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Except as Provided In Article Five, I Endow Thee With All My Worldly Goods – The New Uniform Premarital and Marital Agreement Act*

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I. Introduction

The laws of most states give spouses certain rights in the property of each other. These rights fall into three major categories:

1. The right to receive a share of certain property belonging to the other spouse in the case of a divorce;

2. The right to be supported during marriage and to receive support payments in the event of a divorce or separation;

3. The right to receive a share of his or her spouse's estate if he or she survives his or her spouse.

Many couples contemplating marriage are reluctant to permit state law to determine the rights they will acquire in each other's property upon marriage. There are many reasons for this reluctance, including a desire to protect family wealth or wealth created prior to the marriage and to avoid the hazards and expenses of litigation over the appropriate division of property or the amount of spousal support when these issues are resolved by a judge with broad discretion. Couples may also want to avoid the uncertainty as to the application of state law to their particular situation in view of the possibility of their establishing residences in multiple states,

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each with a different marital regime, throughout their marriage, and the possibility of legislative changes.

The solution these couples seek is a premarital agreement that establishes the rules of their economic relationship. In some cases, marriage actually occurs before such an agreement can be negotiated. In those cases, couples enter into a marital agreement that modifies the state-imposed terms of their economic relationship.

The economic rules imposed on a married couple by the laws of each state reflect that state's policy towards the marital relationship and how spouses should be treated at the end of that relationship. In light of these state policies, historically there has been uncertainty as to the extent to which these agreements are enforceable.

This subject is relevant to estate planning attorneys because they are often called upon to assist clients in negotiating and drafting premarital and marital agreements. Although a client who is seeking to protect his or her property from a spouse's potential future claims may be better protected with a premarital or marital agreement than without one, a premarital or marital an agreement cannot provide complete protection throughout a marriage. The laws affecting the validity and enforceability of these agreements differ from state to state and are the subject of frequent legislative changes and shifting judicial interpretations. Clients whose interests may be affected by such changes should be advised that the legal ground rules they are relying on when they enter an agreement could shift beneath them before they seek to enforce their agreements..

The recent approval by the National Conference of Commissioners on Uniform State Laws of the Uniform Premarital and Marital Agreements Act may, as it is adopted by the various states, lead to greater certainty and uniformity as to the enforceability of these types of agreements.

Part II of this Article discusses the development of the common law relating to premarital agreements; Part III discusses the Uniform Premarital Agreement Act; Part IV discusses the new Uniform Premarital and Marital Agreement Act; and Part V provides some guidance for the attorney who is representing a client who either would like to or is being asked to enter into a premarital or marital agreement.

II. History

Before the approval of the Uniform Premarital Agreement Act (the UPAA) by the National Conference of Commissioners on Uniform State Law in 1983 and its later adoption in various forms by more than half the states, the laws governing the validity and enforceability of premarital agreements were developed by the judiciary. Although courts were likely to enforce agreements that governed property rights at death, courts were reluctant to enforce agreements that altered rights upon divorce. This reluctance was based on a perceived public policy in favor of protecting the institution of marriage.[1] Agreements that provided economic terms upon divorce that differed from state-imposed terms were seen as tending to encourage divorce.[2]

The drafters of the UPAA aimed to bring greater certainty to the issues surrounding the validity and enforceability of premarital agreements. They were particularly concerned with the need to achieve uniformity among states so that couples who moved from state to state during

[1] *See, e.g., Fricke v. Fricke*, 42 N.W. 2d 500, 501 (Wis. 1950).("We are of the opinion that any antenuptial agreement which attempts to limit the husband's liability in the event of separation or divorce is void as against public policy. There are three parties to a marriage contract -- the husband, the wife, and the state. The husband and wife are presumed to have, and the state unquestionably has an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization.")

[2] *See, e.g. id.* at 502. ("At least a majority, if not all of the courts which have considered the matter have held that any antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy and is therefore void. 70 A.L.R. 826. Quite generally the courts have said that the contract itself invites dispute, encourages separation and incites divorce proceedings.") *cf. id.* at 503 Judge Richard S. Brown, dissenting ("Public policy, of course, favors marriage and is concerned with its stability. I think it must be conceded that, in other relationships, contracts defining the expectations and responsibilities of the contracting parties promote stability. If they are desirable in other human activities there should be, at least, no presumption that they tend to promote discord in marriage.")

their marriage would not be concerned that the validity of their premarital agreement would be affected by such moves.[3]

The UPAA has been adopted by at least 26 states and the District of Columbia.[4] Unfortunately, the desired uniformity and certainty has not been achieved. This is so because a substantial number of states have not adopted the UPAA, because many states that have adopted it have done so with substantial changes, and because the manner in which the courts have construed core concepts of the UPAA have varied from state to state.

III. The UPAA

A. Scope of the UPAA

The UPAA covers only premarital agreements, which are agreements made prior to marriage by a couple contemplating marriage. It does not cover agreements entered into after a marriage has taken place. The UPAA permits parties to agree upon a broad range of economic aspects of their marital relationship, including how their property will be divided upon death or divorce, and parties' rights or lack of rights to spousal support after divorce.

Specifically, Section 3 of the UPAA permits the parties to a premarital agreement to contract with respect to:

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

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[3] Unif. Premarital Agreement Act, 9B U.L.A. 369 (1983) (hereinafter UPAA). (According to the Prefatory Note: "despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and nonuniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seem reflective not so much of basic policy differences between the states but rather a result of spasmodic, reflexive response to varying factual circumstances at different times.") available at http://www.uniformlaws.org/shared/docs/premarital%20agreement/upaa_final_83.pdf.

[4] The UPAA has been adopted by Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, Wisconsin and the District of Columbia.

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

3. the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

4. the modification or elimination of spousal support;

5. the making of a will, trust or other arrangement to carry out the provisions of the agreement;

6. the ownership rights in and disposition of the death benefit from a life insurance policy;

7. the choice of law governing the construction of the agreement;[5] and

8. any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

B. Formalities

Section 2 of the UPAA requires that an agreement be in writing and signed by both parties. Other formalities, such as notarization or acknowledgment, are not required. Nor is any other consideration required besides the marriage itself.

C. Enforceability

Section 6(a) of the UPAA sets forth the requirements for the enforceability of a premarital agreement. A premarital agreement is not enforceable against a party if he or she proves that:

1. he or she did not execute the agreement voluntarily; or

[5] The UPAA provides no guidance as to the enforceability of a choice of law provision relating to the validity of the agreement.

