

DRAFT  
FOR DISCUSSION ONLY

# PREMARITAL AND MARITAL AGREEMENTS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For February 10-11, 2012 Committee Meeting

*With Prefatory Note and with Comments*

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January 9, 2012

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# **PREMARITAL AND MARITAL AGREEMENTS ACT**

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# 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, on the basis that they were attempts to alter the terms of a state 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 to allow at least some premarital agreements to be enforced, though the standards for regulating those agreements varied greatly from state to state.

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by twenty-six jurisdictions, with roughly half of those jurisdictions making significant amendments to the Uniform Premarital Agreement Act, 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, mostly 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,” *Duke Journal of Gender and the Law* (forthcoming, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1753785](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753785). 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.

However, the situation regarding agreements waiving rights at the death of the other spouse and the legal treatment of marital agreements have been far less settled and consistent. On rights at the death of the other spouse, the *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) all seem to impose somewhat different standards and requirements. Regarding marital agreements, some states have neither case-law nor legislation, while the remaining states have created a wide range of approaches.

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 support at the point of enforcement, on the other. Because a significant minority of states authorize some form of fairness review based on the

1 parties' circumstances at the time the agreement is to be enforced, a bracketed provision in  
2 section 9 offers the option of refusing enforcement based on a finding of unconscionability at the  
3 time of enforcement.  
4

5 This act chooses to treat premarital agreements and marital agreements under the same  
6 set of principles and requirements. A number of states currently treat premarital agreements and  
7 marital agreements under different legal standards, with higher burdens on those who wish to  
8 enforce marital agreements. *See, e.g.*, Sean Hannon Williams, "Postnuptial Agreements," 2007  
9 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The *ALI Principles* and Agreements:  
10 Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical*  
11 *Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin  
12 Fretwell Wilson, ed., Cambridge: Cambridge University Press, 2006), pp. 372-391, at 382-387;  
13 Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 1  
14 (2012). However, this act follows the American Law Institute, in its *Principles of the Law of*  
15 *Family Dissolution* (2002), in treating the two types of agreements under the same set of  
16 standards. While this act, like the American Law Institute's *Principles* before it, recognizes that  
17 different sorts of risks may predominate in the different transaction types – risks of unfairness  
18 based on bounded rationality and changed circumstances for premarital agreements and risks of  
19 duress and undue influence for marital agreements (*Principles of the Law of Family Dissolution*,  
20 Section 7.01, comment *e*), this act shares the American Law Institute's view that the resources  
21 available through the act and common law principles would be sufficient to deal with the likely  
22 problems with either type of transaction.

1                   **PREMARITAL AND MARITAL AGREEMENTS ACT**

2                   **SECTION 1. SHORT TITLE.** This [act] may be cited as the “Premarital and Marital  
3 Agreements Act.”

4                   **SECTION 2. DEFINITIONS.** In this [act]:

5                   (1) “Amendment” means an express modification or revocation of the terms of a  
6 premarital or marital agreement.

7                   (2) "Custodial responsibility" means physical or legal custody, access, visitation, or other  
8 custodial right or duty with respect to a child.

9                   (3) “Marital agreement” means an agreement between spouses intending to remain  
10 married that affirms, modifies or waives legal rights and obligations otherwise arising between  
11 them by virtue of their marital status under applicable law during the marriage, at separation, at  
12 marital dissolution, or at the death of one of the spouses. The term includes an amendment of a  
13 premarital agreement or prior marital agreement. The term does not include a separation  
14 agreement.

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

17                   (5) “Premarital agreement” means an agreement between individuals contemplating  
18 marriage that affirms, modifies or waives legal rights and obligations that would otherwise arise  
19 between them by virtue of their marital status under applicable law during the marriage, at  
20 separation, at marital dissolution, or at the death of one of the spouses. The term includes an  
21 amendment of a prior premarital agreement executed before the parties' marriage.

22                   (6) “Property” means anything that may be the subject of ownership, whether real or  
23 personal, 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) "Separation" means a court-decreed separation of spouses which does not terminate the marriage.

(9) "Separation agreement" means an agreement between spouses that resolves their legal rights and obligations for purposes of an imminent or pending marital dissolution or separation action. The term includes a marital settlement or divorce settlement agreement.

