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# Is a Postmarital Agreement in Your Best Interest? Why Louisiana Civil Code Article 2329 Should Let You Decide

## INTRODUCTION

The institution of marriage is changing. Over the last few decades, the United States has witnessed a persistent decrease in the number of individuals who choose to get married.<sup>1</sup> In fact, the marriage rate has been in “steady decline since the 1970s,” and researchers currently report that the marriage rate has dropped to an all-time low.<sup>2</sup> The public opinion of marriage has likewise taken a significant downturn.<sup>3</sup> Studies show that Americans from all social and educational circles hold a generally unfavorable view of marriage as an institution.<sup>4</sup> Overall, there seems to be a growing sentiment across the country that marriage is a hassle and is simply unnecessary.<sup>5</sup>

Multiple factors are likely responsible for the evolution of marriage into a perceived voluntary, unnecessary institution in the eyes of modern day society.<sup>6</sup> For example, alternative living arrangements are more socially acceptable today than they were in the past.<sup>7</sup> Now more than ever, individuals feel comfortable living with a partner before marriage or even living as a single parent.<sup>8</sup> Therefore, couples may feel as if they have more habitational

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1. Megan Gannon, *US Marriage Rate Drops to New Low*, LIVESCIENCE (July 19, 2013, 12:57 PM), <http://www.livescience.com/38308-us-marriage-rate-new-low.html>, archived at <http://perma.cc/H2BH-WNHX>.

2. *Id.*

3. Stephanie Pappas, *Record Number of Americans Are Unmarried*, LIVESCIENCE (Dec. 14, 2011, 8:11 AM), <http://www.livescience.com/17462-record-number-americans-unmarried.html>, archived at <http://perma.cc/NS5S-4MDU>.

4. *Id.*

5. See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 317 (2012) [hereinafter Bix et al.].

6. Some scholars suggest that several factors are responsible for the demise of marriage, “including a delay in marriage because of economic concerns and educational pursuits, greater social acceptance of cohabitation and parenthood outside of marriage, and arguably a growing sense that marriage is unnecessary.” *Id.* See also Stephanie Hallett, *Marriage Rate in America Drops Drastically*, HUFFPOST WEDDINGS (Dec. 14, 2011, 5:19 PM), [http://www.huffingtonpost.com/2011/12/14/marriage-rates-in-america\\_n\\_1147290.html](http://www.huffingtonpost.com/2011/12/14/marriage-rates-in-america_n_1147290.html), archived at <http://perma.cc/6TD4-ZE44>.

7. See Hallett, *supra* note 6; see also Bix et al., *supra* note 5, at 317.

8. See Hallett, *supra* note 6; see also Bix et al., *supra* note 5, at 317.

options than were available in the past, causing beliefs that marriage is required before cohabitation to essentially fall by the wayside. Another factor is that some individuals postpone marriage until they complete their education and establish a career.<sup>9</sup> Understanding potential economic concerns, many Americans believe that it is important to be financially stable before entering into a matrimonial union.<sup>10</sup> For example, couples often choose to postpone marital vows until they are better able to support families and afford the inevitable, inherent costs of marriage.<sup>11</sup>

Furthermore, husbands and wives are much more equal to one another in today's world than they were in the past.<sup>12</sup> For example, the gender roles that once defined marriages have largely disappeared.<sup>13</sup> Wives are no longer expected to function as homemakers, and it is now increasingly common to find dual-income households and wives with full-time jobs.<sup>14</sup> However, the law governing marital relationships has not exhibited a similar equality-driven trend.<sup>15</sup> Rather, the legal institution continues to administer marriage with outdated policies and antiquated perceptions, contributing to the general distaste for the institution among prospective couples.<sup>16</sup>

In Louisiana, Civil Code article 2329 is a prime example of marital law that has failed to adapt to the changing reality of marriage.<sup>17</sup> As the preeminent marital contracting law in Louisiana, article 2329 governs the implementation and modification of marital agreements both prior to and during marriage.<sup>18</sup> However, article

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9. See Hallett, *supra* note 6; see also Bix et al., *supra* note 5, at 317.

10. See generally Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 17–19 (2012).

11. See Hallett, *supra* note 6; see also Bix et al., *supra* note 5, at 317.

12. See Lucy A. Hawke, *Gender Roles within American Marriage: Are They Really Changing?*, 5 ESSAI 70, 74 (2007), available at <http://dc.cod.edu/cgi/viewcontent.cgi?article=1023&context=essai>, archived at <http://perma.cc/6DTM-YL4X>; Elizabeth R. Carter, *Louisiana Prenuptial Agreements: Issues for Contemporary Spouses*, 42 ANN. EST. PLAN. SEMINAR 1, 5 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169991), archived at <https://perma.cc/456Z-LWXX?type=pdf>; Bix et al., *supra* note 5, at 316.

13. See generally Hawke, *supra* note 12.

14. See *id.* at 73–74.

15. See generally Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 833 (2007).

16. See *id.* at 829–31; see generally Hawke, *supra* note 12.

17. LA. CIV. CODE art. 2329 (2015).

18. For the purposes of this Comment, marital agreements executed prior to marriage are referred to as “premarital agreements,” and marital agreements executed or modified during marriage are referred to as “postmarital agreements.” If discussing the agreements in general, the author uses the term marital

2329 proves to be rather complicated for spouses attempting to execute or modify postmarital agreements *during* marriage.<sup>19</sup> Before instituting or altering such an agreement, the parties must petition a court and ask a judge to determine whether the parties understand the proposed change and whether it is truly in their best interests to make such a change.<sup>20</sup> Therefore, the decision is effectively taken out of the hands of the parties and given to a judge, allowing an outsider to determine what is in the best interests of the married couple.<sup>21</sup> Consequently, spouses are unable to easily and efficiently alter their marital agreement during marriage, having to go to court to ask a judge for permission instead. Although a judge may agree with the spouses that a modification is in order, not every case is that simple. Married couples in Louisiana are being forced to submit to the outside judgment of third parties when contracting postmaritally, yet today's couples are more than capable of making the unique determination as to what is in their best interests.

Moreover, article 2329 employs several exemptions to the court-approval requirement, introducing inconsistency and confusion into the marital agreement arena. For example, if spouses were to modify their premarital agreement during their marriage in an attempt to switch from a separate property regime to the default community property regime, they would not be required to fulfill the court-approval requirement.<sup>22</sup> In addition, if spouses had married outside of Louisiana and subsequently moved into the state, they could implement a postmarital agreement within one year of relocating without having to obtain court approval.<sup>23</sup> These exemptions, along with a few others, illustrate the inconsistent and arbitrary nature of article 2329's court-approval requirement, calling into question the article's effectiveness as a whole.

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agreements. Some jurisdictions, however, refer to these agreements as prenuptial agreements and postnuptial agreements, respectively. The terms prenuptial and postnuptial are largely foreign to Louisiana matrimonial regime law, with the Legislature and courts opting to refer to such agreements simply as marital agreements. *See id.*

19. *See generally id.*

20. *Id.*

21. Despite article 2329's use of an outsider's decision-making in the marital contracting process, marriage is generally intended to be a private contractual matter between the involved parties. *See Williams, supra* note 15, at 833.

22. *See* LA. CIV. CODE art. 2329 (2015).

23. *Id.*

Overall, the court-approval requirement of article 2329 is outdated and unnecessary, signaling the need for a revision in accordance with the modern aspects of marriage and the current landscape of the marital institution. Due to the declining marriage rate across the nation,<sup>24</sup> the outdated and inconsistent legislative justifications behind article 2329,<sup>25</sup> and a general trend toward freedom of contract,<sup>26</sup> article 2329 should be improved to allow flexibility and uniformity in the realm of marital contracting. In fact, the Uniform Law Commission recently passed the Uniform Premarital and Marital Agreements Act, legislation designed to update and provide equality in the laws governing premarital and postmarital agreements.<sup>27</sup> This piece of model legislation serves as a useful example for the Louisiana Legislature to follow in updating the state's marital agreement law to allow spouses the freedom to structure their marriages on their own terms. By relaxing some of the more stringent requirements associated with marriage, the institution should become more appealing to a wider range of people. Although marital agreements likely require a watchful eye and certain procedural safeguards, the current version of article 2329 is not the answer.

Part I of this Comment offers a historical analysis of marriage, marital contracting in general, and the evolution of marital contracting laws in Louisiana, providing insight into the changing nature of the institution and how such evolution will likely continue. Next, Part II outlines the specific justifications for revising article 2329, offering unique theories as to why the article no longer makes sense in the modern landscape of marriage. Shifting to a study of the differing approaches to the regulation of marital agreements, Part III analyzes how marital contracting is effectively governed in other United States jurisdictions. Lastly, Part IV offers two alternative options that Louisiana could utilize to revise article 2329 and effectively adapt its marital contracting policies to the modern world. As this Comment illustrates, article 2329 is a relic of the past, inefficiently governing the ever-changing world of marriage and subjecting its participants to unnecessary burdens. The time is now to revise article 2329 and position the marital institution for a thriving future.

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24. *See infra* Part I.

25. *See infra* Part II.

26. *See infra* Part II.

27. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (2012).

I. A HISTORICAL PERSPECTIVE: MARRIAGE THEORY  
AND ARTICLE 2329

As the institution of marriage has evolved over time, marital agreements have slowly become more important and widespread, and the modern-day conceptions of marriage have also morphed into a new phenomenon.<sup>28</sup> Overall, marriage is a far cry from a static institution, but the laws employed to govern marriage have not evolved accordingly.<sup>29</sup>

*A. Marriage Theory: A History of Marriage and Marital Agreement Philosophy*

Until the 18th century, marriages commonly functioned as products of arrangement.<sup>30</sup> Families and social units historically coordinated and planned marriages for prospective couples, with religious and social norms serving as the driving considerations.<sup>31</sup> In essence, marriage formerly operated as a mechanism by which families came together for “inheritance, property control, and other economic or political reasons.”<sup>32</sup>

Love-based marriage is of “relatively recent vintage.”<sup>33</sup> Ideally, prospective couples now engage in lasting, meaningful courtships prior to marriage in order to discern their true feelings.<sup>34</sup> However,

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28. Katherine Stoner, *Prenuptial Agreements – An Overview*, NOLO: LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/prenuptial-agreements-overview-29569.html>, archived at <http://perma.cc/Y5BE-WAJ9> (last visited Feb. 5, 2015). Today, prospective couples no longer conceptualize marriage with the traditional ideals that once characterized the institution. *Id.* Rather, marriage is ultimately viewed as means to an end, rather than an end in itself. *See id.*

29. *See generally* Atwood, *supra* note 10, at 17.