2. the agreement was unconscionable when executed and before execution of the agreement he or she was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, did not voluntarily and expressly waive in writing such disclosure and did not have or reasonably could not have had an adequate knowledge of the property or financial obligations of the other party.

The UPAA does not attempt to define what "voluntarily" or "unconscionable" means. The only guidance is provided in the commentary to section 6 of the UPAA, which states that the standard of unconscionability is a commercial law standard[6] intended to protect against one-sidedness, oppression or unfair surprise.

Under paragraph 2 of Section 6(a), unconscionability alone is not a sufficient defense against enforcement. If a party receives reasonable financial disclosure or waived that disclosure or had reasonable knowledge of the property of the other, the agreement will be enforceable no matter how unconscionable it is.

Section 6(b) provides a limited exception to enforceability when one party waives spousal support. A support waiver will not be effective if it causes the waiving party to be eligible for public assistance. In that case, a court may require the other party to provide the level of support necessary to avoid public assistance eligibility.

D. State Variations in the UPAA

1. In General

The UPAA has been adopted in 26 states and the District of Columbia, but with significant variations. These variations pertain to the concepts of voluntariness, unconscionability, limitations on spousal support and adequate disclosure. Because the concepts

[6] This standard is borrowed from Section 306 of the Uniform Marriage and Divorce Act. (available at http://www.uniformlaws.org/shared/docs/Marriage%20and%20Divorce%20Act/UMDA%201973.pdf)

of voluntariness, unconscionability and inadequate disclosure are not defined in the UPAA, additional variations have been created by courts by the manner in which they interpret these terms.

2. Voluntariness

California is one state that attempts to clarify the meaning of voluntary execution through statute. Cal. Fam. Code §1615(c) states that an agreement is voluntarily signed only if the party against whom it is being enforced (1) had independent counsel or executed a written waiver of that right; (2) had at least seven days to consider whether to sign from the date the draft was presented to him or her and the date signed; and (3) if unrepresented by counsel, was fully informed of the terms of the agreement and the rights he or she was relinquishing.[7]

In many states, courts are left with the task of determining the meaning of voluntariness. Factors that courts generally cite as important when deciding whether an agreement was signed voluntarily include the relative bargaining power of the parties, the timing of the signing in relation to the date of the wedding, the advice of independent counsel and the understanding of the party signing.[8] Still, although court opinions list these factors, the decisions they reach often do not seem to give them much significance.

For example, in *Howell v. Landry*, Steven Howell and Mary Landry decided to marry in Las Vegas at the end of December, 1979.[9] At the beginning of December, Steven told Mary that

[7] Cal. Fam. Code §1615(c). The agreement is not voluntary "unless the court finds in writing or on the record all of the" quoted factors, as well as "4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement. and 5) Any other factors the court deems relevant." Query as to how an appellate court can uphold an agreement as voluntary while requiring the lower court to write or record "any other factor".

[8] *Matter of Bonds*, 5 P. 3d 815 (Cal. 2000).

[9] 96 N.C. App. 516, 386 S.E. 2d 610 (1989). Mary "has a Bachelor of the Arts degree in accounting and was employed by Gray Inc., the husband's business, as its corporate accountant and financial officer beginning sometime in 1979." Both spouses had previously been divorced. Mary signed the agreement after making "two minor adjustments" to it.

he wanted her to sign a premarital agreement. On the evening before they planned to leave for Las Vegas to marry, Steven presented Mary with the premarital agreement, telling her that he refused to marry her unless she signed. Mary, having no time to consult with an attorney, signed the agreement. The North Carolina court upheld the agreement, finding that the mere shortness of time between the presentation of the premarital agreement and the date of the wedding was not sufficient to invalidate the premarital agreement, nor was a threat to call off the marriage if the agreement was not signed.

3. Unconscionability

Various states attempt to define unconscionability through statute. Until 2013, for example, New Jersey's statutory variation provided that an agreement was unconscionable if it left one of the parties without means of reasonable support or would have provided him or her with a standard of living far below that which was enjoyed before the marriage.[10]

One variation between states is the time at which unconscionability is determined. Under the UPAA, this determination is made at the time the premarital agreement is executed. Several states, including Connecticut require the determination to be made at the time the parties seek to enforce the agreement as well as at the time of execution.[11] In other states, unconscionability can be tested at the time of enforcement only if the parties' circumstances have changed in ways that were unforeseeable at the time of the marriage.[12]

[10] N.J. Stats. Ann. § 37:2-38. The 2013 amendment that deleted this provision is effective to all prenuptial agreements entered into on or after June 27, 2013.
[11] Conn Stat. §46b-36g(a)(2)("The agreement was unconscionable when it was executed or when enforcement is sought").
[12] *E.g.*, *Blue v. Blue*, 60 S.W. 3d 585 (Ky. App. 2001).

4. Financial Disclosure

Under the UPAA, a premarital agreement will not be invalidated based on inadequate financial disclosure alone. The UPAA also requires unconscionability.[13] Some states, such as Connecticut and Iowa, have decided that inadequate financial disclosure is sufficient to invalidate a premarital agreement.[14] The amount of required disclosure varies from state to state.

Variations between states can result in a court rendering a decision at variance with the law of its own state. In *DeLorean v. DeLorean*, Cristina and John DeLorean entered a premarital agreement a few hours before they were married in 1973.[15] Cristina knew that John was a person of substantial wealth and that he had an interest in a California farm, a large tract of land in Montana and a share of a major league baseball team. She had no further details as to the extent of his wealth or income. The New Jersey court held that the level of financial disclosure that John had provided fell short of what New Jersey law required. It was, however, sufficient under California law. Since the parties lived in California at the time their premarital agreement was executed and because the agreement provided that the agreement should be construed under the laws of the state of California, the New Jersey court enforced the agreement.[16]

[13] UPAA, §6(a)(2).
[14] Iowa Code §596.8(1)(c); Conn Stat. §46b-36g(a)(3).
[15] 511 A.2d 1257 (N.J. Ch. Div. 1986)
[16] Arguably, the statement that the agreement should be construed under the laws of the state of California does not answer the question as to the law that governs the validity of the agreement. The court answered this question by referring to "hornbook law [that provides] that when an agreement is silent as to which law should be applied, the validity and construction of a contract shall be determined by the law of the place of contracting." Id. 1261. The Oregon Court of Appeals reached a different decision in the *Proctor* case. In that case the court held that a provision in a premarital agreement that provided for construction in accordance with the laws of California, the state where the parties lived at the time the agreement was executed, would not control the law applicable to the manner in which the parties' marital property should be divided between them. The division would be controlled by the laws of Oregon, the state where the parties lived at the time of divorce. *In the Matter of the Marriage of Proctor and Proctor*, 234 Ore. App.722, 234 P.3d 133 (2010).

