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### Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho

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# The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho

ELIZABETH BARKER BRANDT\*

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## I. INTRODUCTION

In 1995, the Idaho Legislature adopted the Uniform Premarital Agreements Act (UPAA).<sup>1</sup> The Act was adopted with a minimum of fanfare and little public comment.<sup>2</sup> Given the paucity of case law dealing with premarital agreements in Idaho,<sup>3</sup> the Act fills a niche that needed filling. In addition, the Act provides a more protective

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1. UNIF. PREMARITAL AGREEMENTS ACT, 9B U.L.A. 371 (1987) [hereinafter UPAA] (codified in Idaho at IDAHO CODE §§ 32-921 to -929 (1996)).

2. *Minutes, Senate Judiciary and Rules Committee*, S. 1083, 53d Leg., 1st Reg. Sess. (Idaho 1995). The only testimony was from Rex Blackburn, Commissioner, Idaho Commission on Uniform State Law. *Id.*

3. See *infra* notes 69-108 and accompanying text.

approach to enforcement of remarital agreements than that established by the Idaho Court of Appeals in *Liebelt v. Liebelt*.<sup>4</sup> Finally, the UPAA establishes an arguably lower standard of disclosure for the enforcement of premarital agreements than is established by Idaho case law on post-marital agreements.<sup>5</sup>

In this article, I will discuss the provisions of the UPAA, attempt to place the UPAA in the larger context of judicial treatment of premarital agreements and discuss the criticisms of the Act. I will then discuss the pre-UPAA law in Idaho and show how the UPAA fills the gaps in that law and how it possibly alters the approach previously taken by the Idaho courts.

## II. AN OVERVIEW OF THE UNIFORM ACT

### A. In General

The Uniform Premarital Agreements Act (UPAA) was proposed by the National Conference on Uniform State Laws (NCUSL) in 1983 and has since been adopted by twenty-five states.<sup>6</sup> The UPAA, presented by its drafters as a codification of basic common law principles, was slow to catch on but has been easily adopted in an increasing number of jurisdictions.<sup>7</sup> The information packet put together by NCUSL, and provided to state legislators with the Act, states that

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4. 118 Idaho 845, 801 P.2d 52 (Ct. App. 1990). See *infra* notes 87-108 and accompanying text for a discussion of the *Liebelt* decision.

5. See *infra* notes 109-121 and accompanying text.

6. See UNIF. PREMARITAL AGREEMENTS ACT, 9B U.L.A. 371 (1987 & Supp. 1996); ARIZ. REV. STAT. ANN. §§ 25-201 to -205 (West Supp. 1996); ARK. CODE ANN. §§ 9-11-401 to -413 (Michie 1993); CAL. FAM. CODE §§ 1600-17 (West 1994); 1995 Conn. Acts 95-170 §§ 1-11 (Reg. [Spec.] Sess.); DEL. CODE ANN. tit. 13, §§ 321-328 (Supp. 1996); HAW. REV. STAT. ANN. §§ 572D-1 to -11 (Michie 1997); IDAHO CODE §§ 32-921 to -929 (1996); 750 ILL. COMP. STAT. ANN. §§ 10/1 to 10/11 (West Supp. 1996); IND. CODE ANN. §§ 31-7-2.5-1 to -10 (Michie Supp. 1996); IOWA CODE ANN. §§ 596.1 to .12 (West 1996); KAN. STAT. ANN. §§ 23-801 to -811 (1995); ME. REV. STAT. ANN. tit. 19, §§ 141-151 (West Supp. 1996); MONT. CODE ANN. § 40-2-601 to -610 (1995); NEB. REV. STAT. §§ 42-1001 to -1011 (Supp. 1996); NEV. REV. STAT. ANN. §§ 123A.010 to .100 (Michie 1993); N.J. STAT. ANN. §§ 37:2-31 to -41 (West Supp. 1996); N.M. STAT. ANN. §§ 40-3A-1 to -10 (Michie Supp. 1996); N.C. GEN. STAT. §§ 52B-1 to -11 (1987 & Supp. 1996); N.D. CENT. CODE §§ 14-03.1-01 to -09 (1991); OR. REV. STAT. §§ 108.700 to .740 (1990); R.I. GEN. LAWS §§ 15-17-1 to -11 (1996); S.D. CODIFIED LAWS §§ 25-2-16 to -25 (Michie 1992); TEX. FAM. CODE ANN. §§ 5.41 to .56 (West 1993); UTAH CODE ANN. §§ 30-8-1 to -9 (1995); VA. CODE ANN. §§ 20-147 to -155 (Michie 1995).

7. See Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 127 n.4 (1993). The UPAA was adopted in Idaho with virtually no debate or public input. See *supra* note 2 and accompanying text.

the UPAA "makes no radical departure from the developing common law; indeed, it incorporates the best principles of existing state laws on premarital agreements."<sup>8</sup>

The drafters of the UPAA sought to propose a statute that would ensure greater enforceability of premarital agreements.<sup>9</sup> From this perspective, section 6 of the Act is the key provision.<sup>10</sup> That section provides that a premarital agreement is not enforceable if the party challenging the agreement proves either that she or he did not execute the agreement voluntarily<sup>11</sup> or, that the agreement was unconscionable when executed.<sup>12</sup> To prove unconscionability, section 6 provides that the challenging party must establish that she or he was not provided full and fair disclosure of the other party's property and financial information,<sup>13</sup> did not waive disclosure,<sup>14</sup> or did not know or reasonably could not have known of the other party's property or financial information.<sup>15</sup>

Despite the representations of its drafters, the UPAA goes beyond merely codifying existing common law principles. At the time the UPAA was drafted, the law regarding enforcement of premarital agreements was rather young<sup>16</sup> and no coherent framework had

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8. UNIFORM LAW COMMISSIONERS, *Why All States Need the Uniform Premarital Agreement Act*, in UNIFORM PREMARITAL AGREEMENT ACT — INFORMATION PACKET (1994) (on file with author) [hereinafter UPAA INFORMATION PACKET]. See also Atwood, *supra* note 7, at 127 (quoting an apparently identical document identified as UNIFORM LAW COMMISSIONERS, *Why All States Need the Uniform Premarital Agreement Act*, in UNIFORM PREMARITAL AGREEMENT ACT — INFORMATION PACKET (1990) (on file with Atwood)).

9. UPAA INFORMATION PACKET, *supra* note 8. See also Atwood, *supra* note 7, at 142.

10. The UPAA also contains, among others, provisions regulating the formalities, content, amendment, and revocation of premarital agreements. See UPAA, *supra* note 1, §§ 2, 3, 5, at 372-75. For in-depth discussions of these provisions, see Laura P. Graham, *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); Faith H. Spencer, *Expanding Marital Options: Enforcement of Premarital Contracts During Marriage*, 1989 U. CHI. LEGAL F. 281.

11. UPAA, *supra* note 1, § 6(a), at 376.

12. UPAA, *supra* note 1, § 6(b), at 376.

13. UPAA, *supra* note 1, § 6(b)(i), at 376.

14. UPAA, *supra* note 1, § 6(b)(ii), at 376.

15. UPAA, *supra* note 1, § 6(b)(iii), at 376.

16. In an important article, Judith Younger briefly traces the judicial recognition of premarital agreements to 16th century England. Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1060 (1988) [hereinafter Younger]. See also Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 147-

emerged from the state court treatment of these agreements.<sup>17</sup> In fact, at about the same time that the UPAA was proposed, NCUSL also proposed the Uniform Marital Property Act (UMPA)<sup>18</sup> which established a somewhat different standard for the enforcement of premarital agreements than the UPAA.<sup>19</sup> In particular, although premarital agreements regulating property rights at the death of one of the spouses has long been a part of the marital landscape, such agreements were not generally recognized as effective to allocate property rights between the spouses at divorce until the 1970s.<sup>20</sup> Thus, the phenomenon of one spouse asserting rights under the agreement against the other spouse as part of a divorce action was, at the time the UPAA was drafted, a somewhat new and growing phenomenon.<sup>21</sup>

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48 (1996). Most commentators seem to agree, however, that, driven by higher divorce rates and some key cases in the early 1970s, premarital agreements have enjoyed a resurgence. See Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 264-65 (1994). Many believe the use and enforcement of premarital agreements continues to increase. See Brod, *supra*, at 232; Pamela George, *Can A Woman of the 90's Have it All? Or, Is She Once Again Faced With the Age Old Question — "What's A Girl To Do"?*, 8 J. AM. ACAD. MATRIM. LAW. 73, 74 (1992); Guggenheimer, *supra*, at 151.