30. *Id.* at 16–17 (citing STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 24–31 (2005)). *See also* Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998). Arranged marriages were very common until the 18th century. Shamita Das Dasgupta, *Arranged Marriages*, in 1 ENCYCLOPEDIA OF GENDER AND SOCIETY 40–42 (Jodi O’Brien ed., 2008).

31. *See* Rasmusen et al., *supra* note 30, at 500–01; Atwood, *supra* note 10, at 16–17.

32. Atwood, *supra* note 10, at 16–17.

33. *Id.* at 17. In other words, marriage has not always been a product of love and affection. *Id.* In fact, in the overall scheme of marital history, love has only been a driving force behind marriage for a relatively short period of time. *Id.*

34. *See* Ted L. Huston & Renate M. Houts, *The Psychological Infrastructure of Courtship and Marriage: The Role of Personality and Compatibility in Romantic Relationships*, in THE DEVELOPMENTAL COURSE OF MARRIAGE AND DYSFUNCTION 114–120 (Thomas N. Bradbury ed., 1998). Although this may not be true of all marital relationships, the overwhelming majority of lasting

“[t]he very features that promised to make marriage such a unique and treasured personal relationship opened the way for it to become an optional and fragile one.”<sup>35</sup> The introduction of personal love and subjective affection into the foundations of marriage has destabilized the institution; unfortunately, love often does not last forever in the marriages of today.<sup>36</sup> Also, “the changing goals of marriage have contributed to its fragility, with today’s couples viewing marriage as a vehicle for personal fulfillment and self-realization rather than a commitment for life-long sharing.”<sup>37</sup> Over time, marriage has become increasingly unstable, causing many to initially disfavor marital agreements as mechanisms by which more powerful spouses were able to take advantage of their comparably fragile counterparts.<sup>38</sup> In fact, for many years there was a widespread belief that marital agreements encouraged divorce and manipulated weaker spouses to waive financial and legal benefits.<sup>39</sup>

As marital agreements have become more common, however, the law has gradually become friendlier towards them across the country.<sup>40</sup> For example, divorce rates in the United States increased drastically around the turn of the 21st century,<sup>41</sup> prompting couples to begin planning their futures carefully in an attempt to avoid the financial difficulties implicated by the division of marital property.<sup>42</sup> Therefore, in the context of divorce, courts across the country readily began to favor marital agreements as fair, equitable mechanisms available to dissolve marriages.<sup>43</sup> Today, in fact, premarital agreements are generally accepted

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marriages involve some period of premarital courtship and personal decision-making. *See id.*

35. Atwood, *supra* note 10, at 17 (citing STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 5 (2005)).

36. *See id.*

37. *Id.*

38. Stoner, *supra* note 28.

39. *Id.*

40. *Id.*

41. *See* William F. Fraatz, *Enforcing Antenuptial Contracts in Minnesota: A Practice in Search of a Policy Basis in the Wake of McKee-Johnson v. Johnson*, 77 MINN. L. REV. 441, 463–64 (1992).

42. *See* Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997).

43. *See id.* at 898–99 (noting that courts no longer consider premarital agreements to be void *ab initio* but rather are generally enforceable).

throughout the United States.<sup>44</sup> Many courts view such agreements as “conducive to the welfare of the parties and the marriage relationship as they tend to prevent strife, secure peace, and adjust, settle, and generally dispose of rights in property.”<sup>45</sup>

Despite the favorable acceptance of marital agreements today, policymakers, courts, and scholars continue to recognize a potential for the abuse of such agreements.<sup>46</sup> Such concerns are founded upon “the intimate relationship of the parties to these agreements, the underlying caring and nurturing union that is presumably being contemplated, the fact that children may be produced of the union, and the significant role the state has in regulating this relationship and protecting the spouses and children.”<sup>47</sup>

In other words, with the increasingly unpredictable and emotional nature of marriage, scholars and policymakers recognize the need to regulate marital agreements, in general, to avoid unjust contracting and unfair impositions of will.<sup>48</sup> Historically, such an argument has been founded upon the notion that spouses are not on a level playing field when it comes to marital bargaining power.<sup>49</sup> Scholars argue that “the bargaining dynamics within an intact marriage are materially different than the dynamics of premarital bargaining,” triggering the need for heightened restrictions on postmarital contracting between spouses.<sup>50</sup> “These differences, they claim, increase the potential for fraud and deception, often leaving the spouse with less economic leverage (usually the wife) with no choice but to sign an agreement presented by the wealthier spouse (usually the husband).”<sup>51</sup> However, the status of “bargaining theory” in the realm of marital contracting is largely in flux, with other scholars beginning to question the validity and accuracy of heightened scrutiny arguments that are founded upon the supposed unequal bargaining power within marriages.<sup>52</sup>

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44. See Gary A. Debele & Susan C. Rhode, *Prenuptial Agreements in the United States*, 1 IAML L.J. 1, 2 (2006), available at [http://www.iaml.org/cms\\_media/files/prenuptial\\_agreements\\_in\\_the\\_us.pdf](http://www.iaml.org/cms_media/files/prenuptial_agreements_in_the_us.pdf), archived at <http://perma.cc/W3R5-8TXS>.

45. 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 11:8, at 553–61 (4th ed. 2009) (footnotes omitted).

46. See, e.g., Debele & Rhode, *supra* note 44, at 2, 12.

47. *Id.* at 2.

48. See *id.*

49. Williams, *supra* note 15, at 829–30.

50. *Id.* at 830.

51. *Id.*

52. See, e.g., *id.* at 851; see also *infra* Part II.B.

*B. Marital Agreements in Louisiana*

In general, the State of Louisiana “enjoys a unique historical acceptance of marriage contracts.”<sup>53</sup> Marriage contracts have been recognized and “widely accepted” in Louisiana since the 1700s, an ode to the combined French and Spanish heritage upon which the Louisiana legal system was founded.<sup>54</sup> When Louisiana eventually became an independent entity free from European control, it continued to view premarital contracts favorably and specifically endorsed such agreements in both the 1808 and the 1870 Civil Codes.<sup>55</sup> Marital contracts have been expressly approved and accepted in Louisiana for nearly three centuries, “reflecting a tenacious legal folkway that stood the test of time, persevered in adversity, and prevailed over challenge.”<sup>56</sup>

*1. Pre-Civil Code Article 2329*

Enacted in 1979, Civil Code article 2329 currently serves as the chief marital contracting law in Louisiana; however, the law was not always detailed and explicit. Historically, Louisiana allowed parties to enter into premarital agreements but not postmarital agreements.<sup>57</sup> For example, in January 1879, the Louisiana Supreme Court offered a glimpse into the application of pre-article 2329 marital contracting law in *Hanley v. Drumm*.<sup>58</sup> The Court, faced with a dispute between a decedent’s widow and the decedent’s estate, considered the validity and effectiveness of a marital agreement executed prior to marriage.<sup>59</sup> In approving the marital agreement, the Court recognized that the parties were free to stipulate as they pleased with respect to property rights, provided that such stipulations were “not contrary to good morals.”<sup>60</sup> In addition, the Court addressed the potential modification of an existing postmarital agreement, noting that “matrimonial agreements may be altered by consent *before*, but *not after*, the marriage.”<sup>61</sup>

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53. Carter, *supra* note 12, at 2.

54. *Id.* (citing Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence*, 53 TUL. L. REV. 1, 92 (1979)).

55. *Id.*

56. Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence*, 53 TUL. L. REV. 1, 92 (1979).

57. See *Hanley v. Drumm*, 31 La. Ann. 106, 109 (1879).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 109–10 (“Prior to the marriage, the law treats the intended wife as *sui juris*, as a free agent; but *after* it, it treats her as subject to the power and authority of the husband, and as no longer able to protect herself. Hence it

Therefore, as the *Hanley* Court recognized in the late 1870s, parties were generally free to contract marital agreements prior to marriage; however, parties were not able to modify such agreements after their marriages became effective.<sup>62</sup>

The *Hanley* Court's stance on the modification of marital agreements serves as a vivid illustration of the historical view that marriage was once an inherently one-sided relationship.<sup>63</sup> Prior to the enactment of article 2329, postmarital agreements were prohibited altogether in Louisiana in an attempt to protect weaker spouses and guard against spousal overreaching.<sup>64</sup> In fact, Louisiana has consistently attempted to protect the weaker spouse in marriages, from its complete bar on postmarital agreements and modifications in *Hanley* to the somewhat more lenient restrictions of the current version of article 2329.<sup>65</sup>

## 2. *The Policy and Application of Civil Code Article 2329*

Over a century after the *Hanley* decision, the Louisiana Legislature passed and enacted Louisiana Civil Code article 2329—legislation that appears to, at least somewhat, carry on the *Hanley* tradition of protecting the weaker spouse. As did the prior law, article 2329 distinguishes between premarital agreements, on the one hand, and postmarital agreements, on the other.<sup>66</sup> However, article 2329 makes a noteworthy change to the law under *Hanley* by allowing parties to enter into or modify marital agreements after marriage, subject to some questionable restrictions.<sup>67</sup>

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interposes to shield her from impositions and wrong.”). Therefore, the policies offered by the *Hanley* court appear to be in line with the legislative goals cited in support of article 2329. However, these policies and goals are outdated, no longer warranting the distinctions employed in *Hanley* and codified in article 2329. *See infra* Part II.B.

62. *See Hanley*, 31 La. Ann. at 109.

63. *See id.* at 108–10. The law reflected an understanding that men were the more powerful, dominant players in marital relationships. *See id.*

64. *Id.* at 109–10 (explaining that the wife is “no longer able to protect herself” from “the power and authority of the husband” during marriage).

65. *Id.*; LA. CIV. CODE art. 2329 (2015).

66. *Compare Hanley*, 31 La. Ann. at 109–10, with LA. CIV. CODE art. 2329 (2015).

67. *Id.* Although parties are able to modify marital agreements after marriage, the second paragraph of article 2329 imposes strict requirements on such agreements. For example, article 2329 requires that such an agreement be in the parties' best interests. *Id.* Altering the Louisiana Supreme Court's prior determination that marital agreements could not be altered post-marriage whatsoever, the Legislature made a concise determination to adapt the law to changing times and allow for such modifications.

