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## The "P" Word: Ohio Should Adopt the Uniform Premarital Agreements Act to Achieve Consistency and Uniformity in the Treatment of Prenuptial Agreements

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# THE “P” WORD: OHIO SHOULD ADOPT THE UNIFORM PREMARITAL AGREEMENTS ACT TO ACHIEVE CONSISTENCY AND UNIFORMITY IN THE TREATMENT OF PRENUPTIAL AGREEMENTS

JENNA CHRISTINE COLUCCI\*

## ABSTRACT

Throughout the United States, courts have used inconsistent standards for the interpretation of prenuptial agreements. Under Ohio jurisprudence, courts are concerned with protecting the vulnerable spouse, or the economically disadvantaged party. This legal standard acknowledges the unique relationship of the parties to the contract and will generally review the procedural and substantive components of the prenuptial agreement. Conversely, other courts are weary of interfering with the contractual freedom of the parties and will only invalidate a prenuptial agreement upon a showing of fraud, duress, or misrepresentation. The Uniform Premarital Agreements Act was drafted in 1983 to address the inconsistent treatment of prenuptial agreements on a multi-jurisdictional basis. To date, twenty-seven states have adopted the Act. Ohio’s adoption of the Act would clarify the rights and responsibilities of parties to prenuptial agreements. In addition, subsequent adoption of the Act in all states would guarantee reliable prenuptial agreements which could withstand judicial scrutiny in all United States jurisdictions.

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#### I. INTRODUCTION

Husband speaking to his lawyer: “Are you telling me that I need a lawyer in Nevada, where our marriage took place, another lawyer in Ohio, where we signed the prenuptial agreement, and a third lawyer in New York, where my ex and our children live? Is that what you are saying?” This dramatic conversation is not a legal stretch from the truth. In our modern and mobile society, dissolving marriages and the subsequent enforcement of prenuptial agreements can create multi-jurisdictional nightmares as portrayed herein. To exacerbate this issue, courts in various jurisdictions often apply competing standards when interpreting prenuptial agreements. These distinctive standards, which govern prenuptial agreement interpretations, contribute significantly to the uncertain and non-uniform treatment of prenuptial agreements in the United States.

To illustrate, in the 1970s, Dr. Frederick A. Simeone, a 39-year-old neurosurgeon, married Catherine E. Walsh Simeone, a 23-year-old registered nurse, in Pennsylvania.<sup>1</sup> At the time, Mr. Simeone’s approximate annual income was \$90,000.<sup>2</sup> Mrs. Simeone, however, was unemployed.<sup>3</sup> The day before the wedding, Mrs. Simeone signed a prenuptial agreement prepared by her husband’s attorney without the assistance of her own counsel.<sup>4</sup> The agreement capped Mrs. Simeone’s spousal support at \$25,000, paid in weekly increments of \$200.<sup>5</sup> In 1984, the parties commenced divorce proceedings.<sup>6</sup> Mrs. Simeone argued that the agreement was unreasonable because she misunderstood the nature of alimony pendente lite<sup>7</sup> when she relinquished it in the agreement; thus, the agreement should not be enforced.<sup>8</sup> The lower court rejected her arguments.<sup>9</sup> The Supreme Court of Pennsylvania affirmed the lower court’s ruling, finding that “the agreement was entered into after full and fair disclosure of assets and that there was an absence of duress.”<sup>10</sup>

<sup>1</sup> *Simeone v. Simeone*, 551 A.2d 219, 224 (Pa. Super. Ct. 1988).

<sup>2</sup> *Simeone v. Simeone*, 581 A.2d 162, 163 (Pa. 1990).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Alimony pendente lite refers to spousal support payments paid during the pendency of a divorce proceeding. CORDELL & CORDELL, P.C., *What Is Alimony Pendente Lite?*, DADSDIVORCE.COM (Oct. 1, 2012), <http://dadsdivorce.com/articles/what-is-alimony-pendente-lite/>.

<sup>8</sup> *Simeone*, 581 A.2d at 164.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Under Ohio antenuptial laws, *Simeone* would have been decided differently. In *Simeone*, the court interpreted premarital agreements using the same principles applied to other contracts; the terms of their agreements should bind spouses absent a showing of fraud, misrepresentation, or duress.<sup>11</sup> Conversely, prenuptial agreements enforced in Ohio “must meet certain minimum standards of good faith and fair dealing.”<sup>12</sup> If the premarital agreement is fair and reasonable under the circumstances, it will be deemed enforceable.<sup>13</sup> Henceforth, unlike *Simeone*’s traditional, contractual interpretation predicated on freedom of contracts, Ohio’s conservative standard requires compliance with procedural and substantive mechanisms to protect a vulnerable spouse, to wit, the economically disadvantaged party.<sup>14</sup> Accordingly, under Ohio jurisprudence, the court in *Simeone* would have considered facts such as, the close proximity between the agreement’s execution and the wedding; the husband’s attorney’s role in drafting the agreement; the inequality of bargaining power resulting from the husband’s attorney’s role; the lack of independent counsel representing the wife; and, the unreasonable nature of spousal support where a substantial disparity of income exists between the parties.<sup>15</sup>

Considering these facts, an Ohio court may have concluded that the circumstances surrounding the execution of the prenuptial agreement and the substantive provisions of the agreement were unfair. Because *Simeone* rejected a reasonableness approach, permitting the court to evaluate the reasonableness of such agreements,<sup>16</sup> an Ohio court would likely have held the *Simeone* prenuptial agreement unenforceable for the aforementioned reasons. Therefore, eliminating these competing standards and adopting uniform standards would provide universal guidelines on the drafting and interpretation of prenuptial agreements. Such uniformity would allow couples to create binding, legal premarital contracts, likely to withstand judicial scrutiny across multiple jurisdictions.

The National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (“UPAA”) in 1983 to address the inconsistent treatment of prenuptial agreements on a multi-jurisdictional basis.<sup>17</sup> To date, twenty-seven states have adopted the UPAA, either in full or in some modified capacity.<sup>18</sup> The UPAA adopts accepted standards of existing state laws governing the

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<sup>11</sup> *Id.* at 165.

<sup>12</sup> *Zimmie v. Zimmie*, 464 N.E.2d 142, 146 (Ohio 1984).

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., id.* (focusing on the absence of independent legal counsel for the former wife and her testimony that she did not understand the agreement); *Gross v. Gross*, 464 N.E.2d 500, 504 (Ohio 1984) (“To require Wife to return from this opulent standard of living to that which would be required . . . [by the agreement] could well occasion a hardship or be significantly difficult for the former wife”).

<sup>15</sup> *See Simeone*, 581 A.2d at 163–64.

<sup>16</sup> *Id.* at 162.

<sup>17</sup> Jill Heitler Blomberg, *Unconscionability: The Heart of the Uniform Premarital Agreement Act*, 15 AM. J. FAM. L. 131, 131 (2001).

<sup>18</sup> Jeremy D. Morley, *Uniform Premarital Agreement Act*, INT’L PRENUPTIALS AGREEMENTS—EXPERIENCED INT’L COUNS., <http://www.internationalprenuptials.com/uniform-prenuptial-agreements-act.html> (last visited Sept. 16, 2016).

enforcement of prenuptial agreements.<sup>19</sup> Under these standards, prenuptial agreements must be in writing, signed by both parties, and executed freely and voluntarily; they also require that potential spouses have adequate knowledge of each other's property and finances.<sup>20</sup> The UPAA also provides a flexible framework by excluding nothing from the scope of the agreement except criminal or unconscionable matters.<sup>21</sup> Ohio has neither adopted nor introduced any version of the UPAA; therefore, Ohio's common law and applicable state statutes govern enforcement of prenuptial agreements executed in Ohio.<sup>22</sup>

This Note argues that Ohio's adoption of the UPAA would clarify the rights and responsibilities surrounding prenuptial agreements and that subsequent adoption of the Act in all jurisdictions would facilitate uniformity through consistent treatment of prenuptial agreements across state lines. Many couples in the United States reside in several states during their marriage.<sup>23</sup> Moreover, prospective spouses are increasingly aware of the need to settle marital issues between themselves before marriage.<sup>24</sup> Thus, if Ohio and all states adopt the UPAA, prospective spouses will no longer worry about renegotiating their prenuptial agreements whenever they move to a new jurisdiction.

Part I of this Note analyzes two Supreme Court of Ohio cases involving prenuptial agreements and the law derived therefrom. Part II discusses the focus of Ohio's prenuptial agreements—specifically, the protection of the vulnerable spouse—and compares it to the UPAA's focus—that parties should be free, within broad limits, to choose the financial terms of their marriage.<sup>25</sup> Part III sets forth the UPAA's accepted state standards and flexible framework and argues that Ohio should adopt the UPAA because it will enable prospective spouses to legally and contractually organize their affairs in a valid and binding instrument of law.<sup>26</sup> Finally, Part IV will rebut the prevailing counterargument that the Uniform Premarital and Marital Agreement Act (“UPMAA”) “achieve[s] greater consistency in the way in which the states enforce premarital agreements,”<sup>27</sup> but finds that many states may be reluctant to adopt the UPMAA because a majority of these jurisdictions already enacted laws treating prenuptial agreements as ordinary contracts.

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<sup>19</sup> *Why States Should Adopt UPAA*, UNIF. L. COMM'N—NAT'L CONF. COMM'RS ON UNIF. ST. LS., <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPAA> (last visited Nov. 3, 2016) [hereinafter ULC, *Why States Should Adopt UPAA*].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Kristina Otterstrom, *Prenuptial Agreements in Ohio: A Look at the Basics of Prenuptial Agreements in Ohio*, DIVORCENET.COM, <http://www.divorcenet.com/resources/prenuptial-agreements-ohio.html> (last visited Aug. 27, 2017).

<sup>23</sup> ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> UNIF. PREMARITAL AGREEMENT ACT (UNIF. LAW COMM'N 1983).

<sup>26</sup> ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>27</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW COMM'N 2012); Carlyn S. McCaffrey, *Except as Provided in Article Five, I Endow Thee with All My Worldly Goods—The New Uniform Premarital and Marital Agreement Act*, NAACP J. EST. & TAX PLAN., July–Sept. 2014, at 11.

