agreement provisions relating
29 to alimony. Others allow waiver of permanent alimony, but do not allow waiver
30 of temporary alimony.
31

32 General: The UPAA contains a general (and cryptic) clause stating that premarital
33 agreements can cover any other topic (that is, beyond property division and alimony) not
34 contrary to public policy. While this leaves discretion to the states, it offers no guidance
35 to lawyers, judges, and unrepresented parties. As there is a consensus in the case-law
36 regarding scope, restricting premarital agreements to the provisions discussed here –
37 alimony, property division, characterization of property, and (sometimes) provisions
38 which *increase* child support – and that position seems reasonable, I see no reason to be
39 coy on the matter.
40

41 Waiver of rights against the other spouse’s estate:

42
43 (1) Uniform Probate Code, § 2-313, basically tracks the language of the Uniform
44 Premarital Agreement Act, authorizing waivers of rights against the other spouse’s estate,
45 either before or during the marriage, subject to the claim that the agreement was entered

1 into involuntarily, or that there was a failure of disclosure combined with unconscionable
2 terms.

3
4 (2) Some state create a heightened standard before enforcing a waiver of rights against
5 an estate (e.g. in Arizona, agreement to waive widow's allowance must be "clear and
6 explicit")

7
8 (3) Financial Disclosure for Spousal Rights at Death: At least one state (Florida)
9 does not even require disclosure for death-focused agreements.

10
11 (4) At least two states (Florida and Georgia) require that such agreements be signed in
12 front of two witnesses.

13
14
15 Financial disclosure and waiver: While it is relatively common in legislation (including the
16 Uniform Premarital Agreement Act) and caselaw to treat a party's waiver of financial
17 disclosure as an adequate alternative to full disclosure, the concern is that it may be too
18 easy to get a poorly informed and poorly advised party to sign an agreement that has
19 a "waiver of disclosure" provision inserted among its terms.

20
21 Arkansas has a middle position, requiring actual advice of counsel to waive
22 financial disclosure.

23
24
25 Choice of Law: The restriction of choice of law to states having some connection with
26 the parties or the marriage reflects the experience of the Uniform Law Commissioners
27 when dealing with the revised Uniform Commercial Code, where a wide choice of law
28 provision was universally rejected by the state legislatures considering it, forcing the
29 ULC to redraft, while a less wide-ranging provision, like the one in this Act, did much
30 better.

31
32 Alternatives would include allowing parties to choose any state's law to
33 apply to their agreement (this had been the original position of the revised Article 1
34 of the Uniform Commercial Code, and is the position of UPAA Section 3(a)(7)); there
35 would always be the safeguard that the forum state has the right not to apply any rule that
36 was contrary to its strong public policy.

37
38
39 Conflict of laws: This Act does not modify existing conflict of laws rules relating to
40 premarital agreements (or, in the later section, marital agreements), but merely
41 endorses the application of normal principles (the principles that apply to all
42 contracts). The significance of that endorsement is based on the fact that courts,
43 with surprising frequency, ignore the conflict of laws question (e.g., when the
44 California Supreme Court in the Barry Bonds case applied California law, without
45 question or discussion, to an agreement that had been signed in Arizona by parties
46 who were Arizona residents). The hope is that express language in the relevant

1 statute will remind courts to avert to the issue. When Arizona residents sign an
2 agreement in Arizona, they do or should reasonably expect Arizona law to apply
3 to their agreement; when a different court applies entirely different law (without
4 any further justification based on “strong public policy”), it undermines planning
5 and predictability.
6

7 Domestic Violence: There are two provisions relating to domestic violence. The first
8 allows victims of domestic violence at the time an agreement is signed to avoid
9 enforcement of the agreement. While it may seem obvious that victims of domestic
10 violence could claim duress as a basis as a basis of non-enforcement, that contractual
11 defense has its own intricacies, and the Act reflects the view that a clear rule here is best.
12

13 Secondly, the Act allows victims of domestic violence during the marriage the
14 right to modify or remove provisions that make additional rights conditional on staying in
15 the marriage. It is against public policy to allow perpetrators of violence any
16 state-sanctioned basis to pressure their victims to stay in an abusive marriage.
17

18 The Act might also include a provision requiring attorneys negotiating premarital
19 agreements to certify that to the best of their knowledge there was no domestic violence
20 between the parties to the agreement.