5. Spousal Support

Some states prohibit agreements that affect spousal support[17] or impose more stringent procedural requirements for an agreement that affects support rights. California, for example, provides that an agreement limiting spousal support is not enforceable if the party seeking support was not represented by independent counsel or if the limitation is unconscionable at the time of enforcement.[18]

6. Birth or Adoption of Children

The UPAA merely provides that the right of a child to support may not be adversely affected by a premarital agreement.[19] Some states provide more specificity regarding the effect of the birth or adoption of children on a premarital agreement. Maine's statute contained one of the most significant variations from the UPAA. It provided that a premarital agreement becomes void 18 months after the spouses become parents unless they reaffirm the agreement.[20] In some cases, there might have been little incentive for the economically disadvantaged spouse to agree to reaffirm.

IV. The Uniform Premarital and Marital Agreement Act

A. In General

The Uniform Premarital and Marital Agreement Act (the UPMAA)[21] was approved by the National Conference of Commissioners on Uniform State Laws at its annual conference on

[17] Iowa Code §596.5(2)("The right of a spouse or child to support shall not be adversely affected by a premarital agreement."); N. Mex. Code §40-3A-4(B) ("A premarital agreement may not adversely affect the right of a child or spouse to support, a party's right to child custody or visitation, a party's choice of abode or a party's freedom to pursue career opportunities").
[18] Cal. Fam. Code §1612(c).
[19] UPAA §3(b).
[20] 19-A Me Stat. Ann §606. This section does not apply to premarital agreements executed after October 1, 1993.
[21] Available at http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf. The author was one of the American Bar Association advisors to the drafting committee. The views reflected herein are her own and do not necessarily reflect those of the drafting committee.

July 18, 2012. As the discussion above demonstrates, in its almost forty years of existence, the UPAA brought only limited uniformity to the manner in which states enforce agreements that affect marital rights and obligations. Not only have almost half of the states failed to enact it, many of the states that have enacted it did so with significant variations. In addition, core provisions of the UPAA have been applied in different ways by the courts. The purpose of this new uniform act is to achieve greater consistency in the way in which the states enforce premarital agreements and to extend the uniformity of treatment to agreements that are executed during marriage.

The policy principal underlying the provisions of the Act is that individuals, before or after marriage, should have the freedom, within broad limits relating to due process in formation and minimal standards of substantive fairness, to choose the financial terms of their relationship. The goal of the UPMAA is to provide reliable guidance for creating an enforceable premarital or marital agreement.

B. Scope of the UPMAA

The UPMAA covers agreements executed before or during marriage, in which parties affirm, modify or waive one or more marital rights or obligations during marriage, or at separation, marital dissolution, death or the occurrence or non-occurrence of any other event.[22] Although this list is considerably shorter than the comparable list in the UPAA, the commentary states that an agreement may include other terms not in violation of public policy, including choice of law provisions, appointments of fiduciaries such as guardians and personal representatives and agreements with respect to future tax reporting. The drafters deliberately

[22] UPMAA §2 (2) and (5).

excluded agreements outside of marriage from the scope of the UPMAA (e.g. cohabitation agreements and day-to-day agreements between spouses).

The UPMAA expands the concept of unenforceable terms as compared to the UPAA, which only addressed a child's right to child support. Section 10 of the UPMAA contains a list of provisions that will not be enforced. The unenforceable terms are those that adversely affect a child's right to support or that define the rights or duties of the parties regarding child custody,[23] that limit or restrict a remedy available to a victim of domestic violence, that purport to modify the grounds for a court-decreed separation or marital dissolution, or that penalize a party for initiating a judicial proceeding leading to a court-decreed separation or marital dissolution.

C. Formalities

The UPMAA's formal requirements are nearly identical to the UPAA. Section 6 requires that a premarital or marital agreement must be in a record signed by both parties. Oral agreements are not enforceable under the UPMAA. No additional formalities are required.[24] Because the terms "marital agreement" and "premarital agreement" are defined to include amendments to such agreements,[25] the requirement of a signed record applies to amendments as well as to the original agreements.

[23] A provision that adversely affects a child's right to support could include, for example, a provision that requires each party to pay his or her legal fees incurred in connection with the litigation of child support. It is unenforceable because it violates public policy by discouraging both parents from pursuing litigation in their child's best interests. *In re Marriage of Best*, 387 Ill.App.3d 948 (2d District 2009).

[24] UPMAA §6. Some states require that premarital and marital agreements be subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. *See* N.Y. Domestic Relations Law § 236(B)(3). A recent decision of the New York Court of Appeals invalidated a premarital agreement because the acknowledgement of the husband's signature was defective. The acknowledgment form relating to the husband's signature failed to include a confirmation that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document." *Galetta v. Galetta*, 21 N.Y.3d 186, 991 N.E.2d 684 (2013).

[25] UPMAA §2(2) and (5). The commentary makes the point that the term "amendment" includes revocation. As a result, parties who wish to revoke a premarital or marital agreement must do so in a signed writing. An act intended to revoke an agreement, such as the destruction of the original document, would not be sufficient.

For this purpose, the term "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."[26] To "sign" means to execute or record a tangible symbol or to attach to or logically associate with the record an electronic symbol, sound, or process with present intent to authenticate or adopt a record.[27] The only change regarding execution formalities, from the UPAA to the UPMAA is the permitted use of an electronic medium in addition to writing.

Section 6 also provides that agreement is enforceable without consideration.[28]

D. Enforceability

1. Requirements for Enforceability

Under the UPMAA, the grounds for avoiding enforceability are somewhat broader than the grounds under the UPAA. Section 5 of the UPMAA provides defenses against enforcement on the grounds of principles of law and equity. Section 9 of the UPMAA specifically addresses the requirements for enforceability of a premarital or marital agreement. A premarital or marital agreement will not be enforced against a party unless each of the four requirements listed below were satisfied. The party seeking to avoid enforcement has the burden of proving that one or more of these requirements was not satisfied:

i. The party's consent to the agreement was voluntary and was not the result of duress;

ii. The party had access to independent legal representation;

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[26] UPMAA §2(7).