## II. BACKGROUND

A prenuptial agreement is a “written contract between two people who are about to marry, setting out the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is later dissolved.”<sup>28</sup> Currently, every state recognizes the validity of divorce-focused prenuptial agreements.<sup>29</sup> Until the mid-1970s, most courts held that premarital agreements and other contracts made “in contemplation of divorce” were unenforceable, reasoning that the “agreements were void either [(1)] because they purported to alter the state-imposed terms of the status of marriage, which were not subject to individual alteration, or (2) because they tended to encourage divorce.”<sup>30</sup> This theory of premarital agreements has changed considerably over the past thirty years.<sup>31</sup>

Today, couples often execute a prenuptial agreement in preparation for divorce rather than death.<sup>32</sup> Moreover, society has witnessed an “increasing awareness among prospective marital partners of the need to settle issues of property and income between themselves before marriage.”<sup>33</sup> As a result, “[sixty-three] percent of divorce attorneys surveyed by the American Academy of Matrimonial Lawyers said they had seen an increase in the number of prenuptial agreements drafted in recent years.”<sup>34</sup> Thus, the need for uniform standards and consistent treatment of prenuptial agreements across state lines is a contemporary issue of premarital law.

### A. Prenuptial Agreement Reform

The National Conference of Commissioners on Uniform State Laws drafted the UPAA to “remove substantial uncertainty as to the enforceability of all, or a portion, of the provisions of [prenuptial] agreements.”<sup>35</sup> Prior to its enactment, the protection of the vulnerable spouse and the conventional, contractual freedom juxtaposition was rampant; some courts interpreted prenuptial agreements in consideration of the vulnerable spouse, while others adhered to conventional, contract law to guide the interpretation and enforceability of prenuptial agreements.<sup>36</sup>

For example, Georgia courts often invalidated a prenuptial agreement based on a showing of three elements: “(1) was the agreement obtained through fraud, duress or

<sup>28</sup> ROSEMARY DURKIN & TRISHA ZELLER, OHIO PROBATE § 3.02 (2d ed. 2017).

<sup>29</sup> Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 158 (1998).

<sup>30</sup> *Id.* at 150.

<sup>31</sup> *Id.* at 148.

<sup>32</sup> *Id.* at 149.

<sup>33</sup> *Prenuptial Agreement Act Summary*, UNIF. L. COMM’N—NAT’L CONF. COMM’RS ON UNIF. ST. LS., <http://www.uniformlaws.org/ActSummary.aspx?title=Prenuptial%20Agreement%20Act> (last visited Nov. 3, 2016) [hereinafter ULC, *Summary*].

<sup>34</sup> Kelli B. Grant, *Prenups: Not Just for the 1 Percent*, CNBC.COM (Jan. 20, 2015), <http://www.cnbc.com/2015/01/20/prenups-not-just-for-the-1-percent.html>.

<sup>35</sup> Peter T. Lesson & Joshua Pierson, *Prenups*, 45 J. LEGAL STUD. 367, 371 (2016).

<sup>36</sup> *Id.*

mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?”<sup>37</sup> Such a standard is analogous to Ohio’s current prenuptial agreement law, protecting the vulnerable spouse.<sup>38</sup> However, in Oregon, courts favor the enforcement of prenuptial agreements and, because of the fiduciary relationship of the parties, hold prospective spouses to a “punctilious standard of performing their agreement.”<sup>39</sup> For example, in *In re Moore’s Estate*,<sup>40</sup> the former husband relinquished his rights to the wife’s real property. The issue was whether the parties to an intended marriage contract may waive their statutory rights to the disposition of real and personal property.<sup>41</sup> The court concluded that “such waiver can be effected by a prenuptial agreement which is otherwise valid.”<sup>42</sup> This stringent interpretation of the validity of the prenuptial agreement did not consider whether the former husband had access to independent legal counsel or whether he understood the rights that he was relinquishing.<sup>43</sup> This interpretation is analogous to the contractual freedom standard, ignoring the reasonableness of the agreement.<sup>44</sup>

Prior to the enactment of the UPAA, the enforceability of prenuptial agreements was uncertain. Prenuptial agreements were held to a higher standard than conventional contracts; they had to pass both procedural and substantive fairness tests under doctrines such as unconscionability, fraud, and duress.<sup>45</sup> A majority of courts required evidence that the parties consulted with independent legal counsel, that the parties disclosed their monetary assets, that any spousal rights were waived with full knowledge of those rights, and that the terms of the agreement were not damaging to the interests of the party against whom enforcement was sought.<sup>46</sup> This interpretive standard combined with the prevalence of competing standards for interpreting prenuptial agreements culminated in the creation of the UPAA.<sup>47</sup>

According to commentators, the UPAA has achieved uniform treatment in enforcement of prenuptial agreements in many parts of the United States since its enactment.<sup>48</sup> They contend that “the UPAA provides for the full enforcement of prenuptial agreements as created by their signatories excepting but two

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<sup>37</sup> Scherer v. Scherer, 292 S.E.2d 662, 639 (Ga. 1982).

<sup>38</sup> See *Gross*, 464 N.E.2d at 511 (determining an agreement’s substantive fairness by considering the parties’ changed circumstances).

<sup>39</sup> *In re Moore’s Estate*, 307 P.2d 483, 488 (Or. 1957).

<sup>40</sup> *Id.* at 489.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 492.

<sup>43</sup> *Id.* at 488.

<sup>44</sup> See *id.*

<sup>45</sup> Lesson & Pierson, *supra* note 35, at 370.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

circumstances."<sup>49</sup> However, while states that have adopted the UPAA may move closer toward uniform treatment of prenuptial agreements, the uncertainty of enforcement still concerns couples who seek enforcement in the twenty-three states that have not adopted the UPAA.<sup>50</sup> Thus, to achieve consistency and uniform treatment of prenuptial agreements throughout the United States, Ohio also must adopt the UPAA.

### B. Ohio's Prenuptial Agreement Laws

In Ohio, prenuptial agreements must meet certain minimum standards of good faith and fair dealing.<sup>51</sup> If the agreement is fair and reasonable under the circumstances, it will be deemed enforceable.<sup>52</sup> Such agreements are valid and enforceable if three basic conditions are met: "one, they have been entered into freely without fraud, duress, coercion or overreaching; two, if there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the prospective spouse's property; and, three, if the terms do not promote or encourage divorce or profiteering by divorce."<sup>53</sup> For the first element, a presumption of overreaching or coercion in a prenuptial agreement arises when there is "unfairness or inequity in the result of the agreement or in its procurement."<sup>54</sup> The agreement satisfies the second element when the parties attach as an exhibit the parties' assets, or alternatively, when other instrumentalities demonstrate that the parties gave a full disclosure.<sup>55</sup> The third element is present when "the prenuptial agreement provides a significant sum by way of either property settlement or alimony at the time of divorce and after a short period of time, one of the parties abandons the marriage or disregards their vows."<sup>56</sup> Thus, these premarital laws govern the court's analysis in a judicial proceeding to interpret the validity of a prenuptial agreement.<sup>57</sup>

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<sup>49</sup> *Id.* Those two circumstances, listed in the Prefatory Note of the UPAA, are as follows:

[I]f the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and, before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

UNIF. PREMARITAL AGREEMENT ACT prefatory n. (UNIF. LAW COMM'N 1983).

<sup>50</sup> See UNIF. PREMARITAL AGREEMENT ACT prefatory n. (UNIF. LAW COMM'N 1983).

<sup>51</sup> *Zimmie v. Zimmie*, 464 N.E.2d 142, 146 (Ohio 1984).

<sup>52</sup> *Id.* (first citing *Gross v. Gross*, 464 N.E.2d 500, 504 (Ohio 1984); then citing *Hook v. Hook*, 431 N.E.2d 667 (Ohio 1982)).

<sup>53</sup> *Gross*, 464 N.E.2d at 506.

<sup>54</sup> *Harbom v. Harbom*, 760 A.2d 272, 275 (Md. Ct. Spec. App. 2000).

<sup>55</sup> *Gross*, 464 N.E.2d at 506.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



Ohio has several additional procedural requirements to execute a valid prenuptial agreement. First, couples have a duty to disclose all assets—including property, money, and personal debts.<sup>58</sup> Second, Ohio law requires at least two witnesses present when a couple signs their prenuptial agreement.<sup>59</sup> Third, “[t]he presentation of an agreement a very short time before the wedding ceremony will create a presumption of overreaching or coercion if the postponement of the wedding would cause significant hardship, embarrassment or emotional stress”<sup>60</sup> because courts want prospective spouses to have time to “contemplate the seriousness of the agreement and its legal consequences.”<sup>61</sup> Finally, “all issues related to child support, custody and visitation included in a prenuptial agreement will not be enforced by the court . . . because these issues are decided by the court based upon what is in the child’s best interest.”<sup>62</sup> The court will equitably distribute the couple’s property if it renders a prenuptial agreement unenforceable; “the court will divide . . . marital property in a manner that it deems fair, but not necessarily equal.”<sup>63</sup> Accordingly, in Ohio, the aforementioned substantive and procedural rules create valid prenuptial agreements that courts are bound to uphold.

### C. *The UPAA’s Governing Rules for Prenuptial Agreements*

Other jurisdictions incorporated valuable principles from the UPAA by enacting prenuptial agreement legislation. Section Two of the UPAA sets forth formalities necessary to construct a binding, legal prenuptial agreement.<sup>64</sup> Under the UPAA, the only requirements for a binding prenuptial agreement are that the agreement is in writing and signed by both parties.<sup>65</sup> A few states that adopted the UPAA, however, require additional formalities, such as “notarization or an acknowledgment for the agreement to be enforceable.”<sup>66</sup>

Section Three of the UPAA establishes standards of enforceability for prenuptial agreements.<sup>67</sup> These standards allow prospective spouses to customize an agreement’s content to include “all subject matters except those that are criminal or

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<sup>58</sup> Elizabeth Stock, *Ohio’s Prenuptial Agreement Laws*, LEGALZOOM, <http://info.legalzoom.com/ohios-prenuptial-agreement-laws-25982.html> (last visited Nov. 3, 2016).

<sup>59</sup> *Id.*

<sup>60</sup> *Vanderbilt v. Vanderbilt*, No. 11CA0103-M, 2013 Ohio App. LEXIS 1121, 2013 WL 1286012, at ¶ 22 (Ohio Ct. App. Mar. 27, 2013) (quoting *Fletcher v. Fletcher* 628 N.E.2d 1343, 1348 (Ohio 1994)).

