

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIRST YEAR
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WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE.....	3
SECTION 2. DEFINITIONS.....	3
SECTION 3. SCOPE.....	6
SECTION 4. GOVERNING LAW.....	7
SECTION 5. PRINCIPLES OF LAW AND EQUITY.....	8
SECTION 6. FORMATION REQUIREMENTS.....	9
SECTION 7. WHEN AGREEMENT EFFECTIVE.....	10
SECTION 8. VOID MARRIAGE.....	10
SECTION 9. ENFORCEMENT.....	11
SECTION 10. UNENFORCEABLE TERMS.....	17
SECTION 11. LIMITATION OF ACTION.....	19
SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	20
SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	20
[SECTION 14. REPEALS; CONFORMING AMENDMENTS.....	20
SECTION 15. EFFECTIVE DATE.....	20

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Prefatory Note

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties' right at divorce, on the basis that such agreements were attempts to alter the terms of a status (marriage) or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties' rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16th century English Statute of Uses. 27 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. *See* Jens M. Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012); *see also* Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), *The Future of Family Property in Europe* (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by 26 jurisdictions, with roughly half of those jurisdictions making significant amendments, either at the time of enactment or at a later date. *See* Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 *Journal of the American Academy of Matrimonial Lawyers* 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. *E.g.*, Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 *Journal of Legislation* 127 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 9 *Yale Journal of Law & Feminism* 229 (1994); J. Thomas Oldham, "With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 *Duke Journal of Gender and the Law* 83 (2011). Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.

The situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, other legal standards relating to the waiver of rights at the death of the other spouse, by either premarital agreements or marital agreements, seem to impose somewhat different requirements. *See, e.g.*, *Uniform Probate Code*, Section 2-213; *Restatement*

(*Third*) of Property, Section 9.4 (2003); *Model Marital Property Act*, Section 10 (1983); and *Internal Revenue Code*, Sections 401 and 417 (stating when a surviving spouse's waiver of rights to a qualified plan would be valid).

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other. Because a significant minority of states authorizes some form of fairness review based on the parties' circumstances at the time the agreement is to be enforced, a bracketed provision in Section 9(f) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because a few states put the burden of proof on the party seeking enforcement of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests alternative language to reflect that burden of proof.

This act chooses to treat premarital agreements and marital agreements under the same set of principles and requirements. A number of states currently treat premarital agreements and marital agreements under different legal standards, with higher burdens on those who wish to enforce marital agreements. *See, e.g.*, Sean Hannon Williams, "Postnuptial Agreements," 2007 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The *ALI Principles* and Agreements: Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at pp. 382-387; Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 11 (2012). However, this act follows the American Law Institute, in its *Principles of the Law of Family Dissolution* (2002), in treating the two types of agreements under the same set of standards. While this act, like the American Law Institute's *Principles* before it, recognizes that different sorts of risks may predominate in the different transaction types – risks of unfairness based on bounded rationality and changed circumstances for premarital agreements, and risks of duress and undue influence for marital agreements (*Principles of the Law of Family Dissolution*, Section 7.01, comment *e*, at pp. 953-954) – this act shares the American Law Institute's view that the resources available through this act and common law principles are sufficient to deal with the likely problems related to either type of transaction.

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Premarital and Marital Agreements Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Amendment” means a modification or revocation of a premarital agreement or marital agreement.

(2) “Marital agreement” means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

(3) “Marital dissolution” means the ending of a marriage by court decree. The term includes a divorce, dissolution, and annulment.

(4) “Marital right or obligation” means any of the following rights or obligations arising between spouses because of their marital status:

(A) spousal support;

(B) a right to property, including characterization, management, and ownership;

(C) responsibility for a liability;

(D) a right to property and responsibility for liabilities at separation, marital dissolution, or death of a spouse; or

(E) award and allocation of attorney’s fees and costs.

(5) “Premarital agreement” means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at

separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.

(6) “Property” means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

(7) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(8) “Sign” means with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(9) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Legislative Note: *If your state recognizes nonmarital relationships, such as civil unions and domestic partnerships, consider whether these definitions need to be amended.*

Comment

The definition of “amendment” includes “amendments” of agreements, narrowly understood, and also revocations.

