Marital Agreements in the United States

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I. Default Rules That Apply When There Is No Agreement

There are no public programs in America designed specifically to provide financial assistance to divorced families. Divorced families may of course seek, along with never-married families and everyone else, assistance from any of the hodge-podge of state and federal public welfare programs for which they may be eligible In general, of course, the American social safety net is less comprehensive and less generous than the European. The financial welfare of divorced families is thus largely a matter for private law.

The rules that govern financial claims between divorcing Americans are a challenge to summarize because there are in principle 51 sets of them. One must therefore rely more than one might prefer on generalizations about groups of states.[1]

A. Division of Property.

At one time there was a sharp division between most American states, which followed traditional common-law principles in the allocation of property at divorce, and the eight states that followed community property principles. The common law treated property owned by the spouses during their marriage as the individual property of one of them unless, as to a particular piece of property, they had acted to create joint ownership. The title in which property was held was critical. The effect was to vest ownership in the spouse who earned the money with which the property was purchased, although that owner could make a gift to the other spouse by shifting property to joint title, or sole title in the other spouse's name. At divorce each spouse was allocated his or her property. The result in most cases was to allocate the bulk of the property to the husband. Alimony was therefore often the only financial remedy available to meet claims the divorced wife might have on her own behalf, as contrasted with claims of child support she might make on behalf of her children.

Community property law begins with the contrary presumption: all earnings from spousal labor during the marriage are the property of the marital "community" in which each spouse has an undivided one-half interest. Property acquired with spousal earnings is therefore also owned equally by the spouses, regardless of whether purchased with funds earned by the husband, the wife, or both, unless the parties change the character of the property by agreement or gift. In California and two

1. This section on default rules relies on the overview I prepared for the American Law Institute's Principles of the Law of Family Dissolution, with some updating to take account of later developments.

other community property states, all community property is divided at divorce into spousal shares equal in value, although not necessarily identical in kind. Alimony (renamed as "spousal support" or "maintenance" in most jurisdictions) may also be allowed, as determined on a case-by-case basis.

This sharp dichotomy between common law and community property traditions no longer prevails in the United States. All the common-law states now allow the divorce court to distribute the spouses' property between them on a basis other than common-law principles of ownership, under a doctrine known generally as "equitable distribution". Five of the eight community property states also instruct their divorce courts to divide the community property between the spouses "equitably" (rather than "equally"). Equitable distribution is therefore the dominant rule today, followed everywhere but in the three "equal division" community property states.[2]

The consensus, however, has not been as great as this description suggests. Different starting points in their underlying concepts of ownership can yield differences in the way judicial discretion is exercised under equitable distribution rules that are similar on their face. The concept of joint ownership is pervasive in community property states, applicable not only at dissolution but also at death (a spouse as testamentary power over only half the value of assets acquired through his labor during marriage, as the other half belongs to his spouse) and during marriage (with management control over community assets allocated under gender-neutral rules.)[3] There is thus no doubt that in every sense, spouses in community property states own equal shares of all property that either one acquires through labor during their marriage. That means that the equal ownership principle is fully embedded in the legal culture of community property states, and an unequal division of equally-owned property requires some special justification. In consequence even the five community property states that do not have a formal rule requiring equal division nonetheless order it in almost every case.[4] At the same time, nearly all the community property states follow a rule requiring that "separate property"– property the spouses earned before the marriage, or received by inheritance at any time–be confirmed at divorce as that spouse's sole property. In sum, *property* law is the primary basis on which the community property states allocate property at divorce.

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2. These three are California, Louisiana, and New Mexico.

3. For example, the will of a spouse in a community property state applies only to that spouse's half-share of the community property. The surviving spouse's ownership of the other half is not dependent upon the will and cannot be defeated by it.

4. "[A]ll marital joint property should be divided substantially equally unless sound reason exists to divide the property otherwise. That approach simply reflects the principle that community property implies equal ownership. In most cases, therefore, an equal distribution of joint property will be the most equitable." Toth v. Toth, 940 P.2d 900, 903 (Arizona 1997).

The role of property law is more confused in the common law states, all of which retain traditional common law separate ownership principles at both death and during marriage. They thus superimpose equitable distribution at divorce on top of these property rules. So equitable distribution reform did not change their marital property law, but displaced it: Equity *rather than* property law would now govern the allocation of property at divorce. In its purer form this idea throws all property the spouses own into the pot, rather than only the property acquired during the marriage, because the point was to give courts roving authority to reassign any assets the parties had, without limit, as needed to work a fair result. This attitude can be seen in the history of the Uniform Marriage and Divorce Act, the 1970's model that played a large role in these reforms. In its original form, § 307 of the Act distinguished marital from separate property, along lines that mimicked the community and separate property distinction.[5] Family law attorneys from common law states raised sufficient objection to this formulation to put the Act's endorsement by the American Bar Association in jeopardy.[6] The result was a 1973 amendment that offered two alternative versions of the property section. Alternative A followed an "all property" rule, and was designated as the preferred alternative, while Alternative B, meant for community property states, distinguished community from separate property. But in fact, it was the original version, with its distinction between marital and separate property, that in the end most states adopted. Indeed, in the years since, the minority of common law states that chose the "all property" version has shrunk further. There are today only a few left.[7] Moreover, the distinction between marital and separate property that most common law states follow has been drawn more systematically in recent years. Today some common law states even engage in the careful tracing of assets held at divorce, back to their original sources, to make the crucial classification between marital and separate property–something routinely done in the community property states.[8]

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5. This original 1970 version is set out in the annotations to § 307 in Uniform Laws Annotated.

6. "During the American Bar Association meeting (I believe in 1970 after the Commissioners had given final approval to the Act as it came out of Committee) a group in the Family Law Section, led by Henry Foster, refused to approve the Act (preventing ABA approval) without a change in Section 307 to provide only for the "all property of either spouse" ("Hotchpot") alternative." Email to Ira Ellman from Robert Levy, Reporter for the Uniform Marriage and Divorce Act, August 5, 2009.

7. One recent review claims 14 "all property" states: Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, and Wyoming. J. Thomas Oldham, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY (Law Journal Press, New York, New York, 1987 & Supp. 2008). However, the case law in many of these states creates presumptions that recreate the distinction between marital and separate property though allocation principles that take the method of acquisition into account in deciding on equity of any allocation. See Ellman, Kurtz, Scott, Weithorn and Bix, FAMILY LAW: CASES, TEXT, PROBLEMS 4th ed. (Newark, New Jersey, LexisNexis, 2004) at 299.

8. Examples of common law courts engaging in such tracing include: Merriken v. Merriken, 590 A.2d 565 (Md. Spec. App. 1991) (allowing wife to claim an interest in the appreciation of husband's separate property where

Of course, the strength of this trend toward a more property-oriented approach to equitable division varies among the states. Some have not moved in that direction at all, while others have gone quite far, their courts increasingly comfortable making fine property classification decisions that rely on authority in community property states for guidance.[9] The difference is important, because the more well-defined and narrow is the class of property subject to equitable reallocation, the more certain are the allocation rules that apply to it. An equal allocation rule makes no sense to most people if the pot to which it is applied includes property the spouses inherited, or owned before the marriage, and it would make little sense in New York, which continues to insist, alone among American states, that a portion of a spouse's expected future earnings be treated as if they were property, to be valued and then divided at divorce. So clear rules for distinguishing marital and separate property go hand in hand with clear rules for the division of property. This insight of the community property system has now made considerable inroads in the common law states, even in parts of the country traditionally most attached to the common law system.[10]

One issue on which the the community property rule has been adopted by virtually all the common law states is the treatment of pensions.[11] Allocation is made between the portion of any pension entitlement earned during the marriage, and the portion earned before or after. In the increasing proportion of pension plans that are *defined-contribution* rather than *defined-benefit*, the allocation is often straightforward: contributions made to the pension fund on the employee's behalf, whether by the employer or the employee himself, are marital or community property if earned (or made from earnings) during the marriage. Investment returns from these contrbutions are of course also marital. For defined-benefit plans, allocation is most often made by a relative time rule: the marital years contributing to the pension entitlement are divided by the total years over which the pension was earned to establish the fraction of the pension benefit that is marital or community property. In either case, the marital portion is always divided equally in the community property states

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that appreciation resulted from husband's labor during marriage); Thomas v. Thomas, 377 S.E.2d 666 (Ga. 1989) (dividing the proceeds from the sale of the marital home between the spouses according to the marital and separate property sources of the funds used to acquire it).

9. For an example of a common law state relying on community property principles, see Niroo v. Niroo, 545 A.2d 35 (Md. 1988) (issue is whether to treat at marital property renewal commissioners earned by husband on insurance policies he sold during the marriage, but which are renewed after the marriage).

10. E.g., Arkansas and North Carolina now have statutory presumptions that marital property should be divided equally. Arkansas Code Ann. § 9-12-315(a)(1)(A)(2009) ("All marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable."); North Carolina Gen. Stat. Ann. § 50-20(c)(2009) ("There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable.").

11. For a fuller description of the typical state pension rules and the federal law (ERISA), see Ellman et al., FAMILY LAW at 316-321.

and now, more often than not, in the common law states also. In shorter marriages the retirement plan accumulation is often small enough that it is feasible to settle spouse's claim in a lump sum at divorce, perhaps by way of tradeoff against another asset on which the employee-spouse forgoes his share.

In longer marriages where the spouses are closer to retirement and the value of the accumulated retirement benefit is greater, it is usually more practical to allocate shares of the annuity as it is paid each month. Federal legislation (ERISA) that applies to most private pension plans makes this much easier. It requires the administrator of any pension plan to send directly to the employee's spouse that spouse's share of the monthly benefit, eliminating any need to rely on the employee spouse himself to make monthly payments to his former spouse of her share. ERISA also provides a convenient solution to the otherwise difficult problem that arises when the employee spouse eligible to retire chooses instead to continue working and deter receipt of the pension, while the other spouse needs or want to begin receiving her share of the pension immediately. The court simply directs the pension administrator to bifurcate the benefits, starting payments to the other spouse immediately, in an amount equal to her share of the benefit the employee spouse would have received had he chosen to retire then. The employee receives no benefits until he actually retires, and his benefits are adjusted to take account of the earlier payments to his spouse.

In about one-third of the states, marital misconduct may in principle be considered by courts in setting an equitable allocation, but in many of these states its consideration is limited by formal rules or local practice so that there a few cases in which it has an important impact. Financial misconduct, such as the destruction or concealment of marital assets, is more widely thought relevant, even in strict equal division states that leave nothing else for a judge to consider, because such conduct might otherwise deprive the victim of the true half-share to which they are entitled.

In sum, then, one can group together the American community property states, and an increasing share of the common law states, as sharing an approach that distinguishes clearly between property acquired through labor during marriage, and property acquired through inheritance and gift, or before marriage. This group of states generally divide the former property equally, while confirming a spouse's separate ownership of the latter. The community property states in this group are in general more precise about the classification of property, and more faithful to the equal division principle, than are the common law states, because they see the primary purpose of the property allocation at divorce as recognizing the spouses' equal ownership, which is itself thought, in the great majority of cases, to vindicate any claims of equity. This difference is perhaps most likely to be seen in the occasional case involving a spouse who had a very high income during marriage that accounts for most of the spouses' considerable property accumulation. While the common law states may depart from equal division in such cases, allowing a larger share to the spouse who earned the

property (and who is still its owner under common law rules), the community property states will generally adhere to equal division in such cases with little hesitation.

B. Alimony (Spousal Support, Maintenance).

The American law of alimony (now often called spousal support or maintenance, but all three labels are in use among the various states) can be capsuled at only the highest level of generality: alimony awards are governed by relatively vague statutory standards that leave much to the trial judge. The absence of more certain rules reflects the lack of consensus about alimony's rationale. It has always been difficult to explain why the duty to provide support continues past the end of the marriage on which it is based, but the collapse of gender role norms and the demise of fault-based divorce made the problem worse. So early in the no-fault era some courts concluded that alimony was a remedy whose time had passed, hard to justify and now no longer needed because in the new world of gender equality women who had been homemakers in long-term marriages could now obtain good jobs. Some policymakers in the common law states also thought that the financially dependent spouse's newly acquired rights to share in the property accumulated during the marriage (the marital property reforms had just occurred) would eliminate the need for alimony.[12] The new goal was the "clean break" and, many thought, these new developments would make it possible.[13] Perhaps transitional assistance–"rehabilitative alimony" was the phrase often used–would sometimes be necessary, but certainly nothing more than that. But after a while a new phrase --"displaced homemakers"-- gained currency, as these expectations of alimony's fading relevance were frustrated. To the surprising surprise of some policymakers, it turned out that newly-divorced 45-year old homemakers who had been out of the labor market for 20 years could not easily transition to good-paying jobs after all; that most families did not have a lot of property to divide at divorce (and certainly not enough to generate a middle class income from the share of it received by underemployed former wives); and that if there were minor children of the marriage, a clean break was not possible anyway, at least not if one meant to collect child support and encourage divorced

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12. This was the argument made, for example, as recently as the mid-1980's when Loretta O'Brien's lawyer argued to the highest New York court that it must treat his medical degree as property, rather than accept the lower court's alternative remedy of an alimony award, because in adopting New York's new equitable distribution law the legislature also intended to limit alimony awards to short-term assistance. See the biography of the *O'Brien* case in Ira Ellman, *O'Brien v. O'Brien: A Failed Reform: Unlikely Reformers*, which appears both in Carol Sanger, ed., FAMILY LAW STORIES (New York, New York, Foundation Press, 2008), pp. 269-294, and at 27 PACE LAW REVIEW 949 (2007).

