

The Uniform Premarital and Marital Agreements Act
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[1] Introduction

Historically, though premarital agreements contemplating death were favored, courts refused to enforce agreements that contemplated divorce, believing that allowing a contract to predetermine property and support rights threatened the institution of marriage by making divorce too easy.² That began to change in the early 1970s until every state, by statute or case law, permitted prospective spouses to predetermine in a premarital agreement their rights to property at divorce, and, in the majority of states, to fix or waive the right to support.³ At the same time, courts and legislatures began to struggle with the proper standards for validity. Should the focus be solely on the fairness of the process or should courts also play a role in determining substantive fairness? If the latter, should fairness be judged as of execution or enforcement? And should the standard of fairness be unconscionability or mere unfairness?

In 1983 the Uniform Law Commission (ULC)⁴ approved the Uniform Premarital Agreement Act (UPAA).⁵ Twenty-six states and the District of Columbia have enacted the

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² *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); see also *Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E. 2d 500 (1984).

³ Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (American Bar Association 2011)(hereafter, Ravdin, *Premarital Agreements*), Appendix B, (State Law Summary).

⁴ Also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

⁵ 9C U.L.A. 35 (2001 and Supp. 2014).

UPAA, although some have made significant changes to it. A number of states that have not enacted the UPAA follow standards for validity that are similar to those of the UPAA.⁶

In developing the standards for validity set forth in the UPAA the Commissioners resolved a fundamental disagreement between those who thought predictability of enforcement should be paramount and those who thought substantive fairness was more important.⁷ Those favoring predictability won out. The UPAA criteria for validity emphasize process over substantive fairness and the mandated process is easy to comply with; an agreement need only have been executed voluntarily and with fair financial disclosure (actual or constructive) or an express waiver.⁸ A premarital agreement can be unconscionable at execution as long as the challenging party got financial disclosure or effectively waived it.⁹

The UPAA proved unsatisfactory. Though adopted in half of U.S. jurisdictions, a number of adopting states made significant changes.¹⁰ Thus, it did not succeed in creating uniformity. Many academics have criticized the UPAA.¹¹ The most compelling critique focuses on the enforceability of an agreement that was unconscionable at execution as long as it was

⁶ See, e.g. *Simeone v. Simeone*, 380 Pa. Super. 37, 551 A. 2d 219 (1988), *aff'd*, 525 Pa. 392, 581 A. 2d 162 (1990) (premarital agreement must be executed voluntarily and either not unconscionable at execution or executed after fair financial disclosure); *Taylor v. Taylor*, 832 P. 2d 429 (Okla. Ct. App. 1991) (same).

⁷ *Bonds v. Bonds*, 24 Cal. 4th 1, 5 A.3d 815, 823-824 (2000).

⁸ UPAA § 6 (a)(2).

⁹ *Id.*

¹⁰ The Arkansas version of the UPAA requires actual advice of counsel to waive financial disclosure. Ark. Code Ann. § 9-11-406 (a)(2)(ii). California's enactment creates enhanced procedural requirements for validity. Cal. Fam. Code §§ 1610-1617. The Connecticut Act mandates an opportunity for legal advice and precludes enforcement of an agreement that is unconscionable at enforcement, Conn. Gen. Stat. §§ 46b-36a, *et seq.* Indiana's version of the UPAA does not permit enforcement of an agreement that was unconscionable at execution. Ind. Code § 31-11-3-1, *et. seq.* See also Amberlynn Curry, "Comment: The Uniform Premarital Agreement Act and Its Variations Throughout the States," 23 J.A.A.M.L. 355 (2010).

¹¹ See, e.g., Barbara Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 J. Legis. 127 (1993).

executed voluntarily with financial disclosure or an effective waiver.¹² By contrast, a commercial contract that was unconscionable at execution is unenforceable.¹³ Moreover, the minimal procedural safeguards of the UPAA allow a proponent to present an agreement close to the wedding date with little risk that a court will hold the agreement to be unenforceable on the ground of duress.¹⁴

Historically a married woman could not enter into a contract with her husband.¹⁵ That began to change,¹⁶ so that, currently, in the majority of states, spouses can enter into an agreement not incident to divorce or separation.¹⁷ However, there are no uniform standards for determining the validity of such spousal agreements; rather, there is a hodge-podge of statutes and case law that recognize that spouses can enter into an agreement with each other governing property rights at death or divorce, and, in some states, fixing or waiving spousal support.¹⁸ New York, Wisconsin, and Virginia have statutes governing premarital and marital agreements that provide the same criteria for validity of both types of agreements, permitting parties to contract about the same subjects, and addressing property rights at both death and divorce as well as

¹² See 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 J. Gender L. and Pol'y 83 (Fall 2011); Judith T. Younger, "Lovers' Contracts in the Courts: Forsaking the Minimum Decencies," 13 Wm & Mary J. Women & L. 349 (2007).

¹³ UCC § 2-302(1); *Restatement (Second) of Contracts* § 208 (1981).

¹⁴ J. Thomas Oldham, "Would Enactment of the Uniform Premarital and Marital Agreement Act in all Fifty States Change U.S. Law Regarding Premarital Agreements?" 46 Fam. L. Q. 367, 370 (Fall 2012).

¹⁵ *Adams v. Adams*, 113 A. 279 (N.H. 1921).

¹⁶ See *Harber v. Harber*, 104 Ariz. 79, 449 P. 2d 7 (1969).

¹⁷ Linda J. Ravdin, 849-2nd T.M., *Marital Agreements* (Bloomberg BNA 2012) (hereafter Ravdin, *Marital Agreements*), III. E and Worksheet 10 (State Law Summary).

¹⁸ Ohio appears to be the only state where spouses are not permitted to enter into an agreement governing spousal rights at death or divorce unless the agreement is incident to an existing or planned separation. Ohio Rev. Code Ann. § 310.306; *DuBois v. Coen*, 100 Ohio St. 17, 125 N.E. 121 (1919) (property settlement between spouses not incident to marital separation is prohibited alteration of "legal relations" and unenforceable at death). Case law in Iowa, Oklahoma and Michigan is somewhat contradictory, but appears to permit such agreements under some circumstances. See Ravdin, *Marital Agreements*, III.E. and Worksheet 10 (State Law Summary).

spousal support.¹⁹ Minnesota, by statute, permits a married couple to contract about anything after marriage that they could contract about before.²⁰ A number of states have a statute that permits spouses to enter into a contract defining property rights at death or divorce, but prohibits any alteration in the right to support.²¹

Acting without express statutory authority, courts in Alabama, Florida, Georgia, Massachusetts, Tennessee, and Pennsylvania have held marital agreements generally enforceable at divorce to the same extent as premarital agreements.²² Case law in these states supports enforceability of provisions fixing or waiving spousal support under the same circumstances as apply to a premarital agreement.

Otherwise, there is little guidance and no uniformity as to the standards by which the validity of these agreements is to be judged or their permissible scope. Against this background, the Drafting Committee on Premarital and Marital Agreements of the Uniform Law Commission began its work in 2010.

