THE UNIFORM PREMARITAL AGREEMENT ACT
AND MODERN SOCIAL POLICY: THE
ENFORCEABILITY OF PREMARITAL AGREEMENTS
REGULATING THE ONGOING MARRIAGE

INTRODUCTION

Premarital agreements are gaining in popularity. In recent years, a
variety of widely-circulated magazines, including Time,1 U.S. News &
World Report,2 Business Week,3 and Vogue,4 have featured stories about
the pros and cons of such agreements. The American Bar Association has
also published articles on premarital agreements and has recognized that
they are becoming more fashionable.5 These articles have focused on the
best methods of executing premarital agreements6 and the possible uses
of them,7 while addressing rather simplistically the enforceability of the

   Publicized and popularized by the rich and famous—most loudly of late by the
   feuding Donald and Ivana Trump—prenuptial agreements are increasingly in
   vogue among the middle and upwardly mobile classes. Such contracts are recog-
   nized in all 50 states, and matrimonial lawyers report that they are preparing
   two to five times as many as they did just five years ago . . . .
   Id. at 94.

   1990, at 83. "With nearly half of marriages ending in divorce and second unions on the rise
   among dual-career couples, contracts spelling out who gets what in a split are now being
   exchanged both before and after the vows." Id.

   "The prenuptial contract has long been a familiar, if controversial, document. But the tribu-
   lations of the Trumps are drawing attention to the postnuptial contract—an agreement
   hammered out after the wedding to determine who gets what in case of divorce or death."
   Id.

4. Tracy Young, Great Expectations, Vogue, June 1990, at 274. "Today prenuptial
   agreements, like shotgun weddings, are regarded without so much as a slightly elevated eye-
   brow and are, in fact, as capable of postponing the nuptials as pregnancy is of hurrying
   them along." Id.

5. See, e.g., Nancy Blandgett, Put It In Writing: Marital Facts On the Rise, 71 A.B.A.
   J. 28 (1985); Ira H. Lurvy, Love Letters: Prenuptial Agreements Help Smooth Di-
   vorces—Or Do They?, 79 A.B.A. J. 85 (1993); Lynne Reaves, I Do . . . You Must . . . :

6. Moore, supra note 2, at 83. "To help a postnup pass muster, each person should
   hire a separate matrimonial attorney . . . . Both partners should also understand what they
   might get were they to divorce without a contract . . . . Both partners must fully disclose
   assets and liabilities, and both should have a few weeks to think about the terms before they
   sign. The contract should be revievable every three or four years . . . . " Id.

7. Moore, supra note 2, at 83 (suggesting that spouses may use a postnuptial agree-
   ment to "keep personal property and income separate during the marriage" or to "lock in a
   specific sum before the other embarks on a risky investment deal or quits a job"); Smolowe,
   supra note 1, at 95 (stating that "[n]o matter seems too small—Who takes out the garbage?
   Who does the dishes? —or too weird").
various provisions that couples might wish to include in their agreements. Readers may erroneously assume that they and their partners will be able to contract about virtually any item of concern to them.

The legal attitude toward prenuptial agreements, however, has not been, and is not now, as generous as the popular literature might imply. Although it is true that premarital agreements have gained general acceptance in courts across the United States, these courts have not been willing to expand the scope of such agreements as far as the general public has been led to believe. Furthermore, there has been a significant lack of uniformity among the various states as to the treatment of premarital agreements. Thus, until recently, drafters of premarital agreements had to operate with only minimal guidance concerning what provisions they could safely include.

In response to mounting concern that the law surrounding prenuptial agreements was inadequate in light of the rising demand for such agreements, the National Conference of Commissioners on Uniform State Laws approved the Uniform Premarital Agreement Act (UPAA) in 1983. Although the drafters of the UPAA stated that the Act was “intended to be relatively limited in scope,” some of the provisions within the UPAA have the potential to significantly expand prior statutory and judicial authority on the matter of premarital agreements. One such provision is section 3(a)(8), which allows parties to contract about “any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” Courts have historically construed the term “public policy” very broadly in the setting of premarital agreements, greatly restricting parties’ ability to contract about matters unrelated to property and support. The UPAA, however,

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8. Moore, supra note 2, at 68. “Provisions about child custody and support . . . are never binding, since judges will decide what is in the best interests of the children. And most states will overturn deals that are ‘unconscionable’ at the time of divorce . . . . The deal cannot appear to promote divorce—such as naming a divorce date—since the law views this as against public policy.” Id.

9. See, e.g., UNIF. PREMARITAL AGREEMENT ACT (UPAA) Commissioners’ Prefatory Note, 9B U.L.A. 369, 369 (1987) [hereinafter Prefatory Note] (“It is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage.”).

10. See id. (“Despite a lengthy legal history for . . . premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements.”). For a detailed discussion of the development of the law of premarital agreements, see infra part I.A.


12. Id. For the relevant text of the Prefatory Note to the UPAA, see infra note 99 and accompanying text.


14. UPAA § 3(a)(8), 9B U.L.A. at 373. The provisions of sections 3(a)(1)-(7) which precede the reference in (a)(8) to “any other matter” deal primarily with property rights, rights to support, and choice of law. UPAA §§ 3(a)(1)-(7), 9B U.L.A. at 373. For the full text of these provisions, see infra note 115 and accompanying text.

15. See, e.g., Suzanne Reynolds, Premarital Agreements, 13 Campbell L. Rev. 343, 358 (1991) (stating that provisions of a premarital agreement attempting to regulate the parties’
may have opened the door for courts to re-examine the definition of “public policy” and reflect the changing social conditions that have led to an increased focus on premarital agreements.

The purpose of this comment is to explore the likely boundaries of the UPAA with respect to permissible content of premarital agreements. Section I examines the pre-UPAA law, both statutory and judicially-created, governing the content of premarital agreements. Section II outlines the UPAA's provisions about the permissible content of such agreements, reviews the limited number of cases that have interpreted those provisions, and predicts how future courts will handle agreements regulating the ongoing marriage. Finally, Section III articulates various reasons, some legal and some sociological, why courts should use section 3(a)(8) of the UPAA to the fullest extent to change public policy so as to allow parties the greatest freedom in contractually ordering their marital relationship.

I. BACKGROUND

A. Pre-UPAA Law of Premarital Agreements

Three factors have generally motivated courts to treat premarital agreements differently from ordinary contracts: (1) their unusual subject matter; (2) the confidential relationship of the parties to the agreement; and (3) the possibility of enforcement in the distant future.\(^\text{16}\) This section will examine the first of these factors, focusing primarily on the law regarding permissible subject matter of premarital agreements prior to the enactment of the UPAA.

The most common subjects of premarital agreements—property and support rights during and after marriage, personal rights and obligations of the parties during marriage, and the education and rearing of children to be born to the parties—are subjects in which the state's interest is especially great. Therefore, courts have scrutinized carefully contracts attempting to alter state-created regimes which protect the family.\(^\text{17}\)

1. Provisions regarding property

The first premarital agreements\(^\text{18}\) were the result of sixteenth-century English property law, which affected women quite severely.\(^\text{19}\) The

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\(^{16}\) Judith T. Younger, Perspectives on Antenuptial Agreements, 40 Rutgers L. Rev. 1059, 1061 (1988).

\(^{17}\) Id. at 1061-62.

\(^{18}\) The terms “premarital agreement” and “antenuptial agreement” are used interchangeably within the body of literature addressing the subject. In this comment the term “premarital agreement” will be used consistently.

