UNIFORM PREMARITAL AGREEMENT ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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PREFATORY NOTE

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, 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. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.

This Act is intended to be relatively limited in scope. Section 1 defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 requires that a premarital agreement be in writing and signed by both parties. Section 4 provides that a premarital agreement becomes effective upon the marriage of the parties. These sections establish significant parameters. That is, the Act does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry. Nor does the Act provide for postnuptial or separation agreements or with oral agreements.

On the other hand, agreements which are embraced by the act are permitted to deal with a wide variety of matters and Section 3 provides an illustrative list of those matters, including spousal support, which may properly be dealt with in a premarital agreement.

Section 6 is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable. An agreement is not enforceable if the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and, before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) 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** (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

Even if these conditions are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, and that modification or elimination would cause a party to be eligible for support under a program of public assistance at the time of separation, marital dissolution, or death, a court is authorized to order the other party to provide support to the extent necessary to avoid that eligibility.

These sections form the heart of the Act; the remaining sections deal with more tangential

issues. Section 5 prescribes the manner in which a premarital agreement may be amended or revoked; Section 7 provides for very limited enforcement where a marriage is subsequently determined to be void; and Section 8 tolls any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the parties' marriage.

UNIFORM PREMARITAL AGREEMENT ACT

SECTION 1. DEFINITIONS. As used in this Act:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

Comment

The definition of "premarital agreement" set forth in subsection (1) is limited to an agreement between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together but not contemplating marriage (see *Marvin v. Marvin*, 18 Cal. 3d 660 (1976), judgment after trial modified, 122 Cal. App. 3d 871 (1981)) and postnuptial or separation agreements are outside the scope of this Act. Formal requirements are prescribed by Section 2. An illustrative list of matters which may be included in an agreement is set forth in Section 3.

Subsection (2) is designed to embrace all forms of property and interests therein. These may include rights in a professional license or practice, employee benefit plans, pension and retirement accounts, and so on. The reference to income or earnings includes both income from property and earnings from personal services.

SECTION 2. FORMALITIES. A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.

Comment

This section restates the common requirement that a premarital agreement be reduced to writing and signed by both parties (see Ariz. Rev. Stats. § 25-201; Ark. Stats. § 55-310; Cal. Civ. C. § 5134; 13 Dela. Code 1974 § 301; Idaho Code § 32-917; Ann. Laws Mass. ch. 209, § 25; Minn. Stats. Ann. § 519.11; Montana Rev. C. § 36-123; New Mex Stats. Ann. 1978 40-2-4; Ore. Rev. Stats. § 108.140; Vernon's Texas Codes Ann. § 5.44; Vermont Stats. Ann. Title 12, § 181). Many states also require other formalities, including notarization or an acknowledgement (see, e.g., Arizona, Arkansas, California, Idaho, Montana, New Mexico) but may then permit the formal statutory requirement to be avoided or satisfied subsequent to execution (see *In re Marriage of Cleveland*, 76 Cal. App. 3d 357 (1977) (premarital agreement never acknowledged but "proved" by sworn testimony of parties in dissolution proceeding)). This act dispenses with all formal requirements except a writing signed by both parties. Although the section is framed in the singular, the agreement may consist of one or more documents intended to be part of the agreement and executed as required by this section.

Section 2 also restates what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement (see, e.g., Ga. Code § 20-303; *Barnhill v. Barnhill*, 386 So. 2d 749 (Ala. Civ. App. 1980); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E. 2d 981 (Ind. App. 1980); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash. 1972); but cf. *Wilson v. Wilson*, 170 A. 2d 679, 685 (Me. 1961)). The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement. A marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4). This requires that there be a ceremonial marriage. Even if this marriage is subsequently determined to have been void, Section 7 may provide limits of enforceability of an agreement entered into in contemplation of that marriage. Consideration as such is not required and the standards for enforceability are established by Sections 6 and 7. Nevertheless, this provision is retained here as a desirable, if not essential, restatement of the law. On the other hand, the fact that marriage is deemed to be consideration for the purpose of this act does not change the rules applicable in other areas of law (see, e.g., 26 U.S.C.A. § 2043 (release of certain marital rights not treated as consideration for federal estate tax), 2512; *Merrill v. Fahs*, 324 U.S. 308, rehearing denied 324 U.S. 888 (release of marital

rights in premarital agreement not adequate and full consideration for purposes of federal gift tax).

Finally, a premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement. Those persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into a premarital agreement under those other provisions of law.

SECTION 3. CONTENT.

(a) Parties to a premarital agreement may 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;

(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; 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) The right of a child to support may not be adversely affected by a premarital agreement.

Comment

Section 3 permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. The matters are intended to be illustrative, not exclusive. Paragraph (4) of subsection (a) specifically authorizes the parties to deal with spousal support obligations. There is a split in authority among the states as to whether an premarital agreement may control the issue of spousal support. Some few states do not permit a premarital agreement to control this issue (see, e.g., *In re Marriage of Winegard*, 278 N.W. 2d 505 (Iowa 1979); *Fricke v. Fricke*, 42 N.W. 2d 500 (Wis. 1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., *Newman v. Newman*, 653 P.2d 728 (Colo. Sup. Ct. 1982); *Parniawski v. Parniawski*, 359 A.2d 719 (Conn. 1976); *Volid v. Volid*, 286 N.E. 2d 42 (Ill. 1972); *Osborne v. Osborne*, 428 N.E. 2d 810 (Mass. 1981); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); *Unander v. Unander*, 506 P.2d 719 (Ore. 1973)) (see Sections 7 and 8).