The definitions of “premarital agreement” and “marital agreement” are part of the effort to clarify that this act is not intended to cover cohabitation agreements, separation agreements, or conventional day-to-day commercial transactions between spouses. Marital agreements and separation agreements (sometimes called “marital settlement agreements”) are usually distinguished based on whether the couple at the time of the agreement intends for their marriage to continue, on the one hand, or whether a court-decreed separation, permanent physical separation or dissolution of the marriage is imminent or planned, on the other. To avoid deception of the other party or the court regarding intentions, one jurisdiction refuses to enforce a marital agreement if it is quickly followed by an action for legal separation or dissolution of the marriage. *See Minnesota Statutes* § 519.11, subd. 1a(d)(marital agreement presumed to be

unenforceable if separation or dissolution sought within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves that the agreement was fair and equitable).

While most premarital agreements and marital agreements will be stand-alone documents, a fragment of a writing that deals primarily with other topics could also constitute a premarital agreement or marital agreement for the purpose of this act.

With premarital agreements, the nature and timing of the agreement (between parties who are about to marry) reduces the danger that the act's language will accidentally include types of transactions that are not thought of as premarital agreements and should not be treated as premarital agreements (but see the discussion of *Mahr* agreements, below). There is a greater concern with marital agreements, since (a) spouses enter many otherwise enforceable financial transactions, most of which are not problematic and should not be made subject to special procedural or substantive constraints; and (b) there are significant questions about how to deal with agreements whose primary intention may not be to waive one spouse's rights at dissolution of the marriage or the other spouse's death, but where the agreement nonetheless has that effect. In the terms of another uniform act, the purpose of the definition of "marital agreement" is to exclude from coverage "acts and events that have significance apart from their effect" upon rights at dissolution of the marriage or at the death of one of the spouses. *See Uniform Probate Code*, Section 2-512 ("Events of Independent Significance"). Such transactions might include the creation of joint and several liability through real estate mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns, creation of joint property ownership with a right of survivorship, joint property with payment-on-death provisions or transfer-on-death provisions, durable power of attorney or medical power of attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of marital property into an irrevocable trust for a child, etc.

The shorter definition of "premarital agreement" used by the Uniform Premarital Agreement Act (in its Section 1(1): "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage") had the disadvantage of encompassing agreements that were entered by couples about to marry but that were not intended to affect the parties' existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred *Mahr* payment provisions. See Nathan B. Oman, "Bargaining in the Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal Specialization," 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix, "*Mahr* Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman," 1 *Wake Forest Law Review Online* 61 (2011), available at <http://wakeforestlawreview.com/>.

The definition of "property" is adapted from the *Uniform Trust Code*, Section 103(12).

This act does not define "separation agreement," leaving this to the understanding, rules, and practices of the states, noting that the practices do vary from state to state (e.g., that in many states separation agreements require judicial approval while in other states they can be valid without judicial approval).

A premarital agreement or marital agreement may include terms not in violation of public policy of this state, including terms relating to: (1) rights of either or both spouses to interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2) appointment of fiduciary, guardian, conservator, personal representative, or agent for person or property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5) choice of law governing validity, enforceability, interpretation, and construction of the agreement; or (6) formalities required to amend the agreement in addition to those required by this act.

SECTION 3. SCOPE.

(a) This [act] applies to a premarital agreement or marital agreement signed on or after [the effective date of this [act]].

(b) This [act] does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before [the effective date of this [act]].

(c) This [act] does not apply to:

(1) an agreement between spouses which affirms, modifies, or waives a marital right or obligation and requires court approval to become effective; or

(2) an agreement between spouses who intend to obtain a marital dissolution or court-decreed separation which resolves their marital rights or obligations and is signed when a proceeding for marital dissolution or court-decreed separation is anticipated or pending.

(d) This [act] does not affect adversely the rights of a bona fide purchaser for value to the extent that this [act] applies to a waiver of a marital right or obligation in a transfer or conveyance of property by a spouse to a third party.

Comment

This section distinguishes marital agreements, which are subject to this act, both from agreements that parties might enter at a time when they intend to obtain a divorce or legal separation or to live permanently apart, and also from the conventional transfers of property in which state law requires one or both spouses waive rights that would otherwise accrue at the death of the other spouse.

