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## Rethinking Premarital Agreements: A Collaborative Approach

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# RETHINKING PREMARITAL AGREEMENTS: A COLLABORATIVE APPROACH

Elizabeth R. Carter\*

## I. INTRODUCTION

Premarital Agreement.  
Prenuptial Agreement.  
Matrimonial Agreement.  
Antenuptial Agreement.

Whatever they choose to call it, every couple contemplating marriage should also contemplate a premarital agreement. Yet, scholars and lawyers have told us to be wary of premarital agreements—unfairly characterizing them as being coercive, unfair, sexist, unromantic, and even predictors of future divorce.<sup>1</sup> Critics argue, and the law often presumes, that default marital property laws benefit women—an argument that is outdated, at best. Modifications of the default rules, they claim, must be viewed critically in order to prevent women—who are typically in an economically inferior position—from being harmed. In order to protect a woman from the harms of negotiating with her economically superior spouse, the common law grants courts expansive authority to review marriage contracts for procedural and substantive fairness.

This approach—the approach taken by most major common law jurisdictions—causes more harm than good. It is premised on several sexist and faulty presumptions and it is rarely supported by any actual data. In an effort to protect women from their own ignorance, weakness, and stupidity, the common law creates barriers to entering into premarital agreements that fail to achieve any meaningful protection. The legal profession—in viewing entry into a premarital agreement as an antagonistic process—has erected additional ethical barriers to hiring an attorney to prepare a premarital agreement. For those couples that do decide to pursue a marriage contract, the barriers put in place by the common law and by the legal profession inject unnecessary expense and adversarial decision-making to what could—and should—be a relatively inexpensive and collaborative process. Common law and the legal profession have, in a sense, created a self-fulfilling

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\* Judge Anthony J. Graphia & Jo Ann Graphia Associate Professor of Law, Louisiana State University. B.A., B.S., University of Memphis; J.D., Tulane University; LL.M., University of Alabama. Yes, my husband and I do have a premarital agreement.

1. *E.g.*, Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 240–52 (1994); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 81–82 (1998); Jerome H. Poliacoff, *What Does Love Have to Do with It?*, 33 FAM. ADVOC., Winter 2011, at 13–14; Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. U. GAZETTE (Oct. 16, 2003), <http://news.harvard.edu/gazette/2003/10.16/01-prenup.html>; *Prenuptial Agreements: Are They Necessary? Two Legal Experts Debate*, HUFFINGTON POST (Sept. 14, 2012), [http://www.huffingtonpost.com/2012/09/14/prenuptial-agreements\\_n\\_1874636.html](http://www.huffingtonpost.com/2012/09/14/prenuptial-agreements_n_1874636.html).

prophecy. By adopting a dual-representation, dissolution-focused model for entering into premarital agreements, we increase the chances that agreements will be coercive, stressful, and will fail to reflect the expectations of the spouses.

I argue that these barriers are premised on sexist and outdated notions— notions that typically do more harm than good. Removing these barriers and empowering couples to decide how to arrange their financial affairs would have an overall positive effect on relationship stability and equality of money management within the relationship. Part II examines the traditional arguments against premarital agreements and asserts that many of these arguments are outdated and unsupported by current data. Part II also considers some of the benefits afforded by premarital agreements. Part III examines the doctrine of unconscionability—one of the most significant barriers to entry into and enforcement of premarital agreements. As Part III explains, common law has created two proxies for assessing conscionability: financial disclosure and independent legal representation. I argue that both proxies are founded on misguided, paternalistic, and gendered notions. Part IV describes an additional unnecessary barrier erected by the legal profession—Rule 1.7 of the Model Rules of Professional Conduct. Part V describes a proposed collaborative approach towards premarital agreements and concludes.

## II. PREMARITAL AGREEMENTS SHOULD BE ENCOURAGED: SO WHY AREN'T THEY?

Premarital agreements should be encouraged, socially accepted, and relatively easy to enter into. Moreover, they ought to be viewed quite differently than agreements that are entered into on the eve of divorce or separation. The objective of a premarital agreement ought to be the success of the relationship—not its dismantling. Premarital agreements have the potential for many benefits not afforded by the default laws. When a divorce does occur, a premarital agreement can prevent many of the stresses, costs, and time delays associated with a divorce.<sup>2</sup> Premarital agreements can easily provide more predictable alimony awards obviating the need to expensive and speculative litigation.<sup>3</sup> Premarital agreements could even result in fairer outcomes at divorce because couples are usually able to bargain more cooperatively when they are contemplating their marriage rather than ending it.<sup>4</sup>

Perhaps more importantly, premarital agreements may actually prevent divorce by prompting a couple to better define and communicate their expectations at the outset of the marriage.<sup>5</sup> Couples who learn to communicate with each other about financial decisions are more likely to have lasting and egalitarian relationships.<sup>6</sup> When both spouses participate fully in financial decisions their own

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2. See Chelsea Biemiller, Note, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania is the Right Approach for Review*, 6 DREXEL L. REV. 133, 161 (2013).

3. See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 77–78 (2011); Biemiller, *supra* note 2, at 161.

4. See Biemiller, *supra* note 2, at 161–62.

5. See McMullen, *supra* note 3, at 77–78; Biemiller, *supra* note 2, at 162.

6. See, e.g., Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 857–60 (2015).

wellbeing, and that of their children, is positively impacted.<sup>7</sup> Yet, the default marital property laws rarely require the joint participation of the spouses in financial decisions.<sup>8</sup>

Many, if not most, criticisms of premarital agreements stem from an underlying assumption that women are categorically in a weaker bargaining position in both wanting to marry and in negotiating a premarital agreement. As a result, scholars and practitioners conclude that premarital agreements are often harmful to women and protections are needed. To that end, barriers have been erected to entering into premarital agreements in order to protect the weaker spouse from her own foolishness and overreaching by the other spouse. As I argue in Section III, below, these barriers are unhelpful, unduly paternalistic, and prevent couples from entering into useful agreements.

The most common criticism of premarital agreements is that they are one-sided, unfair, and serve primarily to protect the economically superior spouse (typically the man) to the detriment of the economically inferior spouse (typically the woman). In support of this argument critics make several assumptions. First, critics assume that some significant inequity exists between most prospective spouses. Second, critics assume that the substance of a premarital agreement will exacerbate those inequities. Third, critics assume that the default marital property laws are categorically more beneficial to the disadvantaged spouse than the rules contained in the premarital agreement. I will address each assumption in turn.

#### A. Significant Bargaining Inequity: Fact or Fiction?

The fundamental assumption made by most critics is that premarital agreements “involv[e] parties who are usually not evenly matched in bargaining power”.<sup>9</sup> While this assumption may have been true historically, it has lost footing in recent years. Disparities in education, disparities in age, and disparities in income have often been pointed to by critics as indicators of inequity.<sup>10</sup> These demographic indicators, however, no longer support the assumption that women are categorically disadvantaged when bargaining with their prospective husbands. Some critics have also argued that women are in an inferior bargaining position because women, on average, have a higher demand for marriage than men.<sup>11</sup> Again, the data supporting this argument is outdated as it relies heavily on changed demographic factors.<sup>12</sup> This is not to say, of course, that inequities do not persist. Rather, the remaining inequities fail to support the categorical conclusion that women are in a noticeably inferior position when bargaining for premarital agreements. Women today are more evenly matched with their prospective spouses than at any other time in recent history.

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7. *Id.*

8. *Id.* at 882–87.

9. Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1061 (1988).

10. See Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 187 (1996); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 447–53 (1992).

11. See Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 545–46 (1998).

12. See *id.* at 546–49.

The institution of marriage has undergone a radical transformation in the past century.<sup>13</sup> On the one hand, marriage rates have declined significantly. On the other hand, the characteristics of those people who do chose to marry put them on more even footing than in years past. Those couples who do marry today are older, better educated, and closer in age than in years past. Table 1 illustrates this point by showing changes in age at first marriage and the age gap by decade. Today, “[m]ost couples are similar in age, and most individuals prefer a potential partner to be similar in age.”<sup>14</sup>

Table 1: Age at First Marriage<sup>15</sup>

Year	Male	Female	Age Gap
1940	24.3	21.5	2.8
1950	22.8	20.3	2.5
1960	22.8	20.3	2.5
1970	23.2	20.8	2.4
1980	24.7	22.0	2.7
1990	26.1	23.9	2.2
2000	26.8	25.1	1.7
2010	28.2	26.1	2.1

While the decline in the age disparity between spouses is not dramatic, the increased median age hints at a bigger story. As of 2010, the median age at first marriage was 28.2 for men and 26.1 for women—ages significantly higher than earlier decades. First marriages are now typically delayed until after college is completed and careers are begun.

Table 2: Marriage and Education<sup>16</sup>

Educational Level	% Married 1960	% Married 2008	% Decline from 1960-2008
College Graduate or Higher	76	64	12%
Some College	69	50	19%

13. See generally STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE (2005); John Borneman, *Marriage Today*, 32 AM. ETHNOLOGIST 30 (2005); Kristen Harknett & Arielle Kuperberg, *Education, Labor Markets and the Retreat from Marriage*, 90 SOC. FORCES 41 (2011).

14. Michael J. Rosenfeld & Reuben J. Thomas, *Searching for a Mate: The Rise of the Internet as a Social Intermediary*, 77 AM. SOC. REV. 523, 539 (2012).

15. See U.S. CENSUS BUREAU, TABLE MS-2. ESTIMATED MEDIAN AGE AT FIRST MARRIAGE, BY SEX: 1890 TO PRESENT (2011), <http://www.census.gov/population/socdemo/hh-fam/ms2.xls>.

