Unconscionability: The Heart of the Uniform Premarital Agreement Act

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Throughout the United States, prenuptial[1] agreements have been gaining popularity. Beginning in the early 1990s, a variety of widely circulated magazines, including*Time*,[2] *U.S News and World Report*,[3] *Business Week*,[4] and *Vogue*,[5] have featured stories about the pros and cons of such agreements.

In 1983, in order to remedy the uncertainty of enforcement and the non-uniformity of treatment of premarital agreements throughout the United States, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act, (UPAA)[6]. The Commissioners found that the problems associated with premarital agreements have apparently been caused by a "spasmodic, reflexive response to varying factual circumstances at different times" by the courts.[7] The Commissioners' goal was to create a uniform piece of legislation that would provide sufficient flexibility to accommodate different circumstances.[8] Since 1983, the UPAA has been adopted by 25 states and the District of Columbia,[9] which have incorporated all or a variety of combinations of the sections into their own acts.

The UPAA defines "Premarital Agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage."[10]It requires that such agreements be in writing and signed by both parties,[11] and provides that such agreements are enforceable without consideration.[12] Section 3 broadly describes the permissible subject matter effective upon marriage.[13] Section 5 holds that the agreement may be amended or revoked only by a written agreement signed by the parties.[14]

SECTION 6: STANDARDS FOR UNENFORCEABILITY

The heart of the UPAA, and the section which generates the most controversy, is Section 6, focusing on enforcement of the premarital agreement.[15] Section 6 is the key operative section of the UPAA and sets forth the standards for enforceability of the such agreements. Pursuant to Section 6 (a), a party may avoid enforcement of a premarital agreement by providing either that he or she did not execute the agreement voluntarily or that the agreement was unconscionable[16] when executed.

In addition to the requirements of voluntariness and conscionability, in order to escape enforcement a party must also prove that he or she did not receive a fair and reasonable disclosure of the property or financial obligations of the other party before execution of the agreement, that the party did not waive the right to disclosure, and that the party did not have "or reasonably could have had" adequate knowledge of the other's property of obligation.[17]

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The UPAA's standard of unconscionability is the same standard as embodied in the Uniform

Marriage and Divorce Act (UMDA) partnership role of marriage.**18** The Comments to 6 of the UPAA also suggest that the unconscionability standard is derived, at least in part, from the standard of commercial unconscionability.**19**

DISCLOSURE: HOW MUCH AND WHEN

Despite adoption of the UPAA by twenty-six states, premarital agreements in these jurisdictions are not uniform. States vary not only as to the level of unconscionability required to invalidate a premarital agreement, but also as to the necessary standard of financial disclosure. The UPAA provisions requiring disclosure permit premarital agreements, in certain circumstances, to be enforced without requiring disclosure. Texas for example, does not require each spouse to produce the necessary financial disclosure as required by most states. While this approach varies from state to state, the standard protocol is for both parties to supply sufficient financial information to one another so that a rational and constructive decision can be made before entering into a premarital agreement. In *Fick v. Fick*,**20** for example, the Supreme Court of Nevada invalidated a prenuptial agreement because there was not full financial disclosure before signing.

While the UPAA does specifically permit a spouse to waive disclosure, it permits enforcement of the prenuptial agreement without disclosure when the spouse "knew or reasonably could have known" of the financial situation of the other spouse.**21** Although many courts have used the knew-or-could-have-known standard set for the in the UPAA,**22** several courts have taken the opposite view. These courts have concluded that a premarital agreement is unenforceable without disclosure unless the spouse had actual independent knowledge of the other party's financial situation.**23**

In certain states, the courts will consider the inequity of prenuptial agreements. If a prenuptial agreement is so inequitable that "it is impossible to state it to one with common sense without producing an exclamation at the inequality of it,"**24** some courts will invalidate the agreement regardless of the level of financial disclosure. In some cases where prenuptial agreements permits each spouse to retain a share of the marital property—albeit a small one—courts are more likely to uphold and enforce the agreements.

Some states have held that a premarital agreement is unconscionable if there was a gross disparity in bargaining power which led the party with the lesser bargaining power to sign the contract unwillingly or unaware of its terms and the premarital agreement is one that no sensible person who was not under delusion, duress, or distress would accept.**25** Other states have found that should the enforcement of a prenuptial agreement result in one spouse becoming a public charge, the state's interest in protecting the welfare of the spouse and in mitigating the hardship occasioned by a division justifies "complete judicial reformation by the contract."**26**

One court has even tried to create a good faith exception to an otherwise valid prenuptial agreement in an attempt to aid the duped spouse. In *Pardieck v. Pardeick*,**27** the Court of Appeals of Indiana held that the trial court had improperly determined that, even though the parties' prenuptial agreement was not unconscionable, nonetheless it could not be enforced. The court found that despite the husband's lack of good faith during the marriage, the wife was prohibited from claiming an interest in the husband's business based upon the language in their premarital agreement. The court declined to carve out a new exception to the enforcement of an otherwise valid premarital agreement as Indiana law does not require a duty of good faith and reasonableness be implied in every contract.