(10) "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.

(11) "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. [The term includes a federally recognized Indian tribe or nation.]

**Legislative Note:** *The extent to which this act applies to officially recognized non-marital relationships, such as civil unions and domestic partnerships, is a matter for state law other than this [act]. A state may vary the terminology of "custodial responsibility" to reflect the terminology used in state law other than this [act].*

## Comment

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. 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 terms of another uniform act, the purpose 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*

1 *Code*, Section 2-512 (“Events of Independent Significance”). Such transactions might include  
2 (but are by no means limited to) the creation of joint and several liability through real estate  
3 mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan  
4 guaranties, joint income tax returns, creation of joint property ownership with a right of  
5 survivorship, joint property with payment on death provisions or transfer on death provisions,  
6 durable power of attorney or medical power of attorney, buy-sell agreements, agreements  
7 regarding the valuation of property, the placing of marital property into an irrevocable trust for a  
8 child, the drawing up of joint wills, etc.

9  
10 The shorter definition of “premarital agreement” used by the Uniform Premarital  
11 Agreement Act (“an agreement between prospective spouses made in contemplation of marriage  
12 and to be effective upon marriage”) had the disadvantage of encompassing agreements that were  
13 entered by couples about to marry but which were not intended to affect the parties’ rights and  
14 obligations upon divorce or death, e.g. Islamic marriage contracts, with their deferred *mahr*  
15 payment provisions. See Nathan B. Oman, “Bargaining in the Shadow of God’s Law: Islamic  
16 *Mahr* Contracts and the Perils of Legal Specialization,” 45 *Wake Forest Law Review* 579 (2010);  
17 Brian H. Bix, “*Mahr* Agreements: Contracting in the Shadow of Family Law (and Religious  
18 Law) – A Comment on Oman,” 1 *Wake Forest Law Review Online* 61 (2011), available  
19 at <http://lawreview.law.wfu.edu/articles/>.

20  
21 This Act covers marital agreements but not separation agreements, for which all states  
22 already have fairly well established (and relatively uniform) case-law. The two types of  
23 agreements are usually distinguished factually based on whether the couple at the time of the  
24 agreement intend for their marriage to continue or whether legal separation or dissolution of the  
25 marriage are planned or imminent. To avoid deception of the other party or the court regarding  
26 intentions, some jurisdictions will refuse to enforce a marital agreement if it is quickly followed  
27 by an action for legal separation or dissolution of the marriage. *See, e.g., Minnesota Statutes* §  
28 519.11, subd. 1a(d)(marital agreement presumed to be unenforceable if separation or dissolution  
29 sought within two years; in such a case spouse seeking enforcement must prove that the  
30 agreement was fair and equitable).

31  
32 The definition of “custodial responsibility” is adapted from the Uniform Collaborative  
33 Law Act. The definition of “property” comes from the Uniform Trust Code, Section 103(12).

34  
35 The restriction of “separation” to court-decreed separation was intended to avoid line-  
36 drawing issues if mere de facto physical separations were included. This does raise  
37 complications in jurisdictions which do not have judicially decreed legal separations, and those  
38 jurisdictions may wish to alter this definition according to their own practices and case-law.

### 39 40 **SECTION 3. SCOPE**

41 (a) Except for a separation agreement valid under the law of this state other than this  
42 [act], an agreement that affirms, modifies, or waives any of the following legal rights and



obligations arising between spouses because of their marital status is valid only if it is a premarital or marital agreement consistent with this [act]:

(1) spousal support;

(2) rights to property during marriage, including characterization, management, and ownership;

(3) responsibility for liabilities during marriage;

(4) rights to property and responsibility for liabilities at separation or marital dissolution;

(5) rights of a surviving spouse arising at death of a spouse; or

(6) allocation and award of attorney's fees and costs.

(b) A premarital or marital agreement may include other terms not in violation of public policy of this state, including terms relating to:

(1) rights of either or both spouses to interests in trusts, inheritance, devises, gifts, and expectancies created by third parties;

(2) appointment of fiduciary, guardian, conservator, personal representative, or agent for person or property;

(3) tax matters;

(4) methods for resolution of disputes 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].