16. See PEW RESEARCH CTR., *The Decline of Marriage and Rise of New Families* 11 (Nov. 18, 2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

High School or Less	72	48	24%
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College graduation has become an important predictor of marriage—for both spouses. College graduates in 1960 were only slightly more likely to be married than their peers who either had some college or a high school education or less.<sup>17</sup> As Table 2 demonstrates, the decline in marriage rates has disproportionately affected those with lower educational attainment. As of 2008, college-educated individuals were about 15% more likely to be married than their less-educated peers. The relationship between marriage and college education is revealing in light of the shifting gender gaps in college education. The male-female gap hit a highpoint in 1947 when men outnumbered women in college 2.3 to 1.<sup>18</sup> Women began to catch up. By 1980 more Americans enrolled in colleges than in the past and men and women entered college at equal rates.<sup>19</sup> The gender gap in college is actually reversed today with women outnumbering and outperforming men on college campuses.<sup>20</sup> Among married couples, women are usually equally educated or more educated than their husbands.<sup>21</sup> In 2007, 53% of married couples reported having the same amount of education.<sup>22</sup> Of the couples with disparate education, 28% had a wife with more education while 19% had a husband with more education.<sup>23</sup> Even if a woman marries a wealthy man, she is likely to continue to work and accumulate her own wealth. A recent report from the Organization for Economic Cooperation and Development describes the change this way:

In couple households, the wives of top earners were those whose employment rates increased the most. There was also in all countries a rise in the phenomenon known as “assortative mating”, that is to say people with higher earnings having their spouses in the same earnings bracket – e.g. doctors marrying doctors rather than nurses. Today, 40% of couples where both partners work belong to the same or neighbouring earnings deciles compared with 33% some 20 years ago.<sup>24</sup>

The assumption that women have a greater demand for marriage than men is also incorrect and overly simplistic. Recent studies show that there is no major gender divide in the desire to marry and that, on the whole, the marriage market is

17. *Id.* at 11–12.

18. Claudia Goldin et al., *The Homecoming of American College Women: The Reversal of the College Gender Gap* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 12139, 2006), [http://www.nber.org/papers/w12139.pdf?new\\_window=1](http://www.nber.org/papers/w12139.pdf?new_window=1).

19. *Id.*

20. See Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES (July 9, 2006), <http://www.nytimes.com/2006/07/09/education/09college.html?pagewanted=all>.

21. PEW RESEARCH CTR., *Women, Men and the New Economics of Marriage* 1 (Jan. 19, 2010), <http://www.pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf>.

22. *Id.*

23. *Id.*

24. Dan Beucke, *The Income Gap Grows—As Does the Spouse Gap*, BUS. WEEK (Dec. 5, 2011), [http://www.businessweek.com/finance/occupy-wall-street/archives/2011/12/why\\_the\\_income\\_gap\\_is\\_growing\\_worldwide.html](http://www.businessweek.com/finance/occupy-wall-street/archives/2011/12/why_the_income_gap_is_growing_worldwide.html).

fairly balanced between the genders.<sup>25</sup> Other factors do complicate the market. Unmarried young women often look for men who are their peers in terms of educational attainment.<sup>26</sup> But, because women outpace men in college, the pool of desirable men has shrunk.<sup>27</sup> Similarly, young women tend to seek men who are employed; but employment among young men has declined in recent years.<sup>28</sup> The market varies by geographical region as well—some areas have significantly more “desirable” unmarried men than others.<sup>29</sup> The Internet, however, makes up for some of these geographical differences.<sup>30</sup> As one study explains “[e]fficiencies of Internet search are especially important for individuals searching for something uncommon.”<sup>31</sup> For example, gays and lesbians, who constitute a small overall percentage of our population, “are nearly always in thin dating markets.”<sup>32</sup> Consequently, that same study found that 60 percent of same-sex couples who had met each other in recent years had done so online.<sup>33</sup> This phenomenon applies to heterosexual couples as well. Once heterosexual men and women reach middle age, many potential mates are already coupled, making the overall dating pool quite thin.<sup>34</sup> The Internet allows those heterosexual singles to cast a wider net in order to find a suitable mate.<sup>35</sup>

It seems clear that the assumption that women are categorically in a weaker bargaining position at the outset of marriage is simply inaccurate. Although some disparities may exist, spouses are increasingly starting from an even playing field. Yet, the law continues to assume that spouses are not evenly matched and that the weaker spouse needs significant protection. The time has come to move past this view.

## **B. Substance Assumptions: Assumptions Unsupported by Fact**

The second assumption made by many critics is one of substance. Critics often assume that the substance of most premarital agreements is one-sided and seeks to opt out of the default marital rules without adequate consideration paid to the other spouse.<sup>36</sup> Yet, “[t]here seems to be no statistically valid empirical research that systematically studies the characteristics of the men and women who make

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25. See PEW RESEARCH CTR., *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change* (Sept. 24, 2014), [http://www.pewsocialtrends.org/files/2014/09/2014-09-24\\_Never-Married-Americans.pdf](http://www.pewsocialtrends.org/files/2014/09/2014-09-24_Never-Married-Americans.pdf).

26. *See id.*

27. *See id.*

28. *See id.*

29. *See* Betty Wang, *The Best and Worst Cities for Women Looking to Marry*, PEW RESEARCH CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/the-best-and-worst-cities-for-women-looking-to-marry/>.

30. *See* Rosenfeld & Thomas, *supra* note 14, at 532.

31. *Id.*

32. *Id.* at 533.

33. *Id.* at 532.

34. *See id.* at 539, 544.

35. *See id.* at. 539–40.

36. *See, e.g.,* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 366 (2005–2006); Brod, *supra* note 1, at 239.



premarital agreements or the contents of the contracts themselves.”<sup>37</sup> Those critics who do offer support for their assumption point to anecdotal evidence, litigated cases, and/or the contents of practice guides and other guidebooks.<sup>38</sup> None of these sources can provide an accurate picture of the content of the majority of premarital agreements. Anecdotal evidence is unreliable, conflicting, and sometimes self-serving.<sup>39</sup> Looking to cases is problematic because the substance of most premarital agreements is rarely a question for the courts. It is only when the marriage ends in a contested divorce or a contested estate that the courts would have occasion to examine the substance of a premarital agreement.

The truth is that we really do not know what is contained in most premarital agreements. No law mandates that agreements be one-sided. Parties are free to arrange their property and financial affairs according to just about any set of rules they deem appropriate. If, in fact, premarital agreements are predominantly one-sided then that is a failure of the people responsible for drafting those agreements—not the law itself.

### C. Default Laws: Better or Worse for Women than Contracts?

The assumption that women are adequately or better protected by default marital property and alimony laws is misguided—at best. This assumption makes about as much sense as assuming that your desires are better fulfilled by relying on the laws of intestate succession than by preparing your own last will and testament. This faulty belief is related to the assumption that most agreements are one-sided and a related assumption that the default laws provide for fair and equitable outcomes for the economically inferior spouse. Certainly, there are instances where the default laws operate to the benefit of an individual woman—particularly when compared to a one-sided agreement. These laws do not, however, benefit women (or economically inferior spouses) as a class. Nor do they reliably produce fair and equitable outcomes.

Broadly, there are four sets of default rules aimed at protecting a spouse from suffering the financial consequences of divorce or death of a spouse and at providing a fair and equitable division of assets: alimony, equitable distribution, community property, and elective share statutes. These laws suffer from a variety of deficiencies. Alimony and equitable distribution awards are unpredictable and costly to pursue. Some—like elective share statutes and certain aspects of community property laws—are easily avoided even in the absence of a prenuptial agreement.

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37. Brod, *supra* note 1, at 240; accord Guggenheimer, *supra* note 10, at 152–53.

38. See, e.g., Brod, *supra* note 1, at 239 (citing the observation of a single practitioner); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 420, n.739 (2007) (citing court decisions) [hereinafter *Lovers' Contracts*]; Guggenheimer, *supra* note 10, at 160 (using guidebooks and practice guides as a proxy for the contents of actual agreements); Rebecca Glass, *Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California*, 92 CAL. L. REV. 215, 218 (2004) (anecdotal evidence of financial disparity between spouses); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 832 (2007) (anecdotal evidence of content of postnuptial agreements); Brian Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 232 (2001) (anecdotal evidence and reported cases used to extrapolate content and purpose of agreements).

39. See Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 811, n.373 (2004).

Perhaps most importantly, none of the default laws offer financial protections to spouses during an ongoing marriage or otherwise operate to treat the spouses fairly during marriage.

### 1. *Alimony Awards*

Alimony—which predates equitable distribution laws—is on shaky theoretical footing today.<sup>40</sup> As many scholars have observed, there is no single coherent theory underpinning alimony and the outcomes are unpredictable.<sup>41</sup> Also referred to as a maintenance award or spousal support, alimony is essentially some form of monetary award granted to a spouse at divorce. Most states set forth factors to be considered by the court in making alimony awards—including need of the spouse, length of the marriage, and childcare responsibilities.<sup>42</sup> Because alimony is only awarded at divorce, it does nothing to improve the economic position of a spouse during marriage.

The enforceability of premarital waivers or modifications of alimony awards varies somewhat by state.<sup>43</sup> Most states agree that premarital waivers of post-divorce alimony are generally enforceable.<sup>44</sup> However, a number of states also agree that premarital waivers of interim alimony are unenforceable because of the support obligations spouses owe each other during an ongoing marriage.<sup>45</sup> To the extent that women do waive or modify alimony rights in premarital agreements, critics argue that such waivers or modifications are harmful.<sup>46</sup> In doing so, critics argue, women forfeit the ability to recoup their lost income and earning potential when they decide to leave the workforce or make other career sacrifices to care for children.<sup>47</sup> This argument is based in part on a content-based assumption (that alimony rights are waived or modified in a one-sided manner) for which, as discussed above, we have no evidence. But, even if that assumption is correct, waiving alimony rights is more likely to save a woman from expensive, speculative, and demoralizing litigation than it is to cause her some actual harm. The truth is that alimony rarely compensates women adequately for their losses.<sup>48</sup> Alimony awards are uncommon and, when they are made, are often limited to short time frames.<sup>49</sup> Alimony awards are notoriously unpredictable—reducing incentives to amicably settle disputes and

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40. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L. Q. 271 (2011); John C. Sheldon & Nancy Diesel Mills, *In Search of a Theory of Alimony*, 45 ME. L. REV. 283 (1993).

41. Starnes, *supra* note 40, at 271.

42. See Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119, 129 (2001).

43. See Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 144–52 (2004).

44. See Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW 413, 423 (2008).

45. *Id.*

46. See *Lovers' Contracts*, *supra* note 38, at 422. See also Brod, *supra* note 1, at 234–35.

47. See *Lovers' Contracts*, *supra* note 38, at 421–22. See also Brod, *supra* note 1, at 234–35.

48. See Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 127–32 (2008); Mark A. Sessums, *What Are Wives' Contributions Worth Upon Divorce? Toward a Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 995–1000 (1989).