21 Here is what the Uniform Collaborative Law Act has regarding domestic violence:
22

23 SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP: 24

25 (a) Before a prospective party signs a collaborative law participation agreement, a
26 prospective collaborative lawyer shall make reasonable inquiry whether the prospective
27 party has a history of a coercive or violent relationship with another prospective party.
28

29 (b) A collaborative lawyer shall throughout the collaborative law process continue to
30 reasonably assess whether the party the collaborative lawyer represents has a history of a
31 coercive or violent relationship with another party.
32

33 (c) If the collaborative lawyer reasonably believes that the party the lawyer represents or
34 the prospective party who consults the lawyer has a history of a coercive or violent
35 relationship with another party or prospective party, the lawyer may not begin or continue
36 a collaborative law process unless:

37 (1) the party or the prospective party requests beginning or continuing a
38 collaborative law process; and

39 (2) the collaborative lawyer reasonably believes that the safety of the party or
40 prospective party can be protected adequately during a collaborative law process.
41

42 Enforcement -- Extreme Unfairness: This doctrine reflects the view of the majority
43 of the states, that allows modification or non-enforcement of premarital agreements
44 based on perceived unfairness at the time of enforcement.
45

46 (1) *ALI Principles*:

1 - for formation, creates a “rebuttable presumption” that a premarital agreement was
2 voluntary, if (a) the agreement was executed 30 days before the marriage;
3 (b) both parties were advised to obtain independent legal counsel and had
4 reasonable opportunity to do so; and
5 (c) that if one party was not assisted by legal counsel, the nature of rights
6 being waived or altered is clearly explained, as is the fact that the interests
7 of the spouse may be adverse (ALI 7.04)
8

9 - at enforcement, creates a two-step process:

10
11 (i) if a (designated) significant amount of time has passed, a child was born
12 to or adopted by the couple, or a significant event unexpected at the time the
13 agreement was signed has occurred;
14

15 (ii) the party opposing enforcement has the chance to defeat enforcement
16 on the basis of “substantial injustice”: for that determination, the court
17 must consider the magnitude of the difference between the outcome under
18 the agreement and that under state law; for shorter marriages, the difference
19 between the outcome under the agreement and the likely circumstances
20 had the marriage not occurred; whether the agreement had the purpose and
21 effect of protecting third parties; and the impact of enforcement on the
22 couples’ children. (ALI 7.05)
23

24 (2) UPAA famously allows enforcement except in cases of lack of voluntariness, or the
25 combination of unconscionability and a failure of disclosure.
26 [This last combination – allowing enforcement even for agreements concluded
27 to be unconscionable – has been the subject of very wide criticism.]
28

29 (3) The Committee might consider alternatives that modify who has the burden of proof
30 (or even a shifting burden on proof, triggered by certain events)
31

32 (4) Maine earlier had a provision under which premarital agreements became
33 void 18 months after the birth or adoption of a child, unless expressly
34 affirmed in writing (the law was altered so it does not apply to agreements
35 entered after October 1993, but it remains an option for us to consider).
36
37

38 Other Topics: The Act could include an express authorization of provisions
39 awarding attorney’s fees for prevailing parties, or requiring arbitration of
40 disputes arising from the agreement.
41

ARTICLE 3

MARITAL AGREEMENTS

SECTION 301. FORMATION REQUIREMENTS.

(a) A marital agreement must be in writing, and signed by both parties. It is enforceable without consideration.

(b) Both parties must have had access to independent counsel prior to executing a marital agreement.

SECTION 302. CONTENT.

(a) Spouses entering into a marital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the disposition of property upon separation, marital dissolution, or death;

(3) the characterization of property as community/marital or separate;

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

(5) the modification or elimination of spousal support, subject to Section 303;

(6) the making of a will, trust, or other arrangement to become effective at death;

(7) the rights against the other spouse's estate including but not limited to inheritance, dower, curtesy, elective share, homestead allowance, exempt property, and family allowance.

