

# Premarital Agreements and the Uniform Acts

BY LINDA J. RAVDIN

Historically courts refused to enforce premarital agreements at divorce, believing that such contracts made divorce too easy. 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. 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?

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws) approved the Uniform Premarital Agreements Act (UPAA) in 1983. Twenty-six states and the District of Columbia enacted it, although some made significant changes. The ULC adopted the Uniform Premarital and Marital Agreements Act (UPMAA) in 2012. To date, only two states (Colorado and North Dakota) have adopted it.

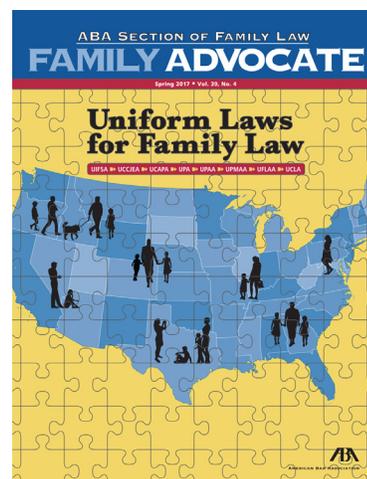
## Criteria for Validity under the UPAA

The criteria for validity of a premarital agreement under the UPAA are set out in section 6:

### Section 6. Enforcement.

- (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
  - (1) that party did not execute the agreement voluntarily; or
  - (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
    - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
    - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
    - (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Voluntariness is the essential element of a valid premarital agreement under the UPAA. Nothing more is required. Financial disclosure is optional; parties may waive financial disclosure as long as the waiver is voluntary. Even an agreement that was unconscionable at execution is enforceable as long as the parties executed it voluntarily and the party seeking to enforce made actual disclosure, or the other party had pre-existing knowledge, or the other party expressly and voluntarily waived disclosure. In choosing to permit enforcement of an unconscionable agreement, the ULC favored predictability of enforcement over fairness of terms.



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## The UPMAA: A Worthy Replacement for the UPAA

The UPAA proved unsatisfactory. Though adopted in half of U.S. jurisdictions, a number of adopting states made significant changes. Thus, it did not succeed in creating uniformity. Many academics have criticized the UPAA because it permits enforcement of an agreement that was unconscionable at execution. By contrast, a commercial contract that was unconscionable at execution is unenforceable. 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 invalidate it on the ground of duress.

The ULC approved the UPMAA in 2012 with the intent that it replace the UPAA. Among other things, the UPMAA creates the same validity criteria for both premarital agreements and marital agreements, i.e., an agreement executed during an ongoing marriage and not incident to separation or divorce. Section 9 provides the criteria for validity:

Section 9. Enforcement.

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

- (1) the party's consent to the agreement was involuntary or the result of duress;
- (2) the party did not have access to independent legal representation under subsection (b);
- (3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
- (4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

....

(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; unconscionability and failure of financial disclosure are separate grounds that permit a court to refuse enforcement. Section 9(f) authorizes a court to refuse enforcement of an unconscionable term; however, the Comment tells us that a court may strike down the entire agreement as unconscionable. The challenging party's lack of access to counsel is an independent ground upon which a court may refuse enforcement.

## Voluntariness and the Uniform Acts

The essential requirement for validity of any contract is that it must be executed voluntarily and not under duress. Neither the UPAA nor the UPMAA define these terms. Rather, existing contract law principles govern. The execution of such an agreement is often either an implicit or an explicit condition for marriage. Conditioning marriage on an agreement may feel like duress, but, standing alone, it is insufficient to void an agreement. Other factors, such as pregnancy, emotional distress, unequal bargaining power, and the prospect of social embarrassment if the wedding is canceled, may create pressure on a recipient. 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. A choice between signing a contract a party does not like and not getting married is still a choice, even when the choice must be made close to the wedding date. The UPMAA does not attempt to change the law as it relates to voluntariness and duress. However, its more robust process standards can significantly improve the recipient's opportunity for a meaningful negotiation.

### **Access to Counsel, the Unrepresented Party, and the Uniform Acts**

The UPAA has nothing to say about the role of the lawyer for either party. Neither actual advice of independent counsel nor access to advice is a prerequisite to validity under the UPAA.

The most important innovation of the UPMAA is the requirement that the party receiving a proposed premarital agreement have access to independent counsel before execution. This is a significant departure from prevailing law. Access to legal representation necessarily means both the money to hire a lawyer and enough time to find one, get advice, and consider that advice. This requirement should make the process of entering into a premarital agreement more fair by forcing the party seeking the agreement to present it well in advance of the wedding date and, in some cases, to pay the legal fees of the recipient.