49. See McMullen, *supra* note 3, at 45–50 (2011).

increasing costs of divorce.<sup>50</sup> Many states continue to tie alimony awards to marital fault, which further increases costs, lack of predictability, and demoralizing litigation.<sup>51</sup> This approach “incentivizes parties facing separation to keep a score card of poor behavior, vet out details of indiscretions, and further swells the already amplified wave of emotions that parties to a divorce are experiencing.”<sup>52</sup> Alimony also carries a societal stigma to the women who seek it, often harming them and preventing some women from seeking it in the first place.<sup>53</sup>

An economically inferior spouse can be much better protected by a premarital agreement that clearly delineates what property or award that spouse should be entitled to at divorce. Contemplating an alimony award in a premarital agreement can decrease costs, increase predictability, and obviate the need for stigmatizing and demoralizing litigation.

## 2. *Equitable Distribution*

Like alimony, equitable distribution is a legal protection that operates in the divorce setting. At divorce, equitable distribution laws direct the court to divide the couple’s property equitably, without regard to legal title.<sup>54</sup> All of the non-community property states employ some method of equitable distribution, as do some of the community property states.<sup>55</sup> Exactly what constitutes an “equitable” distribution depends very much on the state and the judge, who is afforded a great deal of discretion.<sup>56</sup> Broadly, there are two types of equitable distribution systems—the all-property system and the dual classification system.<sup>57</sup> The choice of system affects which assets will be subject to division at divorce.<sup>58</sup> In an all-property jurisdiction the court has jurisdiction over all of the property of both spouses—regardless of the time or manner of its acquisition.<sup>59</sup> In dual classification systems—the more common of the two—the court must first classify property as either separate or marital. Only marital property is subject to division.<sup>60</sup> Marital property typically includes property that results from the labor or industry of the spouses during marriage.<sup>61</sup> Separate

50. See, e.g., Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 29 (2004); David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325, 325 (2009).

51. See Peter Nash Swisher, *Marriage and Some Troubling Issues With No-Fault Divorce*, 17 REGENT U.L. REV. 243, 248–49 (2004–2005).

52. Meghan L. Kruger, *Separation Anxiety: The Implications of Rhode Island’s Reluctance to Remove Fault from Divorce Proceedings*, 19 ROGER WILLIAMS U.L. REV. 808, 834 (2014).

53. See McMullen, *supra* note 3, at 45–50.

54. See BRETT R. TURNER, 1 EQUITABLE DISTRIBUTION OF PROPERTY § 1:1 (3rd ed. 2005).

55. See Marsha Garrison, *What’s Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 68–69 (2011).

56. *Id.* at 58.

57. See TURNER, *supra* note 54, at §§ 2.7–2.9.

58. See *id.* at § 2.7.

59. See *id.* at § 2:8.

60. See *id.* at § 2:9.

61. See, e.g., FLA. STAT. ANN. § 61.075 (West 2016) (marital assets includes “assets acquired . . . during the marriage, individually by either spouse or jointly by them”); TENN. CODE ANN. § 36-4-121 (West 2016) (marital property includes property “acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing”).

property generally consists of premarital property and property acquired by gift or inheritance.<sup>62</sup> Significant variations exist from state-to-state—what is fair and equitable in North Carolina may be unfair and inequitable in South Carolina.

As is the case with alimony, critics of premarital agreements often make the content-based argument that the terms of a premarital agreement will operate to the detriment of the disadvantaged spouse. According to Professor Brod, “mutual waiver[s] of state law protections” are necessarily harmful to the economically inferior spouse.<sup>63</sup> She also contends, that “even if the weaker spouse is given some settlement in return for the waiver, this remuneration is not likely to equal or exceed the economic protection provided by state law.”<sup>64</sup> Not only are these sweeping assumptions unsupported by any reliable evidence, what evidence does exist indicates the opposite may be the case.

In some instances the default law clearly favors the economically superior spouse. For example, most dual-classification jurisdictions agree that inheritances, gifts, and premarital assets are separate property—an approach generally benefitting the wealthier spouse.<sup>65</sup> Considerable variation exists, however, with respect to the classification of increases in value to separate property and income derived from separate property.<sup>66</sup> Laws that classify such assets as separate property typically operate to the detriment of the economically inferior spouse by removing assets from the pool of marital assets available for division. Disability benefits, personal injury awards, professional degrees, life insurance, and goodwill in a professional business can cause similar problems. They are marital property subject to division in some states, but not others.<sup>67</sup> Separate assets “are the very types of assets that place one spouse in a substantially more economically advantaged condition than the other spouse.”<sup>68</sup> To the extent that the default laws classify property as separate property belonging to the economically superior spouse or otherwise make an asset unavailable for division they necessarily operate to the disadvantage of the other spouse.

Judicial discretion may also favor the economically superior spouse. Courts in many equitable distribution states are expressly directed to consider the

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62. See, e.g., ARK. CODE ANN. § 9-12-315 (West 2015) (non-marital property includes “[p]roperty acquired prior to marriage or by gift or by reason of the death of another” and “[p]roperty acquired in exchange for property acquired prior to the marriage”); FLA. STAT. ANN. § 61.075 (West 2016) (Non-marital assets include “assets acquired . . . by either party prior to the marriage . . .” and “assets acquired separated by either party by non-interspousal gift, bequest, devise or descent. . .”).

63. Brod, *supra* note 1, at 234–35.

64. *Id.*

65. See Paul Tomar, *Division of Property in Hawaii: Does the Law Unduly Favor the Economically Advantaged Spouse?*, 14 HAW. B.J. 4, 9 (2010).

66. See, e.g., ARK. CODE ANN. § 9-12-315 (West 2015) (income and increase in value to non-marital property is likewise non-marital property); N.C. GEN. STAT. ANN. § 50-20 (West 2015) (“The increase in value of separate property and the income derived from separate property shall be considered separate property.”). *But see In re Footitt*, 903 P.2d 1209, 1212 (Colo. App. 1995) (holding that income received from separate property is marital property); *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 854 (Minn. 2003) (holding that income from non-marital assets is a marital asset).

67. TURNER, *supra* note 54, at § 6:52–88; see Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 168–71 (2004).

68. Tomar, *supra* note 65, at 10.

contributions made by each spouse to the marital property in order to determine what division is equitable.<sup>69</sup> An empirical study by Professor Garrison supports the theory that judges weigh this factor heavily in dividing marital property, to the detriment of the economically inferior spouse.<sup>70</sup>

Lack of predictability in equitable distribution cases further undermines many criticisms of premarital agreements. Equitable distribution cases are notoriously unpredictable.<sup>71</sup> In pursuit of a personalized approach to asset division—equitable distribution grants trial judges an incredible amount of discretion. That personalized approach, however, often harms the economically inferior spouse.<sup>72</sup> Lack of predictability, for example, reduces incentives to settle disputes—resulting in time-consuming and expensive divorce proceedings.<sup>73</sup> These costs can significantly deplete the amount of property ultimately available for division between the spouses—an outcome obviously harmful to the poorer or less employable spouse.<sup>74</sup> In deciding how to distribute assets, many states allow courts to consider marital fault in dividing marital property—which causes the same problems seen in the alimony context.<sup>75</sup> Unpredictability and reliance on judicial discretion may also further weaken the bargaining position of an already disadvantaged spouse.<sup>76</sup> Both predictability and freedom from judicial discretion can be readily accomplished in a premarital agreement.

### 3. *Elective Share Statutes.*

Elective share statutes generally operate to prevent a spouse from being completely disinherited upon the death of the other spouse. The nature of the elective share varies significantly depending on the jurisdiction.<sup>77</sup> Most community property states offer no elective share protection—relying instead on the community property laws.<sup>78</sup> Among those states that do offer elective share protections, states vary

69. *E.g.*, FLA. STAT. ANN. § 61.075 (West 2016) (allowing consideration of “[t]he contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of . . . both the marital assets and the nonmarital assets of the parties”); 23 PA. STAT. AND CONS. STAT. ANN. § 3502 (West 2016) (allowing consideration of “[t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property . . .”); W. VA. CODE ANN. § 48-7-103 (West 2016) (allowing consideration of “[t]he extent to which each party has contributed to the acquisition, preservation and maintenance or increase in value of marital property by monetary contributions . . .”).

70. See Marsha Garrison, *How Do Judges Decide Divorce Cases: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 456–57 (1996).

71. See, *e.g.*, Marsha Garrison, *Reforming Divorce: What’s Needed and What’s Not*, 27 PACE L. REV. 921, 925 (2007); Kelly, *supra* note 67, at 167.

72. See Garrison, *Reforming Divorce*, *supra* note 71, at 928.

73. *E.g.*, Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 730 (1991); Kreuger, *supra* note 52, at 832.

74. *E.g.*, Garrison, *Good Intentions Gone Awry*, *supra* note 73, at 730; Kreuger, *supra* note 52, at 834.

75. See, *e.g.*, TURNER, *supra* note 54, at § 8:24; Kreuger, *supra* note 52, at 826–28.

76. *Reforming Divorce*, *supra* note 71, at 928.

77. See Terry L. Turnipseed, *Community Property v. the Elective Share*, 72 LA. L. REV. 161, 163 (2011).

78. See *id.*

“widely in the amount to which the surviving spouse is entitled, the variables that determine the amount (length of marriage, family situation, surviving spouse’s net worth, etc.), and the property that is subject to the elective share.” Not only are elective share statutes highly variable, they are also easily avoided through the use of trusts, inter vivos gifting, life insurance, and other common estate planning techniques.<sup>79</sup> Even if a spouse is financially insecure, a waiver of elective share rights might actually operate to his or her benefit. Waiving such rights well in advance may better enable a surviving spouse to qualify for Medicaid or similar needs-based benefits at a later date.<sup>80</sup> Moreover, better protection from disinheritance can be accomplished in a premarital agreement that expressly contemplates provision for the surviving spouse.