<sup>61</sup> Stock, *supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> UNIF. PREMARITAL AGREEMENT ACT § 2 (UNIF. LAW COMM’N 1983).

<sup>66</sup> Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIM. LAW. 355, 359 (2010).

<sup>67</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (UNIF. LAW COMM’N 1983).

unconscionable.”<sup>68</sup> Moreover, parties may contract to the disposition of property upon separation; marital dissolution or the occurrence or nonoccurrence of an event; the modification or elimination of spousal support; the choice of law governing the construction of the agreement; and any other matter, including their personal rights and obligations not in violation of public policy or a statute imposing a criminal penalty.<sup>69</sup>

Currently, courts in various jurisdictions disagree on whether prospective spouses should be permitted to control spousal support provisions in their prenuptial agreements.<sup>70</sup> The UPAA’s position on this issue is that married couples may set forth spousal support provisions as long as enforcement of spousal support does not leave one party eligible for public assistance.<sup>71</sup>

Lastly, Section Six of the UPAA provides that a party may avoid enforcement of a prenuptial agreement by showing that (1) the agreement was not voluntarily executed and (2) “the agreement was unconscionable when executed and before execution of the agreement and, the party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.”<sup>72</sup> Collectively, the aforementioned rules govern enforcement of prenuptial agreements in jurisdictions that have adopted the UPAA.

#### *D. Two Competing Standards Under Which Courts Analyze the Validity of Prenuptial Agreements*

When interpreting prenuptial agreements in the United States, some jurisdictions focus their analysis on protecting the vulnerable spouse.<sup>73</sup> Such jurisdictions acknowledge the unique relationship of the parties to the contract and will generally review the “reasonableness” of the agreement.<sup>74</sup> Ohio adheres to this approach. The Supreme Court of Ohio expressly acknowledged that “[prenuptial] agreements are contracts and generally the law of contracts applies to their interpretation and application . . . but [n]evertheless, [Ohio] has recognized that these agreements

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<sup>68</sup> ULC, *Why States Should Adopt UPAA*, *supra* note 19; *see generally Unconscionable*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/unconscionable> (last visited Aug. 31, 2017) (“In contract law, an unconscionable contract is one that is unjust or extremely one-sided in favor of the person who has the superior bargaining power”).

<sup>69</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (UNIF. LAW COMM’N 1983).

<sup>70</sup> *Id.* § 3 cmt.

<sup>71</sup> *Id.* at prefatory n.; *but cf.* DAWN GRAY & STEPHEN JAMES WAGNER, *COMPLEX ISSUES IN CALIFORNIA FAMILY LAW* ch. K7.01 (2016 ed., Matthew Bender & Co. 2016) (quoting *In re Marriage of Melissa*, 151 Cal. Rptr. 3d 608, 616 (Cal. Ct. App. 2012)) (arguing that courts should be free to challenge universal assumptions underlying the “common law rule that premarital spousal support waivers promote dissolution and for that reason contravene public policy”).

<sup>72</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM’N 1983); *but cf.* Ohio’s judicially-imposed requirement that parties provide a “full” disclosure of assets, unlike the UPAA’s requirement of a “reasonable” disclosure. *Gross v. Gross*, 464 N.E.2d 500, 501 (Ohio 1984) (enforcing prenuptial agreement because there was a full disclosure of monetary assets between the parties).

<sup>73</sup> *See, e.g., Fletcher v. Fletcher*, 628 N.E.2d 1343 (Ohio 1994).

<sup>74</sup> *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

constitute a special type of contract to which certain *special rules* apply.”<sup>75</sup> Hence, these “special rules”<sup>76</sup> guide Ohio courts in determining whether the prenuptial agreement “is fair and reasonable under all the facts and circumstances.”<sup>77</sup>

Other jurisdictions, specifically those that have adopted the UPAA, focus their analysis on well-settled principles of contract law: “[a]bsent fraud, misrepresentation, or duress, spouses should be bound by terms of their agreements.”<sup>78</sup> The rationale is that prenuptial agreements are contracts, and as such, should be evaluated under same criteria applicable to other types of contracts.<sup>79</sup> In analyzing the validity of a prenuptial agreement, some courts decline to consider whether the parties effectuated reasonable or good bargains;<sup>80</sup> yet, “if a court finds that a [prenuptial agreement] is so one-sided that it is unjustly unfair to one spouse, the contract could be thrown out.”<sup>81</sup> If a prenuptial agreement favors one party, however, a court will not automatically deem the agreement “unfair.”<sup>82</sup> Generally, courts enforce these agreements in jurisdictions that adhere to this contract theory of prenuptial agreements as long as one spouse is left “something.”<sup>83</sup> As a result, courts applying the UPAA evaluate prenuptial agreements under traditional rules of contract law.

#### *E. The UPMAA’s Framework*

The Uniform Law Commission (“ULC”) approved the UPMAA at its annual conference on July 18, 2012.<sup>84</sup> The ULC drafted the Act in response to criticism of the UPAA, intending the new Act to supersede the UPAA.<sup>85</sup> Critics opined that the UPAA lacked protection for the vulnerable spouse and that state variations of the UPAA were significant, preventing uniform treatment of prenuptial agreements.<sup>86</sup>

Initially, the UPMAA broadened the scope of the UPAA’s framework. Under the UPAA, a prenuptial agreement was unenforceable if the parties included a provision adversely affecting a child’s right to child support.<sup>87</sup> In Section Ten of the UPMAA,

<sup>75</sup> *Fletcher*, 628 N.E.2d at 1346 (emphasis added).

<sup>76</sup> *See id.*

<sup>77</sup> *Gross*, 464 N.E.2d at 512.

<sup>78</sup> *Simeone*, 581 A.2d at 165.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Thomas Wayne, *The Risk of Do-It-Yourself Prenuptial Agreements*, LEGALZOOM, <http://info.legalzoom.com/risks-doityourself-prenuptial-agreements-26448.html> (last visited Oct. 16, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> McCaffrey, *supra* note 27, at 10–11.

<sup>85</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT prefatory n. (UNIF. LAW COMM’N 2012).

<sup>86</sup> *Id.* (“Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties”).

<sup>87</sup> McCaffrey, *supra* note 27, at 12.

the ULC expanded this concept of unenforceable provisions.<sup>88</sup> Section Ten instructs states to invalidate certain provisions, such as clauses that define “the rights and obligations of the parties regarding child custody, that limit or restrict a remedy available to a victim of domestic violence, that purport to modify the grounds for a court-decreed separation or marital dissolution,” or that similarly offend public policy.<sup>89</sup>

In addition, Section Nine provides grounds for avoiding enforcement of the prenuptial agreement.<sup>90</sup> Here, the parties to the prenuptial agreement must enter into the agreement voluntarily, and both parties must have access to independent legal counsel.<sup>91</sup> If the parties lack independent counsel, the agreement must include a notice of waiver of marital rights, and the parties must have adequately disclosed their assets.<sup>92</sup>

The UPMAA gives courts discretion to invalidate a provision of a prenuptial agreement if unconscionable at the time of signing.<sup>93</sup> In contrast, under the UPAA, “unconscionability provides a basis for refusal to enforce an agreement only if the party against whom the agreement is being enforced did not have fair and reasonable disclosure of the property and financial obligations of the other party.”<sup>94</sup> Thus, the UPMAA’s framework affords more protection for vulnerable spouses by expanding the UPAA’s concepts of unenforceability and grounds for avoiding enforcement.

### III. PROOF OF CLAIM

#### A. *Ohio’s Common Law Rules Regulating the Enforcement of Prenuptial Agreements*

In 1984, the Supreme Court of Ohio issued written opinions for two prenuptial agreement cases. The first, *Zimmie v. Zimmie*,<sup>95</sup> involved William and Kathryn Zimmie, who married in 1963 after executing a prenuptial agreement.<sup>96</sup> In 1977, Mrs. Zimmie filed for divorce, alleging extreme cruelty and gross neglect.<sup>97</sup> Mr. Zimmie filed counterclaims on the same grounds and further alleged that the couple’s prenuptial agreement precluded Mrs. Zimmie’s claims for alimony and division of property.<sup>98</sup> The trial court found the prenuptial agreement invalid as a matter of law “on the basis that there had not been a full disclosure of assets by the defendant and there was insufficient evidence to show that the wife had knowledge as to the amount

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Zimmie v. Zimmie*, 464 N.E.2d 142, 142 (Ohio 1984).

<sup>96</sup> *Id.* at 143.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 144.

of such assets.”<sup>99</sup> The court concluded that Mrs. Zimmie entered into the agreement involuntarily and awarded her \$1,425,000, “payable in installments over a period of nineteen years, or until her death, remarriage or cohabitation . . . as a combination of sustenance alimony and division of property.”<sup>100</sup>

The issue raised on appeal was whether the trial court erred in declaring the prenuptial agreement unenforceable.<sup>101</sup> The appellate court began its analysis by formulating well-settled principles of marital law:

Although [prenuptial] agreements are not *per se* invalid, they must meet certain minimum standards of good faith and fair dealing. If the agreement is fair and reasonable under the circumstances, it will be deemed enforceable. The prospective spouse must be fully and accurately apprised of the nature, value, and extent of the property affected by the agreement, and must enter into it voluntarily.<sup>102</sup>

Applying law to facts, the court inferred that Mrs. Zimmie first saw the agreement on the eve of the wedding and that the parties did not discuss the terms of the agreement beforehand.<sup>103</sup> Moreover, the court found that Mrs. Zimmie signed the agreement at her husband’s attorney’s office without reading its entire content.<sup>104</sup> Mrs. Zimmie testified that no one informed her that signing the agreement waived her marital rights to Mr. Zimmie’s property and that Mr. Zimmie failed to disclose to her the value of his corporate assets.<sup>105</sup> Furthermore, she testified that she felt obligated to sign the agreement.<sup>106</sup> As a result, the court found sufficient “evidence . . . to support the conclusion that [Mrs. Zimmie] did not voluntarily enter into the agreement with a full disclosure of the defendant’s financial worth.”<sup>107</sup> Thus, the court refused to hold that the trial court erred in this matter.<sup>108</sup>

In Ohio, judges focus on the procedural fairness of prenuptial agreements or the circumstances surrounding their execution.<sup>109</sup> Courts in many states require evidence of procedural fairness before courts will validate a prenuptial agreement;<sup>110</sup> however,

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 146.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 147.