[2] Drafting and Adoption of the UPMAA

At its Annual Meeting on July 18, 2012, the Uniform Law Commission (ULC), approved the Uniform Premarital and Marital Agreements Act (UPMAA). The ULC intends for the UPMAA to replace the UPAA. The UPMAA was the product of two years of drafting and

¹⁹ N.Y. Dom. Rel. Law § 236(B)(3); *Rupert v. Rupert*, 245 A.D.2d 1139, 667 N.Y.S.2d 537 (1997); Wis. Stat. Ann. §§ 766.58, 767.61; Va. Code §20-151. Colorado had a similar statute but has replaced it with the UPMAA. Colo. Rev. Stat. § 14-2-301, *et seq.*

²⁰ Minn. Stat. Ann. § 519.11.

²¹ Cal. Fam. Code § 1620 (spousal agreement cannot alter legal relationship except for property provisions); Mont. Code. Ann. § 40-2-303 (husband and wife cannot by contract alter legal relation, except as to property, and except may agree in writing to immediate separation and make provisions for support); Nev. Rev. Stat. Ann. § 123.080 (same); N.M. Stat. Ann. (same); 43 Okl. St. Ann. 43 § 205 (same); S.D. Codified Laws § 25-2-13 (same).

²² *Ansin v. Craven-Ansin*, 457 Mass. 283, 929 N.E.2d 955 (2010); *Vaccarello v. Vaccarello*, 757 A.2d 909 (Pa. 2000); *Tibbs v. Anderson*, 580 So.2d 1337 (Ala. 1991); *Casto v. Casto*, 508 So.2d 330 (Fla. 1987); *Sanders v. Colwell*, 283 S.E.2d 461 (Ga. 1981); *Hoyt v. Hoyt*, 213 Tenn. 117, 372 S.W.2d 300 (1963).

debate.²³ In devising a new uniform act, the Drafting Committee considered a number of policy questions. Importantly, since the early 1970s, when courts first began to enforce premarital agreements at divorce, legal scholars have debated whether courts at divorce should play a role in evaluating the fairness of the terms of the agreement.²⁴ The majority view is that they should not.²⁵ Consistent with the majority approach, the UPMAA provides “more robust procedural fairness protections than does the UPAA,”²⁶ but does not require a fair result. However, as discussed below, the text includes optional bracketed language for those states that wish to permit consideration of substantive fairness at enforcement.

The Drafting Committee also grappled with the question whether the validity standards for a premarital agreement should be the same for a marital agreement. Currently there is considerably less uniformity in the treatment of such agreements. Some states have statutes prescribing the requirements for such an agreement, treating them identically to premarital agreements,²⁷ or creating a unique statutory mandate.²⁸ Some state courts have developed rules mandating greater procedural protection for parties entering into such an agreement than would be applicable for a premarital agreement.²⁹ In others, judges have held they should be governed

²³ See Barbara A. Atwood & Brian H. Bix, “A New Uniform Law for Premarital and Marital Agreements,” 46 Fam L. Q. 313 (Fall 2012) (hereafter, Atwood & Bix). The authors were, respectively, Chair of the Drafting Committee and Reporter for the Act.

²⁴ There is little history of support for consideration of substantive fairness after a spouse has died. See Ravdin, *Marital Agreements*, II. K. 3; UPMAA § 9, Comment.

²⁵ Ravdin, *Premarital Agreements* § 3.08 and Appendix B (State Law Summary).

²⁶ Atwood & Bix, p. 317 – 318.

²⁷ See, e.g., Code of Va. Ann. § 20-151 (spouses can agree to any terms after marriage as could agree to in premarital agreement).

²⁸ See, Minn. Stat. Ann. § 519.11 (parties can contract after marriage re anything they can contract about in prenuptial; agreement must be procedurally and substantively fair at execution and enforcement; spouses must be represented by separate counsel; presumed unenforceable if divorce suit within two years unless proponent proves is fair and equitable).

²⁹ See, e.g., *Ansin v. Craven-Ansin*, 457 Mass. 283, 929 N.E.2d 955 (2010)(providing for close scrutiny at divorce).

by the same standards as premarital agreements.³⁰ In the majority of states the rules governing validity are underdeveloped. Ultimately, the Drafting Committee decided that both types of agreement should be governed by the same standards for validity and that the permissible subjects for such agreements should be the same.

The Committee also debated whether the standards for enforcement of an agreement should be the same at death as at divorce. As with the other debates, the Committee resolved in favor of uniformity. The Drafting Committee also considered a number of other important policy questions about the particulars of the Act, including: “whether the Act should permit waivers of financial disclosure and, if so, under what circumstances; whether the Act should require that parties understand the nature of any marital rights being waived; [and] whether the Act should require that parties to agreements have independent legal representation.”³¹

The UPMAA is an important contribution to the law governing agreements between spouses and future spouses. To the extent enacted, it will enhance the fairness of the process required for a valid premarital agreement, yet will afford predictability of enforcement without unduly burdening parties who seek these agreements. By creating recognition for the right of spouses to enter into an agreement during marriage, and not incident to a marital separation, and for the same robust standards for validity, it will enable spouses to formulate agreements that reflect their own needs and values. The UPMAA “promotes informed decision-making and

³⁰ *Lipic v. Lipic*, 103 S.W.3d 144 (Mo. App. 2003); *Stoner v. Stoner*, 572 Pa. 665, 819 A.2d 529 (2003); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Curry v. Curry*, 260 Ga. 302, 392 S.E.2d 879 (1990); *Casto v. Casto*, 508 So.2d 330 (Fla. 1987).

³¹ *Atwood & Bix*, 46 Fam. L.Q. at 331. The Committee also debated whether the Act should include separation agreements, *i.e.*, an agreement executed by couple on the brink of separation or divorce. It ultimately decided against including this type of agreement. Section 2 of the Act, defining premarital and marital agreements, and Section 3 (Scope), expressly exclude separation agreements from coverage.

procedural fairness without undermining interests in contractual autonomy, predictability, and reliance.”³²

As of April 2015, the UPMAA has been enacted in North Dakota³³ and Colorado.³⁴ It was introduced in previous legislative sessions in Nevada and the District of Columbia, but has not been reintroduced in 2015 to date,³⁵ and in Mississippi, where it died in Committee.³⁶

[3] Formation Requirements

Section 6 addresses the basic requirements for formation of a premarital or marital agreement.

[a] Execution

Section 6 provides that a premarital or marital agreement must be in a record and signed by both parties. Historically, a premarital agreement had to be in writing and signed by both parties.³⁷

The UPAA codified this rule and the UPMAA continues it. However, the UPMAA updates the requirement for a writing. A “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form.”³⁸ The conventional concept of “signed” is also expanded to include the use of an “electronic symbol, sound or process”³⁹ to “authenticate or adopt a record”⁴⁰ Thus, parties could enter into an agreement that exists in an electronic format without signing an actual paper document in ink.

Nevertheless, many lawyers will continue to prefer creating a paper document and having parties

³² *Id.* at 315.

³³ N.D. Cent. Code § 14-03.2-01, *et. seq.*

³⁴ Colo. Rev. Stat. § 14-2-301, *et. seq.*

³⁵ Information obtained from State legislature web sites.

³⁶ Nev. SB 247 (2013); D.C. B20-0217 (2013); Miss. HB 1042 (2014).

³⁷ The Comment identifies a few jurisdictions where there is some authority for enforcement of an oral premarital agreement, but these are a small minority.

³⁸ UPMAA § 2(7).

³⁹ UPMAA § 2(8).