17. A survey of law review articles discussing the enforcement of premarital agreements published around the time the UPAA was proposed illustrates the diversity of opinion and approach to these types of contracts. See, e.g., J. Thomas Oldham, *Premarital Contracts are Enforceable Unless . . .*, 21 HOUS. L. REV. 757, 759 (1984) ("A uniform standard for the enforceability of such contracts has yet to evolve; some states grant spouses substantial freedom to contract, while others impose strict procedural requirements and public policy limits.") (footnote omitted); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982) (advocating the adoption of a coherent framework for the enforcement of marriage contracts because none existed at the time); Pamela M. Donna, Note, *Antenuptial Agreements Governing Alimony or Property Rights Upon Divorce: Osborne v. Osborne*, 24 B.C. L. REV. 469 (1983) (noting, throughout, the disparate treatment of antenuptial agreements from jurisdiction to jurisdiction); Stephen P. Stanczak, Note, *For Better or For Worse . . . But Just in Case, Are Antenuptial Agreements Enforceable*, 1982 U. ILL. L. REV. 531, 531, 544 (noting the "non-uniform treatment of agreements which purport to perform the same function" and noting a trend toward the enforcement of agreements that "do not work an undue hardship on either of the parties").

18. UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 97 (1996) [hereinafter UMPA].

19. The UMPA provides that the spouses shall exercise good faith towards each other and that the duty of good faith may not be altered by agreement. UMPA, *supra* note 18, at § 2.

20. See generally Homer H. Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979) (reviewing the requirements for enforcement of premarital contracts).

21. Interestingly enough, the drafters of the UPAA themselves recognized the uncertainty in the emerging law of premarital agreements in the states. Thus,

At the time the UPAA was drafted, most jurisdictions were just beginning to sort out the "second generation" issues created by their relatively recent recognition of the enforceability of such arrangements. The drafters of the UPAA sorted through this developing state law and, from it, adopted a view of such agreements that certainly was within the mainstream of the developing law, but that avowedly emphasized freedom of contract over protection of the economically un-empowered spouse.<sup>22</sup> It was not at all clear at the time the UPAA was drafted that the freedom of contract view would emerge as the predominant view if states were left to sort out the enforcement issues without the help of a uniform act. In fact, a number of state courts have rejected the freedom of contract view adopted by the UPAA drafters.<sup>23</sup> Even some of the states that have adopted the UPAA have softened some of its most criticized provisions.<sup>24</sup> The criticism of the UPAA has centered on several policy decisions made by its drafters relating to the burden of proof in actions challenging the Act, and to the contours of the Act's provisions regarding unconscionability.<sup>25</sup>

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while stating that the proposed act "makes no radical departure from developing common law," the drafters also argued that the law of premarital contracts "remains confusing, vague and varies from state to state." UPAA INFORMATION PACKET, *supra* note 8, at *Why All States Need the Uniform Premarital Agreement Act*.

22. The freedom of contract approach adopted by the UPAA drafters apparently was driven by their desire for certainty and uniformity in the enforcement of properly executed agreement: "[W]ith the increasing awareness among prospective marital partners of the need to settle issues of property and income between themselves before marriage, the need for adequate, valid premarital agreements grows." UPAA INFORMATION PACKET, *supra* note 8, at *Uniform Premarital Agreement Act*.

23. See *infra* notes 31, 50, 52, 57 and accompanying text.

24. See N.D. CENT. CODE § 14-03.1-07 (1991) (adding a section providing that "[n]otwithstanding the other provisions of this chapter, if a court finds that the enforcement of a premarital agreement would be clearly unconscionable, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of an unconscionable provision to avoid an unconscionable result."). Iowa, Nevada, and New Jersey made financial disclosure an independent requirement for validity of premarital agreements under their versions of the UPAA. See IOWA CODE ANN. § 596.7 (West 1996); NEV. REV. STAT. ANN. § 123A.010 to .100 (Michie 1993); N.J. STAT. ANN. § 37:2-31 to :2-41 (West Supp. 1996). See also *Fick v. Fick*, 851 P.2d 445, 449 (Nev. 1993) (discussing Nevada's version of the UPAA and pointing out Nevada's unique approach that non-disclosure is an independent basis for invalidating a premarital agreement). California, Iowa, and South Dakota did not adopt section 3(a)(4) of the UPAA permitting the modification or elimination of spousal support as an appropriate subject for a premarital agreement. See CAL. FAM. CODE § 1612 (West 1994); IOWA CODE ANN. § 596.5 (West 1996); S.D. CODIFIED LAWS § 25-2-18 (Michie 1992). Arkansas permits waivers of the requirements of the UPAA only after consulting an attorney. ARK. CODE ANN. § 9-11-406 (Michie 1993).

25. See ALEXANDER LINDEY & LOUISE I. PARLY, 3 LINDEY ON SEPARATION

The criticism of the Act, however, must be viewed in a larger context. At the time the UPAA was drafted some jurisdictions had not (and today still have not) adequately dealt with the questions of enforcement of premarital agreements.<sup>26</sup> A few jurisdictions have adopted a view of such agreements that is even less protective of the un-empowered spouse than the UPAA.<sup>27</sup> Thus, adoption of the UPAA has provided a needed structure and context in which such agreements can be enforced or struck down. Moreover, most of the Act's critics have focused on its provisions regarding burden of proof, unconscionability and disclosure, to the exclusion of the provision requiring voluntariness.<sup>28</sup> By overlooking the voluntariness requirement, these commentators have concluded that the Act departs more dramatically from pre-UPAA authority than it actually does.

### B. Burden of Proof

The first contentious provision of section 6 is its imposition of the burden of proof on the party challenging the agreement in all situations.<sup>29</sup> While pre-UPAA and non-UPAA courts generally placed the burden of proof on the challenging party, courts sometimes effectuated a shift of the burden under certain circumstances.<sup>30</sup> In a number of cases, such courts have taken the position that if the pre-

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AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90.12, at 90-106 (1991); Atwood, *supra* note 7, at 142-52; Brod, *supra* note 16, at 275-82; Ronald S. Ladden & Robert J. Franco, *The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat From the Unconscionability Analysis*, 4 AM. J. FAM. L. 267 (1990); Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1, 40 (1992) [hereinafter Younger, *Update*].

26. See *supra* note 17 for the commentators' discussions of the law of premarital agreements around 1983 when the UPAA was adopted. The discussion of Idaho law, *infra* notes 69-108 and accompanying text, indicates that to date, the law in Idaho has not developed with any level of clarity in this area.

27. *E.g.*, *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990) (arguably the court rejected a review of substantive fairness of the agreement altogether). See Atwood, *supra* note 7, at 140-41 for a discussion of the *Simeone* case. See also *Lemaster v. Dutton*, No. 2950324, 1996 WL 661730, at \*25 (Ala. Civ. App. Nov. 15, 1996) (applying the Alabama rule that an agreement is enforceable if "the party against whom the agreement is being enforced [has] . . . general knowledge, not a full knowledge, of the other's estate").

28. See, *e.g.*, Atwood, *supra* note 7, at 143 (omitting completely a discussion of the voluntariness requirement); Ladden & Franco, *supra* note 25, at 272-73 (also focusing exclusively on unconscionability); Younger, *Update*, *supra* note 25, at 40 (noting the voluntariness requirement of the UPAA but not discussing it).

