

PROPOSED AMENDMENT TO WAIVER SECTION OF UPC ELECTIVE SHARE

TO:

FROM:

SUBJECT: Proposed Amendment to UPC § 2-213 Regarding the Validity of a Premarital or Marital Agreement or Waiver of Elective-Share and Other Rights Arising on Death

DATE: July 23, 2007

The Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) proposes an amendment to § 2-213 of the Uniform Probate Code (UPC). Section 2-213 deals with the validity of a premarital or marital agreement or waiver regarding the elective share of the decedent's surviving spouse. Current § 2-213 is based on the Uniform Premarital Agreement Act (1983). The JEB-UTEA also reviewed the provision on marital and premarital agreements adopted by the American Law Institute in the new Restatement (Third) of Property: Wills and Other Donative Transfers § 9.4 (2003).

The JEB-UTEA was mindful of the fact that elective share systems and other statutory rights arising on death protect against unilateral disinheritance of a spouse but do not interfere with genuinely consensual arrangements that waive or reduce such spousal rights. Although protective in purpose, elective share law is default law, which the parties may alter or abrogate. The parties may decline to have an economic partnership of the kind characteristic of most first marriages. It is particularly common, for example, for two previously married older persons contemplating marriage to wish to ensure that on the first spouse's death, all or most of the decedent's property will go to the decedent's children rather than to the surviving spouse (and ultimately, perhaps, to the surviving spouse's children). Freedom to make an enforceable agreement or waiver of this character not only facilitates the marriage of such a couple, but may also improve the quality of the marriage, smoothing the spouses' relationship to their respective children by providing assurance that the new marriage will not interfere with the children's expectations.

While there are good reasons to respect such contracts or waivers, the relationship between parties contracting in anticipation of marriage, or in the midst of an ongoing marriage, requires legal standards different from ordinary commercial settings. A party negotiating a commercial contract can engage in arms-length dealings to maximize partisan advantage. Parties to a premarital or a marital agreement or waiver are in a relationship of trust and confidence. Entering into or operating within a marriage, an individual may have expectations about his or her partner that may impair the capacity for self-protective judgment, or the inclination to exercise it. The law reasonably requires greater assurance that the parties understand and appreciate the consequences of such a premarital or a marital agreement or waiver.

The JEB-UTEA found that the Restatement's standards strike a fairer balance between two objectives: (1) the objective of assuring that the agreement or waiver is valid if the Restatement's

requirements are satisfied and (2) the objective of reasonably requiring greater assurance that the parties understand and appreciate the consequences of such a premarital or marital agreement or waiver. The JEB-UTEA proposes amending § 2-213 to reflect the Restatement's standards for validity.

SECTION 2-213. WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

~~(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:~~

~~(1) he [or she] did not execute the waiver voluntarily; or~~

~~(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:~~

~~(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;~~

~~(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent 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 decedent.~~

(b) For a premarital or a marital agreement or a waiver to be enforceable against the surviving spouse, the enforcing party must show that the surviving spouse's consent was informed and was not obtained by undue influence or duress.

(c) A rebuttable presumption arises that the requirements of subsection (b) are satisfied,

shifting the burden of proof to the surviving spouse to show that his or her consent was not informed or was obtained by undue influence or duress, if the enforcing party shows that:

(1) before the agreement or waiver was executed, (i) the surviving spouse knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent or his or her representative provided in timely fashion to the surviving spouse a written statement accurately disclosing the decedent's significant assets and asset values, income, and liabilities; and either

(2) the surviving spouse was represented by independent legal counsel; or

(3) if the surviving spouse was not represented by independent legal counsel, (i) the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to obtain independent legal counsel, and offered to pay for the reasonable costs of the surviving spouse's representation; and (ii) the agreement stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the agreement, and the nature of that alteration.

(e d) A premarital or a marital agreement or a waiver is unenforceable if it was unconscionable when it was executed. An issue of unconscionability of an agreement or a waiver is for decision by the court as a matter of law.

(d e) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a

renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

COMMENT

This section incorporates the standards by which the validity of a premarital agreement is determined under the Uniform Premarital Agreement Act § 6.

This section applies to a premarital or marital agreement or unilateral waiver. A premarital agreement is one that was entered into before marriage. A marital agreement is one that was entered into during marriage. A unilateral waiver can be made before or after the marriage.