<sup>109</sup> “Procedural unconscionability is about the actions of the parties and not about the actual operation of the agreement.” Paul Bennet Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 193 (2005).

<sup>110</sup> See *Stewart v. Stewart*, 76 A.3d 1221, 1223 (Md. 2013) (“The prevailing view is that both procedural and substantive unconscionability must be present in order for a court to invalidate a contractual term as unconscionable”); *but see* *Simeone v. Simeone*, 581 A.2d 162,

courts disagree on what exigent circumstances suffice to establish procedural unconscionability.<sup>111</sup> Under the UPAA, issues of procedural unconscionability in prenuptial agreements are questions of law for the courts to decide.<sup>112</sup> Adoption of the UPAA, in Ohio and all other states, would, at minimum, require judges to scrutinize prenuptial agreements for procedural unconscionability. To promote uniformity, the National Conference of Commissioners on Uniform State Laws may amend the UPAA's guidelines for courts to better define what constitutes procedural unconscionability for purposes of the Act.<sup>113</sup> Although some critics claim Ohio's common law treatment of prenuptial agreements already conforms to the UPAA's enforcement requirements of procedural fairness, this argument is insufficient.<sup>114</sup> Ohio's adoption of the UPAA would promote uniformity by requiring courts to scrutinize prenuptial agreements for procedural fairness without significantly altering Ohio's prenuptial agreement laws.

In *Gross v. Gross*,<sup>115</sup> Thomas and Jane Gross executed a prenuptial agreement before they married in September of 1968.<sup>116</sup> The parties' agreement limited Mrs. Gross's alimony to \$200 per month for a period of ten years.<sup>117</sup> The agreement also stipulated that she was not entitled to any division of Mr. Gross's property nor to any expense money or counsel fees in connection with any separation or divorce.<sup>118</sup> Mrs. Gross agreed to waive any and all such rights in the agreement<sup>119</sup> and signed the final version of the agreement against the advice of her counsel.<sup>120</sup>

Twelve years later, Mrs. Gross filed for divorce; the court granted the divorce on grounds of extreme cruelty attributable to Mr. Gross.<sup>121</sup> Evidence adduced at trial indicated that Mr. Gross "increased his total assets to \$8,000,000 with a net equity of

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171 (Pa. 1990) (declining to review whether the prenuptial agreement was substantively fair, but upholding the agreement where it is procedurally conscionable).

<sup>111</sup> For example, compare *Simeone*, 581 A.2d at 166, in which one court refused to render the prenuptial agreement void merely because the wife did not obtain independent legal counsel, with *In re Marriage of Shanks*, 758 N.W.2d 506, 518 (Iowa 2008), in which another court explained several factors to be considered when determining procedural unconscionability, including the opportunity to seek independent legal counsel.

<sup>112</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM'N 1983).

<sup>113</sup> See generally UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT prefatory n. (UNIF. LAW COMM'N 2012) (discussing the inconsistencies among the states' various legal standards for premarital and marital agreements enforced by state courts).

<sup>114</sup> See generally Randolph Carl Oppenheimer, *The Antenuptial Contract in Ohio*, 28 CAS. W. RES. L. REV. 1040 (1978) (explaining the long history behind the procedural shortcomings in Ohio premarital contract enforcement).

<sup>115</sup> *Gross v. Gross*, 464 N.E.2d 500, 501 (Ohio 1984).

<sup>116</sup> *Id.* at 503.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 502.

<sup>121</sup> *Id.*

\$6,000,000.<sup>122</sup> In addition, his gross income for the year 1980 was approximately \$250,000.<sup>123</sup> The trial court upheld the prenuptial agreement as valid and enforceable because Mr. Gross fully disclosed his assets, and none of the evidence demonstrated fraud, duress, or misrepresentation.<sup>124</sup> The appellate court found that “inasmuch as the divorce had been granted upon the trial court’s finding that Mr. Gross had been guilty of gross neglect of duty, he had thereby breached the [prenuptial] agreement and could not enforce its provisions against Mrs. Gross.”<sup>125</sup> Mr. Gross appealed this decision to the Supreme Court of Ohio, which held:

[S]uch agreements are valid and enforceable if three basic conditions are met: one, if they have been entered into freely without fraud, duress, coercion or overreaching; two, if there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the prospective spouse’s property; and, three, if the terms do not promote or encourage divorce or profiteering by divorce.<sup>126</sup>

The court noted that historically, courts treat provisions in prenuptial agreements relating to division of property and alimony upon the parties’ divorce differently from other provisions.<sup>127</sup> Courts hold such agreements, made in contemplation of divorce, void as against public policy.<sup>128</sup> The court reasoned that “in the last decade and a half many changes have taken place in the attitudes and mores surrounding marriage and marital relationships,” and “these changes have altered the public policy view toward [prenuptial] agreements made in contemplation of a possible divorce.”<sup>129</sup> The court identified influential factors such as “the greater frequency of divorce and remarriage, the percentage drop in marriage generally among our citizens . . . [and] the widespread adoption of some manner of ‘no fault’ divorce laws.”<sup>130</sup> The court held the appellate

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<sup>122</sup> *Id.* at 503.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 503–04.

<sup>126</sup> *Id.* at 506. *Gross* defined “overreaching” under the first condition as “used in the sense of one party by artifice or cunning, or by significant disparity to understand the nature of the transaction, to outwit or cheat the other.” *Id.* Parties satisfy the second condition by exhibiting an attachment to the prenuptial agreement containing a list of the assets of the parties to the agreement or by showing there had been a full disclosure by other means. *Id.* Finally, the third condition is generally present where the parties enter into “a [prenuptial] agreement which provides a significant sum either by way of property settlement or alimony at the time of a divorce, and after the lapse of an undue short period of time one of the parties abandons the marriage or otherwise disregards the marriage vows.” *Id.*

<sup>127</sup> *Id.* at 505.

<sup>128</sup> *Id.* One such public policy was “a potential for profitability when one spouse forfeits marital or conjugal rights.” *Id.* Under this scenario, divorce is encouraged where a spouse would profit by monetary means from divorce, contravening the state’s interest in the preservation of marriage. *Id.* “Second, the state is virtually a party to every marital contract in that it possesses a continuing concern in the financial security of divorced or separated persons.” *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

court erred in applying a fault-based view in which the breaching party is estopped from benefiting from his or her wrong.<sup>131</sup> In addition, the court held the antenuptial provision limiting Mrs. Gross's spousal support unenforceable because of its substantive unconscionability.<sup>132</sup> The court acknowledged that Mrs. Gross's standard of living dramatically changed between when the parties executed the agreement and when they filed for divorce.<sup>133</sup> In so holding, the court reasoned that forcing Mrs. Gross to return to her prior standard of living could occasion hardship or be extremely difficult for the former wife.<sup>134</sup>

In *Gross*, the judiciary focused on the prenuptial agreement's substantive fairness. The court considered the changed economic circumstances of the parties in determining whether the content of the agreement was substantively fair.<sup>135</sup> Such considerations afford greater protection of a vulnerable spouse.<sup>136</sup> In this respect, the UPAA differs from Ohio by allowing states to consider an agreement's substantive fairness only when the party against whom enforcement is sought proves that he or she was not provided with a fair and reasonable financial disclosure of the spouse's assets.<sup>137</sup> This is a higher standard for substantive unconscionability because the court first must find that the adverse spouse was not provided a fair disclosure of assets before the court may consider the agreement's reasonableness.<sup>138</sup>

Although more exacting, the UPAA's approach to substantive fairness is more desirable than Ohio's approach. Premised upon a theory of contract law, the UPAA treats premarital agreements as contracts. Thus, when a party acts deceptively or withholds facts, the adverse party may raise a defense to have the contract invalidated.<sup>139</sup> Adoption of the UPAA would require Ohio courts to conduct a legal analysis before performing an equitable one. This would promote uniformity in premarital agreement law by requiring the party against whom enforcement is sought to first establish that the disclosure of assets was inadequate before permitting the

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<sup>131</sup> *Id.* at 508.

<sup>132</sup> *Id.*; see generally *In re Marriage of Shanks*, 758 N.W.2d 506, 508 (Iowa 2008) ("The concept of unconscionability includes both procedural and substantive elements. Procedural unconscionability generally involves employment of sharp practices, the use of fine print and convoluted language, as well as a lack of understanding and an inequality of bargaining power. A substantive unconscionability analysis focuses on the harsh, oppressive, and one-sided terms of a contract").

<sup>133</sup> *Gross*, 464 N.E.2d at 510.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 506.

<sup>136</sup> *Simeone*, in adhering to principles of contract law, reasoned that "everyone who enters into a long-term agreement knows that circumstances can change . . . . If parties choose not to address such matters in their prenuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains." *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990). This rule differs from the rule laid down in *Gross*, which permitted the court to consider the changed circumstances of the parties in determining whether an agreement was substantively fair. *Gross*, 464 N.E.2d at 511.

<sup>137</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM'N 1983).

<sup>138</sup> *Id.*

<sup>139</sup> RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).



court to perform an equitable analysis; this would provide prospective spouses with a meaningful opportunity to decide the terms of their marriage and possible divorce while preventing courts from invalidating provisions absent a showing of a wrong committed by one party. Such an analysis is appropriate when one considers that the role of the judiciary is to apply legal principles to facts,<sup>140</sup> not to overreach in their interpretation of prenuptial agreements by considering whether or not the parties made a reasonable or fair bargain.

Thus, Ohio should adopt the UPAA because the Act's approach to substantive fairness is more suitable for the aforementioned reasons. Adoption of the UPAA in Ohio and all other states would assist in achieving uniformity in prenuptial agreement enforcement by preventing courts from considering whether the agreement constitutes a reasonable bargain absent an initial showing of an inadequate financial disclosure.

