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LOVERS' CONTRACTS IN THE COURTS: FORSAKING THE MINIMUM DECENCIES

JUDITH T. YOUNGER*

*Or for every prenuptial, is it now a must
That you treat your betrothed with presumptive
mistrust?*

— Judge Michael Eakin¹

INTRODUCTION

People in intimate relationships — spouses or lovers, prospective spouses or lovers — make all kinds of promises to each other.² So long as harmony reigns between the couple, the law is unconcerned with the content, coerciveness, or impact of these lovers' deals. When the parties disagree, however, and one seeks to enforce a promise while the other seeks to avoid it, the law must take some stand. The law treats most of these mutual promises as "domestic" and therefore outside the realm of enforceable contracts.³ It singles out one group of

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1. *Porreco v. Porreco*, 811 A.2d 566, 576 (Pa. 2002) (Eakin, J., dissenting).

2. As one group of commentators describes these promises:

Some are trivial; some are serious. They can range from agreements about who will pick up the wine and who will shop for what is needed to make the meal at a dinner party, to whether his elderly father will be invited to live with them in the family home.

1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 250 (1995).

3. See, e.g., *Balfour v. Balfour*, (1919) 2 Eng. Rep. 571, 580 (K.B.) (holding the

agreements for potential enforcement: those dealing with the financial details of the couple's ultimate breakup. This group contains both premarital and postmarital agreements, which typically alter state-prescribed property rights otherwise available to the couple on dissolution of their marriage, and cohabitation agreements, which can create marriage-like property rights for the couple for whom the state provides none. Two common threads link all three groups: (1) the agreements are made in relationships in which the financial dominance of one member of the couple enables him to impose greater financial risk on the other member than she⁴ would otherwise have chosen,⁵ and (2) parties to the agreements contract about the dissolution of their relationships, possible future events the effects of which are hard to anticipate.⁶

This article focuses on disputes over the enforcement of premarital, postmarital, and cohabitation agreements that reached the highest state courts in American jurisdictions. It covers cases litigated since 2000, a period of time when marriage has been the subject of emotional public debate between those who want to preserve and strengthen it in its traditional form and those who want to change it in some critical way.⁷ In the wake of all the talk, people continue to

agreement was not a binding legal contract but was instead an ordinary domestic arrangement); *Miller v. Miller*, 35 N.W. 464, 465 (Iowa 1887) (holding the contract was without consideration).

4. This author uses pronouns that reflect the greater reality. Men are almost always proponents of these agreements; women are almost always the challengers. Most represented parties had male lawyers. This article therefore uses masculine pronouns for proponents and lawyers; female pronouns for challengers. In the discussions of specific cases the pronouns match the actual parties' sexes.

5. Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 45, 52 (Peter Benson ed., 2001).

6. *Id.* at 52-53. These agreements differ from separation agreements, which the parties negotiate at the end of their relationships. In separation agreements the events about which the parties are contracting are imminent; the parties are therefore more likely to be dealing at arm's length and better able to advance and protect their individual interests. A.L.I., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 7.09 cmt. b (2000) [hereinafter *PRINCIPLES*]. Furthermore, separation agreements are frequently subject to oversight by the trial court. *Id.* § 7.09 cmt. d. This article does not cover them, but see *Stoner v. Stoner*, 819 A.2d 529 (Pa. 2003), discussed *infra* notes 320-331 and accompanying text (technically involving a separation agreement but analyzed as if it were a premarital or postmarital agreement under Pennsylvania law).

7. See, e.g., Defense of Marriage Act, 1 U.S.C. § 7 (2000) (defining marriage for federal purposes as "only a legal union between one man and one woman as husband and wife"); Michael Kinsley, *Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms*, WASH. POST, July 3, 2003, at A23 (advocating a completely privatized marriage regime, one with no legal significance); Family Research Council, http://www.frc.org/get.cfm?c=ABOUT_FRC (last visited Jan. 7, 2007) (asserting that "[g]overnment has a duty to pro-

marry, divorce, cohabit, and part. The discernible pattern is one of increasingly serial relationships.⁸ As a result, breakup planning becomes more popular and more important. In addition, the cases yield information about current attitudes to marriage, love, money, and the roles of courts and lawyers, and raise again the question of whether marital and cohabitation agreements should ever be enforced.⁹

Part I of this article contains an introductory history of each type of agreement. It surveys the kinds of cases litigated, standards for review, and, using premarital agreements as the template,¹⁰ the special rules of fairness developed for assessing their validity. Part II reviews the cases decided from 2000 to the present. Part III discusses some troubling emerging trends: conflicting cases within single jurisdictions and other judicial errors, the decline of substantive review with a concomitant disregard for dependent spouses, and the mythification of procedural fairness. This article concludes the discussion by offering three possible solutions to achieve just results: (1) enforcing only those contracts for which both sides had independent representation, and a rule that two kinds of contracts, those that leave dependent spouses on welfare and those that fail to provide for reasonable support for homemaker spouses, are unconscionable as a matter of law and therefore unenforceable; (2) requiring advance judicial approval at the time of execution, based on a court's determination that the contract is in the best interests of the parties and that they understand the governing principles and rules; or (3) ceasing to enforce these agreements altogether but according the agreements advisory value for what the parties apparently thought was fair at the time of execution.

mote and protect [traditional] marriage and family in law and public policy"); Freedom To Marry, <http://www.freedomtomarry.org/about.asp> (last visited Jan. 7, 2007) (stating that the Freedom to Marry organization "encourages dialogue with Americans thinking through the need to end discrimination in marriage" and advocates legal recognition of "same-sex marriage").

8. See DEPT OF HEALTH AND HUMAN SERVICES, CTR. FOR DISEASE CONTROL AND PREVENTION, VITAL AND HEALTH STATISTICS SER. 23, NO. 22, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 2-3 (2002).

9. See also Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460, 462-63 (2003) (deeming marital property rights "inchoate" that should not be waivable until the time of divorce, when such rights can be expressly valued); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 69 (1998) (concluding that policy reasons for not enforcing nonmonetary agreements should lead the legal community to "seriously rethink the trend toward enforcement of monetary terms at death or divorce" as well).

10. Those agreements have the longest history of potential enforcement, are the favorite tools for private breakup planning, and account for most of the litigation in this area. UNIF. PREMARITAL AGREEMENT pref. note (1983); see also PRINCIPLES, *supra* note 6, § 7.09 cmt. b.

I. OVERVIEW OF THE LAW OF LOVERS' CONTRACTS

A. A Brief History

Of the three kinds of agreements, premarital agreements are both the most venerable and vogueish. They first appeared in sixteenth century England when litigants began to ask chancery and common law courts to enforce them.¹¹ Couples used them to alter the marital property regime that would otherwise apply to them, and, more specifically, to endow married women with proprietary capacity.¹² Premarital agreements soon became important enough to be joked about in Shakespeare's plays¹³ and incorporated into the original Statute of Frauds.¹⁴ In America premarital agreements prescribing consequences upon death of a spouse won early acceptance.¹⁵ Courts did not receive premarital agreements dealing with divorce as readily. Some courts held them void *ab initio* as contrary to public policy because they were thought to encourage divorce.¹⁶ Starting around 1970, as divorce was becoming easier and more commonplace, judicial attitudes changed.¹⁷ Premarital agreements, whether triggered by death or divorce, now have equal chances for enforcement, are tested by identical standards, and have become the tool of choice for private breakup planning.¹⁸ Courts and legislatures acknowledge their difference from ordinary contracts and therefore accord them different treatment.¹⁹ In 1983 the National Conference of Commissioners on Uniform State Laws approved and promulgated the Uniform Premarital Agreement Act in an effort to eliminate uncertainty and create uniformity in the treatment of these agreements.²⁰ The Act applies only to agreements triggered by divorce.²¹

11. See 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 310-12 (1924).

12. *Id.* at 310.

13. See WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 2, sc. 1. Premarital agreements continue their English theatrical career into the Restoration with William Congreve. See WILLIAM CONGREVE, THE WAY OF THE WORLD act 4, sc. 1, in THE COMPLETE PLAYS OF WILLIAM CONGREVE 389, 449-52 (Herbert Davis ed. 1967).

14. An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. II, c.3 (Eng).

15. See Silbaugh, *supra* note 9, at 72.

16. See, e.g., *Posner v. Posner*, 233 So.2d 381, 382 (Fla. 1970); *Brooks v. Brooks*, 733 P.2d 1044, 1048-49 (Alaska 1987).

17. See *Posner*, 233 So.2d at 385; *Brooks*, 733 P.2d at 1049.

18. PRINCIPLES, *supra* note 6, § 7.01 cmt. e; see, e.g., *Posner*, 233 So.2d at 385.

19. PRINCIPLES, *supra* note 6, § 7.01 cmt. a.

20. UNIF. PREMARITAL AGREEMENT ACT, pref. note (1983). Similarly in 2000, the American Law Institute adopted and promulgated its *Principles of the Law of Family Dissolution*, chapter 7 of which applies to agreements. PRINCIPLES, *supra* note 6, § 7.01-7.12. Its scope is broader than the Uniform Act in that it covers premarital, postmarital, cohabitation, and separation agreements. *Id.* § 7.01 cmt. b. Its application, however, is

Although twenty-six states have passed the Act,²² the cases within the scope of this article demonstrate that by and large it has not achieved its goals.

Postmarital agreements were impossible in England under the common law system because the law considered spouses a single person, embodied in the husband.²³ In contrast, the civil law system prevailing in France and Spain considered spouses to be two separate individuals.²⁴ Each spouse had control of his or her own separate property and was to be an equal partner in community assets.²⁵ Because the husband was the exclusive manager of the community, presumptively only he could contract with third parties with respect to community assets;²⁶ if he consented, the wife could also make such contracts.²⁷ The spouses could contract with each other for dividing, of the New World br sharing, or owning earnings and gains during marriage.²⁸ Settlers ought both common law and civil law systems, although the common law exerted a pernicious influence on the civil law, diminishing the wife's ownership in her separate property by making the husband its manager and reducing her interest in the community assets from a "partnership" to a mere expectancy.²⁹ It was not until the Married Women's Property Acts were passed in the mid-nineteenth century that wives in the common law states were given separate legal capacity, including the power to contract with respect to their property, and wives in community property states regained the power to manage their separate assets.³⁰ Wives' empowerment as true partners in the community had to await the advent of an expanded equal protection doctrine and the passage of state equal

similarly limited to divorce or the equivalent and does not apply on dissolution of relationships by death. *Id.* Its enunciated goals with respect to premarital agreements were similar to those of the Uniform Act, namely to achieve consensus on the appropriate rules to apply and the rationales offered to explain them. *PRINCIPLES, supra* note 6, § 7.01 cmt. a.

21. UNIF. PREMARITAL AGREEMENT ACT, pref. note (1983).

22. *Id.*

23. See 2 WILLIAM BLACKSTONE, COMMENTARIES 441 (St. George Tucker ed., 1803).

24. See WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 37, 59, at 55, 116 (2d ed. 1971).

25. *Id.* § 60, at 116-17 (explaining the presumptions relating to spouses' property under Spanish civil law). The Spanish civil law displaced French civil law in North America. *Id.*

26. *Id.* § 61, at 125.

27. *Id.* § 116, at 283-84.

28. *Id.* § 59, at 116.

29. See Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together With Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 53-59 (1981).

30. See *id.* at 61-63 (recounting the advent of the Married Women's Property Acts in American jurisdictions).

rights amendments during the 1970s; as a result these women can now contract with third parties with respect to community assets.³¹ Thus, postnuptial agreements have a much shorter history of enforcement when compared to premarital agreements; they are not made or litigated as frequently and face even more uncertainty in court.³²

Cohabitation agreements are the youngest and rarest of the trio.³³ That cohabitants might have enforceable rights arising from their relationships is certainly not new to the law. Common law marriages in existence in England before Lord Hardwicke's Act³⁴ could be founded on mere agreements to marry or promises to marry in the future followed by consummation.³⁵ Similarly, putative marriages, based on the good faith belief of a spouse that he or she was validly married, were recognized by the civil law system.³⁶ Couples in common law or putative marriages acquire all the rights and obligations of marriage,³⁷ becoming just as "married" as those who engage in ceremonial marriages. Cohabitants who do not qualify as common law or putative spouses may now appeal to contractual or equitable doctrines to settle the economic consequences of their breakups.³⁸ A few states have been interested enough in cohabitants to enact statutes of frauds for their agreements³⁹ or alternative property regimes for their relationships.⁴⁰ Parties rarely make written cohabitation agreements.⁴¹ In the typical case, one party asks the court to find an alleged oral or implied agreement over the other's objection.⁴² Therefore, the court must decide first whether an agreement exists, and, if so, whether to enforce it.

31. See *id.* at 74-75.

32. See, e.g., *infra* text accompanying notes 474-89 (discussing the Tennessee postnuptial agreement case *Bratton v. Bratton*).

33. See PRINCIPLES, *supra* note 6, § 6.03 cmt. b.

34. Marriage Act, 1753, 26 Geo. 2, c. 33 (Eng.).

35. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 223 (3d ed. 2006).

36. DE FUNIAK & VAUGHN, *supra* note 24, § 56, at 96. Some reformed common law states have adopted the doctrine. E.g., MINN. STAT. ANN. § 518.055 (2006) (granting a putative spouse the legal rights of a legally married spouse until she gains knowledge that she is not legally married).

37. See DE FUNIAK & VAUGHN, *supra* note 24, § 56, at 95-97.

38. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391 (2001).

39. See, e.g., TEX. BUS. & COM. CODE ANN. § 26.01 (2006) (providing that premarital and cohabitation agreements must be in writing to be enforceable); MINN. STAT. ANN. § 513.075 (2005) (providing that agreements between cohabitants are only enforceable if they are in writing and signed by the parties).

40. E.g., VT. STAT. ANN. tit. 15, §§ 1201-1207 (2006) (Vermont's civil union statute).

41. See PRINCIPLES, *supra* note 6, § 6.03 cmt. b.

42. See *id.*

B. General Principles for Testing a Contract's Validity, With Premarital Agreements as Possible Templates

Initially a premarital, postmarital, or cohabitation agreement must comply with the rules governing ordinary contracts, including satisfying the requirement of consideration.⁴³ For premarital agreements, entering into the impending marriage constitutes consideration.⁴⁴ The authorities are divided about postmarital agreements, with some holding that staying in the marriage is sufficient consideration and others requiring additional mutual waivers of rights.⁴⁵ Obviously neither the marriage itself nor the act of staying married is possible consideration in the cohabitation cases. One might think that entering the relationship or staying in it should suffice, but the courts have decided otherwise, holding for the most part that agreements will not be enforced if sexual services form an inseparable part of the consideration.⁴⁶ All three kinds of agreements differ from ordinary contracts in the nature of the parties and the relationship between them, their subject matter, and the probable lapse of considerable time between their execution and potential enforcement.⁴⁷ For these reasons, legislatures and courts have developed additional rules for testing premarital agreements,⁴⁸ which in theory, if not in practice, might easily apply to both postmarital and cohabitation agreements as well.

The rules governing the validity of premarital agreements come into play at two possible points in time: (1) they look back to the contract's execution, and (2) they look forward to the time of attempted enforcement.⁴⁹ At execution, a court might test the agreement for both procedural and substantive fairness as it does in the case of ordinary contracts.⁵⁰ At enforcement a court might take a second look at the impact of the agreement on the challenging spouse to be sure that

43. "Ordinary contract" as used in this article means an agreement that is not a premarital, postnuptial, or cohabitation contract.

44. See *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004).

45. See *id.* (asserting that marriage cannot be sufficient consideration under a postmarital agreement because "past consideration cannot support a current promise"); PRINCIPLES, *supra* note 6, § 7.01 cmt. c. (arguing that the distinction as to marriage's sufficiency for consideration between prenuptial and postnuptial agreements "is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any time").

46. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976).

47. See Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 699 (2001).

48. *Id.*

49. *Id.*

50. See E. ALLAN FARNSWORTH, UNITED STATES CONTRACT LAW §§ 5.1-5.3, at 93-107 (rev. ed. 1999) (outlining how courts "police" contracts).

it does not impose a harsh, one-sided result.⁵¹ In practice, the times and standards used by the courts in testing premarital agreements can vary from jurisdiction to jurisdiction⁵² and, unfortunately, as this article will demonstrate, sometimes from case to case within the same jurisdiction.