⁴⁰ *Id.*

execute multiple originals with inked signatures and initials on every page, including the financial disclosures.

The UPMAA and the law of the majority of UPAA and non-UPAA states, requires only party signatures. There is no requirement for notarization or other execution formalities.

[b] Consideration

Section 6 further provides that no consideration is required for an enforceable agreement. This is consistent with the UPAA and the law in the majority of jurisdictions. At common law, the marriage itself was deemed the only necessary consideration for a premarital agreement.⁴¹ Thus, the UPAA, and now the UPMAA, might be read to mean that no additional consideration, beyond the marriage itself, is necessary, or that the requirement for consideration has been entirely dispensed with.⁴² In any event, the UPMAA does not change prevailing law in this regard for premarital agreements.

Marital agreements are a different story, however. Though some states' laws do not require consideration,⁴³ the more common approach mandates some consideration for the agreement other than the marriage.⁴⁴ In this respect, the UPMAA is a departure from the majority rule.

⁴¹ *Harllee v. Harllee*, 565 S.E.2d 678 (N.C. Ct. App. 2002); *Valid v. Valid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

⁴² See UPMAA §6, Comment.

⁴³ See Alaska Stat. §34.77.090; Colo. Rev. Stat. §14-2-303; Mont. Code Ann. §40-2-304; Va. Code Ann. §20-155; Wis. Stat. Ann. §766.58; *Laudig v. Laudig*, 425 Pa. Super. 228, 624 A.2d 651 (1993).

⁴⁴ See Ind. Code §29-1-2-13; Me. Rev. Stat. Ann. tit. 18-A, §2-204; Mo. Rev. Stat. §474.220; *In re Marriage of Tabassum and Younis*, 377 Ill.App.3d 761, 881 N.E.2d 396, reh. den. (2007); *Simmons v. Simmons*, 98 Ark. App. 12, 249 S.W. 3d 843 (2007); *Whitmore v. Whitmore*, 8 A.D.3d 371, 778 N.Y.S.2d 73 (2004); *Beesley v. Harris*, 883 P.2d 1343 (Utah 1994); *Conigliaro v. Conigliaro*, 1992 Del. Fam. Ct. Lexis 41; *Combs v. Sherry-Combs*, 865 P.2d 50 (Wyo. 1993), *Rockwell v. Estate of Rockwell*, 180 N.W.2d 498 (Mich. Ct. App. 1970).

[4] Validity of Premarital Agreements -- Analysis of the Key Terms of the UPMAA

[a] Criteria for Validity

The criteria for validity of a premarital agreement under the UPMAA are in Section 9, Enforcement, which provides:

- (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).

....

- (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].

Importantly, the UPMAA de-couples unconscionability from financial disclosure. Thus, unconscionability and failure of financial disclosure are separate grounds that permit a court to refuse enforcement of an agreement. Although the text of Section 9(f) only expressly authorizes a court to refuse enforcement of an unconscionable term, the Comment tells us that Section 9(f) is not meant to preclude a court from striking down the entire agreement as unconscionable.⁴⁵ In addition, the challenging party's lack of access to counsel is an independent ground on which a court may refuse enforcement.

The UPMAA thus expands from two to five the grounds on which a court may invalidate a premarital agreement. A challenging party can prevail by proving that he or she:

- (1) executed the agreement involuntarily or under duress; or
- (2) did not receive financial disclosure (actual or constructive) and did not effectively waive disclosure; or
- (3) did not have access to independent counsel; or
- (4) if unrepresented, did not receive a plain language explanation of rights; or
- (5) the agreement was unconscionable when executed.

In addition, Section 5 provides that "principles of law and equity supplement" the UPMAA unless displaced by it. Thus, common law defenses to enforcement, such as lack of legal

⁴⁵ UPMAA § 9, Comment.

capacity, misrepresentation, undue influence, and unconscionability, as developed in each state's law, can also provide a basis for a court to invalidate an agreement.⁴⁶

[b] Burden of Proof

The UPMAA places the burden of proving invalidity on the opponent of the agreement.⁴⁷ That burden never shifts. In allocating the burden of proof to the party challenging enforcement of a premarital agreement, the UPMAA is consistent with the current majority rule, as expressed in the UPAA and the case law of a number of non-UPAA states.⁴⁸

[c] Voluntariness and Lack of Duress

Section (9)(a)(1) sets forth the essential requirement for validity of any contract, that it must be executed voluntarily and not as a result of duress. A considerable body of law has developed around the concepts of voluntariness and duress in relation to premarital agreements.⁴⁹ The execution of such an agreement is often either an implicit or an explicit condition for marriage.⁵⁰ A recipient may feel pressure to assent. This may feel like duress, but, standing alone, is insufficient for a court to invalidate a premarital agreement.⁵¹ Other factors may create pressure on a recipient, such as pregnancy,⁵² emotional distress,⁵³ unequal bargaining power,⁵⁴ and the

⁴⁶ UPMAA § 5, Comment.

⁴⁷ UPMAA § 9(a).

⁴⁸ UPAA § 6(a) (1983); *Reed v. Reed*, 265 Mich. App. 131, 693 N.W. 2d 825 (2005); *Couvillion v. Couvillion*, 886 So. 2d 474 (La. App. 2004); *Forsberg v. Forsberg*, 219 A.D. 2d 615, 631 N.Y.S. 2d 709 (1995); *Gardner v. Gardner*, 190 Wis.2d 216, 527 N.W.2d 701 (1994); *Pajak v. Pajak*, 385 S.E. 2d 384 (W. Va. 1989); *In re Lopata's Estate*, 641 P. 2d 952 (Colo. 1982).

⁴⁹ See, e.g., *Francavilla v. Francavilla*, 969 So. 2d 522 (Fla. App. 2007); *In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007); *Kornegay v. Robinson*, 360 N.C. 640, 637 S.E. 2d 516 (2006); *Cannon v. Cannon*, 384 Md. 537, 865 A. 2d 563 (2005); *In re Estate of Hollett*, 150 N.H. 39, 834 A. 2d 348 (2003); *Bonds v. Bonds*, 24 Cal. 4th 1, 5 P. 3d 815 (2000); *Miles v. Werle*, 977 S.W. 2d 297 (Mo. Ct. App. 1998); *Parr v. Parr*, 635 N.E. 2d. 1124 (Ind. Ct. App. 1994); *Lebeck v. Lebeck*, 118 N.M. 367, 881 P. 2d 727 (Ct. App. 1994); *Laird v. Laird*, 597 P. 2d 463 (Wyo. 1979).

⁵⁰ *Spiegel v. Spiegel*, 553 N.W. 2d 309 (Iowa 1996).

⁵¹ *Weinstein v. Weinstein*, 36 A.D.3d 797, 830 N.Y.S.2d 179 (2007); *Marriage of Barnes*, 324 Ill. App. 3d 514, 755 N.E.2d 522 (2001); *Taylor v. Taylor*, 832 P.2d 429, 431 (Okla. Ct. App. 1991).

⁵² *Marsocci v. Marsocci*, 911 A. 2d 690 (R.I. 2006).