29. UPAA, *supra* note 1, § 6(a), at 376. See, *e.g.*, LINLEY & PARLY, *supra* note 25, at § 90.12.

30. See, *e.g.*, Brod, *supra* note 16, at 262-63.

marital agreement makes no provision or a disproportionately small provision for the economically un-empowered spouse, a presumption of overreaching arises. Once this happens, the burden of proof then shifts to the proponent of the agreement to establish that the execution of the agreement by the un-empowered spouse was voluntary and based on a full understanding of that spouse's property rights and the nature and extent of the property.<sup>31</sup> The UPAA contains no similar provision for shifting the burden of proof, thus making it arguably more difficult to attack the validity of a premarital agreement.<sup>32</sup>

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31. See *Cladis v. Cladis*, 512 So. 2d 271, 273-74 (Fla. Dist. Ct. App. 1987) ("Once the claiming spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) 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 income of the parties."); *Matuga v. Matuga*, 600 N.E.2d 138, 141 (Ind. Ct. App. 1988) (reasoning that while the burden of proof is generally on the party challenging the agreement, "[w]hen, however, the [proponent of the agreement] has a degree of dominance, that party may be required to demonstrate that the agreement is valid, but only if the dominance and its employment has vitiated the free will of the party challenging the agreement and even then, only if the party defending the agreement has obtained a substantial and unconscionable advantage."); *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn. 1989) ("Under the common law, the proponent of the agreement had the burden of demonstrating the procedural fairness of the agreement at its inception. Because we hold that Minn. Stat. § 519.11 did not alter common law rules of procedural or substantive fairness applicable to provisions relating to the allocation of marital property, [the proponent of the agreement] has the burden of establishing the fairness of the contract—both procedurally and substantively."); *Sogg v. Nevada State Bank*, 832 P.2d 781, 784 (Nev. 1992) ("Because of the presumed fiduciary relationship existing between parties who are engaged to be married, a presumption of fraud has been found where the agreement entered into greatly disfavors one of the parties. This presumption may be overcome by a showing that the party claiming disadvantage was not in fact disadvantaged.") (citations omitted); *Randolph v. Randolph*, 937 S.W.2d 815, 821 (Tenn. 1996) ("As we interpret the knowledge element of the [Tennessee] statute, the spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that a full and fair disclosure of the nature, extent, and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings.")

32. See, e.g., *Lebeck v. Lebeck*, 881 P.2d 727, 733 (N.M. Ct. App. 1994) ("The



### C. Voluntariness

The UPAA requirement of voluntariness<sup>33</sup> appears to be completely consistent with the vast majority of non-UPAA requirements for premarital agreements. In addition, the requirement of the UPAA appears to overlap to some extent with the non-UPAA approach to procedural unconscionability. The UPAA's voluntariness requirement proscribes agreements procured by fraud<sup>34</sup> and duress.<sup>35</sup> In addition, the voluntariness provision proscribes conduct leading to the execution of premarital agreements that does not rise to the level of fraud or duress. By using the term "voluntary" in section 6 rather than expressly limiting the Act to fraud and duress, the drafters of the UPAA contemplated that conduct short of fraud or duress would be relevant to the voluntariness of an agreement.<sup>36</sup>

The comments to section 6 support a broad interpretation of the voluntariness requirement. After summarizing the general standards for enforceability of premarital agreements, the comments to section 6 state that "[i]n each of these situations, it should be underscored that execution must have been voluntary."<sup>37</sup> In support of this statement, the drafters of the UPAA cited *Lutgert v. Lutgert*<sup>38</sup> and the provisions of the Delaware Code on premarital agreements requiring a ten day waiting period.<sup>39</sup> *Lutgert* involved a situation in which the

Uniform Premarital Agreements Act has altered these tests by placing the burden solely on the opponent of the agreement with no shift being made for an agreement being 'unfair on its face.'" (citations omitted).

33. UPAA, *supra* note 1, § 6(a), at 376.

34. Lewis Becker, *Premarital Agreements: An Overview*, in *PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS* 1, 8 (Edward L. Winer et al. eds., 1993) (citing fraud as "one of the clearest examples of involuntary assent").

35. *Id.* at 11 (arguing that "the concept of duress [in the premarital agreement context] . . . seems to blend often indistinguishably into a discussion of voluntariness").

36. Professor Becker points out that the requirement of "voluntariness" in the execution of a premarital agreement was often imposed by courts in the pre-UPAA case law. Becker, *supra* note 34, at 10. See also Younger, *Update*, *supra* note 25, at 19-20 ("The inquiry into voluntariness begins as a common law review for fraud, overreaching, or sharp dealing but probes deeper than the similar inquiry made in cases of ordinary contracts. Some factors involved in this assessment are the parties' respective experience in worldly affairs, . . . the timing of the signing of the agreement in relation to the time of the wedding and the parties' representation by independent counsel.") (footnotes omitted).

37. UPAA, *supra* note 1, § 6 cmt., at 376.

38. 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976).

39. DEL. CODE ANN. tit. 13, § 301 (repealed 1996). This section provided in relevant part:

husband "sprung" the premarital agreement on the wife hours before the wedding while they were having their wedding rings sized and after all plans for the wedding had been completed. When the wife expressed reluctance to sign the agreement, the husband told her no agreement, no wedding.<sup>40</sup> The wife spoke only to the husband's lawyers before signing the agreement one-half hour before the ceremony. The court, holding the agreement invalid because the wife's assent was not voluntarily given, stated:

Surely, particularly at the last moment, a prospective wife ought not be forced into a position of being 'bought' at the price of losing all if she does not agree to a grossly disproportionate benefit to the husband should she leave him under any and all circumstances . . . .<sup>41</sup>

The drafters' citation to *Lutgert* and to the procedural protections of the Delaware Code certainly indicate their intent that the voluntariness provisions of the UPAA be read broadly.

Prior to the UPAA, courts used the rubric of voluntariness to include a myriad of factors such as timing,<sup>42</sup> knowledge of underlying legal rights,<sup>43</sup> knowledge and understanding of the terms of the

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A man and a woman in contemplation of matrimony, by a marriage contract executed in the presence of 2 witnesses at least 10 days before the solemnization of the marriage, may determine what rights each shall have in the other's estate during marriage and after its dissolution by death and may bar each other of all rights in their respective estates not so secured to them, and any such contract duly acknowledged before any officer authorized to take acknowledgements [sic] may be recorded in the deed records in the office of the recorder in any and all counties of the State.

*Id.* This provision was repealed when Delaware adopted the Uniform Premarital Agreements Act in 1996. 70 Del. Laws 462 (1996).

40. *Lutgert*, 338 So. 2d at 1114.

41. *Id.* at 1116.

42. Becker notes that "the more time the spouse had, the more likely the agreement is to be upheld." Becker, *supra* note 34, at 10. Compare *In re Marriage of Matson*, 730 P.2d 668, 672-73 (Wash. 1986) (affirming court of appeals' decision based in part on the timing of the agreement's execution, finding that "the timing of the agreement negated any inclination respondent may have had to secure independent advice." The wife was presented with the agreement for the first time four days before the marriage and was required to sign it on the evening before the wedding.) with *Taylor v. Taylor*, 832 P.2d 429, 431 (Okla. Ct. App. 1991) (wife had agreement for three months prior to signing it). But see *DeLorean v. DeLorean*, 511 A.2d 1257 (N.J. Super. Ct. Cl. Div. 1986) (upholding an agreement signed just hours before the wedding because the wife had the opportunity to consult with an attorney who advised her not to sign the agreement).

43. See, e.g., *Orgler v. Orgler*, 568 A.2d 67, 70 (N.J. Super. Ct. App. Div.

agreement,<sup>44</sup> and availability of independent legal advice<sup>45</sup> to determine the voluntariness of any particular agreement. As Judith Younger, in the second of her important articles on premarital agreements describes it, "[t]he inquiry into voluntariness begins as a common law review for fraud, overreaching, or sharp dealing."<sup>46</sup>

#### D. Unconscionability

In addition to requiring voluntariness, the UPAA imposes a requirement that premarital agreements not be unconscionable.<sup>47</sup> The comments to section 6 of the UPAA suggest that the standard of unconscionability is the same standard as that found in the Uniform Marriage and Divorce Act provisions regarding the enforceability of separation agreements<sup>48</sup> or the standard of commercial unconscionability.<sup>49</sup> Many commentators have argued that the motivation of the UPAA drafters to enhance the enforceability of premarital agreements led them to adopt a less protective approach to unconscionability than was emerging in state courts at the time.<sup>50</sup>

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1989) (striking down agreement in part because wife did not understand concepts of equitable division and alimony).

44. See, e.g., *In re Marriage of Foran*, 834 P.2d 1081, 1089 (Wash. 1992) (striking down the agreement because "it was not explained to [the wife] that, by virtue of the contract, [the husband's] already substantial wealth could be increased at the expense of the marital community").

45. Younger, while noting that no state requires independent advice of counsel as a requirement for validity, describes the existence of independent advice of counsel as "the best evidence that a party made an agreement voluntarily." Younger, *Update*, *supra* note 25, at 20. See, e.g., *Friedlander v. Friedlander*, 494 P.2d 208, 214 (Wash. 1972) (striking down an agreement, in part, because the wife did not have independent advice prior to signing the agreement).