Another important variable in assessing the validity of these agreements is the official view of the parties' relationship.⁵³ In some states prospective spouses are in a confidential relationship as a matter of law,⁵⁴ in others they are not,⁵⁵ and in still others the court determines if they are in such a relationship based on the facts of the case.⁵⁶ Spouses are almost universally held to be in confidential relationships with each other.⁵⁷ Cohabitants have equitable principles to aid them⁵⁸ and these principles may place them in a similar position as those in confidential relationships. Parties in a confidential relationship have enhanced duties to each other: they owe each other the utmost duty of good faith and full disclosure.⁵⁹ If one secures a benefit from the agreement, or the agreement greatly disfavors one of the parties,⁶⁰ a presumption may arise that the benefited party has exercised undue influence or fraud. The net effect of such a presumption is to require the party seeking enforcement of the agreement to carry the burden of proving that the parties entered into it freely and voluntarily,⁶¹ thus relieving the challenger of the usual burden of proving that they did not.⁶²

In testing premarital agreements for procedural and substantive fairness, courts understandably treat procedure and substance as closely related.⁶³ If the substantive terms of the agreement seem fair enough to the court, it is more willing to overlook defects in the bargaining process.⁶⁴ Conversely, if the terms of the agreement seem

51. See Younger, *supra* note 47, at 701.

52. *Id.* at 717.

53. Friedlander v. Friedlander, 494 P.2d 208, 213 (Wash. 1972).

54. *E.g.*, Cannon v. Cannon, 865 A.2d 563, 566 (Md. 2005).

55. *In re Marriage of Bonds*, 5 P.3d 815, 831 (Cal. 2000); *Mallen v. Mallen* 622 S.E. 2d 812, 815 (Ga. 2005).

56. *Butler v. Butler*, 347 A.2d 477, 480 (Pa. 1975).

57. See, *e.g.*, *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004).

58. See, *e.g.*, *Marvin v. Marvin*, 557 P.2d 106, 122-23 (Cal. 1976) (holding that cohabitants can make express and implied contracts, and they also may utilize equitable remedies such as quantum meruit and constructive and resulting trusts). Cohabitants can use such equitable principles because they may not avail themselves of the marital regime's protections. *Id.*

59. *Friedlander v. Friedlander*, 494 P.2d 208, 213 (Wash. 1972).

60. *Sogg v. Nevada State Bank*, 832 P.2d 781, 784 (Nev. 1992).

61. See *id.*

62. *Fletcher v. Fletcher*, 628 N.E.2d 1343 (1994).

63. See PRINCIPLES, *supra* note 6, § 7.01 cmt. e.

64. *Id.*

especially unfair, the court will scrutinize procedures surrounding its execution more closely.⁶⁵ Courts are certainly not meticulous in distinguishing between procedure and substance and sometimes confuse the two so thoroughly that the grounds of their decisions are completely obscured.⁶⁶

The test of procedural fairness should center on the procurement of the agreement, inquiring into the conduct of the parties and their status vis-à-vis each other, in essence, how did they behave and what were their circumstances?⁶⁷ To be fairly procured an agreement must be voluntarily entered by each party.⁶⁸ The inquiry into voluntariness starts "as a common law review for fraud, overreaching or sharp dealing."⁶⁹ Additionally, it delves further, into "the circumstances of the parties, their experience, the time of the signing of the agreement in relation to the wedding and the representation of each party by independent counsel."⁷⁰

Disclosure is also required.⁷¹ It is closely related to voluntariness⁷² and can have two aspects: the financial status of the parties including assets and income and the rights and obligations the parties would have if no agreement existed.⁷³ The dual character of disclosure follows from the nature of the agreements themselves. They contain waivers or alterations in the schemes of marital property rights prescribed by the states on dissolution of marriage.⁷⁴ These rights take on or lose economic value based on the spouses' assets and earnings.⁷⁵ A waiver or alteration of such rights cannot be voluntary or fair if the waiving spouse does not know both what rights she is giving up and their value, which is illuminated by the other's financial status.⁷⁶ Thus, disclosure of each party's financial status, including assets and income, and knowledge of the parties' legal rights without the agreement should be obligatory. Financial disclosure may be waived,⁷⁷ or

65. *Id.*

66. See, for example, *Hoag v. Dick*, 799 A.2d 391 (Me. 2002), discussed *infra* notes 386-400 and accompanying text.

67. See *Younger*, *supra* note 47, at 700.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. PRINCIPLES, *supra* note 6, § 7.04 cmt. f.

74. See *id.* These elements are found in both premarital and postmarital agreements. Cohabitation agreements create marriage-like rights or obligations that obviously neither party would otherwise have.

75. *Younger*, *supra* note 47, at 700.

76. *Id.*

77. Two states revised the Uniform Premarital Agreement Act § 6 language to avoid the implication that disclosure can be waived. See CONN. GEN. STAT. ANN. § 46b-36g(a)(3) (2006); IOWA CODE ANN. § 596.7(2)(c) (2006).

may become irrelevant because the challenging party had actual knowledge of the other's finances. The extent of the required financial disclosure varies from jurisdiction to jurisdiction and case to case,⁷⁸ depending on the relative sophistication of the parties, the fairness of the substantive terms of the agreement, and other circumstances unique to the litigants. Courts and legislatures do not always recognize that disclosure includes the property rights relinquished as well as the finances of the parties.⁷⁹ Indeed, as Part III asserts, they tend to undervalue the importance of disclosure generally, thus diluting procedural fairness.

The inquiries into voluntariness and disclosure may lead a court to conclude that the agreement resulted from procedural unconscionability, sometimes described as an "absence of meaningful choice on the part of one of the parties."⁸⁰ Although courts purport to insist on substantive fairness at execution,⁸¹ it is an anomaly in the context of premarital agreements. Most contain waivers by which the less wealthy spouse gives up valuable rights, preserving the wealthier spouse's assets for himself or his preferred beneficiaries.⁸² Thus by nature and purpose they are usually "unfair," and the measure of their substantive fairness at execution can only be one of degree. Courts rarely hold agreements invalid on this ground.⁸³ Substantive fairness at enforcement is focused on the impact of enforcing the agreement against the party challenging it.⁸⁴ Such a review gives the court an opportunity to consider events occurring since execution of the agreement to avoid an unfair or unforeseeable result. Here, again, the test may be anomalous; certainly the courts' tolerance for harsh results appears to be increasing. In policing the substance of agreements at both execution and enforcement, the courts may again invoke the term "unconscionable."⁸⁵ At execution it means that the agreement contains "unreasonably favorable" terms for one of the parties to the disadvantage of the other.⁸⁶ At enforcement it means

78. See PRINCIPLES, *supra* note 6, § 6.01 cmt. b.

79. See, e.g., *Stoner v. Stoner*, 819 A.2d 529, 533 (Pa. 2003) (holding that disclosure of statutory rights was not required for an enforceable postnuptial agreement).

80. FARNSWORTH, *supra* note 50, § 5.3, at 107 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

81. See, e.g., *Cannon v. Cannon*, 865 A.2d 563, 584 (Md. 2005).

82. See, e.g., *In re Marriage of Bonds*, 5 P.3d 815, 817 (Cal. 2000). Typical rights relinquished include an equitable or equal division of marital or community assets, continued support in the form of alimony or maintenance on divorce, and rights to elective or intestate shares, homestead, and allowances on death of a spouse. See, e.g., *id.*

83. Since 2000 only one of the states' highest courts has invalidated an agreement on the basis of substantive unfairness.

84. See, e.g., *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 267 (1989).

85. See, e.g., *Mallen v. Mallen*, 622 S.E. 2d 812, 814 (Ga. 2005).

86. FARNSWORTH, *supra* note 50, § 5.3.

an unduly oppressive, harsh, or one-sided effect on the party against whom enforcement is sought.⁸⁷

II. THE CASES

A. Presentation Conventions

Most of the cases raise more than a single procedural or substantive issue, making attempts to classify them by subject matter difficult. This article presents all the cases that raise one or more procedural issues together despite the fact that many implicate questions of substance and interpretation as well.⁸⁸ The cases that raise only substantive issues are sorted into two groups: those dealing with particular subject matter as appropriate for contracting, such as spousal support, and those dealing with substantive fairness of an agreement's terms at execution or its impact at enforcement. Cases involving questions of interpretation are treated together. In all, the cases present a legal disarray: conflicting results, misinterpretations of agreements, harsh consequences for litigants, and seeming lack of concern for legal ethics standards. Although the respective analyses may vary, premarital, postmarital, and cohabitation agreement cases are nevertheless presented together because common issues greatly overshadow any differences.

B. Procedure

1. Voluntariness and the Foreign National Cases

In the much-publicized *Bonds* case⁸⁹ from California, a foreign-born, unrepresented wife signed a premarital agreement on the eve of her wedding to Major League Baseball player Barry Bonds.⁹⁰ In the agreement, she waived all her rights to community property.⁹¹ After a seven-year marriage that produced two children, the couple divorced, and the wife challenged the voluntariness of the agreement.⁹²

87. See *id.*; Richard A. Lord, *Unconscionable Agreements*, in 8 WILLISTON ON CONTRACTS, § 18.10 (4th ed. 1998).

88. Notwithstanding this convention, *Banks v. Evans*, 64 S.W.3d 746 (Ark. 2002), discussed *infra* at notes 621-27 and accompanying text, is presented with other substantive cases due to the unique substantive argument the wife advanced, even though she also made a procedural challenge to the agreement.

89. *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

90. *Id.* at 817.

91. *Id.*

92. *Id.* at 817, 820.

Under the then applicable law,⁹³ a California court could not enforce a premarital agreement if it was not voluntarily entered.⁹⁴ The burden of proving involuntariness was on the challenger.⁹⁵ After the trial court found the agreement voluntarily entered and valid, the court of appeals reversed and directed a retrial on the issue of voluntariness in view of the fact that wife had not been represented at execution of the agreement nor had she, in its opinion, knowingly waived her right to representation.⁹⁶ Upon special appeal, however, the California Supreme Court found the agreement voluntary.⁹⁷ It criticized the intermediate appellate court for giving too much weight to Mrs. Bonds's lack of representation at execution, which it asserted had effectively relieved her of the burden of proving involuntariness, contrary to the legislature's express intent.⁹⁸

Apparently, the supreme court misgauged that intent; the California legislature promptly registered its disapproval of the *Bonds* decision by amending the law.⁹⁹ Under the new statutory subsection, a premarital agreement will be "deemed" involuntary unless the court makes certain specified findings.¹⁰⁰ Perhaps the most important is the finding that the challenger was represented by independent counsel at execution of the agreement or, after being advised to consult independent counsel, executed a written waiver of such representation.¹⁰¹ Other findings required for voluntariness are that an unrepresented challenger was "fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing."¹⁰² The new subsection also requires a writing signed by an unrepresented challenger stating that the terms and effect of the agreement were explained to her and naming the person who gave the explanation.¹⁰³ The court's findings bearing on the

93. CAL. FAM. CODE § 1615 (2000).

94. *Id.*

95. *Id.*; but see PRINCIPLES, *supra* note 6, § 7.04 (substitutes "informed consent" for "voluntariness" and places the burden of proving it on the proponent).

96. *In re Marriage of Bonds*, 5 P.3d 815, 820 (Cal. 2000).

97. *Id.* at 833-34.

98. *Id.* at 836. In conjecturing further on legislative intent, the supreme court expressed the view that by adopting the Uniform Premarital Agreement Act, the legislature did not intend the voluntariness of a premarital agreement to be examined as if the prospective spouses were in a fiduciary or confidential relationship. *Id.* at 832.

99. CAL. FAM. CODE § 1615(c) (2006).

100. *Id.*

101. *Id.*

102. *Id.* Additionally, the new subsection provides that the challenger have at least seven days between presentation of the agreement and being advised to consult counsel and the time the agreement was signed, that the challenger was proficient in the language of the explanation and the language of the agreement, and that there was no duress, fraud, undue influence, or lack of capacity of the parties. *Id.*

103. *Id.*

determination of voluntariness may include anything else "the court deems relevant."¹⁰⁴ The amendment, well-intentioned but cumbersome, is an obvious attempt to emphasize the importance of independent counsel for both parties while preserving the freedom of dispensing with it if a party chooses to do so.

As a result of this statute, in California voluntariness now means independent representation, or a knowing waiver of representation *and* marital property rights.¹⁰⁵ While enhancing the position of the challenging spouse, the new law imposes a heavy burden on counsel for the represented party.¹⁰⁶ In the performance of his duty to the client, he is obligated to do everything necessary to insure the agreement's enforceability.¹⁰⁷ That means advising the other party to consult independent counsel, getting a written waiver from a party who persists in refusing independent counsel, explaining the terms and effects of the agreement to the unrepresented party as well as the rights and obligations she will give up by signing it, memorializing the explanation, and identifying himself as the provider in writing for signature by the unrepresented party before execution of the agreement.¹⁰⁸ Why the legislature did not simply make representation by independent counsel a minimum requirement for voluntariness, as it did for validity of support waivers in another amendment to California's Premarital Agreement Act contained in the same bill, is unclear.¹⁰⁹ As a guide to lawyers drafting premarital agreements and to courts passing on their validity, the utility of this list of statutory factors is diminished by the legislature's provision allowing consideration of "any other factors the court deems relevant."¹¹⁰ Such a clause leaves interested parties the task of divining and trying to plan for whatever those other factors might be.¹¹¹

104. *Id.*

105. CAL. FAM. CODE § 1615 (c) (Deering 2006). While the statute affords the challenging spouse much more information, there is no guarantee that she will be able to "process" it. See Trebilcock & Elliott, *supra* note 5, at 62-64 (describing "information failure" in family financial arrangements, sometimes where one party lacks the ability to process information).

106. CAL. FAM. CODE § 1615 (c).

107. See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004) (requiring lawyers to represent clients diligently).

108. *Id.*

109. S.B. 78, 2001-02 Reg. Sess. (Cal. 2001). See *infra* note 531 and accompanying text.

110. CAL. FAM. CODE § 1615(c)(5).

111. The new law contains one other noteworthy change on the subject of financial disclosure. The new provision is described in the bill's summaries as having much more impact than it really has: "this bill . . . [c]larifies that pre-marital agreements are not enforceable . . . if the party against whom enforcement of the agreement is now sought did not, prior to signing the agreement, receive a *full*, as well as fair and reasonable disclosure, of the property or financial obligations of the other party." 3rd Reading, S.B. 78,

In two cases very similar to *Bonds* involving foreign nationals, the supreme courts of Montana and North Dakota, applying their respective versions of the Uniform Premarital Agreement Act, invalidated agreements that the prospective wife had not voluntarily entered.¹¹² In the *Shirilla* case from Montana, Steve and Natalia struck up a romance via the internet; he went to Russia to meet her, arranged for her fiancée visa, and brought her and her son to the United States.¹¹³ As the courtship progressed, he presented her with a premarital agreement that kept the parties' property separate during marriage and limited her rights to maintenance on divorce.¹¹⁴ Initially, Natalia refused to sign it because of her limited comprehension of English.¹¹⁵ After trying unsuccessfully to get help from a foreign exchange student in translating the agreement, Steve hired a lawyer for Natalia, but the lawyer did not speak Russian.¹¹⁶ Although "the lawyer expressed reservations about having Natalia sign the agreement," any advice he gave her "was without the benefit of a translator."¹¹⁷ Shortly after the couple married, Steve fell and incurred a traumatic head injury.¹¹⁸ He returned home to find that his wife had moved out and that his court-appointed guardian had bought her a new station wagon and was paying her expenses.¹¹⁹ Five months after the wedding, Steve filed for divorce, and Natalia successfully challenged the voluntariness of the agreement.¹²⁰ As the court explained her situation in rendering its decision, "Natalia gave up her life in Russia and came to Montana to marry Steve."¹²¹ She "did not want to return to Russia;" marriage was the only way to remain in the United States legally, and Steve insisted on a premarital agreement.¹²² No one

2001-02 Reg. Sess. (July 17, 2001) (Cal.), available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0051-0100/sb_78_cfa_20010718_222354_asm_floor.html. This summary is an overstatement of the bill's accomplishment. All the bill does is to add the word *full* to the quantum of "fair and reasonable" financial disclosure, which, if provided before execution of an unconscionable agreement, renders it valid. Under the plain language of the law, an agreement's proponent in fact need not prove the challenger received financial disclosure if he can establish that she entered the agreement voluntarily.

112. *In re Marriage of Shirilla*, 89 P.3d 1, 3-4 (Mont. 2004); *Peters-Riemers v. Riemers*, 2002 ND 72, 644 N.W.2d 197, 206-07.

113. *Shirilla*, 89 P.3d at 2.

114. If the marriage ended before Natalia got a permanent visa, husband agreed to pay her transportation back to Russia and maintenance of \$5,000. If it ended after two years, maintenance went up to \$7,500. *Id.* at 3.

115. *Id.*

116. *Id.* at 4.

117. *Id.* at 3-4.

118. *Id.* at 2.

119. *Shirilla*, 89 P.3d at 2.

120. *Id.* at 4.