⁵³ *DeMatteo v. DeMatteo* 436 Mass. 18, 762 N.E.2d 797 (2002).

prospect of social embarrassment if the wedding is cancelled.⁵⁵ Courts have generally not found duress based solely on one of these factors. Many cases have dealt with a claim of duress where the proponent presented an agreement close to the wedding, creating considerable pressure on the recipient, yet not enough pressure to warrant a finding of duress.⁵⁶ Voluntariness means that the party acted out of his or her own volition, that he or she had a meaningful choice whether to execute a premarital agreement.⁵⁷ A choice between signing a contract a party does not like and not getting married is still a choice, often, even when he or she must make the choice close to the wedding date. As one court observed, a party “is free to leave the relationship if an agreement is objectionable.”⁵⁸ The comments to the UPMAA tell us that section (9)(a)(1) “is not meant to change the law”⁵⁹ as it relates to voluntariness and duress.

Importantly, without attempting to change the law defining voluntariness or duress, the UPMAA will make it more difficult for a proponent to prevail who presents a premarital agreement close to the wedding date. The requirement of Section (9)(a)(2) for access to counsel will make it extremely risky for proponents to wait until close to the date of the wedding to present an agreement.

[d] Access to Counsel

A persistent problem, from the perspective of economically weaker parties, is the practice of presenting a proposed premarital agreement close to the wedding date, when plans have been

⁵⁴ *Gant v. Gant*, 329 S.E.2d 106 (W.Va. 1985).

⁵⁵ *Gardner v. Gardner*, 190 Wis. 2d 216, 527 N.W. 2d 701, 706 (1994).

⁵⁶ See, *Bilouris v. Bilouris*, 67 Mass. App. Ct. 149, 852 N.E.2d 687 (2006); *Yannalfo v. Yannalfo*, 147 N.H. 597, 794 A.2d 795 (2002); *In re Estate of Arbeitman*, 886 S.W.2d 644 (Mo. Ct. App. 1994).

⁵⁷ See, e.g., *Marriage of Rudder*, 230 Or. App. 437, 217 P. 3d 183 (2009); *Dornemann v. Dornemann*, 48 Conn. Supp. 502, 850 A. 2d 273 (2004); *Button v. Button*, 131 Wis. 2d 84, 91, 388 N.W. 2d 546, 551 (1986) *DeLorean v. DeLorean*, 211 N.J. Super. 432, 511 A. 2d 1257 (1986).

⁵⁸ *Gardner v. Gardner*, 190 Wis. 2d 216, 527 N.W.2d 701, 706 (1994).

⁵⁹ UPMAA, Sec. 9, Comment.

made and paid for, and when the rush of pre-wedding activities makes it difficult or impossible to get legal advice and engage in an actual negotiation. The most important feature of the UPMAA is the requirement that the party receiving a proposed premarital agreement have access to independent legal representation before execution.⁶⁰ This is a significant departure from prevailing law. Only Connecticut, New Jersey and Minnesota require access to counsel for general validity.⁶¹ A few other states require actual legal advice, not merely access, but not for general validity, rather only for waiver of specific rights.⁶²

The UPMAA does not mandate actual legal representation, only a meaningful opportunity for legal advice. As one court observed: “[I]nequality of [bargaining positions] may be cured by access to legal counsel by the party in the less advantageous bargaining position.”⁶³ Access to legal representation necessarily means both the money to hire a lawyer and a reasonable time to find one, get advice, and consider that advice.⁶⁴ This requirement should make the process of entering into a premarital agreement more fair by forcing the party seeking the agreement to present the proposed agreement well in advance of the wedding date and, in some cases, to pay the legal fees of the recipient to enable him or her to retain counsel.

⁶⁰ UPMAA § 9(a)(2).

⁶¹ Conn. Gen. Stat. § 46b – 36g (a)(4) (premarital agreement not enforceable if party not afforded reasonable opportunity to consult with independent counsel); N.J. Stat. Ann. § 37:2-38(c)(4) (premarital agreement unenforceable if unconscionable because executed without disclosure, or waiver of disclosure, or adequate knowledge, or independent counsel, or waiver of counsel); Minn. Stat. Ann. § 519.11, subd. 1 (premarital agreement is valid with full disclosure and opportunity of each party to consult with legal counsel).

⁶² California law does not permit enforcement of a support waiver at divorce without independent counsel. Cal. Fam. Code § 1612[c]. Arkansas law does not permit waiver of financial disclosure without actual legal advice. Ark. Code Ann. § 9-11-406(a)(2)(ii). In Minnesota spouses may enter into an agreement during marriage, and not incident to a separation, only if both spouses are represented by separate counsel. Minn. Stat. Ann. § 519.11. In South Carolina, parties may, by premarital agreement, exclude property from the marital estate at divorce if each had separate counsel. S.C. Code Ann. § 20-3-630(A)(4). West Virginia’s high court has ruled that a premarital agreement is entitled to a presumption of validity only when both parties had independent counsel. When only one party had counsel, that party must bear the burden of proof. *Ware v. Ware*, 687 S.E. 2d 382 (W. Va. 2009).

⁶³ *Harbom v. Harbom*, 134 Md. App. 430, 441, 760 A.2d 272, 277 (2000).

⁶⁴ UPMAA § 9(b).

The Drafting Committee considered whether to address concerns about the amount of time needed to ensure meaningful access to counsel by requiring that an agreement be presented prior to a prescribed number of days before the wedding date. California law requires the proponent to present a proposed agreement not less than seven days prior to the wedding.⁶⁵ No other state has a similar mandate.⁶⁶ The Drafting Committee rejected a rigid mandate, opting instead to require a reasonable amount of time.⁶⁷ Whether a party in a given case had a reasonable amount of time will necessarily be a facts and circumstance question.

The requirement for access to independent counsel will have its intended effect if courts interpret it to make this right meaningful, and not a mere ritual.⁶⁸ Neither the text nor the comments of the UPMAA address whether independent means merely that the lawyer does not have a conflict of interest under the applicable rules of professional conduct,⁶⁹ or whether something more is required. The over-involvement of a party or counsel in the selection of counsel for the other party may undermine the independence of the other party's counsel such that the very purpose of requiring access to counsel is defeated. For example, in *re Estate of Hollett*,⁷⁰ the husband's lawyer selected a lawyer for the wife, a recent law school graduate with no relevant experience. This was one factor in the court's decision to void the premarital

⁶⁵ Cal. Fam. Code § 1615(c).

⁶⁶ American Law Institute has taken a somewhat different approach to the same problem. In *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2006) it proposes a rebuttable presumption of validity when an agreement was signed not less than 30 days before the wedding. § 7.05. No state has adopted the ALI Principles.

⁶⁷ UPMAA § 9(b)(1).

⁶⁸ See, e.g., *Howell v. Landry*, 386 S.E.2d 610, 617-618 (N.C. App. 1989), where the husband presented the premarital agreement to the wife on December 31, the parties were scheduled to fly to Las Vegas the following day and the appeals court said "we cannot presume...that the wife had insufficient time to [consult] an attorney."

⁶⁹ MRPC 1.7(a)(prohibiting concurrent conflict of interest without informed consent).

⁷⁰ 150 N.H. 39, 834 A.2d 348 (2003).

agreement.⁷¹ In other cases, courts have been considerably more tolerant of the proponent's over-involvement in the selection of counsel for the other party.⁷² It remains to be seen whether under the UPMAA courts will deem the requirement for access to independent counsel fulfilled when the proponent, or his or her lawyer, handpicks the lawyer for the other party, does not tell that person he or she has a right to select his or her own counsel, or manipulates the process by, for example, arranging to present the agreement in the office of the proponent's lawyer with a handpicked lawyer for the other party present by pre-arrangement.