\(^{19}\) Younger, supra note 16, at 1060 (citing 5 William Holdsworth, A History of English Law 310-12 (3d ed. 1945)).
chief function of these early premarital agreements was to "alter the incidents of the legal marital property regime, specifically to afford married women some proprietary capacity." Without such contracts, women generally had very few property rights. Since women were considered the "property" of their husbands, any property the women acquired or helped to acquire by their labor was deemed to be under the sole control of their husbands. Furthermore, women were regarded as incompetent to contract with their own husbands or third parties except in rare instances. Thus, a woman contemplating marriage had little hope of retaining any rights in her separate property without a contract granting specific authority.

Early American property law, like many other areas of American common law, derived from English common law. Therefore, early American courts continued the common law tradition of allowing women only very limited rights to make premarital contracts with respect to property. However, with the advent of the Married Women's Property Acts in the mid- to late-nineteenth century, the status of women with respect to ownership and control of property vastly improved. Consequently, courts began to relax the previously tight reins on premarital agreements. Over the course of the century following the passage of the Acts, courts routinely upheld provisions within premarital agreements which allocated property upon divorce, provided for distribution of property upon the

20. Id. Eventually these agreements were recognized as important enough to be included in the original Statute of Frauds. Id. (citation omitted).

21. CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 662-65 (1977). At common law, a husband and wife were presumed to take possession of real estate as tenants by the entireties. Id. at 662. The property was "under the exclusive control of the husband. He had the sole privilege of occupancy; he was entitled to all of the income; he could alienate these rights without the wife's consent; and his creditors could levy against them." Id. at 663 (quoting John D. Johnston, Jr., Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. Rev. 1033, 1084 (1972)). This absence of property rights for the wife was explained by the theory of coverture: The husband and wife were one person. HAAR & LIEBMAN, supra, at 663.

22. HAAR & LIEBMAN, supra note 21, at 664 (quoting LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 36 (1969)).


24. In fact, women were allowed to contract on their own about virtually nothing. Id. at 41-57.

25. HAAR & LIEBMAN, supra note 21, at 666-67. The Married Women's Property Acts provided women with some degree of control over their separate property, even if it was obtained during the marriage. Id. at 666. The Acts typically also protected women's separate property from their husbands' creditors. Id. The motivations for the passage of the Acts varied from state to state, as did the Acts themselves. In some states, proponents of women's rights were instrumental in the passage of the Acts. Id. In others, the impetus "came from wealthy fathers, who felt the need for ways to protect married daughters' inheritances from profligate husbands." Id. In still other states, "well-to-do husbands, who sought schemes for avoiding creditors' claims by insulating assets as their wives' separate unattachable property," helped the Acts pass. Id. at 667.

death of a spouse, and regulated the rights of the parties generally to control and manage the property. Recent equitable distribution statutes adopted in many states have established women’s rights in community property so firmly that courts in those jurisdictions have virtually eliminated close scrutiny of property provisions within premarital agreements which are otherwise valid.

2. Provisions regarding support

Courts have been skeptical about premarital agreement provisions which attempt to alter or eliminate the support obligations of the parties. The obligation of spousal support was firmly rooted in the American common law tradition. The origin of the obligation was the notion that a husband and wife were “one person in law.” This fictional unity of husband and wife produced two strong legal rules. First, the husband was the “head of the household” and as such was obligated to provide for his family. Second, “the husband [was] entitled to the wife’s services in the home and . . . she [was] obligated to give those services without compensation.” Therefore, courts often invalidated agreements controlling spousal support on public policy grounds. Recently, however, the trend

27. See, e.g., Spector v. Spector, 531 F.2d 176, 182 (Ariz. Ct. App. 1975) (parties could validly contract to make wills containing specific provisions); Eule v. Eule, 320 N.E.2d 506, 509 (Ill. App. Ct. 1974) (parties had been married a total of fifteen times, three times to each other; court held that “[p]ersons competent to contract may execute an agreement prior to marriage settling in advance the rights of the respective spouses in the property of each other at the date of either’s death”); In re Paulson’s Will, 36 N.W.2d 95, 96 (Wis. 1949) (party can give up claim in spouse’s estate). For a general discussion of the premarital estate contract, see Paul G. Haskell, The Premarital Estate Contract and Social Policy, 57 N.C. L. Rev. 415 (1979).
30. For a discussion of community property principles within the context of equitable distribution, see Golden, supra note 29, at 5-7.
32. Id. at 559.
33. Id. (quoting William Blackstone, Commentaries 445 (1813)). As Blackstone observed, “the very being or legal existence of the women [sic] is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and care, she performs everything.” Id.
34. Krauskopf & Thomas, supra note 31, at 560.
35. Id. at 561. The “services” referred to included “manual labor in the home, . . . the duty to cohabit[,] and [the duty to] provide sexual services.” Id.
36. An illustrative case is Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945). The N.C. Supreme Court stated:
While it is true that in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free trad-
has been towards permitting parties to enter such an agreement so long as the agreement, considered as a whole, and the manner of its execution satisfy definite procedural and substantive standards.\textsuperscript{37}

A comparison of two cases from the same jurisdiction illustrates this trend. In \textit{Reiling v. Reiling},\textsuperscript{38} the court invalidated a premarital agreement which provided that the wife would receive no alimony in the event of a divorce.\textsuperscript{39} Just three years later, in \textit{Unander v. Unander},\textsuperscript{40} the court changed its mind. The \textit{Reiling} decision, the \textit{Unander} court said, had been based on two premises:

(1) agreements providing no alimony is to be paid encourage divorce because the husband is apt to treat his wife without the consideration he [might] have if he had foreseen that he [might] have been required to pay her alimony in the event of a divorce; and (2) the state has a “paramount interest in the adequate support of its citizens, and, therefore, the husband’s duty of support, either before or after divorce, should not be left to private control.”\textsuperscript{41}

The \textit{Unander} court explained that the first premise was no longer valid and cited the 1971 adoption of a no-fault divorce statute as indicative of the state’s policy that certain marriages were not worth preserving (including “a marriage preserved only because good behavior by the husband is enforced by the threat of having to pay alimony”).\textsuperscript{42} Although the court still believed that “one spouse’s duty to support the other cannot be nullified by private agreement,” this principle “[did] not necessarily lead to the conclusion that all antenuptial agreements concerning alimony [were] invalid.”\textsuperscript{43}

\textit{Unander} reflects the pre-UPAA position which permits premarital agreements regarding spousal maintenance provisions. Some jurisdictions
embracing this trend have placed a limitation on provisions about alimony by holding that such provisions will be examined for unconscionability resulting from changed circumstances at the time of divorce. As a general rule, however, parties may agree upon support provisions as long as the agreement is carefully drafted and properly executed.

3. Provisions regarding "other matters"

It is relatively easy to discern a trend in favor of court enforcement of premarital agreements insofar as they relate to property and support matters. For other personal matters within the marriage, however, no such trend emerges. In fact, there are few court opinions that have addressed premarital agreements regulating the ongoing marriage. When courts have considered such agreements, the rulings have depended on interpretations of "public policy," and the results are often difficult to predict. In the context of domestic law, it has frequently been said that the state's overriding "public policy" is the protection of the family. Courts, therefore, have been extremely reluctant to recognize causes of action based on premarital agreements regulating the ongoing marriage. Judges feared that this "interference" during the intact marriage would increase conflict between the parties, present severe enforcement problems, and frustrate judicial economy. Some provisions also presented serious constitutional questions. In addition, courts were influenced in this area by the same considerations that initially motivated them to reject premarital contracts involving support provisions. For example, courts thought that the husband, as "head of the household," had

44. A good example is Gross v. Gross, 464 N.E.2d 500 (Ohio 1984), cert. denied, 476 U.S. 1117 (1986). The parties' agreement provided for a maximum of $200 per month alimony to the wife for ten years. Id. at 503. Fourteen years later, when the agreement was enforced, the husband's estate had grown from $550,000 to $6 million. Id. The court, evaluating the terms of the agreement as of the time of divorce, concluded that enforcement of the agreement would be unconscionable. Id. For another example, see In re Estate of Meyers, 709 P.2d 1044, 1047 (Okla. 1985) (allowing waiver of right to support if no minor children are involved).