### B. *Ohio's Protection of the Vulnerable Spouse Standard*

Ohio common law analyzes prenuptial agreements under non-traditional contract law. Recall that in Part III.A of this Note, *Gross* held prenuptial agreements enforceable if they "have been entered into freely without fraud, duress, coercion or overreaching."<sup>141</sup> The language contained in this rule is analogous to general, contractual language. For example, it is well-settled that "where allegation[s] of fraud, mistake, or material misrepresentation are made, extrinsic evidence may be allowed to interpret language in a written contract which is otherwise plain and unambiguous."<sup>142</sup> However, *Gross* found that the spousal support provision contained in the prenuptial agreement, which limited the former wife's alimony, was unconscionable because her standard of living had changed dramatically from the time that the parties executed the agreement to the time they divorced.<sup>143</sup> The court found the enforcement of the prenuptial agreement unfair because the terms of the agreement failed to account for changed circumstances during the marriage.<sup>144</sup>

Conversely, in jurisdictions that give deference to a party's freedom to contract, if parties fail to plan for foreseeable risks such as changed circumstances, courts must presume the parties contracted to bear these risks.<sup>145</sup> However, courts can use changes in circumstance as rationale for finding a prenuptial agreement invalid.<sup>146</sup> Thus, as portrayed in *Gross*, a court's preference for a reasonableness analysis contravenes principles of contract law because it presumes a failure to address changed circumstances in a prenuptial agreement is the equivalent of the parties' conscious decision to bear the risks of the omission.

In addition, *Gross* held a prenuptial "contract voluntarily entered into during the period of engagement . . . valid when the provision for the [spouse] is fair and

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<sup>140</sup> Vitalius Tumonis, *Legal Realism & Judicial Decision-Making*, 12 JURIS. 1362, 1362 (2012).

<sup>141</sup> *Gross*, 464 N.E.2d at 506.

<sup>142</sup> 6 ARTHUR LINTON CORBIN ET AL., CORBIN ON CONTRACTS § 25.20 (Joseph M. Perillo et al. eds., 2017).

<sup>143</sup> *Gross*, 464 N.E.2d at 510.

<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g.*, *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990).

<sup>146</sup> *Gross*, 464 N.E.2d at 510.

reasonable under all the facts and circumstances."<sup>147</sup> These facts and circumstances could "exist when the disinherited spouse has substantial wealth of his or her own and the deceased spouse had children from a prior marriage who would be natural claimants to his or her bounty."<sup>148</sup> Yet, as previously stated, the Supreme Court of Ohio acknowledged that "[prenuptial] agreements are contracts and generally the law of contracts applies to their interpretation and application"; however, "these agreements constitute a special type of contract to which certain *special rules* apply."<sup>149</sup> Although part of *Gross's* holding is synonymous with contract law, the court's analysis better aligns with jurisdictions that focus upon the reasonableness of the agreement, thereby protecting the economically disadvantaged party.

*Zimmie* analyzed the enforceability of a prenuptial agreement by emphasizing the temporal element, as the former wife first saw the agreement on the eve of the wedding, the absence of the former wife's independent counsel, and her testimony that she felt obligated to sign the agreement.<sup>150</sup> In *Zimmie*, the court "voided the prenuptial contract for procedural unconscionability, [upon] finding that . . . the wife saw the prenuptial contract for the first time only one day prior to the wedding."<sup>151</sup> Yet, in *Simeone*, the court rejected the idea of evaluating the agreement's conscionability, as "[c]ontracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains."<sup>152</sup> Hence, in jurisdictions that purport to protect the vulnerable spouse, courts should consider the circumstances surrounding the execution of prenuptial agreements as well as whether the agreement's terms are reasonable given the positions of the parties. *Zimmie's* analysis falls within the ambit of such.

Some jurisdictions legally recognize the protection of the vulnerable spouse; however, the drafters of the UPAA, along with twenty-seven states, prefer to root judicial inquiries in the principles of freedom to contract.<sup>153</sup> To achieve consistency in premarital agreement law, states must adopt a single, uniform standard. The discrete outcomes in these differing standards place the validity of prenuptial agreements in jeopardy whenever couples move to new jurisdictions. For Ohioans, the UPAA and its contractual freedom approach is appealing, especially because the Supreme Court of Ohio expressly acknowledged that prenuptial agreements are ordinary contracts.<sup>154</sup>

<sup>147</sup> *Id.* at 512 (Brown, J., concurring) (quoting *Juhasz v. Juhasz*, 16 N.E.2d 328 (Ohio 1938)).

<sup>148</sup> *Id.* (citing *Hook v. Hook*, 431 N.E.2d 667 (Ohio 1982)).

<sup>149</sup> *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1346 (Ohio 1994) (emphasis added).

<sup>150</sup> *Zimmie v. Zimmie*, 464 N.E.2d 142, 146 (Ohio 1984).

<sup>151</sup> Joline F. Sikaitis, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 CATH. U.L. REV. 355, 358 n.143 (2004); see also Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 New Eng. L. Rev. 265, 293 (1999) ("The doctrine of unconscionability has provided the means by which courts can begin to perform fairness analysis of the substance of the contractual exchange").

<sup>152</sup> *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

<sup>153</sup> LINDA J. RAVDIN, *PREMARITAL AGREEMENTS: DRAFTING AND NEGOTIATIONS* 8 (2d ed. 2017).

<sup>154</sup> *Fletcher*, 628 N.E.2d at 1346.

As stated *infra*, to achieve consistency and uniform treatment of prenuptial agreements, states like Ohio must conform to the majority approach, giving deference to the contractual freedom of prospective spouses.

C. *The UPAA's Contractual Freedom Focus as the Appropriate Standard*

Ohio should adopt the UPAA because the Act's general approach affords parties freedom, within broad limits, to choose the financial terms of their marriage and divorce.<sup>155</sup> This standard incorporates well-settled principles of contract law, i.e. absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.<sup>156</sup> Under this approach, prenuptial agreements are contracts, and courts should evaluate the agreements under the same criteria applicable to other types of contracts.<sup>157</sup> Not all early adopters of the UPAA stringently adhere to such an approach.<sup>158</sup> For example, Connecticut recognizes that "although a prenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law, the validity of such a contract depends on the circumstances of the particular case."<sup>159</sup> Although a majority of early adopter states slightly varied their enforcement standards for prenuptial agreements, their governing analyses are generally premised upon well-settled principles of contract law.

Thus, to gain acceptance, the UPAA must establish first that it adheres to the contractual freedom standard.<sup>160</sup> Section Three of the UPAA provides strong support for the assertion that the UPAA's general approach is that parties are free to negotiate the terms of their marriage and divorce.<sup>161</sup> This Section regulates the content of prenuptial agreements.<sup>162</sup> The only matters excluded from its scope are criminal or unconscionable matters.<sup>163</sup> Under this Section, parties may freely contract to the disposition of property upon separation; the marital dissolution or the occurrence or nonoccurrence of an event; the modification or elimination of spousal support; the choice of law governing the construction of the agreement; and any other matter, including the parties' personal rights and obligations not in violation of public policy or a statute imposing a criminal penalty.<sup>164</sup> Logic dictates that in mandating minimal restrictions, the UPAA has implicitly affirmed a spouse's right to contractual freedom. In addition, Section Two of the UPAA defines the marriage as consideration for a

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<sup>155</sup> UNIF. PREMARITAL AGREEMENT ACT (UNIF. LAW COMM'N 1983).

<sup>156</sup> *Simeone*, 581 A.2d at 165.

<sup>157</sup> *Id.*

<sup>158</sup> *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011).

<sup>159</sup> *Id.* at 25.

<sup>160</sup> Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania Is the Right Approach for Review*, 6 DREXEL L. REV. 133, 148 (2013).

<sup>161</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (UNIF. LAW COMM'N 1983).

<sup>162</sup> *Id.*

<sup>163</sup> ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>164</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (UNIF. LAW COMM'N 1983).

prenuptial agreement.<sup>165</sup> Consideration, as a basic tenant of contract law,<sup>166</sup> lends further support to the notion that the UPAA intended for courts to consider and evaluate prenuptial agreements as ordinary contracts. Furthermore, the UPAA expressly states that “a premarital agreement is a contract,” and the provisions contained within the Act “may be enforced to the extent that they are enforceable . . . under otherwise applicable law.”<sup>167</sup> Thus, the UPAA takes the position that prenuptial agreements are ordinary contracts that courts should enforce pursuant to traditional contract law.

Accordingly, states that have adopted the UPAA agree that prenuptial agreements are ordinary contracts.<sup>168</sup> Also, other states, like Pennsylvania, that have yet to adopt the UPAA require that prenuptial agreements “be evaluated under the same criteria as are applicable to other types of contracts.”<sup>169</sup> Hence, the prevailing view is that courts should analyze prenuptial agreements under traditional contract law.

In *Reed v. Reed*,<sup>170</sup> the court expressed a convincing argument supporting the contractual freedom standard. In *Reed*, the appellate court overturned the trial court’s ruling that the prenuptial agreement was void given the length of the parties’ marriage and the growth of the parties’ assets over the years.<sup>171</sup> The appellate court found that “the parties’ prenuptial agreement [was] clear and unambiguous, [and that] changed circumstances [did] not render its enforcement unfair and unreasonable.”<sup>172</sup> Justifying its decision, the court cited well-settled principles of prenuptial agreement law, stating, “[c]ourts cannot make contracts. They can only construe them . . . . In keeping with this principle, it necessarily follows that parties who negotiate and ratify [prenuptial] agreements should do so with the confidence that their expressed intent will be upheld and enforced by the courts.”<sup>173</sup> The court in *Reed* opined that the contractual freedom standard was appropriate because courts are not in the business of making contracts.<sup>174</sup> Instead, courts should enforce prenuptial agreements in accordance with the terms set forth by the parties.<sup>175</sup> Arguably, when a court invalidates a prenuptial agreement because it is substantively “unfair,” the court is substituting its judgment for that of the parties.<sup>176</sup> Thus, by invalidating freely and voluntarily executed prenuptial agreements effectuated by competent and consenting adults for any reason other than

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<sup>165</sup> *Id.* § 2.

<sup>166</sup> 2 ARTHUR LINTON CORBIN ET AL., CORBIN ON CONTRACTS §5.2 (Joseph M. Perillo et al. eds., 2017).

<sup>167</sup> UNIF. PREMARITAL AGREEMENT ACT § 2 cmt. (UNIF. LAW COMM’N 1983).

<sup>168</sup> RAVDIN, *supra* note 153, at 8–9.