121. *Id.*

122. *Id.*

translated it for her, and she signed it without understanding it.¹²³ The court thought these circumstances amounted to "coercive pressure" that made the agreement involuntary and unenforceable.¹²⁴

In the North Dakota case, *Peter-Riemers v. Riemers*,¹²⁵ Roland and Jenese met in Belize while he was vacationing there.¹²⁶ He was married but falsely told Jenese that he was divorcing his wife.¹²⁷ Jenese was not a United States citizen, but "at Roland's invitation, [she] left Belize and moved to North Dakota."¹²⁸ He set her up in an apartment and divided his time among her, his wife and five children in another town, and other women with whom he had extra-marital affairs.¹²⁹ After Jenese had Roland's child, Roland divorced his previous wife. Three days before the marriage, he presented Jenese with a premarital agreement prepared by his lawyer.¹³⁰ She was not represented by counsel before or at execution of the agreement but instead read the agreement in "the same room, at the same table, where Roland and his attorney sat."¹³¹ The agreement eliminated the possibility of divisible marital property on divorce but did not prohibit an award of alimony.¹³² Roland's financial disclosure in the agreement understated his net worth by about fifty percent compared to information he had given earlier on loan applications.¹³³ A month after execution of the agreement, Roland sponsored Jenese's application for permanent residence.¹³⁴ Only a year into the marriage, after Roland physically abused her on several occasions,¹³⁵ Jenese filed for divorce. She challenged the premarital agreement as involuntary and unconscionable.¹³⁶ Both the trial court and the Supreme Court of North Dakota agreed.¹³⁷ The circumstances of execution created such a "coercive

123. *Id.*

124. *Id.* at 5. The supreme court affirmed the trial court's property division and maintenance award to the wife. She was allowed to keep the Subaru station wagon bought for her by the husband's guardian, along with the property she brought to the marriage; husband was ordered to pay the fees for her immigration attorney and maintenance of \$1,000 a month for twenty months. *Id.* at 5.

125. *Peters-Riemers v. Riemers*, 2002 ND 72, 644 N.W.2d 197.

126. *Id.* at 200.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 206.

131. *Id.*

132. *Id.*

133. *Id.* In the premarital agreement, Roland disclosed a net worth of \$473,724, while a few months earlier, he had represented on various loan applications net worths of \$1,341,500, \$683,683, and \$706,178. *Id.*

134. *Id.* at 200.

135. *Id.*

136. *Id.* at 206-07.

137. *Id.* at 207.

environment" that Jenese's reading of the agreement was "cursory and her understanding of its consequences limited."¹³⁸ In addition, Roland's financial disclosures did not meet the statutory standard of fairness and reasonableness, and Jenese did not waive disclosure or have notice of the "true state" of Roland's property or financial obligations.¹³⁹

2. *Conflicting Cases in Montana and North Dakota*

The Montana Supreme Court and the North Dakota Supreme Court have each issued an inconsistent decision that must have been wrongly decided if *Shirilla* and *Peter-Riemers* were correctly decided. In the *Wilkes* case from Montana,¹⁴⁰ the parties to the premarital agreement were Mary, a twenty-one-year old "developmentally disabled" young woman, and Lawrence, a sixty-two-year old widower in poor health.¹⁴¹ The two had been living together in Lawrence's home for four months before they married.¹⁴² Lawrence "was retired and received social security benefits as his only income; Mary was unemployed and received social security disability benefits."¹⁴³ Two days before their marriage, Lawrence brought Mary to his attorney's office, where each received a copy of a premarital agreement the attorney had prepared setting out the property of each without listing the values of assets.¹⁴⁴ The agreement provided that each party was to retain his or her separate property, whether acquired before or during the marriage, free from any claim of the other.¹⁴⁵ Lawrence and Mary signed and were married as planned.¹⁴⁶

After Lawrence died nearly two years later, Mary challenged the validity of the agreement on the grounds that she was incapable of understanding it when she signed it, the agreement was unconscionable, and Lawrence had not provided adequate disclosure.¹⁴⁷ The

138. *Id.* at 206.

139. *Id.* at 207. The supreme court upheld the trial court's division of marital property and its maintenance award: Roland was to transfer three parcels of realty to Jenese or \$180,000, pay maintenance of five hundred dollars a month for five years and Jenese's attorney's fees of thirty thousand dollars. *Id.* at 210; *Peters-Riemers*, No. C-00-42, slip op. at 4-8 (D. N.D. May 17, 2001).

140. *Wilkes v. Estate of Wilkes*, 27 P.3d 433 (Mont. 2001).

141. *Id.* at 434.

142. *Id.*

143. *Id.* at 435.

144. *Id.* at 434. He had realty, logging equipment, two cars, and a boat. She had personal effects, a bed, and two dressers. *Id.* at 435.

145. *Id.*

146. *Wilkes*, 27 P.3d at 435.

147. *Id.* at 435-36.

trial court found against her on all three points.¹⁴⁸ It made its determination about Mary's capacity to enter the agreement on the basis of lay testimony alone; no experts were called.¹⁴⁹ Chief among the witnesses on this issue and the one on which the trial court most relied was Lawrence's lawyer, who prepared the agreement and who testified that he explained it to Mary.¹⁵⁰ The court held that Mary did not meet her burden of establishing her incompetence.¹⁵¹ It also rejected her position on substantive and procedural unconscionability.¹⁵² On this issue the trial court made two mistakes: it incorrectly described the impact of the premarital agreement on Mary, and it ignored the procedural defects in the bargaining process.¹⁵³ The court erroneously thought that Mary would share in any assets Lawrence acquired during the marriage under the agreement,¹⁵⁴ thus misreading its plain language, which provided that Mary would share nothing because property whether "now owned or hereafter acquired" was to be free from the claims of the other.¹⁵⁵ Additionally, the trial court viewed the unconscionability issue as one of substance only, neglecting the procedural aspects of the case completely: the comparative ages and experience of Lawrence and Mary, her developmental disability, that Lawrence took her to his lawyer two days before the wedding to sign the premarital agreement that had not assigned values to Lawrence's assets, and that she did not have independent legal representation.¹⁵⁶

148. *Wilkes v. Estate of Wilkes*, No. DV-99-61, slip op. at 4-5 (D. Mont. June 2, 2000).

149. *Id.*

150. *Id.* at 5. "The Court has no doubt that Mary's reading comprehension is below the norm, but she was not required to rely upon her own reading of the prenuptial agreement as Mr. Evans reviewed it in detail." *Id.* The trial judge did not say that Mr. Evans made any explanation to Mary of the rights she gave up by signing it, however. *Id.*

151. *Id.*

152. *Id.*

153. *Wilkes*, No. DV-99-61, slip op. at 5.

154. It explained that "[t]he mere fact that Mary functions at a low intellectual level does not make it less conscionable that she keeps what she brought into the marriage and shares only whatever might have been added to Wilkes' premarital assets during the course of marriage." *Id.* at 4.

155. *Id.* at 2 (reciting the language of the agreement).

156. The district court made still a third mistake about disclosure, equating the superceded, less onerous standard of "fair" disclosure, with the current, more exacting standard of "fair and reasonable" disclosure. *Id.* at 5. See MONT. CODE ANN. § 72-2-224(2)(b)(i) (2005). In two earlier cases, the court defined the old standard, *In Re Estate of Thies v. Lowe*, 903 P.2d 186, 190 (Mont. 1995) and *Wiley v. Iverson*, 985 P.2d 1176, 1181 (Mont. 1999). In *Wiley* the court stated:

Fair disclosure contemplates that each spouse should be given information of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental facilities because of their pending marriage.

Wiley, 985 P.2d at 1181. Presumably the new standard was tougher because it added

In affirming the trial court's decision, the supreme court accepted the trial court's erroneous assessment of the impact of the agreement on Mary and also failed to deal with the procedural defects in the bargaining process although they were patent and egregious. In a special concurrence, two justices correctly described the impact of the agreement on Mary and expressed dismay at the procedural defects in the bargaining process, asserting that although the trial court's use of "buzz words" ensured that the disclosure in the case cleared legal hurdles, the agreement's procurement certainly would not pass a "smell test."¹⁵⁷ The majority did not discuss the issue of Mary's ability to enter the agreement understandingly. It saw no connection between her capacity and the voluntariness of the agreement.¹⁵⁸ The court's failure to connect capacity to voluntariness may account for its inconsistent decision, three years later, in the *Shirilla* case, which presented remarkably similar facts to those in *Wilkes*. Mary in *Wilkes* was developmentally disabled;¹⁵⁹ Natalia in *Shirilla* did not understand English.¹⁶⁰ These factors affected each woman's ability to understand the agreement she signed. At the time of execution, each was already living with her prospective husband and was completely dependent on him. Neither was represented by independent counsel, and each signed the agreement in a coercive environment. In *Shirilla*, the court attempted to distinguish *Wilkes* by claiming that neither of the issues in *Wilkes*, "capacity and unconscionability," were implicated in that case.¹⁶¹

Shirilla and *Wilkes* are in fact about the same issues: procedural unconscionability and voluntariness. The ability of a party to understand the language in which an agreement is written bears on the issue of whether that party entered it voluntarily, as does the mental

"reasonable" to "fair" disclosure. *Id.* The trial judge in *Wilkes*, however, said that even if the new standard was more onerous than the old, the disclosure here was adequate. *Wilkes v. Estate of Wilkes*, No. DV-99-61, slip op. at 5 (D. Mont. June 2, 2000).

157. *Wilkes v. Estate of Wilkes*, 27 P.3d 433, 438 (Mont. 2001) (Nelson, J., concurring). As the concurrence explained:

I remain troubled that a 62-year old, sophisticated businessman can take his 21-year-old developmentally disabled, unsophisticated bride-to-be to his attorney and, in summary fashion and without her being separately represented by counsel, obtain her signature on a prenuptial agreement that effectively divests her of all interest in his property upon his death.

Id. The concurrence was also troubled by the trial court's treatment of the disclosure standard but acquiesced: "Even with [the trial court's] error, however, I do not disagree that the court used enough of the right buzz-words and made sufficient findings to bring this case within the law that actually applies." *Id.*

158. The majority stated that "[b]ecause voluntariness is not an issue, we need not further analyze the agreement." *Id.* at 437.

159. *Id.* at 434.

160. *In re Marriage of Shirilla*, 89 P. 3d 1, 3 (Mont. 2004).

161. *Shirilla*, 89 P.3d at 4.

capacity of a party. The court in *Shirilla* conceded as much, undercutting its own assertion about capacity by quoting from the California *Bonds* decision, which lays out the link between the two: "the party seeking to avoid a premarital agreement may prevail by establishing that the agreement was involuntary, and that evidence of *lack of capacity*, duress, fraud, and undue influence . . . would be relevant in establishing the involuntariness of the agreement."¹⁶²

Similarly in North Dakota, the state supreme court reached the opposite result from *Peters-Riemers* in *Binek v. Binek*,¹⁶³ although the cases had similar facts and implicated the same issues: voluntariness, disclosure, and unconscionability. In *Binek*, the husband, Theodore, presented the premarital agreement to his wife, Ruth, two days before the wedding by leaving it on a table to be discovered by her and her sister.¹⁶⁴ Theodore said that he would not marry if Ruth did not sign it.¹⁶⁵ He was represented by counsel at signing, but she was not.¹⁶⁶ The parties divorced more than eighteen years later, when Ruth was seventy-two years old and Theodore was eighty-one.¹⁶⁷ She challenged the agreement, arguing that "she did not enter it voluntarily, it [was] unconscionable," made without adequate disclosure, and it only applied to dissolution of the marriage by death of a spouse and not divorce.¹⁶⁸ Since execution of the agreement, the couple's financial status had deteriorated.¹⁶⁹ Theodore's net worth had fallen from about six hundred thousand dollars to two hundred thousand dollars; his income was fifteen thousand dollars a year, mostly from social security benefits.¹⁷⁰ Ruth's net worth had dropped from about thirty thousand dollars to virtually nothing; her income was less than five thousand dollars a year from social security.¹⁷¹ Without the three hundred dollars a month she had been receiving in interim spousal support during the divorce proceedings from Theodore, she would be forced to go on welfare.¹⁷²

The state legislature enacted the Uniform Premarital Agreement Act just a few days after the Bineks signed their agreement, and thus the Act did not technically govern.¹⁷³ Nevertheless, the court applied

162. *Id.* (quoting *In re Marriage of Bonds*, 5 P.3d 815, 825-26 (Cal. 2001)) (emphasis added).

163. 2004 ND 5, 673 N.W.2d 594 (N.D. 2004).

164. *Id.* at 596.

165. *Id.*

166. *Id.*

167. *Id.* at 597.

168. *Id.* at 598.

169. *Binek*, 673 N.W.2d at 598.

170. *Id.* at 596-97.

171. *Id.* at 597.

172. *Id.* at 597, 599.

173. *Id.* at 597.

relevant case law decided under the Act because common law requirements were analogous.¹⁷⁴ The trial court rejected Ruth's challenges to the agreement, awarding Theodore all the couple's assets except for the personalty in Ruth's possession and some receivables from her children that she considered uncollectible.¹⁷⁵ The court discontinued any spousal support.¹⁷⁶ Both the district court and the Supreme Court of North Dakota treated the premarital agreement as if it applied to divorce despite its failure to mention divorce and its clear focus on spousal death rights.¹⁷⁷ Downplaying the fact that Ruth had only two days between presentation of the agreement and the wedding, and that Theodore would not proceed with the wedding if she did not sign it, the supreme court concluded that these circumstances did not deprive Ruth of an opportunity to consult legal counsel.¹⁷⁸ It also rejected her arguments that Theodore failed to make a full disclosure, finding that what she knew at the time of signing the agreement was sufficient.¹⁷⁹ However, she seemed to have *known* only one thing: that he owned a coal mine.¹⁸⁰ She testified that she *guessed* that he owned his house; she was *told* by her family that he was worth over a million dollars.¹⁸¹ She only later discovered during the divorce proceedings that he had been worth six hundred thousand dollars at the time of the agreement's execution.¹⁸²

The court tested the agreement for substantive unconscionability at execution and enforcement.¹⁸³ It found the agreement was not unconscionable at the time of execution because "it provided a means for [wife] to keep her own assets and allow them to grow and [husband] was obligated to support [wife] throughout the marriage."¹⁸⁴ This justification is disingenuous because Ruth's assets at the time of the marriage were only thirty thousand dollars, which were ultimately

174. *Id.* at 598.

175. *Binek*, 673 N.W.2d at 597.

176. *Id.* at 601.

177. *Id.* at 600. By signing it, Ruth released

[A]ll rights in the property or estate of [prospective husband] which she might have by reason of their marriage, whether by way of dower, statutory allowance, widow's allowance, intestate share, or election to take against his will . . . and with particular reference to Section 30.1-05-04, North Dakota Century Code, as amended.

Id. The North Dakota statutory section provides for spousal elective shares. See N.D. CENT. CODE § 30.1-05-01 (2005). The supreme court read the language of the agreement as if it ended with "by reason of their marriage," ignoring everything after it.

178. *Binek v. Binek*, 2004 ND 5, 673 N.W.2d 594, 599.

179. *Id.*

180. *Id.* at 596.

181. *Id.*

182. *Id.*

183. *Id.* at 598-600.

184. *Binek*, 673 N.W.2d at 599-600.

entirely consumed,¹⁸⁵ and Theodore had the obligation to support her during the marriage under North Dakota law regardless of any agreement.¹⁸⁶

Despite the fact that enforcement of the agreement would require Ruth to go on public assistance, the court found that it would not be unconscionable to enforce it against her.¹⁸⁷ In its view, "[b]y not addressing spousal support and allowing Ruth Binek to keep her assets separate from Theodore Binek's, the agreement created enough leeway to avoid an unconscionable result based upon the parties' circumstances at the time of dissolution."¹⁸⁸ This reasoning too is disingenuous: by dissolution, Ruth's thirty thousand dollars in assets had not appreciated but had instead been completely depleted, placing her in the position of requiring public assistance to survive.

The court cited *Peters-Riemers* only for a procedural point,¹⁸⁹ avoiding the difficulty of reconciling the two cases. By comparing them one can observe that neither of the challenging wives had been represented by counsel at execution of the agreement. In *Peters-Riemers* the premarital agreement was presented three days before the wedding,¹⁹⁰ in *Binek*, two days.¹⁹¹ In *Peters-Riemers* Roland likely would have refused to marry without the agreement;¹⁹² in *Binek* Theodore stated that he would not marry without it.¹⁹³ Also, neither agreement contained a waiver of alimony or maintenance. Indeed, the *Binek* agreement did not mention divorce and seemed to apply only on death of a spouse.¹⁹⁴ Although *Peters-Riemers*' was a one year marriage,¹⁹⁵ the Bineks' marriage endured for more than eighteen years, during which Ruth was a homemaker.¹⁹⁶ Homemakers in long term marriages are supposed to be protégées of the law, not its victims.¹⁹⁷ As the Supreme Court of North Dakota reported Ruth Binek's

185. *Id.* at 597.

186. Indeed, the spouses owed each other mutual duties of support. See N.D. CENT. CODE 14-07-03 (2006). Theodore complied with his duty by paying most of the living expenses of the parties; Ruth complied with her duty by serving as a homemaker. *Binek v. Binek*, 2004 ND 5, 673 N.W.2d 594, 597.