At its core, Louisiana Civil Code article 2329 is an inconsistent piece of legislation in the realm of marital contracting.<sup>68</sup> Although article 2329 allows spouses to contract postmaritally, it does not treat premarital and postmarital agreements equally. Rather, article 2329 imposes heightened restrictions on marital agreements entered into or modified during marriage, whereas marital agreements entered into or modified prior to marriage are not burdened with such restrictions.<sup>69</sup> Specifically, under article 2329, a married couple in Louisiana is allowed to enter into a marital agreement that alters or modifies an existing matrimonial regime only after a “joint petition and a finding by the court that [the agreement] serves their best interests and that they understand the governing principles and rules.”<sup>70</sup> However, if executed prior to marriage, the only statutory restrictions on marital agreements are that they must not undermine public policy and must be executed in the appropriate form.<sup>71</sup> In addition, the Legislature codified, in article 2329, that spouses are able to “subject themselves to the legal regime by a matrimonial agreement at anytime without court approval.”<sup>72</sup> Article 2329 also exempts new Louisiana domiciliaries from obtaining court approval altogether if the postmarital agreement is executed within the first year after relocating to the state.<sup>73</sup>

With specific policy concerns in mind, the Louisiana Legislature enacted article 2329 in 1979 with the goal “of protecting the less-worldly spouse and preventing that spouse from entering into

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68. See Katherine S. Spaht & Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 91 (1979).

69. LA. CIV. CODE art. 2329 (2015).

70. *Id.*

71. *Id.* In general, contracts must be executed within the confines of public policy. See LA. CIV. CODE art. 7 (2015). As a noteworthy Louisiana decision explained, the chief public policy concern in the realm of marital contracting is the notion that “a husband should support and assist his wife during the existence of the marriage,” and any contracts providing otherwise will be deemed null and void. *Barber v. Barber*, 38 So. 3d 1046, 1049 (La. Ct. App. 2010).

72. LA. CIV. CODE art. 2329 (2015). In effect, this aspect of article 2329 illustrates the Legislature’s preference for the legal regime of community property in Louisiana. Spouses wishing to utilize a community property regime do not need judicial approval, as the Legislature has presumably decided that the legal regime of community property is naturally in the best interests of the parties. See *id.*; Spaht & Samuel, *supra* note 68, at 91.

73. LA. CIV. CODE art. 2329 (2015). Although the purpose of this aspect of article 2329 is not entirely clear, the Legislature appears to desire leniency with couples unfamiliar to the laws of Louisiana, allowing them to act as if they are starting anew in the marital agreement realm unbounded by the court-approval requirement.

disadvantageous agreements that were not fully understood.”<sup>74</sup> Article 2329 functions as a compromise to the strict bar on postmarital agreements under *Hanley*, adapting the policy justification of protecting weaker spouses into a somewhat more lenient framework.<sup>75</sup> Specifically, through Act 709 of the 1979 session, the Legislature purported to place “procedural limitations upon the making or the modification of a matrimonial regime contract during marriage and [add] limitations on the content of these agreements, whether executed prior to or during marriage.”<sup>76</sup> As such, the Legislature defined specific distinctions between premarital and postmarital contracting requirements in an attempt to satisfy its concerns and protect women from their historically more powerful male counterparts.<sup>77</sup>

The substantive suggestions and procedural limitations embodied in article 2329 were recommended to the Legislature by the Louisiana State Law Institute.<sup>78</sup> Initially, the Law Institute’s proposal did not include the court-approval requirement, drawing the ire of some legal observers.<sup>79</sup> For example, the Law Institute was urged to reconsider its original proposal by Mr. Frank P. Simoneaux, a concerned member of the Institute, who believed that “modification of the legal community by a matrimonial agreement [would] result in many nonworking spouses having little or no ownership interest in assets or income that would form part of the community under the legal regime.”<sup>80</sup> Essentially, Mr. Simoneaux argued that the Law Institute’s original proposal was deficient, as it did not incorporate adequate procedural protections for disadvantaged

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74. Lee Hargrave, *Matrimonial Regimes*, 54 LA. L. REV. 733, 741 (1994) (discussing *Boyer v. Boyer*, 616 So. 2d 730 (La. Ct. App. 1993)).

75. Compare *Hanley v. Drumm*, 31 La. Ann. 106 (1879), with LA. CIV. CODE art. 2329 (2015).

76. Spaht & Samuel, *supra* note 68, at 90.

77. See *supra* Part I.B.2. Namely, the Legislature implemented distinctions between premarital and postmarital contracting requirements by requiring spouses to obtain judicial approval when attempting to alter marital agreements after the marriage has taken effect. Spaht & Samuel, *supra* note 68, at 91; LA. CIV. CODE art. 2329 (2015).

78. Spaht & Samuel, *supra* note 68, at 90.

79. *Id.* at 90–91.

80. *Id.* at 91 (citing Written Motion to Reconsider Previous Council Action at 2, Submitted by Frank P. Simoneaux; seconded by A.N. Yiannopoulos and Jack Caldwell (on file with author)). Furthermore, Mr. Simoneaux’s motion “made clear that [his] concern in allowing spouses to enter into matrimonial agreements was solely for the welfare of the spouse whose contributions to the marriage were largely non-economic, and not for the interest of creditors or forced heirs.” *Id.* Thus, Mr. Simoneaux’s concern was grounded upon the need to protect against spousal overreaching. See *id.*

spouses.<sup>81</sup> Despite these concerns, the Law Institute “adhered to its previous position, the original position of the Law Institute, that contractual changes in a matrimonial regime during marriage required no special procedural safeguard.”<sup>82</sup>

Thus, the original proposal of the Law Institute was submitted to the Legislature without any requirement of court approval.<sup>83</sup> However, Mr. Simoneaux’s plea was not forgotten. The court-approval requirement for spouses entering into or modifying marital agreements during marriage was added into the legislative bill at the last minute on the floor of the House of Representatives, and this version of the bill eventually became law after Senate amendment and concurrence.<sup>84</sup>

Faced with the diverse goals and principles of article 2329, the following subsections serve to illustrate specific jurisprudential applications of article 2329 by Louisiana courts. In effect, these decisions shed some light on how courts apply the complicated provisions of article 2329, with most courts opting to closely follow the article’s language and impose the heightened approval requirements on parties contracting postmaritally.

*a. A Basic Jurisprudential Application of Article 2329*

As one of the preeminent judicial decisions involving marital agreements in Louisiana, *Boyer v. Boyer* offers a noteworthy illustration of the intricacies and distinctions embodied in article 2329 and how its requirements are applied in real-world situations.<sup>85</sup> In *Boyer*, the Louisiana First Circuit Court of Appeal was tasked with determining whether a marital agreement, entered into by two spouses during marriage in an attempt to terminate the legal regime of community property, was valid in accordance with article 2329.<sup>86</sup> The husband and wife in *Boyer* executed a “joint petition for [the] establishment of a separate property regime” as well as an affidavit stating that they read the agreement, understood the rules involved, and believed that the agreement was in their best interests.<sup>87</sup>

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81. *Id.*

82. *Id.* This quote illustrates that the court-approval requirement of article 2329 was not an original aspect of the law from the Law Institute but a late addition by the Legislature. *Id.* In fact, the Law Institute initially opted to treat premarital and postmarital agreements identically. *Id.*

83. *Id.*

84. *Id.*

85. *Boyer v. Boyer*, 616 So. 2d 730 (La. Ct. App. 1993).

86. *Id.* at 731.

87. *Id.* at 731.

In considering this marital agreement, the court noted that the *Boyer* agreement satisfied article 2329's requirements, as the spouses executed an effective document and a valid affidavit purporting to understand and agree to the changes.<sup>88</sup> However, in *Boyer*, the spouses did not request a hearing in front of the court regarding their new marital agreement.<sup>89</sup> Nevertheless, the court applied article 2329 and recognized that its plain language does not require a physical hearing to take place.<sup>90</sup> The *Boyer* court explained that it found "no requirement in article 2329 for a hearing before the court can grant approval. Certain statutory laws in Louisiana do require a full hearing before a trial court can make a decision, but article 2329 is not one of them."<sup>91</sup> Rather, "it is within the discretion of the trial court to order a hearing and the parties may ask for a hearing," but one is not required.<sup>92</sup>

The *Boyer* decision provides a model benchmark for what is and is not required to alter or implement a postmarital agreement. The spouses are not required to actually appear before a court, although such an option is certainly available.<sup>93</sup> Rather, the spouses must execute an agreement and convince the court that it is in their best interests to modify or implement an effective postmarital regime.<sup>94</sup>

Whereas the *Boyer* decision contemplates article 2329's application to the realm of postmarital agreements, the Louisiana Fifth Circuit Court of Appeal in *Muller v. Muller* considered its application to premarital agreements.<sup>95</sup> In *Muller*, the parties executed a premarital agreement one day prior to their wedding; however, a notary did not witness the parties actually sign the document as required by law.<sup>96</sup> At trial, the wife acknowledged that the signature on the document was hers, thus bringing into question whether such an acknowledgement could satisfy the form requirements that were not fulfilled prior to marriage.<sup>97</sup> Responding

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88. *Id.* at 732–33.

89. *Id.* at 731.

90. *Id.* at 733.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 365. *See also* LA. CIV. CODE art. 2329 (2015).

95. *Muller v. Muller*, 72 So. 3d 364, 368 (La. Ct. App. 2011).

96. *Id.* at 365–66. Louisiana Civil Code article 2331 requires that a premarital agreement be "made by authentic act or by an act under private signature duly acknowledged by the spouses." LA. CIV. CODE art. 2331 (2015). In *Muller*, the wife claimed that the agreement was invalid as it was not witnessed by anyone and should be set aside for lack of form. *Muller*, 72 So. 3d at 365.