<sup>169</sup> *Raiken v. Mellon*, 582 A.2d 11, 11 (Pa. Super. Ct. 1990); *see Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

<sup>170</sup> *Reed v. Reed*, 693 N.W.2d 825, 836 (Mich. Ct. App. 2005).

<sup>171</sup> *Id.* at 833.

<sup>172</sup> *Id.* at 836.

<sup>173</sup> *Id.* at 835–36.

<sup>174</sup> *Id.* at 835.

<sup>175</sup> *Id.*

<sup>176</sup> *See, e.g., id.*

grave violations of public policy or criminal acts, the court is “making” or modifying an otherwise valid contract. This is an inappropriate act or role of the judiciary.

In addition, as stated *supra*, the contractual freedom standard is appropriate because marriage, itself, is recognized as a contract.<sup>177</sup> Execution of a marriage contract creates a personal and legal relationship between the parties,<sup>178</sup> and the law intervenes to hold these parties to various obligations and liabilities.<sup>179</sup> If courts consider marriage a contract by which parties acquire enforceable, legal obligations, logically, courts should consider and evaluate premarital agreements as contracts as well.

Within the ambit of social progress, the contractual freedom standard is more appropriate, especially given the improved status of women as equals in modern society.<sup>180</sup> Indeed, “[i]n other areas, the law has developed to assume that all similarly situated people, regardless of gender, stand on equal footing and should receive equal treatment under the law . . . . [Therefore, the law] should do the same for those individuals about to enter into marriage.”<sup>181</sup> The standard embraced by Ohio, protecting the vulnerable spouse, undermines women’s status as equal marital partners capable of contracting.<sup>182</sup> Likewise, courts “run the risk of paternalism by recognizing that the achievement of gender equality requires more than equal treatment—it may demand protection of women as a disadvantaged socioeconomic class.”<sup>183</sup> Although in the past women commonly relied on their husbands to provide for them financially,<sup>184</sup> the number of women in the workforce has greatly increased.<sup>185</sup> Thus, the protection of the vulnerable spouse treats women as incapable of contracting voluntarily and “presumes that women [are] unable to understand the contracts they sign.”<sup>186</sup> This standard suggests that “[w]omen are less powerful than men and need societal protection in the form of voiding the bargains they strike.”<sup>187</sup> This obsolete

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<sup>177</sup> *But cf.* *Maynard v. Hill*, 128 U.S. 190, 210–11 (1888) (“[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract”).

<sup>178</sup> *See id.* at 211.

<sup>179</sup> *Id.*

<sup>180</sup> *See* Biemiller, *supra* note 160, at 166.

<sup>181</sup> *Id.*

<sup>182</sup> Gail Frommer Brod, *Premarital Agreements & Gender Justice*, 6 YALE J.L. & FEMINISM 229, 232 (1994).

<sup>183</sup> *Id.*; *but see Pre-nuptial Agreement—A Feminist Issue?*, U. EXETER’S INTERDISC. ACAD. J. (2014), <http://www.theundergraduateexeter.com/2014/03/pre-nuptial-agreement-feminist-issue/> (arguing that commentators have rejected feminist-based theories of prenuptial by asserting that prenuptial agreements generally disadvantage women because women often fall victim to the gender wage gap).

<sup>184</sup> *Cf.* Brod, *supra* note 182, at 232.

<sup>185</sup> *Cf. id.*

<sup>186</sup> Lisa Milot, *Restricting the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 715 (2001).

<sup>187</sup> *Id.* at 715.

standard threatens to dissipate considerable advances and modern progress made in the area of women’s rights—namely, the recognition of women as equals.

To achieve consist and uniform treatment of prenuptial agreements, all states should adopt the UPAA standard for analyzing prenuptial agreements. This proposition becomes compelling when one considers the inherent difference in analyses and subsequent outcomes that flow from inconsistent standards.<sup>188</sup> Ohio should conform to the views of a majority of states and adopt the UPAA’s contractual freedom standard to reduce ambiguity and promote reliable interpretations for prenuptial agreements in all jurisdictions.

#### D. Practical Issues with Competing Standards

Ohio should adopt the UPAA’s contractual freedom standard. Competing standards for analyzing prenuptial agreements present practical problems for prospective spouses attempting to draft valid and binding agreements that are able to withstand judicial scrutiny in multiple jurisdictions. In *In re Marriage of Rahn*, a couple effectuated a prenuptial agreement in another state and sought to enforce it in Colorado.<sup>189</sup> Under Colorado law, “if a prenuptial agreement was entered into in good faith, with full and fair disclosure, and without fraud or overreaching, the agreement was held to be valid and enforceable.”<sup>190</sup> Mrs. Rahn sought to invalidate the agreement because her husband failed to disclose the value or existence of his pension plan.<sup>191</sup> Instead, the court found in her husband’s favor and upheld the prenuptial agreement, finding Mrs. Rahn had *general knowledge* of his assets.<sup>192</sup>

This case exemplifies some of the issues created from competing standards of enforceability, as the parties executed a prenuptial agreement in one state and subsequently sought enforcement in another. An Ohio court would likely have invalidated the prenuptial agreement at issue in *In re Marriage of Rahn* if Mrs. Rahn gave credible testimony that she did not receive a full and accurate disclosure of her husband’s assets.<sup>193</sup> Such conflicting outcomes “subject the parties to the risk that the validity and enforceability of their contract will be judged by standards and rules that did not exist in the state where the contract was drafted.”<sup>194</sup>

Similarly, in *In re Marriage of Bonds*,<sup>195</sup> Barry Bonds, a professional baseball player, and Sun, his Swedish wife, married in Las Vegas, Nevada in 1988.<sup>196</sup> In 1987, Sun moved to Arizona to live with Barry.<sup>197</sup> The morning before their flight to Las

<sup>188</sup> See discussion *infra* Part III.D.

<sup>189</sup> *In re Marriage of Rahn*, 914 P.2d 463, 465 (Colo. App. 1995).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Ohio law requires “full disclosure [of assets] or full knowledge and understanding of the nature, value, and extent of the prospective spouse’s property.” 46 OHIO JUR. 3D *Family Law* § 156 (2017).

<sup>194</sup> 19 SCOTT J. HORENSTEIN, WASH. PRAC. FAM. AND CMTY PROP. L. § 16:5 (2015).

<sup>195</sup> *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783 (Cal. Ct. App. 1999).

<sup>196</sup> *Id.* at 787.

<sup>197</sup> *Id.*

Vegas, the couple met with Barry's attorney and signed a prenuptial agreement<sup>198</sup> containing a complete waiver of spousal support.<sup>199</sup> Moreover, Sun was not represented by independent legal counsel.<sup>200</sup> At the time of the divorce proceedings, the couple lived in California where Sun was a stay-at-home mother of their two children; Barry was earning \$8,000,000 annually as a professional baseball player.<sup>201</sup> Prior to trial, the court considered whether Arizona or California law should govern the interpretation of the prenuptial agreement.<sup>202</sup> The trial court declined to apply California law upon concluding "that the parties could not have anticipated that they were going to live in California."<sup>203</sup> The trial court subsequently enforced the prenuptial agreement.<sup>204</sup> The appellate court reversed, however, applying California law and holding that under the totality of the circumstances, the prenuptial agreement was invalid.<sup>205</sup> The Supreme Court of California was silent on the appellate court's choice of law ruling,<sup>206</sup> but held that the prenuptial agreement was valid except for the waiver of spousal support, which was unenforceable pursuant to California public policy.<sup>207</sup>

*In re marriage of Bonds* illustrates the pragmatic concerns underlying choice-of-law issues that courts must face when deciding which law to apply to enforce prenuptial agreements executed in another state. Under Ohio law, courts would likely invalidate the prenuptial agreement in *Bonds* due to the inequality of bargaining power between the parties coupled with the absence of independent legal counsel for the former wife.<sup>208</sup> An Ohio court would have applied Arizona law to the Bonds' prenuptial agreement because Ohio's choice-of-law rules provide: "in the absence of an effective choice by the parties, the Second Restatement requires application of a most significant relationship test."<sup>209</sup> Thus, if an Ohio court determined that the parties had a significant relationship with the State of Arizona, then Arizona law would govern the interpretation of the prenuptial agreement. Adoption of the UPAA in all states would minimize the effect that choice-of-law determinations have on prenuptial

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<sup>198</sup> *Id.* at 788.

<sup>199</sup> *Id.* at 789.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 783.

<sup>206</sup> *In re Marriage of Bonds*, 5 P.3d 815, 823 (2000).

<sup>207</sup> *Id.* at 838.

<sup>208</sup> Although independent counsel is not a requirement to enforce a prenuptial agreement under Ohio law, the Court in *Zimmie* would have likely given great deference to this fact coupled with the former wife's Swedish heritage and possible language barrier. See *Zimmie v. Zimmie*, 464 N.E.2d 142 (Ohio 1984).

<sup>209</sup> Sonja H. Haller, *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*, 44 OHIO ST. L.J. 239, 247 (1983). The significant relationship test is the application of the law with the "most significant relationship to the event and the parties." *Id.*

agreement interpretations because each state would apply the same uniform standard.<sup>210</sup>

This is significant because the primary reason choice-of-law determinations are repeatedly at issue in prenuptial agreements is because the applicable state law often changes the outcome of the proceeding.<sup>211</sup> The obliteration of competing standards and subsequent adoption of the UPAA will enable couples to effectuate binding premarital contracts, guaranteeing consistent enforcement across state lines.

#### *E. The UPAA Incorporates Accepted Standards of State Laws*

Ohio should adopt the UPAA because the Act incorporates accepted standards of existing state laws. For example, Section Three of the UPAA regulates the content of prenuptial agreements.<sup>212</sup> As stated *supra*, nothing is excluded from the scope of the agreement except matters that are criminal or unconscionable.<sup>213</sup> Every state prohibits prospective spouses from contracting to anything illegal in the prenuptial agreement.<sup>214</sup> Hence, the UPAA's regulation of prenuptial agreement content, although liberal in nature, is uniformly practiced in every state.