Subsection (c) is meant to exclude “separation agreements” and “marital settlement agreements” from the scope of the act. These tend to have their own established standards for

enforcement. The reference to “a waiver of a marital right or obligation” in Subsection (d) would include the release of dower, curtesy, or homestead rights that often accompanies the conveyance of real property. In general, the enforceability of agreements in Subsections (b), (c) and (d) is left to other law in the state.

This section is not meant to restrict third-party beneficiary standing where it would otherwise apply.

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

Comment

This section is adapted from the *Uniform Trust Code*, Section 107. It is consistent with *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects traditional conflict of laws and choice of law principles relating to the enforcement of contracts. See *Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). Section 187(2)(a) of that *Restatement* expressly states that the parties’ choice of law is not to be enforced if “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice....” Section 187(2)(b) of the same *Restatement* holds that the parties’ choice of law is not to be enforced if “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue” The limitation of choice of law provisions to jurisdictions having some connection with the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which restricts choice of law provisions to states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

“Significant relation” and “fundamental public policy” are to be understood under existing state principles relating to conflict of laws, and “contrary to ... fundamental public policy” means something more than that the law of the other jurisdiction differs from that of the forum state. See, e.g., *International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508, 510-513 (Or. App. 2011) (court refused to apply law under choice of law provision because

contrary to “fundamental public policy” of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

For examples of choice of law and conflict of law principles operating in this area, see, e.g., *Bradley v. Bradley*, 164 P.3d 537, 540-544 (Wyo. 2007) (premarital agreement had choice of law provision selecting Minnesota law; amendment to agreement held invalid because it did not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91, 95-96 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546, 553-556 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the agreement was held to be covered by Virgin Islands law because there was no clear party intention that Virginia law apply and because Virgin Island law was not contrary to the forum state’s public policy); cf. *Davis v. Miller*, 7 P.3d 1223, 1229-1230 (Kan. 2000) (parties can use choice of law provision to choose the state version of the Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would otherwise not apply).

SECTION 5. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], principles of law and equity supplement this [act].

Comment

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*, and incorporates the case-law that has developed to interpret and apply those provisions. Because this act contains broad, amorphous defenses to enforcement like “voluntariness” and “unconscionability” (Section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground. Cf. *In re Marriage of Balcof*, 141 Cal.App.4th 1509, 1519-1527, 47 Cal.Rptr.3d 183, 190-196 (2006) (marital agreement held unenforceable on the basis of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257, 1259 (Fla. App. 2007) (affirming trial court conclusion that premarital agreement was voidable for undue influence).

The application of doctrines like duress varies greatly from jurisdiction to jurisdiction: e.g., on whether duress can be shown even in the absence of an illegal act, e.g. *Farm Credit Services of Michigan’s Heartland v. Weldon*, 591 N.W.2d 438, 447 (Mich. App. 1998) (illegal act required for claim of duress under Michigan law), and whether the standard of duress should be applied differently in the context of domestic agreements compared to commercial agreements. This act is not intended to change state law and principles relating to these matters.

Rules of construction, including rules of severability of provisions, are also to be taken from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148, 1155 (N.M. App. 2010), *cert. denied*, 243 P.3d 1146 (N.M. 2010) (premarital agreement that improperly waived the right to alimony and that contained no severability clause deemed invalid in its entirety); *Sanford v. Sanford*, 694 N.W.2d 283, 291-294 (S.D. 2005) (applying state principles of severability to conclude that invalid alimony waiver in premarital agreement severable from valid provisions relating to property division); *Bratton v. Bratton*, 136 S.W.3d 595, 602 (Tenn. 2004) (property division provision in marital agreement not severable from provision waiving alimony). Additionally, state rules and principles will govern the ability of parties to include elevated formalities for the revocation or amendment of their agreements.