[27] UPMAA §2(8). The idea of using an electronic medium to record a premarital or marital agreement and an electronic symbol to sign it are based on concepts found in the Uniform Electronic Transactions Act. Although the use of such electronic methods in commerce may be appropriate, in the case of premarital and marital agreements, the use of conventional paper and ink to record an agreement may be preferable.

[28] UPMAA §6. Some states now require consideration to support a premarital or marital agreement. The mutual release of property rights is generally considered sufficient consideration to support an agreement. An agreement to end a separation and dismiss a petition for divorce has also been held to provide sufficient consideration. *In re Marriage of Tabassum*, 881 N.E. 2d 396, 409 (Ill. App. Ct., 2d Dist. 2008). Adoption of the UPMAA will eliminate this requirement.

iii. If the party did not have independent legal representation at the time the agreement was signed, the agreement included a notice of waiver of rights or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; and

iv. Before signing the agreement, the party received adequate financial disclosure.

2. Voluntariness and Lack of Duress

The UPAA requires that an agreement be executed voluntarily. The UPMAA adds a requirement that the consent of a party to an agreement was not the result of duress. The impact that this additional requirement will have on the application of the UPMAA in future circumstances is not clear. The UPMAA does not attempt to define either "voluntary" or "duress." The commentary to the UPMAA states that the use of these terms is not meant to change the law, but acknowledges that case law that has construed the voluntariness standard of the UPAA has not been consistent. It would not be surprising if some courts used the addition of the duress standard to expand the situations in which an agreement will not be enforced.

3. Access to Independent Legal Representation

The requirement that a party have access to independent legal representation does not mean that a party must actually have such representation. It is sufficient if before signing the agreement he or she has reasonable time to decide whether to retain a lawyer, locate a lawyer, obtain the lawyer's advice and consider the advice provided.

Although the Act does not require that each party have independent legal representation, if one party is represented by a lawyer, the other party must either have the financial ability to retain a lawyer or the party who is represented by a lawyer must agree to pay for the other party's lawyer. In this respect, the UPMAA seeks to eliminate unfairness that may result from an economic imbalance between spouses.

4. Notice of Waiver of Rights

A notice of waiver of rights is required only if a party is not separately represented by independent counsel. Such notice is intended to ensure that the party who has decided not to seek such representation has at least a general idea of the rights he or she is waiving by signing a premarital or marital agreement. The notice of waiver of rights requires language substantially similar to the following, conspicuously displayed:

> "If you sign this agreement, you may be:
>
> Giving up your right to be supported by the person you are marrying or to whom you are married.
>
> Giving up your right to ownership or control of money and property.
>
> Agreeing to pay bills and debts of the person you are marrying or to whom you are married.
>
> Giving up your right to money and property if your marriage ends or the person to whom you are married dies.
>
> Giving up your right to have your legal fees paid."[29]

Although the UPMAA does not require the use of the language set forth above, it does require at least "substantially similar" language. To avoid future controversy as to the meaning of "substantially similar," the safest approach would be to use the language that the UPMAA uses.

The commentary states that the "conspicuously displayed" requirement is intended to follow the standards of §1-201(10) of the Uniform Commercial Code and to incorporate the case law that determines what is conspicuous.

[29] UPMAA §9(c).

5. Adequate Financial Disclosure

Under the UPMAA, a party is deemed to have had adequate financial disclosure if he or she receives a reasonably accurate description and good faith estimate of the value of the property, liabilities and income of the other party, or if he or she expressly waives in a separate signed record the right to any financial disclosure beyond what was provided, or has adequate knowledge or a reasonable basis for having such knowledge of the value of the property, liabilities and income of the other party. There is no requirement that a party has separate legal representation before waiving a right to disclosure, but the waiver must be effected in a document that is separate from the premarital or marital agreement.

This standard of disclosure provides greater protection to the economically disadvantaged party than the disclosure standard in the UPAA. The UPAA requires only that the party receive a "fair and reasonable disclosure of the property or financial obligations of the other party." There was no requirement that income be disclosed. Moreover, the financial disclosure requirement under the UPAA was satisfied if it could be shown that the party had or reasonably could have had adequate knowledge of the property and financial obligations of the other party.

6. Special Rule for Waiver of Spousal Support

The UPMAA provides a special rule for waivers of spousal support. Even if the requirements described above are satisfied, if a waiver of spousal support causes one of the parties to a premarital or marital agreement to be eligible for public assistance and that party requests a court to do so, the court may require the other party to provide support to the extent necessary to cause the party to lose eligibility for public assistance.[30]

[30] UPMAA §9(e).

7. Unconscionability

Under the UPMAA, a court has the discretion to refuse to enforce a term of a premarital or marital agreement if the term was unconscionable at the time of the signing.[31] Conferring this discretion on a court is a major departure from the provisions of the UPAA. Under the UPAA, unconscionability provides a basis for refusal to enforce an agreement only if the party against whom the agreement is being enforced did not have fair and reasonable disclosure of the property and financial obligations of the other party.

"Unconscionability" is not defined in the UPMAA. Case law that has set aside premarital and marital agreements sometimes refers to two types of unconscionability. One is procedural unconscionability, which refers to the circumstances under which the agreement is executed. An agreement executed under duress, for example, may be set aside for unconscionability.[32] The UPMAA's reference to unconscionability does not include procedural unconscionability. Agreements that are not executed voluntarily or that are executed under duress may be unenforceable under UPMAA §9(a)(1).

The focus of §9(f)'s unconscionability provision is on the substantive provisions of the agreement. Substantive unconscionability has been found when the contract terms are "improvident, completely one-sided and oppressive,"[33] when "the agreement is one which no

[31] UPMAA §9(f).

[32] *See, In re Marriage of Richardson*, 606 N.E. 2d 56 (Ill. App. Ct., 1st Dist. 1992)(duress was the death of her father after having been diagnosed with terminal cancer 7 months prior, but specifically that husband "intended to divorce Irene; nevertheless, he resorted to such tactics as promising her that 'they would be a family again' and including the two-year moratorium on divorce in order to influence her decision to enter into the agreement.") and *Petracca v. Petracca*, 956 N.Y.S.2d 77 (App. Div. 2d Dept. 2012)(the duress was "defendant had presented the postnuptial agreement to her for signature days after her 42nd birthday, and shortly after she had suffered a miscarriage. She testified that the defendant had 'bullied' her into signing the agreement by threatening that they would not have any children and that the marriage would be over if she did not consent to the postnuptial agreement").