46. Homer H. Clark, Jr., Antenuptial Contracts, 50 U. Colo. L. Rev. 141, 161 (1979). "[T]here is a serious question whether a relationship so intimate, so many-sided and so fluid as marriage can or should be confined within the limits of contractual rules . . . ." Id. at 162.

47. Reynolds, supra note 15, at 358. "What remedy would the court grant for breach of an agreement to allow the wife first choice in pursuing a career, for example? How could the court compute damages? Even more troubling, how could the court fashion a decree of specific performance?" Id.

48. Oldham, supra note 45, at 783.

49. Id. at 783 n.96. For example, premarital agreements specifying the religious training of future children have come under close scrutiny given the guarantees of the First Amendment. See generally Martin Weiss & Robert Abramoff, The Enforceability of Religious Upbringing Agreements, 25 J. Marshall L. Rev. 655 (1992); James F. Sweeney, Note, Enforceability of Prenuptial Promises Concerning the Religious Training of Children, 10 W. Reserve L. Rev. 171 (1959).
the right to control all aspects of the marriage and that the wife owed the husband certain services in exchange for his support.\textsuperscript{50} The result of all of these concerns has been that courts rarely have upheld agreements attempting to regulate the ongoing marital relationship of the parties.

\textit{a. Provisions regarding living arrangements.} Most courts have been unwilling to enforce premarital agreements setting forth the living arrangements of the partners and their families. In \textit{Mengal v. Mengal},\textsuperscript{51} the parties had orally agreed before their marriage that the wife's two children by a prior marriage would not live with the parties during the marriage.\textsuperscript{52} The court said that even if oral agreements made in consideration of marriage were enforceable (a question which the court did not answer), this particular agreement was not.\textsuperscript{53} "Such an ante-nuptial agreement . . . would not be binding because in effect it threatens the relationship between parent and children and hence would controvert public policy. Mothers should have their children live with them."\textsuperscript{54}

In \textit{Koch v. Koch},\textsuperscript{55} the parties also had made an oral agreement relating to living arrangements. This agreement provided that the husband's mother, then living in Hungary, would be brought to the couple's home to live with them.\textsuperscript{56} Unfortunately, the mother's presence in the home caused extreme friction between the parties and resulted in the disintegration of the marriage.\textsuperscript{57} At trial, Mr. Koch testified that he probably would not have married his wife had she not agreed to allow his mother to live in the home and that he would receive his wife back into the home if she would honor her agreement.\textsuperscript{58} After recognizing that oral agreements in contemplation of marriage are unenforceable, the court held that even assuming the enforceability of such agreements, the particular contract in question could not be enforced:

Rarely . . . will affirmative promises, indefinite as to duration, be interpreted as calling for perpetual performance . . . . That salutary legal concept is certainly applicable in matters of domestic relations where the policy of our law is to preserve the marriage and eliminate contentious elements that do violence to it . . . .

"The home which a husband is obligated to provide for his wife must be one where she is free from abuse, violence, and interference by other persons, including his relatives." For that reason the understanding between the parties, to the extent that it may be considered as one

\begin{itemize}
\item \textsuperscript{50} For a discussion of these considerations, see supra notes 32-35 and accompanying text.
\item \textsuperscript{51} 103 N.Y.S.2d 992 (Dom. Rel. Ct. 1951).
\item \textsuperscript{52} Id. at 994.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id. at 994-95.
\item \textsuperscript{56} Id. at 158.
\item \textsuperscript{57} Id. at 159.
\item \textsuperscript{58} Id.
\end{itemize}
to keep the parent in the household indefinitely, may not be enforced.\textsuperscript{59}

The court seemed to suggest that prospective spouses might, in their enthusiasm about their future marriage, make promises to one another that their human nature would prevent them from performing as the marriage progressed. It is likely that many courts, while not saying so explicitly, have refused to recognize premarital contracts regulating the ongoing marriage not because they violate “public policy,” but because they violate human nature.

\textit{b. Provisions regarding sexual relations.} Perhaps because the subject is an intimate one, courts have been extremely reluctant to recognize the validity of premarital agreements concerning the sexual relationship of the parties. In \textit{Favrot v. Barnes},\textsuperscript{60} the husband attempted to avoid alimony payments to his ex-wife by claiming that she had committed marital fault by breaching a premarital agreement providing that they would “limit sexual intercourse to about once a week.”\textsuperscript{61} The husband claimed that the wife breached the agreement by seeking intercourse three times daily.\textsuperscript{62} The wife maintained that she had kept the agreement “despite her frustration at not being ‘permitted’ at other times even to touch her husband.”\textsuperscript{63} The court refused to find fault based on the parties’ understanding:

We reject the view that a premarital understanding can repeal or amend the nature of marital obligations as declared by C.C. 119: “The husband and wife owe to each other mutually, fidelity, support and assistance.” Marriage obliges the spouses to fulfill “the reasonable and normal sex desires of each other.” It is this abiding sexual relationship which characterizes a contract as marriage, . . . rather than, e.g., domestic employer-employee, or landlord-tenant. Persons may indeed agree to live in the same building in some relationship other than marriage. But that is not what our litigants did. They married.

The law does not authorize contractual modification of the “conjugal association” except “[i]n relation to property . . . .” [Our] law prohibits alteration of marriage like that agreed to here . . . . “Neither can husband and wife derogate by their matrimonial agreement from the rights resulting from the power of the husband over the person of his wife . . . .” Nor—because the rights over the person are largely mutual . . . .—can their matrimonial agreement derogate from the power of the wife over the person of her husband.\textsuperscript{64}

The issue of the parties’ sexual relationship was before the \textit{Favrot} court

\textsuperscript{59} Id. at 160 (quoting 26 Am. Jur. 2d Husband & Wife §338 (1940)) (citations omitted).
\textsuperscript{61} Id. at 875.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. (citations omitted).
only because it affected the resolution of a support motion after the disintegration of the marriage. Had the parties attempted to litigate the issue during the intact marriage, the trial court would probably have refused to entertain the case and there would be no record of it. Perhaps the lack of published decisions about premarital agreements regulating sexual relations is the best evidence of courts’ disfavor towards them.

c. Provisions regarding choice of domicile. Choice of domicile is another subject which prospective spouses have included in premarital agreements. Until only recently, courts were reluctant to enforce choice of domicile provisions because enforcement would disturb the traditional common law rule that the husband was the head of the household and the wife was subject to his decisions about domicile.65 This judicial reluctance is illustrated in the case of Sprinkle v. Ponder.66 In Sprinkle, the wife promised to “follow” her husband in exchange for a deed of property.67 The parties entered into the agreement after their marriage,68 but the court’s holding would apply equally well to premarital agreements:

[I]t is fixed law that any such contract, attempting to make an ordinary marital duty the subject of commerce, is void as against public policy. The “authority of the husband as the head of the family gives him the right, acting reasonably, to . . . determine where . . . the home of the family shall be, and thus to establish the matrimonial and family domicile.” . . . As long as the husband exercises this choice in a reasonable manner, consistent with the comfort, welfare and safety of his wife, it would seem to be the wife’s marital duty to go with the husband to the home of his choice . . . .69

Again, the dearth of published decisions involving choice of domicile provisions suggests that courts have been unwilling even to entertain this issue except in certain very unusual circumstances. Given the number of two-career marriages and the increased mobility of today’s society, however, it is likely that courts will soon be forced to confront this issue squarely.70

65. Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Cal. L. Rev. 1169, 1175 (1974). The husband’s right to choose the marital domicile has been so strong that a woman refusing to accept her husband’s choice has been deemed to have deserted him. Id.
66. 233 N.C. 312, 64 S.E.2d 171 (1951).
67. Id. at 315-16, 64 S.E.2d at 174-75. The parties were disputing an alleged contract in which the wife agreed (against her will) to move with her husband to Flat Creek and to help him build a home there in exchange for his promise to deed part of the Flat Creek land to her. Id.
68. Id. at 316, 64 S.E.2d at 174.
69. Id. at 316-17, 64 S.E.2d at 175 (quoting 26 Am. Jur. Husband & Wife §10 (1940)) (citations omitted).
70. For a prediction as to how courts might react given the new guidelines of the UPAA, see infra notes 117-21 and accompanying text.
d. Provisions regarding domestic services. At common law, the traditional legal marriage contract assigned specific roles to the husband and wife. The wife provided services as housewife, mother, and companion to her husband in exchange for his financial support. The wife's duties to her husband were detailed by the Connecticut Superior Court in *Rucci v. Rucci*. According to that court, she had a duty to "be his helpmeet, to love and care for him in such a role, to afford him her society and her person, to protect and care for him in sickness, and to labor faithfully to advance his interests." Furthermore, she had to "perform her household and domestic duties . . . without compensation therefor. A husband [was] entitled to the benefit of his wife's industry and economy."

Because the wife was obligated to furnish these services to her husband, courts refused to enforce premarital agreements providing that the wife would be compensated for her services. The courts reasoned that such agreements would lack consideration, since the wife would be promising to give her husband something which she already owed him. This reasoning has even been applied to agreements by which the wife would provide "extra" labor, such as working in the husband's business.

The courts' refusal to enforce agreements under which the wife would receive payment for domestic services has had serious consequences. Although wives have furnished valuable services to their families, their efforts have resulted in no independent social security coverage or retirement benefits. Wives have therefore been unable to plan for their own financial security in the event of a divorce. Before states enacted equitable distribution statutes, most courts at divorce disregarded the contributions of women to the marital property. Thus, pre-UPAA law encouraged women to be housewives, but then punished them for doing so if their marriages dissolved. Given the overwhelming social changes in marriage within the last few decades, a change in the judicial reaction to prenuptial agreements regulating domestic services seems inevitable.

e. Provisions regarding religious practices. Ironically, prospective spouses who have contracted about religious practices within their marriage have fared somewhat better than parties who have contracted about

71. Weitzman, supra note 65, at 1187.
72. Id.
74. Id. at 127 (citations omitted).
75. Id.
76. Weitzman, supra note 65, at 1189.
77. Id.
78. Id. at 1189 n.106.
79. Id. at 1190.
80. Id.
81. Id. at 1191-92.
82. Id. at 1193.
83. For a canvass of these changes, see infra part II.A.
living arrangements, sexual practices, domicile, or domestic services. Given the constitutional dimensions which attach to matters of religious practice, one would think that courts would reject any contractual provision which affected the right of either party to practice his or her chosen religion. The reported cases prove otherwise.

In *Ramon v. Ramon*, a Catholic husband and a Protestant wife executed an antenuptial agreement providing that any children born to the parties would be brought up as Catholics and that the wife would not in any way hinder the husband's practice of his religion. Upon the parties' divorce, the wife left the home, removed the parties' daughter from a Catholic school, enrolled her in a public school, and took her to Protestant services. The husband asserted that the wife had breached the contract. The court agreed: "The . . . agreement . . . clearly contemplated the preservation of the spiritual rights and status of the respondent and those of his prospective children. These rights though spiritual and intangible became for all purposes just as real, protective and enforceable as pertained to any physical property." Although the court premised its decision to enforce the agreement on its respect for the unique tenets of the Catholic denomination, its subsequent litany of the husband's rights under the agreement is quite sweeping:

He had the right to determine that in his married life he would continue as formerly to abide by [Catholic] rules, obligations, and discipline. He had the right to seek to preserve this advantage for his children . . . .

He had the right to choose for a spouse one who, though not a Catholic, would at least agree not to interfere in the exercise by him of his solemn religious duties . . . .

Relying on [the] solemn promise by which the petitioner agreed to protect and preserve this right, respondent married the petitioner and irrevocably and for life changed his status from the single to the married state.

One could hardly imagine a more ringing endorsement of premarital agreements regarding religious practices of the parties. Furthermore, there is no logical reason to limit premarital contractual freedom to Catholics only. Indeed, such a limitation would be inconsistent with the Establishment Clause and could not be sustained.

The analysis in *Ramon* was, in fact, applied to a contract between a Jewish couple in *Avitzur v. Avitzur*. Prior to their marriage, the couple

84. 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).
85. Id. at 102.
86. Id.
87. Id.
88. Id. at 104.
89. Id. at 107-08 (citations omitted).
90. Id. at 111.
91. See U.S. Const. amend. I.
executed a document known as the "Ketubah," in which both parties promised that they would recognize the "Beth Din," a Jewish rabbinical tribunal, as having authority to counsel them about matters involving their marriage.\textsuperscript{93} Upon divorce, the husband refused to submit to the Ketubah, although this was the only means by which the couple could obtain a Jewish divorce.\textsuperscript{94} The court enforced the secular terms of the Ketubah, stating that its provisions were "closely analogous to [those of] an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties," and that since the latter agreement would be "valid and enforceable," the parties' actual agreement "should ordinarily be entitled to no less dignity."\textsuperscript{95} The court dismissed the husband's argument that enforcement would violate the constitutional mandate of separation of church and state, concluding that the parties' agreement was enforceable on neutral contract principles and did not require a constitutional analysis.\textsuperscript{96}

It seems inconsistent that courts would be willing to enforce premarital agreements affecting rights as cherished and protected as the right of religious practice and yet refuse to enforce provisions about much more mundane matters, such as living arrangements and choice of domicile. Courts that have not enforced the latter types of provisions have based their refusal on their unwillingness to disturb the privacy of the intact marriage. Yet these same courts have not hesitated to delve into the parties' religious practices—surely an area of the utmost privacy.

Obviously, judicial interpretation of premarital agreements involving "other matters" has produced few hard and fast rules on which prospective spouses and their attorneys can rely. It was, in part, this need for guidance which led to the creation of the UPAA.

B. The Uniform Premarital Agreement Act

The National Conference of Commissioners on Uniform State Laws promulgated the UPAA in 1983.\textsuperscript{97} Since then, nineteen states have adopted the UPAA either in whole or in part.\textsuperscript{98}

\textsuperscript{93} Id. at 137.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 138.
\textsuperscript{96} Id. at 138-39.
\textsuperscript{97} UPAA, 9B U.L.A. 369 (1987).
1. Purpose of the UPAA

The drafters of the UPAA included a prefatory note in which they explained the motivation behind the statute:

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and nonuniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seems not so much a reflexion of basic policy differences between the states, but rather a result of spasmodic, reflexive response to varying factual circumstances at different times. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.99

The UPAA's drafters chose to use the term "modern social policy" instead of the traditional term "public policy," perhaps recognizing that some of the old rules regarding premarital agreements have lost their force. The provisions of the UPAA clarify and codify, to some extent, this "modern social policy" with respect to certain subjects of premarital agreements, such as property and support.100 The UPAA, however, does little to clarify what other types of provisions might conform with "modern social policy."