187. *Binek*, 673 N.W. 2d at 599-600.

188. *Id.*

189. *Id.* at 601.

190. *Peters-Riemers v. Peters-Riemers*, 2002 ND 72, 644 N.W.2d 197, 206.

191. *Binek*, 673 N.W.2d at 596.

192. He "pressed" Jenese to sign it. *Peters-Riemers v. Peters-Riemers*, 2002 ND 72, 644 N.W.2d 197, 205-06 (N.D. 2002).

193. *Binek*, 673 N.W.2d at 596.

194. *Id.*

195. *Peters-Riemers*, 644 N.W.2d at 201.

196. *Binek*, 673 N.W.2d at 597.

197. See, e.g., WIS. STAT. § 767.56 (2006) (listing "length of the marriage" as the first factor for a court to consider in determining support payments); see also *In re Marriage*

own sentiments expressed in her testimony, "if the parties had gotten divorced after one year, she would have abided by the agreement."¹⁹⁸ Nevertheless, the North Dakota Supreme Court found the Pieter-Riemers agreement involuntary and invalid but upheld the Binek agreement.¹⁹⁹ As a result of the decisions, Jenese Peters-Riemers was on her way to American citizenship, funded with a share of marital property, as well as awards of alimony and attorneys' fees,²⁰⁰ whereas Ruth Binek was on her way to the welfare rolls, seemingly saddled with the whole burden of the couple's financial decline.²⁰¹ Perhaps feeling a bit guilty after leaving a wife of such longstanding a public charge, the supreme court remanded to the trial court for an explanation of why it made no alimony award.²⁰²

3. *Conflicting Cases in New Hampshire*

New Hampshire similarly produced a puzzling pair of cases on the voluntariness issue. New Hampshire courts presume that a premarital agreement is valid "if three standards of fairness are met: 1) the agreement was not obtained through fraud, duress or mistake or through misrepresentation or nondisclosure of a material fact; 2) the agreement is not unconscionable; or 3) the facts and circumstances have not changed since the agreement was executed so as to make the agreement unenforceable."²⁰³ In *In re Yannalfo* Gary and Janice bought a home together a month before they married.²⁰⁴ The court noted that "[Gary] provided \$70,000 as the down payment and [Janice] contributed \$5,000 toward closing costs."²⁰⁵ A day before the wedding he presented her with a premarital agreement drafted by his lawyer, providing that if the couple divorced, the house would be sold and Gary would be entitled to the first seventy thousand

of LaRocque, 406 N.W.2d 736, 741-42 (Wis. 1987) ("Where a spouse has subordinated . . . [her] career to devote time and energy to the welfare, career or education of the other spouse or to managing the affairs of the marital partnership, maintenance may be used to compensate this spouse for these nonmonetary contributions to the marriage."); PRINCIPLES, *supra* note 6, § 5.04 (referring to a "durational factor" in determining an award of spousal support, which "should increase with the duration of the marriage", and emphasizing other factors in such a determination, including loss in standard of living).

198. *Binek v. Binek*, 2004 ND 5, 673 N.W.2d 594, 598-99.

199. *Peters-Riemers*, 644 N.W.2d at 210; *Binek*, 673 N.W.2d at 600.

200. *Peters-Riemers*, 644 N.W.2d at 210.

201. *Binek*, 673 N.W.2d at 600.

202. *Id.* at 601. The parties settled out of court, agreeing that Theodore would pay Ruth a lump sum of \$8,750. *Binek v. Binek*, No. 02C-215 (S.W. Dist. N.D. July 23, 2004) (settlement order).

203. *MacFarlane v. Rich*, 567 A.2d 585, 589 (N.H. 1989).

204. 794 A.2d 795, 796 (N.H. 2002).

205. *Id.*

dollars of equity.²⁰⁶ He told Janice that he would not marry her unless she signed; accordingly she did so.²⁰⁷ When the couple divorced after twelve years and three children, Janice challenged the agreement on the grounds that she had signed it under duress.²⁰⁸ She also alleged a legion of changed circumstances since execution which made the agreement unenforceable against her. Gary had been fired from his job for drug use²⁰⁹ and remained unemployed or underemployed during the marriage, requiring his wife to continue to work although the couple had three children.²¹⁰ Gary also dissipated the couple's assets by taking unsuccessful legal action to get his job back and making a speculative land investment that Janice opposed.²¹¹ Additionally her mother had given the couple thirty thousand dollars used to make improvements to the house.²¹² Lastly, Gary's abusive behavior caused Janice to obtain two restraining orders against him resulting in two criminal convictions.²¹³ The trial court agreed with Janice, concluding that the circumstances surrounding execution of the agreement did, indeed, show "a subtle form of duress,"²¹⁴ in that presentation of the agreement left no time for her to examine it or have it reviewed by a lawyer of her choice.²¹⁵ The court also found that circumstances had so changed since its execution that to enforce it would be unfair.²¹⁶

The supreme court disagreed.²¹⁷ Neither the presentation of the agreement one day before the wedding, nor the threat that the marriage would not take place if Janice did not sign it, nor the fact that she was unrepresented, was sufficient to support a finding of duress.²¹⁸ In addition, the court held that these facts were not sufficient to permit a presumption that Janice had no time to consult an attorney if she had decided to seek legal counsel.²¹⁹ Incredibly, the supreme court thought the changed circumstances cited by her, including Gary's behavior and its consequences, were foreseeable at the time

206. *Id.* at 796, 799.

207. *Id.*

208. *Id.*, 794 A.2d at 797; Brief of the Petitioner, *In re Yannalfo*, 794 A.2d 795 (N.H. 2002).

209. Brief of the Petitioner, *supra* note 208, at 14.

210. *Yannalfo*, 794 A.2d at 796.

211. *Id.*

212. *Id.*

213. *Id.* at 796-97.

214. *Id.* at 797.

215. *Id.* at 798.

216. *Yannalfo*, 794 A.2d at 798.

217. *Id.* at 799.

218. *Id.* at 798.

219. *Id.*

of the agreement's execution and thus were not sufficient to make its enforcement unfair.²²⁰

A year later the Supreme Court of New Hampshire found itself faced with another voluntariness case, *In re Estate of Hollett*,²²¹ and reached an inconsistent result from that of *Yannalfo*. In *Hollett*, John presented the antenuptial agreement two years before the wedding, causing a "heated and unpleasant discussion during which Erin said she would not sign [it]."²²² John presented it again less than forty-eight hours before the wedding, saying that he would not go through with the ceremony without it in effect.²²³ His lawyer contacted a recent law school graduate, asked him to counsel Erin with respect to the premarital agreement, and told him that John would pay the fee.²²⁴ Erin's lawyer met with her and her mother the day before the wedding at the offices of John's lawyers; she reportedly sobbed throughout the meeting.²²⁵ Her lawyer had never negotiated a premarital agreement before, but he studied up on the law and his negotiations on her behalf produced a final agreement that was much more favorable to her than the first draft presented.²²⁶ The couple signed the agreement on the morning of the wedding.²²⁷

After eleven years of marriage, John died, and Erin challenged the voluntariness of the agreement.²²⁸ John's first wife, to whom he owed millions of dollars, and his five children with her argued that it was valid.²²⁹ The trial court upheld its validity in a careful, painstaking thirteen-page opinion, sorting through conflicts in the testimony, and noting that Erin's personal assets had grown during the marriage from ten thousand dollars to more than eight hundred thousand dollars, even aside from her participation in husband's estate under the premarital agreement.²³⁰

220. "In our view, these changes in circumstance are not so far beyond the contemplation of the parties when the agreement was executed that its 'enforcement would work an unconscionable hardship.'" *Id.* at 798-99. The dissent agreed with the majority on this issue but thought the evidence adduced at trial could have supported a finding of "duress." The dissenting justice doubted however that the trial court made such a finding and would have remanded for further proceedings. *Id.* at 799 (Dalianis, J., dissenting).

221. 834 A.2d 348 (N.H. 2003).

222. *Id.* at 350.

223. *Id.*

224. *Id.* at 354.

225. *Id.*

226. Under the original draft of the premarital agreement Erin gave up any claim to alimony or property on divorce and would receive only twenty-five thousand dollars and a car. Under the renegotiated agreement, she could get as much as one-sixth of John's estate on his death or their divorce. *Id.* at 350-51.

227. *Hollett*, 834 A.2d at 351.

228. *Id.*

229. *Id.* at 349-51.

230. *In re Estate of Hollett*, No. 2001-0507, slip op. at 13 (Prob. Ct. N.H. May 1, 2002).

The supreme court reversed, finding that the agreement was involuntary and unenforceable.²³¹ Essentially it thought that it would be "unreasonable" to find that Erin had enough time or opportunity to utilize her lawyer's advice.²³² It distinguished *Yannalfo* for the following unconvincing reasons: 1) the agreement in that case did not involve an entire estate over six million dollars as in *Hollett* but rather one asset, the seventy thousand dollar down payment on the house the couple bought one month before they married; 2) the bargaining positions of the spouses in *Hollett* were more unequal than in *Yannalfo*;²³³ and 3) the court thought John's conduct before the wedding in *Hollett* differed from Gary's conduct in *Yannalfo* in that it raised questions of his good faith in dealing with Erin because he waited to present the premarital agreement for the second time just a few days before the wedding.²³⁴

That the voluntariness of an agreement should not depend on a sliding scale of the assets at stake seems obvious, so the court's first point of distinction rings hollow. The bargaining positions of the prospective wives on the eves of their weddings were much alike: each was presented with an unfavorable premarital agreement and an ultimatum from prospective husband that if she did not sign it he would call off the wedding. John Hollett's conduct is arguably better, not worse, than Gary Yannalfo's: John first raised the agreement two years before the wedding and Erin might well have anticipated that it would come up again. In addition, he found a lawyer for her who, despite his inexperience and the time pressures, negotiated a more favorable deal for her than the one originally drafted. If John's good faith was questionable, so was Gary's. Gary presented the premarital agreement for the first time a day before the wedding and a month *after* the house to which it applied had been purchased. The New Hampshire court did not mention that fact nor did it consider in its disposition Gary Yannalfo's postmarital conduct, which was arguably far worse than John Hollett's by any measure.

4. Three Conflicting Disclosure Cases From Georgia

Three Georgia premarital agreement cases deal with financial disclosure but reach inconsistent results, making the state the fourth jurisdiction to exhibit unreconciled conflicting cases. Georgia employs

231. *In re Estate of Hollett*, 834 A.2d 348, 354 (N.H. 2003).

232. *Id.*

233. Erin was dependent on John. He had money; she had much less. She also had little understanding of and no involvement in his business, whereas in *Yannalfo* both were postal workers. *Id.*

234. *Hollett*, 834 A.2d at 352-53.

the same three-pronged standard of review as New Hampshire, examining each premarital agreement for procedural and substantive fairness at the time of execution of the agreement and giving each a second look for substantive fairness at enforcement.²³⁵

In *Alexander v. Alexander*, the couple lived together before they married.²³⁶ Four days before the wedding, Jerome presented Kimberly with a premarital agreement.²³⁷ He told her "that he would not marry unless she signed it and that his parents would not allow the marriage without it."²³⁸ No attorney reviewed it for her, perhaps because Jerome told her such review was unnecessary.²³⁹ By virtue of the agreement, she waived rights to any property division and to alimony as well.²⁴⁰ Although the agreement cited full disclosure by each in Exhibits A and B "attached," no exhibits were attached.²⁴¹ A year after the marriage, the couple had a child, and Kimberly stayed home to care for her.²⁴² On divorce six years after the marriage, Kimberly challenged the validity of the agreement.²⁴³ The trial court held it invalid, finding that Jerome's ultimatum to Kimberly immediately before the wedding induced her to sign the agreement "under considerable duress. The wedding plans had been made; she had little time to consult with an attorney . . . and, as she testified she felt that if she did not sign the agreement [Jerome] would think that she did not love and trust him."²⁴⁴ The court also found that the agreement did not disclose material facts: no exhibits of assets were attached to it and no evidence showed that either party had sufficient actual knowledge of

235. In *Alexander v. Alexander*, 610 S.E.2d 48, 49 (Ga. 2005), the Georgia Supreme Court phrased it this way:

. . . the trial judge should employ basically three criteria in determining whether to enforce [an antenuptial] agreement in a particular case: (1) was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) is the agreement unconscionable? (3) [h]ave the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

236. In Jerry's attorney's words: "The parties had known each other since June of 1996 and had lived together before the marriage." Brief of Appellant at 3, *Alexander v. Alexander*, 610 S.E.2d 48 (Ga. 2005). In Kimberly's attorney's words: "At the time of the presentation of the . . . agreement Appellee was very dependent upon Appellant. . . . At the time of the signing of the . . . agreement Appellee was living and working with Appellant and did not have any other place to live or any other source of income." Brief of Appellee at 2, *Alexander v. Alexander*, 610 S.E.2d 48 (Ga. 2005).

237. *Alexander*, 610 S.E.2d at 49.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Alexander*, 610 S.E.2d at 49.

244. *Alexander v. Alexander*, Civ. Act. No. 02-OV-310J, slip op. at 1, (Sup. Ct. Ga. July 29, 2003).

the property owned by the other.²⁴⁵ As to the third prong of the test for validity, the court found that the agreement did not contemplate the birth of the parties' child, a significant change in circumstances that made enforcement unfair and unreasonable.²⁴⁶ The Georgia Supreme Court found it unnecessary to address each of the three grounds if any one supported the trial court's decision.²⁴⁷ Therefore, it affirmed the trial court on the disclosure ground alone, agreeing that husband's ownership of an undisclosed forty thousand dollar investment account was a material fact without knowledge of which wife could not intelligently enter into the agreement.²⁴⁸ Two justices concurred in a separate opinion to emphasize their view that husband's failure to disclose was the only ground for affirmance.²⁴⁹

A few months later, faced with a similar issue in *Mallen v. Mallen* and a similarly unrepresented wife,²⁵⁰ the Georgia Supreme Court upheld the agreement against her.²⁵¹ Like the Alexanders, the Mallens had lived together before their marriage.²⁵² During this time, Catherine found herself pregnant.²⁵³ "While she was at a clinic to terminate the pregnancy, [Peter] called to ask her not to go through with the abortion and to marry him."²⁵⁴ She agreed. A few days later, and nine or ten days before the wedding, Peter presented her with the premarital agreement, allegedly telling her that it was "just a formality and he would always take care of her."²⁵⁵ Peter sent her to a lawyer who told her that he could not review the agreement for her in time.²⁵⁶

245. *Id.*

246. *Alexander v. Alexander*, 610 S.E.2d 48, 49 (Ga. 2005).

247. *Id.*

248. *Id.* at 49-50.

249. *Id.* at 50 (Sears, J., concurring). The justices objected to the trial court's decision on duress and change of circumstances. On the former, they said:

Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. . . .

The threats must be sufficient to overcome the mind and will of a person of ordinary firmness.

Id. (Sears, J., concurring). The concurrence also disputed that the birth of a child could constitute a material change in circumstances that would render the agreement unenforceable. *Id.* (Sears, J., concurring).

250. 622 S.E.2d 812 (Ga. 2005).

251. *Id.* at 817.

252. *Id.* at 814.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* The lawyer recounted:

I remember [prospective wife] crying as we discussed the situation. . . . I told her that, in my personal opinion, the actions of her fiancé in this regard were those of a cad. . . . I told her that, given the shortage of time and lack of information, I was unable to give her specific advice concerning the fairness

She thereafter met with Peter and his lawyer more than once about the agreement, apparently trying to negotiate on her own behalf.²⁵⁷ Peter agreed to increase a life insurance benefit and to modify the limited alimony provisions (one thousand dollars a month for four years) increasing the monthly amount by one hundred dollars for each year of marriage, and Catherine ultimately signed the agreement.²⁵⁸ Aside from this severely limited spousal support, the agreement provided that all property was to be separate, belonging to the party who owned it originally or received it during marriage.²⁵⁹ Although the agreement disclosed Peter's assets (at least eight million five hundred thousand dollars) it did not divulge his income of more than five hundred sixty thousand dollars a year.²⁶⁰

When he sought a divorce after more than eighteen years of marriage and four children, Catherine challenged the validity of the agreement alleging duress, fraudulent representations, failure to disclose material facts, unconscionability,²⁶¹ and a significant change in circumstances since its execution that would make enforcement of the agreement unfair, namely that husband's net worth had by the time of the divorce grown by fourteen million dollars.²⁶² The trial court rejected all of Catherine's claims without making any findings of fact or conclusions of law; it merely entered an order upholding the agreement.²⁶³ The Supreme Court of Georgia affirmed the trial court and its award to Catherine under the agreement of only two thousand nine hundred dollars a month in alimony for only four years.²⁶⁴ Peter received all the assets with which he entered the marriage and all the assets accumulated during it.²⁶⁵ For its decision on the issue of duress, the supreme court adopted a new definition and applied it arbitrarily to Catherine.²⁶⁶ Phrased negatively, "insistence on a prenuptial

of the Prenuptial Agreement.