SECTION 6. FORMATION REQUIREMENTS. A premarital agreement or marital agreement must be in a record and signed by both parties. The agreement is enforceable without consideration.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all jurisdictions currently require premarital agreements to be in writing. A small number of courts have indicated that an oral premarital agreement might be enforced based on partial performance, *e.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003), *rev'd*, 36 Cal.4th 1096, 116 P.3d 1152 (Cal. 2005) (ultimately holding that the partial performance exception to statute of frauds did not apply to transmutation agreement), and at least one jurisdiction has held that a premarital agreement could be amended or rescinded by actions alone. *Marriage of Baxter*, 911 P.2d 343, 345-346 (Or. App. 1996), review denied, 918 P.2d 847 (Or. 1996). One court, in an unpublished opinion, enforced an oral agreement that a written premarital agreement would become void upon the birth of a child to the couple. *Ehlert v. Ehlert*, No. 354292, 1997 WL 53346 (Conn. Super. 1997). While this act affirms the traditional rule that formation, amendment, and revocation of premarital agreements and marital agreements need to be done through signed written documents, states may obviously construe their own equitable doctrines (application through Section 5) to warrant enforcement or modification without a writing in exceptional cases.

It is the consensus view of jurisdictions and commentators that premarital agreements are or should be enforceable without (additional) consideration (the agreement to marry or the act of marrying is often treated as sufficient consideration). Additionally, most modern approaches to premarital agreements have by-passed the consideration requirement entirely: *e.g.*, *Uniform Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family Dissolution*, Section 7.01(4) (2002); *Restatement (Third) of Property*, Section 9.4(a) (2003).

In some states, courts have raised concerns relating to the consideration for marital agreements. The view of this act is that marital agreements, otherwise valid, should not be made unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the distinction (not requiring additional consideration for enforcing premarital agreements, but

requiring it for marital agreements): “This distinction is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any time.” *Principles of the Law of Family Dissolution*, Section 7.01, Comment *c*, at 947-948 (2002). The consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the agreement, and the seriousness of the parties. *See, e.g.*, Lon L. Fuller, “Consideration and Form,” 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in this act directly by other provisions. On the conclusion that consideration should not be required for marital agreements, see also *Restatement (Third) of Property*, Section 9.4(a) (2003), and *Model Marital Property Act*, Section 10 (1983).

SECTION 7. WHEN AGREEMENT EFFECTIVE. A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The effective date of an agreement (premarital agreement at marriage, marital agreement at signing) does not foreclose the parties from agreeing that certain provisions within the agreement will not go into force until a later time, or will go out of force at that later time. For example, a premarital agreement may grant a spouse additional rights should the marriage last a specified number of years.

Parties sometimes enter agreements that are part cohabitation agreement and part premarital agreement. This act deals only with the provisions triggered by marriage, without undermining whatever enforceability the cohabitation agreement has during the period of cohabitation.

SECTION 8. VOID MARRIAGE. If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example, if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but, unknown to Joan, John was still legally married to Martha, the marriage between John and Joan would be void, and whether their premarital agreement should be enforced would be left to the discretion of the court, taking into account whether enforcement in whole or in part would be required to avoid an inequitable result.

This section is intended to apply primarily to cases where a marriage is void due to the pre-existing marriage of one of the partners. Situations where one partner is seeking a civil annulment (see Section 2(3)) relating to some claims of misrepresentation or mutual mistake

would usually be better left to the main enforcement provisions of Sections 9 and 10.

SECTION 9. ENFORCEMENT.

(a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:

(1) the party's consent to the agreement was involuntary or the result of duress;

(2) the party did not have access to independent legal representation under subsection (b);

(3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or

(4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

(b) A party has access to independent legal representation if:

(1) before signing a premarital or marital agreement, the party has a reasonable time to:

(A) decide whether to retain a lawyer to provide independent legal representation; and

(B) locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and

(2) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

“If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid.”

(d) A party has adequate financial disclosure under this section if the party:

(1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;

(2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or

(3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

(e) If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to

avoid that eligibility.

(f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:]

[(1)] the term was unconscionable at the time of signing[: or

(2) enforcement of the term would result in substantial hardship for a party

because of a material change in circumstances arising after the agreement was signed].

