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Criteria for an Enforceable Premarital Agreement

§2.01 Scope of This Chapter

This chapter addresses the general validity of premarital agreements and the basic criteria for a valid agreement. The issue of validity of the agreement as a whole must be distinguished from the question of enforceability of a particular provision. For example, in a few states a provision fixing or waiving spousal support is always unenforceable, and in all states, such a provision could become unenforceable as a result of circumstance. An unenforceable spousal support provision will generally be severable from an otherwise valid agreement.

§2.02 Essential Contractual Elements

A premarital agreement is a contract, albeit of a special type. Thus, to be enforceable, it must adhere to basic requirements for formation of any other contract. The contract must be entered into voluntarily by persons with legal capacity to contract, and there must be consideration.

1. See Section 5.02(a).
2. See Chapter 12, paragraph 49.
(a) Consideration

Both the Uniform Premarital Agreement Act (UPAA) and the Uniform Premarital and Marital Agreements Act (UPMAA) provide that a premarital agreement is valid without consideration.\(^4\) However, the UPAA merely codifies the common law principle that marriage alone is adequate consideration for a premarital agreement.\(^5\) Thus, nothing more is required.

(b) Formalities

Almost uniformly, state law requires that a premarital agreement be in writing and signed by both parties.\(^6\) Before modern enactments, such as the Uniform Premarital Agreement Act, an agreement on consideration of marriage was among those which Statutes of Frauds rendered unenforceable unless there was a written agreement or other writing memorializing the terms. These statutes still exist in many states. The UPAA requires that a premarital agreement be in writing and signed by the parties, as does the UPMAA.\(^7\)

The UPMAA updates the requirement for a writing. A “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form.”\(^8\) The conventional concept of “signed” is also expanded to include the use of an “electronic symbol, sound or process” to “authenticate or adopt a record . . . .”\(^9\) Thus, under the UPMAA parties could enter into an agreement that exists in an electronic format without signing an actual paper document in ink. Nevertheless, many lawyers will continue to prefer creating a paper document and having parties execute multiple originals with inked signatures and initials on every page, including the financial disclosures.

Some states require additional execution formalities such as acknowledgment,\(^11\) recordation in the land records where real estate affected

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\(^4\) UPAA § 2; UPMAA § 6 (2012).
\(^7\) UPAA § 2; UPMAA § 6.
\(^8\) UPMAA § 2(7).
\(^9\) UPMAA § 2(8).
\(^10\) Id.
by the contract is located,\textsuperscript{12} or witnesses.\textsuperscript{13} These requirements are strictly enforced.\textsuperscript{14}

\textbf{(c) Legal Capacity}
At common law, legal capacity to contract is an essential element of all contracts.\textsuperscript{15} Thus, a premarital contract executed by one who lacked capacity at execution will generally be voidable.\textsuperscript{16}

\section*{§2.03 Approaches to Determining Validity: Process Versus Substance}
Two schools of thought provide the framework for determining the validity of a premarital agreement. One school of thought considers a premarital agreement to be a contract no different than any other contract and therefore governed by strict contract principles.\textsuperscript{17} Parties are assumed to be equally capable of protecting themselves and are thus held to their bargain if the process leading to the execution of the agreement was fair. Adherence to an analysis of procedural fairness only will generally permit enforcement of an agreement that was substantively unfair or unconscionable at execution and remains so at death or divorce. The procedural fairness standard incorporates consideration of substantive terms only to a limited extent. This is the approach taken by the UPAA and many non-UPAA states.