2. The provisions of the UPAA

Although the focus of this comment is on section 3 of the UPAA, a brief description of the other provisions of the statute is necessary to place section 3 in its proper context. Section 1(1) provides that the UPAA applies to agreements "between prospective spouses made in contemplation of marriage."101 Section 1(2) defines the term "property" as any interest in "real or personal property, including income and earnings."102

100. For a discussion of property and support provisions in pre-UPAA premarital agreements, see supra parts I.A.1., I.A.2.
101. UPAA § 1(1), 9B U.L.A. at 371. This language is significant because it excludes postnuptial agreements (made during the intact marriage but not in contemplation of divorce) from the UPAA's scope.
102. UPAA § 1(2), 9B U.L.A. at 371. The Official Comment to § 1(2) says that property rights may include "rights in a professional license or practice, employee benefit plans,
Section 2 states that "[a] premarital agreement must be in writing and [must be] signed by both parties"; if these requirements are met, the agreement is "enforceable without consideration." 103 Section 4 provides that "[a] premarital agreement becomes effective upon marriage," 104 and section 5 sets forth the procedures for amendment and revocation of the agreements. 106 Section 6, regarded by many commentators as the "heart" of the UPAA, 109 outlines the requirements for enforceability of premarital agreements, focusing on such important contract principles as duress, unconscionability, and disclosure. 107 Section 7 provides that if a marriage is declared void, a prior premarital agreement is enforceable "only to the extent necessary to avoid an inequitable result." 108 Section 8 tolls the statute of limitations applicable to a claim for relief under the premarital agreement during the parties' marriage. 109 Section 9 deals with application and construction of the UPAA, 110 section 10 gives the short name of the Act, 111 and section 11 provides for severability of the provisions of the UPAA. 112 Section 12 declares the effective date of the UPAA, 113 and section 13 provides the mechanism whereby adopting states can list statutes


103. UPAA § 2, 9B U.L.A. at 372. At least one court has implied that an oral premarital agreement might be enforceable by promissory estoppel principles, since the UPAA did not affect enforcement alternatives. See Hall v. Hall, 271 Cal. Rptr. 773 (Cal. Ct. App. 1990). For a discussion of these formality requirements, see Lord, supra note 102, at 240.

104. UPAA § 4, 9B U.L.A. at 375.
105. UPAA § 5, 9B U.L.A. at 375.

106. The Prefatory Note to the UPAA calls section 6 the "key operative section of the Act." Prefatory Note, supra note 9, 9B U.L.A. at 369; see also Reynolds, supra note 15, at 369 (recognizing the enforcement provisions as the most controversial portion of the UPAA); Younger, supra note 16, at 1087; S. Christine Mercing, Comment, The Uniform Premarital Agreement Act: Survey of its Impact in Texas and Across the Nation, 42 Baylor L. Rev. 825 (1990).

107. UPAA § 6, 9B U.L.A. at 376. A detailed discussion of the enforceability provisions of the UPAA is beyond the scope of this comment. However, the concepts embodied in section 6 have been the subject of extensive commentary. See, e.g., Clark, supra note 46, at 162-64; Oldham, supra note 45, at 770-77; Younger, supra note 16, at 1073-90. For specific analyses of the fairness aspects of premarital agreements, see Robert Roy, Annotation, Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms—Modern Status, 55 A.L.R.4th 161 (1987); Robert Roy, Annotation, Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status, 53 A.L.R.4th 85 (1987).


109. UPAA § 8, 9B U.L.A. at 379.
110. UPAA § 9, 9B U.L.A. at 379.
111. UPAA § 10, 9B U.L.A. at 379.
113. UPAA § 12, 9B U.L.A. at 380.
which are repealed by the UPAA.\textsuperscript{114}

3. "Content" under the UPAA

Section 3(a) of the UPAA, entitled "Content," provides that parties to a premarital agreement may contract with respect to

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
(4) the modification or elimination of spousal support;
(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
(6) the ownership rights in and disposition of the death benefit from a life insurance policy;
(7) the choice of law governing the construction of the agreement; and
(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.\textsuperscript{116}

Subsection (b) provides that the parties' agreement may not adversely affect the right of a child to child support.\textsuperscript{116}

Subsections (a)(1) through (a)(7) codify to a great extent the pre-UPAA trend toward enforcing premarital agreements about property and support.\textsuperscript{117} Subsection (a)(8), however, appears by its plain language to be a significant expansion of the common law.\textsuperscript{118} Since subsections (a)(1) through (a)(7) already contain all the previously permissible subjects of premarital agreements, subsection (a)(8) must contemplate that parties may also agree upon matters unrelated to property and support, including some of those matters previously prohibited, such as living arrangements, choice of domicile, and domestic services. The phrase "personal rights and obligations" seems to encompass such matters as household chores, childrearing responsibilities, and perhaps even sexual relations.\textsuperscript{119} Furthermore, the Official Comment to section 3 states that "subject to [the public policy] limitation, an agreement may provide for such matters

\textsuperscript{114} UPAA § 13, 9B U.L.A. at 380.
\textsuperscript{115} UPAA § 3, 9B U.L.A. at 373 (emphasis added).
\textsuperscript{116} Id.
\textsuperscript{117} For a discussion of this trend, see supra parts I.A.1., I.A.2.
\textsuperscript{118} Reynolds, supra note 15, at 358. Professor Reynolds wrote specifically about the North Carolina statute, but her comments would be equally applicable to the original UPAA.
\textsuperscript{119} See, e.g., Oldham, supra note 45, at 769 (recognizing that such a reading is possible but not likely, "because such a radical step would not be taken in so oblique a manner").
as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on." One might therefore expect that the UPAA would cause a dramatic increase in the enforcement of premarital agreements addressing these subjects. In spite of the tantalizing language of section 3(a)(8) and its Official Comment, there is little evidence that the section accurately reflects a shift in interpretation of the phrase "public policy." Commentators on premarital agreements forecast that the "any other matter" provision in the UPAA will spur little, if any, appreciable change in the pre-UPAA judicial attitude towards agreements purporting to regulate the ongoing marriage. It appears that public policy has not yet caught up with the "modern social policy" which the UPAA's drafters had in mind.

II. Analysis

For decades, scholars of both law and sociology have advocated the use of marital contracts to regulate certain aspects of the ongoing marriage. These commentators have argued that couples should have great latitude in deciding about which subjects they wish to contract premaritally. Some of the commentators have gone so far as to draw up sample contracts involving areas of personal concern to the partners during their marriage. These writers' arguments in favor of premarital contracting are based on a variety of social and contractual principles which are as valid today as they were ten or twenty years ago.

This section begins by describing the many changes that have occurred within the institution of marriage in recent decades. These changes suggest that courts need to rethink their position on premarital agreements regulating the ongoing marriage. The section then explores various legal developments, such as the expansion of contract law and the rising popularity of mediation, which would facilitate the enforcement of such agreements.

A. The Changing Face of Marriage

The state has traditionally viewed the family as a cornerstone of society and has articulated a strong public policy of protecting the family in

120. UPAA § 3 cmt., 9B U.L.A. at 374 (emphasis added).
121. Oldham, supra note 45, at 783-84; Reynolds, supra note 15, at 359; Younger, supra note 16, at 1087 (writing that "the statutory permission for agreements on personal rights and obligations seems to be meaningless"). In this connection, it is important to note that the Official Comment to section 6 (the enforcement provision of the UPAA) seems to weaken the terms of section 3(a)(8), stating that "[n]o special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations." UPAA § 6 cmt., 9B U.L.A. at 377.
122. See generally Karl Fleischmann, Marriage by Contract: Defining the Terms of Relationship, 8 Fam. L.Q. 27 (1974); Marjorie M. Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 207 (1982); Weitzman, supra note 65.
123. Fleischmann, supra note 122, at 30-31; Schultz, supra note 122, at 220-23; Weitzman, supra note 65, at 1250-55.
order to protect society. This public policy, as noted earlier, has been the basis for widespread state regulation of marriage and divorce.124 The state has reasoned that since lasting marriages are essential to procreation and the continuation of society, the state has the right and the duty to see that marriages are preserved.125

Professor Lenore Weitman, one of the chief proponents of premarital contracting, has theorized that the state’s policy of prescribing a single legal structure for all marriages which could not be altered by contract is based on several outdated assumptions.126 First, the state policy assumes that all couples who marry intend that the marriage will be permanent.127 Second, the state policy assumes that all marriages are first marriages between young adults.128 Third, the state policy assumes that procreation is an essential part and purpose of the relationship.129 Fourth, the state policy assumes that there will be a strict division of marital labor in the family, and that such division will conform to traditional sex roles.130 Fifth, the state policy assumes a white, middle-class family.131 Weitman, writing in 1974, argued that these assumptions were severely outdated and that state policy against marital contracting ought to change to conform to the new face of marriage.132 Surely, Weitman’s argument has gathered momentum in the nearly two decades that have followed her work.