97. *Muller*, 72 So. 3d at 366.

in the negative, the court ruled that postmarital acknowledgements of premarital agreements are bound by the judicial approval dictates of article 2329 and not the more lenient premarital standards:<sup>98</sup>

We hold that a post-nuptial acknowledgement cannot vitiate the mandate of [Civil Code article 2329] that any matrimonial agreement entered into during the marriage to modify or terminate a matrimonial regime must be by joint petition, and after a finding by the court that the agreement serves the best interests of the parties.<sup>99</sup>

Thus, the *Muller* decision further emphasizes the sharp line drawn between the contracting requirements of premarital agreements and those of postmarital agreements. Despite the fact that the parties intended to execute a premarital agreement, the *Muller* court subjected a postmarital acknowledgment of that agreement to the heightened restrictions applicable to postmarital contracts under article 2329.<sup>100</sup> The *Muller* court did not take article 2329's dictates lightly, opting instead to closely mirror its language and apply its restrictions literally. Essentially, the court decided that a postmarital recognition of a defective premarital agreement rendered the entire agreement subject to the postmarital restrictions embodied in article 2329.<sup>101</sup> Such an application is harsh for litigants, as they are required to follow article 2329's rigorous postmarital regulations even though they did not intend to implement a postmarital agreement.

*b. Article 2329's Legal Regime Exemption*

In *Weinstein v. Weinstein*, the Louisiana Third Circuit Court of Appeal discussed a different aspect of article 2329, providing a glimpse into one of the more controversial aspects of the article.<sup>102</sup> Specifically at issue in *Weinstein* was the nature of a postmarital agreement and whether the spouses wished to establish a community property regime through that agreement.<sup>103</sup> Although the court did not reach a final decision as to the effectiveness of the agreement,<sup>104</sup>

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98. *Id.* at 368.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Weinstein v. Weinstein*, 62 So. 3d 878, 883–84 (La. Ct. App. 2011).

103. *Id.* at 883–84.

104. In *Weinstein*, the Third Circuit considered a postmarital agreement and the procedural history behind that agreement; however, the court did not rule as to its effectiveness. *Id.* at 884. Rather, the court simply ruled on a dismissal order that a judge had previously issued, finding that order was invalid. *Id.* at

it did recognize that the spouses intended to implement a community property regime through their postmarital agreement.<sup>105</sup> In addition, the court acknowledged that “the law does not require that an agreement establishing a community property regime be authorized by a judge, nor does it prohibit its being approved by or acknowledged in front of a judge.”<sup>106</sup>

Therefore, the *Weinstein* agreement did not require court approval in order to become effective and binding, an exemption that seems puzzling to many Louisiana scholars as inconsistent with the stated goals of article 2329.<sup>107</sup> Scholars argue that spousal overreaching is just as likely to occur when contracting the community property regime as it is when attempting to implement a separate marital property regime.<sup>108</sup> In fact, the more powerful spouse is just as able to take advantage of the weaker spouse regardless of the type of regime being implemented.<sup>109</sup>

The legal regime exemption evidenced in *Weinstein* illustrates how article 2329 presupposes that community property is in the best interests of the spouses.<sup>110</sup> However, it is easy to imagine a situation in which community property may not be beneficial or in the best interests of the spouses;<sup>111</sup> Louisiana even seems to recognize such a conclusion in the overall scheme of its matrimonial regime law by

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884–85. Nevertheless, the Third Circuit did opine on the nature of the agreement and the applicable aspects of article 2329 that were controlling. *Id.* at 883–84.

105. *Id.* at 884.

106. *Id.*

107. Spaht & Samuel, *supra* note 68, at 91–92.

108. Regardless of whether or not the parties have married yet, the more powerful party will have significantly more chips to bargain with when considering a premarital or postmarital agreement. *Id.* The establishment of a marital relationship does little to change the weakened position of a downtrodden spouse. *Id.* If one spouse is inherently weaker for whatever reason, that spouse will remain weaker after the marriage. *See id.*

109. *See id.*

110. *See* ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 8.6, in 16 LOUISIANA CIVIL LAW TREATISE 848 (4th ed. 2013). In other words, by not requiring spouses to obtain court approval when implementing the legal regime of community property, the law seems to recognize that the legal regime is naturally in the best interests of Louisiana’s couples, rendering judicial insight and approval unnecessary. *See id.*

111. For example, in marriages involving substantial wealth and wherewithal, community property may not be the best option for the spouses. *See* Charlotte K. Goldberg, *Opting In, Opting Out: Autonomy in the Community Property States*, 72 LA. L. REV. 1, 1–2 (2011). Rather, an agreement maintaining the individual wealth of each party may better meet the needs of the spouses by allowing them to retain control over their individual patrimony. *Id.*

allowing the parties to establish a separate property regime to avoid community property altogether.<sup>112</sup>

*c. Article 2329's Out-of-State Exemption*

The final sentence of article 2329 incorporates another exemption to the article's general terms, noting that "[d]uring the first year after moving into and acquiring a domicile in this state, spouses may enter into a matrimonial agreement without court approval."<sup>113</sup> While considering a broad range of marital legal issues, the Louisiana Supreme Court interpreted this aspect of article 2329 in *Hand v. Hand*.<sup>114</sup> Specifically, the couple in *Hand* married in South Carolina, after which one of the spouses relocated to Morgan City, Louisiana.<sup>115</sup> A divorce followed soon thereafter.<sup>116</sup> Although the *Hand* couple did not attempt to execute a premarital or postmarital agreement,<sup>117</sup> the Court opined on article 2329 and its exemption from obtaining court approval for spouses moving into Louisiana.<sup>118</sup> Particularly, the Court recognized that when both spouses acquire domicile in Louisiana within the first year after relocating to the state, the spouses do not need to petition a court to determine whether a postmarital agreement is in their best interests.<sup>119</sup> Rather, the spouses may simply execute such an agreement on their own, defining the terms and conditions of their postmarital agreement without any help or input from the legal system.<sup>120</sup>

Similar to the legal regime exemption explored in *Muller*, the out-of-state exemption evidenced in *Hand* does little to further the legislative goals behind article 2329.<sup>121</sup> In fact, spousal overreaching is just as likely to occur in marriages that commence

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112. See LA. CIV. CODE art. 2329 (2015).

113. *Id.*

114. *Hand v. Hand*, 802 So. 2d 560, 561–62 (La. 2001).

115. *Id.* at 561.

116. *Id.*

117. The dispute in *Hand* involved the applicability and availability of the regime of community property to a married couple when only one spouse was a Louisiana domiciliary. *Id.* In reaching the conclusion that both spouses must be domiciled in Louisiana to obtain community property status, the court interpreted the use of the terms "spouse" and "spouses" in the various matrimonial regime Civil Code articles. *Id.* at 562–63. In fact, the court determined that article 2329, along with a few others, requires both parties to be domiciled in the state before the provisions of the law apply. *Id.* at 566.

118. *Id.* at 562.

119. *Id.*

120. *Id.*

121. Spaht & Samuel, *supra* note 68, at 91–92.

in other states as it is in those that begin in Louisiana.<sup>122</sup> It is difficult to imagine why spousal overreaching would be a phenomenon experienced only in Louisiana, yet this exemption seems to recognize such a notion by relaxing the marital contracting standards for marriages instituted elsewhere.

## II. A CALL FOR CHANGE: THE JUSTIFICATIONS FOR REVISING ARTICLE 2329

The marital institution is largely in need of an overhaul. Prospective spouses are abstaining from marriage like never before, generating significant consequences for themselves and society as a whole.<sup>123</sup> In an attempt to right the floundering ship of marriage, affirmative action should be taken to restore and modernize the marital institution in accordance with our evolving society. In Louisiana specifically, Civil Code article 2329 provides a promising opportunity to begin updating and improving the status and reputation of marriage within the state. The principles and theories embodied in article 2329 are problematic as applied to today's society, injecting unnecessary inconvenience and inconsistency into the marital agreement arena. The premarital and postmarital distinctions within the article make little sense today, and the potential for abuse of the court-approval requirement is high.<sup>124</sup> As a whole, Louisiana spouses should have the freedom and flexibility to structure their marriages on their own terms, which is not entirely possible under the current version of article 2329. Thus, article 2329 should be revised with an eye on the future, adapting its outdated provisions to the needs of a changing world.

### *A. The Changing Perception of Marriage: A Motivation for Revision*

In the State of Louisiana, as well as in several other states around the country, flexibility is needed and warranted in the realm

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122. *See id.* at 92.

123. *See generally* Hallett, *supra* note 6; *see, e.g.*, Ron Haskins, *Marriage on the Rocks: Economic and Social Consequences for Kids*, BROOKINGS (June 26, 2013), <http://www.brookings.edu/research/opinions/2013/06/26-marriage-economic-social-consequences-haskins>, archived at <http://perma.cc/M4QN-B25M> (discussing the effects of the changing role of marriage on children).

124. *See infra* Part II.C.

of marital contracting.<sup>125</sup> In the words of one scholar, “the law of marital agreements should be compatible with evolving understandings of the meaning of marriage, including the rise of individualized marriage.”<sup>126</sup> Currently, Louisiana Civil Code article 2329 embodies legislative goals that are a product of outdated reasoning and antiquated perceptions of reality, illustrating the incompatibility of article 2329 with modern marital principles.<sup>127</sup> With the state of marriage in the United States currently in flux, outdated laws such as article 2329 serve as inviting opportunities to begin correcting the flaws and misconceptions soiling the institution of marriage and its reputation.

As such, the rules and distinctions of article 2329 serve as unwarranted obstacles to a positive marriage rate for at least two reasons. First, standards that govern marital agreements and hinder a couple’s ability to alter the default rules undoubtedly work against the current trend of private ordering and individualized marriage structuring.<sup>128</sup> Additionally, marriage standards that are “heavily laden with mandatory terms may not attract adherents.”<sup>129</sup>

For these reasons, as well as several others,<sup>130</sup> the Legislature should revise article 2329 to better conform to the modern needs and understandings of marriage. Given the decreasing marriage rate across the nation, the uniformity and flexibility of marital contracting laws would serve society well as a step in the right direction toward encouraging and fostering the institution of marriage. Scholars have long debated the appropriateness of distinguishing between premarital and postmarital agreements, and the inherent distinctions embodied in article 2329 do little to

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125. Louisiana is one of several states that imposes heightened restrictions on postmarital agreements while premarital agreements remain largely unregulated. See Williams, *supra* note 15, at 881; see also discussion *supra* Part I.

126. Atwood, *supra* note 10, at 16.

127. Louisiana Civil Code article 2329 was enacted to protect weaker spouses from their more dominant counterparts within the marital relationship, a goal that is no longer necessary due to the changing landscape of marital life. See Spaht & Samuel, *supra* note 68, at 91–92; see discussion *supra* Part I.