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

Legislative Note: *Section 9(a) places the burden of proof on the party challenging a premarital agreement or a marital agreement. Amendments are required if your state wants to (1) differentiate between the two categories of agreements and place the burden of proof on a party seeking to enforce a marital agreement, or (2) place the burden of proof on a party seeking to enforce either a premarital agreement or marital agreement.*

If your state wants to permit review for “substantial hardship” caused by a premarital agreement or marital agreement at the time of enforcement, Section 9(f), including the bracketed language, should be enacted.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 6. While this section gives a number of defenses to the enforcement of premarital agreements and marital agreements, other defenses grounded in the principles of law and equity also are available. See Section 5.

The use of the phrase “involuntary or the result of duress” in Subsection (a)(1) is not meant to change the law. There is significant and quite divergent caselaw that has developed under the “voluntariness” standard of the Uniform Premarital Agreement Act and related law – *e.g., compare Marriage of Bernard*, 204 P.3d 907, 910-913 (Wash. 2009) (finding agreement “involuntary” when significantly revised version of premarital agreement was presented three days before the wedding) *and Peters-Riemers v. Riemers*, 644 N.W.2d 197, 205-207 (N.D. 2002) (agreement presented three days before wedding found to be “involuntary”; court also emphasized absence of independent counsel and adequate financial disclosure) *with Brown v. Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement presented day before wedding; court held assent to be “voluntary”), *aff’d sub. nom Ex parte Brown*, 26 So.3d 1222, 1225-1228 (Ala. 2009) *and Binek v. Binek*, 673 N.W.2d 594, 597-598 (N.D. 2004) (agreement sufficiently “voluntary” to be enforceable despite being presented two days before the wedding); *see also Mamot v. Mamot*, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test many

courts use to evaluate “voluntariness” under the UPAA); *see generally* Judith T. Younger, “Lovers’ Contracts in the Courts: Forsaking the Minimal Decencies,” 13 *William & Mary Journal of Women and the Law* 349, 359-400 (2007) (summarizing the divergent interpretations of “voluntary” and related concepts under the UPAA); Oldham, “With All My Worldly Goods,” *supra*, at 88-99 (same). This act is not intended either to endorse or override any of those decisions. One factor that courts should certainly consider: the presence of domestic violence would be of obvious relevance to any conclusion about whether a party’s consent to an agreement was “involuntary or the result of duress.”

The requirement of “access to independent counsel” in Subsections (a)(2) and (b) represents the view that representation by independent counsel is crucial for a party waiving important legal rights. The act stops short of requiring representation for an agreement to be enforceable, *cf. California Family Code* § 1612(c) (restrictions on spousal support allowed only if the party waiving rights consulted with independent counsel); *California Probate Code* § 143(a) (waiver of rights at death of other spouse unenforceable unless the party waiving was represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387-391 (W. Va. 2009) (*access* to independent counsel required, and *presumption of validity* for premarital agreement available only where party challenging the agreement actually consulted with independent counsel). When a party has an obligation to make funds available for the other party to retain a lawyer, under Subsection (b)(2), this refers to the cost of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as many lawyers as the first party may have.

The notice of waiver of rights of Subsections (a)(3) and (c) is adapted from the *Restatement (Third) of Property*, Section 9.4(c)(3) (2003), and it is also similar in purpose to *California Family Code* § 1615(c)(3). It creates a safe harbor when dealing with unrepresented parties by use of the applicable designated warning language of Subsection (c), or language substantially similar, but also allows enforcement where there has been an explanation in plain language of the rights and duties being modified or waived by the agreement.

The requirement of reasonable financial disclosure of Subsection (a)(4) and (d) pertains only to assets of which the party knows or reasonably should know. There will be occasions where the valuation of an asset can only be approximate, or may be entirely unknown, and this can and should be noted as part of a reasonable disclosure. Disclosure will qualify as “reasonably accurate” even if a value is approximate or difficult to determine, and even if there are minor inaccuracies. As the Connecticut Supreme Court stated, after reviewing cases from many jurisdictions on the comparable standard of “fair and reasonable disclosure,” “[t]he overwhelming majority of jurisdictions that apply this standard do not require financial disclosure to be exact or precise. ... [The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities....” *Friezo v. Friezo*, 914 A.2d 533, 549, 550 (Conn. 2007). Under Subsection (d)(1), an estimate of value of property, liabilities, and income made in good faith would satisfy this act even if it were later found to be inaccurate.