[33] *In re Marriage of Tabassum*, 881 N.E. 2d 396, 412 (Ill. App. Ct., 2d Dist. 2008). *In re Marriage of Richardson, supra*, note 32 (post-nuptial agreement set aside when wife after 27 years of marriage was to receive only 7.55% of the value of the marital assets and husband had concealed the true value of those assets).

reasonable person would make and no honest person would accept"[34] or when there was "an absence of meaningful choice on part of one of the parties together with contract terms which are unreasonably favorable to the other party."[35]

Because some states have adopted a rule that tests for unconscionability at the time of divorce, the UPMAA provides an alternate provision for avoiding enforceability. Under this alternate provision, a court may refuse to enforce a term of a premarital or marital agreement if enforcement of the term would result in a substantial hardship for a party because of a material change in circumstances arising after the agreement was executed.[36]

E. Principles of Law and Equity

Section 5 of the UPMAA provides that the principles of law and equity supplement the Act unless displaced by a specific provision of the Act. The Reporter's comments to this provision state that this section was included in the Act to preclude an argument that the Act's reference to concepts of "voluntariness" and "unconscionability" as relevant for enforceability prevents the use of other traditional contract law principles of equity. Other potentially applicable principles include defenses based on fraudulent misrepresentation[37] and undue influence.

[34] *In re Marriage of Drag*, 762 N.E. 2d 1111, 1115 (Ill. App. Ct. 3rd Dist. 2002); *see also Christian* v *Christian*, 42 N.Y. 2d 63, 71 (1977)("no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other'"(gender neutrality supplied by *Christian* court, citing *Hume v. United States*, 132 U.S. 406 (1889)).
[35] *Barocas v. Barocas*, 942 N.Y.S.2d 491, 493 (Sup. Ct. 1st Dept. 2012).
[36] UPMAA §9(f)(2).
[37] *See Cioffi-Petrakis v. Petrakis*, 898 N.Y.S.2d 861 (App. Div. 2nd Dept. 2013) in which the Appellate Division confirmed a finding of the New York Supreme Court that the husband had fraudulently induced the wife to sign a prenuptial agreement when he orally promised (never intending to fulfill the oral promise), prior to execution of the written agreement, that he would revoke the agreement when they had their first child.

F. Choice of Law

Section 4 of the UPMAA provides that the validity, enforceability, interpretation and construction of a premarital or marital agreement will be determined by the law of the jurisdiction designated in the agreement, provided that a significant relationship exists between that jurisdiction and the agreement or either party to the agreement. A choice of law provision, however, may be disregarded if the court determining the matter concludes that the law of the chosen jurisdiction as it applies to a particular provision of an agreement is contrary to a fundamental public policy of the jurisdiction in which the matter is being decided.[38] If the agreement does not contain a choice of law provision the law applicable in the state where the court deciding the matter is located will apply.

G. Enactment

As of October 2014, only two states have adopted the UPMAA, Colorado[39] and North Dakota.[40] Unfortunately, both adopted versions depart in seemingly significant ways from the UPMAA.

Colorado's version of the UPMAA contains the following variations:

1. In Colorado, it is not possible to waive financial disclosure. If the adequate financial disclosure requirements of the UPMAA are not satisfied, the agreement will not be enforceable.[41]

[38] UPMAA §4(1).
[39] CRS § 14-2-301 *et. seq.*
[40] N. D. Cent. Code § 14-03.2-01 *et. seq.*
[41] CRS §14-2-309(1)(d). Note that CRS §14-2-309(4)(c) states that a party has received adequate financial disclosure if they have "adequate knowledge or a reasonable basis for having adequate knowledge" of the information that would constitute an adequate financial disclosure. Although adequate financial knowledge cannot be waived, adequate knowledge is not actually required.

2. There is no requirement that the agreement as a whole be conscionable at the time of execution or at the time of enforcement. The conscionability requirement of the UPMAA was replaced with a provision that causes the agreement to be unenforceable to the extent that the provisions for spousal maintenance or the allocation of attorney fees are unconscionable at the time of enforcement.[42]

3. Colorado's version of the UPMAA expands the list of unenforceable terms to include terms that violate public policy. Although the public policy requirement is not specifically part of the UPMAA, the Reporter's comments suggest that §5's statement that the "principles of law and equity supplement this [act]" would invalidate a provision in an agreement that violated public policy.[43]

North Dakota made only one change, but it is particularly troubling. It seems to reverse section 5's direction that the principles of law and equity supplement the Act. North Dakota's version of the UPMAA provides that the principles of law and equity may not supplement or be used to alter a material term in an agreement that is executed in accordance with the Act.[44]

V. Advising Clients in Connection with Negotiation and Drafting of Premarital and Marital Agreements

A. In General

Advice that attorneys give their clients who wish to enter into a premarital or marital agreement should emphasize that such agreements cannot provide total protection for the client's present and future property and income. The statutes that govern the enforceability of these

[42] CRS §14-2-309(5). The conscionability requirement affects only the provisions containing unconscionable attorney fee or spousal maintenance provisions. The remainder of the document would apparently stand even if other of its provisions were also unconscionable..
[43] UPMMA §5; CRS §14-2-310.
[44] N.D. Cent. Code §14-03.2-04.

agreements and the way in which the statutes are construed by the courts are subject to change. Moreover, because the laws governing the validity of premarital and marital agreements vary from state to state, there can be no complete assurance that an agreement that is valid in the place where the couple lived at the time of negotiation and execution will be valid in the state where they are living at the time one of them seeks to enforce it. In order to minimize the risk that a premarital or marital agreement will be unenforceable, the best approach is to seek to satisfy the highest standards of procedural and substantive fairness found in the laws of the various states. The UPMAA provides a helpful guide to such principles.

B. When is a Premarital Agreement Advisable?

The negotiation of a premarital agreement may be an unpleasant process for a couple contemplating marriage. In some cases, it may be unnecessary. For example, if the goal of such an agreement is to protect family wealth that has not yet found its way into the hands of the party seeking protection, adequate protection may be achievable by advising the family members who still control the family wealth to put the party's share of that wealth in a lifetime discretionary trust for his or her benefit, rather than give it to the party outright. If the party is unlikely to amass wealth individually, a family trust may be all he or she needs.