ALIMONY/MAINTENANCE MODIFICATION

Section 6 of the UPAA also limits the modification or elimination of spousal support provisions was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

Did not voluntarily expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

If a provision of a premarital agreement modifies or eliminates spousal support and the 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 the eligibility.

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

18. *See* § 306 of the Uniform Marital Property Act, 9B U.L.A. 97 (1996).

19. *See* UPAA, *supra* note 10, § 6 comment, at 377 ("The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression or unfair surprise¼. Hence the act does not introduce a novel standard known to law. In the context of negotiations between spouses as to the financial incidents to 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 one another" (citations omitted) (quoting the Commissioner's note to UMDA § 306.))

20. Fick v. Fick, 109 Nev. 458, 851 P.2d 445 (1993).

21. *See* UPAA § 6(a)(2)(ii), which permits voluntary, express, written waivers of disclosure.

22. *See, e.g.*, Ex parte Walters, 580 So.2d 1352, 1354 (Ala. 1991) (finding that because spouses had lived together for six months prior to marriage, each had an adequate general knowledge of the other's property); In re Matter of Ascherl, 445 N.W.2d 391, 393 (Iowa Ct. App. 1989) (finding that the challenging spouse had visited other spouse's property and reasonably should have known its value); Warren v. Warren, 523 N.E.2d 680 (Ill. Ct. App. 1988) (finding that because the wife worked for husband's company, she thus acquired knowledge of the company's property).

23. *See, e.g.*, Cladis v. Cladis, 512 So.2d 271, 274 (Fla. Dist. Ct. App. 1987) (finding that the proponent of the agreement must establish that the other spouse had "a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the incomes of the parties. The test in this regard is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether the challenging spouse is prejudiced by the lack of information.") (citations omitted); Greenwald v. Greenwald, 454 N.W.2d 34, 39 (Wis. Ct. App. 1990) (holding that the wife's actual knowledge acquired by keeping her husband's books prior to the marriage was sufficient to take the place of disclosure.)

24. Miles v. Werle, 977 S.W.2d 297 (Mo. Ct. App. 1998).

25. Justus v. Justus, 581 N.E.2d 1265 (Ind. 1991).

26. MacFarlane v.Rich, 567 A.2d 585 (N.H. 1989). *See also* Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988) (standing for the proposition that a court may decline to enforce an antenuptial agreement but only where enforcement would leave a spouse in a position where he would be unable to support himself.

27. Pardieck v. Pardieck, 676 N.E.2d 359 (Ind. Ct. App. 1997).

28. UPAA, *supra* note 10, § 6B.

29. Dechant v. Dechant, 867 P.2d 193 (1993).

30. Rider v. Rider, 699 N.E.2d 160 (Ind. 1996).

31. Stalb v. Stalb, 168 Vt. 235 (1998).

32. *See, e.g.*, Bassler v. Bassler, 156 Vt. 353 (1991).

33. *See* "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," 28 *Wake Forest L. Rev*. 1037 (1993).

34. Favrot v. Barnes, 332 So.2d 873 (La. Ct. App.), *rev'd in part on other grounds*, 339 So.2d 843 (La. 1976), *cert. Denied*, 431 U.S. 966 (1977).

35. *See supra* n.10, at § 6(a)(ii).

36. Burtoff v. Burtoff, 418 A.2d 1085 (D.C. Ct. App. 1980).

37. Grant v. Grant, 329 S.E. 2d 106 (W. Va. 1985).

38. Baker v. Baker, 622 So.2d 541 (Fla.Dist. Ct.App. 1993) (holding that antenuptial agreements are enforceable even if one spouse would become a public charge); Simeone v. Simeone, 581 A.2d 162 (Pa. 1990) (holding that unconscionability should be determined at the time of execution and that a change in circumstances should not invalidate an otherwise valid contract).

39. *See supra* n.10, at § 6(a).

40. *See* Gail Frommer Brod, "Premarital Agreements and Gender Justice," 6 *Yale J.L. & Feminism* 229, 262-263 (1994).

41. *See, e.g., Cladis*, 512 So.2d at 273-74; Matuga v. Matuga, 600 N.E.2d 138, 141 (Ind. Ct. App. 1988)); and Randolph v. Randolph, 937 S.W.2d 815, 821 (Tenn. 1996).

42. *See, e.g.*, Lebeck v. Lebeck, 881 P.2d 727, 733 (N.M. Ct. App. 1994) (holding that the UPAA "plac[es] the burden [of proof] solely on the opponent of the agreement with no shift being made for an agreement being 'unfair on its face.'"(citations omitted).

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