(b) Parties may choose the law governing the construction of the agreement, as long as the state chosen has some connection with the parties or their marriage, but this state may refuse to enforce the chosen state's rule of formation or interpretation if that rule offends this state's

1 strong public policy.

2 (c) A marital agreement may not prescribe fault grounds for divorce, regulate behavior
3 during marriage, define the parties' rights of child custody, parenting time, access, visitation, or
4 relocation, or adversely affect a child's right to support.

5 **SECTION 303. ENFORCEMENT.**

6 (a) Spouses in an intact marriage are in a fiduciary relationship. For that reason, a marital
7 agreement is not enforceable unless the party seeking to enforce the agreement proves that he or
8 she gave full financial disclosure to the other party and that the terms of the agreement were
9 substantively fair at the time the agreement was entered. "Full financial disclosure" means a
10 generally accurate description of the nature and value of available assets and liabilities.

11 Disclosure will qualify as "full" even if a value is approximate or difficult to determine, and even
12 if there are minor inaccuracies. A party's independent knowledge of the nature and value of
13 assets and liabilities, if sufficiently detailed, can substitute for disclosure. However, the duty of
14 disclosure cannot be waived.

15 (b) A marital agreement is not enforceable unless the party seeking to enforce the
16 agreement proves that he or she informed the other party in writing and in clear language, of the
17 rights being waived or modified by the agreement.

18 (c) A court may modify, or refuse to enforce a marital agreement, even one that meets the
19 procedural requirements of this Act, if its enforcement would result in "extreme unfairness."
20 The conclusion of "extreme unfairness" is an all-things-considered judgment, which can take
21 into account procedural unfairness at the time the agreement was signed, but should focus
22 primarily on the circumstances at the time of enforcement:

23 (1) How long the marriage lasted.

1 (2) How different the outcome is under the agreement compared to the outcome
2 under state statutory and case-law.

3 (3) Whether the party against whom enforcement is sought has lost significant
4 income-earning ability due to work at home, child-care, disease, or disability.

5 (4) Whether the agreement was motivated by the intention to protect the interests
6 of third parties (e.g., children of a prior marriage), and whether enforcement of the agreement
7 would still have the effect of protecting those interests. If the court is asked to declare an
8 agreement unenforceable due to extreme unfairness, its conclusion, either for or against
9 enforcement, must be supported by detailed written findings.

10 (d) A marital agreement is not enforceable to the extent that enforcement will cause a
11 party to be eligible for support under a program of public assistance at the time of enforcement.
12 A court may refuse enforcement or exercise its equitable powers to modify the agreement's
13 terms.

14 (e) Unless the agreement expressly states otherwise, terms should be treated as divisible,
15 such that the modification or non-enforcement of one provision will not necessarily require the
16 modification or non-enforcement of other provisions or the agreement as a whole.

17 (f) If there had been domestic violence at the time the marital agreement was signed, and
18 the perpetrator is seeking to enforce the agreement, the victim can elect to void the agreement.

19 (g) If the agreement contains provisions that increase one party's property or alimony
20 rights the longer the marriage lasts, and that party is a victim of domestic violence within the
21 marriage, the court shall modify the agreement such that the victim can dissolve the marriage and
22 still receive the increased property or alimony rights, even though the time period established by
23 the agreement has not yet been reached.

(h) If the agreement contains a choice of law provision, the agreement should be enforced under the terms of the chosen state's law. If there is no choice of law provision, the court should apply the law of the state which has the strongest connection with the parties and their agreement at the time the agreement was signed. In either case, the court may refuse to enforce another state's laws which are contrary to the state's own strong public policy.

Commentary and Alternatives

Proposed Official Comments

[Many items and topics are the same as for premarital agreements.]

On Marital Agreements Generally: While some states treat marital agreements under the same standard as premarital agreements, this Act follows the approach of many states that marital agreements need to meet more stringent requirements to be enforced. While the strong presumption of enforceability for premarital agreements follows from the view that parties should be able to choose the terms on which they marry, the less deferential standard for marital agreements reflects both the significant risk of improper pressure and undue influence in negotiations between spouses, and the concern that too often the effort to modify the financial terms of an ongoing marriage is motivated by bad faith reasons.