A significant number of states permit parties to include a provision to modify or eliminate spousal support; however, the rules vary as to the limitations imposed on such provisions.<sup>215</sup> Under the UPAA, a provision that modifies or eliminates a spouse's right to spousal support will be invalidated if enforcement of the provision would leave one party destitute.<sup>216</sup> The test is "whether, within a reasonable period of time following the divorce, it is probable . . . that the deprived spouse will become a public charge if the limitation or waiver of alimony is enforced."<sup>217</sup> California and South Dakota are the only two states that have eliminated this section from their

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<sup>210</sup> This argument is advanced in the preceding paragraph.

<sup>211</sup> Julia McLaughlin, *Prenuptial Agreements and Choice of Law: One, Two, Three, Baby, You and Me*, 72 MO. L. REV. 793, 795 (2007).

<sup>212</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (UNIF. LAW COMM'N 1983).

<sup>213</sup> ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>214</sup> *What Can and Cannot Be Included in Prenuptial Agreements*, FINDLAW.COM, <http://family.findlaw.com/marriage/what-can-and-cannot-be-included-in-prenuptial-agreements.html> (last visited Oct. 14, 2016).

<sup>215</sup> See, e.g., *Gant v. Gant*, 329 S.E.2d 106, 116 (W.Va. 1985) (holding that a prenuptial agreement concerning waiver of alimony was enforceable and presumptively valid, despite the fact that prenuptial agreements are disfavored). In Ohio, courts permit parties to a prenuptial agreement to contract to matters relating to spousal support, but "a party may challenge the spousal support provisions contained therein by demonstrating that the terms related to spousal support are unconscionable at the time of the divorce." *Vanderbilt v. Vanderbilt*, No. 13CA0084-M, 2014 Ohio App. LEXIS 3589, 2014 WL 4179486, at ¶ 5 (Ohio Ct. App., Medina County, Aug. 25, 2014) (first quoting *Vanderbilt v. Vanderbilt*, No. 11CA0103-M, 2013 Ohio App. LEXIS 1121, 2013 WL 1286012, at ¶ 39 (Ohio Ct. App., Medina County, Mar. 27, 2013); then citing *Gross v. Gross*, 464 N.E.2d 500, 501 (Ohio 1984)).

<sup>216</sup> See Susan Wolfson, *Prenuptial Waiver of Alimony*, 38 FAM L.Q. 141, 145 (2004).

<sup>217</sup> *O'Daniel v. O'Daniel*, 419 S.W.3d 280, 281 (Tenn. Ct. App. 2013).



versions of the UPAA.<sup>218</sup> “However, California case law indicates that spousal support waivers are not contrary to public policy and are not per se void or unenforceable.”<sup>219</sup>

Conversely, some states prohibit waiver of spousal support provisions on the theory that such provisions encourage divorce and are void as against public policy.<sup>220</sup> Nevertheless, several states still permit spouses to contract to such spousal support provisions.<sup>221</sup> The UPAA adopts accepted state standards governing spousal support provisions within prenuptial agreements.

In addition, Section Six of the UPAA provides grounds for avoiding enforcement of a prenuptial agreement.<sup>222</sup> First, premarital agreements are not enforceable if the party against whom enforcement is sought proves that the parties did not enter into the agreement voluntarily.<sup>223</sup> This requirement is another accepted standard in all states.<sup>224</sup> For example, Ohio “requires that the agreement be freely entered into without fraud, duress, coercion or overreaching.”<sup>225</sup> This language is analogous to the language in Section Six of the UPAA, which states “an agreement remains unenforceable if the attacking party proves, by the preponderance of the evidence, it was not voluntary, or was the product of fraud, duress, coercion, or overreaching.”<sup>226</sup> Hence, the requirement that parties voluntarily execute prenuptial agreements is an accepted standard of enforcement in all states.

Ohio is among a significant minority in its interpretation of prenuptial agreements.<sup>227</sup> Arguably, Ohio and similar jurisdictions possess second-tier views to the corresponding governing standards. Inevitably, all states, upon recognizing the importance of uniform treatment of prenuptial agreements, will have to compromise on which standards and principles should govern. Such a compromise is essential to ensure preservation of the rights of spouses to contract freely in prenuptial agreements. The wisdom of twenty-seven state legislatures reinforces the widespread acceptance of the UPAA’s standards. Therefore, adopting these accepted standards would allow uniform treatment and consistent outcomes in the enforcement of prenuptial agreements, providing adequate and reliable guidance for judicial interpretation of prenuptial agreements.

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<sup>218</sup> Wolfson, *supra* note 216, at 145.

<sup>219</sup> *Id.*; see CAL. FAM. CODE § 1612(c) (2017).

<sup>220</sup> *Cf. Stratton v. Wilson*, 185 S.W.2d 22, 523 (Ky. 1916) (“[T]he law will not permit parties contemplating marriage to enter into a contract providing for, and looking to, future separation after marriage”).

<sup>221</sup> McCaffrey, *supra* note 27, at 10.

<sup>222</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM’N 1983).

<sup>223</sup> *Id.*

<sup>224</sup> *But see In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783, 795 (Cal. Ct. App. 1999) (“Although all states require ‘voluntary’ execution of such contracts, jurisdictions vary significantly in the standards used to review the validity of prenuptial agreements”).

<sup>225</sup> *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984).

<sup>226</sup> Unif. Premarital Agreement Act § 6 (Unif. Law Comm’n 1983).

<sup>227</sup> *See Curry*, *supra* note 66, at 355.

*F. The UPAA Incorporates a Flexible Framework*

Another reason why Ohio should adopt the UPAA is because the Act provides a flexible framework for interpreting prenuptial agreements. The UPAA’s flexible framework allows states to make minor modifications prior to enacting their own versions of the UPAA.<sup>228</sup> For example, regarding child support provisions, the UPAA states that a prenuptial agreement may not adversely affect the right to child support.<sup>229</sup> Utah’s modification of this section provides that “in addition to the right to child support not being adversely affected by a premarital agreement, the medical insurance, the health and medical provider expenses, and the child-care coverage cannot be affected by such an agreement.”<sup>230</sup> Connecticut added a discretionary clause to its version of the UPAA, stating that “any provision relating to the custody, visitation, and care or any other statement affecting a child shall be subject to judicial review and modification.”<sup>231</sup> Currently, in Ohio, “all issues related to child support, custody and visitation included in a prenuptial agreement will not be enforced by the court . . . because these issues are decided by the court based upon what is in the child’s best interest.”<sup>232</sup> The Act’s flexible framework would allow the Ohio Legislature to craft its own version of the UPAA, similar to Connecticut’s version, subjecting child support provisions in prenuptial agreements to judicial review. Ultimately, as more states adopt the UPAA, Ohio will have to compromise and defer to the UPAA’s governing standards.<sup>233</sup> However, as demonstrated here, Ohio can preserve some of its common law principles without hindering the uniform application of the UPAA across state lines.

Many states have adopted modified versions of the UPAA; yet, these states still adhere to the Act’s general framework. For example, California requires “fair, reasonable and full disclosure of the property or financial obligations of the other party.”<sup>234</sup> The UPAA “requires only ‘fair and reasonable disclosure.’”<sup>235</sup> Thus, “[u]nder the UPAA, less than full disclosure might be acceptable.”<sup>236</sup> Similarly, Illinois “allows for a provision of the premarital agreement dealing with the modification or elimination of support to be changed by a court to avoid the party against whom enforcement is sought from suffering undue hardship.”<sup>237</sup> Finally, the Indiana version of the UPAA implies that although a “premarital agreement that

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<sup>228</sup> *Id.* at 356.

<sup>229</sup> *Id.* at 357 (citing UNIF. PREMARITAL AGREEMENT ACT § 3(b) (UNIF. LAW COMM’N 1983)).

<sup>230</sup> *Id.* at 381 (citing UTAH CODE § 30-8-4(2) (2008)).

<sup>231</sup> *Id.* at 363 (citing CONN. GEN. STAT. § 46b-36d(c) (2008)).

<sup>232</sup> Stock, *supra* note 58.

<sup>233</sup> See UNIF. PREMARITAL AGREEMENT ACT prefatory n. (UNIF. LAW COMM’N 1983); see also ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>234</sup> Curry, *supra* note 66, at 362 (quoting CAL. FAM. CODE § 1615(a)(2)(A) (2009)).

<sup>235</sup> *Id.* (quoting UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2)(i) (UNIF. LAW COMM’N 1983)).

<sup>236</sup> *Id.* (first citing UNIF. PREMARITAL AGREEMENT ACT § 6(b) (UNIF. LAW COMM’N 1983); then citing CAL. FAM. CODE § 1615 (2009)).

<sup>237</sup> *Id.* at 367; 750 ILL. COMP. STAT. 10/1–10/11 (2017).

causes one spouse to be forced onto public assistance may be unconscionable, a better test for unconscionability is to compare the situations of both parties.”<sup>238</sup> Overall, the UPAA’s flexible framework provides Ohio with the unique opportunity to merge traditional Ohio prenuptial agreement principles with the UPAA, thereby contributing to the uniform application of prenuptial agreement law across state lines.

### G. The UPAA Promotes Uniformity

Ohio should adopt the UPAA because the Act promotes uniform enforcement of prenuptial agreements. The ULC, in promulgating the UPMAA, explained that the UPAA “brought . . . consistency to the legal treatment of premarital agreements,” but ultimately concluded that “uniformity has declined as states have amended the act in various ways throughout the years.”<sup>239</sup> Despite its variations, the UPAA continues to promote uniformity because it eliminates the existence of diametrically opposed standards and adopts a more uniform approach—the contractual freedom standard.<sup>240</sup> Continuing this abolition of competing standards will eradicate the need for courts to constantly assess substantive fairness because, under the UPAA, states may consider the substantive fairness of the agreement *only* when the party against whom enforcement is sought proves that he or she was not provided a fair and reasonable financial disclosure.<sup>241</sup> Furthermore, adoption of the UPAA will eliminate content assessments because the UPAA permits parties to contract to a wide range of subject matters.<sup>242</sup> Eventually, adoption of the UPAA could even phase out individual state content restrictions altogether on terms such as child or spousal support.