#### 4. *Community Property.*

Community property laws offer rights at both death and divorce, and to a lesser extent during marriage. Each spouse in a community property regime is deemed to be the owner of one-half of all of the couple’s community property—which generally includes property acquired by the effort, labor, or industry of the spouses during marriage.<sup>81</sup> Separate property—which typically includes premarital property, inheritances, and gifts—is owned by each spouse, individually.<sup>82</sup> Each spouse can only dispose of one-half of the community property at death—a rule that provides some measure of protection to the surviving spouse against disinheritance.<sup>83</sup> Divorce is a more complicated matter. Three community property states—Louisiana, California, and New Mexico—employ the rule of equal division at divorce.<sup>84</sup> In an equal division system each spouse retains all of his or her separate property as well as one-half of the community property.<sup>85</sup> Unlike equitable distribution, the judge does not typically have the authority to provide for some other allocation of assets if he deems the default rule inequitable. The other community property jurisdictions, however, have adopted an equitable distribution approach at divorce that operates much like any other dual classification state.<sup>86</sup>

Community property offers one benefit to the economically inferior spouse that is not afforded under any other system. Under the community property laws of every community property state except Texas, the spouses purportedly have co-equal rights to the management of the community property during marriage.<sup>87</sup> In theory

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79. See generally Turnipseed, *supra* note 77, at 178–80.

80. See, e.g., EDWIN KASSOFF, *ELDER LAW AND GUARDIANSHIP IN NEW YORK* § 7:147 (2014); VINCENT J. RUSSO & MARVIN RACHLIN, *NEW YORK ELDER LAW AND SPECIAL NEEDS PRACTICE* § 22:24 (2015).

81. See, e.g., CAL. FAM. CODE § 751 (West 2016); LA. CIV. CODE ANN. arts. 2336, 2338 (2015).

82. See LA. CIV. CODE ANN. art. 2341 (2015).

83. See, e.g., CAL. PROB. CODE § 100 (West 2016); LA. CIV. CODE ANN. art. 2369.(1), (2) (2015); WASH. REV. CODE ANN. § 11.02.070 (West 2015).

84. James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn’t Equal Equal*, 72 LA. L. REV. 21, 21 (2011); accord CAL. FAM. CODE § 2550 (West 2015); LA. CIV. CODE ANN. art. 2369.(1), (2) (2015).

85. See, e.g., CAL. FAM. CODE § 2550 (West 2015); LA. CIV. CODE ANN. art. 2369.(1), (2) (2015).

86. See, e.g., ARIZ. REV. STAT. ANN. § 25-318 (2016); TEX. FAM. CODE ANN. § 7.001 (West 2015). See generally Ratner, *supra* note 84.

87. See Carter, *supra* note 6, at 873–74.

then, spouses in community property regimes do not have to wait until death or divorce to be on equal economic footing with each other. As I have argued elsewhere, however, the notion of co-equal rights during marriage is more theory than reality.<sup>88</sup> In truth, there are so many exceptions to the rule of equal management that the rule is practically worthless—rarely, if ever, providing spouses with equal decision making over their community assets.<sup>89</sup>

Community property rules offer few, if any, clear advantages at divorce. Those community property states that employ equitable distribution at divorce suffer the same shortcomings discussed above. Equal division states may offer advantages in some instances,<sup>90</sup> but they are just as likely to benefit the economically superior spouse or to result in outcomes that are patently unfair.<sup>91</sup> As in dual classification jurisdictions, many community property rules operate to the advantage of the economically superior spouse. Five of the community property states, for example, classify the rents and profits earned from separate property as separate property.<sup>92</sup> As discussed above, this approach—the so called “American rule”—tends to favor the economically superior spouse. The other four community property states adhere to the Spanish rule that classifies such property as community.<sup>93</sup> Two of those states, however, allow a spouse to elect American Rule treatment in some instances without the necessity of the other spouse’s agreement.<sup>94</sup>

Community property laws can also have harmful and unanticipated financial consequences during an intact marriage—consequences easily avoided by premarital agreement. The default community property regime, for example, can be disastrous for spouses who are unable to pay their bills.<sup>95</sup> Bankruptcy is similarly problematic because the financial irresponsibility of one spouse may result in both

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88. See *id.* at 870–88.

89. *Id.*

90. See Ratner, *supra* note 84, at 35–42 (arguing that “an equal division of community worth is preferable” to judicial discretion to make an equitable distribution).

91. See generally Ashley L. Gill, Comment, *Until Debt Do Us Part: The Need for Revision of Article 2364 Reimbursement Claims for Student Loan Debts*, 74 LA. L. REV. 1007, 1026 (2014) (stating that equal division states have distribution statutes that are not equitable in distributing debt based on enjoyment or benefits received). But see Kelly Kromer Boudreaux, Comment, *So You’ve Married a Mismanager: The Inadequacy of Louisiana Civil Code Article 2354*, 68 LA. L. REV. 219, 223 (2007) (“Community property states thus recognize that different, but valuable, contributions are made to the marriage by both the working and non-working spouse.”).

92. See Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 L. & CONTEMP. PROBS. 171, 180–92 (1993) (stating that Arizona, California, Nevada, New Mexico, and Washington classify separate property rent and interest earned as separate property); see also Wendy A. Wake, Note, *Uniform Marital Property Act: Suggested Revisions for Equality Between Spouses*, 1987 U. ILL. L. REV. 471, 480 (1987) (stating that Arizona, California, Nevada, New Mexico, and Washington follow the American Rule).

93. Andrews, *supra* note 92, at 180 (stating that Idaho, Louisiana, Wisconsin, and Texas follow the Spanish rule).

94. LA. CIV. CODE ANN. art. 2339 (2008); IDAHO CODE ANN. § 32-906 (West 2003).

95. See, e.g., James R. Ratner, *Creditor and Debtor Windfalls from Divorce*, 3 EST. PLAN. & CMTY. PROP. L.J. 211, 215–22 (2011) (explaining that spouses are at risk because of the debts incurred during marriage); Margaret Ryznar & Anna Stepień-Sporek, *To Have and To Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 32 (2009) (stating that both spouses are at risk of having their property collected to pay off the other spouse’s debt).

spouses being called into bankruptcy court.<sup>96</sup> Community property limits the right of a spouse to seek innocent spouse relief under the Internal Revenue Code—even if the spouses filed separate income tax returns.<sup>97</sup>

Community property may be based on a theory of sharing and partnership that is consistent with modern marriage—but this theory rarely translates into reality.<sup>98</sup> In some instances the default community property laws operate to the detriment of the spouses as a single economic unit or to the detriment of the financially insecure spouse. These pitfalls can be easily avoided through a personalized premarital agreement.

### III. UNCONSCIONABILITY: UNHELPFUL BARRIER TO FREE CONTRACT

Freedom of contract is a fundamental organizing principal of most western legal systems and is essential to a free society.<sup>99</sup> That freedom of contract is an essential feature of American law is hardly surprising; it is consistent with the high value Americans have always placed on personal autonomy.<sup>100</sup> Yet, common law has largely resisted a robust freedom of contract policy in the marriage context. The more barriers we erect to entering into premarital contracts, the more expensive and stigmatized they become and the less likely prospective spouses are to consider entering into them.

Freedom of contract is subject to a variety of restrictions—such as the requirement of the free consent of the parties to the contract.<sup>101</sup> Although these limitations exist in all areas of contract law, they tend to present more substantial barriers in the premarital agreement context. As one American court recently explained: “in many instances agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general.”<sup>102</sup> Common law’s “traditional societal distrust”<sup>103</sup> for premarital agreements stemmed,

96. See generally Margaret Dee McGarity, *Community Property in Bankruptcy: Laws of Unintended Consequences*, 72 LA. L. REV. 143 (2011).

97. See BORIS I. BITTKER & MARTIN J. MCMAHON, JR., *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 35.1[2] (Warren, Gorham & Lamont, 2d ed. 1995) (“[T]he Supreme Court held in *United States v. Mitchell* that a community property wife was liable for the taxes on her share of her husband’s earnings for years in which no returns were filed by him, although she had little knowledge of his finances and relied on his assurances that he was filing timely returns and paying the taxes due.”).

98. See generally Carter, *supra* note 6.

99. *Stickovich v. City of Cleveland*, 143 Ohio App. 3d 13, 2001-Ohio-4117, 757 N.E.2d 50, at ¶ 20 (“In a free and democratic society, freedom of contract is the general rule; public-policy limits are the exception.”); accord Christina Erbel-Borges & Su Yingxia, *Freedom of Contract in Modern Chinese Legal Practice*, 46 GEO. WASH. INT’L L. REV. 341, 341 (2014); Benito Arruñada & Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 WASH. U. J.L. & POL’Y 81, 105 (2008); Bruno Zeller, *When is a Fixed Sum Not a Fixed Sum But a Penalty Clause?*, 30 J.L. & COM. 173, 175 (2012).

100. See, e.g., Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 193 (2012); Karen A. Cerulo, *Social Relations, Core Values, and the Polyphony of the American Experience*, 23 SOC. F. 351, 352 (2008).

101. *E.g.*, *Morrill v. Nightingale*, 28 P. 1068, 1069 (Cal. 1892) (“The consent of a party to a contract must be free, and it is not free when obtained through duress or menace.”).

102. *Anonymous v. Anonymous*, 999 N.Y.S.2d 386, 386 (N.Y. App. Div. 2014).

103. *Estate of Martin*, 2008 ME 7, 938 A.2d 812, 817.



primarily, from a paternalistic view towards women and concerns regarding divorce.<sup>104</sup> Common law often stigmatized the marriage contract and subjected it to a stricter scrutiny than other types of contracts.<sup>105</sup> Many common law jurisdictions accepted and enforced marriage contracts regulating the distribution of property upon the death of a spouse—and particularly contracts that waived one spouse’s rights in the estate of the other spouse.<sup>106</sup> In the case of second marriages, for example, these contracts presumably facilitated marital harmony by “allow[ing] the marriage to occur without disturbing third-party rights.”<sup>107</sup> In other words, common law had few qualms with allowing a surviving spouse to sign an agreement that prohibited her from having any rights in her deceased spouse’s estate. However, common law jurisdictions treated marriage contracts regulating the relationship between the spouses or division of property at divorce with overt hostility.<sup>108</sup> Most states lacked statutes specifically addressing marriage contracts that were effective at some time earlier than the death of a spouse.<sup>109</sup> Moreover, many courts believed these types of marriage contracts violated public policy by encouraging divorce.<sup>110</sup> Divorce-focused agreements were “antithetical to the marriage contract” and any “contracts which tend to induce a separation of husband and wife [were] utterly void and of no force or effect.”<sup>111</sup>

As views of marriage, divorce, and family changed, marriage contracts gained greater acceptance. Yet, significant barriers still exist. Common law claims to have now rejected the “paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times.”<sup>112</sup> These paternalistic presumptions, however, are far from gone.