46. Younger, *Update*, *supra* note 25, at 19-20.

47. UPAA, *supra* note 1, § 6(b), at 376.

48. See UPAA, *supra* note 1, § 6 cmt., at 376 (citing UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 216-17 (1987) [hereinafter UMDA]). Interestingly enough, a number of commentators have pointed out that a party can more easily escape the binding effect of a separation agreement under the UMDA than a premarital agreement under the UPAA; under the UMDA a separation agreement regarding spousal maintenance is not binding if a court finds it "unconscionable." UMDA, *supra* § 306, at 216.

49. UPAA, *supra* note 1, § 6 cmt, at 377 ("The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise . . . . Hence the act does not introduce a novel standard unknown to the law.") (citations omitted) (quoting the Commissioner's note to UMDA, *supra* note 48, at 217).

50. See Atwood, *supra* note 7, at 128-29; Younger, *Update*, *supra* note 25, at 42-43; Ladden & Franco, *supra* note 25, at 272-73. Feminist writers have also criticized the UPAA as departing from the common law of many states in a way

The UPAA drafters opted to evaluate unconscionability at the time the agreement is executed.<sup>51</sup> In doing so, however, they deviated from the approach of jurisdictions which evaluated the unconscionability of an agreement at the time of enforcement.<sup>52</sup> In addition, the UPAA provisions regarding disclosure open the door for

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that is disproportionately hard on women. *See generally* Brod, *supra* note 16. *See also* George, *supra* note 16, at 82; Guggenheimer, *supra* note 16, at 153-54.

51. UPAA section 6(a)(2) provides that the agreement can be set aside if it "was unconscionable when it was executed" among other requirements. UPAA, *supra* note 1, § 6(a)(2), at 376. UPAA section 6(b) does permit the court to evaluate the fairness of an agreement's provisions for spousal support at the time the agreement is enforced if the agreement's provisions for or bar on spousal support will cause one of the spouses to become dependent on public assistance. UPAA, *supra* note 1, § 6(b), at 376.

52. *See, e.g.,* Newman v. Newman, 653 P.2d 728, 734-35 (Colo. 1982) ("One of the purposes of the [Uniform Dissolution of Marriage] Act is to mitigate potential harm to a spouse caused by the dissolution of marriage. This purpose militates against the strict enforcement of an antenuptial provision for maintenance which, while drafted with meticulous care and utmost good faith and perfectly reasonable at the time of the execution of the agreement, has since become unconscionable in terms of its application to the spouse at the time of the marriage dissolution. The policy to mitigate against potential harm is consistent with the legitimate governmental interest of the state generally to protect the health and welfare of its citizens. It is not unrealistic to recognize that the health and employability of the spouse may have so deteriorated during a marriage that to enforce the maintenance provisions of an antenuptial agreement would result in the spouse becoming a public charge. Thus, we do not subscribe to the view that the antenuptial agreement, even though entered into in accordance with the strict tests heretofore alluded to, is strictly enforceable regardless of intervening events which have rendered it in effect unconscionable."); *Justus v. Justus*, 581 N.E.2d 1265, 1273 (Ind. Ct. App. 1991) (holding that a court may consider circumstances at the time of dissolution in determining unconscionability); *Gross v. Gross*, 464 N.E.2d 500, 509 (Ohio 1984) ("One who, by way of a motion for modification, claims the unconscionability of a provision for maintenance within an antenuptial agreement has the burden of showing the unconscionable effect of the provision at the time of divorce or dissolution."); *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985) ("[P]renuptial agreements will be enforced in their explicit terms only to the extent that circumstances at the time the marriage ends are roughly what the parties foresaw at the time they entered into the prenuptial agreement. In this regard the passage of time, a change of position based upon reasonable reliance on the permanence of the marriage, and the birth of children are relevant factors, among others, for a court to consider."); *Button v. Button*, 388 N.W.2d 546, 552 (Wis. 1982) ("Clearly an agreement fair at execution is not unfair at divorce just because the application of the agreement at divorce results in a property division which is not equal between the parties or which a court might not order under [the equitable distribution statute]. If, however, there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce.").

premarital agreements to be enforced without requiring disclosure in all circumstances, an approach that varies from some non-UPAA courts.<sup>53</sup> By permitting a spouse to waive disclosure,<sup>54</sup> and by permitting enforcement of a premarital agreement without disclosure where the spouse knew or reasonably could have known of the financial situation of the other spouse<sup>55</sup> the Act broadens the possibility of enforcement by weakening the standard of unconscionability.

A number of courts have taken the approach adopted by the UPAA regarding the "knew or could have known" standard.<sup>56</sup> In contrast to the UPAA, however, many 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.<sup>57</sup>

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53. See *Fick v. Fick*, 851 P.2d 445, 449 (Nev. 1993) (interpreting Nevada's unique version of the UPAA, see *supra* note 24, and prior Nevada case law requiring disclosure as making disclosure an independent requirement for enforcement of a premarital agreement).

54. UPAA section 6(a)(2)(ii) permits voluntary, express, written waivers of disclosure. UPAA, *supra* note 1, § 6(a)(2)(ii), at 376.

55. *Id.* The UPAA's language regarding knowledge — "did not have, or reasonably could not have had, an adequate knowledge" of the other spouse's finances — is curious. *Id.* (emphasis added). The use of the term "could" implies that if the spouse could have discovered the other's finances, he or she has some implied obligation to inquire, regardless of whether a reasonable spouse would have done so.

56. See *Ex parte Walters*, 580 So. 2d 1352, 1354 (Ala. 1991) (finding that because the spouses had lived together for six months prior to marriage, the one spouse 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, 683 (Ill. App. Ct. 1988) (finding that because the wife worked for husband's company, she thus acquired knowledge of his property); *In re Marriage of Adams*, 729 P.2d 1151, 1156 (Kan. 1986) (upholding an agreement, in part, because the wife was a real estate agent who had the opportunity to visit the husband's property, had a long time friendship with the husband prior to the marriage and had significant family connections to the defendant's business).

57. 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 income 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); *Hartz v. Hartz*, 234 A.2d 865, 871 (Md. 1967) ("If there is neither proper disclosure nor actual knowledge and the allowance made to the one who waives is unfairly disproportionate to the worth of the property involved at the time the agreement is made, the burden is cast upon the one who

The UPAA's provision permitting express written waivers of disclosure<sup>58</sup> is the broadest practical exception to the disclosure requirements that had been emerging in many state courts. Prior to the UPAA, little authority existed for the waiver of disclosure. Some state codes provided for waiver<sup>59</sup> and an occasional court had implied that a party waived the right to disclosure through his or her behavior.<sup>60</sup> The language of the UPAA requiring waivers of disclosure to be express and in writing offers some protection against the sorts of implied waivers sometimes recognized by courts.

Finally, commentators have pointed to the UPAA provision limiting the modification of alimony provisions in a premarital agreement to only situations where modification is necessary to keep the weaker spouse off public assistance<sup>61</sup> as a significant deviation from the non-UPAA law of many states.<sup>62</sup> This provision is an exception

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relies on the agreement to prove that it was entered into voluntarily, freely and with full knowledge of its meaning and effect."); *Ryken v. Ryken*, 461 N.W.2d 122, 125 (S.D. 1990) ("[A]n antenuptial agreement will be held valid if the prospective spouse can be said to have had adequate knowledge of the nature and extent of the other party's property, either as a result of disclosure by the other party or through the independent knowledge, however acquired, of the prospective spouse, or if the prospective spouse has been adequately provided for by the agreement.' . . . While Husband does not dispute [this] legal principle, . . . he contends this Court should impose upon Wife in this case an obligation to find out what the Husband owned. We decline to do so.") (citations omitted); *Randolph v. Randolph*, 937 S.W.2d 815, 821 (Tenn. 1996) (striking down the agreement because the wife did not have actual knowledge of the "full nature, extent and value" of the husband's holdings); *Greenwald v. Greenwald*, 454 N.W.2d 34, 39 (Wis. Ct. App. 1990) (holding that the wife's actual knowledge acquired by keeping the husband's books prior to the marriage was sufficient to take the place of disclosure).