Some commentators have urged that a waiver of the right of financial disclosure (or the right of financial disclosure beyond what has already been disclosed) be valid only if the waiver were signed after receiving legal advice. The argument is that it is too easy to persuade an

unrepresented party to sign or initial a waiver provision, and that the party waiving that right would then likely be ignorant of the magnitude of what was being given up. Even when notified in the abstract of the rights being given up, it would make a great deal of difference if the party thinks that what was being given up was a claim to a portion of \$80,000, when in fact what was being given up was a claim to a portion of \$80,000,000. However, this act follows the current consensus among the states in not requiring legal representation for a waiver. One reason for not requiring legal advice is that this might effectively require legal representation for all premarital agreements and marital agreements. Under a requirement of legal representation, parties entering agreements might reasonably worry that even if there were significant disclosure, it would always be open to the other party at the time of enforcement to challenge the agreement on the basis that the disclosure was not sufficient, and that any waiver of disclosure beyond the amount given was invalid because of a lack of legal representation. In general, there was a concern that a requirement of legal representation would create an invitation to strategic behavior and unnecessary litigation.

“Conspicuously displayed” in Subsection (c) follows the language and standard of Uniform Commercial Code § 1-201(10), and incorporates the case-law regarding what counts as “conspicuous.”

Reference in Subsection (d)(3) to “adequate knowledge” includes at least approximate knowledge of the value of the property, liabilities, and income in question.

Subsection (e) as adapted from the *Uniform Premarital Agreement Act*, Section 6(b). Other jurisdictions have in the past chosen even more significant protections for vulnerable parties. *See, e.g., N.M. Stat. § 40-3A-4(B)* (premarital agreement may not affect spouse’s right to support); *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998) (widow’s spousal allowance could be awarded, even in the face of express provision in premarital agreement waiving that right); *In re Estate of Thompson*, No. 11-0940, 812 N.W.2d 726 (Table), 2012 WL 469985 (Iowa App. 2012) (same); *Hall v. Hall*, 4 So.3d 254, 256-257 (La. App. 2009), writ denied, 9 So.3d 166 (La. 2009) (waiver of interim support in premarital agreement unenforceable as contrary to public policy). This act attempts to give vulnerable parties significant procedural and substantive protections (protections far beyond what was given in the original *Uniform Premarital Agreement Act*), while maintaining an appropriate balance between such protection and freedom of contract.

The reference in Subsection (f) to the unconscionability of (or substantial hardship caused by) a term is meant to allow a court to strike particular provisions of the agreement while enforcing the remainder of the agreement – consistent with the normal principles of severability in that state (see Section 5 and its commentary). However, this language is not meant to prevent a court from concluding that the agreement was unconscionable as a whole, and to refuse enforcement to the entire agreement.

Subsection (f) includes a bracketed provision for states that wish to include a “second look,” considering the fairness of enforcing an agreement relative to the time of enforcement. The suggested standard is one of whether “enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement

was signed.” This language broadly reflects the standard applied in a number of states. *E.g.*, *Connecticut Code* § 46b-36g(2) (whether premarital agreement was “unconscionable . . . when enforcement is sought”); *New Jersey Statutes* § 37:2-38(b) (whether premarital agreements was “unconscionable at the time enforcement is sought”); *North Dakota Code* § 14-03.1-07 (“enforcement of a premarital agreement would be clearly unconscionable”); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 964 (Mass. 2010) (“the terms of the [marital] agreement are fair and reasonable . . . at the time of divorce”); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (“the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution”). However, it should be noted that even in such “second look” states, case law invalidating premarital agreements and marital agreements at the time of enforcement almost universally concerns rights at divorce. There is little case law invalidating waivers of rights arising at the death of the other spouse grounded on the unfairness at the time of enforcement.