The UPMAA recognizes that the right to access to counsel will not be meaningful if the recipient does not have the financial means to hire a lawyer. Section 9(b)(2) requires a proponent who is represented by counsel to pay "the reasonable fees and expenses" of the other party if he or she is unable to pay his or her own. The comments suggest that the obligation is to make funds available for a lawyer competent in this area of the law. In cases where there is a significant wealth disparity, proponents wishing to reduce future litigation risk will offer to pay for a lawyer with experience and skill and will not attempt to impose an arbitrary limit on his or her total fee.

[e] Financial Disclosure

Adequacy of financial disclosure comprises questions of the content of the disclosure, the method of disclosure, its timing, and the efficacy of waiver. Both the UPAA and the UPMAA

⁷¹ See also *Ex parte Williams*, 617 So. 2d 1032 (Ala. 1992) (summary judgment for husband reversed where only lawyer pregnant wife consulted was friend of husband); *Orgler v. Orgler*, 237 N.J. Super. 342, 568 A.2d 67 (App. Div. 1989) (husband's selection of wife's attorney coupled with inadequate disclosure rendered agreement invalid even though lawyer advised wife not to sign).

⁷² See e.g., *Friezo v. Friezo*, 281 Conn. 166, 914 A.2d 533 (2007) (upholding premarital agreement where husband arranged for his sister-in-law to handpick wife's lawyer, an inexperienced associate in sister-in-law's law firm, who did not charge for services), see also *Tyler v. Tyler*, 990 So.2d 423 (Ala. Ct. Civ. App. 2008).

require that financial disclosure be made before execution, but do not specify how long before. An otherwise adequate disclosure that comes late in the process should generally suffice.⁷³

The UPAA describes the content of the required financial disclosure as “fair and reasonable disclosure of the property [and] financial obligations”⁷⁴ of the disclosing party. The UPMAA refines and expands the UPAA requirement for financial disclosure in subtle, but important, ways. It provides:

- (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).⁷⁵

The UPAA requires disclosure of assets and liabilities, but does not state expressly that the owner must provide valuations. The UPMAA fills in this gap, requiring a good faith estimate of values, recognizing that in many cases the owner may only be able to provide an estimate.⁷⁶

Some cases have held that a disclosure that identified assets without providing values was sufficient to uphold a premarital agreement.⁷⁷ The text of the UPMAA requires more than mere identity of assets.

⁷³ See *Friezo v. Friezo*, 281 Conn. 166, 914 A.2d 533 (2007); *Boote v. Shivers*, 198 S.W. 3d 732 (Tenn. Ct. App. 2005).

⁷⁴ UPAA § 6(a)(2)(ii).

⁷⁵ UPMAA § (9)(d).

⁷⁶ Courts and legislatures have never made formal appraisal a requirement for fair disclosure of values.

⁷⁷ *Cannon v. Cannon*, 384 Md. 537, 865 A.2d 563 (2005); *Marriage of Yager*, 155 Or. App. 407, 963 P.2d 137 (1998); *Gooch v. Gooch*, 10 Ark. App. 432, 664 S.W. 2d 900 (1984).

The UPMAA also departs from the text of the UPAA by expressly including income in the requirement for financial disclosure. Some cases have made the question whether a proponent must disclose income or whether the premarital agreement includes a spousal support waiver.⁷⁸ The UPMAA makes no distinction; parties must disclose income, whether or not there is a support waiver.

Any gaps in a formal financial disclosure can be filled in through one of the other methods. Thus, a disclosure that fails to include values of property interests or income can still be adequate if the other party already had pre-existing knowledge, or “a reasonable basis”⁷⁹ for such knowledge or effectively waived disclosure beyond whatever was provided. The UPMAA does not depart from the large body of case law that recognizes that a party may acquire adequate knowledge of the other party’s financial affairs in a variety of less formal ways, such as through employment, living in the same home, moving in the same social circles, and having access to financial records, such as tax returns.⁸⁰ However, a party who relies on such informal disclosure will continue to do so at his or her own risk.

The UPMAA permits parties to waive financial disclosure and does not require actual advice of counsel for an effective waiver, consistent with the UPAA and the law in the majority of the non-UPAA states.⁸¹ The UPAA implies that a waiver must be in a separate writing.⁸² The

⁷⁸ See *King v. King*, 66 S.W.3d 28 (Mo. Ct. App. 2001) (husband’s failure to disclose income did not render agreement invalid where did not waive the wife’s right to share in property acquired with income earned during marriage); *Corbett v. Corbett*, 280 Ga. 369, 628 S.E.2d 585 (2006) (husband’s failure to disclose income was material to wife’s decision whether to sign agreement waiving alimony; agreement invalid).

⁷⁹ Sec. 9(d)(3).

⁸⁰ See *e.g.*, *Friezo v. Friezo*, 281 Conn. 166, 914 A.2d 533 (2007); *Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003); *Nanini v. Nanini*, 166 Ariz. 287, 802 P.2d 438 (Ct. App. 1990); *Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865 (1967).

⁸¹ Arkansas requires actual advice of counsel for an effective waiver of financial disclosure. Ark. Code Ann. § 9-11-401(a)(2)(ii). Connecticut’s version of the UPAA deleted the provision permitting waiver. Conn. Gen. Stat. § 46b-36g.

⁸² A premarital agreement is unenforceable if unconscionable at execution “and, **before execution**, ...[the challenging] party...did not...expressly waive in writing.....” UPAA § 6(a)(2)(ii)(emphasis added).

UPMAA improves on the wording of the UPAA by stating expressly that a waiver must in a separate signed writing. Both the UPMAA and the UPAA require the waiver to be executed before the agreement, though there is nothing in the text or comments that suggests the waiver must be signed on a different day.

It is noteworthy what Section 9 (d)(1) does not say. It does not say the financial disclosure must be in writing, or that a written disclosure must be appended to the agreement, nor does it say all major assets and liabilities must be itemized. It identifies income as an element of required disclosure but does not require itemization of the sources or amounts from each source. Thus, Section 9(d)(1) stops short of requiring what one court has called “the gold standard”⁸³ for financial disclosure. The obligations imposed by Section 9(d)(1) are not especially burdensome.

[f] Substantive Fairness; Unconscionability

The Drafting Committee had to consider several issues in formulating the provisions of the UPMAA relating to fairness. First, was whether to decouple unconscionability from financial disclosure and made it an independent ground for a challenge to validity. Second, the Committee had to consider whether to retain unconscionability as the standard of fairness or require a standard more favorable to economically disadvantaged parties. The Committee also considered whether the adequacy of the agreement’s terms should be judged as of execution or enforcement.

In the years preceding the UPAA in 1983, courts struggled with the extent to which judges should be able to refuse enforcement of a premarital agreement on substantive fairness grounds. The UPAA rejected as paternalistic the prevailing approach that permitted a judge to

⁸³ *Cannon v. Cannon*, 384 Md. 537, 573, 865 A.2d 563, 584 (2005).

relieve a party of a bad bargain.⁸⁴ The UPMAA rejects a return to pre-UPAA paternalism. It retains the unconscionability standard and the majority rule that unconscionability is determined as of execution.⁸⁵ This is consistent with the UPAA and the case law of a number of non-UPAA states.