The right to homestead allowance, exempt property and family allowance are conferred by the provisions of Part 4. The right to disclaim interests is recognized by Section 2-1105. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common desire of parties to second and later marriages to insure that property derived from the prior spouse passes at death to the joint children (or descendants) of the prior marriage instead of to the later spouse. The operation of a property settlement in anticipation of separation or divorce as a waiver and renunciation takes care of most situations arising when a spouse dies while a divorce suit is pending.

Itc \13 "Elective share systems and other statutory rights arising on death protect against unilateral disinheritance of a spouse but do not interfere with genuinely consensual arrangements that waive or reduce such spousal rights. Although protective in purpose, elective share law is default law, which the parties may alter or abrogate. The parties may decline to have an economic partnership of the kind characteristic of most first marriages. It is particularly common, for example, for two previously married older persons contemplating marriage to wish to ensure that on the first spouse's death, all or most of the decedent's property will go to the decedent's children rather than to the surviving spouse (and ultimately, perhaps, to the surviving spouse's children). Freedom to make an enforceable agreement of this character not only facilitates the marriage of such a couple, but may also improve the quality of the marriage, smoothing the spouses' relationship to their respective children by providing assurance that the new marriage will not interfere with the children's expectations.

While there are good reasons to respect such contracts, the relationship between parties contracting in anticipation of marriage, or in the midst of an ongoing marriage, requires legal standards different from ordinary commercial settings. A party negotiating a commercial contract can engage in arms-length dealings to maximize partisan advantage. Parties to a premarital or a marital agreement or waiver are in a relationship of trust and confidence. Entering into or operating within a marriage, an individual may have expectations about his or her partner that may impair the capacity for self-protective judgment, or the inclination to exercise it. The law reasonably requires greater assurance that the parties understand and appreciate the consequences of such a premarital or a marital agreement or waiver.

Signed Writing. itc \13 "Signed Writing. }To be enforceable, an agreement or waiver covered by this section must be in writing, and must be signed by the surviving spouse. The agreement or waiver need not be supported by consideration.

Burden of Proof{itc \13 "Burden of Proof}. Because the parties to a premarital or a marital agreement or waiver are in a relationship of trust and confidence, subsection (b) places the burden of proof on the enforcing party (the party seeking to enforce the agreement or waiver against a surviving spouse who claims the elective share or other statutory rights in violation of the agreement or waiver). The enforcing party must show that the surviving spouse's consent was informed and was not obtained by undue influence or duress. The burden of proof shifts to the surviving spouse to show the opposite, however, if the rebuttable presumption established in subsection (c) of this section applies.

Presumption That Surviving Spouse's Consent Was Informed and Was Not Obtained by Undue Influence or Duress{itc \13 "Presumption That Surviving Spouses Consent Was Informed and Was Not Obtained by Undue Influence or Duress}. If the enforcing party shows the existence of the circumstances described in subsection (c) of this section, the enforcing party benefits from a rebuttable presumption that the requirements of subsection (b) of this section are satisfied, shifting the burden of proof to the surviving spouse.

The rebuttable presumption minimizes the risk of the agreement being found defective in circumstances in which, before the agreement's execution, the surviving spouse knew the decedent's financial situation, understood what legal rights or claims he or she might have as the decedent's surviving spouse, understood how the proposed agreement

intended to alter those rights, and had (or had a reasonable opportunity to have) independent legal representation in negotiating the agreement. The rebuttable presumption is thus designed to increase the predictability and enforceability of premarital and marital agreements by facilitating planning that minimizes the risk of the agreement being found defective.

Knowledge of the Decedent's Financial Situation{tc \13 "**Knowledge of the Decedents Financial Situation**}.}

The surviving spouse must be shown to have had knowledge of the decedent's financial situation when the agreement was executed in order for the rebuttable presumption provided in subsection (c) to arise. Such knowledge is crucial to understanding the agreement's significance, as the assets are themselves the subject of the agreement.

To have the benefit of the rebuttable presumption under subsection (c), the enforcing party must show that, before the execution of the agreement or waiver, (i) the surviving spouse knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent or his or her representative provided in timely fashion to the surviving spouse a written statement accurately disclosing the decedent's significant assets and asset values, income, and liabilities. In circumstances in which the decedent's property consisted importantly of assets for which an immediately ascertainable market price is not available, such as close corporation shares or interests in real estate, the duty to disclose asset values requires the decedent to supply suitable appraisals.