Aff. Tom Pye at 2-3, *Mallen v. Mallen*, 622 S.E.2d 812 (2005).

257. *Mallen*, 622 S.E.2d at 814.

258. *Id.* at 814, 818.

259. *Id.* at 814.

260. *Id.* at 816, 818.

261. *Id.* at 814, 816.

262. *Id.* at 817.

263. *Mallen v. Mallen*, No. 2003CV73595 (Sup. Ct. Ga. April 12, 2004) (order enforcing premarital agreement).

264. *Mallen v. Mallen*, 622 S.E.2d 812, 814, 817 (Ga. 2005).

265. *Id.*

266. The court accepted the definition of duress laid out by the concurring justices in *Alexander v. Alexander*, 610 S.E.2d 48, 50 (Ga. 2005) (Sears, J., concurring). The court explained:

Nothing in the record of this case suggests that wife's free will was overcome by the "threat" of not going through with the wedding. In fact, wife exercised her free will and declined to sign the agreement in the form it was presented

agreement as a condition of marriage" was not duress sufficient to invalidate the agreement.²⁶⁷

On the disclosure issue, the court took another questionable position, holding that Peter did not have to disclose his income because no confidential relationship exists between parties about to marry in Georgia.²⁶⁸ Instead Catherine had a duty to make inquiries to ascertain the full nature and extent of Peter's resources.²⁶⁹ She lived with him before the marriage and "was aware from the standard of living they enjoyed that he received significant income from his business and other sources."²⁷⁰ In contrast Kimberly Alexander lived with Jerome before their marriage, yet his failure to disclose a forty thousand dollar IRA was sufficient to invalidate their premarital agreement.²⁷¹ Curiously the court made no attempt to distinguish *Alexander*. By imposing a duty on the wife to investigate husband's financial resources, the court effectively negated that part of the Georgia test that makes failure to disclose a material fact a ground for invalidating a premarital agreement. Three justices dissented from the majority.²⁷² They would have held, correctly, that parties entering a premarital agreement have a duty to disclose material facts, even in the absence of a confidential relationship.²⁷³ They saw clearly that in a case like this one in which the premarital agreement severely limited alimony, the husband's income was a material fact that he has the obligation to disclose.²⁷⁴

to her, acquiescing only when changes were made improving her position in the event of divorce or husband's death. The fact of wife's pregnancy does not make husband's insistence on the agreement rise to the level of duress. She had already demonstrated her willingness to terminate the pregnancy so she cannot credibly claim the pregnancy put such pressure on her as to overcome her will.

Mallen, 622 S.E.2d at 816. For more examples of courts applying new standards to the instant litigants before them, see *infra* notes 528-32 and accompanying text (discussing the *Pendleton* case from California where the court changed its stance on the enforceability of alimony waivers), notes 582-604 and accompanying text (discussing *DeMatteo* case from Massachusetts where court imposed new substantive fairness standard), and notes 646-74 and accompanying text (discussing *Hardee* case from South Carolina where court enforced alimony waiver against wife).

267. *Id.* at 815.

268. *Id.* at 816.

269. *Id.*

270. *Id.*

271. *Alexander v. Alexander*, 610 S.E.2d 48, 50 (Ga. 2005). The IRA was an asset that, according to Jerry's attorney, was acquired before the marriage and never liquidated and to which the premarital agreement did not apply. The only asset at issue in the divorce case was a residence to which, again according to Jerry's attorney, the premarital agreement "is crucial," and about which "Ms. Alexander had adequate knowledge." Brief of Appellant at 5, *Alexander v. Alexander*, 610 S.E.2d 48 (Ga. 2005).

272. *Mallen v. Mallen*, 622 S.E.2d 812, 817-18 (Ga. 2005) (Sears, C.J., dissenting).

273. *Id.* at 818.

274. *Id.*

The disclosure issue arose again in a recent Georgia case, *Corbett v. Corbett*.²⁷⁵ Charles and Eileen married in 1987, signing a premarital agreement three days before the wedding.²⁷⁶ It precluded the acquisition of marital assets, kept the spouses' property separate, and waived alimony.²⁷⁷ The agreement contained an acknowledgment that "they each had read it and had it explained to them by specifically identified independent counsel of their own choosing. [It] also purported to make full disclosure of the . . . assets of [each spouse]."²⁷⁸ When Ellen sought a divorce after fifteen years of marriage, Charles asserted the agreement.²⁷⁹ The trial court refused to enforce it, holding that it violated all three prongs of the Georgia test, most importantly, that it failed to disclose Charles's income and Ellen waived alimony.²⁸⁰ The supreme court said that regardless of what the agreement recited, "the evidence uncontrovertedly established that Wife had not read the agreement prior to signing it, she did not have an attorney review or explain [it] . . . she had no knowledge, independent or otherwise, as to the amount of Husband's income."²⁸¹ The only point the court discussed was the disclosure issue, holding that the trial court was correct in its conclusion that the husband's failure to disclose his income invalidated the agreement.²⁸² Attempting to distinguish the cases, the court cited *Alexander* and *Mallen*, saying

We find nothing in the parties' standard of living before the marriage which would have put Wife on notice that Husband failed to disclose material facts so as to render the nondisclosure immaterial. Compare [*Alexander*] (nondisclosure of \$40,000 investment account rendered antenuptial agreement unenforceable) with [*Mallen*] (wife deemed to be aware of husband's 'significant income' from high standard of living before marriage).²⁸³

This analysis is not a satisfactory reconciliation of the cases. The undisclosed asset in *Alexander* was a small investment account consisting of Jerome's separate property that Kimberly would not have shared on divorce had no premarital agreement existed.²⁸⁴ Thus, the undisclosed asset was not material to the voluntariness of her entry

275. 628 S.E.2d 585 (Ga. 2006).

276. *Id.* at 585.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 586.

281. *Corbett*, 628 S.E.2d at 585.

282. *Id.* at 586.

283. *Id.*

284. See *Alexander v. Alexander*, 610 S.E.2d 48, 49 (Ga. 2005) (noting "that prior to marriage, Mr. Alexander owned an investment account worth approximately \$40,000").

into the premarital agreement. The undisclosed asset in *Mallen* was Peter's substantial income, which would have been the basis for an alimony award after their eighteen-year marriage had no agreement existed. This income was certainly material to the voluntariness of her entry into the premarital agreement. Indeed, the court recognized this proposition in the facts of *Corbett*.

5. Disclosure in Pennsylvania

In 1990, the Pennsylvania Supreme Court announced in *Simeone v. Simeone* that it would no longer review premarital agreements for substantive fairness at either execution or enforcement but look only for procedural defects in procurement.²⁸⁵ Pennsylvania applies the same principles to postmarital agreements.²⁸⁶ It enforces both types of agreements unless they are void on common law grounds, such as fraud, or if a party fails to make "full and fair" disclosure of his own assets before entering the agreement.²⁸⁷ Since *Simeone*, the supreme court has decided only two cases dealing with the disclosure requirement, one arising from a premarital agreement, the other from a postmarital agreement.²⁸⁸

The court described the couple in *Porreco v. Porreco*, as: "Louis, forty-five years old and previously married when he met [Susan] when she was seventeen years old, in high school, living with her parents and working at a ski shop."²⁸⁹ The two dated for more than two years, during which time Susan quarreled with her parents about the relationship, prompting Susan to move out of her family home.²⁹⁰ The court noted that "Louis provided [her] with an apartment, an automobile, insurance, a weekly allowance, access to one of his credit cards as a secondary cardholder, and a gas charge account at his car dealership's fueling station."²⁹¹ Louis also gave Susan an engagement ring, telling her the gem it contained was a diamond even though he knew it was merely a cubic zirconium.²⁹² Before their marriage Louis presented Susan with a premarital agreement, providing that on divorce she would receive a lump sum of three thousand five hundred dollars for each year of marriage instead of alimony.²⁹³ Under the agreement, Louis was to "provide her with an automobile and health insurance

285. 581 A.2d 162, 165 (Pa. 1990).

286. *In re Estate of Ratony*, 277 A.2d 791, 793 (Pa. 1971).

287. *Porreco v. Porreco*, 811 A.2d 566, 570 (Pa. 2002).

288. *Id.* at 567.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 568.

for one year."²⁹⁴ The parties would retain their separate property, including appreciation in its value. An attorney, a tenant in Louis's guest house,²⁹⁵ reviewed the agreement for Susan but conducted no negotiations on her behalf.²⁹⁶ Susan testified that she understood what she would receive under the agreement at divorce.²⁹⁷ Before the parties signed it, Louis prepared a handwritten statement of Susan's assets listing the engagement ring at a value of twenty-one thousand dollars. In fact it was "worthless."²⁹⁸ The final typed version of assets listed hers at over forty-six thousand dollars, almost half of which was attributable to the ring, and his near \$3.3 million.²⁹⁹

When the parties separated more than ten years later, Susan took the engagement ring to a jeweler only to discover that it did not contain a diamond. She sought to set the premarital agreement aside on three grounds: "(1) that Louis fraudulently induced her to marry him by misrepresenting the value of the ring; (2) that Louis breached a confidential relationship with her, and (3) that Louis violated his duty . . . of a full and fair disclosure" required under the Pennsylvania standard by not disclosing the true value of her engagement ring.³⁰⁰ The trial court agreed that Louis and Susan were in a confidential relationship, treating it as a question of fact rather than law.³⁰¹ To support this conclusion the court cited the difference in the parties' ages, sophistication, wealth and status, and Susan's dependence on Louis for material and social well-being.³⁰² It found that Louis violated the relationship by having his lawyer draft such a one-sided premarital agreement.³⁰³ It also held that Louis misrepresented the value of the engagement ring to induce Susan to sign the agreement and that she signed it in material reliance on the misrepresentation.³⁰⁴ The trial court believed her testimony that if she had known Louis had given her a "fake" ring and lied about it, she would not have married him.³⁰⁵ In invalidating the agreement the trial court did not

294. *Id.*

295. Susan had trouble finding a lawyer. Her uncle, a partner in a law firm, was her original choice but her father asked her not to "drag her family into the situation." *Porreco v. Porreco*, 82 ERIE COUNTY LEGAL J. 35, 41 (reprinting trial court opinion). She then tried a mutual friend of the parties who declined. *Id.* The attorney who finally agreed to represent her lived in the guest house on the husband's property. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 46.

299. *Porreco v. Porreco*, 811 A.2d 566, 568 (Pa. 2002).

300. *Id.* at 569.

301. *Porreco v. Porreco*, 82 ERIE COUNTY LEGAL J. 35, 45 (reprinting trial court opinion).

302. *Id.*

303. *Id.* at 45-46.

304. *Id.* at 46.

305. *Id.*

reach the disclosure issue.³⁰⁶ The superior court affirmed in a two-to-one decision; the majority agreed that Louis had fraudulently misrepresented the value of the ring, but it did not address the issue of breach of confidential relationship.³⁰⁷ Interestingly, the dissenting justice thought the remedy of invalidating the agreement too harsh and would have required Louis to pay Susan twenty-one thousand dollars for the represented value of the ring, otherwise enforcing the agreement.³⁰⁸

The Supreme Court of Pennsylvania, while purporting to be bound by the trial court's factual conclusions, found that Susan's reliance on the value of the ring listed on the asset schedule was not justifiable.³⁰⁹ According to the majority, she should have conducted her own investigation of the ring's value.³¹⁰ It explained that since *Simeone*, Pennsylvania has moved toward treating prospective spouses the "same as parties to other contracts" with the "duties of investigation and due care for their bargain."³¹¹ Because Susan had the ring in her possession, she should have done at the outset what she did when she and Louis separated: gone out and gotten an appraisal.³¹² Thus, the supreme court reversed the superior court's decision on the misrepresentation issue but remanded the case to review whether the parties were in a confidential relationship.³¹³ Three judges dissented from the majority, one in rhyme.³¹⁴ Agreeing with the trial court, the dissenting judges thought that in view of the disparities between the parties in age and sophistication, Susan's reliance on Louis's misrepresentation was justified.³¹⁵ Two judges wrote separate concurrences to object to the rhyming dissent³¹⁶ and a third

306. *Id.* at 47.

307. *Porreco v. Porreco*, No. 1502 WDA 1999 (Pa. Super., June 6, 2000).

308. *Id.* at 15 (Kelly, J., dissenting).

309. *Porreco v. Porreco*, 811 A.2d 566, 571-72 (Pa. 2002).

310. *Id.* at 572.

311. *Id.* at 571.

312. *Id.* at 572.

313. *Id.*

314.

She was 19, he was nearly 30 years older;
was it unreasonable for her to believe what he told her?

Given their history and Pygmalion relation,
I find her reliance was with justification.
Given his accomplishment and given her youth,
was it unjustifiable for her to think he told the truth?

Or for every prenuptial, is it now a must
that you treat your betrothed with presumptive mistrust?

Id. at 576 (Eakin, J., dissenting).

315. *Id.* at 575-76.

316. *See, e.g., id.* at 572 (Zappala, C.J., concurring) ("I write separately to address my

to point out that none of the courts had yet ruled on the issue of disclosure.³¹⁷ On remand, the superior court found that no confidential relationship existed because Susan had consulted a lawyer,³¹⁸ but it neglected to mention that he did not negotiate for her and that he was Louis's tenant. In turn, that court remanded the case to the trial court for a determination of the disclosure issue.³¹⁹ There the case languishes.

In *Stoner v. Stoner*, the parties, neither of whom was represented by counsel, were already divorcing when they executed the agreement.³²⁰ Thus, their agreement is technically a separation agreement and would otherwise fall outside the scope of this article.³²¹ However, the supreme court in *Stoner* did not distinguish it in any significant way either from premarital agreements or other postmarital agreements, calling it a "postnuptial" agreement and citing *Simeone* for the proposition that premarital and postnuptial agreements are to be treated alike.³²² Therefore, *Stoner*, valuable for what it says about disclosure obligations in Pennsylvania, is properly included in this discussion.

The agreement in *Stoner* acknowledged that Danny had paid Mary six thousand dollars and that the payment was his sole obligation to her on dissolution of the marriage.³²³ She agreed to sign all divorce papers and to sign off on his retirement accounts.³²⁴ Mary challenged the agreement in divorce proceedings on the ground that it did not satisfy the *Simeone* disclosure requirement because Danny did not disclose the statutory rights that she was relinquishing by signing.³²⁵ Danny argued that if Mary was correct, no marital agreement could ever be valid unless the parties were represented by counsel.³²⁶ The trial court agreed with Danny, but the superior court

grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania.").

317. See *id.* at 573-74 (Castille, J., concurring).

318. *Porreco v. Porreco*, No. 1502 WDA 1999 at 4 (Pa. Super., June 6, 2000).

319. *Id.*

320. 819 A.2d 529, 530 (Pa. 2003).

321. See PRINCIPLES, *supra* note 6 (defining the scope of this article to exclude separation agreements).

322. *Stoner*, 819 A.2d at 533 n.5. In an earlier decision the supreme court distinguished between two kinds of postnuptial agreements: a separation agreement that would be abrogated by the parties' reconciliation and a postnuptial settlement agreement that would not. *Vaccarello v. Vaccarello*, 757 A.2d 909, 911 (Pa. 2000). Finding the agreement in question to be the latter, it remanded to the superior court for a determination of whether the husband made full and fair disclosure of the marital assets. *Id.* at 915.

323. *Stoner*, 819 A.2d at 530.

324. *Id.*

325. *Id.* at 531, 533.

326. *Id.* at 532.

reversed.³²⁷ The majority held that even though Mary had received a full and fair disclosure of marital assets, she had not been apprised of the rights she forfeited by signing.³²⁸ The court said that the agreement should have mentioned everything: equitable distribution, alimony, and alimony *pendente lite*.³²⁹ The supreme court agreed with the dissent in the superior court and accordingly reversed, declining to impose advice of statutory rights as part of the Pennsylvania disclosure requirement.³³⁰ To do so, it thought, would “contravene the guiding principles of Simeone,” and “resurrect the paternalistic approaches to evaluating marital contracts” that assume wife “lacks the intelligence or ability to protect her own rights.”³³¹

6. Disclosure and Representation in Connecticut

The Connecticut legislature considered but rejected the promulgated version of the Uniform Premarital Agreement Act. It instead passed its own unique scheme for testing the validity of premarital agreements in 1995.³³² Connecticut provides five independent grounds for challenging a premarital agreement. Successful proof of any one of the following will invalidate the agreement: 1) that the party did not enter the agreement voluntarily,³³³ 2) that the agreement was unconscionable when executed,³³⁴ 3) that the agreement was unconscionable at the time of enforcement,³³⁵ 4) that the challenger did not receive “a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party” before execution of the agreement,³³⁶ or 5) that the challenger did not have “a reasonable opportunity to consult with independent counsel.”³³⁷ In *Friezo v. Friezo*, the Connecticut Supreme Court ruled on two of these grounds, the disclosure requirement and the requirement that the challenger receive a reasonable opportunity to consult with independent counsel.³³⁸

Victoria and David began their relationship in 1994 when Victoria went to work as a trader’s assistant and personal aide for

327. *Id.* at 530-31.