In some cases, advising a client to keep his or her premarital and family wealth separate from earnings during the marriage may suffice. Most states do not give one spouse any interest in such property that belongs to the other spouse. There are, however, exceptions. This advice may suit a couple marrying and living in New York. If, however, during the marriage, the same couple decides to move to Connecticut, they will face a different set of marital property laws that permit a court to divide all property owned by one spouse between both spouses.

C. Best Practices

When negotiating and preparing a premarital agreement for a client, the following guidelines should be followed:

1. Independent Representation by Counsel

Make sure that the other party is represented by independent counsel. If he or she lacks the financial resources to pay for one, your client should offer to pay. Although there is no absolute requirement that both parties are represented by counsel, when both parties are represented, it is more difficult for the party seeking to avoid enforcement to successfully argue his or her consent was involuntary or the product of duress.

2. Timing

Although a few states have established timing requirements, most do not require any particular length of time between the signing of a premarital agreement and the marriage. Nevertheless, the shorter the time period, the more likely that the party seeking to avoid enforcement will claim that his or her execution of the agreement was the product of duress on account of the pressures of the forthcoming wedding. Therefore, it is best to start the negotiation several months before the wedding and to present the other party and his or her counsel with a draft agreement at least one month before.

3. Financial Disclosure

The party seeking a premarital agreement is best served by disclosure of as much detail as possible as to his or her financial assets, obligations and income. Interests in family trusts, both discretionary and contingent, should be disclosed. Expected inheritances should also be described. Financial disclosure should be set forth on a schedule to be attached to the agreement itself so that it will not be possible for the other party to claim in the future that he or she did not

see the disclosure. To avoid any doubt as to income, it is good practice for one party to provide the other party with a recent income tax return.

D. Specific Provisions

1. In General

Negotiating and drafting a premarital agreement often entails helping a client determine which assets and income he or she wishes to protect. In many cases, the client will not be seeking complete protection. The goal may simply be to protect inherited wealth or wealth acquired prior to the marriage. An agreement embodying these goals may require the other party to waive a claim to such property, including earned income and appreciation, even if attributable in part to the services of one of the parties. Such an agreement would not necessarily have any impact on future claims to spousal support or rights to equitable distribution of property earned during the marriage.

Some clients will only be interested in protecting assets in the event of divorce. They may be willing to permit their spouses to receive whatever share of property that state law would provide upon death. For residents of states that provide outright elective shares at death, some clients may wish to require their spouses to accept their elective shares in trust rather than outright.

Premarital agreements should clearly reflect any agreed upon terms. Waivers of rights should be no broader than those agreed upon.

2. Treatment of Particular Types of Property

Particular types of property such as the family home, interspousal gifts of tangible personal property and retirement benefits are often the subject of special provisions.

The ownership of the family home, particularly for the economically disadvantaged party to a premarital agreement, often holds a great deal of emotional significance. In some cases, this

party will be willing to relinquish substantial economic rights so long as he or she may retain some rights in the home. To handle this situation, one approach is to treat the family home as a marital asset, but to treat as separate property the amount that one party contributes to the cost of its acquisition or improvement. For example, if one party contributes the entire purchase price for the family home, the parties could agree that the appreciation in the value of home above the purchase price would be marital property.

During a marriage, spouses frequently make gifts to each other of tangible personal property such as jewelry, art and antiques. Generally, these property interests do not come with documents of title. As a result, when a marriage breaks down, there is often a dispute as to whether particular valuable items were intended to be gifted from one to the other. In order to avoid these disputes, it may be advisable to include a clause in a premarital or marital agreement that provides that all such property purchased during the marriage at a price in excess of a specified amount will be deemed to be the property of the party who purchased it unless there is written evidence of his or her intention to gift it to the other.[45]

The waiver of rights in certain retirement benefits that are protected under the Employee Retirement Income Security Act (ERISA) cannot be accomplished in a premarital agreement. Any waiver of these rights must satisfy federal requirements as well as state requirements as to the enforceability of premarital and marital agreements. Code Sec. 417(a)(3)[46] requires that a waiver of a spouse's rights to be designated as a beneficiary under an ERISA plan be in writing, and that it designate an alternate beneficiary that may not be changed without his or her consent or expressly permits future beneficiary changes without consent. It also requires that a waiver

[45] If this clause is used, consideration could be given to providing a mechanism for adjusting the fixed amount for inflation.
[46] References to "Code Sec." refer to sections of the Internal Revenue Code of 1986, as amended.

acknowledge the effect of the election, and that the waiving spouse's signature be witnessed by a plan representative or by a notary public. The Treasury Regulations make it clear that an agreement entered into prior to marriage will not be effective to waive ERISA rights.[47]

In order to effectively deal with this matter, a premarital agreement should contain a provision in which the party whose waiver is sought agrees to sign the necessary waiver documents after the marriage has taken place. In order to provide some method of enforcing this waiver, the agreement could also provide that if the party failed to execute such a waiver and actually collected benefits he or she had agreed to waive, he or she would be obligated to make a payment to the estate of the other party of an amount equal to the benefits collected.

3. Legal Fees

Consider adding a provision that requires a party who challenges the validity of the agreement to pay the legal fees of both parties if he or she loses the challenge. This provision may work to discourage future challenges.

4. Confidentiality

Privacy is important to some individuals. For a client who is concerned about privacy, consider adding a provision that requires that each party keep the details of their premarital or marital agreement and their lives together confidential.

5. Choice of Law

It is important to include a choice of law provision stating that the law of a particular state will govern the validity, enforceability and interpretation of the agreement. In the absence of a choice of law provision, the court in which one of the parties seeks to enforce the agreement is more likely to apply its own law, particularly if the couple is living there at the time. For

[47] Treas. Reg. §1.401(a)(20).

example, in *Rivers v. Rivers*,[48] a Missouri appellate court applied Missouri law to a premarital agreement that had been negotiated and executed in Louisiana by two Louisiana residents. At the time the husband sought to enforce it, the couple lived in Missouri. The court relied on the Restatement of Conflict of laws to determine that, in the absence of a choice of law provision in the contract, the validity of a contract dealing with the division of property in the event of a divorce should be determined by the place of performance.[49]

Conflict of laws principles generally permit the parties to a contract to select the state whose laws govern the validity, enforceability and interpretation of their agreement. The chosen state should have a substantial relationship to the parties at the time the agreement is executed.