1. The prevalence of divorce

The current divorce rate belies the state’s theory that marriage is a permanent undertaking between two young adults who have not been previously married. In 1992 the United States Census Bureau reported that 15.8 million persons listed their marital status as divorced in the preceding year, representing 8.6% of the total population.133 These figures do not reflect the complete picture of the divorce rate, since the figures do not take into account those divorced persons who later remarried.

124. Weitman, supra note 65, at 1170.
125. Id. at 1211; see also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (providing that “marriage and procreation are fundamental to the very existence and survival of the race”); Miller v. Miller, 159 N.E. 681 (N.Y. 1928); Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862).
126. Weitman, supra note 65, at 1170.
127. Id. at 1200-04.
128. Id. at 1204-10.
129. Id. at 1211-16.
130. Id. at 1216-27.
131. Id. at 1227-29.
132. Id. at 1171 (writing that “present laws . . . are . . . founded in large part on sociological assumptions which are anachronistic and inappropriate in modern society”).
133. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, 44-45 (1992) [hereinafter CENSUS 1992]. In 1990 8.3% of the population was divorced; in 1980 the number was 6.2%. Id.
2. Singleness as a lifetime choice

Another indicator of the weakening of the marriage institution is that more and more persons are choosing either to delay marriage or not to marry at all. In 1970 only 6.2% of women 30 to 34 years old had never been married.\(^{134}\) In 1980 the number had jumped to 9.5%,\(^{135}\) and by 1991 the number had climbed to 18.7%.\(^{136}\) The number of unmarried couples choosing to cohabit has also risen dramatically, from approximately 1.6 million couples in 1980 to just over three million couples in 1991.\(^{137}\) Overall, it is estimated that at least ten percent of today’s young adults are likely to remain unmarried throughout their lives.\(^{138}\) These statistics indicate that the state’s reliance on marriage as the stronghold of family life is greatly misplaced in today’s society.

3. The decline of procreation as a reason to marry

Two trends also belie the state’s assertion that a fundamental purpose of marriage is procreation. First, there has been a dramatic increase in the number of births to unmarried women.\(^{139}\) Obviously, many adults do not consider marriage a prerequisite to having children, and many children continue to be reared in single-parent homes.\(^{140}\) Second, there has been an increase in the number of married couples who choose not to have children at all.\(^{141}\) Thus, the state can no longer logically justify control over marriage as a necessary or effective means of ensuring procreation.

4. The shift away from traditional sex roles

There is also strong evidence that even within “healthy” marriages the relationship between husband and wife is not the same as it was many years ago when the state’s “public policy” was being forged. As noted previously, marriage laws operated on the assumption that the husband, as head of the household, was solely responsible for the support of the family, while the wife owed a corresponding duty to furnish domestic services.\(^{142}\) However, this assumption clearly is outdated today. More women are working outside the home, and their wages are often vitally

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134. Id. at 45.
135. Id.
136. Id.
137. Id.
139. In 1970 approximately 11% of all children born were born to unwed mothers. Census 1992, supra note 133, at 69. In 1980 the figure was 18%, and by 1989 the number had jumped to 27%. Id.
140. The percentage of children living with only one parent was 12% in 1970, 20% in 1980, and 25% in 1991. Id. at 55.
141. Weitzman, supra note 65, at 1214-16.
142. For a discussion of traditional marital roles, see supra notes 71-75 and accompanying text.
important to their families’ economic survival. The husbands are assuming a greater role in childrearing and in housekeeping. The shift in perception of men’s and women’s roles within marriage has led to greater sharing of important decision-making in all aspects of the marriage. Weitzman suggests that one of the forces “augmenting the present trend toward more egalitarian family patterns” is the change in “expectations for a marital relationship, with multiplied emphasis on the emotional and psychological needs of the spouses—love, sex, intimacy, companionship, emotional support, security, and ego enhancement.” If it is true that more couples are getting married for emotional and psychological reasons, rather than economic ones, these couples should be allowed greater control over their ongoing relationships so that they can structure their roles within their marriages to achieve maximum personal fulfillment.

5. Socioeconomic diversity among families

There appears to be virtually no basis for the fifth assumption attacked by Weitzman—that all marriages involve white middle class partners. Indeed, there is a great diversity of marriage patterns among families of different races and ethnic origins which suggests the need for these families to vary the traditional state-imposed marriage contract. For example, Weitzman says that

families in some ethnic groups might want a marriage contract which extended support obligations beyond the conjugal family unit to include grandparents, aunts, uncles, and cousins among those who would provide or receive support. These families might also find it more appropriate and prefer to apportion financial, domestic, and child-care responsibilities along generational rather than sex-linked lines. However, by imposing the white middle-class ideal family type on all families, traditional legal marriage often ignores and excludes the special concerns and needs of ethnic and racial minorities...

Weitzman also points out that many family laws, such as those involving alimony, child support, and property, penalize the poor more heavily than the middle and upper classes.

145. Temple, supra note 143, at 1551-52; Weitzman, supra note 65, at 1219-21.
146. Weitzman, supra note 65, at 1226.
147. Temple, supra note 143, at 150-51.
148. Weitzman, supra note 65, at 1227-29.
149. Id. at 1229.
150. Id. at 1227-29. An illustrative situation involves child support: “[A]lthough middle- and upper-class men [are better able] to pay[,] . . . enforcement proceedings are . . . [more frequently] brought against [lower-class fathers], because of the state’s concern with reducing public expenditures for [these fathers’] children and ex-wives.” Id. at 1228.
In the face of all of the changes in marriage over the last few decades, it indeed seems anachronistic for the state to use its old public policy arguments to prevent couples from contracting premaritally about their ongoing relationships. In fact, in other domestic areas the state itself has recognized that the idea of marriage as a sacred institution has eroded. Two indicators of this recognition are the widespread acceptance of no-fault divorce\textsuperscript{151} and the gradual acknowledgement of the validity of premarital agreements covering property and support.\textsuperscript{152} It appears that the drafters of the UPAA recognized that public policy was changing when they wrote in the official commentary to section 3(a)(8) that the choice of domicile, the freedom to pursue careers, and the allocation of domestic and childrearing responsibilities would be permissible subjects of premarital agreements.\textsuperscript{153} One suspects that, if the state is indeed beginning to adjust its notions of public policy, there must be other factors behind the state’s refusal to enforce premarital agreements regulating the ongoing marriage.

B. New Alternatives for Enforcement

The UPAA itself suggests that the courts’ refusal to enforce premarital agreements regulating the ongoing marriage may stem more from procedural concerns than from substantive ones. Although the UPAA allows the parties seemingly wide latitude regarding permissible subject matter for regulation, the official comment to section 6 states that, “[n]o special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations.”\textsuperscript{154} This language, when read in conjunction with the broad language of section 3(a)(8), suggests that, although courts may not be as concerned as before about the content of such provisions, the enforcement of the provisions is still a major stumbling block. Courts simply do not want to get involved in these types of disputes between spouses.\textsuperscript{155}

Although courts may stubbornly insist that they cannot enforce premarital agreements regulating the ongoing marriage, several recent legal developments indicate otherwise.