328. *Id.* at 531.

329. *Stoner*, 819 A.2d at 531.

330. *Id.* at 533.

331. *Id.*

332. Connecticut Premarital Agreement Act, CONN. GEN. STAT. § 46b-36a (2004).

333. *Id.* § 46b-36g (a)(1).

334. *Id.* § 46b-36g (a)(2).

335. *Id.*

336. *Id.* § 46b-36g (a)(3).

337. *Id.* § 46b-36g (a)(4).

338. *Friezo v. Friezo*, 2007 WL 268897 (Conn. Feb. 6, 2007).

Bankers Trust in London, England.³³⁹ She was a British citizen with a high school education, working under David's direction.³⁴⁰ David was a college graduate with an impressive, established career in finance.³⁴¹ The two began dating and Victoria left her mother's house to live with David in his Mayfair apartment.³⁴² Aside from the rent, which David paid, the two maintained their finances separately.³⁴³ He did not provide Victoria with a credit card or bank account, and she paid her own expenses.³⁴⁴ The parties did not talk about David's finances.³⁴⁵ The relationship continued for three years during which the parties traveled together and Victoria continued to work at Bankers Trust, serving as personal assistant to David at work and at home.³⁴⁶

In the summer of 1997, [David] asked [Victoria] to go to the United States to oversee renovations and furnishing of the Westport house. The plaintiff . . . readily agreed to his request . . . [and] took an unpaid leave of absence from the Bankers Trust job. In October, 1997, the plaintiff received notice that her employment at Bankers Trust was terminated because of the extraordinary length of her leave of absence. She continued to look after the renovations at the Westport house. Because her tourist visa allowed her to stay in the United States only ninety days at a time, the plaintiff traveled home to London every three months for a stay of a week before returning to Westport As in London, the plaintiff provided all the domestic services and ran personal errands for the defendant. The defendant paid the mortgage and utility expenses at the Westport house. The plaintiff used her savings to pay all her other living expenses³⁴⁷

In August of 1998, Victoria discovered that she could no longer enter the United States on a tourist visa.³⁴⁸ She and David consulted an immigration lawyer who apparently advised that if Victoria married an American citizen by the end of November 1998, she could stay in the United States.³⁴⁹ David proposed marriage on August 20, 1998 and shortly thereafter told Victoria that she would have to sign a

339. *Id.* at *1.

340. *Id.*

341. *Id.* at *1-2, *3 n.14.

342. *Id.* at *1.

343. *Id.*

344. *Friezo*, 2007 WL 268897, at *1.

345. *Id.* at *1 & n.4.

346. *Id.* at *1-2.

347. *Id.* at *2 (quoting the trial court in *Friezo v. Friezo*, No. FA020190070, 2004 WL 2165045, at *2 (Conn. Super. Ct. Aug. 27, 2004)).

348. *Id.*

349. *Id.*

premarital agreement.³⁵⁰ Victoria was not "familiar" with such agreements but was willing to sign if that was what David wanted.³⁵¹

They planned the wedding for Friday, November 6, 1998.³⁵² David did not mention the agreement again until November 2, when he said the wedding would have to be postponed because the agreement was not ready.³⁵³ The parties never discussed possible terms, and Victoria set a new wedding date of November 13.³⁵⁴ David gave Victoria a copy of the agreement at his apartment on November 5; it contained nineteen articles but no disclosure of assets or income.³⁵⁵ He told her to "look it over and get it signed."³⁵⁶ David also told Victoria that his sister-in-law, Kristen Friezo, could recommend an attorney with whom Victoria might wish to consult.³⁵⁷

After reading the agreement and making notes on it, Victoria went to see Kristin Friezo, an attorney, who introduced Victoria to another lawyer in her firm, Eamonn F. Foley.³⁵⁸ Foley's first act was to ask Victoria to sign a conflict of interest waiver, which she did.³⁵⁹ The two met for half an hour. Foley already had a draft of the agreement, as well as a statement of David's assets and liabilities.³⁶⁰ David had sent these to Foley the day before David presented the draft to Victoria. Foley didn't discuss David's assets with Victoria, nor did he explain any parts of the draft agreement that she didn't raise herself. Foley did not ask whether Victoria understood the draft. This was Foley's only meeting with Victoria though they may have had a later conversation before she signed the agreement.³⁶¹ Foley faxed his notes about Victoria's comments on the agreement to David's attorney, but Victoria never had an opportunity to speak to David about the agreement because he was out of the country.³⁶² Twenty-four hours before the wedding, the parties met in the offices of David's lawyer and signed the agreement.³⁶³ By then it contained the disclosures of financial information that it had lacked before, and Victoria saw a statement of David's assets, liabilities, and income for the first time.³⁶⁴

350. *Friezo*, 2007 WL 268897, at *2.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Friezo*, 2007 WL 268897, at *2.

357. *Id.* at *3.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at *4.

362. *Friezo*, 2007 WL 268897, at *4.

363. *Id.*

364. *Id.*

These disclosures showed David's net worth as approximately \$6.5 million and his income for 1997, excluding capital gains, as \$2.3 million.³⁶⁵ Victoria had filled in her schedule earlier, showing total assets of twenty-two thousand dollars.³⁶⁶ Foley was not present at the signing and did not charge Victoria for his services, although David "directed" Victoria "to send Foley two bottles of wine as a gesture of gratitude," which she did.³⁶⁷ David paid his lawyer over five thousand dollars.³⁶⁸

The parties married on November 13, had a son, and ultimately, in June 2002, Victoria sought a divorce.³⁶⁹ By this time David's assets had grown to \$22.7 million,³⁷⁰ and Victoria, who had not worked outside the home after losing her Bankers Trust job, had assets consisting of "bank accounts totaling \$26,063, security deposits with her landlords of \$11,800, and assorted furnishings and jewelry."³⁷¹ In response to Victoria's challenge, the trial court invalidated the premarital agreement on two grounds: David failed to make the required financial disclosures, and Victoria did not have a reasonable opportunity to consult with independent counsel. Specifically, the trial court found that Victoria did not have time to examine the agreement once the financial information was included and did not have actual knowledge of the defendant's income or his assets.³⁷² It also concluded that Foley did not represent Victoria's interests or give her adequate help in understanding the agreement.³⁷³ Indeed, it found that Victoria, inexperienced with lawyers, "did not know that she was being set up" [presumably by David, his sister-in-law, and Foley].³⁷⁴ It accordingly awarded her \$10.5 million as a property settlement to be paid over seven years and alimony of fifteen thousand dollars a month until payment of the first installment of the property award, when Victoria's alimony would be reduced to ten thousand dollars monthly.³⁷⁵ Under the premarital agreement she would have received only four hundred thousand dollars, plus use of a residence for herself and the parties' child.³⁷⁶

365. *Id.* at *10.

366. *Id.* at *3.

367. *Id.* at *4.

368. *Friezo*, 2007 WL 268897, at *5 n.18.

369. *Id.* at *4.

370. *Friezo v. Friezo*, No. FA020190070, 2004 WL 2165045, at *8 (Conn. Super. Ct. Aug. 27, 2004).

371. *Id.*

372. *Id.* at *4.

373. *Id.* ("Foley was either incredibly incompetent in his representation of the plaintiff or he was not, in fact, representing her at all.")

374. *Id.*

375. *Id.* Orders, ¶¶ 25, 42.

376. See *Friezo v. Friezo*, 2007 WL 268897, at *18 & n.1 (Conn. Feb. 6, 2007) (Norcott, J., dissenting).

On appeal, the Connecticut Supreme Court, over Justice Norcott's dissent,³⁷⁷ did three extraordinary things. First, it gave no deference to the trial court's findings of fact, engaging instead in a complete de novo review even though review for clear error was the appropriate standard.³⁷⁸ Second, after conceding that parties to a premarital agreement in Connecticut are "in a confidential relationship of mutual trust that demands the exercise of the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement,"³⁷⁹ it nevertheless held that Victoria's lack of financial experience was not relevant to whether David made a fair and reasonable disclosure of his financial circumstances.³⁸⁰ It further held that Foley's knowledge of David's finances must be imputed to Victoria, despite the facts that Foley never communicated this information to her, that his performance in representing her was substandard at best, and that he was connected through Kristen Friezo to David.³⁸¹ To shore up this decision, it attributed to Victoria "excellent judgment in conducting her personal financial affairs"³⁸² because "[h]er total net worth was \$22,000 at the time of the marriage. It is therefore clear that the plaintiff knew how to save, invest and manage her own money."³⁸³ The court failed to note that David's net worth at the same time was a little more than \$6.5 million and that Victoria's conduct of her personal financial affairs caused her to lose her job with Bankers Trust, and, thus unemployed, to become financially dependent on her own small savings and David. Third, the court closed its eyes to the connection between David and Foley, the timing of David's suggestion that Victoria consult his sister-in-law, and Foley's incompetent performance as Victoria's lawyer. Foley's main interest at his only meeting with Victoria seemed to be securing, without explanation, Victoria's waiver of his clear conflict of interest.³⁸⁴ As if to add insult to injury, the supreme court suggested that Victoria could have brought a

377. *Id.*

378. As Justice Norcott said in his dissent: "I disagree with the majority's conclusion that this appeal is subject to plenary review Rather, my review of the text and structure of the statute itself indicates that the trial court's conclusions [on disclosure and representation] were factual findings subject to review only for clear error." *Id.* at *19; see also *Alexander v. Alexander*, 610 S.E.2d 48, 49 (2005); *In Re Marriage of Bonds*, 5 P.3d 815, 836 (2000).

379. *Friezo*, 2007 WL 268897, at *9 (majority opinion).

380. *Id.* at *10.

381. *Id.* at *12. For this conclusion the court relied on *Dornemann v. Dornemann*, 859 A.2d 273 (Conn. Super. Ct. 2004). In that case, the plaintiff's attorneys were unconnected to the husband, their independence was not under attack, and they had communicated the husband's financial information to the plaintiff. *Id.* at 505.

382. *Friezo*, 2007 WL 268897, at *15.

383. *Id.*

384. *Id.* at *3.

malpractice action against Foley on the grounds of his incompetence but that she "did not do so."³⁸⁵ The supreme court's refusal to protect Victoria in these circumstances is an unjustifiable dilution of the Connecticut Premarital Agreement Act.

7. Maine

In *Hoag v. Dick*,³⁸⁶ the Supreme Judicial Court of Maine affirmed a lower court decision that had held a premarital agreement invalid because the prospective wife did not enter it voluntarily and "intelligently" and because the substance of the agreement was unfair.³⁸⁷ As the parties executed the agreement a few months before Maine enacted the Uniform Premarital Agreement Act, the court applied the common law.³⁸⁸ The parties' first marriage lasted four years.³⁸⁹ However, they continued to live together after their divorce until Terry's church threatened her with excommunication unless she remarried or stopped living with Richard, her ex-husband.³⁹⁰ The parties decided to remarry and discussed premarital agreements with Richard's son, an attorney.³⁹¹ Although he suggested that each party be represented by independent legal counsel, Terry remarked that it should not be necessary because she "did not want anything."³⁹² Richard would not remarry without an agreement; his son prepared it and delivered it to Terry on the day of the wedding.³⁹³ In fact, she signed it before a notary in the parking lot of the church just before the ceremony.³⁹⁴ The agreement gave her a six-thousand-dollar lump sum on divorce even though Richard had assets in excess of one million dollars.³⁹⁵

On the parties' second divorce ten years later, Terry raised issues of involuntariness and unconscionability.³⁹⁶ The trial court noted that Terry was not represented by independent counsel, did not know the legal impact of the agreement, and had no opportunity to learn of its implications.³⁹⁷ The court refused to enforce the agreement, concluding that Terry could not have "intelligently entered into the

385. *Id.* at *12.

386. 799 A.2d 391 (Me. 2002).

387. *Id.* at 395; *Dick v. Dick*, No. AUG-FM-98-26, slip op. at 5 (D. Ct. Me. Dec. 7, 1998).

388. *Hoag*, 799 A.2d at 392-94.

389. *Id.* at 392.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Hoag*, 799 A.2d at 392.

395. *Id.*

396. See *Dick v. Dick*, No. AUG-FM-98-26, slip. op. at 5 (D. Ct. Me. Dec. 7, 1998).

397. *Id.*

[agreement].”³⁹⁸ It said further that the substance of the agreement, under which plaintiff received only six thousand dollars and was responsible for her own and her husband’s legal fees if she began a divorce proceeding, was “beyond unfair and unreasonable.”³⁹⁹ The supreme court obscured the exact grounds of its affirmance; after laying out the troublesome substantive provisions of the agreement, it shifted to the procedural aspects of the case, ultimately saying, “[t]he [trial] court’s factual findings regarding the circumstances of execution support its conclusion that the premarital agreement is unenforceable.”⁴⁰⁰

8. Kansas

In *Davis v. Miller*, Steven filed for divorce after a twenty-seven year marriage with Charline.⁴⁰¹ Nine months later, the parties, each represented by counsel, executed a postmarital agreement and reconciled.⁴⁰² The reconciliation lasted a year, after which Steven again filed for divorce.⁴⁰³ The divorce order incorporated the postmarital agreement, which provided that its validity should be governed under the Kansas Uniform Premarital Agreement Act.⁴⁰⁴ In a separate action, Charline challenged the agreement, alleging fraud and breach of warranty.⁴⁰⁵ She claimed that Steven valued his company at book value rather than fair market value.⁴⁰⁶ Documents that turned up in discovery during the divorce showed the company’s fair market value to be about twice book value or approximately three million dollars.⁴⁰⁷

The trial court granted summary judgment against Charline.⁴⁰⁸ In the Supreme Court of Kansas, Charline argued first that although the parties had agreed to be bound by the Uniform Act, it should not govern.⁴⁰⁹ Stating its view that parties entering a postnuptial agreement were in a “vastly different position” from those executing a

398. *Id.*

399. *Id.* The ultimate divorce judgment gave Terry \$150,600 as her share of marital property, spousal support of six hundred dollars a month for at least five years (until October 31, 2006), nominal support of one dollar a year thereafter, and attorneys’ fees of about \$17,500. *Id.* at 11, 12.

400. *Hoag v. Dick*, 799 A.2d 391, 395 (Me. 2002).

401. 7 P.3d 1223, 1226 (Kan. 2000).

402. *Id.* at 1227, 1229.

403. *Id.*

404. *Id.* at 1229.

405. *Id.* at 1227.

406. *Id.* at 1228.

407. *Id.*

408. *Id.* at 1226.

409. *Id.* at 1229. She knew she would not be able to get the agreement struck down if the Uniform Act applied, because under the Act disclosure is only an issue where the agreement is unconscionable, and here clearly it was not. See KAN. STAT. ANN. § 23-807 (2005).

premarital agreement, and that the "dynamics and pressures" involved in each were "qualitatively different," the supreme court held nevertheless that parties could choose to have their agreement judged under an otherwise inappropriate standard.⁴¹⁰

Charline next argued that Steven failed to fully disclose his assets, claiming that she would not have signed the agreement if she had known his company's fair market value was so much greater than its book value.⁴¹¹ The court noted that during the negotiations Charline had independent counsel and was advised as well by an accountant.⁴¹² She and her advisors chose not to make an independent valuation of Steven's company because they deemed it too expensive.⁴¹³ Furthermore, she was a stockholder in the company with access to financial information if she asked for it.⁴¹⁴ "[M]oreover," the court noted that, "due to the lengthy marriage, [Charline] was in a position of knowledge that is far superior to that of a young bride signing the agreement *before* the marriage."⁴¹⁵ The agreement gave her substantial assets: she "was able to keep the family home, the power motor boat, \$100,000 in cash, and a promissory note worth over one million dollars."⁴¹⁶ According to the court, this was enough "[t]o continue a lifestyle . . . she led when married . . ."⁴¹⁷ Applying the Act, the Supreme Court of Kansas found that Charline had entered the agreement voluntarily, the agreement was not unconscionable, and Steven fairly and reasonably disclosed his property to her.⁴¹⁸

9. Allegations of Promises Not Included in the Premarital Agreement: North Dakota and Maryland

In re Estate of Lutz was triggered by the death of Emanuel after a six-and-a-half year marriage.⁴¹⁹ The North Dakota Supreme Court decision was the last act in a litigation that began in 1995, went to the state's highest court three times over various procedural disputes,⁴²⁰ and ultimately left Lavilla Lutz on the welfare rolls.⁴²¹ In the litigation, she sought to set aside a premarital agreement under which the

410. *Davis v. Miller*, 7 P.3d 1223, 1229 (Kan. 2000).

411. *Id.* at 1228, 1231.

412. *Id.* at 1227, 1229.