The unconscionability at execution standard creates a high barrier for a party seeking to void an agreement. A claim of unconscionability is a question of law for the court.⁸⁶ The challenging party must generally prove both substantive unconscionability – grossly unfair terms – and procedural unconscionability – a grossly unfair process.⁸⁷ Persons seeking a premarital agreement can have a high degree of confidence that their agreement will be upheld, as long as the process was fair, under the new, more robust fairness standards of the UPMAA. Parties who choose to strike a very hard bargain will have somewhat more risk than they currently do that a court may invalidate the agreement.

Currently, in 14 states a court at divorce can consider whether a validly executed premarital agreement is unfair or unconscionable.⁸⁸ If the court makes such a finding, it may refuse to enforce the agreement in its entirety or may refuse to enforce a severable provision, such as an alimony waiver, and enforce the remainder of the agreement. There is no uniformity among these states about the standards for application of this second look. Courts in some states

⁸⁴ *Bonds v. Bonds*, 24 Cal. 4th 1, 5 P. 3d 815 (2000).

⁸⁵ Ravdin, *Premarital Agreements*, Appendix B (State Law Summary).

⁸⁶ UPMAA § 9(g).

⁸⁷ *Barocas v. Barocas*, 94 A.D. 3d 551, 942 N.Y.S. 2d 491 (2012); *Galloway v. Galloway*, 47 Va. App. 83, 92, 622 S.E. 2d 267, 271 (2005); *Marsh v. Marsh*, 949 S.W. 2d 734 (Tex. App. 1997).

⁸⁸ The second-look at divorce states are Alaska, Connecticut, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, North Dakota, South Carolina, Vermont, West Virginia, and Wisconsin. Ravdin, *Premarital Agreements*, Appendix B (State Law Summary).

invalidate a premarital agreement if it is merely unfair at divorce.⁸⁹ More commonly, the terms must not be unconscionable at divorce.⁹⁰ States also vary as to whether the challenger must show changed circumstances and whether the change in circumstances must be unanticipated.⁹¹

Section 9(f) provides bracketed text for second-look states. Under the bracketed text, the court may refuse to enforce an agreement, in whole or in part, if enforcement would result in “substantial hardship” resulting from “a material change in circumstances” after execution. Under this standard, the change in circumstances need not be unanticipated. As worded, the text would permit a second-look after a spouse’s death; it is not limited to divorce. However, in the current second-look states, courts have only applied it at divorce.⁹²

[g] Dealing with the Unrepresented Party

The UPMAA addresses the interests of the unrepresented party in several respects. First, as discussed above, it provides that the recipient must have had access to independent legal advice.⁹³ Second, the agreement must include either a “plain language” explanation of the marital rights or obligations that are modified or waived by the agreement,⁹⁴ or a “notice of waiver of rights....conspicuously displayed,”⁹⁵ substantially as follows, as applicable:

“If you sign this agreement, you may be:

⁸⁹ Wis. Stat. Ann. § 767.61(3)(L) (property divided in accordance with premarital agreement if not inequitable at divorce); *Estate of Benker*, 416 Mich. 681, 689, 331 N.W.2d 193, 196 (1982) (premarital agreement must be fair, equitable and reasonable).

⁹⁰ Conn. Gen. Stat. § 46b-36g(a)(2); N.J. Stat. § 37:2-38b; N.D. Cent. Code § 14-03.1-0-7; *DeMatteo v. DeMatteo*, 436 Mass. 18, 762 N.E.2d 797 (2002); *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990); *MacFarlane v. Rich*, 132 N.H. 608, 567 A.2d 585 (1989); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).

⁹¹ *Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003) (premarital agreement upheld where wife’s serious health problems known at execution, deterioration foreseeable, and two attorneys advised her not to sign); *Bassler v. Bassler*, 156 Vt. 353, 593 A.2d 82 (1991)(agreement is unconscionable at divorce if will leave spouse destitute or at standard of living far below premarital standard).

⁹² See, UPMAA § 9, Comment.

⁹³ UPMAA § 9(a)(2).

⁹⁴ UPMAA § 9(a)(3).

⁹⁵ UPMAA § 9(c).

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.”

When the other party elects not to get legal advice, the lawyer for the proponent has a choice between drafting an explanation of the rights being waived, or the obligations undertaken, as the case may be, or simply using the safe harbor language of Section 9(c), quoted above. The approved text is not very informative. Indeed, it is deliberately general, even superficial.

However, writing a plain language explanation of default spousal rights at divorce and at death is a challenge the lawyer may not want to undertake as any such explanation is almost sure to be inadequate. An attempt to explain the subtleties of title versus classification of property at divorce, or the concept of active appreciation resulting from direct or indirect monetary or nonmonetary contributions of either spouse to his or her own or the other spouse’s nonmarital property, is too much to expect.

In requiring a plain language explanation, but allowing for the alternative safe harbor language, the UPMAA makes a departure, though ever so slight, from the current majority rule. In the majority of states, it is not necessary that a proponent provide the unrepresented party with

an in-depth explanation of every paragraph of the agreement;⁹⁶ rather, a general understanding of the key features of the agreement and how they alter marital rights is sufficient.⁹⁷ For example, in *Many* cases hold that if the terms of the agreement can be understood by a reasonably intelligent adult with no legal training, that will be enough to convey adequate knowledge.⁹⁸ In a few states, courts appear to require something more like a meaningful explanation of marital rights.⁹⁹

[5] Recognition and Standards for Validity of Marital Agreements

The UPMAA, for the first time, creates proposed uniform standards for recognition and validity of marital agreements.¹⁰⁰ The UPMAA defines a marital agreement as an agreement executed by spouses who intend to stay married and which “affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, [or] death of one of the spouses”¹⁰¹ A marital agreement includes an amendment to a premarital agreement as well as an agreement revoking a premarital agreement or a marital agreement;¹⁰²

⁹⁶ *Mormello v. Mormello*, 452 Pa.Super 590, 682 A. 2d 824 (1996) (postmarital agreement adequately disclosed marital rights where specific rights mentioned, but not explained, and where wife opted not to retain counsel for further explanation).

⁹⁷ *Bonds v. Bonds* 24 Cal. 4th 1, 5 P.3d 815 (2000) (wife’s understanding premarital agreement altered community property law to permit each party to retain all earnings as separate property was adequate); *Friezo v. Friezo*, 281 Conn. 166, 914 A.2d 533 (2007) (detailed understanding of law of divorce is not necessary; wife’s understanding purpose of agreement to protect husband’s assets in event of divorce was sufficient).

⁹⁸ *Boyd v. Boyd*, 2010 Ky. App. Unpub. Lexis 160 (2/26/10); *Wiley v. Iverson*, 295 Mont. 511, 985 P.2d 1176 (1999); *Panossian v. Panossian*, 172 A.D. 2d 811, 569 N.Y.S. 2d 182 (1991); *Nanini v. Nanini* 166 Ariz. 287, 802 P. 2d 438 (Ct. App. 1990); *Pajak v. Pajak*, 385 S.E. 2d 384 (W. Va. 1989).