### A. Unconscionability in General

Free consent of the parties is an essential element of a valid contract. When consent is not free—such as when it is the result of duress, error/mistake, or fraud—then the contract is generally voidable.<sup>113</sup> In allowing the aggrieved party to avoid a contract the law recognizes that there was no meeting of the minds on the part of the

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104. *Id.*

105. See James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 937–38 (2000) (stating that prenuptial agreements were historically disfavored and condemned); see also Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473 (1941) (stating that marriage is highly favored, and that contracts that discourage marriage raise public policy concerns).

106. See William F. Fraatz, Comment, *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, 444 (1992) (observing that marital contracts were enforced as economic regulators at the death of a spouse).

107. *Id.*

108. See *id.* at 445–46 (stating that divorce-focused agreements were highly disfavored).

109. See Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner’s Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 4 (2002) (stating that states made determinations on a case-by-case basis in absence of premarital statutes).

110. See Fraatz, *supra* note 107, at 445

111. See *id.*

112. *Friezo v. Friezo*, 914 A.2d 544, 556 (Conn. 2007) (citations omitted).

113. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (AM. LAW INST. 1981).

aggrieved party and, therefore, a fundamental element of contract formation does not exist.<sup>114</sup> These exact same rules supposedly apply to the enforceability of premarital agreements. In addition to duress, error/mistake, and fraud, common law recognizes an additional consent-based ground for rendering a contract voidable—unconscionability.<sup>115</sup> The doctrine of unconscionability allows a court to refuse to enforce contracts, or specific contractual provisions, that are so “one-sided, oppressive and unfairly surprising” that no reasonable person would have agreed to be bound by such terms.<sup>116</sup> A contract may be either procedurally or substantively unconscionable—but both bear on issues of consent.<sup>117</sup> A contract “[i]n the commercial context [a contract is] unconscionable at law if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>118</sup> Yet, the mere fact that an agreement might be more favorable to one party than the other should not, alone, render it unenforceable.<sup>119</sup> If a party has entered into a disadvantageous contract despite being fully apprised of all the facts, he should be bound by that contract.<sup>120</sup>

The doctrine of unconscionability has been expressly adopted in the matrimonial agreement context by most American states.<sup>121</sup> While unconscionability might serve some useful role in the law governing matrimonial agreements, it does not currently do so. Rather, unconscionability, as currently implemented in the matrimonial agreements context, is unhelpful, unduly paternalistic, and serves primarily to increase barriers to entering into premarital agreements.

The tests for unconscionability in the premarital agreement context reflect the underlying assumption that parties are in unequal bargaining positions. Whether a premarital agreement will be deemed unconscionable typically turns on either of two factors: (1) whether the parties made adequate financial disclosures to each other; and (2) whether the parties consulted with independent counsel.<sup>122</sup> Both factors—which, in practice, often serve as proxies for determining unconscionability—are drawn from the divorce context.<sup>123</sup> In particular, these factors are drawn from a view of marriage and divorce that prevailed during the 1970’s—views that have little to do with the realities of contemporary marriages. Couples today rarely marry in order to achieve financial stability—rather, they have usually achieved that stability prior to marrying.<sup>124</sup> Financial instability, however, remains an important predictor of

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114. *E.g.*, *Foster v. Auto-Owners Ins., Co.*, 703 N.E.2d 657, 659 (Ind. 1998); *Metro. State Bank v. Cox*, 134 Colo. 260, ¶¶ 2–6, 302 P.2d 188 (1956).

115. SAMUEL WILLISTON, *WILLISTON ON CONTRACTS* §18.1 (Richard A. Lord, 4th ed. 2010).

116. *Energy Home v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013); *accord Markwed Excavating, Inc. v. Mandan*, 2010 ND 220, ¶ 22, 791 N.W.2d 22.

117. *Id.* at 835.

118. *In re Shanks*, 758 N.W.2d 506, 514 (Iowa 2008).

119. *E.g.*, *Lewis v. Lewis*, 748 P.2d 1362, 1365–66 (Haw. 1988) (stating that a mere inequitable contract does not render it unenforceable unless it rises to the level of unconscionability).

120. *Id.*

121. *See infra* Section III(B).

122. *E.g.*, Younger, *supra* note 9, at 1062.

123. *See infra* Section III(B)(4).

124. *See supra* Part II.

divorce.<sup>125</sup> Divorce—which necessarily involves litigation—seems to be a poor model upon which to base premarital agreement laws. Agreements entered into in connection with divorce are “negotiated under conditions of extraordinary stress” and are “uniquely positioned to exploit psychological and emotional dependencies built up over a number of years.”<sup>126</sup> Couples entering into marriage, however, stand in a much different position.

## B. Full Financial Disclosure—A Useless Proxy for Unconscionability

Many jurisdictions have adopted the view that a full disclosure of each party’s assets and liabilities prior to the execution of a premarital agreement serves as proxy for assuring the agreement is not unconscionable. This approach—borrowed from divorce cases and laws—is problematic for several reasons. As explained below, the significance of financial disclosure to the ultimate enforceability of the agreement varies somewhat by jurisdiction. Regardless of whether a jurisdiction views financial disclosure as an absolute requirement for a valid premarital agreement, lawyers will require clients to make such disclosures as a matter of course—thus increasing transaction costs and barriers to entry.<sup>127</sup> The authors of a Florida practice guide, for example, point out that although “financial disclosure is not required under the UPAA or the Florida Probate Code for premarital agreements”; it nonetheless “appears that it is always best practice to provide full financial disclosure which discloses assets, liabilities, and income.”<sup>128</sup>

### 1. UPAA States

The Uniform Premarital Agreement Act (the “UPAA”)—which has been adopted by at least twenty-six American jurisdictions<sup>129</sup>—clearly uses financial disclosure as a sort of proxy for unconscionability. Unconscionability alone does not render the agreement voidable under the UPAA; rather, a party must show that “the agreement was unconscionable when it was executed” and that prior to execution: (1) the party “was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;” (2) the party “did not voluntarily and

125. See Carter, *supra* note 6.

126. Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1406 (1984).

127. E.g., THOMAS A. JACOBS, ARIZONA PRACTICE SERIES, COMMUNITY PROPERTY LAW § 2.10, Westlaw (database updated September 2015); ABRAHAM M. MORA ET AL., 12 FLORIDA PRACTICE SERIES, ESTATE PLANNING §§ 25:14, 20, Westlaw (database updated December 2015); 12 ILLINOIS FORMS LEGAL & BUSINESS §§ 36:2, 5, Westlaw (database updated August 2015); LINDA D. ELROND & JAMES P. BUCHELE, 1 KANSAS LAW AND PRACTICE, FAMILY LAW § 2:16, Westlaw (database updated December 2015); LLOYD T. KELSO, 1 NORTH CAROLINA FAMILY LAW PRACTICE § 3.8, Westlaw (database updated July 2015); DORIS J. LICHT, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND § 12.3.1 (2011); 15 TEXAS FORMS LEGAL AND BUSINESS §§ 32:7-8, Westlaw (database updated August 2015).

128. ABRAHAM M. MORA ET AL., 12 FLORIDA PRACTICE SERIES § 25:20 Westlaw (database updated December 2015); accord PHILLIP C. HUNT, A PRACTICAL GUIDE TO ESTATE PLANNING IN MAINE § 12.3.1 (1st ed. 2012) (“Note that although technically financial disclosure is optional . . . it is highly recommended that the parties provide such information.”).

129. See *Legislative Fact Sheet – Premarital Agreement Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Premarital%20Agreement%20Act>. (last visited Mar. 29, 2016).

expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and” (3) the party “did not have, or reasonably could not have had an adequate knowledge of the property or financial obligations of the other party.”<sup>130</sup>

The UPPA approach has created some rather curious outcomes in the courts. The UPAA prohibits a finding of unconscionability if a party made adequate financial disclosure.<sup>131</sup> In *Marsocci v. Marsocci*, for example, the Rhode Island Supreme Court specifically found a prenuptial agreement to be unconscionable because the wife was not represented by an attorney and the agreement was one sided in favor of the husband.<sup>132</sup> Despite the agreement’s unconscionability, the court upheld the agreement because the husband made an adequate financial disclosure in accordance with the statute.<sup>133</sup> As the court explained, “[u]nconscionability alone . . . will not defeat a premarital agreement.”<sup>134</sup> Notice that the reasons the agreement was unconscionable—lack of counsel and one-sidedness—really had little to do with financial disclosure. Financial disclosure, or waiver of such disclosure, would not have done anything to remedy the unfairness of the agreement. Despite the limitations of the UPAA financial disclosure requirements, courts in UPAA states can readily refuse to enforce premarital agreements that they disagree with by finding that they were not executed voluntarily.<sup>135</sup>

## 2. Modified UPAA States

Not all states adopted the UPAA as written—a number modified the Act in ways that make financial disclosure even more important. Connecticut and Iowa, for example, make lack of financial disclosure an independent ground for voiding a premarital agreement.<sup>136</sup> In those states, a matrimonial agreement may be unenforceable if it is *either* unconscionable *or* if there was an insufficient financial disclosure or waiver of such disclosure.<sup>137</sup> Nevada and North Dakota take fairly similar approaches.<sup>138</sup> In all of these states the mere lack of financial disclosure or an adequate waiver may be sufficient to invalidate an otherwise fairly negotiated contract. This result seems extreme. In the absence of a premarital agreement, a spouse’s financial situation prior to marriage may have little or no bearing upon the division of assets upon the termination of the marriage. Why, then, should the enforceability of a premarital agreement be predicated on such a disclosure?

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130. UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM’N 1983).

131. *See, e.g., Mamot v. Mamot*, 813 N.W.2d 440, 453 (Neb. 2012); *In re Marriage of Rudder*, 217 P.3d 183, 189–90 (Or. Ct. App. 2009).

132. 911 A.2d 690, 698 (R.I. 2006).