128. Bix et al., *supra* note 5, at 317. The complexities of modern society and the growing financial and economic intricacies of relationships have led to an increase in the use of privately structured marriages. See discussion *supra* Part I.A. In other words, marital agreements are more prevalent than ever, and the outdated requirements of article 2329 are an unnecessary obstacle for couples opting to marry on their own terms. See discussion *supra* Part I.A.

129. Atwood, *supra* note 10, at 16.

130. In addition to the declining marriage rate and the need for flexibility in the marital institution, article 2329 proves ineffective and inefficient in itself. See Spaht & Samuel, *supra* note 68, at 92. Article 2329 is highly inconsistent in attempting to accomplish its policy objectives, and its requirements are better suited for a time long ago. See *id.* at 91–92.

promote the legislative goals cited in support of the law.<sup>131</sup> Therefore, given the unpopularity of marriage in today's society, along with the inconsistencies and outdated requirements of article 2329, the marital agreement law in Louisiana is ripe for change.

*B. The Shifting Socioeconomic Times: Court Approval Is Outdated and Unnecessary*

Similarly, the policies supporting article 2329's heightened, restrictive governance of postmarital agreements are also outdated. The policy justifications behind article 2329's enactment are grounded in the notion that marriages inherently involve disparate bargaining power and require oversight to guard against spousal overreaching.<sup>132</sup> However, although the marriages of yesteryear may have involved spouses with unequal bargaining power and diverse educational and societal backgrounds,<sup>133</sup> today's marriage statistics suggest that such disparity is no longer prevalent.<sup>134</sup>

Individuals who enter into marital contracts today are much more sophisticated and educated, and women consistently find themselves less disadvantaged as compared to their male counterparts.<sup>135</sup> This theme of marital equality also holds true in Louisiana, where women are becoming more involved in the workforce and are contributing substantially to the financial stability of their households.<sup>136</sup> In addition to boosting the marital equality between spouses, these trends suggest that marital contracts may actually provide women with more "leverage" in the marital context, a proposition that is entirely different from the inferior marital standing that was once ascribed to women.<sup>137</sup> Accordingly, "a new era of marriage has arrived—an individual's autonomy and right to contract supersede the theory that marriage is a partnership wherein contracting would require greater

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131. *See id.* at 92.

132. *See* discussion *supra* Part I.A.

133. Hawke, *supra* note 12.

134. *See id.*; *see also* Carter, *supra* note 12.

135. Bix et al., *supra* note 5, at 316.

136. Steven Ward, *Divorce Rate in La. Above Nation's*, THE ADVOCATE (Sept. 6, 2011), <http://theadvocate.com/home/771554-79/divorce-rate-in-la.-above>, archived at <http://perma.cc/N89B-659J>.

137. Bix et al., *supra* note 5, at 316. As such, women are no longer reliant upon the protection of favorable marital agreements. *See generally id.* Rather, the naturally heightened bargaining power that women, as a whole, possess today provides adequate protection. *See generally id.* Therefore, the increased protection guaranteed by article 2329's court-approval requirement is no longer necessary.

accountability.”<sup>138</sup> Therefore, the Legislature’s goal of protecting the less-worldly spouse has essentially been accomplished by the natural evolution of society, a process through which the less-worldly spouse has become virtually nonexistent.<sup>139</sup> Thus, article 2329’s postmarital contracting requirements mandating court approval are currently unnecessary.

Adding to the general ineffectiveness of article 2329’s court-approval requirement, article 2329 plainly delegates the determination of whether a postmarital agreement serves a married couple’s best interests to an impartial, disinterested judge.<sup>140</sup> In making the best-interest determination, the judge is, ideally, supposed to consider whether the spouses “understand the principles and rules governing the matrimonial regime and whether such a regime serves their best interests.”<sup>141</sup> However, faced with the personal, unique circumstances of each married couple, a judge is largely unable to pronounce whether that couple understands the agreement or whether it fits the couple’s aspirations and lifestyle.<sup>142</sup> In order to make such a determination, a judge can do nothing “short of administering an exam to them on the subject.”<sup>143</sup>

Overall, a disinterested judge is generally unable to determine the true best interests of a married couple in an effective manner.<sup>144</sup> Although judges presumably operated as helpful mediators guarding against spousal abuse in the past, these judicial services are no longer a necessary component of marital contracting. Today, statistics indicate that married individuals are more than able to stand up for themselves within the confines of marriage, having achieved near-equal levels of education and marital equality.<sup>145</sup> As such, today’s married couples should have the freedom to structure their marital agreements as they wish.

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138. Stephanie A. Bruno, Note, *Insuring the Knot: The Massachusetts Approach to Postnuptial Agreements*, 45 SUFFOLK U. L. REV. 397, 421 (2012).

139. Although one spouse may have more financial stability than the other, statistics suggest that spouses are generally on an equal playing field today in terms of bargaining power and marital control. See Williams, *supra* note 15, at 851.

140. LA. CIV. CODE art. 2329 (2015).

141. Spaht & Samuel, *supra* note 68, at 94.

142. The nature of the best-interest determination is undoubtedly an involved process, substantially hindering the decision-making abilities of judges and making an accurate determination that much more difficult to render. See *generally id.* at 94–95.

143. *Id.* at 94.

144. See *id.* To make an effective determination, a judge must employ considerable resources and truly understand the spouses’ predicaments and lifestyles, a feat that is no easy task. See *generally id.*

145. Hawke, *supra* note 12. See also Carter, *supra* note 12.

Although article 2329 is outdated and unnecessary as applied to the spouses involved in a marital agreement, some may argue that article 2329 is still needed to protect the spouses' creditors.<sup>146</sup> However, such an argument is largely unwarranted. The original proposal of article 2329 offered by the Law Institute in 1979 "made clear that the concern in allowing spouses to enter into matrimonial agreements was solely for the welfare of the spouse whose contributions to the marriage were largely non-economic, and not for the interest of creditors or forced heirs".<sup>147</sup>

Since the judicial inquiry must focus on the best interests of the spouses, they should not have to prove that no harm will accrue to their creditors as a result of the proposed agreement. Creditors, like forced heirs, are protected in other areas of the law. Available to the creditors are the same remedies they have against any contract of the debtor, in particular, the revocatory action, the action in declaration of simulation, and the oblique action.<sup>148</sup>

Therefore, a revision of article 2329 would not significantly affect the position or status of creditors, as they have a sufficient number of alternative remedies at their disposal to protect themselves under the law.<sup>149</sup> Not only are article 2329's arbitrary requirements unnecessary as applied to the spouses and prospective spouses opting to contract marital agreements in Louisiana, the article's protections are also immaterial from the perspective of creditors, and the article should be revised to reflect this new economic reality of marriage.

### *C. Problems of Inconsistency: Article 2329's Exemptions Make Little Sense*

In addition to its outdated reasoning and antiquated policy rationales, article 2329 is also a highly inconsistent piece of legislation. Despite the Legislature's desire to prevent spousal overreaching by requiring spouses to obtain judicial approval when contracting postmaritally, the language of article 2329 incorporates several exemptions from its otherwise strict court-approval

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146. See, e.g., Spaht & Samuel, *supra* note 68, at 91.

147. *Id.* The quoted language demonstrates that the security of creditors was not a primary motive in allowing spouses to engage in marital contracts. Thus, this suggests that abolishing the distinction codified in article 2329 would not be unfair to creditors. See *id.*

148. *Id.* at 98 (citations omitted).

149. *Id.* at 91, 98.

requirement.<sup>150</sup> Specifically, the following individuals are exempted from obtaining court approval: prospective spouses; spouses who marry out of state and enter into a marital agreement within one year of moving to Louisiana; spouses who married and established the legal regime prior to January 1, 1980; and spouses who change to the legal regime by marital agreement.<sup>151</sup>

However, the legislative goal for which article 2329 was created, protection of the less-worldly spouse, is hardly served or advanced by these exemptions. The justification for the enhanced scrutiny of postmarital agreements is the protection of the less-worldly spouse, but less-worldly spouses and potential spouses also engage in the agreements encompassed by the exemptions without procedural protections.<sup>152</sup> Criticizing the inconsistencies of article 2329, Professor Katherine Spaht explained why its exemptions make little sense:

In the situations encompassed by the exemptions, overreaching by one of the parties is as great a possibility as in those situations not exempted. The less-worldly party is not necessarily any better able to defend himself or herself from a disastrous matrimonial agreement before getting married than after the ceremony, before having lived in Louisiana one year than after this period of residency, or before January 1, 1980 than after that date. Likewise, a change to the legal regime, which does not require court approval, may not always be in the interest of the less-worldly spouse, as when an antenuptial agreement, carefully planned with the aid of the parents to protect the less-worldly spouse, is upset by a change to the legal regime.<sup>153</sup>

Thus, one is hard pressed to find a “coherent rationale” for the court-approval requirement of article 2329 due to its various exemptions.<sup>154</sup> The exemptions effectively weaken the policy objectives of article 2329, doing little to prevent spousal overreaching and failing to fully protect the less-worldly spouse.<sup>155</sup> Article 2329 is inherently “inconsistent in its attitude toward spousal overreaching,”

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150. *Id.* See *supra* Part I.B.2; LA. CIV. CODE art. 2329 (2015).

151. LA. CIV. CODE art. 2329 (2015). The legal regime in Louisiana is one of community property. See LA. CIV. CODE art. 2327 (2015).

152. See Spaht & Samuel, *supra* note 68, at 92. Marital agreements have traditionally been subjected to heightened regulations to equalize the contractual aptitudes of spouses in marital relationships. *Id.*

153. *Id.*

154. CARROLL & MORENO, *supra* note 110.

155. *Id.*

which is not surprising given the haste with which the requirement was added into the article during the 1979 legislative session.<sup>156</sup>

Furthermore, the plain language of article 2329 does not require a married couple to seek a full-fledged judicial hearing in order to obtain court approval of a postmarital agreement, evidencing another inefficiency in article 2329's application.<sup>157</sup> In fact, the couple does not even need to personally appear before the judge.<sup>158</sup> Conceivably, if the Legislature intended to protect weaker spouses and prevent spousal overreaching, a mandatory hearing would have been an appropriate procedural protection to implement. Without such a hearing, the more powerful spouse is in a position to execute a forged agreement or impose his will on the other spouse to sign an unfavorable affidavit, ultimately negating the stated goals of article 2329.