(c) A term in a premarital or marital agreement is not enforceable to the extent that it:

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

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

4 (3) modifies the grounds for separation or marital dissolution available under the  
5 law of this state other than this [act]; or

6 (4) penalizes a party for initiating a legal proceeding leading to a decree of  
7 separation or marital dissolution.

8 (d) A term in a premarital or marital agreement that defines the rights and responsibilities  
9 of the parties regarding custodial responsibility is not binding on a tribunal.

#### 10 **Comment**

11  
12 This section is adapted from *Uniform Premarital Agreement Act*, Section 3(a).  
13 Subsection (c) is adapted from the American Law Institute, *Principles of the Law of Family*  
14 *Dissolution*, Section 7.08.

15  
16 Subsection (c)(1) applies also to step-children, to whatever extent the state imposes child-  
17 support obligation on step-parents.

18  
19 Amendment and revocation of premarital and marital agreements is governed by a  
20 number of provisions in this section and other sections of this act. Under section 4, the state's  
21 general contract law rules and principles determine whether and how the parties can vary the  
22 formalities or other requirements for amendment or revocation. Section 8(b)(6) reaffirms that a  
23 provision establishing heightened formalities and other requirements for amendment or  
24 revocation is a legitimate provision for a premarital and marital agreements. Actual modification  
25 of a premarital agreement or prior marital agreement is a marital agreement (see section 2(3))  
26 falling under the constraints of section 3(c) and (d) and section 9.

27  
28 The Committee has taken notice of the general consensus in the case-law that courts will  
29 not enforce premarital agreement provisions relating to topics beyond the parties' financial  
30 obligations *inter se*. In particular, courts have concluded that the parties cannot waive their  
31 children's right to child support payments (though some courts have held enforceable agreements  
32 that would *increase* such payments beyond the amount set by state law). And while courts  
33 generally refuse to enforce provisions in premarital and marital agreements that regulate (or  
34 attach financial penalties to) conduct during the marriage, *e.g.*, *Diosdado v. Diosdado*, 118 Cal.  
35 Rptr.2d 494 (App. 2002) (refusing to enforce provision in agreement imposing financial penalty  
36 for infidelity); *Marriage of Dargan*, 13 Cal. Rptr. 522 (App. 2004) (refusing to enforce provision  
37 that penalized husband's drug use by transfer of property), the act does not expressly deal with

1 such provisions (beyond subsection (a)(15), leaving issues of public policy to each state's  
2 courts), in part because a few courts have chosen to enforce premarital agreements relating to  
3 parties' cooperating in obtaining religious divorces or agreeing to appear before a religious  
4 arbitration board. *E.g., Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983) (holding enforceable  
5 religious premarital agreement term requiring parties to appear before religious tribunal and  
6 accept its decision regarding a religious divorce).

7 While there appear to be scattered cases in the distinctly different context of separation  
8 agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce  
9 e.g., *Masser v. Masser*, 652 A.2d 219 (N.J. App. Div. 1994) (and we are aware of no case law  
10 enforcing an agreement to avoid *no-fault* grounds); *cf. Eason v. Eason*, 682 S.E.2d 804 (S.C.  
11 2009) (agreement not to use adultery as defense to alimony claim enforceable), taking into  
12 account the different context in which premarital and marital agreements are entered, the  
13 Committee preferred the position of the American Law Institute, that agreements affecting  
14 divorce grounds in any way should not be enforceable.

15  
16 The Committee took notice of the common practice of escalator clauses in premarital and  
17 marital agreements, making parties' property rights vary with the length of the marriage.  
18 Subsection (c)(4), which makes provisions unenforceable that penalize one party's initiating an  
19 action that leads to the dissolution of a marriage, does not cover such escalator clauses.  
20 Additionally, nothing in this provision is intended to affect the rights of parties who enter valid  
21 covenant marriages in states that make that alternative form of marriage available.

22  
23 **SECTION 4. CONTRACT LAW AND EQUITABLE PRINCIPLES.** The law of  
24 contracts and principles of equity supplement this [act], except to the extent displaced by this  
25 [act] or other statute of this state.