\textsuperscript{13} Georgia law defines a premarital agreement made to settle property rights during the marriage or upon death as a marriage contract that must be attested by two witnesses. But, a premarital agreement made in contemplation of divorce does not require witnesses. Ga. Code Ann. § 19-3-63; \textit{Dove v. Dove}, 285 Ga. 647, 680 S.E.2d 839 (2009).
\textsuperscript{15} Restatement Second of Contracts § 12 (1981).
\textsuperscript{16} Id. § 15; UPAA § 2 cmt.; UPMAA § 5 cmt. See further discussion of legal capacity in Section 4.02. There is some suggestion in some cases that statutes such as the UPAA limit defenses to enforcement to those set out in the statute so that common law defenses are no longer viable. See \textit{Sanders v. Sanders}, 2010 Tex. App. LEXIS 8308, where the court observed that, technically, a Texas statute permitting spouses to enter into postmarital agreements limits defenses to enforcement to involuntariness and unconscionability, but upheld a trial court finding that the wife’s lack of capacity rendered the agreement involuntary.
In the other school of thought, courts have a greater role to play in insuring a fair result. A substantive fairness analysis is concerned with the adequacy of the terms of the agreement and whether it makes fair and reasonable provision for the economically weaker spouse. Substantive fairness may be judged as of execution, as of enforcement, or both. A substantive fairness review necessarily allows a degree of judicial subjectivity in deciding whether to uphold an agreement. Moreover, a standard of review that allows a judge to determine fairness as of the date of enforcement permits consideration of events occurring after marriage even though it is precisely to avoid the risk of the uncertainties ahead that motivates many parties to want a premarital agreement in the first place.

The dominant trend is to permit parties to accept any terms they can agree upon so long as the process by which they got there was fair. Even in states where there is a role for the court to judge substantive fairness at enforcement, courts rarely invalidate on that ground alone.

§2.04 Fiduciary or Confidential Relationship

Historically, the status of prospective spouse created a fiduciary or a confidential relationship that imposed an obligation of fair dealing and utmost honesty. Because of this relationship of mutual trust and confidence, courts believed that parties to an impending marriage could not deal at arm’s length. Currently, some states retain the principle that prospective spouses are in either a confidential or a fiduciary relationship, although modified to impose the obligation on both parties without regard to gender, rejecting the “archaic presumption of dominance by the husband. . . .” Other courts

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20. See Section 4.08.
23. Del Vecchio, 143 So. 2d 17, 21.
have rejected application of principles of fiduciary or confidential relationships in favor of treating premarital agreements like any other contract.\(^{24}\) As the California Supreme Court observed in *Bonds v. Bonds*,\(^{25}\) the UPAA does not contemplate “that the voluntariness of a premarital agreement would be examined in light of . . . strict fiduciary duties. . . .”\(^{26}\) There is no presumption of undue influence arising from the agreement to marry under the UPAA.\(^{27}\)

Even when there is no presumption of a fiduciary or a confidential relationship between prospective spouses as a matter of law, such a relationship may exist in a given case as a matter of fact:

A fiduciary relationship is “something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance . . . ordinarily exercised.” *Asleson v. West Branch Land Co.*, 311 N.W.2d 533, 539 (N.D. 1981). . . . A fiduciary relationship develops when someone is under a duty to act for, or to give advice to, another person upon matters within the scope of the relationship. . . . A fiduciary relationship generally arises from an unequal relationship between the parties. . . . For a fiduciary relationship, the superior party must have a duty to act in the dependent party’s best interest. . . . [W]hether a fiduciary relationship exists is generally a question of fact.\(^{28}\)

The existence of a fiduciary or a confidential relationship as a matter of law, or as a result of the parties’ particular circumstances, operates to impose a mutual obligation for full financial disclosure. Further, it requires closer scrutiny of the procedural fairness and substantive terms of the agreement than would be required for an ordinary commercial contract; it also shifts the burden of proof of the elements of validity—most importantly,


\(^{25}\) 24 Cal. 4th 1, 5 P.3d 815 (2000).

\(^{26}\) Id., 24 Cal. 4th at 29, 5 P.3d at 833.

\(^{27}\) *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App. 1997); *Parr*, 635 N.E.2d at 1124.