Consideration: A number of court decisions have held particular marital agreements unenforceable on consideration grounds. Unlike premarital agreements, where a party that was not waiving rights could be said to have given consideration by the act of marriage (or the promise to marry), a party to marital agreement who does not waive or confer rights may not be giving consideration. The main use of consideration issues in marital agreements (as in other areas of contract law, like the modification of commercial agreements) was arguably as a proxy for other concerns, like duress and exploitation. The preference expressed in this Act is that such concerns be addressed directly, rather than indirectly, through the doctrine of consideration.

Fiduciary relationship: While courts frequently discuss whether parties to premarital and marital agreements are in a fiduciary relationship, the upshot of this discussion is usually (only) that there is a duty of financial disclosure. This act treats married parties entering marital agreements (but not about-to-be-married parties entering premarital agreements) as being fiduciaries, in the full sense courts elsewhere apply, e.g., to lawyers entering commercial agreements with their clients.

Substantive fairness: The "substantive fairness" test is not meant to be a requirement of an equal division, or even that the outcome under the agreement closely approximates

1 what the result would have been under the state's statutes and case-law. It is rather
2 reaffirms the court's equitable powers to refuse to enforce agreements that either
3 (a) lead to extremely one-sided results (especially if the marriage had been one of
4 many years); or (b) there are reasons to believe that the marital agreement was the
5 outcome of improper pressure, or that the party seeking the agreement did not have
6 good faith reasons for seeking it.

7
8 Circumventing agreements: There are agreements spouses enter that do not fit the Act's
9 definition of a marital agreement, but which would have the purpose or effect of
10 indirectly changing spousal rights on divorce or death: e.g., where the parties agree
11 to an evaluation of an asset owned by one spouse, and that evaluation is significantly
12 higher or lower than the asset's actual value. Courts should use their equitable powers
13 to prevent parties from circumventing the requirements of this Act (and the other
14 state rules relating to divorce and rights after a spouse's death).

15 16 17 **Commentary and Alternatives (for Committee)**

18
19 [Many items and topics are the same as for premarital agreements.]

20
21 General validity: At least one state (Ohio) does not enforce any marital agreements, and
22 this rule has been applied also to attempts to amend to a premarital agreement during
23 the course of a marriage.

24
25 Independent Counsel: Some states (e.g., Minnesota) require that the parties be
26 represented by independent counsel (and not merely have *opportunity to consult*
27 independent counsel).

28
29 Reconciliation agreements: Some states appear to treat differently reconciliation agreements
30 (agreements entered when the marriage is in imminent danger of ending, and one
31 spouse gives up something in exchange for the other party's agreement to stay in the
32 marriage) differently from other marital agreements. This Act creates no such sharp
33 distinction, but does take the circumstances of the marital agreement into account in
34 making determinations of enforceability.

35
36 Waiver of rights against the other spouse's estate:

37
38 (1) Uniform Probate Code, § 2-313, basically tracks the language of the Uniform
39 Premarital Agreement Act, authorizing waivers of rights against the other spouse's estate,
40 either before or during the marriage, subject to the claim that the agreement was entered
41 into involuntarily, or that there was a failure of disclosure combined with unconscionable
42 terms.

43
44 (2) At least one state (Florida) does not even require disclosure for death-focused
45 agreements.

1 (3) At least two states (Florida and Georgia) requires that these agreements be signed in
2 front of two witnesses
3

4 (4) Iowa does not allow spouses to waive their rights against their spouses' estates in
5 marital agreements (though it does allow such waivers in premarital agreements).
6

7 Enforcement: As noted in the Commentary, one possibility is to treat reconciliation
8 agreements as enforceable and other marital agreements as not enforceable, or at least
9 to give reconciliation agreements a stronger presumption of enforceability than other
10 agreements.
11

12 Timing and Enforcement: Minnesota has the following provision for marital agreements:
13 "A postnuptial contract or settlement is presumed to be unenforceable if either
14 party commences an action for a legal separation or dissolution within two years of
15 the date of its execution, unless the spouse seeking to enforce the postnuptial
16 contract or settlement can establish that the postnuptial contract or settlement is
17 fair and equitable."