If the parties to the agreement were married or lived together for many years and commingled their finances, or had been business partners, they may have had knowledge of each other's financial situation before the contract negotiations were begun, and such a showing will satisfy the requirements of subsection (c)(1) of this section. In the more typical case in which the parties did not have such knowledge, written disclosure in connection with the agreement is required.

Representation by Independent Legal Counsel.{tc \13 "**Representation by Independent Legal Counsel.** }

Showing that the surviving spouse had knowledge of the decedent's financial situation when the agreement or waiver was executed is essential but not sufficient to give rise to the rebuttable presumption provided in subsection (c) of this section.

The surviving spouse must also have understood what legal rights or claims that he or she might have as the decedent's surviving spouse and understood how the proposed agreement or waiver intended to alter those rights. Under subsection (c)(2) of this section, that requirement can be satisfied by showing that the surviving spouse was represented by independent legal counsel. An independent counsel can be expected to provide advice that is customized to the client's particular situation, explain the legal rights that would accrue to the client as surviving spouse, and negotiate the terms of the agreement on behalf of the client.

Reasonable Opportunity to Obtain Independent Legal Counsel and Clear Explanation of the Import of the Agreement or Waiver. If the surviving spouse was not represented by independent legal counsel, the enforcing party can obtain the benefit of the rebuttable presumption by making two further showings. First, the enforcing party must show that the surviving spouse had a reasonable opportunity to obtain independent legal counsel in a timely fashion. That is, the enforcing party must show that the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to obtain independent legal counsel; and offered to pay for the reasonable costs of the surviving spouse's representation.

The enforcing party must also show that the agreement stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the agreement, and the nature of that alteration.

To qualify under subsection (c)(3) of this section, the language must be explicit, concrete, and reasonably complete, but need not address every detail of the agreement's legal significance. For example, the language need not ordinarily explain the tax consequences of the agreement's provisions (although such an explanation would be necessary if tax planning was a primary purpose of the agreement and the tax impact on the surviving spouse is both significant and adverse).

Unconscionability. A premarital or a marital agreement or a waiver is unenforceable if it was unconscionable when it was executed. In accordance with general principles of contract law, subsection (d) provides that an issue of unconscionability is for decision by the court as a matter of law.

Effect of Premarital Agreement or Waiver on ERISA Benefits. As amended in 1984 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its provisions to provide that an election of a waiver shall not take effect unless

(i) the spouse of the participant consents in writing to such election,

(ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designation by the participant without any requirement of further

consent by the spouse), and
(iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

See 29 U.S.C. § 1055(c) (1988); Int. Rev. Code § 417(a).

In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.1992), the court held that a premarital agreement was not an effective waiver of a wife's claims to spousal death benefits under a qualified profit sharing plan in which the deceased husband was the sole participant. The premarital agreement provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executor, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties ... with respect to any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the other party, as fully as though the parties had never married...." The court held that the premarital agreement was not an effective waiver because it "did not designate a beneficiary and did not acknowledge the effect of the waiver as required by ERISA." 982 F.2d at 781. Although the district court had held that the premarital agreement was also ineffective because the wife was not married to the participant when she signed the agreement, the Second Circuit "reserve[d] judgment on whether the [premarital] agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage." *Id.* at 781 n. 3. The court did, however, quote *Treas. Reg. § 1.401(a)-20* (1991), which specifically states that "an agreement entered into prior to marriage does not satisfy the applicable consent requirements...." *Id.* at 762. Other cases involving the validity of premarital agreements on ERISA benefits include *Callahan v. Hutsell*, *Callahan & Buchino*, 813 F.Supp. 541 (W.D.Ky.1992); *Zinn v. Donaldson Co., Inc.*, 799 F.Supp. 69 (D.Minn.1992); *Estate of Hopkins*, 574 N.E.2d 230 (Ill.App.Ct.1991); see also *Howard v. Branham & Baker Coal Co.*, 1992 U.S.App. LEXIS 16247 (6th Cir.1992).

Cross Reference. See also Section 2-208 and Comment.