133. *Id.* at 699.

134. *Id.* at 698.

135. *See, e.g., Mamot v. Mamot*, 813 N.W.2d 440 (Neb. 2012).

136. CONN. GEN. STAT. ANN. § 46(b)-36(g) (West 2016); IOWA CODE ANN. § 596.8 (West 2016).

137. *See* CONN. GEN. STAT. ANN. § 46(b)-36(g) (West 2016); IOWA CODE ANN. § 596.8 (West 2016).

138. *See* NEV. REV. STAT. ANN. § 123A.080 (West 2016); N.D. CENT. CODE ANN. § 14-03.2-08 (West 2016).

### 3. *Non-UPAA States*

Even those states that have not adopted the UPAA use financial disclosure as a sort of proxy for assessing unconscionability. Georgia, for example, considers three factors in order to determine whether a premarital agreement is valid: “(1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?”<sup>139</sup> In applying this test, Georgia courts use misrepresentation or nondisclosure of financial information as a proxy for determining the second factor—unconscionability.<sup>140</sup> The mere fact that the agreement is grossly inequitable is not grounds for unconscionability if there was an adequate disclosure of financial resources. As one court explained: “That the antenuptial agreement may have perpetuated the already existing disparity between the parties’ estates does not in and of itself render the agreement unconscionable when . . . there was full and fair disclosure of the assets of the parties prior to the execution of the agreement . . .”<sup>141</sup> On the other hand, failure to make an adequate financial disclosure will typically render the agreement unenforceable.<sup>142</sup>

### 4. *What is the Point of Full Financial Disclosure?*

Prospective spouses should, of course, have open and frank discussions with each other about their financial resources and liabilities. The ability and willingness of spouses to have those types of conversations is an important predictor of successful marriages.<sup>143</sup> Yet, we require no such inquiry when spouses marry without a premarital agreement. Moreover, the types of disclosures required in connection with premarital agreements does not necessarily facilitate open and honest discussion. So, why is this disclosure required? A spouse’s premarital assets are not typically subject to division at divorce, nor are those assets necessarily indicative of the assets and liabilities a spouse will have at death or divorce.<sup>144</sup> A spouse will typically not have any rights to the other spouse’s premarital assets during marriage.<sup>145</sup> It seems odd that the enforceability of a contract should be predicated on the disclosure of facts that may have little relevance at death, divorce, or even during the marriage.

As it turns out, this illogical and sometimes burdensome requirement was simply imported from Section 306 Uniform Marriage and Divorce Act (the “UMDA”)—a model law that addressed a substantially different sort of agreement.<sup>146</sup> The requirement of financial disclosure makes more sense in context

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139. *Mallen v. Mallen*, 622 S.E.2d 812, 814 (Ga. 2005); *accord Blige v. Blige*, 656 S.E.2d 822, 824 (Ga. 2008); *Adams v. Adams*, 603 S.E.2d 273, 274 (Ga. 2004).

140. *See Mallen*, 622 S.E.2d at 816–17.

141. *Adams*, 603 S.E.2d at 275; *accord Sides v. Sides*, 717 S.E.2d 472, 473 (Ga. 2011).

142. *See Blige*, 656 S.E.2d at 826.

143. *See Carter*, *supra* note 6, at 855–60.

144. *See infra* Section II(C)

145. *See id.*

146. UNIF. PREMARITAL AGREEMENT ACT § 6, CMT. (UNIF. LAW COMM’N 1983).

of the UMDA. “In order to promote amicable settlement of disputes” between divorcing couples, Section 306 allows divorcing spouses to “enter into a written agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.” Knowledge of assets owned by the spouses at the time of divorce is a relevant consideration in awarding alimony and making an equitable or equal division of marital property. Requiring fair disclosure by both spouses is appropriate in this context because divorcing spouses have incentives to hide assets. Further, if spouses are to enter into their own separation agreements it is important that they be able to assess whether the agreement is fair—and the assets owned by each spouse is an important factor in that assessment. But, disclosure of premarital assets makes little sense as a requirement for valid premarital agreements.

### C. Independent Legal Representation

Most jurisdictions either require or strongly emphasize the need for access to separate representation in the negotiation and execution of premarital agreements. Imposing a “*per se* requirement that parties entering a [marriage] agreement must obtain independent legal counsel [is] contrary to the traditional principles of contract law . . . .”<sup>147</sup> Yet, many states have effectively taken that approach. Although most states fall short of an outright *per se* requirement of independent representation, they nonetheless consider it an important—and often determinative—factor in the validity of the agreement. This approach is overly paternalistic and, perhaps worse, fails to achieve the goal it seeks to achieve.

#### 1. UPAA States

The UPAA does not expressly require independent legal representation. Rather, Section 6 of the UPAA provides that an agreement is not enforceable if a party shows his execution was not voluntary or that the agreement was unconscionable when it was executed. As explained above, the test for conscionability is expressly predicated on full financial disclosure. The comments to Section 6, however, explain that although “the absence of independent legal counsel [is not] a condition for the unenforceability of a premarital agreement,” the “lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed.”<sup>148</sup> This apparently stems from a belief that lack of independent representation can create some “doubts regarding the good faith and fairness aspect of the agreement.”<sup>149</sup>

Although this requirement is not express in the UPAA, it is clear that adopting states require separate representation as a matter of course. In North Dakota—a UPAA state where the statutes are silent on the issue of independent representation—the state supreme court explained that “[w]e agree with the view that lack of adequate legal advice to a prospective spouse to obtain independent counsel is a significant factual factor in weighing the voluntariness of a premarital

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147. *Sabad v. Fessenden*, 2003 PA Super 202, ¶ 16, 825 A.2d 682, 691.

148. UNIF. PREMARITAL AGREEMENT ACT § 6, CMT (UNIF. LAW COMM’N 1983).

149. 12 ILLINOIS FORMS LEGAL & BUSINESS § 36:2 Westlaw (database updated August 2015).

agreement.”<sup>150</sup> Practice guides in nearly all of the adopting states recommend that each party have independent legal representation and that steps are taken to assure that none of the three conjunctive predicates for a finding of unconscionability are an issue.<sup>151</sup> An Illinois formulary, for example, offers this practice tip: “Although the parties to a premarital agreement are not required to have the services of independent counsel, it is highly recommended that they retain such services . . . .”<sup>152</sup>

## 2. *Modified UPAA States and UPMAA States*

Some UPAA states modified the act to essentially mandate separate representation—an approach since adopted by the subsequent Uniform Premarital and Marital Agreements Act (the “UPMAA”). Section 9 of the UPMAA—now enacted in Colorado and North Dakota—makes it clear that an “agreement is unenforceable if a party against whom enforcement is sought proves . . . .the party did not have access to independent legal representation.”<sup>153</sup> This change is supposed to reflect the view of most states that “representation by independent counsel is crucial for a party waiving important legal acts.”<sup>154</sup> Connecticut—a UPAA state—takes a similar approach by providing that an agreement is not enforceable against a party who “was not afforded a reasonable opportunity consult with independent counsel.”<sup>155</sup> New Jersey provides that an agreement may be unconscionable if (among other reasons) a party “did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.”<sup>156</sup> California requires independent legal counsel or adequate waiver for an agreement to be considered entered into voluntarily.<sup>157</sup> Further, California requires that a party have “not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.”<sup>158</sup>

150. *In re Estate of Lutz*, 1997 ND 82, ¶ 34, 563 N.W.2d 90, 98.

151. See THOMAS A. JACOBS, ARIZONA PRACTICE SERIES, COMMUNITY PROPERTY LAW § 2.10, Westlaw (database updated September 2015); ABRAHAM M. MORA ET AL., 12 FLORIDA PRACTICE SERIES, ESTATE PLANNING §§ 25:14, 20, Westlaw (database updated December 2015); 12 ILLINOIS FORMS LEGAL & BUSINESS §§ 36.2, 5, Westlaw (database updated August 2015); LINDA D. ELROND & JAMES P. BUCHELE, 1 KANSAS LAW AND PRACTICE, FAMILY LAW § 2:16, Westlaw (database updated December 2015); LLOYD T. KELSO, 1 NORTH CAROLINA FAMILY LAW PRACTICE § 3.8, Westlaw (database updated July 2015); DORIS J. LICHT, A PRACTICAL GUIDE TO ESTATE PLANNING IN RHODE ISLAND § 12.3.1 (2011); 15 TEXAS FORMS LEGAL AND BUSINESS §§ 32:7–8, Westlaw (database updated August 2015).

152. 12 ILLINOIS FORMS LEGAL & BUSINESS § 36.2, Westlaw (database updated August 2015); *accord* J. ERIC SMITHBURN, 14 INDIANA PRACTICE SERIES § 2:6, Westlaw (database updated November 2015) (“Parties entering into an antenuptial agreement should negotiate the terms well in advance of their wedding day, and they should both be represented by counsel.”).

153. UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT § 9 (UNIF. LAW COMM’N 2012).

154. *Id.* at CMT.

155. CONN. GEN. STAT. ANN. § 46(b)-36(g) (West 2016).

156. N.J. STAT. ANN. § 37:2-38 (West 2015).

157. CAL. FAM. CODE § 1615 (West 2016).

158. *Id.*

### 3. *Non-UPAA States*

Even in states that have not adopted the UPAA, independent representation remains an important consideration. Some states have created jurisprudential rules essentially requiring access to independent legal representation.<sup>159</sup> Other states use the presence or absence of independent legal counsel as a sort of proxy for determining unconscionability and, sometimes, voluntariness. In *Fletcher v. Fletcher*, for example, the Ohio Supreme Court explained that although “an agreement signed without counsel is not *per se* invalid” whether a party had a meaningful opportunity “to seek counsel before executing an antenuptial agreement is . . . a significant element of the [] test to determine whether coercion or overreaching occurred.”<sup>160</sup> As a result, knowledgeable attorneys will insist that spouses obtain independent legal representation even if there is no statutory requirement that they do so.