The UPAA also promotes uniformity by minimizing splits in authority. For example, “there is a split in authority among the states as to whether a premarital agreement may control the issue of spousal support.”<sup>243</sup> A growing trend exists where parties may contractually alter spousal support if certain standards are met.<sup>244</sup> As more states adopt the UPAA, more trends will emerge. Ohio and Connecticut agree that child support, visitation, and custody are best left to family courts;<sup>245</sup> yet, several states disagree and permit broad freedom to contract provided the right to child support is not adversely affected.<sup>246</sup> Thus, if every state adopts the UPAA, a majority rule will likely emerge, thereby minimizing splits in authority. As a result, the widespread adoption of the UPAA would promote uniform treatment of prenuptial agreements.

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<sup>238</sup> Curry, *supra* note 66, at 368 (citing *Rider v. Rider*, 669 N.E.2d 160, 164 (Ind. 1996)); see IND. CODE §31-11-3-8 (2017).

<sup>239</sup> ULC, *Summary*, *supra* note 33.

<sup>240</sup> See UNIF. PREMARITAL AGREEMENT ACT § 6 cmt. (UNIF. LAW COMM’N 1983).

<sup>241</sup> *Id.* § 6.

<sup>242</sup> See *id.* § 1 cmt.

<sup>243</sup> *Id.* § 3.

<sup>244</sup> *Id.*

<sup>245</sup> See Curry, *supra* note 66, at 355.

<sup>246</sup> *Id.* at 357.

IV. CONFRONTING THE COUNTERARGUMENT: STATES WILL BE RELUCTANT TO ADOPT THE UPMAA

As stated *supra*, the ULC approved the UPMAA at its annual conference on July 18, 2012<sup>247</sup> after half of the states failed to adopt the UPAA.<sup>248</sup> Commentators have suggested that the state variations of the UPAA were significant, preventing uniform treatment of prenuptial agreements across state lines.<sup>249</sup> Because states traditionally governed premarital and marital agreements under separate legal standards, the ULC sought to unify the interpretation of such agreements under one set of procedures.<sup>250</sup>

Some argue that states may have undermined uniformity by modifying and enacting their own versions of the UPAA; however, scholars refute these claims, arguing that “many of these changes have no significant impact on [a] state’s adoption of the UPAA.”<sup>251</sup> Consider the Arkansas Premarital Agreement Act, similar to the UPAA, which requires a prenuptial agreement be in writing and signed by both parties.<sup>252</sup> Unlike the UPAA, Arkansas’s Act also requires “the agreement . . . be acknowledged by both parties.”<sup>253</sup> Florida “allows a premarital agreement to be held unenforceable if the party against whom enforcement is sought can prove the agreement was the product of fraud, duress, coercion or overreaching.”<sup>254</sup> Florida, thus, builds upon the UPAA’s general requirement that parties execute prenuptial agreements voluntarily, enacting additional enforceability requirements that could render a prenuptial agreement invalid.<sup>255</sup> Overall, although many states add modifications to the UPAA provisions, they have not impeded the uniform application of the UPAA’s governing standards across state lines.

If one views the UPAA as a safety net, this proposition becomes compelling. Essentially, the UPAA mandates minimal formal requirements—the agreement must be in writing and signed by both parties.<sup>256</sup> Additional formalities, like Arkansas’s additional provision, do not change the underlying rules prohibiting parties from orally executing prenuptial agreements.<sup>257</sup> Florida’s inquiry into whether the prenuptial agreements overreach, similarly, does not hinder the UPAA’s provision requiring voluntary execution in prenuptial agreements.<sup>258</sup> Voluntariness operates as a safety net; stated differently, it is the bare minimum required to justify enforcing a prenuptial

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<sup>247</sup> McCaffrey, *supra* note 27, at 10.

<sup>248</sup> *Id.* at 11.

<sup>249</sup> See UNIF. PREMARITAL AGREEMENT ACT prefatory n. (UNIF. LAW COMM’N 1983).

<sup>250</sup> See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW. COMM’N 2012).

<sup>251</sup> Curry, *supra* note 66, at 383.

<sup>252</sup> *Id.* at 360 (citing ARK. CODE ANN. § 9-11-402 (2009)); compare UNIF. PREMARITAL AGREEMENT ACT § 2 (UNIF. LAW COMM’N 1983) with ARK. CODE § 9-11-402 (2017).

<sup>253</sup> Curry, *supra* note 66, at 360 (citing ARK. CODE ANN. § 9-11-402 (2009)).

<sup>254</sup> *Id.* at 366 (quoting FLA. STAT. § 61.079(7)(a)(2) (2017)).

<sup>255</sup> *Id.*; see FLA. STAT. § 61.079(7) (2017).

<sup>256</sup> UNIF. PREMARITAL AGREEMENT ACT § 2 (UNIF. LAW COMM’N 1983).

<sup>257</sup> Curry, *supra* note 66, at 360.

<sup>258</sup> *Id.* at 366.

agreement. Overreaching operates as an additional factor courts could consider in determining whether the agreement was sufficiently voluntary.<sup>259</sup> Other states have made similar changes such as rearranging the organizational structure of the UPAA, modifying provisional language, eliminating subsections, and adding subsections.<sup>260</sup> Despite these variations, the Act's original provisions remain significantly unharmed in every manifestation, likely because the UPAA provides such a broad, general framework for enforcement of prenuptial agreements.<sup>261</sup> Thus, states may continue to enact their own variations, while the overall framework and substance of the UPAA protects uniformity.

In the prefatory note of the UPMAA, the ULC said critics attacked the UPAA as insufficient in its protection of the vulnerable spouse.<sup>262</sup> The UPAA says, in relevant parts, that "a premarital agreement is a contract," and the Act's provisions "may be enforced to the extent that they are enforceable . . . under otherwise applicable law."<sup>263</sup> Logically, courts should evaluate a contract under traditional principles of contract law. Many states have expressed agreement by adopting the UPAA.<sup>264</sup> States that agree with the UPAA's approach will be reluctant to adopt the UPMAA as the Act's revised focus centered around the protection of the vulnerable spouse.<sup>265</sup> Unfortunately, this view would require a significant number of states to alter materially their prenuptial agreement laws, focusing, instead, on whether an agreement is substantively fair and includes a reasonable bargain.<sup>266</sup> These goals are unrealistic; the ULC essentially expects a majority of states to unravel years of jurisprudence overnight to preserve uniform prenuptial agreement laws.<sup>267</sup> Simultaneously, the commission endorsed two opposing standards contained within two different prenuptial agreement acts.<sup>268</sup> In addition, the UPMAA's attempts to bring both marital and premarital agreements into its scope<sup>269</sup> decreases the likelihood that states will adopt it. The ULC, itself, conceded that most states analyze premarital

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<sup>259</sup> *Id.*

<sup>260</sup> *See* Curry, *supra* note 66, at 367; *see also id.* at 364 ("Indiana changed some of the organizational structure of the UPAA, even where it did not change the language or meaning of that section of the act; Connecticut has also kept some of the original UPAA's language").

<sup>261</sup> *See* UNIF. PREMARITAL AGREEMENT ACT prefatory n. (UNIF. LAW COMM'N 1983).

<sup>262</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT prefatory n. (UNIF. LAW. COMM'N 2012).

<sup>263</sup> UNIF. PREMARITAL AGREEMENT ACT § 2 (UNIF. LAW. COMM'N 1983).

<sup>264</sup> *See, e.g.,* Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) ("Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements").

<sup>265</sup> *See* UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT prefatory n. (UNIF. LAW. COMM'N 2012).

<sup>266</sup> *Id.*

<sup>267</sup> *See* ULC, *Why States Should Adopt UPAA*, *supra* note 19.

<sup>268</sup> *Id.*

<sup>269</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT prefatory n. (UNIF. LAW. COMM'N 2012).

and marital agreements under entirely different legal standards.<sup>270</sup> Regardless, many of the state variations of the UPAA are insignificant in terms of impact on uniformity. Thus, Ohio should adopt the UPAA's accepted state standards, flexible framework, and contractual freedom approach to prenuptial agreement interpretation.

#### V. CONCLUSION

In today's society, emerging awareness among prospective spouses of the need to settle marital issues between themselves before marriage<sup>271</sup> has led to an increase in prenuptial agreements.<sup>272</sup> Couples in the United States commonly live in several states throughout the course of their marriage.<sup>273</sup> Such circumstances have caused individual states to establish prenuptial agreement laws that differ in both formal and substantive ways.<sup>274</sup> As a result of non-uniform treatment of prenuptial agreements across state lines,<sup>275</sup> the ULC drafted the UPAA as a remedial measure.<sup>276</sup> Currently, Ohio remains one of twenty-three states yet to adopt the UPAA.<sup>277</sup> Ohio's adoption of the UPAA would clarify the rights and responsibilities of parties subject to prenuptial agreements; subsequent adoption of the Act in all states would guarantee reliable prenuptial agreements which could withstand judicial scrutiny in all jurisdictions.

Moreover, Ohio's adoption of the UPAA would conform to state precedent. Ohio law currently adheres to the UPAA's enforceability requirements—that premarital agreements are unenforceable if the party against whom enforcement is sought proves that the parties did not execute the agreement voluntarily or that the agreement was unconscionable.<sup>278</sup> In addition, because of the UPAA's flexible framework, Ohio legislatures may create their own version of the UPAA to complement existing Ohio law.<sup>279</sup> The only significant departure from current Ohio law would occur in the absence of an inadequate disclosure of assets, which, under the UPAA, allows prenuptial agreements to be invalidated only upon a showing of fraud, misrepresentation, or duress.<sup>280</sup> This departure is a small, legal concession that would ensure that courts uphold respective intents of parties when dictating crucial terms of their marriage and divorce. In time, Ohio's adoption of the UPAA would be a significant step toward the ultimate goal—adoption of the UPAA across all fifty states. Nationwide adoption of the UPAA would encourage and permit prospective spouses wishing to solidify their terms of marriage and divorce to do so through binding and valid legal instruments.

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<sup>270</sup> *Id.*

<sup>271</sup> ULC, *Summary*, *supra* note 33.

<sup>272</sup> *Id.*

<sup>273</sup> UNIF. PREMARITAL AGREEMENT ACT § 2 (UNIF. LAW. COMM'N 1983).

<sup>274</sup> *Id.*

<sup>275</sup> Blomberg, *supra* note 17, at 131.

<sup>276</sup> *Id.*

<sup>277</sup> Curry, *supra* note 66, at 355.

<sup>278</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW. COMM'N 1983).

<sup>279</sup> *See id.* § 6 cmt.

<sup>280</sup> *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