Among the states that allow challenges based on the circumstances at the time of enforcement, the terminology and the application vary greatly from state to state. Courts characterize the inquiry differently, referring variously to “fairness,” “hardship,” “undue burden,” “substantial injustice” (the term used by the American Law Institute’s *Principles of the Law of Family Dissolution* § 7.05 (2002)), or just “unconscionability” at the time of enforcement. In determining whether to enforce the agreement or not under this sort of review, courts generally look to a variety of factors, including the duration of the marriage, the purpose of the agreement, the current income and earning capacity of the parties, the parties’ current obligations to children of the marriage and children from prior marriages, the age and health of the parties, the parties’ standard of living during the marriage, each party’s financial and home-making contributions during the marriage, and the disparity between what the parties would receive under the agreement and what they would likely have received under state law in the absence of an agreement. *See* Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital Agreements* (2nd ed., ABA Section of Family Law, 2012), p. 417. The American Law Institute argued that courts generally were (and should be) more receptive to claims when the marriage had lasted a long time, children had been born to or adopted by the couple, or there had been “a change of circumstances that has a substantial impact on the parties . . . [and that] the parties probably did not anticipate either the change, or its impact” at the time the agreement was signed. American Law Institute, *Principles of the Law of Family Dissolution* § 7.05(2) (2002). One court listed the type of circumstances under which enforcement might be refused as including: “an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse.” *Gross v. Gross*, 464 N.E.2d 500, 509-510 n.11 (Ohio 1984).

Subsection (g) characterizes questions of unconscionability (or substantial hardship) as questions of law for the court. This follows the treatment of unconscionability in conventional commercial contracts. *See UCC* § 2-302(1) & Comment 3; *Restatement (Second) of Contracts* § 208, comment f (1981). This subsection is not intended to establish or modify the standards of review under which such conclusions are considered on appeal under state law.

Waiver or modification of claims relating to a spouse's pension is subject to the constraints of applicable state and federal law, including ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*, 666 F.Supp.2d 463, 467-468 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her husband's separate property did not qualify as a waiver of her spousal rights as beneficiary under ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214, 217-220 (N.Y. App. Div. 2010) (waiver in premarital agreement conforms with ERISA waiver requirement and is enforceable).

In contrast to the approach of the act, some jurisdictions put the burden of proof on the party seeking enforcement of an agreement. *See, e.g., Randolph v. Randolph*, 937 S.W.2d 815, 820-821 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in general, that other party entered agreement "knowledgeably": in particular, that a full and fair disclosure of assets was given or that it was not necessary due to the other party's independent knowledge); *Stancil v. Stancil*, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13, 2012) (same); *In re Estate of Cassidy*, 356 S.W.3d 339, 345 (Mo. App. 2011) (parties seeking to enforce waivers of rights at the death of the other spouse have the burden of proving that procedural and substantive requirements were met). The Legislative Note directs a state to amend Subsection (a) appropriately if the state wants to place the burden of proof on the party seeking enforcement of a marital agreement, a premarital agreement, or both. In those jurisdictions, Subsection (a) should provide that the agreement is unenforceable unless the party seeking to enforce the agreement proves each of the required elements.

Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961-964 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17, 23-25 (Conn. 2011). Those jurisdictions view agreements in the midst of marriage as being especially at risk of coercion (the analogue of a "hold up" in a commercial arrangement) or overreaching. Additionally, these conclusions are sometimes based on the view that parties already married are in a fiduciary relationship in a way that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (American Bar Association, 2011), pp. 16-18. Also, some jurisdictions have distinguished "reconciliation agreements" entered during marriage with other marital agreements, giving more favorable treatment to reconciliation agreements. *See, e.g., Bratton v. Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004) (summarizing the prior law in Tennessee under which reconciliation agreements were enforceable but other marital agreements were void). Many other jurisdictions and The American Law Institute (in its *Principles of the Law of Family Dissolution*, Section 7.01(3) & Comment *b* (2002)) treat marital agreements under the same standards as premarital agreements. This is the approach adopted by this act.

SECTION 10. UNENFORCEABLE TERMS.

(a) In this section, "custodial responsibility" means physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child.

(b) A term in a premarital agreement or marital agreement is not enforceable to the extent

that it:

(1) adversely affects a child’s right to support;

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act];

(3) purports to modify the grounds for a court-decreed separation or marital dissolution available under law of this state other than this [act]; or

(4) penalizes a party for initiating a legal proceeding leading to a court-decreed separation or marital dissolution.