#### 26 **Comment**

27 This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of  
28 the *Uniform Commercial Code*. Because this act contains broad, amorphous defenses to  
29 enforcement like "voluntariness" and "unconscionability" (section 9), there is a significant risk  
30 that parties, and even some courts, might assume that other conventional doctrinal contract law  
31 defenses are not available because preempted. This section is intended to make clear that  
32 common law contract doctrines and principles of equity continue to apply where the act does not  
33 expressly displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital and  
34 marital agreements based on legal incompetency, misrepresentation, duress, undue influence,  
35 unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to  
36 one of the parties for the first time hours before a marriage (where financial commitments have  
37 been made and guests have arrived from far away) clearly raises issues of duress, and might be  
38 voidable on that ground. *Cf. In re Marriage of Balcof*, 141 Cal.App.4th 1509, 47 Cal.Rptr.3d 183  
39 (2006) (marital agreement held unenforceable on the basis of undue influence and duress); *Bakos*  
40 *v. Bakos*, 950 So.2d 1257 (Fla. App. 2007) (affirming trial court conclusion that premarital  
41 agreement was voidable for undue influence).

1 The Committee recognizes that the application of doctrines like duress varies greatly  
2 from jurisdiction to jurisdiction: *e.g.*, on whether duress can be shown even in the absence of an  
3 illegal act, *e.g. Hall v. Hall*, No. 288241, 2010 WL 334721 (Mich. App. 2010) (refusal to set  
4 aside settlement agreement on the basis of duress, as duress requires illegal conduct, and none  
5 was alleged), and whether the standard of duress should be applied differently in the context of a  
6 domestic agreement compared to a commercial agreement. This act is not intended to change  
7 state law and principles in these matters.

8  
9 Rules of construction, including rules of severability of provisions, are also to be taken  
10 from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148 (N.M. App. 2010)  
11 (premarital agreement that improperly waived the right to alimony and that contained no  
12 severability clause deemed invalid in its entirety). Additionally, state rules and principles will  
13 govern the ability of parties to include elevated formalities for the revocation or amendment of  
14 their agreements.

15  
16 **SECTION 5. GOVERNING LAW.** The validity, enforceability, interpretation, and  
17 construction of a premarital or marital agreement are determined by:

18 (1) the law of the jurisdiction designated in the agreement if that jurisdiction has a  
19 significant relationship to the agreement or either of the parties, and the designated law is not  
20 contrary to a strong public policy of the forum state; or

21 (2) in the absence of a controlling designation in the agreement, the law of the forum  
22 including the choice of law rules of the forum state.

### 23 **Comment**

24  
25 This section is taken from the *Uniform Trusts Act*, Section 107. It is consistent with  
26 *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects  
27 traditional Conflict of Laws and Choice of Law principles relating to the enforcement of  
28 contracts. *See Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). These conflict  
29 of laws principles include the authority of courts to refuse to enforce the rule(s) of another  
30 jurisdiction, even if that jurisdiction has the most significant relationship to the agreement, if that  
31 other jurisdiction's rules are contrary to the strongly held public policy of the enforcing state.  
32 "Significant relation" and "strong public policy" are to be understood under existing state  
33 principles relating to conflict of laws, and they mean something more than that the forum law  
34 differs from the law of the other jurisdiction. *See, e.g., International Hotels Corporation v.*  
35 *Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); Russell J.  
36 Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

37  
38 The Committee is aware that in with sales of goods, the Uniform Commercial Code has  
39 chosen to restrict choice of law provisions to states with reasonable relation to the transaction

(this was Section 1-105 under the old UCC; and Section 1-301 in the Revised UCC Article 1). The Committee has concluded that the concerns that led the state legislatures and the UCC Commissioners to prefer a narrower choice of law option for sales of goods would not be present for premarital and marital agreements.

For examples of choice of law and conflict of law principles operating in this area, see, *e.g.*, *Bradley v. Bradley*, 164 P.3d 567 (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 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands prior to their wedding there; agreement will be covered by Virgin Islands law, unless there is a clear party intention that Virginia law apply or if Virgin Island law is contrary to the this forum state's public policy); *cf. Davis v. Miller*, 7 P.3d 1223 (Kan. 2000) (authorizing parties to 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).

Attorneys choosing choice of law provisions for their clients should do so cautiously and only after detailed research. Attorneys who select the law of another state to govern their clients' agreements, ignorant of how that other state's law actually works against their clients interests, risk malpractice liability.