58. UPAA, *supra* note 1, § 6(a)(2)(ii), at 376.

59. CAL. CIV. CODE § 5315(a)(2)(B) (West Supp. 1992). See current version at CAL. FAM. CODE §§ 1610 to 1617 (1994); VA. CODE ANN. § 20-151(2)(ii) (Michie 1995).

60. See, e.g., *Hafner v. Hafner*, 295 N.W.2d 567, 569-70 (Minn. 1980) (finding that wife's statements to husband's attorney that she knew what the agreement was and that it was what they wanted, constituted a waiver of her right to disclosure); *Greenwald v. Greenwald*, 454 N.W.2d 34, 39 (Minn. Ct. App. 1990) (holding agreement enforceable because evidence showed that wife wanted to marry husband regardless of whether he had additional assets or not).

61. UPAA, *supra* note 1, § 6(b), at 376.

62. See *Marschall v. Marschall*, 477 A.2d 833, 840-41 (N.J. Super. Ct. Ch. Div. 1984) ("An agreement which would leave a spouse a public charge or close to it, or which would provide a standard of living far below that which was enjoyed both before and during the marriage would probably not be enforced by any court.") (emphasis added); *Gross v. Gross*, 464 N.E.2d 500, 510-11 n.11 (Ohio 1984) (holding that "[u]nconscionability of a provision for maintenance and sustenance contained in an antenuptial agreement may be found in a number of circumstanc-

to the general approach to unconscionability adopted in the Act in that it permits modification of alimony provisions that are unfair based on circumstances at the time of enforcement rather than at the time of execution.<sup>63</sup> However, this provision has been criticized for placing the standard for modification so high as to make effective policing of fairness for alimony provisions at the time of divorce all but impossible.<sup>64</sup>

### III. IDAHO LAW DEALING WITH ENFORCEMENT OF PREMARITAL AGREEMENTS

#### A. Statutory Authority

Prior to the adoption of the UPAA in Idaho, little direct statutory authority expressly regulating premarital agreements existed in Idaho. The Idaho Code did contain provisions dealing with "marriage settlement agreements." These provisions did not set forth substantive requirements for such agreements but, rather, established procedural hurdles for them, requiring, among other things, that they be "in writing, executed and acknowledged or proved in like manner as conveyances of land."<sup>65</sup> These provisions have been part of the Idaho statutory law since Idaho's original adoption of a community property system during the territorial period in 1867<sup>66</sup> and have been the primary basis for the transmutation of community property between the spouses. Prior to the enactment of the UPAA, which did not displace these provisions of Idaho law but rather was tacked on to the

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es, examples of which might be an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse"; *In re Marriage of Purcell*, 783 P.2d 1038 (Or. Ct. App. 1989) (enforcing alimony award despite wife's waiver in an antenuptial agreement because she had "no other reasonable source of support").

63. See *Rider v. Rider*, 669 N.E.2d 160, 163 (Ind. 1996). *Rider* cites UPAA section 6(b) and suggests that the UPAA codifies the view that antenuptial agreements are enforceable unless unconscionable at the time of dissolution. *Id.* The court's citation to the UPAA was dicta and appears to read section 6(b) more broadly than the drafters intended.

64. See, e.g., *Atwood*, *supra* note 7, at 147-48.

65. IDAHO CODE § 32-917 (1996). The Idaho Code also provides that such agreements must be recorded, IDAHO CODE § 32-918 (1996), and that the effect of recording is the same as for a land conveyance. IDAHO CODE § 32-919 (1996).

66. 1867 Idaho Territory Laws 16-18.

end of them,<sup>67</sup> it was generally assumed that these provisions governed both pre- and post-marital agreements.<sup>68</sup>

### B. Idaho Premarital Agreement Cases

Only three Idaho cases even come close to addressing the standards to be applied to the enforcement of premarital agreements.<sup>69</sup> In *Jones v. Jones*,<sup>70</sup> the wife brought an action against the husband to dissolve their second marriage.<sup>71</sup> Previously, at the dissolution of their first marriage (of twenty-two years), the wife and husband had negotiated a separation agreement which provided, among other things, for the equal division of their community property, custody of the children in the wife and child support. In that separation agreement, the wife also waived any rights to alimony. In anticipation of their second marriage, the wife and husband executed a prenuptial agreement which "ratified and confirmed the terms of the previous separation agreement and, in addition, provided that all income earned from the parties' separate property would be community property and that all separate debts and property should remain separate."<sup>72</sup>

The second marriage of the spouses in *Jones* lasted two years.<sup>73</sup> The wife commenced the second divorce action; she sought \$1,500 per month alimony and alleged that all the property acquired since the beginning of their first marriage was community property despite the terms of the earlier separation and prenuptial agreements.<sup>74</sup> The wife argued that both the separation and prenuptial agreements were procured as a result of fraud, coercion and undue influence and that

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67. The older transmutation provisions are found in IDAHO CODE §§ 32-918 to -920 (1996), and the UPAA is codified as IDAHO CODE §§ 32-921 to -928 (1996).

68. Compare *Wolford v. Wolford*, 117 Idaho 61, 785 P.2d 625 (1991) (applying Idaho Code sections 32-918 to -920 to a premarital agreement) with *Suchan v. Suchan*, 106 Idaho 654, 682 P.2d 607 (1984) and *Stockdale v. Stockdale*, 102 Idaho 870, 643 P.2d 82 (Ct. App. 1982) (both applying provisions to post-marital agreements). The assumption was codified in section 32-916 in 1980 when the section was amended to apply to "agreements entered into prior to or during marriage." IDAHO CODE § 32-916 (1980) (amended 1995). The reference to premarital agreements was eliminated when the UPAA was adopted. 1995 Idaho Sess. Laws 229.

69. See *Jones v. Jones*, 100 Idaho 510, 601 P.2d 1 (1979); *Wolford*, 117 Idaho at 61, 785 P.2d at 625; *Liebelt v. Liebelt*, 118 Idaho 845, 801 P.2d 52 (Ct. App. 1990).

70. *Jones*, 100 Idaho at 510, 601 P.2d at 1.

71. *Id.* at 511, 601 P.2d at 2.

72. *Id.*

73. *Id.*

74. *Id.*



she did not have independent advice of counsel for either agreement.<sup>75</sup>

While the court did not expressly so state, it appears that the parties engaged in some level of disclosure regarding their property at the time of the two agreements in question because the primary wrangling in the litigation was over whether the values of the property were accurate.<sup>76</sup>

The court granted summary judgment against the wife without addressing the substantive requirements necessary for a prenuptial agreement to withstand judicial policing.<sup>77</sup> Instead the court held that the wife had failed to advance any evidence regarding the inaccuracy of the property values.<sup>78</sup> By virtue of her failure to respond to a timely request for admissions, the wife was held to have admitted that the values provided by the husband for their community property represented the fair market value of the property.<sup>79</sup> In addition, in response to interrogatories and at deposition, the wife could provide no information as to how the values provided by the husband were inaccurate.<sup>80</sup> According to the court, the substance of the wife's objection to the agreement appeared to be that her husband had exhibited distrust of her by insisting on the agreement.<sup>81</sup>

*Jones* seems to indicate that disclosure of assets including valuations, was apparently made by the husband to the wife at the time the agreements were formed. As a result of the wife's discovery default, however, the case provides little guidance on the necessary prerequisites for enforcement of a prenuptial agreement.

In *Wolford v. Wolford*,<sup>82</sup> the Idaho court again addressed the enforceability of a prenuptial agreement. In *Wolford*, the husband's attorney prepared an agreement which the husband presented to the wife two weeks before the marriage.<sup>83</sup> The husband also made arrangements for the wife to consult independent counsel regarding the

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75. *Id.*

76. *Id.* (noting that the husband's request for admissions were to the effect that the "parties' agreed-to valuation" was also equal to the fair market value of the property") (emphasis added). See also *id.* at 512, 601 P. 2d at 3 ("Wife has admitted, by virtue of her failure to deny, that *all the property values ascribed by the parties* to their community property were fair market values.") (emphasis added).

77. *Id.* at 513-14, 601 P.2d at 4-5.

78. *Id.* at 512, 601 P.2d at 3.

79. *Id.* at 512-13, 601 P.2d at 3-4.

80. *Id.*

81. *Id.* at 513, 601 P.2d at 4.

82. 117 Idaho 61, 785 P.2d 625 (1991).