\textsuperscript{151} Schultz, supra note 122, at 272-74. Professor Schultz argues that since the state has already eroded the foundation of marriage by its liberal no-fault divorce laws, the parties to a marriage need some way to achieve the stability that state law once provided. Id. She suggests that marital contracting would be one source of such stability. Id. at 274. For a discussion of no-fault divorce, see Herma H. Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1 (1987).

\textsuperscript{152} For a discussion of this acceptance, see supra parts I.A.1., I.A.2.

\textsuperscript{153} UPAA § 3 cmt., 9B U.L.A. at 374.

\textsuperscript{154} UPAA § 6 cmt., 9B U.L.A. at 377.

\textsuperscript{155} As Professor Schultz has noted, the courts’ refusal to get involved in these types of disputes is inconsistent with their frequent adjudication of other highly personal matters: “[M]any issues are litigated even though they involve intense emotional content and context: witness, for example, abortion rights, paternity or custody disputes, contested wills, race or sex discrimination suits. No haven of pure objectivity is possible even in the courtroom.” Schultz, supra note 122, at 324.
1. Changes in contract principles

Recent developments in contract law have given judges new tools with which to work when confronted with a premarital agreement regulating the ongoing marriage. In the commercial setting, the Uniform Commercial Code (UCC) is a good example of the increased flexibility of the contractual framework.158 For example, pre-UCC contract law required that key terms to a contract, such as price, quantity, and time of performance, be specified before courts would enforce the contract.157 The UCC, however, allows parties to leave open, or indefinite, certain terms of the contract without rendering it unenforceable.158 The drafters of the UCC recognized that it was possible, and sometimes even desirable, for parties “[to] intentionally structur[e] their transaction to provide a desired flexibility over time.”159 If courts are now willing and able to recognize flexibility in commercial contracts, they should at least begin to consider providing the same flexibility to parties in a marital relationship.

Professor Marjorie Schultz suggests one possible application of UCC theory to premarital agreements: “[I]nstead of either specifying in advance their place of domicile or leaving it to an unpredictable future, under modern contract rules [Husband] and [Wife] could establish a procedure for its later determination.”160 Such a provision would provide a method for judges to enforce the parties’ agreement without delving too deeply into the intact marriage.

Two other relatively recent contract principles, good faith161 and unconscionability,162 also would give judges great flexibility in interpreting premarital contracts.163 The UPAA itself incorporates the doctrine of un-

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156. Id. at 292.
157. Id. (citing Wilcox, Inc. v. Shell, 186 N.E. 562 (Mass. 1933)).
158. See U.C.C. § 2-305 (1989) (open price term); U.C.C. § 2-308 (place of delivery); U.C.C. § 2-309 (time provisions); U.C.C. § 2-310 (time of payment).
159. Schultz, supra note 122, at 292.
160. Id. at 293. Professor Schultz suggests a model provision:
If mutual agreement is not possible, then during the first two years of marriage Mary may decide where they live, the next two years John may decide, and so forth. If one of the parties exercises the option to insist on a move, that person must give the other party six months notice. That other party must make immediate good faith efforts to locate an acceptable job in the new location. If the efforts fail, the party not choosing to move may stay in the old location and commute at least once a month to the new location for up to two years. During this period, the parties will be considered as having independent domiciles in their respective locations. If no job is found by the end of two years, the parties agree to search for new jobs in a location acceptable to both.

Id. at 222.
162. U.C.C. § 2-302. For a discussion of the doctrine of unconscionability as it might apply to premarital agreements regulating the ongoing marriage, see Temple, supra note 143, at 160.
163. Schultz, supra note 122, at 293-94. Professor Schultz points out the flexibility
conscionability in its enforcement section, testing an agreement at the
time of execution.\textsuperscript{164} The application of the doctrine of unconscionability
to premarital agreements regulating the ongoing marriage is illustrated by
the above example involving choice of domicile. Unconscionability would
help a judge decide if one spouse were taking unfair advantage of the
other, and good faith norms would aid a judge in deciding whether the
reluctant spouse had indeed made a good effort to find a new job.\textsuperscript{165} Of
course, good faith and unconscionability principles would not help judges
with all provisions of premarital agreements.\textsuperscript{165} Such principles would,
however, surely provide a frame of reference which judges could supple-
ment with common sense.

The contract principle of impracticability\textsuperscript{167} may also have signifi-
cance for premarital agreements. The doctrine of impracticability recog-
nizes that unanticipated changes in the circumstances surrounding
performance of a contract may be grounds for modification of the con-
tract and in some cases may excuse performance.\textsuperscript{166} Thus, in the premar-
ital contract setting, a judge who is asked to enforce a troublesome
 provision of an agreement that regulates the ongoing marriage may ex-
cuse a party from performing the provision if circumstances warrant such
action.\textsuperscript{167} For example, assume that a husband and wife contracted
premaritally that the wife would provide childcare during the second five
years of the marriage. In the meantime, the wife receives a job offer dif-

\textsuperscript{164} To an unusual degree, both [of these concepts] encourage judicial examination
of the context of a contractual relationship. In so doing, they subtly alter notions of
what constitutes rational management of such relationships. They dilute empha-
sis on narrow and adversarial self-interest, redefine standards of bargaining
and performance, and look to nuance and context as well as to literal explica-
tion. In addition, these principles openly infuse public policy concerns into the
domain of privately ordered contracts.

Flexible contextual principles like these help adapt contractual governance
to marriage, because they endorse notions of appropriate rational manage-
ment that are better suited to the context of marriage and respond to public concerns
about its character and functioning.

\textit{Id.} at 294.

164. UPAA § 6(a)(2), 9B U.L.A. 376 (1987). The provision reads as follows:
(a) A premarital agreement is not enforceable if the party against whom enforce-
ment is sought proves that:

\begin{quote}
\text{\ldots}
\text{(2) the agreement was unconscionable when it was executed." Id.}
\end{quote}

165. Schultz, \textit{supra} note 122, at 294.

166. \textit{Id.} For example, Schultz suggests that "even the good faith principle might be
inadequate to determine whether a promise like that of 'no recriminations' for sexual infi-
delity \ldots had been performed." \textit{Id.}

167. \textit{Restatement (Second) of Contracts} § 261 (1981). The doctrine is frequently
called "changed circumstances."

168. \textit{Id.; see also} Temple, \textit{supra} note 143, at 168.

169. Schultz gives the following example: "[If [Husband] were to renege on his prom-
ise to support [Wife] during her postgraduate studies because he is involuntarily unem-
ployed, modern changed circumstances doctrine could determine the legitimacy of his
excuse for nonperformance." Schultz, \textit{supra} note 122, at 293.
ferent in kind and quality from the job the parties contemplated at the
time of contracting. The doctrine of impracticability might excuse her
performance under these circumstances.

Finally, courts have pointed to a lack of viable remedies as justifica-
tion for refusing to enforce premarital agreements regulating the ongoing
marriage.\textsuperscript{170} Contract law, however, has expanded in the area of remedies
available to injured parties. Admittedly, an order of specific performance
would be difficult for a court to monitor during the intact marriage, and
economic injury would be difficult to measure in some situations. For ex-
ample, a court would be ill-equipped to specifically enforce a provision
allocating housework between the spouses, or to measure the value of
such work in awarding damages for a spouse's failure to perform.

In other situations in which traditional contract remedies have failed,
however, the courts have not been hesitant to create new ones. A good
example is the relatively new remedy of damages for emotional distress.\textsuperscript{171}
This shows that courts have the creativity needed to fashion new reme-
dies where the old ones are inadequate. The lack of an established reme-
edy should not preclude enforceability of a particular contractual
provision.