**SECTION 6. FORMATION REQUIREMENTS.** A premarital 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 jurisdictions have allowed oral premarital agreements to be enforced based on partial performance. *E.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This act does not authorize enforcement of oral premarital agreements on that basis.

It is the consensus view of jurisdictions and commentators that premarital agreements are or should be enforceable without (additional) consideration. In any event, those states that have looked for consideration for the waiver promises in premarital agreements have concluded that the other party's agreement to marry or the act of marrying constitute valid legal consideration. However, 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, comment *c* (2002); *Restatement (Third) of Property*, Section 9.4 (2003).

1 In some states, there is case-law raising issues relating to a consideration requirement for  
2 marital agreements. The view of this act is that marital agreements, otherwise valid, should not  
3 be made unenforceable on the basis of a purported lack of consideration. As the American Law  
4 Institute wrote on the distinction (not requiring additional consideration for enforcing premarital  
5 agreements, but requiring it for marital agreements): “This distinction is not persuasive in the  
6 context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the  
7 marriage altogether.” *Principles of the Law of Family Dissolution*, Section 7.01, comment c  
8 (2002). On the conclusion that consideration should not be required for marital agreements, see  
9 also *Restatement (Third) of Property*, Section 9.4 (2003) and *Model Marital Property Act*,  
10 Section 10 (1983).

11  
12 **SECTION 7. EFFECTIVE DATE OF AGREEMENT.** A premarital agreement is  
13 effective on marriage. A marital agreement is effective on execution unless the agreement  
14 provides otherwise.

#### 15 **Comment**

16  
17 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The  
18 Committee took notice of the practice that parties sometimes enter agreements that are part  
19 cohabitation agreement and part premarital agreement. This act deals only with the provisions  
20 triggered by marriage, without undermining the enforceability of the cohabitation agreement  
21 during the period of cohabitation.

22  
23 **SECTION 8. VOID MARRIAGE.** If a marriage is determined to be void, a premarital  
24 or marital agreement is unenforceable except to the extent necessary to avoid an inequitable  
25 result.

#### 26 **Comment**

27  
28 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example,  
29 if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but,  
30 unknown to Joan, John was still legally married to Martha, the marriage between John and Joan  
31 would be void, and whether their premarital agreement should be enforced would be left to the  
32 discretion of the court, taking into account whether enforcement in whole or in part would be  
33 required to avoid an inequitable result.

#### 34 35 **SECTION 9. ENFORCEMENT.**

36 (a) In this section:

37 (1) “Access to independent legal representation” means:

1 (A) reasonable time to decide whether to retain an independent lawyer  
2 before signing a premarital or marital agreement;

3 (B) if a party decides to retain a lawyer, reasonable time to locate an  
4 independent lawyer, obtain legal advice, and consider the advice provided; and

5 (C) if the other party is represented by a lawyer, either the financial ability  
6 to retain a lawyer or the receipt of an offer from the other party to pay the reasonable costs of  
7 retaining and consulting the lawyer.

8 (2) “Fair and reasonable financial disclosure” means a reasonably accurate  
9 description of the nature and value of a party’s property and liabilities and the amount and  
10 sources of a party’s income at the time the agreement is signed.

11 (b) A premarital [or marital] agreement is unenforceable against a party if that party  
12 proves that any of the requirements of subsection (c) is not satisfied. [A marital agreement is  
13 unenforceable unless the party seeking to enforce the agreement proves that all of the  
14 requirements of subsection (c) are satisfied.]

15 (c) A premarital or marital agreement is unenforceable against a party unless:

16 (1) the party executed the agreement voluntarily and without duress;

17 (2) the party had access to independent legal representation;

18 [(3) the agreement stated in language understandable by an adult of ordinary  
19 intelligence the general nature of any rights or obligations otherwise arising at separation, marital  
20 dissolution, or death which were altered or waived by the agreement, and the nature of the  
21 alteration or waiver, unless the party was a lawyer or was represented by a lawyer at the time the  
22 agreement was negotiated and signed;] and

23 (4) before signing the agreement, the party:

1 (A) was provided a fair and reasonable financial disclosure from the other  
2 party;

3 (B) voluntarily and expressly waived, in a separate signed record, a right  
4 to fair and reasonable financial disclosure beyond the disclosure provided; or

5 (C) had, or reasonably could have had, adequate knowledge of the  
6 property, liabilities, and income of the other party.