6. Non-Economic Provisions

Some parties are interested in including provisions in their premarital or marital agreement that seek to regulate conduct rather than economics. Fidelity clauses are an example of such provisions. Provisions dealing with the religious training of future children are another example. These provisions may not be harmful but their enforceability is uncertain. If included, they should be drafted in a way that carefully separates them from the balance of the agreement so that they do not jeopardize the enforceability of the other provisions.

Section 10 of the commentary to the UPMAA states that there is a general consensus in case law that courts will not enforce premarital agreement provisions relating to topics beyond the parties' financial obligations to each other. Although there is some case law that supports this statement, it does not seem sufficient to support a conclusion that there is a consensus. For example, California has invalidated provisions that required an unfaithful spouse to pay

[48] 21 S.W.3d 117, 121 (Mo. Ct. App. 2000)
[49] *Id.* citing Restatement (Second) of Conflict of Laws §188.

liquidated damages to the other and that required a spouse to waive certain rights if he used drugs. In both cases, the court decided that these agreements violated California's public policy in favor of no-fault divorce, an important aspect of which was a division of property between the spouses that was effected without reference to the fault of either of them.[50] The Iowa Supreme Court reached a similar conclusion in 2009 holding that the enforcement of a provision providing additional economic benefits to the wife if the husband's indiscretion leads to a divorce would "empower spouses to seek an end-run around our no-fault divorce laws through private contracts."[51]

Other states have reached a contrary conclusion. In 1988, an Alabama court upheld a provision giving the marital home and a lump sum payment and periodic alimony if the husband drank excessively or caused bodily injury to or inflicted mental cruelty upon the wife.[52] And in 1989, a New Hampshire court validated a provision that altered the couple's economic agreement if the husband left his wife for another woman.[53] Similarly, in 1993, a Pennsylvania court enforced a provision by which the wife would forfeit her share of the marital property if she engaged in sexual intercourse with anyone other than the husband for a 15 year period.[54]

Whether or not these types of clauses are enforceable, it may be appropriate to include them when they deal with issues that are important to the individuals. Even if they are unenforceable, their inclusion in the agreement will serve to remind the couple of their original intentions.

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[50] *In re Marriage of Mehren & Dargan*, 13 Cal. Rptr. 3d 522 (Ct. App. 2004); *Diosado v. Diosado*,118 Cal. Rptr. 2d 494 (Ct App. 2002). In In *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990), the Pennsylvania court invalidated an agreement determining the religion in which the children will be raised.
[51] *In re Marriage of Cooper*, 769 N.W.2d 582, 587 (Iowa 2009).
[52] *Stadther v. Stadther*, 526 So. 2d 598 (Ala. Civ. App. 1988).
[53] *MacFarlane v. Rich*, 567 A. 2d 585 (N.H. 1989).
[54] *Laudig v. Laudig*, 425 Pa. Super. 228, 624 A. 2d 228, 624 A.2d 651 (Superior Ct. of Pa., 1993).

7. Tax Clauses.

a. Allocating Tax Liability

When a premarital or marital agreement distinguishes between separate property and marital property, it is important to include a provision covering the appropriate allocation of income taxes between income produced by marital property and income produced by separate property. In the absence of a tax allocation agreement, the couple's marital property may be used to pay taxes on all of their income, including the separate property of one of them. This would unfairly reduce the marital property available for division between them in the case of a separation or divorce.

b. Requirement to File Joint Income Tax Returns

Because the combined income tax liability of two spouses is often less if the couple files a joint income return rather than two separate returns, the party with the greater income will sometimes ask the other party to agree to a clause in the premarital or marital agreement that will obligate one spouse to file a joint return if asked to do so by the other spouse. Because spouses who file jointly are jointly and severally liable for the entire tax due on the return, including interest and penalties,[55] it is not a good idea to make an advance commitment to joint filings. Each spouse should remain free to decide each year whether he or she wants to take on this risk for a particular year. If the commitment is made, consider requiring each party to agree to reimburse the other for any income tax liability imposed on him or her by reason of the joint return and for any costs incurred in connection with the determination of the correct amount of the liability. Recognize, however, that the agreement will be worthless if the spouse with the reimbursement obligation has insufficient funds to satisfy it.

[55] Code Sec. 6013(d)(3).

c. Requirement to File Split-Gift Elections on Gift Tax Returns

Code Sec. 2513(a) permits spouses to elect on their gift tax returns to treat all their gifts in a particular year as having been made 50% by each other. In many cases, this election will result in a lower combined gift tax liability. As is the case with joint income tax returns, the split-gift election will cause each spouse to be jointly and severally liable for the gift tax liabilities of the other for the year to which the split-gift election applies.[56] As a result, committing to make split-gift elections in a premarital or marital agreement may not be a good idea. If the commitment is made, it should be accompanied by an agreement by each party to reimburse the other for any tax liability imposed on him or her by reason of the split-gift election and for any costs incurred in connection with the determination of the correct amount of the liability. As stated above, in connection with the similar problem that arises when joint income tax returns are filed, the reimbursement obligation will become worthless if the spouse with the obligation does not have sufficient assets to satisfy it.

In addition, when one spouse elects to split gifts with the other, he or she may be using his or her applicable credit amount under Code Sec. 2505, with the result that his or her future gifts and estate may be exposed to gift or estate tax sooner than they otherwise would have been.

d. Use of the Unused Exemption Amount of the First Spouse to Die

Code Sec. 2010(c)(2) permits a surviving spouse to increase his or her basic exclusion amount by the unused basic exclusion amount of his or her deceased spouse. The higher an individual's basic exclusion amount, the lower will be his or her future gift and estate taxes. In 2014, the basic exclusion amount of an individual is $5,340,000.[57] This means that a surviving

[56] Code Sec. 2513(d).
[57] Code Sec. 2010; Rev. Proc. 2013-35, 2013-47 I.R.B. 537 §3.32.

spouse whose deceased spouse had never used any of his or her basic exclusion amount will have a total exclusion amount of $10,680,00 which can be used to shield $10,680,000 worth of assets from gift and estate tax.

