

To: Commission
From: Jayne J. Johnson
Re: Uniform Premarital and Marital Agreement Act
Date: February 9, 2015

Executive Summary

This Memorandum discusses the Uniform Premarital and Marital Agreement Act (UPMAA) promulgated by the ULC to replace the 1983 Uniform Premarital Agreement Act (UPAA). New Jersey enacted the UPAA in 1988 and amended the statute mostly recently in 2013. Staff recommends against enactment of the UPMAA in deference to the 2013 amendments and the body of state law in this area.

I. Introduction

The Uniform Law Commission (ULC), in July 2012, approved and recommended for enactment in all states the UPMAA.¹ The UPMAA modifies the 1983 UPAA and seeks to address the issues raised with the preceding act, concerning the excessive strength of the enforcement provisions and the sufficiency of protections available to the economically disadvantaged party.² Two jurisdictions, Colorado and North Dakota, enacted the UPMAA and, in 2015, it was introduced in the District of Columbia and Mississippi.³

For decades, the courts viewed premarital agreements as inconsistent with the state's interest to preserve marriage.⁴ By the early 1980s, the tide turned, favoring enforcement of premarital agreements to protect the economically disadvantaged party and to reduce protracted litigation.⁵ The prevalence of premarital agreements and the increased mobility of the American populous galvanized the effort to create uniformity in this area of the law.⁶ Premarital agreements under the uniform act are defined as:

agreements between two individuals who intend to marry, which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or

¹ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT (2012)

² *Id.*; *see also* UNIF. PREMARITAL AGREEMENT ACT (1983).

³ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT (2012), Legislative Fact Sheet, *available at* http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf

⁴ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1 (2012).

⁵ *Id.*

⁶ Mary Kay Kisthardt & Barbara Handschu, New Uniform Act Covers Postnups and Prenups: The Drafters of the Uniform Premarital and Marital Agreements Chose to Treat Both Agreements in a Similar Fashion, *Nat'l L. J.* Sept. 24, 2012 at 10.

nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.⁷

The UPMAA, unlike its predecessor, which solely addressed premarital agreements, governs marital or post-nuptial agreements.⁸ The ULC added marital agreements to the 2012 act to “bring clarity and consistency across a range of agreements between” spouses, and those contemplating marriage.⁹ Marital agreements under the UPMAA are defined as:

an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.¹⁰

“The focus is on agreements that purport to modify or waive rights that would otherwise arise at a time of the dissolution of the marriage or the death of one of the spouses.”¹¹

II. Uniform Act

The UPMAA “fills a gap in existing uniform marital laws” by including agreements made during marriage by spouses” who desire to continue their marriage “but who wish to order the financial terms affecting their marriage.”¹² The UPMAA seeks to encourage couples to freely determine these terms with uniform standards of due process and fairness.¹³

The UPMAA is not intended to cover cohabitation agreements, property settlement, or separation agreements.¹⁴ The ULC suggests that marital agreements and separation agreements may be distinguished by determining whether the parties at the signing intended for the marriage to continue.¹⁵ The scope of the UPMAA does not extend to acts and events that may effect the rights of the parties at the dissolution of the marriage or death of a spouse.¹⁶ The UPMAA excludes the following transactions involving:

- joint and several liability through real estate mortgages,
- motor vehicle financing,
- joint lines of credit,

⁷ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 2(5) (2012).

⁸ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1.

⁹ *Id.*

¹⁰ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 2(2).

¹¹ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1.

¹² Kisthardt & Handschu, *supra* at 10.

¹³ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1.

¹⁴ *Id.*

¹⁵ *Id.* at § 2 cmt.