7 (d) A premarital or marital agreement is unenforceable to the extent that it would limit  
8 the income or property available to a party at the time of enforcement to an amount less than that  
9 allowed for a person eligible for need-based medical assistance or other form of public assistance  
10 in the state where enforcement is sought.

11 (e) A court may modify or refuse to enforce a premarital or marital agreement to the  
12 extent that the agreement was unconscionable at the time of signing. The court shall decide a  
13 question of unconscionability as a matter of law.

14 [(f) A court may modify or refuse to enforce a premarital or marital agreement to the  
15 extent that enforcement would result in [undue hardship] [substantial injustice] for a party  
16 because of circumstances arising since the time of signing.]

17 **Legislative Note:** A state opting to permit a substantive fairness review of premarital or marital  
18 agreements at the time of enforcement should enact subsection (f).

19  
20 **Comment**

21  
22 This section is adapted from *Uniform Premarital Agreement Act*, Section 6.  
23 Under subsection (a)(2) and (c)(4), disclosure will qualify as “fair and reasonable” even if a  
24 value is approximate or difficult to determine, and even if there are minor inaccuracies.

25  
26 Subsection (b)(4) is adapted from the *Restatement (Third) of Property*, Section 9.4(3)  
27 (2003), and it is also similar in language and purpose to *California Family Code* §1615(c)(3). In  
28 that section, reference to “plain language understandable by an adult of ordinary intelligence”  
29 includes a requirement that the explanation be written in a language in which the party in  
30 question understands.



1 Subsection (d) as adapted from *N.D. Cent. Code*, Section 30.1-05-07. While a few states have  
2 comparable rules, either by statute or case-law for premarital agreements and for rights at  
3 divorce, *e.g.*, *Newman v. Newman*, 653 P.2d 728, 736 (Colo. 1982), this act expands coverage of  
4 the restriction by having it apply more generally, including marital agreements and rights at the  
5 death of the other spouse.

6  
7 The requirement of "access to independent counsel" represents the Committee's  
8 considered view that representation by independent counsel is crucial for a party waiving  
9 important legal rights. The act stops short of requiring representation, *see California Family*  
10 *Code* § 1612(c) (restrictions on spousal support allowed only if the party waiving rights  
11 consulted with independent counsel); *California Probate Code* § 143(a) (waiver of rights at  
12 death of other spouse unenforceable unless the party waiving was represented by independent  
13 counsel); *cf. Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009) (*access to independent counsel*  
14 *required, and presumption of validity for premarital agreement available only where party*  
15 *challenging the agreement consulted with independent counsel*).

16  
17 The requirement of reasonable disclosure pertains only to assets of which the party  
18 knows or reasonably should know. There will be occasions where the valuation of an asset can  
19 only be approximate, or may be entirely unknown, and this can and should be noted as part of a  
20 reasonable disclosure.

21  
22 The use of the phrase "voluntary and without duress" is not meant to change the law. The  
23 Committee is aware of the (quite divergent) law that arose under the "voluntariness" standard of  
24 the Uniform Premarital Agreement Act – *e.g.*, *compare Marriage of Bernard*, 204 P.3d 90  
25 (Wash. 2009) (finding agreement "involuntary" when significantly revised version of premarital  
26 agreement was presented three days before wedding) *with Brown v. Brown*, No. 2050748 (Ala.  
27 App. 2007) (agreement presented agreement day before wedding; court held assent to be  
28 "voluntary"), *aff'd*, No. 1071057 (Ala. 2009); *see generally* Judith T. Younger, "Lovers'  
29 Contracts in the Courts: Forsaking the Minimal Decencies," 13 *William & Mary Journal of*  
30 *Women and the Law* 349, 359-400 (2007) (summarizing the divergent interpretations of  
31 "voluntary" and related concepts under the UPAA); Oldham, "With All My Worldly Goods,"  
32 *supra* (same). This [act] is not intended either to endorse or override any of those decisions. The  
33 Committee does emphasize that the presence of domestic violence will be of obvious relevance  
34 to any conclusion about whether the standard of "voluntary and without duress" has been met.