When the recipient elects not to retain counsel, the agreement must include either a "plain language" explanation of the marital rights or obligations that are modified or waived by the agreement, or a "notice of waiver of rights ..., conspicuously displayed." The Act provides text that will fulfill the notice requirement.

### **Financial Disclosure and the Uniform Acts**

Adequacy of financial disclosure is reflected in the content of the disclosure, the method of disclosure, its timing, and the efficacy of waiver. Both the UPAA and the UPMAA require that financial disclosure be made before execution, but they do not specify how long before. An otherwise adequate disclosure that comes late in the process appears to suffice.

The UPAA describes the content of the required financial disclosure as "fair and reasonable disclosure of the property [and] financial obligations" of the disclosing party. Section 9(d) of the UPMAA refines and expands the UPAA requirement for financial disclosure. 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).

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, recognizing that the owner may only be able to provide an estimate. Some older cases say that a disclosure without values was sufficient. The UPMAA requires more.

The UPMAA also departs from the UPAA by expressly including income in the requirement for financial disclosure. Some older cases require disclosure of income only when the agreement includes a spousal support waiver. The UPMAA makes no distinction; parties must disclose income whether or not there is a support waiver.

Both the UPMAA and the UPAA permit parties to waive financial disclosure and do not require actual advice of counsel for an effective waiver. Both acts require a waiver to be in a separate writing. Both 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. Both allow preexisting knowledge of a party's financial affairs to substitute for a formal disclosure.

### **Fairness of Terms and the Uniform Acts**

In the years preceding the UPAA, 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 relieve a party of a bad bargain. 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.

The unconscionability-at-execution standard creates a high bar for a party seeking to void an agreement. The challenging party must generally prove both substantive unconscionability—grossly unfair terms—and procedural unconscionability—a grossly unfair process. Under the UPMAA, 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 its more robust process standards. Parties who choose to strike a very hard bargain will have somewhat more risk under the UPMAA than under the UPAA that a court may invalidate the agreement because of unconscionability.

Fourteen states, including one UPAA state and one UPMAA state, permit a judge to take a second look at the substantive fairness of an agreement and to refuse enforcement at divorce if the result is unduly harsh. This is a difficult standard for any challenging party to meet; defending parties in these states, however, have somewhat more risk. The UPMAA includes alternative language for legislatures who wish to permit a second look at divorce.

### **Scope of Premarital Agreements and the Uniform Acts**

Both the UPAA and the UPMAA permit contracting parties to predetermine property rights of a surviving spouse. A complete waiver of all marital rights is permissible. They also permit parties to predetermine disposition of property at dissolution (and again, a complete waiver of all marital rights is permissible) and to fix or waive spousal support. Parties may not use a premarital agreement to predetermine custody of or support for a minor child.

Parties may contract about other matters not in violation of public policy. For example, they can contract to use binding arbitration to resolve a dispute under the agreement, waive legal fees and provide for prevailing party fees, expand spousal rights at divorce, or oblige a spouse to make provisions for a surviving spouse that are not otherwise available under state law.

### **Qualified Retirement Plans and the Uniform Acts**

The permissible scope of a premarital agreement includes a complete waiver of rights to share in retirement benefits at divorce, as well as spousal rights to death benefits. The Employee Retirement Income Security Act (ERISA), which preempts state contract law, does not permit enforcement against the plan administrator of a premarital waiver of surviving spouse rights under a qualified retirement plan. To be effective, the spouse must execute a new waiver after the marriage *and* the participant must file a beneficiary designation with the plan. A growing body of case law permits enforcement of a contractual waiver through state law remedies,

such as a constructive trust, once the plan benefits are in the hands of the surviving spouse. Nothing in ERISA prevents a court from enforcing a waiver of spousal rights at divorce.

### **The UPMAA and (Post) Marital Agreements**

The UPMAA, for the first time, creates proposed uniform standards for marital agreements. Section 2(2) defines a marital agreement as an agreement that is executed by spouses who intend to stay married and that “affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, [or] death of one of the spouses....” A marital agreement includes an amendment to a premarital agreement, as well as an agreement revoking a premarital agreement or a marital agreement.

The UPMAA proposes that marital agreements be governed by the same validity standards as premarital agreements, that parties to a marital agreement have the same freedom to contract regarding property and spousal support, and that they be subject to the same restrictions on their freedom to contract as parties to a premarital agreement.

### **The UPMAA and Domestic Violence**

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

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