\(^{28}\) *In re Estate of Lutz*, 563 N.W.2d 90, 98 (N.D. 1997) (citations omitted).
that the agreement was not secured through undue influence—from the opponent to the proponent of the agreement.29

§2.05 BURDEN OF PROOF OF ENFORCEABLE PREMARITAL AGREEMENT

(a) Proof of Existence and Terms of Agreement

The party relying on a premarital agreement has the burden of proving the existence and terms of the agreement.30 The client should be advised to keep a signed original or a photocopy of a signed original of the agreement in a safe place. It is also a good idea for counsel to retain a signed original or a copy of the signed original. When the agreement refers to an asset disclosure schedule as an attachment, counsel should advise the client to retain the schedule and keep it attached to the agreement at all times.31

(b) Burden of Proof of Validity

States take various approaches to placement of the burden of proof required to uphold, or establish the invalidity of, a premarital agreement. The goal of the attorney for the proponent should be an agreement that a court will uphold under any burden of proof that may be applicable, preferably on a motion for summary judgment.

- Burden on the Opponent at All Times. Both the UPAA and the UPMAA place the burden of proving invalidity on the opponent of the agreement. That burden never shifts.32 Some non-UPAA


31. See, e.g., In re Estate of Mary Davis, 213 S.W.3d 288 (Tenn. App. 2006) (premarital agreement invalid after death of wife after 30 years of marriage where wife’s written financial disclosure was not attached to agreement and could not be found).

32. UPAA § 6(a); UPMAA § 9(a); In re Estate of Martin, 938 A.2d 812 (Me. 2008); Bonds v. Bonds, 24 Cal. 4th 1, 5 P.3d 815 (2000); Marsh v. Marsh, 949 S.W.2d 734 (Tex. App. 1997); Lebeck v. Lebeck, 118 N.M. 367, 881 P.2d 727 (Ct. App. 1994); Penhallow v. Penhallow, 649 A.2d 1016 (R.I. 1994).
states similarly place the burden of proof on the party opposing enforcement.\textsuperscript{33}

- **Burden of Proof on the Proponent at All Times.** A few states put the burden of proof on the party relying on the premarital agreement to prove the existence of a valid contract.\textsuperscript{34}

- **Burden on the Opponent, Shifts to the Proponent Once the Opponent Makes a Prima Facie Case.** In a few non-UPAA states, the opponent of the premarital agreement generally has the burden of proving invalidity. However, the burden shifts to the proponent when the opponent makes a prima facie case.\textsuperscript{35} Even where the burden is generally placed on the opponent, when the specific facts of the case show the existence of a fiduciary relationship at the time of execution, the burden of proof will shift to the dominant party to disprove fraud or overreaching.\textsuperscript{36}

- **Burden on the Proponent, Shifts to the Opponent Once the Proponent Makes a Prima Facie Case.** In Pennsylvania, the proponent bears the burden of proof of disclosure, after which the burden shifts to the opponent.\textsuperscript{37} Similarly, in Maryland and Oklahoma the proponent bears the burden of proving the agreement was executed voluntarily with full disclosure.\textsuperscript{38} If the proponent can show there was an actual give-and-take negotiation, the burden shifts to the opponent to establish another contract defense, such as fraud, duress, coercion, mistake, undue influence, incompetence, or unconscionability.\textsuperscript{39}

- **Burden on the Opponent, Except if Unrepresented.** One state, West Virginia, in a 2009 opinion, created a new principle regarding allocation of the burden of proof. In *Ware v. Ware*,\textsuperscript{40} the West Virginia


\textsuperscript{34} See In re Estate of Cassidy, 356 S.W.3d 339 (Mo. Ct. App. 2011); Randolph, 937 S.W.2d 815; Ex parte Williams, 617 So. 2d 1032 (Ala. 1992); McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989).

\textsuperscript{35} Fletcher, 628 N.E.2d at 1343; In re Marriage of Foran, 67 Wash. App. 242, 834 P.2d 1081 (1992).


\textsuperscript{38} Cannon, 384 Md. at 563; Griffin v. Griffin, 94 P.3d 96 (Okla. App. 2004).

\textsuperscript{39} Cannon, 384 Md. at 572–75, 865 A.2d at 583–85; see also Griffin, 94 P.3d 96.

\textsuperscript{40} 687 S.E.2d 382 (W.Va. 2009).
Supreme Court reaffirmed the presumption of validity announced in *Gant v. Gant*, but limited the presumption to cases where both parties had independent counsel. When only one party had counsel, that party has the burden of establishing validity.