83. *Id.* at 62, 785 P.2d at 626.

agreement. The court also noted that "the agreement listed in a schedule both David and Kathryn's separate property."<sup>84</sup> The agreement provided that the income from the wife's salary, personal earnings and separate property would remain her separate property.<sup>85</sup> It also provided that the salaries and earnings of the husband would be community property but that the income or increase in value of the husband's separate property would remain his separate property.<sup>86</sup>

Because the circumstances under which the prenuptial agreement in *Wolford* was formed were not at issue, the case provides little guidance on the standards for enforcement. The facts of *Wolford* establish, however, that the parties observed a procedure by which the wife had independent counsel at the time of the agreement and the agreement contained a disclosure of assets (although the nature and extent of the disclosure is unknown). Moreover, the terms of the agreement appear to have been favorable to the wife — allowing her to retain her earnings and salaries as separate property and only waiving her claim in the increase in value of the husband's separate property.

The most recent and directly applicable Idaho case is a court of appeals decision, *Liebelt v. Liebelt*.<sup>87</sup> There the husband insisted that the premarital agreement, drafted by his attorney, be signed before the marriage.<sup>88</sup> Although the wife was reluctant, both spouses signed the agreement two days before the ceremony.<sup>89</sup> The agreement "combined" their separate property but provided that they would each retain a one-half undivided interest in each item of their "combined property" as separate property.<sup>90</sup> In addition the agree-

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84. *Id.* at 62-63, 785 P.2d at 626-27.

85. *Id.* at 62, 785 P.2d at 626.

86. *Id.* The agreement in *Wolford* was not challenged as being unconscionable; nor was the adequacy of the disclosure provided at the time the agreement's formation was challenged. Rather, the wife argued that the agreement had been subsequently modified through an informal note written on a napkin at a bar in which the husband allegedly promised to give the wife an interest in a corporation that was his separate property. The court held that the attempted modification of the prenuptial agreement was invalid because of lack of mutuality. *Id.* at 65, 785 P.2d at 629. The court believed that "[the napkin note] was an attempt to quiet marital discord, rather than an attempt to transmute a multimillion dollar separate property asset into community property." *Id.* In addition, the napkin note failed to comply with the formalities for execution of a marriage settlement agreement. *Id.* at 66, 785 P.2d 630. ("[N]either had [Kathryn] shown that the formalities required in I.C. §§ 32-917 to -919 had been followed").

87. 118 Idaho 845, 801 P.2d 52 (Ct. App. 1990).

88. *Id.* at 846, 801 P.2d at 53.

89. *Id.*

90. *Id.* at 846-47, 801 P.2d 53-54.

ment provided for a distribution of this "separate combined" property by which the parties would hire an appraiser to determine the value of the property and would alternately select items of the property until the value on each side was equal.<sup>91</sup>

Both the magistrate and district judges held that the agreement was unenforceable on the grounds of duress and that it was not entered into freely by the wife.<sup>92</sup> The court of appeals reversed and, for the first time, directly addressed the prerequisites for enforcement of prenuptial agreements. Writing for the court, Judge Walters began the analysis by noting that "[w]hen examining, or determining the validity of, a prenuptial agreement we apply ordinary contract principles unless otherwise noted by statute or case precedent."<sup>93</sup>

Analyzing the duress issue, the court in *Liebelt* held that

[t]o be voidable on the grounds of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unconscionable, or illegal; the defense of duress cannot be predicated on demands which are lawful or the threat to do that which the demanding party has a right to do.<sup>94</sup>

The court reasoned that the husband's threat not to go through with the marriage if an agreement was not reached was something the husband had a legal right to do and, thus, could not form the basis of a duress claim.<sup>95</sup>

With respect to undue influence, the court held that the spouse attacking the agreement must show that she was "compelled by artifice, force or fear to do, what [s]he does not want to do, and what [s]he would not otherwise do but for such influence."<sup>96</sup> Thus, the

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91. *Id.* at 847, 801 P.2d at 54.

92. *Id.* at 846, 801 P.2d at 53.

93. *Id.* at 847-48, 801 P.2d at 54-55 (citing *Vail v. Vail*, 117 Idaho 520, 789 P.2d 208 (Ct. App. 1990)). Interestingly enough, *Vail* did not deal with the enforceability of a prenuptial agreement, but rather dealt with the interpretation of a separation agreement that had been incorporated into a divorce decree. Moreover, the court did not directly address the standards to be applied in interpreting the agreement in *Vail*, other than to cite two non-marital contract cases as the basic authority on the contract interpretation question at issue. *Vail*, 117 Idaho at 522, 789 P.2d at 210.

94. *Liebelt*, 118 Idaho at 848, 801 P.2d at 54 (citing *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953)).

95. *Id.*

96. *Id.* at 848, 801 P.2d at 55 (citing *Kelly v. Perrault*, 5 Idaho 221, 48 P. 45 (1897)).

court reasoned that undue influence had not occurred because the husband's threat to call off the marriage did not rise to the level of using artifice, fear or force to compel the wife to do something that she would not otherwise do.<sup>97</sup>

Finally, the court addressed the wife's claim that she did not understand the agreement and therefore should not be held to it.<sup>98</sup> Here, the court reasoned that her signature on the contract indicated her intent to enter the contract. Relying on case law from outside the premarital agreement context, the court concluded:

[A] written contract cannot be avoided by one of the parties to it on the ground that he signed it without reading it and did not understand it; failing to read the contract or to have it read to him or to otherwise inform himself as to the nature, terms and conditions of the contract constitutes nothing more than gross negligence on the part of that party and is an insufficient ground upon which to set the contract aside.<sup>99</sup>

Key to the court's reasoning in *Liebelt* was the fact that the husband had encouraged the wife "repeatedly" to get independent advice of counsel.<sup>100</sup> And, although she did not obtain independent representation, the wife participated in the drafting of the agreement.<sup>101</sup> The facts do not reveal whether disclosure of particular assets or financial information was made at the time the agreement was entered into. Finally, the agreement appeared, on its face, to have been fair to the wife. In fact, the court's opinion does not make clear what the wife stood to gain by contesting the agreement; it did not waive alimony claims and it effectuated a relatively even division of property that otherwise would have been separate property.<sup>102</sup>

*Liebelt's* reasoning that premarital contracts are governed by the same standards that govern non-marital contracts between third parties, is problematic<sup>103</sup> in that it ignores the special status of the marital relationship.<sup>104</sup> Moreover, the court was selectively blind in

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97. *Id.*

98. *Id.*

99. *Id.* at 848-49, 801 P.2d at 55-56 (citing *Milner v. Earl Fruit Co. of the Northwest*, 40 Idaho 339, 345-46, 232 P. 581, 583 (1925); *Grant Lumber Co. v. North River Ins. Co. of N.Y.*, 253 F. 83 (D. Idaho 1918)).

100. *Id.* at 849, 801 P.2d at 56.

101. *Id.*

102. *Id.*

103. Becker also impliedly criticizes *Liebelt* for applying a traditional contract approach to duress rather than recognizing duress as a more general component of voluntariness. Becker, *supra* note 34, at 9-10.

104. Judith Younger has identified several reasons why premarital agreements

its survey of non-marital contract law in that it completely ignored the possibility that the parties to a premarital agreement are in a confidential relationship. Such a relationship between parties to a premarital agreement has been recognized by virtually every other court that has addressed these cases.<sup>105</sup> The Idaho courts have consistently recognized a definition of confidential relationship outside the domestic relations context, broad enough to include the relationship between two people contemplating marriage.<sup>106</sup>

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differ from other contracts. First, the subject matter of premarital agreements, marital property and spousal support, rights and obligations of the spouses during marriage, and the rearing and care of children, is of greater interest to the state than is the subject matter of the typical commercial contract. Second, the parties to a premarital agreement are most often involved in a confidential relationship in which their bargaining power is seldom equal. Finally, premarital agreements generally are performed some time in the future of a relationship that has not yet begun and which may continue for many years before the agreement is executed. Younger, *Update*, *supra* note 25, at 3-4. See Atwood, *supra* note 7, at 131-33 for a detailed discussion and elaboration of Younger's reasoning.