A surviving spouse may not use his or her deceased spouse's basic exclusion amount, however, unless the executor of the deceased spouse's estate files an estate tax return and makes an election on the return to permit the surviving spouse to use his or her basis exclusion amount. In some cases, it will be appropriate to include a clause in a premarital or marital agreement that requires each spouse to direct his or her executor to file an estate tax return and make the election whether or not the executor has an obligation under the tax law to file an estate tax return. Because the filing of an estate tax return will cause an expense to the deceased spouse's estate that would otherwise have not been incurred, the party who is asked to make this commitment should require the surviving spouse to reimburse his or her estate for these expenses.

E. Tax Treatment of Future Payments

When a premarital or marital agreement provides for future payments from one spouse to the other at the end of or after the end of the marriage, the tax consequences of making those payments should be considered. There are provisions in the Internal Revenue Code that give special and beneficial tax treatment to certain payments that are made pursuant to a divorce or separation instrument. They include (i) Code Secs. 71 and 215, which makes certain spousal support payments deductible, a feature that has become more important with the increased progressivity in the income tax rates, (ii) the regulations under Code Sec. 1041 which permit certain tax free transfers of appreciated property between former spouses made more than one year after the divorce if made pursuant to a divorce or separation instrument, (iii) Code Sec. 2516, which permits gift-tax free transfers of property between spouses if made pursuant to a

written agreement entered into within 2 years before or 1 year after a divorce and (iv) Code Sec. 2043(b) which permits an estate tax deduction for post-death payments made pursuant to an agreement that meets the requirements of Code Sec. 2516.

A premarital agreement is not a separation instrument. In most cases, if a divorce occurs, it will not happen within two years after the premarital agreement is signed. The best method of assuring that the spouse who is required to make transfers pursuant to a premarital agreement will be able to claim the benefits of these sections is to include a provision in the premarital agreement that requires, as a precondition for any spousal support payment intended to be treated as taxable alimony and as a precondition for any property transfer that is to be made after a divorce, that the requirement to make the payments or other transfers be incorporated into a marital settlement agreement.

For example, a premarital agreement requiring taxable support payments could include a provision similar to the following:

> We understand that if the monthly support payments that section ___ of this agreement requires Spouse 1 to make to Spouse 2 in the event of the occurrence of an Event of Marital Discord are not made under a divorce or separation instrument, the payments will not be includable in the gross income of Spouse 2 and will not be deductible by Spouse 1 for income tax purposes. In order to assure that these payments will receive the income tax treatment we have agreed to, we agree that Spouse 1 shall have no obligation to begin monthly payments to Spouse 2 until we sign a separation agreement that incorporates all of the obligations we will owe to each other under this Agreement in the event of the occurrence of an Event of Marital Discord ("our Marital Discord Obligations"), including the obligation of Spouse 1 to make these payments to Spouse 2 or until Spouse 1's obligation to make these payments is incorporated in a court order. Each of us agrees to sign a separation agreement that incorporates all of our Marital Discord Obligations promptly after the occurrence of an Event of Marital Discord if requested to do so by the other.[58]

[58] For a similar form, see Linda J. Ravdin, Premarital Agreements, American Bar Association Section of Family Law (2011) at 265.

The regulations issued under the prior version of Code Sec. 71 contain an example that supports the validity of this approach. Former Code Sec. 71 required inclusion of certain support payments in the gross income of the recipient spouse if the payments were made pursuant to a decree of divorce or separate maintenance, pursuant to a separation agreement, or pursuant to a decree for support. The spouses in the example in the regulations had entered into a premarital agreement that required one spouse to make monthly payments to the other for support. The example concludes that these payments would not be included in the gross income of the transferee spouse under Code Sec. 71 because they would not be made under a separation agreement or a divorce decree. The regulation observes that inclusion would have been required if the parties' written separation agreement had incorporated the requirement to make these payments, if the divorce decree contained a reference to the premarital agreement or if the parties had referred to it in a written instrument incident to the divorce status.[59] The regulations under the present version of Code Sec. 71 confirm that the term "divorce or separation instruments" for purposes of the new law include the instruments described in old Code Sec. 71.[60]

A premarital agreement requiring any post-divorce or post-death transfers could include a provision similar to the following:

> We understand that if Spouse 1 makes the transfer of property to Spouse 2 that is required to be made under section ___ of this agreement after our divorce, Spouse 1 could be treated for federal gift tax purposes as having made a taxable gift to Spouse 2 and, for federal income tax purposes, as having made a taxable sale of the transferred property. Similarly, we understand that if the estate of Spouse 1 makes the post-death payment Spouse 1's estate is required to make to Spouse 2 under section ___ of this agreement and if we are no longer married when Spouse 1 dies, the estate of Spouse 1 may not be able to deduct the amount of the obligation from the gross estate for federal estate tax purposes. In order to protect the required transfers from income tax and from gift tax and to secure an

[59] Treas. Reg. §1.71-1(b)(6), Example (2),
[60] Treas. Reg. §1.71-1T Q&A 4.

> estate tax deduction for them in the event payments are made after the death of Spouse 1, we agree that the obligation of Spouse 1 to make all of the payments and other transfers that Spouse 1 is required to make to Spouse 2 in the event of the occurrence of an Event of Marital Discord shall be incorporated in a written agreement between us relative to our martial rights entered into during the three year period that begins two years before our divorce and ends one year after our divorce or in our decree of divorce.

The regulations issued under Code Sec. 1041 support this approach. They say that the term "divorce or separation instrument" has the same meaning under Code Sec. 1041 as it does under Code Sec. 71(b)(2).[61]

There seems to be no specific authority confirming that an agreement made in connection with a divorce (a "divorce related agreement") that incorporates the terms of a premarital agreement are made 'under the divorce related agreement' rather than under the premarital agreement. Nevertheless, if the premarital agreement provides that its provisions can be implemented only if incorporated in a marital settlement agreement, a conclusion that the payments are made under the marital settlement agreement seems supportable.

VI. Conclusion

Over the past forty years, state legislatures and courts have been moving slowly toward the creation of a body of principles that govern the enforceability of premarital and marital agreements. Given the steady increase in couples who begin their married lives in one state and reside in several others before their marriage is dissolved, there is a growing need for a uniform body of law on this subject. The new Uniform Premarital and Marital Agreement Act, if widely enacted and consistently construed, will be a major step in the development of that uniform body of law. It may also serve the interests of both parties to a marriage. Although the UPMAA

[61] Treas. Reg. §1.1041-1T Q&A 7.

provides more protection against substantively unfair agreements, through additions such as an explicit list of unenforceable provisions, it also provides guidance and greater confidence for parties wanting to execute an enforceable agreement.