413. *Id.* at 1227.

414. *Id.* at 1228.

415. *Id.* at 1233.

416. *Davis*, 7 P.3d at 1232.

417. *Id.*

418. *Id.* at 1231-33.

419. 2000 ND 226, 620 N.W.2d 589, 592.

420. *See id.* (*Lutz III*); 1997 ND 82, 563 N.W.2d 90 (*Lutz I*); 1999 ND 121, 595 N.W.2d 590 (*Lutz II*).

421. *Lutz*, 563 N.W.2d at 100.

parties waived any share of the other's estate and consented to each other's wills.⁴²² Emanuel's lawyer drafted his will, Lavilla's will, and the premarital agreement at the same time.⁴²³ Emanuel's will left his wife their marital home (an apartment in a duplex) for life or until she remarried, along with the furniture, household items and personalty used in connection with it, and the family car.⁴²⁴ Lavilla challenged the agreement on both procedural and substantive grounds, arguing that it was neither voluntary nor conscionable.⁴²⁵ Her attack on the voluntariness of the agreement was twofold. She argued that she did not seek independent representation because she believed that Emanuel's lawyer was representing her in connection with the premarital agreement, and he did not advise her to seek independent counsel.⁴²⁶

Second, she claimed that she entered the agreement based on Emanuel's oral assurances that he would provide for her outside the will, which he failed to do.⁴²⁷ Her challenge to the substantive fairness of the agreement was that husband's provisions for her were so negligible that the agreement was unconscionable at its execution.⁴²⁸ Also, because she would become a public charge without additional support, she argued that it was unconscionable at enforcement as well.⁴²⁹ North Dakota's version of the Uniform Premarital Agreement Act invalidates premarital agreements if they are involuntary or unconscionable at execution and made without disclosure.⁴³⁰ Another state statute gives the court discretion if it finds the enforcement of an agreement to be clearly unconscionable.⁴³¹ The court may refuse to enforce the agreement, enforce only the conscionable part of it, or limit

422. *Id.* at 92.

423. *Lutz*, 620 N.W.2d at 592.

424. Will of Emanuel Lutz, at 1 (Feb. 1, 1988) (copy on file with author).

425. *Lutz*, 620 N.W.2d at 594-96. Mrs. Lutz made two other claims in this litigation, one for compensation for care of Mr. Lutz during his last illness, and one based on language in his will that conditioned the residuary clause, leaving the remainder of his estate to his children and grandchildren, on Mrs. Lutz's failure to survive him. *Id.* at 593-94, 597. Her claim was that because she did survive Mr. Lutz, the residuary clause was inoperative and she was entitled to an intestate share. *Id.* at 597. The trial court denied her claim for services, finding that she failed to overcome the presumption that such services are gratuitous by proving a contract for payment for them. *In re Estate of Emanuel Lutz*, No. 94-C-2850, slip op. at 3-5 (S. Cent. Jud. Dist. N.D. June 30, 1998). The supreme court thought the will ambiguous, filled in the ambiguity by looking at the premarital agreement and the intent expressed in it to leave the residue of Lutz's estate to his children and grandchildren, and declared the condition of survivorship a "drafting error." *Lutz*, 620 N.W.2d at 597-98.

426. *Id.* at 594.

427. *Id.* at 595.

428. *In re Estate of Lutz*, 1997 ND 82, 563 N.W.2d 90, 99.

429. *Id.* at 100.

430. N.D. CENT. CODE § 14-03.1-06 (2005).

431. N.D. CENT. CODE § 14-03.1-07 (2005).

the application of the unconscionable part so as to avoid an unconscionable result.⁴³² Still a third statutory section, enacted after Emanuel's death but before the litigation had been resolved, provides that waivers of spousal rights on death are unenforceable if enforcement would make the surviving spouse eligible for public assistance.⁴³³

On the issue of voluntariness, Lavilla's testimony was pitted against that of Emanuel's lawyer, who was in the position of defending himself against Lavilla's claim that he acted improperly, and Emanuel's daughter, who was a co-executor of her father's estate and one of the residuary beneficiaries of his will.⁴³⁴ Emanuel's lawyer testified that he had told Lavilla that he was representing only her husband and that she should consult her own attorney.⁴³⁵ He also denied that Emanuel made oral promises to Lavilla about providing for her outside the will.⁴³⁶ Emanuel's daughter testified that neither Emanuel nor Lavilla had informed her about any promise to provide Lavilla with additional income.⁴³⁷ The trial court decided against Lavilla on the issue of the voluntariness of the agreement but made no specific findings about what Emanuel's lawyer did or said or what Emanuel might have promised.⁴³⁸ The trial court held that the agreement was not unconscionable at execution under the Uniform Act because Emanuel had made full disclosure.⁴³⁹ In an earlier stage in the litigation, it found the agreement clearly unconscionable in result but later reversed itself on this point; it held the statute invalidating waivers of spousal rights on death in Lavilla's circumstances inapplicable to her because it was enacted after the Lutz agreement was signed and after Emanuel had died.⁴⁴⁰ It accepted the executors' valuation of Lavilla's interest in the marital duplex at ninety thousand dollars (she had contended that it was worth only thirty thousand dollars) and the value of the estate as four hundred thousand dollars.⁴⁴¹ The supreme court could have decided the issues of voluntariness and unconscionability *de novo* but chose instead to rely on the trial court.⁴⁴²

432. *Id.*

433. N.D. CENT. CODE § 30.1-05-07(2)(a) (2005).

434. *In re Estate of Lutz*, 2000 ND 226, 620 N.W.2d 589, 591, 595.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 596.

440. *Lutz*, 620 N.W.2d at 597.

441. *Id.* at 597. It went on to make findings about Mrs. Lutz's financial needs in case the supreme court decided that she was, after all, entitled to additional income from the estate. It found that Mrs. Lutz's total income was \$659 a month and that she would need an additional \$250 a month to stay off the welfare rolls. *In re Estate of Emanuel Lutz*, No. 94-C-2850, slip op. at 4 (S. Cent. Jud. Dist. N.D. June 30, 1998).

442. *In re Estate of Lutz*, 2000 N.D. 226, 620 N.W.2d 589, 596-97.

Because certain crucial findings were absent from the trial court record, the supreme court implied them, namely that Emanuel's lawyer had told Lavilla that he was representing only Mr. Lutz, that he had advised her to seek independent counsel, and that Emanuel had made no promises to provide for Lavilla outside of his will.⁴⁴³ The court accepted the trial court's conclusions on unconscionability and the inapplicability of the statute allowing modification of death rights waivers.⁴⁴⁴ It instead could have applied the spousal waiver statute despite the date of its enactment. Other jurisdictions propound authority for the proposition that a statute that reflects a change in public policy may be applied retroactively.⁴⁴⁵ Similarly, the supreme court could have invoked another statutory section providing that any provision of a contract is unlawful if it is contrary to the policy of express law.⁴⁴⁶

In *Cannon v. Cannon*, the Court of Appeals of Maryland⁴⁴⁷ took the opportunity to update its law of premarital agreements.⁴⁴⁸ The couple involved lived together for four years before they became engaged.⁴⁴⁹ Wendy had been through an earlier marriage and divorce and had two children from it.⁴⁵⁰ Two months before the wedding, John, who earned about forty thousand dollars a year, more than double what Wendy made, raised the subject of a premarital agreement.⁴⁵¹ He was concerned about bankruptcy proceedings begun against Wendy and her former husband, fearing that creditors might reach his assets after the impending marriage.⁴⁵² Thus, about a month before the wedding, the couple executed a premarital agreement prepared by John's lawyer in which Wendy waived all marital rights, agreed to pay John one thousand dollars a month during the marriage toward mortgage expenses and utilities, and empowered him to require her and her children to leave the marital residence on sixty

443. *Id.* at 595.

444. *Id.* at 596-97.

445. See *Bloomfield v. Bloomfield*, 764 N.E.2d 950, 953 (N.Y. 2001), discussed *infra* notes 698-708 ("The general principle that the validity of a contract depends upon the law that existed at the time the contract was made does not appertain to variations of the law that are made due to changes in public policy."); cf. CAL. CIV. PROC. CODE § 1008 subdiv. c ("If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order.").

446. N.D. CENT. CODE § 9-08-01(2) (2006).

447. The Court of Appeals is the highest state court in Maryland. See Maryland Judiciary, <http://www.courts.state.md.us/coappeals/> (last visited Oct. 4, 2006).

448. 865 A.2d 563 (Md. 2005).

449. *Id.* at 577.

450. *Id.* at 566.

451. *Id.* at 568.

452. *Id.*

days notice.⁴⁵³ The agreement recited disclosure and that each party had been free to seek independent counsel, although Wendy was not represented.⁴⁵⁴

When the parties separated seven years later, John asserted the premarital agreement.⁴⁵⁵ Wendy challenged its validity, arguing that she entered it on the basis of the parties' oral expressed intent to protect John from any consequences of her bankruptcy and that the parties did not intend it to be a permanent waiver of her marital rights.⁴⁵⁶ She also argued that to enforce it against her would be unconscionable because of its one-sided terms and the fact that it was intended to be a temporary expedient during the specter of bankruptcy.⁴⁵⁷ The trial court agreed with her, holding in an oral opinion that the agreement was valid only until 1996 when the threat of the bankruptcy proceedings against Wendy had terminated.⁴⁵⁸ The court thought that the confidential relationship between the parties justified her reliance on the parties' understanding to make the agreement only a temporary waiver of her marital property rights.⁴⁵⁹ The court called the terms "draconian," specifically noting that under them she would waive all rights to alimony, death benefits by reason of the marriage, any claim for retirement benefits, and that she could be forced out of the marital house on sixty days notice.⁴⁶⁰

The Maryland Court of Special Appeals reversed, finding that the trial court had given too much weight to the parties' oral understanding in evaluating the alleged unfairness of the agreement, which was not ambiguous on its face and contained no stated time limit other than dissolution of the marriage.⁴⁶¹ The Court of Appeals of Maryland affirmed the validity of the agreement.⁴⁶² It said that in Maryland the parties to a premarital agreement are in a confidential relationship as a matter of law and are thus expected to make full, frank, and truthful disclosure to each other at the time of execution of the agreement.⁴⁶³ The import of the relationship, explained the court, is that the party seeking to enforce the agreement must bear the burden of proving its validity.⁴⁶⁴ Even placing the burden on John in this case,

453. *Id.* at 569.

454. *Cannon*, 865 A.2d at 566-67.

455. *Id.* at 568-70.

456. *Id.* at 567.

457. *Id.* at 567, 588.

458. *Id.* at 566-67.

459. *Id.* at 567.

460. *Id.* at 569, 588 n.23.

461. *Cannon v. Cannon*, 846 A.2d 1127, 1137-38 (Md. Ct. Spec. App. 2004), *aff'd*, 865 A.2d 563 (Md. 2005).

462. *Cannon*, 865 A.2d at 588.

463. *Id.* at 574.

464. *Id.*

the evidence showed Wendy had seventeen days between presentation of the agreement and its execution to seek independent counsel.⁴⁶⁵ She also had some knowledge about her husband's assets from living with him for four years before their marriage, although the court acknowledged that the disclosure he made was imperfect.⁴⁶⁶ He did not ever tell her the purchase price of the home, the mortgage to which she was contributing, or his income.⁴⁶⁷ Furthermore, the premarital agreement attached no values to the listed assets.⁴⁶⁸ The court also attributed to her an understanding of the significance of waivers due to her earlier divorce.⁴⁶⁹ It emphasized that although the trial court had called the agreement "draconian," that court had, nevertheless, held that the agreement was valid until the bankruptcy threat ended.⁴⁷⁰ The court of appeals enunciated what it called the correct standard for determining the validity of premarital agreements: whether there is an "overreaching, that is, whether in the atmosphere and environment of the confidential relationship there was unfairness or inequity in the result of the agreement or in its procurement."⁴⁷¹ In this case, according to the court, there was no such overreaching and thus the agreement was still valid at the time of divorce.⁴⁷² This holding seems to contradict the trial court's characterization of the facts:

When asked on cross[-]examination, [John] again confirmed . . . that the primary purpose of the contract was to [protect] him from any claims of her creditors coming out of the bankruptcy. He said he didn't know when the bankruptcy was filed. He didn't know when that threat would end. But because of the various disputes [John and Wendy] had, he didn't see any reason to go along with any termination to that agreement.⁴⁷³

So John, acknowledging the purpose of the agreement as to tide the couple through Wendy's bankruptcy, decided unilaterally when the

465. *Id.* at 587.

466. *Id.* at 586.

467. *Id.* at 570.

468. *Cannon*, 865 A.2d at 586.

469. *Id.* at 570. Courts often say that a previous divorce makes ex-wives legally knowledgeable about waivers, but this is not always a warranted assumption. See, e.g., *Austin v. Austin*, 839 N.E.2d 837, 840 (Mass. 2005) (reiterating the trial court's finding that the wife, "having been divorced previously, was fully aware of her rights to alimony, support, property division, and child support").

470. *Cannon v. Cannon*, 865 A.2d 563, 567 (Md. 2005).

471. *Id.* at 584.

472. *Id.* at 587-88.

473. *Cannon v. Cannon*, 846 A.2d 1127, 1133 (Md. Ct. Spec. App. 2004) (quoting trial court).

relationship soured to conveniently forget the agreement's original purpose and meaning. Coupled with his failure to disclose and the agreement's harsh terms, he is guilty of overreaching.

10. *Tennessee*

In *Bratton v. Bratton* the parties married after Michael had completed his first year of medical school and Cynthia was employed as a research technician.⁴⁷⁴ The doctors with whom Cynthia worked predicted that after medical school her husband would leave her and advised her that she needed a legally binding agreement for protection.⁴⁷⁵ Thus, a year after the marriage, the parties signed an agreement that Michael drafted by hand in which he promised never to cause a divorce between the two and that, if he violated the promise, he would give his wife half of his present belongings and half of his net future earnings.⁴⁷⁶ A typed version that the parties signed later superceded this handwritten version.⁴⁷⁷ It provided that in the event of divorce the parties' jointly held properties would be divided equally and that if Michael was guilty of statutory grounds for divorce and his wife sought one he would pay her half of all his gross net income.⁴⁷⁸

After Michael graduated from medical school, became an orthopedic surgeon, and the couple had two children, Michael committed adultery.⁴⁷⁹ Cynthia filed for divorce after their eighteen-year marriage and asserted the agreement in the proceeding.⁴⁸⁰ The trial court held the property division part of the agreement valid but rejected the alimony portion on the ground that it lacked consideration.⁴⁸¹ Accordingly, it awarded the wife half of the couple's property and \$10,500 a month as alimony, plus additional money for child support.⁴⁸² The intermediate appellate court approved of the property division, alimony award, and child support but held that the agreement was invalid as contrary to public policy because it entitled the wife to property division and alimony benefits solely on the basis of the husband's fault.⁴⁸³ On appeal, the Tennessee Supreme Court addressed

474. 136 S.W.3d 595, 597 (Tenn. 2004).

475. *Id.* at 598.

476. *Id.* at 597.

477. The parties disagreed about whether he or she took the original to the lawyer, who acted as scrivener of the second version. *Id.*

478. *Id.* at 597-98.

479. *Id.*

480. *Bratton*, 136 S.W.3d at 597-98.

481. *Id.* at 598.

482. *Id.* at 598-99.

483. *Id.* at 599. The court asserted that the agreement impermissibly "preempt[ed]" the marital property regime. *Bratton v. Bratton*, No. E2002-00432-COA-R3-CV, 2003 WL

the validity of postnuptial agreements, finding them valid and not contrary to public policy.⁴⁸⁴ However, it held that this particular agreement was invalid because it lacked consideration running from Cynthia to Michael.⁴⁸⁵ It rejected both foregoing a career or staying in the marriage as sufficient consideration.⁴⁸⁶ The former, it said, was something Cynthia had decided to do before the agreement was entered and the latter, if it was the consideration, would invalidate the agreement "due to the taint of coercion and duress."⁴⁸⁷ If the court had analyzed this agreement like a premarital agreement for procedural and substantive fairness at execution and substantive fairness at enforcement, instead of under a consideration rubric, it might very well have reached the same result. As the intermediate appellate court observed, Michael's obligation under the applicable child support guidelines amounted to thirty-two percent of his income.⁴⁸⁸ Paying half of his income to his wife would leave him only eighteen percent for himself, very arguably an unconscionable result.⁴⁸⁹ Interesting to note is that none of the premarital agreement cases consider the frequent ultimatum "sign the agreement or I won't marry you" to be coercive. How different, one wonders, is the one attributed to Cynthia: "Sign the agreement or I'll leave the marriage"?