105. The existence of a confidential relationship has been recognized most often as the basis for much of the special protection accorded to premarital agreements. In his hornbook on domestic relations law, Homer Clark states that "[m]any courts take the view that the prospective spouses are in a confidential relationship, and this seems clearly correct." 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 1.9, at 44 (2d ed. 1987). See also Atwood, *supra* note 7, at 133; Younger, *Update*, *supra* note 25, at 18-19 (stating that "[a]ccording to most courts, parties to antenuptial agreements do not deal at arm's length; rather they are in confidential relationships that call for good faith, candor and sincerity in all matters connected with the agreement"). For recent cases recognizing the confidential relationship between prospective spouses, see *Estate of Beesley*, 883 P.2d 1343, 1346 (Utah 1994) ("The mutual trust between the parties raises an expectation that each party will act in the other's best interest . . . . Parties to premarital agreements therefore are held to the highest degree of good faith, honest, and candor in connection with the negotiation and execution of such agreements."); *Carpenter v. Carpenter*, 449 S.E.2d 502, 504 (Va. Ct. App. 1994) ("Parties engaged to be married are not dealing at arm's length. They have a special relationship of trust and confidence.").

106. In *Klein v. Shaw*, 109 Idaho 237, 706 P.2d 1348 (Ct. App. 1985), the Idaho Court of Appeals set forth the requirements for a confidential relationship in Idaho. *Klein* involved a situation in which the transferors deeded land to the transferees in an exchange for an oral contract to reconvey the land at a later date. *Id.* at 239, 706 P.2d at 1350. The parties had a long-term friendship in which the transferee had also served as insurance agent and personal financial advisor to the transferors. *Id.* at 238, 706 P.2d at 1349. The case turned on the question of whether a confidential relationship arose between the parties such that the transferees had a duty to deal fairly with the transferors. *Id.* at 239, 706 P.2d at 1350. Relying, in part, on the Restatement of Restitution, the court reasoned that a confidential relationship exists "wherever by reason of kinship, business association, disparity of age, etc., the transferee is in an especially close relationship to the transferor, and the latter reposes a high degree of trust and confidence

Idaho case law regarding contracts between persons in a confidential relationship provides significant support for a more protective approach to a premarital agreement than that applied by the *Liebelt* court. The Idaho courts have held that the existence of a confidential relationship gives rise to an affirmative duty to disclose information to the other party and to act fairly toward that party.<sup>107</sup> Finally, the Idaho Court of Appeals has recognized a broad approach to the doctrine of unconscionability in commercial contracts that permits such contracts to be challenged for procedural irregularities in the formation of the contract short of duress or fraud.<sup>108</sup>

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in the former." *Id.* at 240, 706 P.2d at 1351 (citing the RESTATEMENT OF RESTITUTION § 166, cmt. d (1937)). See also, *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (finding a confidential relationship between homeowners and their building contractor); *Stearns v. Williams*, 72 Idaho 276, 288, 240 P.2d 833, 840-41 (1952) ("A fiduciary relationship does not depend upon some technical relation created by or defined in law, but it exists in cases where there has been a special confidence imposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of one reposing the confidence.").

107. In *Bethlahmy*, 91 Idaho at 55, 415 P.2d at 698, the court found that the existence of a confidential relationship between homeowners and the builder of their home, imposed upon the builder a duty to disclose the fact that an unsealed irrigation ditch ran under the garage of the home. In reaching this conclusion, the *Bethlahmy* court relied on the Second Restatement of Torts which provides:

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them . . . .

RESTATEMENT (SECOND) TORTS § 551(2) (1976) (quoted in *Bethlahmy*, 91 Idaho at 59, 415 P.2d at 702). See also *Stearns*, 72 Idaho at 287-88, 240 P.2d at 840-41.

108. In *Hershey v. Simpson*, 111 Idaho 491, 725 P.2d 196 (Ct. App. 1986), the Idaho Court of Appeals addressed the requirement for unconscionability in a commercial contract. Writing for the court, Judge Burnett reasoned that an agreement could be either procedurally or substantively unconscionable. According to the court, "[p]rocedural unconscionability relates to the bargaining process leading to an agreement. It is characterized by disparity in the bargaining positions of the parties, by extreme need of one party to reach some agreement (however unfavorable), or by threats short of duress." *Id.* at 493-94, 725 P.2d at 198-99. Substantive unconscionability relates to the agreement itself. According to Judge Burnett, substantive unconscionability could be shown only in special circumstances where

'at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties.' The elements of one-sidedness, oppression and unfair surprise are commonly cited in analysis of unconscionability.

### C. Idaho Post-Marital Agreement Cases

In addition to these premarital contract cases, the Idaho courts have addressed the enforceability of marriage settlement agreements negotiated by spouses in the shadow of divorce and have taken a very protective approach to these agreements.

In *Compton v. Compton*,<sup>109</sup> the Idaho Supreme Court set forth the requirements for attacking the enforceability of a marriage settlement agreement negotiated in contemplation of divorce. The action in *Compton* arose in the context of an independent action for relief from a final judgment of divorce, into which the parties' property settlement agreement had been merged. The court held that an "extreme degree of fraud" must be shown to support an independent action attacking a prior judgment.<sup>110</sup> Regarding the property settlement agreement, the court held that the husband and wife were involved in a fiduciary relationship until such time as their marriage was dissolved.<sup>111</sup> This fiduciary relationship, is not altered because the parties are negotiating in contemplation of divorce. As the court explained:

This fiduciary duty extends to the parties' negotiations leading to formation of the property settlement agreement during marriage, and requires, at least, a disclosure by both parties of all information within their knowledge regarding the existence of community property and of pertinent facts necessary to arrive at a reasonable valuation of the property.<sup>112</sup>

In characterizing an earlier decision, the court reasoned:

In *Sande v. Sande*, the court held that where a separation agreement is unfair and inequitable, and where overreaching appears, the agreement may be avoided despite the absence of actual fraud and duress. That is, the presence of overreaching automatically shifts the burden to the party benefitted by the unequal agreement to show that the community should not be reapportioned. Overreaching often appears where one of the parties is not represented by independent counsel.<sup>113</sup>

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*Id.* (quoting *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976)).

109. 101 Idaho 328, 612 P.2d 1175 (1980).

110. *Id.* at 335, 612 P.2d at 1182.

111. *Id.* at 336, 612 P.2d at 1183.

112. *Id.*

113. *Id.* (citation omitted).

In *Compton*, the wife alleged that the husband had misrepresented the value of the community property.<sup>114</sup> On its review of the record, however, the court found that the wife's allegations that she was unaware of the property values or that she did not suspect the values provided by the husband were not supported.<sup>115</sup> Rather the court concluded that the husband had made adequate disclosure of the existence of the property and of the fact that its value had appreciated even though there was significant room to argue that the husband had undervalued the property. Thus, the court held that the wife's allegations did not, as a matter of law, rise to the level necessary to show the extreme degree of fraud necessary to set aside a judgment.<sup>116</sup> Importantly, the court refused to consider whether the husband's disclosures would have been sufficient had the court been considering the question in a direct appeal from the divorce action.<sup>117</sup>

In *Golder v. Golder*,<sup>118</sup> the Idaho Supreme Court upheld the trial court decision to set aside the final judgment of divorce which incorporated a property settlement agreement reached as a result of fraud and overreaching of the husband. In *Golder* the husband made false representations to the wife regarding the value and extent of their community property. He told her that they were on the verge of bankruptcy which was not true. He represented her fair share of the community at a level significantly lower than its true value. As a result of his representations, the wife signed a property settlement agreement that provided her a community property distribution of approximately \$11,000 when the actual value of their community estate was more than \$355,000.<sup>119</sup> The court, affirming *Compton's* characterization of the marriage as giving rise to a fiduciary relation, held that the husband concealed the values of the community property and overreached the wife who was not represented by counsel as part of the negotiations.<sup>120</sup>

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114. *Id.* at 332, 612 P.2d at 1179.

115. *Id.* at 336-37, 612 P.2d at 1183-84.

116. *Id.* at 334, 612 P.2d at 1181.

117. *Id.* at 337, 612 P.2d at 1184 ("We expressly decline to decide whether we would agree with the husband's valuation if this matter were before the court on appeal from the divorce decree."). See also *Bodine v. Bodine*, 114 Idaho 163, 165, 754 P.2d 1200, 1202 (1988) ("The failure of a spouse to make such disclosures may be grounds for setting aside a judgment that divides the community inequitably.").

118. 110 Idaho 57, 714 P.2d 26 (1986).

119. *Id.* at 60, 714 P.2d at 29.

120. *Id.* at 61, 714 P.2d at 30.