Although spousal overreaching is not a significant concern in today's society, the judiciary has nevertheless dropped the figurative ball in interpreting article 2329 by not requiring spouses to appear before the court. As such, spouses have the opportunity to "overreach" article 2329's protections aimed at preventing that very activity. Today, the potential for spousal overreaching is not as amplified as it was in the past, yet the lack of a mandatory hearing in article 2329 calls the reasoning of the Legislature into question and reveals yet another problem with article 2329's procedural protections.

In addition, spouses are able to circumvent the court-approval requirements of article 2329 with some creative contracting techniques. "Spouses who believe that the requirement of judicial approval of all postnuptial matrimonial agreements is an undesirable intrusion into their private affairs may attempt to minimize judicial involvement by initially contracting a regime containing a mechanism to change it."<sup>159</sup> For example, spouses could "include in their original agreement a 'termination' provision and an alternate regime to be adopted upon the lapse of the original regime."<sup>160</sup> Legally justified as either a conditional obligation or an

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156. Spaht & Samuel, *supra* note 68, at 91 ("Since the requirement of court approval went in and out of the bill as if caught in a revolving door, it is not surprising that the new legislation is inconsistent in its attitude toward spousal overreaching.").

157. LA. CIV. CODE art. 2329 (2015). *See also* Boyer v. Boyer, 616 So. 2d 730, 734 (La. Ct. App. 1993).

158. LA. CIV. CODE art. 2329 (2015). *See also* Hargrave, *supra* note 74, at 741; Boyer, 616 So. 2d at 731.

159. Laura Schofield Bailey, Note, *Marital Property Agreements—Being Creative With The New Legislation*, 43 LA. L. REV. 159, 164 (1982).

160. *Id.*

optional, alternative regime,<sup>161</sup> these contractual mechanisms and spouses' use of these mechanisms are ultimately subverting the goals and requirements of article 2329. Therefore, the holes in article 2329's proverbial net extend far and wide, providing several opportunities for willing and eager spouses to avoid the legislative protections embodied within the article. The current version of article 2329 is largely unnecessary in today's society, a conclusion that is furthered by the ineffectiveness of the article and fueled by the potentials for abuse detailed above.

The majority of article 2329's intricacies may even overshadow the legislature's admirable goals, creating more inconvenience than value. Article 2329 essentially relegates postmarital agreements to the discretionary regulation of a court, requiring individuals contracting postmaritally to comply with a strict court-approval requirement in order to do so.<sup>162</sup> On the other hand, premarital agreements and those agreements encompassed by article 2329's exemptions are not governed by similarly strict requirements.<sup>163</sup> In essence, article 2329 makes agreements that are established or altered during marriage more onerous than their premarital counterparts, a result that is inconsistent with sound policy given the modern landscape of marriage.<sup>164</sup> These discrepancies suggest that article 2329 is largely a disappointment as applied to modern day society. Although admittedly some safeguards may be necessary, article 2329 goes too far by imposing arbitrary distinctions and restrictions on postmarital agreements.

#### *D. The Obligatory Nature of Article 2329 Is Questionable*

The argument for revising article 2329 is enhanced by the possibility that the Louisiana Legislature may not have intended article 2329's marital contracting requirements to be mandatory.<sup>165</sup> In fact, article 2329 is potentially a suppletive requirement that may be "derogated from conventionally."<sup>166</sup> "Neither the text nor

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161. *Id.*

162. LA. CIV. CODE art. 2329 (2015).

163. Spaht & Samuel, *supra* note 68, at 91.

164. By imposing additional requirements and hurdles on individuals attempting to contract during marriage, the institution is hardly furthered or promoted. Atwood, *supra* note 10, at 16. Recognizing that marriage is a favorable public policy objective, difficulty in marital contracting is not desirable nor does it encourage individuals to enter into the institution. Daniel T. Lichter, *Marriage as Public Policy*, PROGRESSIVE POL'Y INST. (Sept. 2001), [http://www.human.cornell.edu/pam/outreach/upload/marriage\\_lichter.pdf](http://www.human.cornell.edu/pam/outreach/upload/marriage_lichter.pdf), archived at <http://perma.cc/52SH-Y8LG>.

165. Bailey, *supra* note 159, at 162.

166. *Id.* at 166.

the comments to the 1979 revision impose any sanctions for the failure to obtain judicial approval,” suggesting that Louisiana couples may not need to abide by the dictates of article 2329.<sup>167</sup>

Article 2329 arguably falls under the general category of supplemental law since it contains neither a commentative nor textual directive of absolute nullity when the parties fail to obtain judicial approval. Another factor supporting the supplemental character of this requirement is the general trend of increasing spousal contractual freedom. The legislature dropped the historical bars to interspousal contracting<sup>168</sup> on the assumption that modern spouses have equal bargaining strength and can rely on general contractual enforcement and protective devices to prevent overreaching. Requiring *mandatory* judicial approval is inconsistent with this assumption; article 2329 should not be considered mandatory absent an express directive.<sup>169</sup>

At the very least, the obligatory nature of article 2329 is questionable.<sup>170</sup> Although Louisiana courts generally nullify postmarital agreements that do not fulfill the court-approval requirement,<sup>171</sup> such action is not traceable to a legislative directive. Thus, despite courts nullifying agreements that do not comply with article 2329, one is left to wonder whether such nullification is truly what the Legislature intended when it enacted the court approval provisions of article 2329. Therefore, a revision of the article would help clarify its intended application, as the confusion surrounding the obligatory nature of article 2329 supports the idea that it should be revised to resolve the issue.

#### *E. Freedom of Contract and Bargaining Theory*

On a broader note, Louisiana has witnessed a “general trend of increasing spousal contractual freedom” over the last few decades.<sup>172</sup> In fact, this trend is not unique to Louisiana, as many community property states have witnessed similar movements

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167. *Id.* at 167.

168. Recognizing that the Legislature “dropped the historical bars to interspousal contracting,” Bailey is referring to the fact that the Legislature eliminated interspousal contractual incapacity when it implemented Louisiana Civil Code article 1790 during the 1978 legislative session. *Id.*

169. *Id.* at 167–68 (citations omitted).

170. *Id.* at 168.

171. *See, e.g.,* Muller v. Muller, 72 So. 3d 364, 368 (La. Ct. App. 2011).

172. Bailey, *supra* note 159, at 167.

toward contractual freedom among spouses.<sup>173</sup> Recognizing such freedom as “advantageous,” one legal commentator offered the following insight into the significance of postmarital contracting in Louisiana:

Allowing modification of the regime during marriage can be advantageous for a number of reasons—to utilize as an estate planning tool, to replace what has become an unfavorable system, to reflect changes resulting from the birth and growth of children, to reflect changes in wealth, etc.<sup>174</sup>

It appears that Louisiana generally favors contractual freedom in the realm of marital contracting.<sup>175</sup> However, article 2329 does not accord with this general view. Rather, article 2329 continues to embody strict postmarital contracting requirements, a testament to its outdated legislative reasoning and nonconformity with modern trends.

Freedom-of-contract theory also provides a helpful response to some supporters of article 2329’s court-approval requirement. For example, advocates of article 2329 often rely on the presence of a similar prerequisite in an old French *Code Civil* article as justification for retaining the requirement in Louisiana.<sup>176</sup> In fact, French *Code Civil* article 1397 also requires spouses to obtain court approval in order to change or implement a marital agreement during marriage.<sup>177</sup> However, the incorporation of the court-approval requirement into the law of Louisiana is not as seamless as its advocates believe. A prominent Louisiana scholar noted that “the French legal system may be better suited for this kind of judicial inquiry than Louisiana’s.”<sup>178</sup> European countries, such as France, are historically “less deferential to freedom of contract” principles than are American jurisdictions,<sup>179</sup> lending support to the notion that article 2329’s court-approval requirement is misplaced. In the United States, where freedom of contract is a popular concept,<sup>180</sup> the court-approval requirement seems rather

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173. *Id.* at 163.

174. *Id.* (citations omitted).

175. *Id.* at 167.

176. Spaht & Samuel, *supra* note 68, at 94–95 n.82.

177. *Id.*

178. *Id.* (citing P. HERZOG, CIVIL PROCEDURE IN FRANCE §§ 3.11–3.21, 7.51(c) (1967)).

179. Atwood, *supra* note 10, at 34.

180. See 5 WILLISTON ON CONTRACTS § 12.3 (4th ed.) (“[P]ublic policy . . . requires that parties of full age and competent understanding must have the greatest freedom of contracting, and contracts, when entered into freely and voluntarily, must be upheld and enforced by the courts.”).

contradictory. Therefore, requiring court approval before implementing or changing a marital agreement seems to make much more sense in the French legal environment than it does in Louisiana.

On a different note, a likely counterargument to freedom-of-contract theory in the marital context lies in the inherently unstable nature of the marital institution.<sup>181</sup> Specifically, this counterargument is founded upon the notion “that the bargaining dynamics within an intact marriage are materially different than the dynamics of premarital bargaining.”<sup>182</sup> However, marital instability has been exaggerated in this regard, leading many to the unwarranted conclusion that spouses are unable to bargain on an equal playing field.<sup>183</sup> In fact, “[b]argaining theory suggests that courts and commentators have overstated the likely disparity in bargaining power between richer and poorer spouses.”<sup>184</sup> Moreover, even single-income families, in which the wife serves as a homemaker while the husband functions as the primary breadwinner, do not present concerns of contractual instability.<sup>185</sup>

Although unbridled marital contracting will not always produce fair outcomes, “any injustice is likely to be the result of the spouses’ default entitlements and not any defect in the bargaining process itself.”<sup>186</sup> Rather than flowing from disproportionate bargaining power, injustices in postmarital contracting will occur to the extent that the default marital contracting rules of the state are unjust.<sup>187</sup> Therefore, if the state has established an effective set of default rules to govern marital relationships and the separation of property upon the dissolution of those relationships, spouses will not find themselves contracting with one another on an unequal playing field. Any injustices that are prevented solely by imposing amplified restrictions on postmarital contracting are minimal.<sup>188</sup>

As a leading family law scholar recognized, the availability of postmarital agreements leaves both spouses better off than they would be without such an option.<sup>189</sup> Bluffing and trickery generally

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181. *See generally* Williams, *supra* note 15, at 830 (explaining that some scholars continue to believe that bargaining dynamics in the marital realm are materially different from bargaining in other contexts).