13. An early case that proved influential in reversing this trend toward allowing only fixed-term rehabilitative alimony awards was Marriage of Morrison, 573 P.2d 41 (Cal. 1978), which held that in longer marriages the courts should not assume the financially dependent spouse could successfully renter the job market and become able to support herself at an appropriate living standard.

Dads to continue to play a positive role in their children's lives. Once these lessons were learned it became clear that alimony could not be abolished after all.

Nonetheless, surveys suggest that alimony is requested in only a small minority of divorces, and granted in only some of those. It is certainly rare at the dissolution of short-term childless marriages, but undoubtedly more common in longer marriages and marriages with children. At the same time, appellate cases continue to affirm long-term alimony awards that trial courts grant to financially dependent spouses at the dissolution of their long-term marriages. So it seems that most courts still believe the law should intervene to reduce significant disparities in the post-dissolution incomes of those who have been married to one another for 15 or 20 years or more, even at the cost of maintaining financial ties between the former spouses.[14] Alimony may also be allowed in marriages of shorter duration where there are children of the marriage who are still young and the primary custodian's income is considerably less than the support obligor's. But if there is agreement on such propositions, it is not unanimous, and exists at only a very general level. Judgments of how great an income disparity to tolerate, how much of any disparity to close through an alimony award, and for how long to continue the award, will vary. The American Law Institute recommended that alimony guidelines be adopted, analogous to the guideline employed for child support, and some jurisdictions have tried this approach,[15] but it has not as yet been widely employed.

C. The Relationship Between Alimony Awards and Property Allocations.

Income flows and capital assets can be substituted for one another, and can be valued on a common scale. For this reason, an enhanced share of marital property may in principle always substitute for a fixed-term alimony award. But few divorcing couples have capital assets sufficiently large to provide an adequate substitute for any but the most modest of alimony awards. While that

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14. Examples include Clapp V. Clapp, 653 A.2d 72 (Vt. 1994) (Middle-aged wife of 20 years with stable employment as public school guidance counselor entitled to substantial long-term alimony award from higher-earning husband); Rainwater V. Rainwater, 869 P.2d 176 (Ariz. App. 1993) (41-year old wife employed as secretary entitled to substantial alimony award of indefinite duration at dissolution of her 22-year marriage to higher-earning husband).

15. For discussion of recent use of alimony "guidelines" see Twila Larkin, 'Guidelines for Alimony: The New Mexico Experiment' (2004) 38 *Family Law Quarterly* 29, 38-49. A Commission of the American Academy of Matrimonial Lawyers has developed its own guidelines in 2007, listed and discussed in Mary Kay Kisthardt, 'Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance' (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 61. The family courts in Maricopa County (Phoenix) Arizona adopted alimony guidelines by court rule, and their use was approved by the Arizona Court of Appeals in *Cullum v. Cullum*, 160 P.3d 231 (Ariz. App. Div. 1 2007) There has also been movement towards alimony guidelines in Canada. See Department of Justice (Canada), 'Spousal Support Advisory Guidelines: A Draft Proposal' (2005) (prepared by Carol Rogerson & Rollie Thompson), canada.justice.gc.ca/eng/dept-min/pub/ss-pae/proj/ssag-idpa.pdf.

means that alimony is often the only possible remedy for the spouse put at financial disadvantage from the divorce, its unreliability and unpredictability make it unsatisfactory. Lawyers have therefore sought to transform claims on a spouse's future earnings from alimony to property. Their technique has been to reduce expected future earnings to a present value that is then treated as a "thing" acquired during the marriage, and is therefore marital property in which both spouses have an interest. Judicial reaction to such claims have depended largely on the extent to which they could be framed in familiar terms. All American states but New York have now rejected claims that professional degrees or licenses are "property" with a value measured by the earnings increment that the holders of such credentials typically realize.[16] On the other hand, some time ago most courts began accepting claims that professional goodwill is earning capacity, and a fair number accepted methods for measuring that goodwill that effectively include the professional spouse's earning capacity. More recently, however, more courts have favored market price measures of goodwill that do not include earning capacity, although the states remain divided on this question.[17]

The American view contrasts with the English system, which does not make the same distinction between claims one spouse may make at divorce on property the other spouse owns, and claims one spouse may make on the other's post-divorce income. The English perspective appears similar to that taken at first by some American common-law states after the American reforms. As noted earlier, some American states initially concluded that if equity replaces property law as the source of principle for deciding on property claims between spouses, then there was no reason to distinguish between marital and separate property. That same perspective can be taken further to conclude there is also no reason to distinguish between claims on property and claims on post-divorce income: As equity provides the ultimate touchstone for both, they are simply two alternative tools to the same end, tools that may be used separately or jointly. New York's treatment of earning capacity as property can be understood as a way implementing this perspective, different from the British approach on the surface, but not in fundamental principle. But the rejection of this New York rule in the rest of the United States illustrates that in most of the country, income claims remain fundamentally distinct from property claims. Spouses are regarded as having some claim of right, akin to a property interest if not precisely that outside the community property states, to assets acquired during the marriage. In contrast, claims on the post-divorce income of one's former spouse are regarded as claims of equity. It is this difference in the American understanding of these two kinds of claims that allows many if not most states to adopt at least a presumption that marital property is divided equally, while clinging tenaciously to the rule that alimony claims are matters of judicial discretion which cannot even be subject to presumptive guidelines. This same conception must also

16. See the treatment of these questions in Ellman et al., FAMILY LAW at 324-345.

17. Id. at 345-362.

be part of the explanation for the difference we will see in the American law's treatment of terms in premarital agreements that fix property claims, terms that limit alimony claims. Contractual re-allocations of property owned by the contracting parties is familiar and accepted, while contractual limits on the power of a court to make an equitable judgment are unfamiliar and suspect.

II. Agreement Made Before Marriage

A. General Overview

1. Decline of Traditional Rules Barring Agreements Altogether

The traditional rule allowed agreements concerning the distribution of property at the death of a spouse, but barred agreements that "contemplated divorce". It was consistent with the prevailing law of the fault-divorce era: given that the law barred divorce by mutual consent, one would expect it to also look skeptically on premarital agreements setting forth divorce terms. As no-fault divorce was widely adopted during the 1970s and 1980s, this limitation on premarital agreements gradually disappeared as well. An early case adopting the modern view explained that "Public policy is not violated by permitting...persons ...to anticipate the possibility of divorce and to establish their rights by contract in such an event as long as the contract is entered with full knowledge and without fraud, duress or coercion."[18] This is now the dominant view.[19]

As a general matter, premarital agreements fall within the provision of the Statute of Frauds applying to promises made in consideration of marriage, and the cases require a writing whenever marriage is even part of the contract's consideration. Section 2 of the Uniform Premarital Agreement Act requires a writing, as does the American Law Institute's Principles of the Law of Family Dissolution, § 7.04(1). An oral agreement otherwise barred by the Statute of Frauds may be enforceable if one of the parties has performed in reliance upon it. That general rule has been applied in the context of marital or premarital agreements.[20]

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18. Volid v. Volid, 286 N.E.2d 42, 46-47 (Ill. App. 1972).

19. For a general overview of the history of premarital agreements in the United States, see Brian Bix, "Bargaining in the Shadowof Love: The Enforcement of Premarital Agreements and How We Think About Marriage," 40 William and Mary Law Review 145 (1998), at 148-58.

20. This was the holding of Marriage of Benson, 7 Cal. Rptr. 3d 905 (App. 2003) (enforcing parties' oral agreement that husband's retirement account would remain his separate property in exchange for husband abandoning any community property interest in the marital residence, because the deed transferring the residence to a trust of which

Modern courts still occasionally say they will not enforce agreements "encouraging" divorce, but no one appears to know precisely what this means. *Marriage of Noghrey*, 215 Cal. Rptr. 153 (App. 1985), relied on this principle in refusing to enforce a provision in a *ketuba*, the traditional Jewish marriage contract. The disputed provision required the husband to pay the wife $500,000 if they divorced, unlike the typical modern Ketubah in which this traditional provision calls for only a symbolic payment. The parties were Iranians, and the wife claimed the payment was meant to compensate her for the difficulty she would have in finding a new Iranian husband when she was no longer a virgin. The court held the provision void because it created an incentive for the wife to seek divorce and was not meant to adjust property rights arising from the marriage.

More recently, in *Bellio v. Bellio*, 129 Cal. Rptr. 2d 556 (App. 2003), the court considered an agreement keeping the parties' earnings separate but giving the wife a lump sum of of $100,000 if the marriage ended by either divorce or the husband's death. The husband had sought the earnings provision, which the wife accepted only after he added the provision giving her the lump sum. The wife had depended upon alimony payments from her first husband, which would terminate with this second marriage, and she wanted to protect herself in case the second marriage also ended in divorce. Citing *Noghrey*, the trial court held the provision invalid, but the appeals court reversed, distinguishing *Noghrey* on the grounds that the payment was merely a reasonable financial plan to protect the wife from becoming worse off than before the marriage. If her waiver of community property rights in the husband's earnings were to be held valid, the court could hardly refuse enforcement of this modest substitute for the waived rights. Perhaps the lump sum provision could be seen as encouraging her to divorce, but then the earnings provision might be seen as encouraging him.

The fact is that any agreement that does not track prevailing law will leave one spouse or the other better off than without it, which means that *any* meaningful agreement will make one spouse or the other more likely to seek divorce than if there were no agreement.[21] So if agreements are to

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wife was sole beneficiary had already been executed). In that case, however, the California Supreme Court later reversed, finding that a specific California statute displaced the normal statute of frauds rule and did not allow the part performance claim. Marriage of Benson, 116 P.3d 1152, 32 Cal.Rptr.3d 471 (Cal. 2005).

21. Consider the agreement made by one-time spouses Donald Trump and Marla Maples, who announced in May of 1997 that they would divorce "as friends" after "long relationship and a three-and-a-half year marriage." An inside source reported that the parties' premarital agreement promised Ms Maples "$1 million to $5 million in the event of divorce" but would expire within 11 months, leaving her then entitled to a settlement based on Mr. Trump's net worth, then estimated at $2.5 billion. The source claimed there was no third party involved in the divorce, which occurred because Mr. Trump was "forced economically to act. ... Unless you're married to someone you have 1000 percent surety in, you just can't do [otherwise]." *Donald and Marla Headed for Divestiture*, N.Y. Times, May 3, 1997, at 20. Here, then, a provision promising Ms. Maples a very large lump sum was said to encourage Mr. Trump to seek divorce, since the provision protected him from the even larger claims she might after it expired–just the opposite of

be allowed at all, a rule casting doubt on those that "encourage divorce" makes little sense, and few courts now rely upon such a rule to refuse enforcement. We may wish the law to refuse enforcement of some kinds of marital agreements, but our grounds for that refusal need be something else.

Most American states in fact apply procedural and substantive rules to premarital agreements that they do not apply to contracts generally. These are addressed below.

2. Rules Limiting Agreements as to Particular Subjects

a. Provisions concerning children. The traditional rule that a contract between prospective spouses cannot bind a court in deciding child support or child custody matters seems largely preserved by both the UPAA and the American Law Institute. Both authorities state that "the right of a child to support cannot be affected adversely" by an agreement.[22] Perhaps this rule leaves open the possibility of enforcing an agreement enlarging support, as, e.g., by obliging a parent to support a child in college where the governing state law would not otherwise impose that duty. Such provisions are typically enforced when contained in separation agreements. As to custody, the UPAA is silent; it is omitted from the list of specific items that the agreement may address, but neither is it specifically barred by any specific provision analogous to provision concerning child support. The American Law Institute reflects prevailing law in giving premarital agreements about custodial allocations a largely advisory role:[23] courts should "take into account any prior agreement" of the parties "that would be appropriate to consider in light of the circumstances as a whole".[24] Separation agreement provisions on custody are given more weight by the A.L.I, as they typically are by the courts, although they also are not binding.[25] The Institute explains the lesser weight given premarital agreement in largely the same terms that it explains more generally the limitations it places on the

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the assumption of the Noghrey court that under the facts of that case, it was the wife who was promised the lump sum payment who would thereby be encouraged to seek divorce.

22. UPAA § 3(b); American Law Institute, *Principles of the Law of Family Dissolution* § 7.06 (Newark, New Jersey, LexisNexis, 2002).

23. For an example of a court's refusal to apply a premarital agreement on custody see Combs v. Combs, 865 P.2d 50 (Wyo. 1993) (finding unenforceable a provision in a premarital agreement providing that "any progeny resulting from this union, should this contract be terminated, shall remain in the custody of the parent of that progeny's sex", because state law forbids basing custody determinations solely on the gender of the parent).