### 4. *Why Do We Care About Separate Representation?*

Spouses are free to marry and to subject themselves to the default marital property laws without first consulting legal counsel. Why, then, do we want them to seek not one, but two attorneys before they can enter into a premarital agreement altering those default laws? The rationale is tied to the flawed assumptions that premarital agreements are typically one-sided, unfair, and the result of a fundamentally unfair bargaining process. As discussed in Part II, these assumptions are inaccurate. Separate legal representation, we assume, will somehow make up for these deficiencies and serve as evidence that the party in the weaker bargaining position understood the agreement. As a Kansas practice guide explains: “The presence of independent legal advice theoretically assures that both parties understand the terms of the agreement, that it is voluntary, that they know what is being waived, and what is being gained.”<sup>161</sup>

The use of independent representation as a proxy for determining conscionability and voluntariness is misplaced. There is no conclusive evidence that independent legal representation will prevent a spouse from entering into a one-sided or unfair agreement. To the contrary, there are plenty of reported decisions where a spouse with independent counsel signed an unfair agreement. For example, in *Sanford v. Sanford*, wife signed a premarital agreement waiving rights to alimony and property division at divorce.<sup>162</sup> Under the agreement, the most the wife could hope to receive at divorce was \$144,000, paid in installments, and a condominium in Sioux Falls. The financial disclosures showed that, at the time of marriage wife had a net worth of \$127,500 and husband had a net worth of \$55 million.<sup>163</sup> Similarly, the wife in *Sanderson v. Sanderson* waived alimony and property division rights in

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159. See, e.g., *Ware v. Ware*, 687 S.E.2d 382, 388 (W. Va. 2009) (“Thus, a prenuptial agreement is invalid if either party lacked the opportunity to consult with independent legal counsel.”).

160. 628 N.E.2d 1343, 1348 (Ohio 1994).

161. LINDA D. ELROD & JAMES P. BUCHELE, 1 KANSAS LAW & PRACTICE, FAMILY LAW § 2:9, Westlaw (database updated December 2015).

162. *Stanford v. Stanford*, 2005 SD 34, ¶ 1, 694 N.W.2d 283, 285.

163. *Id.* ¶ 4.



her premarital agreement with a wealthier husband.<sup>164</sup> The wife's attorney advised her that the agreement was one-sided and yet she decided to proceed anyway.<sup>165</sup> Perhaps courts are simply more comfortable enforcing a harsh agreement where a lawyer first warned the spouse of the potential inequity.

#### IV. RULE 1.7—ANOTHER UNHELPFUL BARRIER

The rules of professional conduct provide additional barriers to the effective entry into marriage contracts. In the estate-planning context, joint representation of both spouses is a common and cost-effective occurrence that rarely raises significant ethical dilemmas.<sup>166</sup> Yet, in the context of a premarital agreement, joint representation is verboten.<sup>167</sup> Why is this the case?

The Model Rules of Professional Conduct—and in particular Rule 1.7—prevent a lawyer from representing a client if a concurrent conflict of interest exists.<sup>168</sup> A concurrent conflict potentially exists any time that “the representation of one client will be directly adverse to the other client; or . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . .”<sup>169</sup> Any time a lawyer seeks to engage in dual representation—the representation of two different parties in a matter—a concurrent conflict may exist. Whether a particular dual representation creates a concurrent conflict depends, in part, on whether the clients' interests are aligned. For example, spouses purchasing a home together may typically be represented by the same attorney because their interests are aligned with each other. Even when the parties' interests are not perfectly aligned, dual representation is permitted and often advantageous. The Rule's comment notes, “[f]or example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.”<sup>170</sup> When a lawyer engages in dual representation in a non-litigation matter his role becomes more like that of an intermediary. As an intermediary, “[t]he role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results.”<sup>171</sup>

A concurrent conflict does not necessarily preclude dual representation. Rather, the lawyer may represent both clients if the following requirements are met:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

164. 2012-CA-01153-SCT (¶ 4) (Miss. 2014).

165. *Id.* ¶ 5.

166. See Lauren J. Wolven, *Estate Planner's Guide to Advising Couples About Divorce*, 31 EST. PLAN. 427, 429–30 (2004); John R. Price, *In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 U. MIAMI L. REV. 735, 745–47 (2008).

167. See Barbara Freedman Wand, *Ethical Issues in Representing Husbands and Wives in Estate Planning*, 2 MARQ. ELDER'S ADVISOR 90, 91 (2000); Wolven, *supra* note 167, at 430.

168. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).

169. *Id.*

170. *Id.*, at cmt. 28.

171. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 130 cmt. c (AM. LAW INST. 2000).

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.<sup>172</sup>

In some instances, however, dual representation is prohibited even if both parties agree to waive the conflict in accordance with Rule 1.7.<sup>173</sup> These cases arise when the conflict is “nonconsentable” and, therefore, cannot be cured by informed client waiver.<sup>174</sup> Whether a conflict is consentable or nonconsentable depends on a variety of circumstances, including the type of legal work involved.

#### A. Rule 1.7 and the Prohibition on Dual Representation in Premarital Agreements

Only a handful of courts, scholars, and practitioners have seriously considered the issue of dual representation in premarital agreements. Those who have done so have typically compared the potential for conflict to divorce and have, thus, concluded that the conflict is nonconsentable.<sup>175</sup> This comparison is misplaced because drafting premarital agreements “is the antithesis of what the matrimonial attorney ordinarily does.”<sup>176</sup> Divorce attorneys spend much of their time dissolving failed partnerships—whereas premarital agreements seek to form successful ones.<sup>177</sup> Divorce involves litigation—whereas premarital agreements are transactional in nature. The role of the attorney should be much different in the two contexts. In other words, “[c]onduct that might be appropriate in a divorce litigation will be inappropriate in trying to form the relationship between the parties.”<sup>178</sup>

Opinions and scholarship adopting the view that divorce presents a nonconsentable conflict further illustrate the distinctions between the two contexts. In an advisory opinion, the Utah State Bar concluded that the “concurrent representation of both parties in a divorce is an ethically unacceptable practice.”<sup>179</sup> In support of its decision the Utah State Bar explain that: (1) “dual representation tends to erode confidence in the courts as a tool for the equitable resolution of disputes”; (2) “the court is presented with only one view of the facts in the divorce, substantially reducing the court’s ability to protect both parties”; and (3) “dual representation can foster actual impropriety by facilitating a fraud on the court.”<sup>180</sup> The Vermont Supreme Court expressed similar concerns with respect to custody decisions made incident to divorce.<sup>181</sup> Courts are obligated to consider the best

172. MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2013).

173. See, e.g., *Ware v. Ware* 687 S.E.2d 382, 389 (W. Va. 2009); MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2013).

174. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 28 (AM. BAR ASS’N 2013).

175. See, e.g., *Ware*, 687 S.E.2d at 389.

176. GARY N. SKOLOFF ET AL., DRAFTING PRENUPTIAL AGREEMENTS § X-B (2016).

177. *Id.*

178. *Id.*

179. *Utah State Bar Ethics Advisory Opinion Committee Opinion #116*, UTAH B.J., Nov. 1992, at 21, 23.

180. *Id.* at 21.

181. *Barbour v. Barbour*, 505 A.2d 1217, 1220–21 (Vt. 1986).

interest of the child in making custody decisions.<sup>182</sup> Dual representation, however, could impede this function because it “does not insure that a full and complete presentation of the relevant factors relating to custody will occur.”<sup>183</sup> None of these justifications, however, seem to dictate a prohibition on dual representation in the drafting of a premarital agreement because premarital agreements do not require court approval or other involvement.

Yet, this distinction has traditionally been ignored. In *Ware v. Ware*, the court noted that it had previously held that dual representation was never permitted in divorce proceedings.<sup>184</sup> The court then reasoned that dual representation in the premarital agreement setting was likewise nonconsentable:

Like divorce actions, the nature of prenuptial agreements is such that the parties’ interests are fundamentally antagonistic to one another. Indeed, the purpose of a prenuptial agreement is to preserve the property of one spouse, thereby preventing the other from obtaining that to which he or she might otherwise be legally entitled. In this circumstance, as in a divorce, “[t]he likelihood of prejudice is so great with dual representation so as to make adequate representation of both . . . [parties] impossible. . . .” Accordingly, the Court holds that one attorney may not represent, nor purport to counsel, both parties to a prenuptial agreement.<sup>185</sup>

*Ware* goes too far in assuming that a couple’s interests are “fundamentally antagonistic to one another” in the negotiation of a premarital agreement and the comparison to divorce is misplaced. Divorce is, of course, often antagonistic and adversarial in nature. Properly drafted premarital agreements, however, are prepared with an eye towards a successful relationship. The spouse’s interests are, in fact, aligned and dual representation should be permitted in most cases. In executing a premarital agreement spouses seek to decide in advance how they will manage and allocate their resources. Yet, most authorities and practice guides seem to concur with *Ware*.<sup>186</sup> Because “[t]he negotiation of such an agreement often involves the waiver of statutory rights otherwise available to spouses,” there exists “an actual conflict of interest that requires separate counsel.”<sup>187</sup>

Notably, not all jurisdictions and scholars agree that divorce presents a nonconsentable conflict of interest.<sup>188</sup> Some have even suggested that an attorney

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182. *Id.* at 1219.

183. *Id.* at 1221; *accord In re Themelis*, 83 A.2d 507 (Vt. 1951).

184. *Ware v. Ware*, 687 S.E.2d 382, 389 (W. Va. 2009).

185. *Id.* (citations omitted) (quoting *Walden v. Hoke*, 429 S.E.2d 504, 505 (W. Va. 1993)).

186. *See, e.g.*, Naomi Cahn & Robert Tuttle, *Dependency & Delegation: The Ethics of Marital Representation*, 22 SEATTLE U.L. REV. 97, 101 (1998) (recommending separate representation when the “spouses’ interests are in conflict” such as when “a man and woman who intend to marry want to execute a prenuptial agreement”).

187. *Wand, supra* note 168, at 91.

188. *See, e.g.*, Burton Young & Lori H. Bienstock, *Every Lawyer’s Danger Zone - Beware: Conflicts of Interest Can Arise from Seemingly Innocent Actions*, FAM. ADVOC., Fall 1983, at 8, 10 (noting that “[t]he Missouri, Oregon, and Colorado State Bar Associations . . . permit dual representation in divorce actions if there are prior agreements concerning certain issues of custody, settlement, and division of

could serve as a mediator to the divorce action—representing neither party and acting as a sort of independent third party.<sup>189</sup> Further, the mediator may also be able to represent both parties in the preparation of the ultimate settlement agreement and court pleadings.<sup>190</sup> Utah accepted this approach—despite its *per se* bar on dual representation in divorce litigation—provided that the parties give informed consent, the lawyer can reasonably believe the dual representation will not adversely affect either client, and the spouses are committed to the settlement with no remaining points of contention.<sup>191</sup> Notwithstanding the recent reconsideration of conflicts in the divorce context, states seem to be hesitant to reconsider conflicts in the premarital agreement context.