⁹⁹ See *In re Marriage of Lewis*, 808 S.W. 2d 919 (Mo. Ct. App. 1991); *Matter of Estate of Halmaghi*, 184 Mich. App. 263, 457 N.W. 2d 356 (1990).

¹⁰⁰ Among the questions the Drafting Committee wrestled with was what to call this type of agreement to distinguish it from other types of spousal agreements, especially from an agreement incident to a marital dissolution. Agreements of this type are sometimes called postmarital agreements, postnuptial agreements, or mid-marriage agreements. When the primary purpose of the spousal agreement is to predetermine spousal rights when a couple is estranged, but is willing to make an attempt at reconciliation, the agreement may be called a reconciliation agreement.

¹⁰¹ UPMAA § 2(2).

¹⁰² UPMAA § 2(2); Comment.

thus, parties to such must comply with the heightened process requirements of Section 9, including financial disclosure and access to counsel.

The UPMAA proposes that marital agreements be governed by the same validity standards as premarital agreements and that parties to a marital agreement have the same freedom to contract as to property and spousal support, and the same restrictions on their freedom to contract, as parties to a premarital agreement. Adoption of the UPMAA would introduce significant changes in the law governing marital agreements in many states.

In a number of states, by statute or common law, spouses in an ongoing marriage are considered to occupy a fiduciary relationship,¹⁰³ or a confidential relationship.¹⁰⁴ The UPMAA leaves no room for imposition, as a matter of law, of heightened obligations arising from such a relationship. Rather, each party is obliged to look out for his or her own interests, albeit with access to counsel, the right to financial disclosure and an otherwise fair process. Moreover, whereas imposition of a fiduciary duty or the existence of a confidential relationship generally thrusts upon the proponent of an agreement the burden of proof of validity,¹⁰⁵ the UPMAA, allocates the burden of proof to the person challenging validity.¹⁰⁶

As noted in Section [3][b], above, the UPMAA departs from the law in the majority of states in requiring no consideration for a marital agreement.

¹⁰³ Alaska Stat. §34.77.010; Ala. Code §30-4-9; Cal. Fam. Code §721; N.M. Stat. Ann. §40-2-2; *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); Mont. Code Ann. §§40-2-301–40-2-311; *Grossman*, 82 P.3d 1039 (Ore. Ct. App. 2003); *Marriage of Myers*, 210 Mont. 173, 682 P.2d 718 (1984); *Ray v. Ray*, 189 So. 895 (Ala. 1939).

¹⁰⁴ *Barchella v. Barchella*, 844 N.Y.S.2d 78 (2007); *Dospil v. Dospil*, 2007 Tenn.App.Lexis 684; *Stoner v. Stoner*, 572 Pa. 665, 819 A.2d 529 (2003); *Robert O. v. Ecmel A.*, 460 A.2d 1321 (Del. 1983); *Crawford v. Crawford*, 524 N.W.2d 833 (N.D. 1994); *Manhart v. Manhart*, 725 P.2d 1234 (Okla. 1986); *Marshall v. Marshall*, 166 W. Va. 304, 273 S.E.2d 360 (1980); *Grover v. Grover*, 101 Ark.App. 346, 276 S.W.3d 740 (2008) (applying Fla. law).

¹⁰⁵ See *Friedman v. Friedman*, 100 Cal. App. 4th 65, 122 Cal. Rpt. 2d 412 (2002); *Gabaig v. Gabaig*, 717 P.2d 835 (Alas. 1986).

¹⁰⁶ See discussion in Section [4][b], above.

As discussed in Section [4][c], the UPMAA does not seek to change the existing body of law relating to voluntariness and duress.¹⁰⁷ However, in contrast to the presentation of a premarital agreement that may be unacceptable to the recipient, where courts have said he or she has the option of cancelling the wedding, courts are considerably more protective of the existing marriage.¹⁰⁸ The UPMAA does not depart from this body of law.

In many states parties to a marital agreement may not fix or waive spousal support or their right to do so is unclear.¹⁰⁹ The UPMAA would bring needed clarity, consistency and uniformity to this issue. Parties to such an agreement would be able to contract about spousal support to the same extent after marriage as they could before marriage.

[6] Scope of Party Autonomy to Define Rights and Obligations

The UPMAA generally provides for expansive party autonomy to define economic rights during the marriage and at dissolution or death. An agreement governed by the Act is one “which affirms, modifies, or waives a marital right or obligation....”¹¹⁰ A marital right or obligation is defined as a right or obligation “arising between spouses because of their marital status”¹¹¹ and includes: spousal support; property rights during the marriage, at death or dissolution; responsibility for debts; and allocation of attorney’s fees and costs.¹¹² The UPMAA does not depart from the current majority approach, as expressed in the UPAA and the law of most non-UPAA states, that gives parties to either type of agreement a free hand to define their

¹⁰⁷ UPMAA §9, Comment.

¹⁰⁸ See *Pacelli v. Pacelli*, 319 N.J. Super. 185, 725 A.2d 56 (1999) (husband’s demand for postmarital agreement favorable to him, forcing wife to choose between financial security and keeping family together, was invalid as inherently coercive); *Marriage of Myers*, 210 Mont. 173, 682 P.2d 718 (1984) (husband took advantage of wife where demanded postmarital agreement transferring half her separate property to him as condition of staying married).

¹⁰⁹ Ravdin *Marital Agreements*, Worksheet 10 (State Law Summary).

¹¹⁰ UPMAA § 2(2), (5).

¹¹¹ UPMAA § 2(4).

¹¹² *Id.*

property rights at death or divorce, subject to the limitation on enforcement of an agreement, or a term of an agreement, that was unconscionable at execution.¹¹³

Parties' freedom to contract before marriage about rights at dissolution includes the right to fix or waive spousal support. Only a small minority of states reject enforcement of an alimony waiver in a premarital agreement.¹¹⁴ The UPMAA thus does not depart from prevailing law as to the right to contract about spousal support in a premarital agreement. However, it does depart from prevailing law, or lack thereof, in the majority of states regarding provisions of a marital agreement fixing or waiving spousal support.¹¹⁵

The UPMAA permits a court to award alimony over a waiver in a premarital or marital agreement, but only to the extent necessary to prevent a spouse from becoming eligible for public assistance.¹¹⁶ This was the approach taken in the UPAA.

Section 10 describes terms that are unenforceable or not binding on a court. The UPMAA retains the prohibition of the UPAA on enforcement of a term that "adversely affects a child's right to support."¹¹⁷ It adds a provision making a term that purports to determine custody of a minor child not binding on a court.¹¹⁸ This is new to the UPMAA, but is not new to the law.¹¹⁹ Two provisions seek to prevent parties from using a premarital agreement to alter grounds of divorce or impose a penalty for initiating a divorce.

¹¹³ UPMAA §9(f).

¹¹⁴ Iowa Code § 596.5(2) (premarital agreement may not adversely affect spouse's right to support); N.M. Stat. Ann. § 40-3A-4(B) (same); S.D. Codified Laws §§ 25-2-16, *et seq.*; *Sanford v. Sanford*, 694 N.W.2d 283 (S.D. 2005); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978); *Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003); *Stearns v. Stearns*, 66 Vt. 187, 28 A. 875 (1893).