24. American Law Institute, *Family Law Principles* § 2.08(1)(e).

25. The court is instructed to follow, in its custody order, a parenting plan agreed upon by the parents unless the agreement "is not knowing or voluntary" or "would be harmful to the child." American Law Institute, *Family Law Principles* § 2.06 (1).

enforcement of premarital agreements; the Institute's views are explained further below.[26] On the other hand, a number of states accept, at least to a limited degree, separation agreement provisions requiring arbitration of post-decree custody disputes, and similar provisions in premarital agreements might receive similar treatment. However, courts usually retain authority to override the arbitrator's decision, which is not how arbitrations are treated in commercial contexts.[27]

b. Provisions concerning fault or the termination of the marriage. Although the matter has not often arisen, American courts have in general declined to honor provisions in premarital agreements that attempt to alter state law concerning the circumstances under which a marriage may be dissolved, or which would penalize a spouse, in the financial arrangements at divorce, for marital misconduct that state law would not otherwise consider.[28] The UPAA is silent on this question, but the refusal to enforce such provisions is in agreement with the rule adopted on this matter by the American Law Institute.[29]

c. Provisions limiting alimony at divorce. American courts and legislatures have historically been more resistant to enforcing waivers of alimony than waivers of marital property rights. This is

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26. See American Law Institute, *Family Law Principles* § 2.08, Comment *i,* which explains:
Prenuptial agreements are typically made in contexts, and with respect to matters, as to which individuals are unable to predict and assess realistically either the events that will happen in the future, or the significance of the interests they are bargaining away. The difficulty of enforcing agreements made when the family's future, and even its composition, are unknown, is particularly acute when it comes to the allocation of responsibility for children. Prenuptial agreements typically are made before the needs of a particular child are known--indeed, often before the child is born, or before it is known whether there will be any children. Along with the customary lack of realism most couples share about the likelihood of a separation or divorce, adults on the brink of marriage can be expected to be limited in their ability to evaluate their child's needs, judge the other parent's ability to meet the child's needs, or gauge their own interests. Such limitations exist as well, to be sure, with respect to agreements negotiated in the context of a separation. These Principles assume, however, that parties tend to be significantly less realistic before or during marriage than when separation is contemplated.

27. Cases like Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993), favor arbitration agreements, but still reserve ultimate judicial authority to override arbitrators' awards. For more on this topic see See E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, (2000) 57 *Washington & Lee Law Review* 1139; Elizabeth A. Jenkins, 'Validity and Construction of Provisions for Arbitration of Disputes As to Alimony or Support Payments or Child Visitation or Custody Matters'(1993) 38 *American Law Reports5th* 69.

28. Diosdado v. Diosdado, 118 Cal.Rptr. 2d 494 (App. 2002) (refuses to enforce agreement providing various penalties, including "liquidated damages" of $50,000, against a spouse who kisses "on the mouth" or touches "in any sexual manner" any third party); Marriage of Dargan, 13 Cal.Rptr. 3d 522 (App. 2004) (follows *Diosdado* with respect to husband's agreement to grant wife his interest in specified items of community property if he used drugs).

29. American Law Institute, *Family Law Principles* § 7.08.

in part motivated by the state's desire to look to a former spouse for support of an individual who would otherwise receive public assistance, as can be seen by the UPAA provision that expressly provides for overriding a contractual waiver of alimony in that situation.[30] The suspicion of alimony waivers goes beyond that concern, however. Many states that otherwise adopted the UPAA have modified its language to limit provisions on alimony even further. Two allow courts to order spousal maintenance, despite contract terms to the contrary, when a spouse would otherwise suffer "extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement."[31] Two provide expressly that the right to spousal support may not be adversely affected by a premarital agreement.[32] Two other states changed the UPAA text to delete spousal maintenance from the list of subjects that a valid agreement may address. In one (South Dakota) the state supreme later held the effect of this omission was to disallow provisions waiving alimony, but in the other (California) the court held that it did not have this effect.[33] The California legislature t hen amended the statute to bar enforcement of agreements waiving spousal support if they are "unconscionable at the time of enforcement"or if the waiving party was not represented by independent counsel at the time of the waiver.[34] In states that have not adopted the UPAA, traditional resistance to alimony waivers continues to be seen.[35]

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B. Special Rules Policing Premarital Agreements: Overview

One may treat premarital agreements differently than ordinary contracts by imposing special procedural requirements or special tests of substantive fairness. One traditional thread of American law, represented here by *Button v. Button*, 388 N.W.2d 546 (Wis. 1986), does both. It enforces

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30. Delaware (Del. Code Ann. tit. 13, § 326 (2009)) and Virginia (Va. Code Ann. § 20-151 (2009).

31. These are Indiana and Illinois. See Rider v. Rider, 669 N.E.2d 160, 163-64 (Ind. 1996). ILL. COMP. STAT. 10/7-§ 7(b) (2009).

32. They are Iowa and New Mexico. See N.M. Stat. Ann. § 40-3A-4 (2009); Iowa Code Ann. § 596.5 (2009).

33. The South Dakota decisions holding that alimony waivers are not allowed are Walker v. Walker, 765 N.W.2d 747 (S.D. 2009) and Sanford v. Sanford, 694 N.W.2d 283 (S.D. 2005); the California decision holding that the deletion of alimony from the list did not show the legislature's intention to bar provisions on alimony is Pendleton v. Fireman, 5 P.3d 839 (Cal. 2000).

34. CAL. FAM. CODE § 1612(c)(2009).

35. E.g., Lane v. Lane, 202 S.W.3d 577 (Ky. 2006) (agreement to waive spousal support unconscionable at time of enforcement, where husband became a millionaire, in part because he devoted himself entirely to his career while wife devoted herself to being a homemaker).

premarital agreements concerning the division of property at divorce only if: 1) the parties had knowledge of each other's assets, either independently or through disclosure; *and* 2) the agreement was "voluntary," *and* 3) its terms were fair at the time of execution; *and* 4) it is fair to apply it at the time of divorce. The first is a procedural fairness requirement, and it turns out on examination that the second is, as well. The third and fourth are requirements of substantive fairness. None are applied to ordinary commercial contracts. *Button* exemplifies the regulatory approach followed by some American states.[36] The other end of the American spectrum is exemplified by *Simeone v. Simeone,* 581 A.2d 162 (Pa. 1990) which insists that premarital agreements should be treated like any other contract (with the one exception that it also requires a disclosure of financial assets).

Simeone is a new development that few if any other states have followed; *Button* is a traditional rule that many states have now abandoned. Most American states today fall somewhere between these bookends. The Uniform Premarital Agreement Act, adopted in about half the states,[37] is closer to *Simeone* than *Button*, and this orientation has motivated considerable criticism by many commentators, as well as the American Law Institute. Many adopting states have modified the UPAA's recommended text to allow challenges that move back towards *Button*, as we will see below in addressing particular provisions, although one state (Rhode Island) changed the language to move in the opposite direction, toward *Simeone*.[38] One criticism of the original UPA test is that its provisions would in fact work an important policy change in many states, but that the change is

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36. A more recent decision consistent with *Button* is Blige V. Blige, 656 S.E.2d 822 (Ga. 2008) ("the party seeking enforcement bears the burden of proof to demonstrate that: (1) the antenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts; (2) the agreement is not unconscionable; and (3) taking into account all relevant facts and circumstances, including changes beyond the parties' contemplation when the agreement was executed, enforcement of the antenuptial agreement would be neither unfair nor unreasonable.").

37. Uniform Laws Annotated lists 26 adopting states, plus the District of Columbia, although many of these have made substantive changes in the act.

38. Rhode Island eliminates voluntariness as a separate basis for finding an agreement unenforceable. The party challenging the agreement in Rhode Island must show it was involuntary, *and* unconscionable, *and* that the other spouse's assets were not disclosed, *and* that there was no waiver of disclosure, *and* that the challenging party had no knowledge of the other party's assets. The failure to prove *any* of these facts by *clear and convincing* evidence–a heightened standard of proof rarely applicable in ordinary contract cases--is fatal to a challenge of a premarital agreement. R.I. Gen.Laws 1956, § 15-17-6 (2009). These rules make it far more difficult to challenge the validity of a premarital agreement than of any commercial contract, and produce highly questionable results. See, e.g., Marsocci v. Marsocci, 911 A.2d 690 (R.I. 2006) (premarital agreement signed by unrepresented wife four days before wedding, in which the value of husband's assets was not disclosed, held enforceable because the party challenging enforcement must prove by clear and convincing evidence both unconscionability and failure of adequate disclosure.)

effectively concealed in the guise of a technical improvement intended only to achieve interstate consistency.[39] Many critics believe the UPAA's orientation is simply wrong as a matter of policy.[40]

C. Special Rules Policing Premarital Agreements: Procedural Protections

1. The Voluntariness Requirement: A Form of Procedural Fairness. The UPAA would deny an agreement's enforcement if the spouse challenging it proves that he "did not execute the agreement voluntarily". Most other American authorities agree that an agreement must be "voluntary" to be enforceable. But what does this mean? The UPAA itself offers no further explanation, and the cases that address the meaning of the voluntariness requirement, whether under the UPAA or pre-existing caselaw, are often unhelpful and certainly inconsistent with one another.

The debate among the Uniform Law Commissioners sheds some light on what they intended the voluntariness requirement to mean.[41] These debates took place in the context of the drafting committee's defense of their draft's severe limits on unconscionability challenges to agreements, limits we consider further below. The narrow majority that ultimately approved the draft's language defended elimination of the unconscionability defense with assurances that the requirement of voluntariness would prevent enforcement of the questionable contracts that opponents were concerned about. They said, for example, that spouses could rely on the voluntariness requirement to resist enforcement of agreements whose effect they did not understand, and that it would also prevent enforcement of a one-sided agreement signed by a young pregnant girl told by her child's father that he would not otherwise marry her. These debates on the meaning of voluntariness, the discussion of the term in the case law, and the logic of statutory construction (why include the term unless it is meant to add something to the normal requirements for enforcing any contract?) combine to support the view that the voluntariness requirement imposes a test for premarital agreements that

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39. Barbara Atwood, 'Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act' (1993) 19 *Journal of Legislation* 127, 128 ("Despite the representations of N.C.C.U.S.L., the U.P.A.A. departs, sometimes dramatically, from the common law of many states").

40. Katharine Silbaugh, 'Marriage Contracts and the Family Economy' (1998*) 93 Northwestern University Law Review 65* (critical of the trend toward enforcement of agreements, noting that accepted arguments against enforcement of some nonmonetary terms may apply to monetary terms as well); Gail F. Brod, 'Premarital Agreements and Gender Justice' (1994) *6 Yale Journal Of Law and Feminism 229, 295* (arguing that the UPAA fails to give adequate weight to policies other than freedom of contract and personal autonomy, such as the ``attainment of economic justice for the economically vulnerable spouse at the end of marriage"). The American Law Institute's views are described more fully in the text.

41. For a discussion of these Uniform Commissioner debates, see the Reporter's Notes to Comments *b* and *g* of §7.04 of American Law Institute, *Family Law Principles.*

goes beyond what's required by standard doctrines, such as duress, that apply to all contracts. And so this view is widely accepted by the authorities (the principle exception being the Pennsylvania decision in *Simeone).*

One can compare the limited reach of the traditional duress doctrine to the kinds of facts that have caused an agreement to fail the voluntariness requirement. For example, in *Hamilton v. Hamilton*,[42] the wife was 18, unemployed, and three months pregnant when she married the father. He had demanded, as a condition of the marriage, her agreement to waive all alimony claims. She signed such an agreement even though her counsel had advised her against it. The court enforced the waiver, concluding that "[w]here a party has been free to consult counsel before signing an agreement, the courts have uniformly rejected duress as a defense". *Hamilton* is not alone in this view of duress doctrine,[43] but the opposite result has been reached when the claim is analyzed under a voluntariness rubric, in which courts have held that a "coercive atmosphere" in securing the agreement casts doubt on its validity.[44]

The California Supreme Court's decision in the case of the baseball player Barry Bonds[45] is perhaps the most thorough judicial examination of the meaning of this requirement under the UPAA. Examining the cases cited in the Uniform Commissioners' debates, *Bonds* concludes "that the voluntariness of a premarital agreement may turn in part upon whether the agreement was entered into knowingly, in the sense that the parties understood the terms or basic effect of the agreement." Because it is difficult to know what someone really understood, this requirement tends to get redefined into procedural safeguards ensuring the party had every chance to understand it: e.g., was the party advised by independent counsel, were assets disclosed, and was an adequate explanation of the agreement's significance provided? A second thread Bonds finds in the voluntariness cases reflects the view of some drafting Commissioners that the voluntariness requirement deals with cases of oppression, for which the young pregnant bride is just one example. Some courts have described this aspect of the rule as requiring that the parties have "a meaningful choice" but this does not

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42. Hamilton v. Hamilton, 591 A.2d 720, 722 (Pa. Super. 1991).

43. E.g., Lebeck v. Lebeck, 881 P.2d 727 (N.M. App. 1994) (duress not shown by wife with independent counsel, who signed agreement demanded by her attorney-husband because she wished to legitimate their daughter; "a threat to do that which the demanding party has the right to demand is not sufficient to support a claim of duress").

44. Williams v. Williams, 617 So. 2d 1032 (Ala. 1992), held that a rule requiring "that the agreement was entered into freely and voluntarily," requires the lower court to decide whether, as a question of fact, "the father's conditioning the marriage on the pregnant mother's signing the antenuptial agreement, joined with the mothers moral objection to abortion and the importance of legitimacy in a small town, created a coercive atmosphere in which the mother had no viable alternative to accepting the father's condition for marriage."