## B. The Estate Planning Model—A Better Alternative?

Estate planners wrestled with the issue of dual representation in the 1990's and, in so doing, promulgated workable and sensible guidelines interpreting the Rules of Professional Conduct.<sup>192</sup> As explained in more detail in Part V, the estate planning approach provides an alternative, and better, approach to premarital agreements. Because “estate planning is fundamentally nonadversarial in nature,” different ethical considerations are implicated than are in litigation.<sup>193</sup> Furthermore, “the role of the married couple as a unit for many societal purposes suggests . . . that it is appropriate to view the couple as unified in goals and interests until shown otherwise.”<sup>194</sup> The fact that the spouses may have some differing interests of objectives should not preclude the representation of both spouses so long as their overall objectives are aligned.<sup>195</sup> Marriage does not automatically “suggest a limitation on the lawyer’s duties of independent judgment and loyalty.”<sup>196</sup> Only if there is a substantial risk that a conflict of interest will arise is it necessary for the lawyer to obtain a waiver or to decline to engage in the dual representation.<sup>197</sup>

Representing both spouses can, of course, raise some ethical questions. Does the lawyer have two separate attorney-client relationships—one with each

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property”); accord Steven C. Bowman, *Idaho’s Decision on Divorce Mediation*, 26 IDAHO L. REV. 547, 561–62 (1989/1990).

189. See Bowman, *supra* note 189, at 562–66.

190. E.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Opinion 736 (Jan. 3, 2001), 2001 WL 670915.

191. Utah State Bar Ethics Advisory Op. Comm., Opinion Number 05-03 (Sept. 30, 2005), 2005 WL 3779039.

192. See Special Study Committee on Professional Responsibility, *Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765 (1994) [hereinafter Special Study Committee]; THE AM. COLL. OF TR. AND ESTATE COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006) [hereinafter ACTEC COMMENT].

193. ACTEC COMMENT, *supra* note 193, at 91; accord Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 352–54 (1996); Daniel Hoffheimer, *Professionalism in Estate Planning, Trust, and Probate Law*, 14 OHIO PROB. L.J. 84 (2004).

194. Special Study Committee, *supra* note 193, at 779.

195. See ACTEC COMMENT, *supra* note 193, at 91–96.

196. Special Study Committee, *supra* note 193, at 779.

197. *Id.* at 780.

client?<sup>198</sup> Or, does the lawyer represent the spouses together as joint clients?<sup>199</sup> The answer to this question could affect questions of confidentiality and disclosure.<sup>200</sup> Although the authorities differ on the precise answer to nature of the representation, they tend to agree on how a lawyer should proceed in representing both spouses.<sup>201</sup> The lawyer should notify the spouses of the ground rules from the outset.<sup>202</sup> Specifically, the lawyer ought to explain the advantages and disadvantages of shared representation.<sup>203</sup> The lawyer should also explain that he will adopt a policy of full and mutual disclosure of information to both spouses.<sup>204</sup>

This should be a model for how we treat premarital agreements. Estate planning and premarital agreements are analogous. Estate planning plans for what happens after the death of a person and a premarital contract plans for what happens after the death of a marriage. These two similar situations should be approached in a similar fashion. Just as in estate planning, the attorney should advise both the husband and wife of the implications of joint representation.<sup>205</sup> The couple works together with the one attorney to create a tailored agreement that suits them personally.<sup>206</sup> There would not be a draft of the agreement until after the couple has discussed what is important to them and their future together.<sup>207</sup>

## V. THE COLLABORATIVE APPROACH

The validity of premarital agreements should not turn on separate legal representation or financial disclosure. Neither requirement has proven particularly helpful in assessing whether spouses have freely executed an agreement. They have, however, proven quite successful in increasing the barriers to entry into premarital agreements. These requirements have also proven successful in helping to perpetuate outdated gender stereotypes in the courts. Given that these requirements were essentially imported from the divorce setting—a setting that is in every way the antithesis of a successful premarital agreement—this is hardly surprising.

Lawyers cost money, and “[s]eparate lawyers means additional expense for the clients even though the additional protection is often unnecessary.”<sup>208</sup> Requiring two attorneys can make the process unnecessarily contentious and, in many instances, may be counterproductive.<sup>209</sup> A premarital agreement should be based on

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198. See Cahn & Tuttle, *supra* note 187, at 102.

199. *Id.*

200. See *id.* at 102–103.

201. See *id.*

202. See EVE PREMINGER ET AL., NEW YORK PRACTICE SERIES: TRUSTS AND ESTATES PRACTICE IN NEW YORK § 6:126 (2015–16 ed. 2015); GERRY BEYER, 10 TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 53.7 (3rd ed. 2002).

203. See PREMINGER, *supra* note 203, at § 6:126; BEYER, *supra* note 203, at § 53.7.

204. See PREMINGER, *supra* note 203, at § 6:127.

205. See *id.*

206. See Donna Beck Weaver, *The Collaborative Law Process for Prenuptial Agreements*, 4 PEPP. DISP. RESOL. L.J. 337 (2004).

207. See *id.*

208. Cahn & Tuttle, *supra* note 187, at 101.

209. *Id.* at 102.

a relationship of “mutual trust and confidence” by the couple.<sup>210</sup> Using a single attorney to represent the couple would help build this trust and confidence. Details of the couple’s future would be discussed openly. This openness and honesty builds trust at the beginning of the couple’s marriage. It also obviates the need for a specific disclosure of financial assets because such disclosure would be a part of that process.

Mandating that a couple obtain separate representation takes something that should be a team decision between the future spouses and transforms it into something more along the lines of an adversarial event. It is this adversarial nature of premarital agreements that may be deterring couples from considering them.<sup>211</sup> Using one attorney to represent the couple would make drafting a premarital agreement a collaborative team event by allowing the couple to work together to draft the contract.<sup>212</sup> This not only takes the adversarial nature out of drafting a premarital agreement, but it also requires the couple to discuss major sources of disagreement before entering marriage and provide for better communication about finances once the couple is married.<sup>213</sup>

Ethical considerations are different in the dual representation/collaborative model. As discussed above, estate planning provides a better comparison for interpreting the applicable ethical considerations. In applying Rule 1.7 to dual representation in premarital agreements, the spouses should be presumed to have the same goals and interests. The fact that the spouses may be altering their default rights should not automatically be viewed as creating a conflict of interest. At the outset, the lawyer should explain the following to the spouses:

1. That they each have the right to seek separate, independent legal representation; and the benefits of doing so.
2. That the lawyer is not acting as an advocate for either spouse. Rather, he is acting more as a mediator to facilitate the spouses reaching a mutually beneficial agreement.
3. That all communications shared by either spouse with the lawyer will be shared with the other spouse.
4. That both spouses must work together to determine what the terms of their agreement should be.

It would be wise for the lawyer to ask the spouses to sign a waiver and acknowledgement attesting to the forgoing—in accordance with Rule 1.7; however, such waiver is probably not necessary in most cases.

In his first meeting with the clients, the lawyer should explain the default marital property rules in general terms—including alimony, equitable distribution, elective share rights, and community property rights. The lawyer should also inquire into the following:

1. Their reasons for seeking a premarital agreement.
2. The assets, debts, and earning capacity of the spouses.

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210. *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 21 (Fla. 1962).

211. *See Weaver*, *supra* note 207.

212. *See Weaver*, *supra* note 207.

213. *See Allison A. Marston, Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 895 (1997).

3. How the spouses plan to manage their money during marriage and contribute to the expenses of the marriage and family.

4. What rights each spouse should have in the earnings and property of the other spouse—including retirement funds and the family home.

5. What rights a spouse should have if he or she discontinues work for any reason—to care for minor children, care for aging family members, to pursue educational goals, etc.

6. How the spouses believe the property and debts should be divided at death or divorce.

Many spouses will not be able to answer these questions with specificity in their first meeting with the lawyer. To that end, once the lawyer understands the couple's shared goals and has a general picture of their assets, debts, and earning potential, the lawyer should give the spouses a "homework assignment." The lawyer should ask the couple to discuss the forgoing questions and to send him their written answers as well as any additional questions they may have. This approach has several benefits. First, the lawyer and the spouses have a written record of the issues discussed in the preparation of the premarital agreement and proof of the joint involvement of both spouses in the decision making process. This proof may be helpful if a dispute later arises regarding the validity of the agreement or its interpretation. This approach also helps to insure that both spouses are fully engaged in the process and understand the implications of their agreement. Second, and more importantly, by facilitating this conversation the lawyer has helped both spouses better define and communicate their expectations at the outset of the marriage.

If, at any point, the lawyer has reservations about the circumstances surrounding the agreement or its contents, he should withdraw from the representation. For example, the lawyer may determine that one spouse is coercing or otherwise domineering the other spouse in making decisions against his or her interest. The lawyer may realize that the spouses are asking for an agreement that—in light of their assets and resources—is one-sided and unfair to the other spouse. The lawyer may determine that one spouse is not fully engaged in the process or is too reliant on the other spouse. Any of these circumstances may indicate that the lawyer should withdraw from the representation.

### CONCLUSION

The law and the profession should encourage couples to enter into premarital agreements and to do so in a collaborative and productive manner. The barriers that have been erected to protect a spouse in a weaker bargaining position prohibit this from occurring and cause more harm than good. The barriers—financial disclosure and independent legal representation—routinely fail to accomplish any meaningful protection. They are also premised on outdated, sexist, and unsupported assumptions—assumptions which are reiterated by courts and practice guides thus reinforcing unhelpful stereotypes. A collaborative approach, one in which both spouses consult with a single lawyer who helps guide them through the process of outlining their joint goals and expectations, is the better approach. It is better suited to the realities of modern marriage and it facilitates the entry into effective premarital agreements without an antagonistic process.