¹⁶ *Id.*

- buy-sell agreements,
- durable power of attorney or medical power of attorney,
- estate planning, or
- irrevocable trusts for the benefit of a child.¹⁷

The UPMAA adopts the prevailing view that the agreement to marry provides sufficient consideration to enforce a premarital agreement.¹⁸ The ULC acknowledges the rebuttable presumption in some jurisdiction that marital agreements are inherently coercive due to insufficient consideration between individuals who are already married.¹⁹ Under the UPMAA, the lack of consideration does not render an otherwise valid marital agreement void.²⁰

The UPMAA treats premarital and marital agreements “under the same set of principles and requirements.”²¹ The UPMAA requires the following for both premarital and marital agreements:

- (1) voluntary signing;
- (2) access to independent legal representation – the provision stops short of requiring representation, but to achieve fairness requires that:
 - (A) each party must have a reasonable time to decide whether to retain an independent attorney before signing;
 - (B) each party must have reasonable time to obtain advice and consider;
 - (C) if one party is represented by an attorney, the other spouse must have the financial ability to obtain counsel or the represented spouse must endeavor to pay the reasonable fees and expenses of representation as defined in the act;
- (3) conspicuously displayed terms;
- (4) good faith at the signing – an alternative provision requires a party challenging the agreement to establish that unconscionability existed at the time enforcement is sought;
- (5) notice of waiver of rights – if there is a notice of waiver of rights, it must include language that alerts the waiving party that rights to support, ownership, and control of money and property, and rights that would otherwise accrue at divorce or death may be given up; and
- (6) reasonable financial disclosure – a waiver of financial disclosure must be signed separately from the underlying agreement.²²

The UPMAA anticipates that enacting jurisdictions will apply common law contract doctrines and principles of equity where the act does not displace them.²³ The defenses of legal

¹⁷ *Id.*

¹⁸ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 6 cmt.

¹⁹ *See id.*

²⁰ *Id.*

²¹ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1.

²² UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 9.

incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, and waiver are still available under the UPMAA.²⁴ If a premarital agreement precedes a marriage later determined to be void, the act leaves to the discretion of the court whether enforcement, in whole or in part of the premarital agreement, creates an equitable result.²⁵

III. New Jersey Statutory Background

New Jersey was one of the twenty-six jurisdictions that enacted the UPAA but, like nearly half of those jurisdictions, at the time of enactment or at a later date, New Jersey amended the statute.²⁶ Most recently in June 2013, New Jersey revised the “second look” provision of the statute.²⁷ Prior to the amendment, New Jersey required a party challenging the enforceability of a prenup²⁸ to demonstrate unconscionability at the time enforcement was sought.²⁹ The determination under the amended statute looks to the circumstances that existed at the time the agreement was signed.³⁰ The amendment also narrows the definition of unconscionability by deleting the following language:

Unconscionable premarital or pre-civil union agreement means an agreement, either due to a lack of property or unemployability: (1) which would render a spouse or partner in a civil union couple without a means of reasonable support; (2) which would make a spouse or partner in a civil union couple a public charge; or (3) which would provide a public charge; or (3) which would provide a standard of living far below that which was enjoyed before the marriage or civil union.

The amended statute requires the moving party to show by clear and convincing evidence that:

- a. The party executed the agreement involuntarily; or
- b. (Deleted by amendment, P.L.2013, c. 72).

c. The agreement was unconscionable when it was executed because that party, before execution of the agreement:

²³ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, Prefatory Note 1.

²³ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 9.

²⁴ *Id.*

²⁵ UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 8.

²⁶ N.J.S. 37:2-31, et seq. (amended 2013) L.2013, c. 72 (noting the statute was amended in 2007 by L.2006, c. 103).

²⁷ N.J.S. 37:2-38c.

²⁸ *Id.* (recognizing that New Jersey provides for premarital and pre-civil union agreements, the term “prenup(s)” will be used to include both premarital/antenuptial and pre-civil union agreements, likewise the term postnup(s) will be used to collectively describe marital/civil union agreements or post-nuptial agreements); *see Lewis v. Harris*, 188 N.J. 415, 499 (2006)(establishing civil unions in New Jersey to ensure equal treatment under the law and providing civil union partners the same protections, benefits and responsibilities as individuals in a marriage); *see also Garden State v. Dow*, 216 N.J. 314, 330 (2013)(holding that the State must permit same-sex civil marriage).