45. Marriage of Bonds, 24 Cal. 4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (Cal. 2000).

provide much help. The victim of the armed robber makes a very meaningful choice when told "your money or your life", and he probably would rather have that choice, than not. Nor can we expect a court to look into the soul of the signing party to determine whether his or her free will was then intact.

The American Law Institute concluded that the real meaning of the voluntariness requirement, as it is actually applied in practice, is to refuse enforcement of agreements obtained through improper bargaining tactics. We say the robber's victim acted *involuntarily* in handing over his money because we condemn the robber's threat, not because we doubt the victim's cognitive capacity at the time he yielded to it. Similarly, we say assent to an agreement is involuntary when we condemn the bargaining tactics used to obtain it. This insight explains why the voluntariness requirement sets a different standard for premarital agreements than the duress defense sets for commercial contracts: Hard tactics acceptable between business persons might be unacceptable in negotiations with one's intended spouse.

Assessing whether a bargaining tactic is improper in the marital context does require some subtle distinctions. On one hand, for example, the cases all find that one party's insistence on an agreement as a condition of marriage does not make the other party's assent to it involuntary. Such insistence is not inherently improper, for one is always entitled to decline to marry if one's terms for marriage are not met.[46] But on the other hand, such insistence may be regarded as improper if first expressed on the eve of the wedding,[47] or in other circumstances in which it appears coercive.[48] Similarly, conditioning marriage on an agreement may be thought an improper bargaining tactic in

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46. Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008); Liebelt v. Liebelt, 801 P.2d 52, 55 (Idaho App. 1990); Gardner v. Gardner, 527 N.W.2d 701, 706 (Wis. App. 1994); Howell v. Landry, 386 S.E.2d 610, 617-18 (N.C. App. 1989); Taylor v. Taylor, 832 P.2d 429, 431 (Okla. App. 1992).

47. "The 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... The meaningfulness of the opportunity of the nonproponent party to seek counsel before executing an antenuptial agreement is ... [significant in determining] whether coercion or overreaching. Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994) (but upholding the particular agreement before it because in this particular case the wedding's postponement would not have caused hardship or embarrassment). See also Calif. Fam. Code § 1615(c)(2009) which provides that an agreement is not voluntary if "the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed." This provision was adopted by the legislature after the *Bonds* decision, as an amendment to that state's version of the UPAA. It is modeled on ALI provisions.

48. E.g., Peters-Riemers v. Riemers, 644 N.W.2d 197 (N.D. 2002) wife's consent held involuntary where she read the agreement for first time in front of Husband and his attorney, without her own counsel, creating a "coercive environment," and where Husband had only disclosed fifty percent of his assets.

pregnant-bride cases like *Williams*, supra, if the groom is seen as exploiting the bride's vulnerability to gain an unfair advantage.[49] This understanding of the the voluntariness requirement can in fact protect some vulnerable parties in situations in which courts might otherwise rely upon the unconscionability doctrine to reach the same result, although it cannot deal with all the cases to which unconscionability claims might apply, as discussed further below.

2. The American Law Institute's Approach to Voluntariness[50]

The ALI Principles avoid use at all of the term *voluntary*. Concluding that "the best understanding of the frequently stated voluntariness requirement is that it expresses the law's heightened sensitivity to duress and coercion concerns in the context of premarital agreements", the ALI chooses to meet this concern with special procedural requirements rather than with reliance upon a requirement of voluntariness it regarded as too vague. It requires the party seeking to enforce the agreement to show that the other party's consent was informed and not obtained under duress. Section 7.04(3) then gives the agreement's proponent the benefit of a presumption (rebuttable) that this burden has been met, if the proponent shows that:

> (a) [the agreement] was executed at least 30 days before the parties' marriage;
>
> (b) both parties were advised to obtain independent legal counsel, and had reasonable opportunity to do so, before the agreement's execution; and,
>
> (c) in the case of agreements concluded without the assistance of independent legal counsel for each party, the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training,
>
> (i) the nature of any rights or claims otherwise arising at dissolution that are altered by the contract, and the nature of that alteration, and
>
> (ii) that the interests of the spouses with respect to the agreement may be adverse.

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49. See also Marriage of Shirilla, 89 P.3d 1, 319 Mont. 385 (Mont.2004), which found that a Russian national's consent was involuntary, rendering the agreement unenforceable, where she came to the United States in reliance on husband's promise that if she married him she would "be an equal partner for life," only to have him present her with the agreement, once here, as a condition of the marriage. While she was provided an attorney, he did not speak Russian and she did not have the benefit of a translator.

50. For commentary on the ALI Principles by an informed outsider who inventories its differences from current doctrine, see Brian H. Bix, "The ALI Principles and Agreements: Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* 272-291 (Robin Fretwell Wilson, ed., Cambridge: Cambridge University Press, 2006).

Section 7.05 is thus an attempt to deal directly with concerns the voluntariness requirement addresses only by implication: that the parties had a fair opportunity to understand the agreement's terms and their significance, and a reasonable opportunity to consult independent counsel. The agreement's proponent may prevail even if these requirements are not met, but only by carrying the burden of proving that "the other party's consent was informed and not obtained under duress." The Institute explained that a contract first presented on the eve of the wedding "resembles new terms that one party insists upon adding to an agreement to marry that had already been reached and partially executed. ... Premarital agreements are rarely proposed on impulse. They are usually planned. The party who wants the agreement typically hires a lawyer to draft it. There is usually no reason why this process cannot begin early enough to be completed a month before the wedding."

American law had not generally required any minimal time period between the agreement's execution and the wedding, so the ALI proposal, to require the proponent of a late-presented agreement to show the other spouse's consent was informed and obtained without duress, required new law and, perhaps, new legislation. *Bonds*, the California Supreme Court decision described earlier, interpreted for the first time that state's enactment of the UPAA, and involved a factual dispute on the voluntariness question which was resolved in favor of enforcing an agreement. The enforced agreement denied any share of the community property to the wife of a phenomenally successful baseball player who had married him at the beginning of his major league career, had little income of her own, and had borne two children during their marriage. After the *Bonds* decision, the California legislature amended its statute to adopt the ALI's approach. The new provision, Calif. Fam. Code § 1615(c), provides that an agreement is not voluntary (and thus not enforceable) unless two conditions are both met:

> (1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.
>
> (2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

One should note that neither the ALI's formulation, nor this California provision, would necessarily reach the case in which one party exploits the other's weakness to gain their consent to a one-sided agreement. The ALI, unlike the UPAA, preserves the defense of unconscionability, which may address such cases, and also contains another provision addressed below that deals more directly with agreements the enforcement of which would yield a substantial injustice.

3. The Requirement of Disclosure of Assets.

Disclosure has probably been the most universal of the heightened procedural requirements applied to premarital agreements, required under both pre-UPAA law as well as the ALI Principles. Even *Simeone*, the "freedom of contract" bookend, says that absent a ``full and fair disclosure of the financial positions of the parties...material misrepresentation in the inducement for entering a prenuptial agreement may be asserted." Disclosure helps to show that consent to the agreement was "knowledgeable," one important part of the "voluntariness"rubric, and concealment of one's assets in an effort to mislead the other spouse about them might be thought the kind of bargaining tactic that rule was meant to bar. Section 7.04(5) of the ALI Principles requires the person seeking to enforce an agreement limiting the other party's financial claims at divorce to prove that prior to the agreement's execution, he had disclosed his assets and income to the other party, or that disclosure was not necessary because the other party already knew what they were, at least approximately.

The Uniform Premarital Agreement Act's treatment of the disclosure requirement is therefore a puzzling shift in the law, and one reason for criticism of the Act. The UPAA allows the parties to waive their right to disclosure. It also requires the spouse objecting to an agreement on nondisclosure grounds to prove a negative: that he or she "did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party." Most importantly, the UPAA has a unique provision that ties the nondisclosure to unconscionability: an objecting spouse must prove *both* to resist enforcement of an agreement; neither nondisclosure nor unconscionability will alone affect the agreement's validity. Indeed, the waiver provision in § 6(a)(2)(ii) of the UPAA creates the stunning possibility that an unconscionably unfair agreement could be enforced against a party who was uninformed because she *waived* disclosure, because having lost the nondisclosure objection to the agreement, she necessarily also loses the unconscionability objection. For most adopting states, this provision would constitute a significant change in their law, perhaps a change a legislature might not notice unless its significance was called to the legislature's attention.[51]

Indeed, there may be reason to wonder whether the Commissioners themselves understood this result. The official UPAA commentary to § 6 cites with approval a well-known case that is entirely inconsistent with these UPAA provisions: it requires disclosure, disallows its waiver, and

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51. Another indicator of the extent to which the UPAA falls outside the legal mainstream in the limits it places on claims of unconscionability is the guarded support offered for the unconscionability doctrine by Richard Espstein, who is otherwise well-known for his libertarian opposition to paternalistic intervention in contract matters. He believes the doctrine might be necessary to afford protection against parties victimized by duress, undue nfluence, or misrepresentation that could not be proven. Richard A. Epstein, "Unconscionability: A Critical Reappraisal," 18 Journal of Law and Economics 293-315 (1975).

does not treat disclosure as redeeming an otherwise unconscionable agreement so as to allow its enforcement.[52] At least three states that otherwise adopted the UPAA changed its language to avoid the implication that disclosure can be waived, and to preserve disclosure and unconscionability as separate requirements, so that failing either one alone makes an agreement unenforceable.[53] A fourth state that does allow waivers nonetheless changed the UPAA language to provide that unconscionability and failure to disclose assets are each an adequate basis alone for refusing enforcement of an agreement,[54] while another state that retains the UPAA's connection between disclosure and unconscionability disallows waivers of disclosure by a party who did not have legal counsel.[55]

The UPAA rule seems to confuse the concepts of voluntariness and conscionability. An agreement might not be so one-sided so as to raise a question of its unconscionability, but still have terms unfavorable to a party who would not have signed it had they known key facts--such the other party's income and assets. To limit the relevance of nondisclosure to cases of unconscionability is thus to limit considerably the reach of the voluntariness doctrine. It allows enforcement of an unfair agreement the disadvantaged party would not have signed if disclosure had been made, unless it is so unfair as to be unconscionable. In any event, the consequence of the UPAA is to leave voluntariness as the only basis upon which to challenge an agreement in which disclosure was made or waived.

4. Independent Counsel.

Some state courts do not allow enforcement of an agreement against a party who did not have independent counsel, unless the agreement is itself reasonably understandable to a layman.[56] In most states, however, independent counsel for each contracting party is not required, but its presence or absence, or some alternative source of explanation of the agreement's terms and significance, is often said to be an important fact to consider in deciding whether an agreement was entered into

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52. Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).

53. The three are Connecticut, New Jersey, and Iowa. see Conn. Gen. Stat. Ann. § 46b-36g (2009); Iowa Code Ann. § 596.7 (2009); N.J. Stat. Ann. § 37:2-38 (2009).

54. Nevada Revised Statutes § 123A.080 (2009).

55. Arkansas allows waiver only after a consultation with counsel, Ark. Code Ann. § 9-11-402 (2009)

56. Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985). Connecticut provides by statute that an agreement is not enforceable against a party who "was not afforded a reasonable opportunity to consult with independent counsel." Conn. Gen. Stat. Ann. § 46b-36g (2009).

voluntarily. This is the position, for example, taken by the *Bonds* case, after noting that the UPAA itself imposed no separate counsel requirement. I earlier noted that the American Law Institute's recommended rule would deny the party seeking to enforce an agreement the benefit of a presumption that the other party's assent was informed, and not given under duress, if the agreement is executed less than 30 days before the wedding. An additional and separate requirement for applying the presumption, however, is that "both parties were advised to obtain independent legal counsel, and had reasonable opportunity to do so, before the agreement's execution". In commentary, the Institute explains that a party does not have a "reasonable opportunity" to consult independent counsel if that party does not have the funds with which to hire counsel. That means that a party who wants an enforceable agreement must pay for the other party's counsel, if the other party cannot, in order to have the benefit of a presumption that the other party was informed and not under duress at the time of the agreement's execution.

Following the *Bonds* decision, the California legislature added two sections to that state's version of the UPAA, imposing a stronger requirement of independent counsel than *Bonds* had held applicable under the original UPAA text. The first, mentioned above because it also required seven days' time between execution of the agreement and the wedding, provides that an agreement is not voluntary unless "the party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel."[57] If this section had applied to the *Bonds* agreement itself, that agreement would have not passed the voluntariness test. In a separate section, the legislature also provided that any provision in an agreement waiving alimony was not enforceable if the waiving party was not represented by independent counsel at the time of the waiver.[58]

D. Special Rules Policing Premarital Agreements: Substantive Protections

1. Unconscionability and Its Alternatives: The Problem of Foreseeability

Section 208 of the *Restatement Second, Contracts* states the classic American rule of unconscionability:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract

57. Calif. Fam. Code §1615(c) (2009).

58. Cal. Fam. Code § 1612(c) (2009).

> without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The Restatement attempts no further definition of unconscionability. It is not inadvertent, however, that § 208 specifies that the question is whether an agreement is unconscionable "at the time the contract is made" and not at some later time when its enforcement is sought. This feature of the unconscionability principle is inherent in its rationale. As explained in Comment d of § 7.01 of the ALI Principles:

> The doctrine goes primarily to defects in the bargaining process, including unfairness in the negotiating tactics used to obtain agreement. Along with procedural defects, however, the law has also recognized substantive unconscionability, or a gross one-sidedness in terms. The two often go hand in hand, for one may tend to prove the other. A grossly one-sided agreement may corroborate unconscionable bargaining tactics, while unfair bargaining tactics may most often be employed to obtain a one-sided agreement.