¹¹⁵ See Section [5], above.

¹¹⁶ UPMAA § 9 (e).

¹¹⁷ UPMAA § 10(b)(1).

¹¹⁸ UPMAA § 10(c).

¹¹⁹ See *Restatement Second of Contracts* § 191 (1981); Md. Code Ann., Fam.Law § 8-103(a) (court may modify provision of marital agreement relating to custody of minor child); *In re Marriage of Best*, 387 Ill. App. 3d 948, 901 N.E.2d 967 (2009); *Kessler v. Kessler*, 33 A.D.3d 42, 818 N.Y.S.2d 571 (2006); *R.R. v. M.H.*, 426 Mass. 501, 689

Section 10 also includes an important innovation to protect victims of domestic violence. Section 10(b)(2) provides that a term of an agreement is unenforceable insofar as it limits remedies available to a victim of domestic violence.

[7] Governing Law

The UPMAA addresses governing law in two important ways. First, it clarifies party autonomy in choosing the law to govern a dispute about the agreement. Section 4 permits parties to contract as to the choice of law governing “validity, enforceability, interpretation, and construction” of their agreement. By contrast, the UPAA permits parties to choose the law to govern construction and interpretation but does not address choice of law to govern a dispute about validity.¹²⁰ However, general choice-of-law principles permit parties to contract with respect to the law that will govern a future dispute about whether the agreement is valid.¹²¹ The UPMAA thus codifies common law principles.¹²² Consistent with general choice-of-law principles, the chosen law must have a “significant relationship to the agreement or either party” and may not be “contrary to a fundamental public policy” of the forum state.¹²³ Thus, if a party seeks enforcement in a state other than that of the chosen law, a court in the forum state could, on fundamental public policy grounds, apply its own law to refuse enforcement of the agreement as a whole, or a severable provision of the agreement. In sum, the UPMAA codifies, but in no way departs from, existing law permitting parties to choose governing law.

N.E.2d 790 (1998); *In re Marriage of Littlefield*, 133 Wn. 2d 39, 940 P.2d 1362 (1997); *Combs v. Sherry-Combs*, 865 P.2d 50 (Wyo. 1993).

¹²⁰ UPAA § 3(a)(7) (1983).

¹²¹ *Restatement Second of Conflict of Laws* § 187; *Franzen v. Franzen*, 135 N.C. App. 369, 520 S.E.2d 74 (1999)(court must give effect to valid choice-of-law provision in premarital agreement).

¹²² UPMAA § 4(1).

¹²³ *Id.*

Second, Section 4(2) provides that the law of the forum will govern a dispute about validity, enforceability, interpretation or construction in the absence of an effective choice of law. Thus, when an agreement is silent as to governing law, the forum court need not engage in an analysis of whether to apply the law of another state before turning to the substance of the dispute; rather the UPMAA provides a clear mandate for application of forum law. This is a departure from the UPAA, which is silent on the law governing an agreement that is itself silent on the question. This provision should obviate one phase of potential litigation in cases where a disputed agreement lacks a choice-of-law clause.¹²⁴

[8] Other Principles of Law and Equity

Section 5, Principles of Law and Equity, provides: “unless displaced by a provision of this [act], principles of law and equity supplement this [act].” The comment explains that this section is meant to make clear that the UPMAA does not displace common law contract principles. As discussed in Section [4][a] above, states are free to recognize common law defenses to enforcement in addition those explicitly set forth in Section 9 of the Act.

Other contract principles also remain viable, unless expressly pre-empted by the Act. The Comment identifies rules of construction, including severability, as an example of a subject governed by state law rules “unless displaced.”¹²⁵ Section 9(f), permitting a court to refuse enforcement of an unconscionable term, would operate to displace case law in the few states

¹²⁴ See, e.g. *Black v. Powers*, 48 Va. App. 113, 628 S.E. 2d 546 (2006), where two Virginia residents traveled to the Virgin Islands, signed a premarital agreement with no choice-of-law clause and got married. The appeal resolved the dispute about applicable law in favor of Virgin Islands law.

¹²⁵ UPMAA §5, Comment.

where judges have held that, in the absence of severability clause, a void or unenforceable term renders the entire agreement unenforceable.¹²⁶

Contract law questions of abandonment, rescission, and oral amendment also fall under Section 5. General contract law principles permit parties to orally modify or rescind a contract including that provision of the contract that precludes oral modification.¹²⁷ The UPMAA, like the UPAA, requires an amendment be in a signed writing.¹²⁸ States have differed on how they treat purported oral amendments and revocations as well as claims of rescission or abandonment. Some cases have held that parties can effectively amend or revoke a premarital agreement orally.¹²⁹ By contrast, courts in North Carolina, Virginia, Iowa and Arkansas have strictly construed the UPAA to require a signed writing to revoke a premarital agreement, in other words, they treated the UPAA as displacing common law. The UPMAA goes a step further in displacing common law. Because an amendment to, or revocation of, a premarital agreement is a marital agreement, parties must comply with Section 9, including the requirements for financial disclosure, or an effective waiver, and access to counsel.¹³⁰ This would appear to completely displace any common law principles permitting parties to alter their contractual relationship by means other than as prescribed in the Act.

¹²⁶ See e.g., *Rivera v. Rivera*, 243 P.3d 1148 (N.M. Ct. App.2010) (premarital agreement without severability clause is unenforceable in its entirety due to void spousal support waiver).

¹²⁷ *Williston on Contracts* § 39:26 (4th ed. 1990); *Restatement (Second) Contracts* § 150 (1981).

¹²⁸ See, Section [3][a].

¹²⁹ *Jensen v. Jensen*, 753 P.2d 342 (Nev. 1988) (oral agreement to modify premarital agreement coupled with consistent actions effected modification); *Gustafson v. Jensen*, 515 So.2d 1298 (Fla. Dist. Ct. App. 1987) (oral agreement to reconcile conditioned on termination of premarital agreement coupled with destruction of agreement effected abandonment); *In re Marriage of Young*, 682 P.2d 1233 (Colo. Ct. App. 1984) (husband's proposal to wife to tear up agreement along with complete pooling of resources during marriage effected abrogation of agreement).

¹³⁰ *Muchmore v. Trask*, 666 S.E.2d 667 (N.C. Ct. App. 2008); *Miller v. Miller*, 2007 Va. App. Lexis 340 (2007) (unpub.); *Marriage of Cobb*, 2007 Iowa App. Lexis 930 (unpub.); *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002).

[9] Conclusion

To the extent enacted, the UPMAA will raise the standards for validity of premarital agreements and bring much needed recognition for, and uniformity in the rules governing, marital agreements. By allowing for spouses to enter into agreements not incident to dissolution, and providing the same fair process requirements, the UPMAA promotes the right of these couples to make their own decisions about their economic relationship. The UPMAA strikes a reasonable balance between the desire of proponents for predictability of enforcement of their premarital agreements and the needs of economically disadvantaged spouses and prospective spouses for a genuinely fair process. By imposing a more robust process, especially the requirement for access to counsel, it should give persons on the receiving end of a premarital agreement a fair chance to either negotiate acceptable terms or cancel the marriage plans and should give needed protection to spouses considering such an agreement. However, it will not require lawyers who are currently employing best practices in the conduct of premarital and marital agreement negotiations to alter their protocols.

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