Paragraph (8) of subsection (a) makes clear that the parties may also contract with respect to other matters, including personal rights and obligations, not in violation of public policy or a criminal statute. Hence, subject to this limitation, an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on. However, subsection (b) of this section makes clear that an agreement may not adversely affect what would otherwise be the obligation of a party to a child.

SECTION 4. EFFECT OF MARRIAGE. A premarital agreement becomes effective upon marriage.

Comment

This section establishes a marriage as a prerequisite for the effectiveness of a premarital agreement. As a consequence, the act does not provide for a situation where persons live together without marrying. In that situation, the parties must look to the other law of the jurisdiction (see *Marvin v. Marvin*, 18 Cal. 3d 660 (1976); judgment after trial modified, 122 Cal. App. 3d 871 (1981)).

SECTION 5. AMENDMENT, REVOCATION. After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

Comment

This section requires the same formalities of execution for an amendment or revocation of a premarital agreement as are required for its original execution (cf. *Estate of Gillilan v. Estate of Gillilan*, 406 N.E. 2d 981 (Ind. App. 1980) (agreement may be altered by subsequent agreement but not simply by inconsistent acts).

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.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

Comment

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent marriage is determined to be void, the enforceability of the agreement is governed by Section 7.

The conditions stated under subsection (a) are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g., Ark. Stats. § 55-309; Minn. Stats. Ann. § 519.11; *In re Kaufmann's Estate*, 171 A. 2d 48 (Pa. 1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn. Code Ann. § 36-606; *Barnhill v. Barnhill*, 386 So. 2d 749 (Ala. Civ. App. 1980); *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); *Coward and Coward*, 582 P. 2d 834 (Or. App. 1978); but see *Matter of Estate of Lebsock*, 618 P.2d 683 (Colo. App. 1980)) and so may a voluntary, knowing waiver (see *Hafner v. Hafner*, 295 N.W. 2d 567 (Minn. 1980)). In each of these situations, it should be underscored that execution must have been voluntary (see *Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. 1976); see also 13 Dela. Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. *Hartz v. Hartz*, 234 A.2d 865 (Md. 1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) (see *Ferry v. Ferry*, 586 S.W. 2d 782 (Mo. 1979); see also *Newman v. Newman*, 653 P.2d 728 (Colo. Sup. Ct. 1982) (maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against onesidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, Scott v. U.S., 12 Wall (U.S.) 443 (1870) ('contract . . . unreasonable and unconscionable but not void for fraud'); Stiefler v. McCullough, 174 N.E. 823, 97 Ind.App. 123 (1931); Terre Haute Cooperage v. Branscome, 35 So.2d 537, 203 Miss. 493 (1948); Carter v. Boone County Trust Co., 92 S.W. 2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. Bell v. Bell, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing." (Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e.g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962)).

Even if the conditions stated in subsection (a) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e.g., *Osborne v. Osborne*, 428 N.E. 2d 810 (Mass. 1981) (dictum); *Unander v. Unander*, 506 P.2d 719 (Ore. 1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are under otherwise applicable law (see *Avitzur v. Avitzur*, 459 N.Y.S. 2d 572 (Ct. App.).

Section 6 is framed in a manner to require the party who alleges that a premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies (contrast Ark. Stats.

§ 55-313; 31 Minn. Stats. Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. *Linker v. Linker*, 470 P.2d 921 (Colo. 1970); *Matter of Estate of Benker*, 296 N.W. 2d 167 (Mich. App. 1980); *In re Kauffmann's Estate*, 171 A.2d 48 (Pa. 1961). Some have placed the burden upon those relying upon the agreement to prove its validity. *Hartz v. Hartz*, 234 A.2d 865 (Md. 1967). Finally, several have adopted a middle ground by stating that a premarital agreeement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. (*Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962); *Christians v. Christians*, 44 N.W.2d 431 (Iowa 1950); *In re Neis' Estate*, 225 P.2d 110 (Kans. 1950); *Truitt v. Truitt's Adm'r*, 162 S.W. 2d 31 (Ky. 1942); *In re Estate of Strickland*, 149 N.W. 2d 344 (Neb. 1967); *Kosik v. George*, 452 P.2d 560 (Or. 1969); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash. 1972).

SECTION 7. ENFORCEMENT: VOID MARRIAGE. If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

Comment

Under this section a void marriage does not completely invalidate an premarital agreement but does substantially limit its enforceability. Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result (see Annot., 46 A.L.R. 3d 1403).

SECTION 8. LIMITATION OF ACTIONS. Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Comment

In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties (contrast *Dykema v. Dykema*, 412 N.E. 2d 13 (Ill. App. 1980) (statute of limitations not tolled where fraud not adequately pleaded, hence premarital agreement enforced at death)). However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.

SECTION 9. APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Comment

Section 9 is a standard provision in all Uniform Acts.

SECTION 10. SHORT TITLE. This [Act] may be cited as the Uniform Premarital Agreement Act.

Comment

This is the customary "short title" clause, which may be placed in that order in the bill for enactment as the legislative practice of the state prescribes.

SECTION 11. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Comment

Section 11 is a standard provision included in certain Uniform Acts.

SECTION 12. TIME OF TAKING EFFECT. This [Act] takes effect _____ and applies to any premarital agreement executed on or after that date.

SECTION 13. REPEAL. The following acts and parts of acts are repealed:

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