35  
36 Waiver or modification of claims relating to a spouse's pension are subject to the  
37 constraints of applicable state and federal law, including but not limited to ERISA (Employee  
38 Retirement Income Security Act of 1974, 19 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*, 666  
39 F.Supp.2d 463 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her  
40 husband's separate property did not qualify as a waiver of her spousal rights as beneficiary under  
41 ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214 (App. Div. 2010) (waiver in premarital agreement  
42 conforms with ERISA waiver requirement and is enforceable).

43  
44 There is a long-standing consensus that premarital agreements cannot bind a court on  
45 matters relating to children – cannot determine custody or visitation, and cannot limit the amount  
46 of child support (though a few courts have allowed agreements to help justify an *increase* of

1 child support). *E.g.*, In re *Marriage of Best*, 901 N.E.2d 967, 970-971 (Ill. App. 2009). The  
2 basic point is that parents and prospective parents do not have the power to waive the rights of  
3 third parties (their current or future children), and do not have the power to remove the  
4 jurisdiction or duty of the courts to protect the best interests of minor children.

5  
6 Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital  
7 agreements as compared to premarital agreements. *See, e.g.*, *Ansin v. Craven-Ansin*, 929 N.E.2d  
8 955 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011). Those jurisdictions view  
9 agreements in the midst of marriage as being especially at risk of coercion (the analogue of “hold  
10 up” in a commercial arrangement) or overreaching. Additionally, these conclusions are  
11 sometimes based on the view that parties already married are in a fiduciary relationship in a way  
12 that parties about to marry, and considering a premarital agreement, are not. Many other  
13 jurisdictions and The American Law Institute (in its *Principles of the Law of Family Dissolution*)  
14 treat marital agreements under the same standards as premarital agreements. This is the  
15 approach adopted by this act.

16  
17 Some jurisdictions require that parties seeking to enforce waivers of rights at the death of  
18 the other spouse have the burden of proving that procedural and substantive requirements were  
19 met. *See, e.g.*, In re *Estate of Cassidy*, \_\_\_ S.W.3d \_\_\_, No. SD 30025, 2011 WL 5566415 (Mo.  
20 App.). This act does not follow that practice, but views that vulnerable parties will be  
21 comparably protected by the terms of the act, even though the burden of proof remains with the  
22 party opposing enforcement.

23  
24 Bracketed subsection (f) reflects the standard applied in a number of states, in which  
25 agreements are enforceable only if they are shown to meet basic standards of fairness at the time  
26 of enforcement. *E.g.*, *Connecticut Code* § 46b-36g(2) (premarital agreements); *New Jersey*  
27 *Statutes* § 37:2-38(b) (premarital agreements); *North Dakota Code* § 14-03.1-07 (premarital  
28 agreements); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963-64 (Mass. 2010) (marital agreements);  
29 *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (marital agreements).

30  
31 **SECTION 10. LIMITATION OF ACTIONS.** A statute of limitations applicable to an  
32 action asserting a claim for relief under a premarital or marital agreement is tolled during the  
33 marriage of the parties to the agreement, but equitable defenses limiting the time for  
34 enforcement, including laches and estoppel, are available to either party.

### 35 **Comment**

36 This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the Comment to  
37 that Section stated: "In order to avoid the potentially disruptive effect of compelling litigation  
38 between the spouses in order to escape the running of an applicable statute of limitations, Section  
39 8 tolls any applicable statute during the marriage of the parties (contrast *Dykema v. Dykema*, 412  
40 N.E. 2d 13 (Ill. App. 1980) (statute of limitations not tolled where fraud not adequately pleaded,  
41 hence premarital agreement enforced at death)). However, a party is not completely free to sit on

his or her rights because the section does preserve certain equitable defenses."

**SECTION 11. 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 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and 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 13. SAVINGS CLAUSE.** This [act] does not affect any right, obligation, or liability arising under a premarital or marital agreement entered into before the effective date of this [act].

**[SECTION 14. REPEALS.** The following are repealed:

(1) [Uniform Premarital Agreement Act]

(2) [Uniform Probate Code § 2-213( )& ( ) (Waiver of Right to Elect and of Other Rights)]

(3) .....

(4) .....

(5) .....]

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