182. *Id.*

183. *Id.* at 851.

184. *Id.*

185. “[E]ven in a traditional family where the husband works for wages and the wife works in the home, the husband’s bargaining power will not be significantly greater than his wife’s.” *Id.*

186. *Id.* at 879.

187. *See id.*

188. *See id.*

189. *See id.*

do not influence the marital contracting process, as women likely have sufficient information to recognize any inopportune agreements presented to them by their husbands.<sup>190</sup> Overall, “[t]he results of any bargain will benefit both spouses compared to their option to divorce under the state’s default rules.”<sup>191</sup>

*F. Privacy Concerns: Marital Agreements Are Intended To Be Private*

Furthermore, some scholars seem to respect the increasing marital equality and contractual capabilities of spouses by recognizing those spouses’ privacy to execute their agreements.<sup>192</sup> In fact, all postmarital agreements are intended to be private and solely a matter for consideration between the spouses.<sup>193</sup> Moreover, “[n]o state requires that spouses register their [postmarital] agreements in any formal way.”<sup>194</sup> Nevertheless, Louisiana seems to reject this notion of privacy altogether, forcing spouses to seek the input and approval of an outside official before implementing a postmarital agreement.<sup>195</sup> Although marital agreements must be recorded in the public records in certain circumstances,<sup>196</sup> such recordation of the agreement does not rise to the level of injecting an outsider’s input into the substance of the agreement.<sup>197</sup>

If marital agreements are truly intended to be private, injecting the disinterested opinions of a third-party judge into the postmarital contracting process does little to further privacy-oriented objectives. As a whole, postmarital agreements are intended to be a private matter for a reason. Particularly in today’s society in which the marital playing field has largely been equalized, spouses know how they want to structure their marriages, and they are educated and worthy enough to make those decisions in private by themselves.

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190. *Id.*

191. *Id.*

192. *See generally id.* at 833.

193. *Id.*

194. *Id.*

195. LA. CIV. CODE art. 2329 (2015).

196. In Louisiana, a marital agreement must be recorded in the public records in order to affect third persons. LA. CIV. CODE art. 2332 (2015).

197. Arguably, the recordation of a marital agreement is much less of an intrusion into privacy than allowing a third party to dictate substantive terms of that agreement.

## III. A SURVEY OF DIFFERING JURISDICTIONAL APPROACHES

With premarital and postmarital agreements finding widespread acceptance and utilization throughout the United States,<sup>198</sup> it should not come as a surprise that many states and regulatory bodies differ in their approaches as to how such agreements should be regulated. For example, the Uniform Law Commission recently approved the Uniform Premarital and Marital Agreements Act, model legislation that serves as a prime example for states to follow in updating their laws governing marital agreements.<sup>199</sup> To date, Colorado and North Dakota have adopted the Act in their jurisdictions, while legislators in Mississippi and the District of Columbia have introduced the Act to their colleagues for approval.<sup>200</sup>

Another popular regulatory approach involves a careful-scrutiny framework in which a judge is to consider a marital agreement with “careful scrutiny” only if the agreement is challenged or contested.<sup>201</sup> Massachusetts employs such a framework in an effective manner.<sup>202</sup>

Yet another approach focuses on the notion that spouses must employ independent counsel when formulating their agreements, an approach grounded in principles of substantive fairness, which has been adopted by the state of Minnesota.<sup>203</sup>

Lastly, other states opt to treat premarital and postmarital agreements under an identical set of standards, citing a general freedom-of-contract theory as justification for doing so.<sup>204</sup> Utah and Wisconsin govern marital agreements in this manner, yet both operate slightly differently in regulating premarital and postmarital agreements on a level playing field.

*A. Uniform Premarital and Marital Agreements Act*

On a national stage, the law governing marital agreements has undergone significant modifications in accordance with the ever-changing world of marriage. The Uniform Law Commission (ULC) recently approved the Uniform Premarital and Marital Agreements Act, a new piece of model legislation calling for states

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198. Stoner, *supra* note 28.

199. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (2012).

200. *Premarital and Marital Agreements Act*, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Premarital+and+Marital+Agreements+Act>, archived at <http://perma.cc/NA2F-6Y3N> (last visited Feb. 5, 2015).

201. *See infra* Part III.B.

202. *See infra* Part III.B.

203. *See infra* Part III.C.

204. *See infra* Part III.D.

“to treat premarital agreements and marital agreements under the same set of principles and requirements.”<sup>205</sup> Approved in July 2012, the Act suggests that “parties should be free, within broad limits, to choose the financial terms of their marriage,” with due process and substantive fairness benchmarks serving as the only limitations.<sup>206</sup>

As its name suggests, the Uniform Premarital and Marital Agreements Act covers agreements executed both prior and subsequent to the beginning of a marital relationship.<sup>207</sup> After considerable debate, the Drafting Committee of the Act determined that premarital and postmarital agreements should be judged under the same set of standards, arguing that postmarital agreements do not deserve the heightened scrutiny that many states currently employ.<sup>208</sup> The Drafting Committee recognized that postmarital agreements are characterized by a different set of risks than are premarital agreements, namely risks of unfairness, duress and undue influence, and changing circumstances.<sup>209</sup> In response, the Drafting Committee concluded that the resources available in the new Uniform Premarital and Marital Agreements Act, along with various common law principles, are “sufficient to deal with the likely problems related to either type of transaction.”<sup>210</sup>

The requirement that the spouse presented with a proposed agreement have access to independent legal representation before executing the agreement is arguably the most important feature of the new Uniform Premarital and Marital Agreements Act.<sup>211</sup> Such access “necessarily means both the money to hire a lawyer and the time to find one, get advice, and consider that advice.”<sup>212</sup> This requirement of separate legal representation applies to both premarital and postmarital agreements, ensuring that spouses in both circumstances have enough time and resources to fully consider any proposed changes to the terms of their marital relationships.<sup>213</sup> At the end of the day, requiring access to

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205. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (2012).

206. *Id.*

207. *Id.*

208. Bix et al., *supra* note 5, at 315.

209. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (2012).

210. *Id.*

211. Linda J. Ravdin, *The New Uniform Premarital and Marital Agreement Act*, PASTERNAK & FIDIS (Apr. 1, 2013), [http://www.pasternakfidis.com/divorce\\_family\\_law/new-uniform-premarital-marital-agreements-act](http://www.pasternakfidis.com/divorce_family_law/new-uniform-premarital-marital-agreements-act), archived at <http://perma.cc/3N8D-8Y7S>.

212. *Id.*

213. *See id.*

independent legal counsel will cut down on spousal overreaching and unfairness in marital contracting.<sup>214</sup>

The objective of the Drafting Committee in the Uniform Premarital and Marital Agreements Act was to produce an act that “promote[d] informed decision-making and procedural fairness without undermining interests in contractual autonomy, predictability, and reliance.”<sup>215</sup> Importantly, the Drafting Committee was motivated by the “changing socioeconomic reality” taking place in the United States, citing the notion that men and women are no longer inherently unequal creatures in marital relationships.<sup>216</sup>

The Committee was also aware of our changing socioeconomic reality. Notwithstanding the persistence of economic inequality along gender lines, the relative value of marriage for men and women has been shifting since the original UPAA was enacted. Women have exceeded men in education and income growth over the last four decades and have almost reached parity as a percentage of the workforce. In almost a quarter of marriages, wives are now the higher wage earners, and in a majority of marriages, wives have an equal or higher education level than their husbands.<sup>217</sup>

Providing a national perspective on the inconsistencies in marital contracting that are prevalent in Louisiana, the Uniform Premarital and Marital Agreements Act serves as a welcoming opportunity to revise article 2329 to conform to today’s society. The Council of State Governments approved the Act as “Suggested State Legislation” in September 2013, further demonstrating that the Act is ripe for adoption across the country.<sup>218</sup>

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214. One should recognize, however, that requiring access to independent counsel will create barriers to freedom of contract. Nevertheless, such a requirement may be necessary to govern the marital relationship effectively without mandating that spouses obtain court approval of their marital agreements. Essentially, one may be faced with a battle of two evils in the marital context due to the inherent instability that remains a part of the institution. *See supra* Part II.

215. Bix et al., *supra* note 5, at 315.

216. *Id.* at 316.

217. *Id.* (citations omitted).

218. *CSG Includes Uniform Premarital and Marital Agreements Act as “Suggested State Legislation”*, UNIF. LAW COMM’N (Sept. 19, 2013), available at <http://www.uniformlaws.org/NewsDetail.aspx?title=CSG%20Includes%20Uniform%20Premarital%20and%20Marital%20Agreements%20Act%20as%20%22Suggested%20State%20Legislation%22>, archived at <http://perma.cc/S2K5-6A9F>.

*B. Modified Careful-Scrutiny Framework*

Massachusetts employs a careful-scrutiny test that effectively addresses and adapts to the concerns surrounding marital agreements in an appropriate, efficient, and modern framework.<sup>219</sup> First, postmarital agreements are not subject to a court-approval requirement in Massachusetts as they are in Louisiana.<sup>220</sup> Rather, Massachusetts respects the wishes of contracting spouses and allows them to contract postmarital agreements without imposing any restrictions at the time of agreement.<sup>221</sup> The only restrictions on postmarital agreements in Massachusetts are imposed much later in the process, if and when the agreement is challenged or contested in court.<sup>222</sup> “In general, Massachusetts courts prefer to respect the right of [the] parties to freely enter into contracts. Postnuptial agreements are, however, subject to careful scrutiny.”<sup>223</sup>

If presented with a disputed marital agreement, Massachusetts courts require that agreement to be “fair and reasonable both at the time of its execution and the time of its enforcement.”<sup>224</sup> Although these principles are not legislatively codified, the Massachusetts Supreme Court has set forth a five-factor test with which to determine the enforceability of marital agreements:<sup>225</sup>

Before a marital agreement is sanctioned by a court, careful scrutiny by the judge should determine at a minimum whether (1) each party has had an opportunity to obtain separate legal counsel of each party’s own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce. Where one spouse challenges the enforceability

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219. See generally Bruno, *supra* note 138; *Ansin v. Craven-Ansin*, 929 N.E.2d 955 (Mass. 2010).