Since *Compton*, it has been clear in Idaho that parties to a marriage are in a fiduciary relationship that imposes on them a duty to deal fairly with each other. That duty includes a duty to disclose the existence of community property and the necessary information to enable a party to arrive at their own valuation of that property. Where an agreement effectuates an unfair division of the property, the burden is on the person who benefits from the agreement to show that it was fairly obtained. Furthermore, the Idaho courts have viewed the lack of independent advice of counsel for the economically subservient spouse as serious evidence of overreaching.<sup>121</sup>

The Idaho post-marital agreement cases provide a startling contrast to the premarital agreement cases. The courts' willingness to recognize a very protective standard even in the context of an anticipated divorce differs sharply from the courts' freedom of contract approach to premarital cases of treating the prospective spouses just like your average commercial parties. Also interesting is the fact that the courts in both *Wolford* and *Liebelt* never referred to *Compton* and its progeny.

#### IV. THE UPAA AND IDAHO LAW: ANALYSIS AND ADVICE

##### A. General Observations

Because the Idaho law dealing with premarital agreements is so spotty, the adoption of the UPAA fills some important gaps. The Act provides a standard for unconscionability and sets forth the circumstances under which disclosure must take place — neither of which had been previously addressed by Idaho courts. To the extent that the Idaho courts had held in *Liebelt* that a premarital agreement is subject to the same standards for enforceability as are commercial contracts, the UPAA provides a more protective standard for the enforcement of premarital contracts. Despite the criticism of the Act for adopting a lower standard for unconscionability than that developing in the states at the time of its drafting, its requirement of voluntary execution clearly retains many procedural protections above and beyond what would normally be required in a commercial context.

The most troubling aspect of the UPAA for Idaho is the radically different standard it establishes for court supervision in the premari-

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121. In both *Compton* and *Golder* the respective wives were unrepresented. See *Compton*, 101 Idaho at 336, 612 P.2d at 1183 ("Overreaching often appears when one of the parties is not represented by independent counsel."); *Golder*, 110 Idaho at 60-61, 714 P.2d at 29-30.

tal agreement context compared to the requirements in the post-marital agreement context under Idaho case law. The adoption of the Act does not resolve the startling contrast that had existed in the Idaho cases between these two situations. The UPAA permits disclosure to be expressly waived, and dispenses with the disclosure requirement when the future spouse knew or could have know of the other person's financial situation. *Compton* and its progeny make clear that the "knew or could have known" standard does not apply to the post-marital contract situation even when the spouses are bargaining in the shadow of divorce. The explanation offered by the court in *Compton* — the fiduciary duty imposed on the manager spouse in a community property state — does not seem to fully justify the distinction between the cases given the fact that prospective spouses are generally considered to be in a confidential relationship.

This more protective approach to post-marital agreements cannot be easily explained from a policy perspective. The substance of pre- and post-marital agreements between spouses is likely to be similar. If anything the argument is for stronger procedural protections in the context of the premarital agreement than the post-marital agreement. First, the parties' relationship of trust and confidence is arguably at its strongest immediately before the wedding when the couple is likely to envision a rosey future going on indefinitely for themselves. In the *Compton* fact pattern, the relationship had deteriorated to the point where the parties were contemplating divorce most likely because their faith and trust in each other had broken down.

In addition to the different nature of the relationship of trust and confidence, a person who is not yet married will usually be in a weaker position to know of the other person's financial affairs than a person who is married will be. The married person has been presumably residing in the same home with his or her spouse, and has likely been required to sign financial documents and other instruments such as tax returns during the marriage which could have made him or her privy to details of financial information. Even unmarried persons who have cohabited will not experience the same level of entwinement on financial affairs.

Thus, the adoption of the UPAA in Idaho sets up a situation in which the unmarried person entering into a prenuptial agreement will receive significantly less protection than the married person entering into a marriage settlement agreement will receive.

This anomaly can be avoided if the Idaho courts apply the UPAA standards rigorously. Rigorous application will be most important in two areas. First, the courts must fully and rigorously apply the requirement of voluntariness in the Act to protect the economically un-

empowered spouse from overreaching and sharp tactics by the empowered spouse. Second, courts must be vigilant against expanding the "knew of could have known" exception to the disclosure requirement beyond the bounds necessary to protect the economically unempowered person in a premarital agreement context. In this regard, the court should ask whether the unempowered spouse's knowledge is comparable in depth and detail to what they would have received had the other spouse formally engaged in adequate disclosure.

### B. Advice to the Wise

Lawyers advising clients regarding a premarital agreement should carefully follow a number of steps to best ensure the enforceability of the agreement in the future. It may be that the following advice should be obvious. Judging, however, by the number of cases in which no disclosure took place, and in which both parties were not represented and sharp tactics were apparently present, it bears repeating.<sup>122</sup>

First, the lawyer should impress upon the client the importance of negotiating and executing the agreement well before the anticipated wedding date. Second, the lawyer should ensure that both prospective spouses are represented by counsel. Clients often wish to avoid the expense associated with the latter suggestion; the prudent lawyer, however, should insist on the presence of independent representation. Although the UPAA does not require independent representation, the UPAA's requirement of voluntariness should protect the economically unempowered spouse against overreaching and sharp tactics; it is crucial to avoid even the appearance of inappropriateness in the execution of the agreement.

Despite the fact that the UPAA does not require disclosure under all circumstances, detailed disclosure is the best way to protect against a future attack on the basis of unconscionability. Disclosure

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122. A number of guides for drafting premarital agreements are available. See, e.g., ALEXANDER LINLEY & LOUIS PARLEY, *LINLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* (1994); DAVID SALTMAN & HARRY SCHAFFNER, *DON'T GET MARRIED UNTIL YOU READ THIS: A LAYMAN'S GUIDE TO PRENUPTIAL AGREEMENTS*, (1989); GARY SKOLOFF, ET AL., *DRAFTING PRENUPTIAL AGREEMENTS* (1994); LESTER WALLMAN & SHARON MCDONNELL, *CUPIDS, COUPLES, AND CONTRACTS: A GUIDE TO LIVING TOGETHER, PRENUPTIAL AGREEMENTS AND DIVORCE* (1994); Edward L. Winer, *Practical Considerations for Premarital Agreements in PREMARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS* (Edward L. Winer & Lewis Becker eds., 1993). For a feminist critique of these and other guides, see Guggenheimer, *supra* note 16 at 160-87.

should include financial statements, tax returns or data, and other information regarding the property owned by each spouse, its value and each spouse's respective incomes.<sup>123</sup> The documents constituting disclosure should be provided to the other party enough in advance of execution to allow the party to study and analyze them. The documents evidencing the parties' property, its value and their incomes should be attached to and made part of the agreement. Reciting that disclosure has taken place in the agreement is not enough if, in fact, no disclosure took place.<sup>124</sup> Finally, care should be taken to ensure that disclosure is complete and accurate. Incomplete or inaccurate disclosure will provide fodder for subsequent litigation and may, if the omissions are serious enough, lead to the invalidity of the agreement.

The express waiver of disclosure provision of the UPAA provides a tempting out for the client who is reluctant to make detailed disclosure of his or her property and financial information. However, the waiver of disclosure must itself be voluntary.<sup>125</sup> Thus, to the extent that the agreement as a whole has problems with the voluntariness requirement, an express waiver contained in the agreement would also be in jeopardy. In addition, to the extent a party does not fully understand his or her right to disclosure, a waiver might have separate voluntariness problems. If an express waiver is to be used, it should be executed as a separate agreement for which the waiving spouse has independent advice of counsel.

Finally, with respect to disclosure, relying on the spouses' general knowledge of each other's financial situation is not advisable. At a minimum, if the agreement is ever attacked, thorny litigation over what the spouse actually knew is likely. Moreover, the failure to make disclosure or obtain an express, voluntary waiver of disclosure, can, in the presence of other facts, give rise to the appearance of sharp tactics or overreaching.

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123. The UPAA section 6(a)(2) requires disclosure of "property or financial obligations" of the parties. UPAA, *supra* note 1, § 6(a)(2), at 376. Section 1(2) of the UPAA defines property as "an interest . . . in real or personal property, including income and earnings." UPAA, *supra* note 1, § 1(2), at 371.

124. Younger, *Update*, *supra* note 25, at 25-26.

125. UPAA, *supra* note 1, § 6(a)(2)(iii), at 376.