In other words, one would not usually expect a competent adult to agree to contract terms that are oppressive - substantively unconscionable - at the time of the agreement, unless there was a defect in the bargaining process. That process defect might be of the sort contemplated by other contract doctrines, such as misrepresentation or duress. But it might not, and then the unconscionability doctrine is important. An example is the unfair exploitation, by one party, of the other's special vulnerability. See Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741 (1982) (explaining how the unconscionability doctrine is necessary to deny enforcement of the stranded desert traveler's promise to pay a million dollars for a jug of water). Substantive unconscionability thus suggests the likelihood of procedural unconscionability, and can be said to depend upon that likelihood as part of its rationale for denying enforcement of an unconscionable agreement. But if an agreement's terms would have seemed fair at the time of execution, then there is no reason to suspect procedural unconscionability in securing either party's consent to it. Nor is any doubt created about procedural regularity in execution by substantive terms that seem unfair at enforcement only because of facts that neither party anticipated at the time of execution. We still may wish, of course, to deny enforcement of terms that may have seemed reasonable at execution but which, as things turn out, become enormously one-sided later. But doing so requires the development of a different doctrine than unconscionbility, for while substantive unconscionability exists as a legal concept, it is not entirely independent from concerns with procedural unconscionability.

That need for a different doctrine is obscured by courts and statutes which by their terms deny enforcement of an agreement if it is unconscionable at the time of enforcement. Some states that

adopted the UPAA have modified it to add such language.[59] It may seem that this approach has the advantage of applying an established doctrine to a new situation, but the temporal shift robs the unconscionability doctrine of much of its rationale. Some courts that apply a "second look" at an agreement's fairness (a look at the time of enforcement in addition to the time of execution) do not use the word "unconscionable" but simply hold that an agreement can be reviewed for "fairness" as of the time of enforcement. This may not be entirely satisfactory either, for it seems inconsistent with basic ideas of contract law to allow courts to reject any agreement they find "unfair." Indeed, concern with just such freewheeling judicial scrutiny is what appears to have motivated the Uniform Commissioners to circumscribe the unconscionability doctrine in the UPAA. The challenge, then, is to develop a doctrine dealing with agreements that seem wrong to enforce because of circumstances prevailing at the time of enforcement, while doing so in a way that is more limited than just allowing courts to refuse enforcement of any contract they believe unfair.

The American Law Institute, borrowing an analysis found in some of the cases,[60] concludes that the real concern in most "second look" cases is the difficulty of foreseeing, at the time of the agreement's execution, the circumstances under which enforcement will be sought years later. This is not a problem of unconscionability in the classic sense, because it is not a case in which one party has necessarily imposed unfairly on the other. It may be that neither party really foresaw, at the time of execution, the impact of enforcing its terms later. In adopting this general approach, the ALI Principles necessarily fill in some details. Its language, and some of the supporting commentary, is worth quoting, as an example of how such an approach might work.

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59. E.g., Conn. Gen. Stat. Ann. § 46b-36g(a)(2) (2009) (agreement is not enforceable if "unconscionable when it was executed or when enforcement is sought"); N.D. Cent. Code §14-03.1-06(1)(2009) (similar, see Lutz v. Schneider, 563 N.W.2d 90 (N.D. 1997)); N.J. Stat. Ann. 37:2-38(b)(2009) (defining as unconscionable any agreement that "would provide a standard of living far below that which was enjoyed before the marriage"); Calif. Fam. Code §1612(c) (2009) (with respect to spousal support terms only).

60. See in particular Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985), described above, and McKee-Johnson v. Johnson, 444 N.W.2d 259, 267 (Minn. 1989) (enforcement may be denied to a premarital agreement fair at its inception "if the premises upon which [the contract was] originally based have so drastically changed that enforcement would not comport with the [original] reasonable expectations of the parties ... to such an extent that ... enforcement would be unconscionable.") *McKee-Johnson* was overruled as to a different issue in Estate of Kinney, 733 N.W.2d 118, 125 (2007) ("the opportunity to consult with independent counsel [is] relevant when assessing whether the agreement was fair and equitable, [but it] is not a *sine qua non* under common law. To the extent that McKee-Johnson could be read to indicate otherwise, [it is] overruled on that issue.")

American Law Institute, Principles of the Law of Family Dissolution, § 7.05

§ 7.05 When Enforcement Would Work a Substantial Injustice

(1) A court should not enforce a term in an agreement if, pursuant to Paragraphs (2) and (3) of this section,

(a) the circumstances require it to consider if enforcement would work a substantial injustice; and

(b) the court finds that enforcement would work a substantial injustice.

(2) A court should consider whether enforcement of an agreement would work a substantial injustice if, and only if, the party resisting its enforcement shows that one or more of the following have occurred since the time of the agreement's execution:

(a) more than a fixed number of years have passed, that number being set in a rule of statewide application;

(b) a child was born to, or adopted by, the parties, who at the time of execution had no children in common;

(c) there has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change, or its impact.

(3) The party claiming that enforcement of an agreement would work a substantial injustice has the burden of proof on that question. In deciding whether the agreement's application to the parties' circumstances at dissolution would work a substantial injustice, a court should consider all of the following:

(a) the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing legal principles;

(b) for those marriages of limited duration in which it is practical to ascertain, the difference between the circumstances of the objecting party if the agreement is enforced, and that party's likely circumstances had the marriage never taken place;

(c) whether the purpose of the agreement was to benefit or protect the interests of third parties (such as children from a prior relationship), whether that purpose is still relevant, and whether the agreement's terms were reasonably designed to serve it;

(d) the impact of the agreement's enforcement upon the children of the parties.

Comment:. ...

b. ... [N]early all premarital agreements involve special difficulties arising from unrealistic optimism about marital success, the human tendency to treat low probabilities as zero probabilities, the excessive discounting of future benefits, and the inclination to overweigh the importance of the immediate and certain consequences of agreement - the marriage - as against its contingent and future consequences. Paragraph (2), however, does not call for the court's examination at divorce of all premarital agreements, but only a subset in which these difficulties are particularly likely. Paragraph (2)(a) identifies contracts made more than a fixed period of years before enforcement is sought, that period having been set in a uniform rule of statewide application. A period of about 10 years would ensure scrutiny of agreements whose enforcement is particularly likely to be problematic, while leaving a clear majority of divorces unaffected (because most divorces occur after fewer years of marriage). Paragraph (2)(b) identifies for scrutiny those cases in which the parties had no children in common at the time of the agreement, but do so at the time that its enforcement is sought. Even childless parties who anticipate having children are often unable to anticipate the impact that children will have on their values and life plans. Once they are parents, the effect of the terms they earlier agreed upon are therefore likely to seem quite different than they expected when childless. Note that, when the parties have children, there are policy issues as well. See Comment *c*.

c. Most of the fact patterns justifying a substantial-injustice inquiry when enforcement is sought will be captured by Paragraphs (2)(a) and (2)(b), but not all. There are additional cases in which the cognitive difficulties are particularly severe, but which are not easily identified by the simple objective indicators employed in Paragraphs (2)(a) and (2)(b). Paragraph (2)(c) states a more general standard under which at least some of these problem cases may be reached....

Illustrations:

1. Prior to their marriage, Susan and George enter into an agreement that keeps most of their property separate rather than marital, and that limits claims for compensatory payments. At the time of the contract, they are childless, have no plans to have children, and work at jobs yielding similar, comfortable incomes. Two years after their marriage, Susan's sister dies unexpectedly, and Susan becomes the legal guardian of her two nieces, then four and seven. Susan changes to part-time work so that she can spend more time with the children. She eventually reduces her employment even further, with George's acquiescence, to devote more time to her nieces.

In the eighth year of their marriage, George and Susan divorce. Susan will remain the children's primary caretaker. Their state has set 10 years as the applicable period under Paragraph (2)(a). Paragraph (2)(a) therefore does not apply because 10 years have not passed since the agreement was executed. Paragraph (2)(b) does not apply, because Susan and George have no children in common. (The conclusion would be different had they adopted Susan's nieces.) However, under Paragraph (2)(c), the court should consider whether the enforcement of this agreement would work a substantial injustice. There has been a change in the parties' circumstances since the agreement was executed that significantly alters the impact of the agreement's enforcement on the parties. Susan has not worked full time for some years. It is unlikely that contracting parties would anticipate the events that brought about this change. Moreover, the changes in the marriage are similar to those that might have occurred if the parties had their own children, in which case Paragraph (2)(b) would have applied. Paragraph (2)(c) requires the same result here, and therefore the court should consider whether enforcement would work a substantial injustice.

The ALI thus offers an approach that is more limited than the traditional cases that seemed to invite a freewheeling judicial review of the agreement's fairness. It permits the inquiry in only a subset of premarital agreement cases, and lists the considerations that bear upon whether an agreement works a substantial injustice.

2. Foreseeability and the Amendment by Conduct

While the law is generally clear that a writing is required to establish a premarital agreement, courts have occasionally held that the parties' conduct during their marriage negated an earlier written agreement. E.g., in Baxter v. Baxter,[61] the parties had kept their finances separate during the first half of their 13-year marriage, but during the second half the wife left her own employment and worked without pay as manager of the husband's golf course, and applied some of her separate assets to the business's debts. The court found that this conduct "demonstrated mutual intent to rescind" their agreement to retain separate ownership of their assets.[62] New Mexico has put such a principle

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61. 911 P.2d 343 (Ore. App. 1996),

62. For a compilation of such cases, see Annotation, *Antenuptial Contracts: Parties' Behavior During Marriage as Abandonment, Estoppel, or Waiver Regarding Contractual Rights*, (1987), 56 American Law Reports 4th 999. The UPAA has been criticized for appearing to bar such modifications of agreements by later conduct. Barbara Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. Legis. 127, 147 (1993).

in its statute, providing that "a premarital agreement may be amended or revoked...by a consistent and mutual course of conduct, which evidences an amendment to or revocation of the premarital agreement."[63] Doctrinally, it is possible to understand this rule as merely a particular application of the principle that partial performance takes a contract out of the Statute of Frauds, so that the partially performed oral agreement may permissibly modify the terms of the original writing. But more broadly, these cases and the New Mexico statute illustrate a recognition that the law invites difficulties if it does not take account of the inevitable fact that many parties will end up conducting their lives differently than they contemplated at the time of an agreement made years earlier–thus justifying a second look. Jurisdictions that permit their courts broad equitable authority to decline to enforce premarital agreements may employ equitable doctrines such as estoppel to provide relief in such cases.[64]

3. The Rationale for a Second Look Review.

Why impose special process requirements on premarital agreements, and why allow courts ever to inquire into the fairness of enforcing them? The ALI Principles summarizes the arguments it relies upon, in Comment *c* of § 7.02:

> While there are good reasons to respect contracts relating to the consequences of family dissolution, the family context requires some departure from the rules that govern the commercial arena. First, the relationship between contracting parties who are married, or about to marry, is different than the usual commercial relationship in ways that matter to the law's treatment of their agreements. Persons planning to marry usually assume that they share with their intended spouse a mutual and deep concern for one another's welfare. Business people negotiating a commercial agreement do not usually have that expectation of one another. ... These distinctive expectations that persons planning to marry usually have about one another can disarm their capacity for self-protective judgment, or their inclination to

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63. N.M. Stat. Ann. § 40-3A-6 (2009).

64. See, e.g., Krejci v. Krejci, 667 N.W.2d 780 (Wisc.App. 2003), which finds it inequitable to enforce an agreement that excluded the appreciated value of a resort hotel from the marital property division where, during their 18-year marriage, the parties combined their resources, including inheritances, savings, and incomes, operated the resort as a partnership, and generally ignored the agreement, which no longer comported with their expectations. One must distinguish the claims in these cases, which are based on the parties' conduct during marriage with respect to their assets, from claims that one party's marital misconduct should allow the other to avoid an agreement about their property. This latter claim is not ordinarily allowed. See, e.g., Perkinson v. Perkinson, 802 S.W.2d 600 (Tenn. 1990), rejecting the claim of a wealthy widow to avoid her agreement to provide her new husband with $150,000 in full satisfaction of any claim he might have on her separate property, on the basis of her allegation of his cruel and inhumane treatment.

exercise it, as compared to parties negotiating commercial agreements. This difference justifies legal rules designed to strengthen the parties' ability and inclination to consider how a proposed agreement affects their own interest, such as rules that require transparency in the agreement's language and that encourage parties to seek independent legal counsel.

Second, even though the terms of agreements made before, or during, an ongoing family relationship address the consequences of its dissolution, the parties ordinarily do not expect the family unit to dissolve. Even if the possibility of dissolution is considered, it is necessarily imagined as arising at some indefinite time in the future. The remoteness of dissolution in both likelihood and timing, as well as the difficulty of anticipating other life changes that might occur during the course of the marriage, further impedes the ability of persons to evaluate the impact that the contract terms will have on them in the future when its enforcement is sought. ...