The argument that judges cannot fashion appropriate relief for par-
ties injured by the breach of a provision regulating the intact marriage
also overlooks the distinct possibility that the couples themselves will
provide their own remedies within their contracts.\textsuperscript{172} The doctrines of un-
conscionability and good faith would assist judges in situations in which
the parties' stated remedy seems excessive or inappropriate.

It seems only natural that courts would look to contract principles to
interpret and enforce premarital agreements regulating the ongoing mar-
rriage. Sociologists have found that most couples already conduct their
marriages on a bargain basis—albeit an informal one.\textsuperscript{173} Since new theo-
ries in contract law allow for greater application of contract principles
within the marriage setting, there is no apparent reason why courts
should prohibit couples from reducing their implicit understandings
about their marriage into an explicit, enforceable writing.

\textsuperscript{170} Temple, \textit{supra} note 143, at 170-72.
\textsuperscript{171} \textit{Restatement (Second) of Contracts} § 353; \textit{see also} Temple, \textit{supra} note 143, at
170-72.
\textsuperscript{172} Temple, \textit{supra} note 143, at 171; Weitzman, \textit{supra} note 65, at 1271. Weitzman
suggests that "[c]ouples may wish to include liquidated damages provisions in cases where a
court would have difficulty assessing the amount of damages, or they may wish to adopt
arbitration arrangements that empower the arbitrator to award damages, or both." \textit{Id}.
\textsuperscript{173} \textit{See generally} Kjell E. Lommerud, \textit{Marital Division of Labor With Risk of Di-
vorce: The Role of "Voice" Enforcement of Contracts}, \textit{7 J. Lab. Econ.} 113 (1989); Marilyn
Manser & Murray Brown, \textit{Marriage and Household Decision-Making: A Bargaining Analy-
sis}, \textit{21 Int'l Econ. Rev.} 31 (1980); H. Elizabeth Peters, \textit{Marriage and Divorce: Informational
2. Mediation as an enforcement alternative

Courts have frequently complained that enforcing premarital contracts during the intact marriage would severely overburden already clogged court dockets.174 This complaint, however, rests on an unfounded assumption that most couples who choose to execute premarital agreements will also choose to litigate them in a courtroom.176 In fact, it is likely that very few of these contracts would be litigated during marriage. An agreement entered for the purpose of clarifying expectations and addressing possible subjects of disagreement would, if successful, obviate the need for court involvement.176 There is no data to suggest that parties to such agreements would flock to the courts with every perceived breach, and courts should not refuse to enforce the agreements merely because of this assumption. Even in the context of divorce based on the failure of a contracted marriage, it is unlikely that huge numbers of these contracts would come before the courts, because most divorces are uncontested.177

If a party to a premarital agreement decided to bring an action during the intact marriage, the courtroom would not be the only available forum in which to adjudicate the dispute. Arbitration and mediation have been suggested as good alternatives to full-blown court proceedings.178 Mediation has long been recognized as an effective means of marital counseling. Furthermore, within the field of marital counseling, contracting has long been recognized as an effective tool in building healthy relationships.179 Thus, the availability of a non-adjudicatory forum in which the parties could resolve their contractual disputes seems highly logical. There are differences between the various types of non-adjudicatory fora,180 but all of them share certain qualities that are attractive to


175. Temple, supra note 143, at 168.

176. Fleischmann, supra note 122, at 37.

177. Id. at 37-38.

178. Clark, supra note 46, at 161; Krauskopf & Thomas, supra note 31, at 599; Schultze, supra note 122, at 317-25; Margaret G. Sokolov, Marriage Contracts: Is There A Need?, in Marital and Non-Marital Contracts: Preventive Law for the Family 13, 17 (Joan Krauskopf ed., 1979); Weitzman, supra note 65, at 1270.

179. Schultze, supra note 122, at 257. The Conciliation Court of Los Angeles is a good example of the use of mediation in the marital setting. The Court was "originally established to try to help save troubled marriages by reconciling couples after they had filed for divorce." Temple, supra note 143, at 164. For a discussion of the functioning of conciliation courts in general, see Meyer Elkin, Conciliation Courts: The Reintegration of Disintegrating Families, 22 Fam. Coordinator 63 (1973).

180. Schultze, supra note 122, at 317. Some of these differences include: the presence and authority of a third party; the extent to which a solution is consented to or imposed upon the parties; the extent to which results must be based on principle or may be ad hoc; the extent to which results are governed by fixed referents, as opposed to being responsive to present and future circumstances.

Id.
contracting couples. Parties who have included an arbitration or mediation clause in their contract feel a sense of power in controlling the outcome of their dispute, even when they receive the help of an arbitrator or mediator.\textsuperscript{181} Adjudicatory proceedings are inherently adversary, whereas mediation proceedings encourage cooperation in resolving problems.\textsuperscript{182} Adjudication relies on evidence of the parties' behavior, whereas mediation relies on information about the persons themselves, actually shared by those persons.\textsuperscript{183} Finally, and importantly, mediation and arbitration are much quicker (and usually cheaper) than adjudication.\textsuperscript{184} Mediation would help conserve valuable judicial resources by preventing unnecessary divorce actions.\textsuperscript{185}

Some commentators advocate a requirement that all premarital agreements, including those regulating the ongoing marriage, be reviewed and renegotiated, if necessary, at fixed intervals.\textsuperscript{188} This requirement would help guard against a later court ruling that some provisions in the agreement were unconscionable or unenforceable because of changed circumstances. Periodic review of these agreements would also force the parties to think often and seriously about their expectations for the marriage, and would perhaps help forestall, if not eliminate, many divorces. Courts should therefore be eager to help states create mediation or arbitration programs for couples who contract premaritally and then find themselves disputing the provisions of their agreements. This approach would seem to be far more conducive to the state's goal of preserving marriage than the present policy of simply refusing to recognize the parties' sincere efforts to agree about their relationship.

\textbf{Conclusion}

Much of this discussion of premarital agreements regulating the ongoing marriage has relied on arguments made ten to twenty years ago by sociologists and legal scholars who were seriously concerned that the law of premarital agreements did not reflect modern social views on the institution of marriage. Given that marriage patterns are constantly shift-

\begin{itemize}
\item\textsuperscript{181} Cochran, \textit{supra} note 174, at 57-58.
\item\textsuperscript{182} \textit{Id.} at 56-57.
\item\textsuperscript{183} Schultz, \textit{supra} note 122, at 317-19.
\item\textsuperscript{184} \textit{Id.} at 319.
\item\textsuperscript{185} Cochran, \textit{supra} note 174, at 62-63.
\item Mediation of disputes within the intact family . . . would not create a flood of litigation. Mediation would be conducted before mediators, rather than before courts. The number of claims that could be mediated would be limited by the ability of the parties to pay private mediators and the willingness of \textit{pro bono} community, church, or synagogue mediators to resolve such disputes. Some initial litigation over the enforceability of such agreements might arise, but once it became clear that courts would enforce such agreements, litigation would taper off. To the extent that mediation of disputes within intact families proved successful, the case-load of courts might actually be reduced.
\item\textit{Id.}
\item\textsuperscript{186} Temple, \textit{supra} note 143, at 169.
\end{itemize}
ing, these arguments have become more persuasive, not less so, with time. Yet courts have ignored social reality when asked to enforce contracts regulating personal rights and obligations of the parties during the intact marriage.

The UPAA, as written, gives courts the flexibility to expand the scope of permissible content of premarital agreements. New theories in contract law and new enforcement alternatives such as arbitration and mediation can greatly help judges develop appropriate responses to provisions regulating the ongoing marriage. Collectively, courts in UPAA jurisdictions have the tools to define a new "modern social policy" that would both promote the long-standing state policy of preserving marriage and reward prospective spouses who desire private ordering of their marriage. It only remains to be seen whether, armed with these tools, the courts will accept the task.

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