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Are changes to state's premarital agreement law in the wind?

Illinois did not recognize premarital agreements affecting divorce until a 1972 holding by the Illinois Appellate Court.

After *Valid v. Valid*, 6 Ill.App.3d 386, 286 N.E. 2d 42, there were a number of decisions which applied common-law principles to determine the validity of premarital agreements. Essentially, the party who sought to enforce the premarital agreement had the burden to prove it was fair and reasonable and not contrary to public policy.

Moreover, the agreement could not create an unforeseen condition of penalty to a party due to lack of property, resources or employability and the agreement must have been entered into with full knowledge and without fraud, duress or coercion. (See *Warren v. Warren*, 169 Ill.App.3d 226, 523 N.E.2d 680 (1988).) "Knowledge" assumed understanding the agreement and the decisions made which would necessarily include disclosure of assets and liabilities.

The Illinois case law standard developed after 1972 led to seemingly inconsistent decisions. The "fairness" and "reasonable" standard called for subjective decisions. With the anger inevitably arising in contested divorces, it became common for the party who waived rights to try to have the agreement, if not for any other wrongful conduct, found invalid as being unreasonable or unfair.

It became difficult to predict outcomes if litigating enforceability of agreements, thereby making settlements difficult to reach.

In 1989, the Illinois legislature passed the Illinois Uniform Premarital Agreement Act, which became effective for agreements executed after Jan. 1, 1990. The Illinois Uniform Premarital Agreement Act was the product of the Commissioners on Uniform State Laws in 1983 and was approved by the American Bar Association. The Uniform Act intended to make agreements more binding than before and discourage litigation simply because of

buyer's remorse.

Illinois adopted the Uniform Act provisions except as it related to modifying or eliminating spousal support, which Uniform Act permitted waivers of spousal support if enforcement would not cause a party to be eligible for support under a program of public assistance. If the court did not enforce the waiver, it would allow the court to require the other party to provide support to the extent necessary to avoid that eligibility.

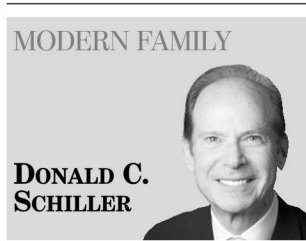
The Illinois version of the Uniform Act permits courts to deny enforcement of waivers of maintenance that would cause a party to the agreement undue hardship, considering circumstances not reasonably foreseeable at the time of execution. If the court found undue hardship, it would enforce the agreement only if the other party provided support necessary to avoid such hardship.

In addition, the Uniform Act changed the traditional burden of proof. The party wanting to avoid enforcement now has the burden of proof to show the agreement is not enforceable because of limited specific reasons detailed in the statute.

Once a written agreement is proven to have been executed, it is presumptively valid and enforceable unless the party challenging enforceability can show it was not signed voluntarily or that the agreement was unconscionable when executed. Voluntariness includes challenges such as duress, coercion, lack of knowledge and understanding the rights being waived, but the commission intentionally did not include the requirement that either party have legal counsel.

Also, proving unconscionability sufficient to avoid enforceability goes beyond proving the terms were unconscionable, but that the challenging party had not received a fair and reasonable disclosure of the property and obligations of the other when agreeing unless they had voluntarily waived the right to disclosure.

Even if disclosure was not waived and there was no formal



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disclosure, the objecting party then must show they did not have or reasonably could not have had actual knowledge of the property and financial obligations of the other.

After Jan. 1, 1990, the effective date of the Uniform Act, cases and precedent made it clear that avoiding enforcement was much more difficult. Therefore, agreements typically include standard language waving disclosure except to the extent made at the time of the agreement.

With a clear written waiver of disclosure, a party to an agreement could not sustain an unconscionability defense to enforcement regardless of the terms. According to the Commission on Uniform State Laws, 27 states, including Illinois, adopted the Uniform Premarital Agreement Act. Judges, lawyers and people contemplating premarital agreements became accustomed to the agreement's high level of enforceability.

But now, the Commission on Uniform State Laws has changed its Uniform Act to make it more sensitive to consumer protection. In 2012, the commission promulgated the Uniform Premarital and Marital Agreement Act. This new Uniform Act has been approved by two states: Colorado and North Dakota.

The good news is that it codifies marital agreement require-

ments (commonly called postmarital agreements) as well as premarital agreements. Enforceability standards appear to be the same.

In my opinion, the bad news is that it weakens enforcement provisions in a manner complicating the process of entering into the agreements offering special protections to a party who chose to not have legal counsel.

If a party does not have independent counsel at the time of the agreement, the agreement is not enforceable unless the agreement includes a notice of waiver of rights or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement.

The new Uniform Act requires adequate financial disclosure that specifically includes accurate descriptions of property, as well as good faith estimates of value, liabilities as well as the income of the other party unless there is a separate signed record expressly waiving the right to financial disclosure beyond the disclosure provided. Or, the party actually knew of the property, estimated value, liabilities and income when the agreement was executed.

A troubling provision added weakening enforceability is, if the court finds that as a whole, enforcement results in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed, it may not enforce the agreement or an offending term. This takes us back to the time when there was uncertainty of the protections provided for in the agreement and likely opens the door to more challenges and litigation.

The new Uniform Act has not yet been introduced in the Illinois legislature. Nor has it been approved by the Illinois State Bar Association, The Chicago Bar Association or the American Academy of Matrimonial Lawyers. Be on the lookout for if or when it is submitted to the Illinois legislature and be sure to let your voices, experiences and opinions be heard.