The two concerns just identified describe distinctive limits on the cognitive capacity with which persons may enter family contracts, as contrasted with commercial agreements. There is, in addition, the point that the rights and obligations that parties might seek to waive through private agreements are designed to protect the interests of persons who enter into family relationships, and the interests of their children. Enforcement of agreements about the consequences of family dissolution therefore present a different policy question than enforcement of commercial agreements between persons who otherwise have no claims on one another's property or income. Family contracts set aside otherwise applicable public policies while commercial agreements do not. Two implications of this difference are noted here. First, when a contract departs from otherwise applicable public policies that are designed to protect parties, the law can reasonably require greater assurance that the parties understand and appreciate what they are doing, than when the contract does not. Second, vindication of the public policies may require rules that limit the enforcement of private agreements that significantly infringe upon them. These policy concerns thus suggest a rationale for special rules for family contracts that is additional to the rationale based upon the cognitive limitations that are likely to impinge upon persons entering into family contracts. ... Indeed, the cases in which the parties are most likely to make errors of cognition overlap considerably with those in which significant public policies are most likely implicated: long marriages and marriages producing children.

The Institute thus offers two complementary explanations for treating premarital agreements differently than ordinary commercial contracts: a cognitive rationale, and a policy rationale. The cognitive rationale, as the Institute later explains, arises from the fact that "[c]ontract law is...based not only upon a philosophical commitment to individual autonomy, but also upon a factual

assumption about the abilities of contracting parties." In this respect, the Institute relies on modern studies from behavioral economics which suggest that the cognitive capacities necessary for the kind of assessment of self-interest assumed by contract doctrine are more likely to be deficient in the premarital agreement context than in the commercial context, and particularly so in the case of long marriages and marriages with after-born children. The policy rationale notes that as the legal obligations arising from family relationships were not based upon contract in the first place, they are not necessarily waivable by contract either. This point seems obvious with respect to the obligations of parents to their children, but applies as well, the Institute argues, to duties arising between spouses in a long-term relationship. Of course, the law may well allow parties to waive obligations to one another that the law imposes, fully or partially, or only under specified conditions. Permitting such partial or limited waiver is the approach taken by the ALI.

The competing view is stated is *Simeone*, which stands largely alone in its unrestrained commitment to contractual freedom in marital relations. In enforcing the agreement before it, *Simeone* observed that "the possibilities of illness, birth of children, reliance upon a spouse, numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. 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." Of course, the real question is not, for example, whether the parties may anticipate having children, but rather whether they can anticipate all the changes in their life that the presence of children–and all other future developments in their marriage--may bring. As one leading American scholar of contract law has observed, "It is almost impossible to predict the impact that a prenuptial agreement will have if it does come into play. Personal income may increase or decrease; job skills may be acquired or lost; family obligations may vary in regard to both the other spouse and children; personal expectations may change. Change in the course of marriage is foreseeable, but the specifics of the change are not. The limits of cognition therefore provide a strong justification for a second-look approach to prenuptial agreements."[65]

III. Agreements Made During Marriage: Fiduciary Relationships and Unconscionability

Nearly all American states treat spouses as having a "confidential" or "fiduciary" relationship with one another that gives rises to heightened duties in their mutual dealings, akin to the obligations, for example, of trustees with respect to the beneficiaries of the assets to which they hold legal title. This is clearly the case, for example, in a community property state when either spouse exercises

65. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, (1995) 47 Stan. L. Rev. 211, 254-58.

management authority during the marriage over their jointly owned property. In exercising that authority, the spouses have fiduciary obligations to another. Such obligations affect the rules that might govern any contract into which they enter.

Many American states have also treated parties intending to marry as in a "confidential' or fiduciary relationship. An older opinion of the Washington Supreme Court is typical and often quoted on this point: "[A]n engagement to marry creates a confidential relationship. Parties to a pre-nuptial agreement do not deal with each other at arm's length. Their relationship is one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement."[66] Contracts between persons in a confidential relationship to one another are subject to heightened judicial scrutiny to prevent either party from exploiting their position of trust to gain a contractual advantage over the other. It appears that a majority of states treat prospective spouses as being in a confidential relationship, and traditional rules imposing special requirements on premarital agreements can be understood as grounded on this difference between their legal relationship as compared to the legal relationship between commercial actors.[67] Just for that reason, in effect, the California Supreme Court in *Bonds* reaffirmed that states's rule that while spouses are in a confidential relationship, those still planning their marriage to one another are not. *Bonds* explains that one common consequence of a fiduciary relationship is that the fiduciary will have the burden of justifying any contract between the parties which confers any benefit or advantage upon the fiduciary, and that burden might include a showing that no "undue influence" was applied. Requiring the spouse seeking to enforce a premarital agreement that advantages him to make that showing would be inconsistent, *Bonds* observes, with the UPAA. Some other states have taken the same position.[68]

The preceding discussion suggests that as a matter of logic, a state's position on whether prospective spouses have the same confidential relationship as actual spouses should decide whether premarital agreements, and agreements made during marriage, receive the same legal treatment. Despite this logic, it is not clear that the states divide along precisely these lines on the question of whether marital agreements are governed by stricter rules than premarital agreements. But they do divide. The statutes of many states seem to indicate clearly that there is no difference in the legal

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66. Friedlander v. Friedlander, 494 P.2d 208 (Wash. 1972).

67. For more recent cases so holding, see Friezo v. Friezo, 914 A.2d 533 (Conn. 2007) (follows majority rule that parties to premarital agreement in confidential relationship); Cannon v. Cannon, 865 A.2d 563 (Md. 2005) (prospective spouses in a confidential relationship as a matter of law; also, agreement must meet test of substantive unfairness at time of execution)

68. E.g., Mallen v. Mallen, 622 S.E.2d 2d 812 (Ga. 2005) (prospective spouses not in a confidential relationship as a matter of law).

treatment of marital and premarital agreements.[69] On the other hand, a 1994 Minnesota enactment imposes a series of special requirements on marital agreements that the state does not impose on premarital agreements: Each party must be represented by separate legal counsel, and the agreement is not enforceable if either spouse commences an action for legal separation or divorce within two years of its execution unless the spouse seeking to enforce it proves it is fair and equitable.[70] Louisiana, in an apparently unique provision, requires marital agreements, but not premarital agreements, to be judicially approved, the judge being required to find that the agreement serves both parties' "best interests" and that both understood "the governing rules and principles".[71] A recent compilation concludes that 17 American states impose requirements on during-marital agreements that they do not impose on premarital agreement while 11 states treat make no distinction between them, with the remaining states having not yet had occasion to address the issue.[72] A few states have never overruled older authorities that find during-marriage agreements invalid as contracts because they lack consideration; these authorities hold that agreeing to remain married, in contrast to agreeing to marry, does not constitute lawful consideration.[73] Both the American Law Institute and the

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69. Statutes that apply the same rule without regard to whether the agreement was executed before or during the marriage include Wis. Stat. § 767.61(3) (2009), which was the basis of the Wisconsin Supreme Court's opinion in the *Button* case (in which the spouses had made both kinds of contracts) and North Carolina .G.S. § 52-10(a) ("Contracts between husband and wife not inconsistent with public policy are valid, and any persons about to be married and married persons may release rights which they might respectively acquire or may have acquired"). A case that takes the same position is Reese v. Reese, 984 P.2d 987 (Utah 1999) (``spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith and do not unreasonably constrain the court's equitable and statutory duties.").

70. Minn. Stat. Ann. §519.11(1a)(2)(c) and § 519.11(1a)(2)(d) (2009).

71. LA. Civ. Code Ann. art. 2329 (2009).

72. Sean Hannon Williams, *Postnuptial Agreements*, 2007 Wisconsin Law Review 827, 881.

73. See, for example, Bratton v. Bratton, 136 S.W.3d 595 (Tenn. 2004), holding the husband's agreement to give his wife half the property in the event of divorce failed for lack of consideration. The dissent argued that "the consideration Dr. Bratton bargained for and received was the benefit of domestic tranquility....[and] Ms. Bratton's promise that she would stay in the marriage." The majority disagreed:

> While life may have been "much better" for Dr. Bratton after he signed the agreement, this "domestic tranquility" does not constitute consideration adequate to support the contract. ...This was not a situation in which the parties were already arguing about other issues, after which time a post-nuptial agreement was drafted and entered into. Under the dissent's theory, consideration could be found in many instances which would otherwise amount to or border on coercion. For example, if spouse A wanted to get spouse B to enter into a post-nuptial agreement that was essentially for the sole benefit of A, A could simply create such a hostile environment at home by badgering B until B signed the agreement.

See also Simmons v. Simmons, 249 S.W.3d 843 (Ark.App.,2007) (husband's agreement to treat real property held in trust for him as marital property not enforceable for lack of consideration; their marriage is "past consideration" that cannot support the agreement) and Whitmore v. Whitmore, 778 N.Y.S.2d 73 (Wife's waiver of claims on husband's property in agreement signed three months after marriage unenforceable for lack of consideration. "Although the wife

Commissioners on Uniform State Laws reject this position, adopting instead the rule that consideration is not required for an enforceable agreement, whether premarital or during-marriage.[74]

The American Law Institute takes the position that the same principles should apply to agreements made before or during marriage, but observes that those principles are likely to have different application in these two settings. The Institute notes, in particular, that while prospective spouses may have difficulty foreseeing the eventual impact of their agreement, problematic marital agreements are more likely to fail under the traditional unconscionability rule that asks whether the agreement was unconscionable at the time it was executed. "[O]pportunities for hard dealing may be greater in the context of marital agreements, making claims of unconscionability more likely, than in the premarital context. When one spouse has changed position in reliance upon the marriage, such that divorce will place a particular burden on that spouse, the other spouse's threat to divorce, as a tactic to extract one-sided marital terms, is suspect. In addition, the presence of children, more likely in the developed relationship that is usually the subject of a marital agreement, may create additional opportunities for problematic hard dealing."[75] The Institute offers several examples. Here is one:

> When Eugene and Dolores marry, they are both employed with comparable incomes, and have no children. Thirteen years later, they have two children, ages seven and 11. Dolores has been the primary caretaker of the children since their birth, and has not been regularly employed since that time. The younger child has learning disabilities, and Dolores has borne the primary responsibility for closely monitoring the child's school performance, and for making sure that the child's school provides the child with appropriate services.
>
> Eugene, who has been employed as a software engineer, has devoted evenings and weekends to developing a new software product, BugFree. He believes he may soon be ready to license BugFree to a major software company, and hopes to realize significant profits. From a friend who was recently divorced, Eugene learned that

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released her claims on the husband's business property, he did not relinquish any rights to any of her property or give the wife anything in return. The husband claims that his continuing to remain married to the wife provided adequate consideration. We disagree.") The American Law Institute notes, American Law Institute, Principles of the Law of Family Dissolution, § 7.01, *Comment c,* that cases declining to enforce during-marriage agreements on consideration grounds often present facts that suggest the agreement is problematic on other grounds as well, such as coercive tactics. *Bratton* would seem an example of that point.

74. American Law Institute, *Family Law Principles* § 7.01(4); Uniform Premarital Agreement Act § 2; Uniform Marital Property Act §§ 10(a) and 10(d).

75. American Law Institute, *Family Law Principles* § 7.01, *Comment e*.

under the law of his state his wife would have an equal property interest with him in BugFree, were they to divorce. In recent years, he has had doubts about their marriage. Eugene therefore presents Dolores with a marital agreement, drafted by an attorney he has hired, under which Dolores gives up any marital-property claims she otherwise would have to BugFree. Eugene tells Dolores that, if she does not sign this agreement, he will seek an immediate divorce, because he does not feel he can go forward with BugFree's development and marketing if he does not retain sole ownership of it.

Dolores is stunned to learn that Eugene is considering divorce and at a loss to imagine how she would live and care properly for the children if divorce were to occur. She strongly believes her children's welfare would be seriously compromised were she to return full time to work, yet does not see how she and the children could maintain their accustomed life on compensatory payments and child support alone. As the manager of the couple's household finances, she knows that their current assets are modest. She is also fearful of the impact that divorce and the accompanying disruption would have on the children. She is not certain whether Eugene's threat is serious but feels she cannot take the risk. Unhappily and reluctantly, she signs the agreement.

Five years later, Eugene files for divorce. In the meantime, BugFree has been a success, and Eugene's interest in it worth several million dollars, which would be marital property but for the agreement. The couple's other marital property is worth less than $ 100,000. Eugene seeks enforcement of the marital agreement, and thus allocation of the entire value of BugFree to him as his separate property, with the parties' other property divided equally between Eugene and Dolores.

Because the parties' circumstances at divorce are not different than was contemplated at the time they made their agreement, § 7.05 [dealing with the legal treatment necessitated by the difficulty of foreseeing future developments] is unlikely to present any bar to its enforcement. The contract doctrine of unconscionability, however, is applicable. Dolores, in reliance upon the marriage, had left her employment and made herself financially dependent upon Eugene, so that their potential divorce was a much greater threat to her welfare than to his. In addition, Eugene's threat was effective in part because it exploited Dolores's responsible concern for the welfare of their children. Under the circumstances present here, Eugene's threat to divorce Dolores if she did not sign, as a tactic to obtain her consent to a very one-sided agreement that denied Dolores any claim at all on the fruits of

Eugene's marital labor in BugFree, renders the agreement unconscionable, and thus unenforceable.[76]

IV. Choice of Law Rules: Which State's Law Applies?

People in the United States move, and they are especially likely to move at the time they divorce. Consider then the Smiths, who meet in college in Massachusetts, marry at the bride's family home in New York, and set up their marital home in California, where they live for the next ten years while Mr. Smith acquires considerable stock options in the Silicon Valley company for which he works. Their marriage then runs aground and Mrs. Smith moves with their children to Arizona, to where her parents have retired and her sister now lives. Mr. Smith moves to Washington state for a new .job with Microsoft. Which state's court will hear the decide the matters relevant to their divorce, and whose law will it apply?