220. See Bruno, *supra* note 138.

221. *Id.*

222. *Id.*

223. Mary H. Schmidt & Christopher H. Suh, *A Practical Guide to Estate Planning in Massachusetts*, MASS. CONTINUING LEGAL EDUC., INC., EPII MA-CLE 12-1 (Vol. II, ch. 12) (2011) (citing *DeCristofaro v. DeCristofaro*, 508 N.E.2d 104 (Mass. App. Ct. 1987); *Ansin*, 929 N.E.2d at 963–64 (Mass. 2010)).

224. See Schmidt & Suh, *supra* note 223.

225. See *Ansin*, 929 N.E.2d at 963–64.

of the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria.<sup>226</sup>

Massachusetts does not impose heightened restrictions on postmarital agreements from the outset.<sup>227</sup> Rather, all marital agreements in Massachusetts are simply viewed with “careful scrutiny” if challenged to guard against any possible mistreatment or unfair dealing.<sup>228</sup> Therefore, Massachusetts couples are not burdened with having to obtain court approval of their postmarital agreements, as they are able to effectively structure the terms of their marriages themselves.

### *C. Substantive Fairness and Independent Counsel Framework*

Similar to Louisiana, Minnesota imposes restrictions on postmarital agreements that do not apply to premarital agreements.<sup>229</sup> Specifically, Minnesota “requires that each spouse be represented by counsel when forming a postnuptial agreement, but requires merely the opportunity to obtain independent counsel when forming a prenuptial agreement.”<sup>230</sup> In the realm of postmarital agreements, Minnesota also “require[s] that the agreement meet standards of substantive fairness both at the time it is signed and at the time it is ultimately enforced, even though [Minnesota] reject[s] this requirement for prenuptial agreements.”<sup>231</sup>

Overall, postmarital agreements in Minnesota are not effective unless the spouses are represented by independent counsel and the agreement is substantively fair at the time it is signed and the time it is enforced.<sup>232</sup> However, Minnesota does not require spouses to seek judicial approval of their postmarital agreements, but instead leaves it up to the spouses to decide what the terms of their marriage should be.<sup>233</sup> Thus, Minnesota’s landscape of postmarital and premarital agreements is characterized by heightened restrictions on the former, but unlike Louisiana, it does not require an outside determination by a disinterested third party.

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226. *Id.* (footnotes omitted).

227. *See* Schmidt & Suh, *supra* note 223.

228. *See id.*; *Ansin*, 929 N.E.2d at 963–64.

229. MINN. STAT. ANN. § 519.11 (West 2015).

230. Williams, *supra* note 15, at 838–39. *See also* MINN. STAT. ANN. § 519.11 (West 2015).

231. Williams, *supra* note 15, at 839.

232. *Id.* at 838–39. *See also* MINN. STAT. ANN. § 519.11 (West 2013).

233. Williams, *supra* note 15, at 838–39.

*D. General Freedom-of-Contract Framework*

In Utah, premarital and postmarital agreements are treated under a common set of standards, and postmarital agreements are not subject to any heightened restrictions or requirements.<sup>234</sup> In fact, a postmarital agreement in Utah is enforceable “absent fraud, coercion, or material nondisclosure.”<sup>235</sup> According to prominent Utah family law attorney Eric Johnson, “[p]ostmarital and premarital agreements are generally subject to ordinary contract principles.”<sup>236</sup> Essentially, postmarital agreements and premarital agreements are in no way different from any other type of contract in Utah. Overall, the state seems to completely ignore the marital aspect of spousal contracting, bypassing the fact that the bargaining parties may potentially be at less than arm’s length.

In Wisconsin, premarital and postmarital agreements are treated identically by statute.<sup>237</sup> Specifically, Wisconsin previously adopted the Uniform Premarital Agreements Act, a 1986 Uniform Law Commission proposal that the Uniform Premarital and Marital Agreements Act is designed to replace, for both premarital and postmarital agreements.<sup>238</sup> Therefore, in Wisconsin, premarital and postmarital agreements are generally enforceable, unless a spouse proves satisfaction of one of a host of factors delineated by the Wisconsin legislature.<sup>239</sup> Unlike Louisiana, Wisconsin does not require spouses to obtain court approval if they attempt to execute a postmarital agreement, nor does Wisconsin subject such agreements to heightened restrictions.

#### IV. HOW LOUISIANA SHOULD ADDRESS THE DEFICIENCIES OF ARTICLE 2329: ALTERNATIVES TO PURSUE IN REVISION

The Louisiana Legislature could pursue a few different avenues in revising article 2329, all of which have the potential to be effective in updating Louisiana’s marital agreement laws and philosophies. Two of the more promising solutions are incorporated in the following subsections. One such approach embraces the forethought and reasoning of the Uniform Law Commission, as Louisiana could adopt the Uniform Premarital and Marital

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234. See Eric K. Johnson, *Utah Family Law*, in 2 UTAH PRACTICE SERIES § 30-8-6 (2014 ed.).

235. *D’Aston v. D’Aston*, 808 P.2d 111, 113 (Utah Ct. App. 1990).

236. Johnson, *supra* note 234.

237. WIS. STAT. ANN § 766.58 (West 2015).

238. *Id.*

239. *Id.* See generally Katherine W. Lambert, *Death in Wisconsin*, in 16 WISCONSIN PRACTICE SERIES § 12:15 (9th ed. West 2014).

Agreements Act to reform the current version of article 2329.<sup>240</sup> This approach would help to align Louisiana with the national trends, which have begun to shift toward the equal treatment of premarital and postmarital agreements.<sup>241</sup> As such, Louisiana spouses and prospective spouses would realize and experience the freedom and flexibility that is needed to equate marital contracting laws with the current landscape of the marital institution, making it that much easier to enter into and modify marital relationships. Alternatively, Louisiana could employ a careful-scrutiny framework very similar to the one currently utilized by Massachusetts.<sup>242</sup> This approach would help Louisiana adapt to the changing landscape of marriage by providing spouses with more freedom to execute marital agreements on their own terms while retaining an aspect of judicial oversight to prevent abuse if the agreements are ever challenged or contested.<sup>243</sup>

*A. Louisiana Should Adopt the Uniform Premarital and Marital Agreements Act*

First, a promising solution that the Louisiana Legislature should pursue in correcting the inefficiencies and shortcomings of article 2329 is to adopt the Uniform Premarital and Marital Agreements Act in Louisiana. The Act treats premarital and postmarital agreements under the same set of standards, dealing with any risks inherent in postmarital agreements in a more flexible and appropriate manner.<sup>244</sup> By requiring spouses to obtain independent counsel and implementing other procedural mechanisms such as due process requirements in the formation of marital agreements as well as principles of substantive fairness,<sup>245</sup> the Uniform Premarital and Marital Agreements Act effectively governs postmarital agreements without imposing unreasonable restrictions or undue distinctions.

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240. See *infra* Part IV.A.

241. See *infra* Part IV.A.

242. See *infra* Part IV.B.

243. See *infra* Part IV.B.

244. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (2012).

245. The Uniform Premarital and Marital Agreements Act requires that spouses have independent legal representation when executing premarital and postmarital agreements. *Id.* In addition, the Act delineates several enforcement standards, noting that agreements may be deemed unenforceable under circumstances involving duress, inadequate representation, and an insufficient explanation of the rights and obligations being altered. *Id.* Furthermore, the Act requires that consideration be given “to the need to promote uniformity of the law,” and it also incorporates a list of unenforceable terms that will not be given effect in premarital and marital agreements. *Id.*

Under the Act, spouses in Louisiana would no longer be forced to submit to the determinations of a judge in executing their marital agreements, as they would have the freedom to contract on their own terms. As such, Louisiana would begin to respect the contractual capacity of its married citizens while maintaining sufficient regulation through alternative procedures. By adopting the Act, Louisiana's law would be much more in line with the modern conceptions of marriage and the needs of today's spouses, unlike the arbitrary court-approval requirement that remains in force through Louisiana Civil Code article 2329.

*B. Louisiana Should Implement a Legislative Solution Employing the Massachusetts Framework*

Another viable solution is to revise the article to incorporate principles similar to those employed in Massachusetts.<sup>246</sup> Although Massachusetts does not currently distinguish between premarital and postmarital agreements by statute, the state supreme court recently handed down a landmark decision in the marital-agreement context that calls for the unique treatment of such agreements.<sup>247</sup> Specifically, the court in *Ansin v. Craven-Ansin* delineated a list of factors that a court should consider before "sanctioning" a marital agreement.<sup>248</sup> Massachusetts does not require postmarital agreements to be approved or ratified by a court, nor does it mandate the involvement of a disinterested third party.<sup>249</sup> Rather, the parties are free to contract a postmarital agreement with the terms and principles of their choosing; the court system only becomes involved if the agreement is subsequently challenged.<sup>250</sup> If challenged, a Massachusetts court will then employ the *Ansin* factors to ensure that the postmarital agreement was executed and formed properly.<sup>251</sup>

This solution is also much more appropriate and in line with the marital traditions of today than is article 2329, providing both the flexibility and uniformity that will help attract more individuals to the institution of marriage. The marital agreement law of Massachusetts serves as a helpful example of marital agreement policies being adapted to the changing marital landscape of today's

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246. See *Ansin v. Craven-Ansin*, 929 N.E.2d 955 (Mass. 2010).

247. See *id.*

248. *Id.* at 963–64.

249. See *id.*; Bruno, *supra* note 138; Schmidt & Suh, *supra* note 223.

250. Schmidt & Suh, *supra* note 223.

251. *Id.*

world, and Louisiana would be well served to adopt a similar approach.

#### CONCLUSION

The complicated world of premarital and postmarital contracting is characterized by historically rooted, competing views as to how much regulation these agreements truly warrant. Although postmarital agreements may have deserved heightened restrictions and detailed approval requirements in the past, the day has come for a change. Premarital and postmarital agreements are a large part of the marital landscape in today's society, serving as efficient mechanisms through which couples can manage the increasingly unstable institution of marriage. Therefore, the law governing such agreements should not retain relics of the past—adjustment is vital. Marriage is in a downward spiral across the country, and the Louisiana Legislature has the ability to begin correcting this spiral in Louisiana for the better. By offering flexibility and uniformity to married couples to structure their marriages, more individuals are likely to favor the institution and begin to reclaim its noted benefits. The Louisiana Legislature must revise Louisiana Civil Code article 2329 and rid the article of its arbitrary and unwarranted court-approval requirement.

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