(c) A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court.

Legislative Note: *A state may vary the terminology of “custodial responsibility” to reflect the terminology used in the law of this state other than this act.*

Comment

This section lists provisions that are not binding on a court (this contrasts with the agreements mentioned in Section 3, where the point was to distinguish agreements whose regulation fell outside this act). They include some provisions (*e.g.*, regarding the parents’ preferences regarding custodial responsibility) that, even though not binding on a court, a court might consider by way of guidance.

There is a long-standing consensus that premarital agreements may not bind a court on matters relating to children: agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed *increase* of child support may be enforceable). *E.g.*, *In re Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009) (“Premarital agreements limiting child support are ... improper”), appeal denied, 910 N.E.2d 1126 (Ill. 2009); *cf. Pursley v. Pursley*, 144 S.W.3d 820, 823-826 (Ky. 2004) (agreement by parties in a separation agreement to child support well in excess of guideline amounts is enforceable; it is not unconscionable or contrary to public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

There is a general consensus in the caselaw that courts will not enforce premarital agreement provisions relating to topics beyond the parties’ financial obligations *inter se*. And

while some courts have refused to enforce provisions in premarital agreements and marital agreements that regulate (or attach financial penalties to) conduct during the marriage, e.g., *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494, 496-497 (Cal. App. 2002) (refusing to enforce provision in agreement imposing financial penalty for infidelity); *In re Marriage of Mehren & Dargan*, 118 Cal.App.4th 1167, 13 Cal.Rptr.3d 522 (Cal. App. 2004) (refusing to enforce provision that penalized husband's drug use by transfer of property); see also Brett R. Turner and Laura W. Morgan, *Attacking and Defending Marital Agreements* 379 (2nd ed., ABA Section on Family Law, 2012) ("It has been generally held that antenuptial agreements attempting to set the terms of behavior during the marriage are not enforceable" (footnote omitted)), this act does not expressly deal with such provisions, in part because a few courts have chosen to enforce premarital agreements relating to one type of marital conduct: parties' cooperating in obtaining religious divorces or agreeing to appear before a religious arbitration board. E.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-139 (N.Y. 1983) (holding enforceable religious premarital agreement term requiring parties to appear before religious tribunal and accept its decision regarding a religious divorce). Also, while there appear to be scattered cases in the distinctly different context of separation agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce, e.g., *Massar v. Massar*, 652 A.2d 219, 221-223 (N.J. App. Div. 1994); cf. *Eason v. Eason*, 682 S.E.2d 804, 806-808 (S.C. 2009) (agreement not to use adultery as defense to alimony claim enforceable); see generally Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (ABA, 2011), p. 111 ("In some fault states, courts may enforce a provision [in a premarital agreement] that waives fault"), there appears to be no case law enforcing an agreement to avoid *no-fault* grounds. This act follows the position of the American Law Institute (*Principles of the Law of Family Dissolution*, Section 7.08(1) (2002)), that agreements affecting divorce grounds in any way should not be enforceable.

It is common to include escalator clauses and sunset provision in premarital agreements and marital agreements, making parties' property rights vary with the length of the marriage. Cf. *Peterson v. Sykes-Peterson*, 37 A.3d 173, 177-178 (Conn. App. 2012), cert. denied, 42 A.3d 390 (Conn. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable that penalize one party's initiating an action that leads to the dissolution of a marriage, does not cover such escalator clauses. Additionally, nothing in this provision is intended to affect the rights of parties who enter valid covenant marriages in states that make that alternative form of marriage available.

Section 10 does not purport to list all the types of provisions that are unenforceable. Other provisions which are contrary to public policy would also be unenforceable. See Section 5.

SECTION 11. LIMITATION OF ACTION. A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement or marital agreement is tolled during the marriage of the parties to the agreement, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Comment

This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the Comment to that Section stated: “In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.”

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 14. REPEALS; CONFORMING AMENDMENTS.

(a) [Uniform Premarital Agreement Act] is repealed.

(b) [Uniform Probate Code Section 2-213 (Waiver of Right to Elect and of Other Rights)] is repealed.

(c) [. . .]

SECTION 15. EFFECTIVE DATE. This [act] takes effect