American courts generally apply the forum's law in divorce cases, although there are occasional exceptions. For the unexceptional cases, the question of whose law applies is thus transformed into the jurisdictional question of whose courts will hear the case. In this brief overview, we focus on the jurisdictional and choice of law questions that arise with respect to questions of divorce status, alimony, property, and agreements. This simplified overview does not pretend to provide a complete description of the relevant rules and how they work. Not does it address at all the special rules for jurisdiction and choice of law that apply to child support and child custody disputes.

Section A below considers the rules that would apply if there were no premarital agreement. The possible impact of the premarital agreement, including the question of which state's law governs its enforceability and interpretation, is treated in Section B. Background principles of American constitutional law that could in theory deny a forum the right to apply its own law to a dispute in which its interest is limited are discussed in Section B. They could in concept be relevant to the analogous choice of law issue addressed in Section A, although the matter seems not to have arisen.

A. Divorce Status, Property, and Alimony

American jurisdictional law has two sources. Federal constitutional principles determine the

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76. The conclusion of this illustration, that the agreement is not enforceable, is consistent with the result in Pacelli v. Pacelli, 725 A.2d 56 (N.J. App. Div. 1999), but that case argues that different principles should apply to marital agreements than premarital agreements because "the dynamics and pressures" are different. For a thoughtful discussion of the difficulties with contracts between persons already married, see Michael Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in THE THEORY OF CONTRACT LAW (Peter Benson ed.,Cambridge: Cambridge University Press, 2001).

circumstances under which a state *may* assert jurisdiction; each state's law then determines whether in any particular situation it does. Constitutional principles allow states to dissolve a marriage if one of the spouses is domiciled in that state, no matter where the other spouse lives, and all states entertain divorce petitions filed by their own domiciliaries. Many will also entertain a divorce petition by a non-domiciliary if the respondent spouse is domiciled in the state. So once Mr. Smith is settled in Washington, or Mrs. Smith in Arizona, either can petition the courts in his or her new home state to dissolve their marriage, and may also be able to petition the court in the other spouse's new home state. Whichever valid petition is filed first will normally govern.

Although the matter is not often addressed, constitutional principles almost certainly also allow a state to adjudicate a divorce petition filed by a non-domiciliary if the state has personal jurisdiction over the other spouse, as it can for any other civil lawsuit. A state court has personal jurisdiction not only over its domiciliaries but also over persons served with process while physically present in the state, or persons served outside the state whose contacts with it are sufficient, in both quantity and relationship to the dispute in question, to justify the state's exercise of jurisdiction over that particular matter. So, for example, a state that served as the marital domicile for many years could constitutionally exercise jurisdiction over a spouse who no longer lives there, as to a matter involving that marriage. With limited exceptions, however, states do not usually assert divorce-status jurisdiction when neither spouse is currently domiciled in the state.[77] But in any event, the court that hears the divorce petition will almost certainly apply its own law governing the process for dissolving a marriage and the findings necessary for dissolving it. In our example, Arizona would apply Arizona law to that question, and Washington would apply Washington law. This is the principle under which, in the era of fault divorce, individuals whose marital home was in a state with restrictive divorce laws could obtain a "migratory" divorce, by moving to and establishing domicile in a state with more liberal rules.

But jurisdiction over divorce status does not itself confer jurisdiction over the ancillary issues of spousal support and property allocation. To decide on a petition for alimony, a court must have personal jurisdiction over the respondent spouse. So, for example, if Mr. Smith visited his children in Arizona, where Mrs. Smith now lives, and she had him served with process for an Arizona proceeding, the Arizona court would have personal jurisdiction over him to adjudicate her alimony claim. A court in a state which was the recent marital home, such as California in our example, may also have personal jurisdiction for this purpose, because the alimony obligation arises from the

77. The one common exception is for individuals in the military forces who have been assigned to a military base within a state that is not their home state. Nearly all states will hear divorce petitions in marriages in which one of the spouses is a soldier stationed in that state, even if the soldier is not domiciled there. (Military personnel are often not domiciled in the state in which they are based because they usually have no intention to remain there indefinitely or to treat that state their home).

marriage. If neither spouse lives there, however, and jurisdiction is available in another state which appears to be a more convenient forum, a state in California's position might decline to exercise the jurisdiction it could in theory claim. Once again, whichever court ends up adjudicating the alimony claim will do so under its own law.

The rules governing property claims are somewhat more complex. Jurisdiction to determine a party's claim to personal property–movables–arises in any state with personal jurisdiction over that party, but in theory the rule is different for real property, the ownership of which can only be adjudicated in the state in which the real property is located (the "situs state"). In the divorce context this standard situs-state rule is often entirely impractical. Consider, for example, the divorcing California couple who have lived there their entire marriage, but who own a vacation home in Colorado. It is obvious that only the California court can decide how to allocate ownership of the Colorado property, as that determination cannot be made in isolation but must take account of the court's allocation of the remaining property as well. The normal solution is for the California court to decide the matter as if it had jurisdiction. While it cannot implement its decision by directly ordering a change in the title to the Colorado property, it can normally expect Colorado courts to honor its decision and effectuate the change in title if need be, even though they are not bound to do so, upon presentation of the California judgment. Or, the California court can order one spouse to convey his or her interest in the property to the other, an order it can enforce through its contempt powers so long as it has personal jurisdiction over the spouse subject to it. Finally, in deciding on the allocation of the Colorado vacation home, the California court will apply its community property law, and not the marital property law of Colorado. That means, for example, that if the Colorado home was purchased with earnings during the marriage, it will be considered community property owned in equal shares by the spouses and divided between them accordingly, regardless of the title in which it is held in Colorado.

Under the more complicated facts of our opening hypothetical, the matter may seem more difficult. Let us assume the principal property question is the allocation of valuable stock options Mr. Smith earned while working in California. Assume as well that Mrs. Smith filed for divorce in Arizona, and served Mr. Smith while he was there visiting their children, so that the Arizona courts have personal jurisdiction over him and can thus decide how to allocate the stock options. But should they apply the law of the forum (Arizona), the state in which the parties lived during the marriage in which they acquired the property (California), the state in which Mr. Smith, who earned the property, now lives (Washington), or the state in which the marriage took place (New York)?[78]

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78. For a helpful review of the varying approaches employed for deciding this question, see Thomas Oldham, *Marital Property Rights of Mobile Spouses When They Divorce in the United States*, (2008) 42 Family Law Quarterly 263.

Neither Washington nor New York deserve much consideration as the state whose law governs the matter, and they won't get it. Washington has no connection with either the marriage or Mrs. Smith. Nor does New York, after conclusion of the original wedding ceremony years ago. California seems a more plausible candidate. Tom Oldham tells us the most common European approach to this question, often called "total immutability", determines the relevant law at the time of marriage, usually "either the law of the first marital domicile or the common nationality of the spouses."[79] "Common nationality" is not a helpful concept in choosing among the American states, but a rule establishing the first marital domicile would in our case enshrine California law permanently as the source of law for deciding questions about the Smiths' property. Oldham observes that the " obvious benefit" of this rule is that it "is clear and the law applicable to the parties' rights is known from the beginning of the marriage."

In the American context, however, this apparent advantages of "total immutability" may be illusory. That point is illustrated by considering a second hypothetical couple, the Johnsons, who marry in New York in 1978 and divorce there in 1986 without having ever stepped outside its borders. Between the time of their marriage and divorce, the governing New York law changed dramatically, as the state shifted from a traditional common law system to a unique equitable distribution rule that, alone among American states, treats Mrs. Johnson's medical degree as property in which Mr. Johnson has an interest. Like every other American state, New York will deal with the Johnsons' property according to the law in place at the time of their divorce, not the law at the time of their marriage. If one conceived of the marriage as a contract in the normal sense, this result would be wrong. Why should the Johnsons' property rights be determined by a relatively extreme form of equitable distribution that they could never have anticipated, when they signed up for the common law system? The answer is that American law does not treat marriage as a contract at all, even though the word "contract" is often used metaphorically to describe it. The fact is that the rules of marriage are not determined by agreement of the parties but by the state, which is entitled to change them along the way.[80] And as we have seen, while the state may *allow* the parties to set their own rules via marital contracts, it is not bound to honor their choice, and often does not. If this set of rules seems somehow insufficiently deferential to the spouses' wishes, consider whether, as a factual matter, many couples choose their marital domicile on the basis of its marital property rules.

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79. *Id.*

80. The estranged wife of the entertainer Jackie Gleason learned this lesson to her detriment after she agreed to a legal separation from Jackie. When New York later changed its law to allow Jackie to obtain a no-fault divorce from her on the basis of that agreement–something he could not have done before the law's change–she resisted his divorce petition on the grounds that application of the new law to her old agreement constituted an impairment of her contractual rights in their marriage, in violation of the Constitution. Rejecting her claim, the court held, among other things, that marriage is not a contract within the meaning of the Contracts Clause of the Constitution. Gleason v. Gleason, 256 N.E.2d 513, 308 N.Y.S.2d 347 (N.Y. 1970).

A small handful of the very wealthy may, but they are surely an exception. Normal people consult their families, not their lawyers, when deciding where to hold their marriage ceremony.

If "total immutability" does not make sense, what of a second alternative, "partial mutability", under which each item of property is governed by the law of the state in which the spouses lived when they acquired it. In the American context in which people frequently move across state lines, the practical advantages of American courts applying their own marital property law at the parties' divorce overwhelms any arguments for partial mutability. It is not just the inherent difficulty of one state mastering another's marital property rules, because in other contexts courts are often asked to perform analogous tasks. It can be done. But a rule of partial mutability that requires the court to decide part of the case by the law of one state and another part by the law of a different state may make it impossible to produce coherent results that implement either state's policies. Suppose, for example, that the forum state's rules require equal division, while some of the property before the court was acquired while the spouse lived in a state that has a rule of equitable division under which departures from strict equality are common. To vindicate the other state's rules, the forum state would have to take into account its equal division of forum-acquired property, because the proper allocation of this other property might be affected by the fact that the forum-state property was divided equally. But should it, for example, let its equal division of forum acquired property justify a less then equal share of the other property to the financially dependent spouse, when that violates its own policies? Or should it consider the other property as if it were the only property, perhaps justifying a more generous award to the financially dependent spouse under the other state's rules–but only through the device of ignoring facts the other state would want to consider? Multiply these complications by the reality that many married couples will have lived in three or more states by the time of their divorce, and the difficulties become apparent.[81]

In sum, American courts will generally apply one state's rules to all the property before them in a divorce cases, and that will usually be the forum state's rules. So, for example, a California or Arizona court adjudicating a divorce between spouses who are its current domiciliaries will apply community property law in allocating their property, even if the property in question was acquired by the marital partners while they were domiciled in a common law state.[82] Tom Oldham has

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81. While the Restatement of Conflicts 2d, § 258, appears to endorse the partial mutability rule criticized here, courts and commentators have not. Ismail v. Ismail, 702 S.W.2d 216, 222 (Tex.App.1985) (Restatement rule is "anachronistic" and "unworkable in modern mobile America"); Marriage of Martin, 752 P.2d 1026 (Ariz. App. 1986) (same); Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 Tex.Tech.L.Rev. 1285, 1344 (1982).

82. Under the governing rubric, this is called "quasi-community property", which means that at divorce, assets acquired by the spouses through labor during the marriage will be treated as if it were community property even though the labor was performed while the spouses lived in a common law state. See Addison v. Addison, 399 P.2d 897 (Cal. 1965) (sustaining the constitutionality of the quasi-community property statute). California has expressed some

suggested that in at least some cases, states should apply the marital property law of the spouses' last common residence, rather than the law of forum state.[83] This rule could be a workable alternative, although Oldham recognizes that it would have to provide an exception to allow forums to refuse to apply a law that violates an important forum policy. The need for this exception might undermine the advantages the rule is said to offer. In any event, the dominant American rule is in fact that divorce courts apply their own law in deciding on the allocation of the spouses' property at divorce.

B. Whose Law Determines the Validity and Enforceability of An Agreement?

If a premarital agreement is a contract, then it would seem that the choice of law that governs its validity and interpretation ought to be determined by the same rules that determine the law governing any other contract. That could mean, depending upon the forum's choice of law rule, that one would apply the law where the contract was made, or was intended to be performed, or the law chosen by the parties themselves in the contract, if they made a choice and the chosen jurisdiction has some colorable connection to the contract. Yet on the other hand, premarital agreements are also instruments of family law. States need not honor them at all and most once did not. And, as we have seen, most states still impose both procedural and substantive limitations on them. It would be thus consistent with the approach courts take to adjudicating other divorce issues for the forum to apply its own policies as to the agreement's validity and effect, at least in cases in which the parties have some connection with the forum.