§2.06 Legal Advice as a Prerequisite to Validity

(a) Actual Legal Advice

Actual advice of independent counsel is not a prerequisite to validity of a premarital agreement in any state. However, in a few states, in the absence of actual advice there must be either an express, written waiver of the right to such advice, or the opportunity for independent advice, to establish general validity of an agreement. In California an alimony waiver in a premarital agreement is unenforceable unless the claimant had actual advice of counsel. In Arkansas, a party to a premarital agreement cannot effectively waive financial disclosure without actual legal advice. In South Carolina, parties may, by premarital agreement, exclude property from the marital estate at divorce; such an agreement is presumptively fair if both parties had counsel and executed voluntarily and with full financial disclosure. West Virginia’s high court has ruled that a premarital agreement is entitled to a presumption of validity only when both parties had independent counsel. When only one party had counsel, that party must bear the burden of proof.

(b) Access to Legal Advice

The UPMAA requires that a party receiving a proposed premarital agreement have access to independent legal representation before execution. This is a significant departure from prevailing law. Only Connecticut, New

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44. Cal. Fam. Code § 1615(c).
47. *Ware v. Ware*, 687 S.E.2d 382 (W.Va. 2009).
48. UPMAA § 9(a)(2).
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Jersey, and Minnesota require access to counsel for general validity. A few other states require actual legal advice, not merely access, but not for general validity, rather only for waiver of specific rights.

The UPMAA does not mandate actual legal representation, only a meaningful opportunity for legal advice. As one court observed: “[I]nequality of [bargaining positions] may be cured by access to legal counsel by the party in the less advantageous bargaining position.” Access to legal representation necessarily means both the money to hire a lawyer and a reasonable time to find one, get advice, and consider that advice.

§2.07 Requirements for Validity: Procedural Fairness States

(a) UPAA and Procedural Fairness States

In the majority of states, a premarital agreement is valid if the process leading to execution was fair. As of 2016, 26 states (including the District of Columbia) have the UPAA, and a number of other states follow criteria similar to those of the UPAA. The key provision of the UPAA regarding general validity is set forth below:


(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

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

50. See Section 2.06(a).


52. UPMAA § 9(b).

53. Nineteen states adopted the UPAA without changing the validity criteria: Arizona, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kansas, Maine, Montana, Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia. See Appendix B(1), State Law Summary: Premarital Agreements. As discussed in the following section, Arkansas, California, Connecticut, and New Jersey added to the process requirements of the UPAA. Four UPAA states, Connecticut, Indiana, Iowa, and Nevada, made changes to the substantive fairness requirements. See Section 2.08.
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(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.54

Voluntariness is the essential element of a valid premarital agreement
under the UPAA. Nothing more is required. Financial disclosure is optional;
parties may waive financial disclosure as long as the waiver is voluntary.
Even an agreement that was unconscionable at execution is enforceable as
long as the parties executed it voluntarily and the party seeking to enforce
made actual disclosure, or the other party had pre-existing knowledge, or the
other party expressly and voluntarily waived disclosure.55 The premarital
agreement will fail, however, even if voluntary, if it was unconscionable at
execution and there was no actual disclosure, no pre-existing knowledge,
and no express voluntary waiver of disclosure.56 Independent counsel is
not a requirement for validity under the UPAA, although the presence or
absence of independent counsel is one factor a court may consider in deter-
mining voluntariness.

Importantly, the UPAA permits no modification of the disposition of
property provisions of a valid premarital agreement in the event circum-
stances change after execution even if the result at death or divorce will be
unconscionable.57 Under the UPAA, the sole opportunity for modification
of the agreement is when a support waiver will cause a spouse to become
eligible for public assistance. In that event, the court may award spousal

54. UPAA § 6(a).
56. Chaplain, 2011 Va. App. LEXIS 15; Parr v. Parr, 635 N.E.2d 1124. Fairness and uncon-
scionability are discussed in Section 4.08.