²⁹ N.J.S. 37:2-38c (amended in 2006) L.2006, c. 103.

³⁰ N.J.S. 37:2-38c.

(1) Was not provided full and fair disclosure of the earnings, property and 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;

(3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or

(4) Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.

d. The issue of unconscionability of a premarital or pre-civil union agreement shall be determined by the court as a matter of law. An agreement shall not be deemed unconscionable unless the circumstances set out in subsection c. of this section are applicable.³¹

IV. New Jersey Interpretative Case Law

New Jersey courts favor premarital and pre-civil union agreements.³² The court in *Marschall v. Marschall*, observed in a case of first impression that such agreements are generally reached “when the relationship is at its closest, when the parties are least likely to be cautious in dealing with each other.”³³ Prenups, once disfavored, are now “recognized as being conducive to marital tranquility and thus in harmony with public policy.”³⁴

As high divorce rates have continued, there has naturally evolved a concurrent increase in second and third marriages [sic] of mature people with substantial means and separate families from earlier marriages. The conflicts that inhere in such relationships make the litigation that follows the breakup of such a marriage even more uncertain, unpleasant and costly than would otherwise be the case.³⁵

Prenups should be welcomed “to the extent” that they can reduce the uncertainties in the divorce process created by the “advent of equitable distribution.”³⁶

³¹ N.J.S. 37:2-38 (West 2014).

³² *Guido v. Guido*, 2014 WL 4212456 at 3(App. Div. Aug. 27, 2014) (holding that the antenuptial agreement signed by the plaintiff, a college graduate with a landscaping business, would not leave her to the public charge and the change in lifestyle that would result in the dissolution of the marriage did not render the antenuptial unconscionable) (citing *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995)).

³³ *Marschall v. Marschall*, 195 N.J. Super.16, 29 (Ch. Div. 1984) (holding that a genuine issue of fact existed whether the full disclosure of the husband’s income and assets were made at the signing of the prenup agreement, and the prenup did not bar wife’s request for pendent lite alimony based on the difference between her asserted needs and her monthly income).

³⁴ *Id.* (citing *Posner v. Posner*, 233 So.2d 381, 383 (Fla. Sup. Ct. 1970)).

³⁵ *Marschall*, 195 N.J. Super. at 27.

³⁶ *Id.* at 28; *see also Rogers v. Gordon.*, 404 N.J. Super. 213, 219 (App. Div. 2008) (quoting *Marschall*, 195 N.J. Super. at 28).

The court in *Pacelli v. Pacelli* cautioned that placing a mid-marriage/civil union agreement, as defined in the UPMAA, in the same category as a prenup is inappropriate because the dynamics and pressures involved in a mid-marriage/civil union context are qualitatively different.³⁷ The considerations within the marriage/civil union context are often complex and case specific, but generally center around the desire to preserve an intact family and avoid the turmoil of dissolution.³⁸

New Jersey case law identifies the following categories of postnup agreements:³⁹ (1) property settlement agreements, (2) reconciliation agreements; and (3) mid-marriage/civil union agreements.⁴⁰ New Jersey courts distinguish the agreements by determining whether the parties at the date of the signing intended for the marriage to continue.⁴¹

Property settlement agreements arise at the end of marriage, “in contemplation of divorce[,] to fix each party’s economic rights on entry of a divorce judgment.”⁴² The marital relations have already deteriorated,” the “parties usually deal at arms length” and the “proceeding almost by definition – is adversarial.”⁴³

A reconciliation agreement, on the other hand, seeks to restore the marriage or civil union by reuniting separated parties.⁴⁴ The court in *Nicholson v. Nicholson* identifies several factors that must be demonstrated to enforce a reconciliation agreement:

- (1) The court must determine that the promise to restore marital relations was made when the marital crisis was substantial;
- (2) If the agreement was oral and enforcement is sought of a promise to convey real estate, there must also be compliance with the statute of frauds;
- (3) The court must consider whether the circumstances under which the agreement was entered into were fair to the party charged;
- (4) The terms of the agreement must have been conscionable when the agreement was made;
- (5) The party seeking enforcement must have acted in good faith.⁴⁵

The prerequisite to enforcement is a requirement that “the marital relationship has deteriorated at least to the brink of an indefinite separation or suit for divorce.”⁴⁶ A promise that

³⁷ *Pacelli v. Pacelli*, 319 N.J. Super. 185, 190 (App. Div. 1999), *certif. denied*, 161 N.J. 147 (1999) (holding that a mid-marriage agreement was unenforceable because the marriage did not genuinely deteriorate, instead the agreement was used as leverage against an economically disadvantaged party that wanted to keep the family intact).

³⁸ *See id.*

³⁹ *See* UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 2(2) (using the term “postnup(s)” to describe marital/civil union agreements, or post-nuptial agreements).

⁴⁰ *Id.* at 190-192.

⁴¹ *See id.* at 190.

⁴² *Id.* at 191.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Nicholson v. Nicholson*, 199 N.J. Super. 525, 532 (App. Div. 1985).

“induces a reconciliation” and unites separated parties to restore their marriage or civil union will generally be enforced if it is fair and equitable.⁴⁷

The court in *Pacelli* found that mid-marriage/civil union agreements closely resemble reconciliation agreements.⁴⁸ The postnup agreements contemplated by the UPMAA are described as mid-marriage/civil union agreements in New Jersey case law.⁴⁹ New Jersey courts refrained from adopting the rebuttable presumption applied in other jurisdiction that mid-marriage/civil union agreements are inherently coercive; instead, the courts caution that mid-marriage/civil union agreements “must be closely scrutinized and carefully evaluated.”⁵⁰

The court warned that mid-marriage/civil union agreements are “[p]regnant with the opportunity for one party to use threat of dissolution to ‘bargain themselves into positions of advantage.’”⁵¹

[T]he rights and duties in the marriage [or civil union] relationship are fixed by law and [sic] the parties should not be encouraged to abrogate or avoid them by using family strife to bargain themselves into positions of advantage; [sic] doing so bears the seeds of further strife.⁵²

The court concluded that the policy reasons supporting the validity of a prenup are not applicable to a mid-marriage/civil union agreement and the *sui generis* nature of these agreements requires a fact-sensitive determination.⁵³

V. Conclusion

The UPMAA deviates from the course of state judicial decisions and legislation in New Jersey which distinguish the standard of review for prenups from the standard used to evaluate mid-marriage/civil union agreements. The 2013 amendments to the New Jersey UPAA revised the enforcement provisions in the same manner the UPMAA now recommends, and achieves the ULC’s objective to encourage fair and enforceable prenups. It appears that the New Jersey amendment furthers the consistent treatment of prenups promoted by the UPMAA. By deferring to the 2013 amendments, New Jersey encourages fair and enforceable prenups without encountering the harm that may result from creating a statutory scheme that governs both prenups and mid-marriage/civil union agreements. Staff recommends against enactment of the UPMAA in New Jersey in deference to the body of state law and recent legislation.

⁴⁶ *Pacelli*, 319 N.J. Super. at 191.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See UNIF. PREMARITAL AND MARITAL AGREEMENT ACT, § 2(2).

⁵⁰ *Pacelli*, 319 N.J. Super. at 195; see also *Ward-Gallagher v. Gallagher*, 2010 WL 3257916 at *6 (Aug. 13, 2010).

⁵¹ *Id.* (quoting *Mathie v. Mathie*, 363 P.2d 779, 783 (1961)).

⁵² *Id.*

⁵³ See *Pacelli*, 319 N.J. Super. at 195.