Background Constitutional principles can limit a forum's choice of the law to apply in determining a contract's enforceability. In *Home Insurance v. Dick*,[84] a Texas domiciliary brought suit in Texas on a fire insurance contract issued to him in Mexico, by a Mexican insurance company, protecting him from loss of his tugboat in Mexican waters. The contract itself barred claims brought more than a year after the loss. Mexican law would have enforced this bar but Texas law disallowed provisions imposing time limits of less than two years. So if the Texas law, applied the suit was allowed; if Mexican law applied, it was barred. When the Texas courts applied Texas law, the

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reluctance in extending the quasi-community property regime to cases in which only one spouse moved there, Marriage of Roesch, 147 Cal.Rptr. 586 (App. 1978) (statute not applicable to divorce of California husband from wife who remained in common law marital domicile where they had lived 26 years), but Arizona has rejected this limitation, Marriage of Martin, 752 P.2d 1026 (Ariz. App. 1986) (Arizona and not the conflicting California law applies in determining, for purpose of the parties' divorce, whether assets earned by husband in California, after Wife had moved to Arizona, are community or separate property; California had been the marital domicile and husband had never lived in Arizona).

83. Oldham, supra note 78.

84. 281 U.S. 397 (1930).

defendants appealed. The Supreme Court reversed the Texas courts, holding that application of the Texas statute violated the Due Process Clause of the American Constitution. The Court conceded that a state may ordinarily "declare invalid the making of certain contracts within its borders" and may prohibit within its borders the performance of contracts made elsewhere if the performance would violate its laws. But this case was different because "nothing in any way relating to the [insurance] policy sued on...was ever done or required to be done in Texas."

> All acts relating to the making of the policy were done in Mexico. [A]ll things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except...the bringing of this suit. The fact that [the plaintiff's] permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to [to do so] violates the guaranty against deprivation of property without due process of law....[¶] . It is true that....in the absence of a contractual provision, the local statute of limitation may be applied to [allow a claim of] a right created in another jurisdiction even where the remedy in the latter is barred....When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for....

This general approach was reaffirmed a few years ago when the Court sustained Nevada's application of its own law allowing a suit brought by its domiciliary against a California agency (rather than applying the California law that would have barred the suit). The Court quoted with approval from an earlier case observing that "[f]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Nevada's application of its own law was upheld in this case because when such contacts exist, "a State need not 'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[85]

What these cases seem to teach is that an American court can constitutionally apply its own law in deciding whether to enforce a premarital agreement, so long as it has a "significant contact or aggregation of contacts creating state interests" with the marriage. The usual jurisdictional rules keep American states from dissolving marriages unless at least one of the spouses is their domiciliary, and do not permit them to bind a respondent spouse to decisions on alimony or property allocation unless

85. Franchise Tax Board v. Hyatt, 538 U.S. 488 (2003).

they have personal jurisdiction over that spouse. Although exceptions are possible, a court that meets both these jurisdictional tests is also likely to have sufficient contacts to justify, as a constitutional matter, applying its own law to the question of whether a premarital agreement should be enforced as written. But the question of whether a state can apply its own law is perhaps put most starkly when the parties' agreement itself specifies that another state's law should govern.

If one focuses on party autonomy, one reference point sometimes used in choice of law questions, the refusal to honor the parties' own choice of law provision would seem especially problematic. On the other hand, recall that forums can change the law they apply to their own domiciliaries over time. When they change their requirements for dissolving the marriage, or their rules for allocating property, they can and generally do apply their new rules to marriages commenced under their old ones.[86] While the American constitution does not allow states to impair the obligation of contracts, marriage is not regarded as a contract for the purpose of this rule. The rules of marriage and divorce are instead understood as expressions of fundamental public policies, policies the state may reconsider and revise without the constraint that would be imposed by allowing individual citizens a vested right to have their divorce governed by the law in force when they married–a law the state has now determined to change. The same kind of reasoning explains how a state may conclude that it must apply its own law in deciding whether to enforce a premarital agreements that could alter its otherwise applicable divorce rules. A state's rules may express important policy choices the state is not inclined to allow the parties to override by specifying the law of another state which would so allow. When courts take this approach to premarital agreements they effectively emphasize their family law as opposed to their contractual nature. *Marriage of Bonds*,[87] the lengthy, thorough, and important decision of the California Supreme Court construing the Uniform Premarital Agreement Act (UPAA), is an example. Its analysis of California law was discussed above. But was it clear that California law should apply?

Barry and Sun Bonds met in Montreal, Canada, where she was then living. She moved to Arizona in 1987, when they became engaged and commenced living together. Their premarital agreement was drafted by an Arizona attorney with whom they met and in whose office it was executed. They were married in Las Vegas, Nevada, in 1988, after which Barry began the season as a professional baseball player for the Pittsburgh, Pennsylvania Pirates. Barry continued to play for Pittsburgh until the 1993 season, when he moved to the San Francisco Giants. When Barry and Sun filed for divorce in 1994 in California, the court noted that they were then California residents. So whose law should determine the validity of this agreement: Arizona's, Pennsylvania's, Nevada's, or

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86. See the *Gleason* case described in note 80, *supra*.

87. 5 P.3d 815, 99 Cal.Rprt.2d 252 (Cal. 2000).

California's? Barry and Sun disagreed on this point: Barry argued California law should apply, while Sun argued for Arizona law. Our discussion of the *Bonds* case in a prior section of this chapter has already revealed the punch line of this story: California law was applied, and the contract was enforced. But it is instructive to review how this conclusion was reached.

As one might surmise from the spouse's conflicting positions, California and Arizona law differed in ways that mattered. Even though states routinely apply new family law rules to marriages entered into before they were adopted, the UPAA itself, interestingly enough, and perhaps consistently with its more general contractual orientation, took the opposite tack: it provides that it shall not apply to premarital agreements entered into before its adoption. California had already adopted the UPAA by the time Barry and Sun executed their agreement, but Arizona had not. Arizona law would thus test the validity of the Bonds' agreement by its pre-UPAA law, which would have required Barry, in seeking to enforce the agreement, to prove by "clear and convincing" evidence that Sun had "acted with full knowledge of the property involved and [her] rights therein," and that the agreement was "fair and equitable"[88]–rules far more favorable to Sun than the UPAA rules under which the agreement was eventually upheld.

Although the Bonds' agreement contained what seemed to be a choice of law provision, it was, like the rest of the agreement, somewhat sloppily put together.[89] An "obscure provision entitled 'Situs' ... stated the following: 'This Agreement shall be subject to and governed by the laws of the state set forth as the effective place of this Agreement.'" Unfortunately, no other provision in the agreement identified its "effective place". The trial court, observing that at the time of the agreement the parties could not have anticipated that they would eventually live in California, decided that Arizona law should apply because that was where the agreement was drafted and executed, and where the spouses lived at that time. The intermediate court of appeals disagreed. It first applied the UPAA's own choice of law rule to reject the agreement's deficient choice of law provision. While that rule allows the parties to specify "the choice of law governing the construction of the agreement", the court, quoting a commissioner's comment during the Uniform Act debates, emphasized that "construction" was different than "validity and enforcement". "A forum", this commissioner said, "will not enforce a contract and provide a remedy which is contrary to its local public policy". Whether or not this principle is really different from that applied to other contracts

88. 83 Cal.Rptr.2d 783, 791 (1999) (quoting Arizona authorities).

89. This description of the agreement is taken from the opinion of the intermediate court of appeals, 83 Cal.Rptr.2d 783, 789 (1999), which, unlike the California Supreme Court, did address the choice of law question.

may be subject to debate.[90] But in any event, the result was that the sloppiness of the agreement's choice of law provision didn't much matter, because the court found the parties could not choose the law applicable to the main issue in the case (whether the agreement was enforceable) even if it were drafted clearly and meticulously.

Note that the implicit assumption of the UPAA commissioner on whose statement the appeals court relied was that on this question of enforceability, the forum would apply *its* law, and properly so. This position was implicitly adopted by the appeals court when it rejected Arizona law on the grounds that Arizona's pre-UPAA policies on enforceability conflicted with the UPAA policy that California had adopted. The California Supreme Court never addressed this choice of law question, saying only "We...do not review the determination of the Court of Appeal that California law, rather than Arizona law, governs the enforceability of this agreement, and we express no opinion on this point."[91] But if it had addressed the question, one guesses it would have agreed that California law should apply. It is not so much that American courts *never* apply the law of another state in deciding the enforceability of a premarital agreement. In *Bradley v. Bradley*, for example, the Wyoming Supreme Court agreed to honor a choice of law provision in the parties' premarital agreement specifying that Minnesota law would govern its "validity, execution, enforcement, and construction". The spouses executed a post-nuptial amendment to the agreement that did not comply with Minnesota law because they did not have separate counsel and they failed to sign the amendment in the presence of two witnesses or a notary. Although no similar requirements were imposed by Wyoming law, the court followed Minnesota law and found the amendment (but not the original agreement) invalid.[92] But on the other hand, the court also found that these Minnesota requirements were not "contrary to Wyoming law, public policy, or the general interests of our citizens", and

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90. For example, in the case of employment contracts, one scholar in the area concludes that "The ability of employers to bind mobile employees to the law of a particular state through a choice-of-law clause depends in large part on which state's courts decide the question. This is because, as indicated by cases reported in the Surveys of previous years, choice-of law clauses fare significantly better in the courts of the state whose law is chosen by the clause than in other states." Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 American. Journal of Comparative Law 243, 287 (2008).

91. 99 Cal.Rprt.2d 252, 263 (2000). One should note that neither Sun nor Barry had raised the choice of law question in the intermediate court of appeals, which addressed it (and requested their briefs on the matter) *sua sponte*. From the public record is it not possible to tell whether either party raised the question with the California Supreme Court. And often other American courts do not even acknowledge there is a choice of law question to address. For example, in Stawski v. Stawski,43 A.D.3d 776, 843 N.Y.S.2d 544 (2007), the wife, an American citizen who married a German citizen in 1975, sought to set aside a prenuptial agreement drafted by a German lawyer in German and executed by the parties in Germany before a German notary the year before they wed. Because the parties has spent their married life in New York, it was reasonable to apply to New York law to the agreement. Nonetheless, the court not only analyzed the agreement's validity under New York law, it never even considered the choice of law question.

92. Bradley v. Bradley, 164 P.3d 537 (Wyo. 2007).

cautioned that if they were, they would not be followed. The court thus made clear that the parties' choice of another state's law would not govern if that would mean violating a local policy the court believed important–even where, as here, the parties' contacts with that other state made their choice of its law reasonable.

The difference, then, between *Bonds* and *Bradley* seems to be the forum's different views of the centrality of the public policy as to which the competing laws differ. It is a subtle difference, because in both cases the validity of the disputed contract provisions lay in the balance. It is *not* that differences in the competing laws matter to the outcome in one case but not the other, but rather the importance to the forum state of the policy choice that produces that different outcome. In *Bonds* Arizona but not California required that the agreement be fair, and that its proponent carry the burden of so showing, under a heightened standard of proof–a rule the adoption of which would indeed seem of some import. One could argue that in *Bradley*, by contrast, the differences between the Minnesota rules and the Wyoming rules were more procedural and less substantive. Even if crucial to the outcome in this particular case, this argument would go, they were mere details of execution as to which California as well as Wyoming might have less concern. Perhaps one could, in this way, reconcile the two cases. But one could plausibly argue the opposite as well, that the difference between the Minnesota and Wyoming laws were also important.[93] In that case, one is left with the impression that the real distinction between *Bonds* and *Bradley* is the greater inclination of the California court to insist on its law. If that is the case, then given the absence of any good basis upon which to say whether California's or Wyoming's inclinations are more typical, one is left with little more guidance than the observation contained in some standard texts that forums do tend to apply their own law.[94] Indeed, one guesses that an important reason that forums usually apply their own law is that the parties don't often even raise with the court the possibility of doing anything else.

V. Conclusion

American law recognizes premarital agreements but remains somewhat ambivalent about

93. Certainly, the requirement that each party have his or her own counsel might reasonably be thought important. Moreover, the Minnesota law appears to contain other uncommon provisions that would have barred enforcement of this amendment, not mentioned or focused on by the Wyoming court, but which seem quite significant. For example, it disallows the enforcement of a post-nuptial agreement when either party files for dissolution within two years of its execution–which was in fact the case in Bradley, measuring from the time of the disputed amendment.

94. An American text that observes that the choice of law governing a premarital agreement "is subject to the same tests concerning governing law as are other contracts" but then goes on to concede that "several factors tend to weigh in favor of forum law, which the court often views as more equitable". Luther McDougal, Robert Felix, and Ralph Whitten, AMERICAN CONFLICTS LAW 5th Edition 775 (Transnational Publishers, Ardsley N.Y. 2001).

them. The dominant understanding is that the law must limit them, but both the appropriate extent of the limits, and the details of their implementation, vary between the states and between the two leading models offered to guide them, the UPAA and the ALI *Principles*. Fifteen or twenty years ago the clear trend was toward fewer limitations on the subject matter of agreements and less stringent review of their terms and the circumstances under which they are executed and enforced. That trend was propelled by the UPAA and reached its zenith in the Pennsylvania case of *Simione*. More recently that trend has halted, and in some cases reversed, as exemplified by California's revisions of statutory provisions based on the UPAA. This more recent trend was encouraged by the ALI *Priniciples*. While the law is thus somewhat unsettled at present, states seem, for the most part, inclined to view their own rules on premarital agreements as part of their larger set of marriage and divorce policies, as to which they are reluctant, in adjudicating divorces, to yield to conflicting rules that may have been adopted by another state in which an agreement was executed or where the spouses once lived.

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