11. Rhode Island

In a serendipitous symmetry, the most recent and last case in this section leads us back to the very first, *In re Marriage of Bonds* and its legislative reversal in California.⁴⁹⁰ In *Bonds*, the California Supreme Court, applying its version of the Uniform Premarital Agreement Act, upheld the voluntariness of a premarital agreement signed by an unrepresented wife on the eve of the wedding.⁴⁹¹ The California

1191185, at *2 (Tenn. Ct. App. Sept. 2, 2003), *aff'd on other grounds*, 136 S.W.3d 595 (Tenn. 2004).

484. *Bratton*, 136 S.W.3d at 599.

485. *Id.* at 603. The test the court put forth for establishing validity was that the agreement be supported by "adequate consideration, knowledgeably entered into, and there is no evidence of fraud, coercion or duress." *Id.* at 605. According to the court, spouses are in confidential relationships with each other and their agreements are therefore subject to "close scrutiny." *Id.* at 601.

486. *Id.* at 603.

487. *Id.* A dissenting justice thought there was sufficient consideration, accepting both versions of what might constitute consideration. *See id.* at 606-08 (Holder, J., concurring in part, dissenting in part).

488. *Bratton v. Bratton*, No.E2002-00432-COA-R3-CV, 2003 WL 1191185, at *2 (Tenn. Ct. App. Mar. 14, 2003).

489. *Id.*

490. *See supra* Part II.B.2.

491. *In re Marriage of Bonds*, 5 P.3d 815, 820 (Cal. 2000).

legislature responded by enacting a rebuttable presumption of involuntariness for agreements signed in such circumstances.⁴⁹² In *Marsocci v. Marsocci*,⁴⁹³ Rhode Island courts decided a similar issue under Rhode Island's unique version of the Uniform Act.⁴⁹⁴ Under the Rhode Island statute, involuntariness alone is not a ground for invalidating a premarital agreement.⁴⁹⁵ To succeed, a challenger must prove three elements by clear and convincing evidence: she entered the agreement involuntarily, the agreement was unconscionable when executed, *and* she was not provided with fair and reasonable disclosure before its execution.⁴⁹⁶

In *Marsocci*, Debra and David signed a premarital agreement four days before the wedding.⁴⁹⁷ Debra was already pregnant with the couple's only child.⁴⁹⁸ David was represented by counsel; Debra was not.⁴⁹⁹ The agreement contained a declaration that each party had "fully disclosed [his or her] approximate net worth."⁵⁰⁰ The agreement listed David's assets as six parcels of real estate, three motor vehicles, and a company checking account.⁵⁰¹ It did not assign values to any of these.⁵⁰² It showed "no assets" for Debra.⁵⁰³ The agreement provided that David's listed assets and any income or other value they produced during the marriage would be his separate property.⁵⁰⁴ As David's business was selling and buying properties, the provision seemed to insulate the business and its income from division as marital property on divorce.⁵⁰⁵

When the parties did divorce after a seven-year marriage, Debra challenged the validity of the premarital agreement.⁵⁰⁶ She argued that it was involuntary and unconscionable and that David had not made fair and reasonable disclosure.⁵⁰⁷ The trial court agreed with her and looked to California for guidance on the meaning of voluntariness. It applied that state's statutory presumption that a premarital agreement is involuntary unless the court finds, among other

492. See *supra* text accompanying notes 99-104.

493. 911 A.2d 690 (R.I. 2006).

494. R.I. GEN. LAWS § 15-17-1 (2006).

495. *Id.* § 15-17-6.

496. *Id.* § 15-17-6 (a), (b).

497. *Marsocci*, 911 A.2d at 692.

498. *Id.*

499. *Id.*

500. *Id.* at 699.

501. *Id.* at 692.

502. *Id.* at 698 n.4.

503. *Marsocci*, 911 A.2d at 698 n.4.

504. *Id.* at 694 n.2, 698.

505. *Id.* at 698.

506. *Id.* at 692-93.

507. *Id.* at 694.

things, that the party challenging it, if unrepresented, was fully informed of the terms and basic effects of the agreement as well as the rights and obligations she was giving up by signing it.⁵⁰⁸ The trial court held that this presumption combined with David's failure to provide dollar values for assets or net worth and the absence of a written waiver of disclosure by Debra caused the agreement to be involuntary and disclosure less than fair and reasonable.⁵⁰⁹ The trial court further found the agreement unconscionable based on the parties' confidential relationship and the fact that it precluded any accumulation of marital assets in which Debra could share on divorce.⁵¹⁰ Accordingly, it invalidated the agreement and made an equitable distribution of the couple's property.⁵¹¹

Both parties appealed. David contended that Debra failed to prove the three elements required under the Rhode Island statute, and Debra contended that she was entitled to half of the marital estate rather than the one-third the trial court awarded.⁵¹² The Rhode Island Supreme Court reversed, holding the premarital agreement valid and the trial court's reliance on California law unwarranted.⁵¹³ In Rhode Island involuntariness cannot be presumed; it must be found separately by clear and convincing evidence.⁵¹⁴ Similarly, Rhode Island courts require clear and convincing evidence to find a lack of fair and reasonable disclosure and unconscionability.⁵¹⁵ The Rhode Island Supreme Court found no evidence in the record that Debra did not execute the agreement voluntarily; David's list of assets without specific values and the acknowledgment in the agreement that each party had disclosed approximate net worth were "adequate."⁵¹⁶ Although the trial court was correct in finding the premarital agreement unconscionable, unconscionability alone was not enough to invalidate it. The court, in an apparent effort to help Debra on remand, softened the agreement's potential effect by holding that it did not permanently freeze David's separate assets and their future products in a separate state.⁵¹⁷ Separate assets could still be transmuted into marital assets; any that had been so transmuted as well as any appreciation in value of separate assets resulting from

508. *Id.* at 693.

509. *Marsocci*, 911 A.2d at 695.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.* at 697.

514. *Id.*

515. *Marsocci*, 911 A.2d at 699.

516. *Id.* at 698.

517. *Id.* at 699.

marital efforts were marital property subject to equitable distribution on divorce.⁵¹⁸

C. Pure Substance

1. Permissible Subjects of Agreement: Alimony, Palimony, and Children

Although premarital agreements are now generally enforceable, courts and legislatures are still reluctant to allow parties to privately control certain subjects through them.⁵¹⁹ Spousal support has traditionally been one of these. As a policy matter, the state is fearful that a divorced, formerly dependent spouse will have to go on public assistance as the result of agreements that modify or eliminate spousal support rights.⁵²⁰ Understandably, it would prefer to have an ex-spouse foot the bill whenever possible. Some states have thus barred spousal support as a permissible subject of premarital agreement.⁵²¹ Others, including those that have adopted the Uniform Premarital Agreement Act in its promulgated form, do allow parties to contract about spousal support.⁵²² The Act, however, provides for a second look at support waivers on divorce and permits courts to override any that will cause an ex-spouse to become a public charge.⁵²³ Some states have enacted identical "second-look" provisions for agreements that waive elective or intestate shares on death of a spouse.⁵²⁴ States that have not adopted the Act, or any other relevant statute, subject support waivers to the same second-look tests for fairness at enforcement as they do other provisions of premarital agreements.⁵²⁵

Since 2000, two more states have joined the permissive trend allowing spousal support rights to be a subject of premarital

518. *Id.*

519. *See, e.g., Sanford v. Sanford*, 694 N.W.2d 283, 288 (S.D. 2005).

520. *See, e.g.,* N.Y. GEN. OBLIG. LAW § 5-311 (2006).

521. *See, e.g.,* IOWA CODE § 596.5(2) (2006); *Sanford*, 694 N.W.2d at 288.

522. *Sanford*, 694 N.W.2d at 288 n.2.

523. The Act provides

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

UNIF. PREMARITAL AGMT. ACT § 6(b) (1983).

524. *See, e.g.,* N.D. CENT. CODE § 30.1-05-07(2)(a) (2005).

525. For example, New York (N.Y. GEN. OBLIG. LAW § 5-311 (2005)); New Hampshire (*MacFarlane v. Rich*, 567 A.2d 585, 589 (N.H. 1989)); Massachusetts (*DeMatteo v. DeMatteo*, 762 N.E.2d 797, 811-13 (Mass. 2002)).

agreement.⁵²⁶ The California legislature initially enacted the Act without its support provisions, but it did not expressly prohibit such waivers.⁵²⁷ In *Pendleton v. Fireman*, the California Supreme Court reexamined the common law prohibition, finding it "anachronistic."⁵²⁸ Accordingly, it upheld a premarital waiver of alimony against the wife,⁵²⁹ noting that it was an agreement between "educated, intelligent" prospective spouses who appeared "to be self-sufficient in property and earning ability" and had the advice of counsel at the time they executed the waiver.⁵³⁰ In response to this judicial fiat, the state legislature passed a new law providing that alimony waivers are not enforceable if the party against whom enforcement is sought was not represented by independent counsel or if the waiver was unconscionable at the time of enforcement.⁵³¹ The law provides further that independent representation does not sanitize an otherwise unconscionable waiver.⁵³² South Carolina similarly changed course on the enforceability of premarital support waivers. In *Hardee v. Hardee*, the supreme court overruled earlier cases that pointed to the conclusion that waivers of support rights in premarital agreements were void as against public policy.⁵³³ It enforced a waiver against a wife who was totally disabled, unable to support herself, and would become a public charge as a result.⁵³⁴ Unlike California and South Carolina, South Dakota rejected the opportunity to "modernize" its law, adhering to the traditional position that alimony is not a proper subject of premarital agreement.⁵³⁵ In *Sanford v. Sanford*, the South Dakota Supreme Court struck down a provision in a premarital agreement that bound Denny to pay Colleen \$144,000 on termination of their marriage.⁵³⁶ The payment was structured like alimony: on the first business day of the month for thirty-six months, Denny was to pay Colleen four thousand dollars, and his obligation would cease if she died, remarried,

526. *E.g.*, *Hardee v. Hardee*, 585 S.E.2d 501, 503 (S.C. 2003); *Pendleton v. Fireman*, 5 P.3d 839, 848 (Cal. 2000).

527. *Pendleton*, 5 P.3d at 841.

528. *Id.* at 845.

529. *See infra* note 604 and accompanying text (discussing the Massachusetts Supreme Court's refusal to retroactively apply new law in *Sullivan v. Burkin*).

530. *Id.* at 848. Unlike virtually all of the other cases covered by this article, the husband and wife in *Pendleton* seemed to occupy roughly equal bargaining positions. At the time of divorce, each had assets worth approximately \$2.5 million. *Id.* at 840. She had a master's degree and was an aspiring writer; he had degrees in law and pharmacology and invested in business ventures. *Id.*

531. CAL. FAM. CODE § 1612 (2006).

532. *Id.*

533. 585 S.E.2d 501, 504 (S.C. 2003).

534. For discussion of *Hardee*, see *infra* notes 646-74 and accompanying text.

535. *Sanford v. Sanford*, 694 N.W.2d 283, 295 (S.D. 2005).

536. *Id.* at 285-86.

or cohabited with an adult male.⁵³⁷ Wife agreed to make no other claim against husband on divorce "in the nature of support, alimony, property settlement or otherwise."⁵³⁸ The supreme court, voiding the provision as alimony, unaccountably held it enforceable as a property division.⁵³⁹

Langley v. Langley, a Georgia case, raised the policy question of whether a husband who was obligated to pay his wife a lump sum in alimony on divorce would be allowed to set off against it his payments of temporary alimony and attorneys' fees made in earlier divorce proceedings that he had commenced and dismissed.⁵⁴⁰ The trial court allowed the setoff, but the Supreme Court of Georgia reversed.⁵⁴¹ It noted the great disparity in the financial positions of Robert and Nancy and the fact that Robert's earlier proceedings were the cause of the fees and support he was now trying to deduct from his alimony obligation.⁵⁴² The court appropriately concluded that to allow the set-off "would effectively allow Mr. Langley to use the . . . agreement to place Ms. Langley in the untenable position of forfeiting her \$25,000 entitlement or rendering herself financially, and thus legally, defenseless in the . . . divorce action which proceeded to judgment."⁵⁴³

Two other cases, one from Florida and the other from Wisconsin, dealt with the questions of whether a prevailing party attorney's fees provision and a waiver of homestead rights, respectively, were appropriate subjects of premarital agreement. In *Lashkajani v. Lashkajani*, after a ten-year marriage that produced three children, Amy unsuccessfully challenged a provision of the premarital agreement on procedural and substantive grounds.⁵⁴⁴ Both parties asked for attorneys' fees.⁵⁴⁵ Hadi based his claim on the provision of the agreement that provided that attorneys' fees and other costs incurred in litigating the agreement were to be paid by the losing party.⁵⁴⁶ The trial court

537. *Id.* at 286.

538. *Id.*

539. *Id.* at 295.

540. 613 S.E.2d 614, 615 (Ga. 2005).

541. *Id.* at 615, 617.

542. *Id.* at 616.

543. *Id.* at 617. The court went on to interpret the language of the premarital agreement to support this result. The lump sum was payable to Nancy "should their marriage dissolve." *Id.* The parties were bound to it "in the event the marriage should be dissolved or terminated by legal proceedings." *Id.* The quoted language, said the court, showed the parties' expectations that Robert was to pay the lump sum as a result of the dissolution of the marriage and that it was not to include sums spent in obtaining the divorce or in earlier litigation. *Id.*

544. 911 So. 2d 1154 (Fla. 2005).

545. *Id.* at 1155.

546. *Id.* The wife based her claim on a Florida statute empowering courts to use equity in dissolution proceedings. *Id.* at 1156. Thus the trial court awarded the wife roughly

awarded him sixty-three thousand dollars for attorney's fees based on Amy's unsuccessful challenge to the agreement.⁵⁴⁷ She appealed the award, arguing that prevailing party provisions in premarital agreements were tantamount to waivers of spousal support rights during marriage and therefore void under Florida law.⁵⁴⁸ The Supreme Court of Florida upheld the provision as a proper subject of premarital contract as more closely related to distribution of assets after marriage than to support during marriage.⁵⁴⁹ In *Jones v. Estate of Jones*, the pertinent issue was whether statutory homestead protection could be waived in a premarital agreement, a question of first impression in Wisconsin.⁵⁵⁰ The court, in holding that a premarital agreement could effectively waive homestead protection and the one at issue did so, explained that the purpose of homestead is to protect spouses from unilateral action by one of them to the detriment of the other.⁵⁵¹ Where the spouses act together by means of a premarital agreement, it explained, there is no violation of the policy underlying the protection.⁵⁵²

In sharp contrast to the harsh results found in some of the alimony waiver and limitation cases stands *In Re Estate of Roccamonte*.⁵⁵³ Arthur and Mary had a twenty-five year relationship, during which Arthur remained married to his wife with whom he had two children.⁵⁵⁴ Although Arthur lived with Mary and supported her lavishly, filed joint income tax returns with his wife, and supported their children, he disregarded his accountant's reminders that he ought to make a will.⁵⁵⁵ Mary knew of these facts and nevertheless continued the relationship.⁵⁵⁶ When Arthur died intestate, Mary brought a claim against the estate alleging that Arthur promised to support her for the rest of her life.⁵⁵⁷ The litigation wound through the courts for seven years, until the New Jersey Supreme Court reached out to save Mary, by then seventy-seven with no assets and living in poverty.⁵⁵⁸ It did so by invoking its original jurisdiction to find that Arthur had made the oral promise she had alleged to support her for

twice (\$117,022.42) the amount Hadi was awarded, under the Florida statute, because her challenge was in good faith and not frivolous. *Id.* at 1155-56.

547. *Id.* at 1156.

548. *Id.*

549. *Id.* at 1158.

550. 646 N.W.2d 280, 281-82 (Wis. 2002).

551. *Id.* at 285-86.

552. *Id.* at 286.

553. 808 A.2d 838 (N.J. 2002).

554. *Id.* at 840.

555. *In re Estate of Roccamonte*, 735 A.2d 614, 616-17 (N.J. Super. Ct. App. Div. 1999).

556. *Roccamonte*, 808 A.2d at 840-41.

557. *Id.* at 841.

558. She was dependent on social security of less than one thousand dollars per month and food stamps. *Id.* at 842.

the rest of her life.⁵⁵⁹ The court further held that unlike an alimony obligation, the promise was not discharged by Arthur's death but could be enforced against his estate.⁵⁶⁰ It remanded the matter for a determination of the value of Mary's right to support.⁵⁶¹

Another sensitive subject is child support. Even the Uniform Premarital Agreement Act, which tolerates agreements modifying or eliminating spousal support, provides that "the right of a child to support may not be adversely affected by a premarital agreement."⁵⁶² In *T.F. v. B.L.*, the Supreme Judicial Court of Massachusetts dealt with the question of whether a child's right to support had been created by an alleged agreement between two female cohabitants, now "divorced."⁵⁶³ Plaintiff, the child's biological mother, alleged an agreement with defendant, her former cohabitant, to create and co-parent a child; plaintiff sought to enforce the agreement by means of a child support order from the court.⁵⁶⁴ The trial court found an implied agreement as alleged but refused to enforce it.⁵⁶⁵ The supreme court agreed, holding that "'parenthood by contract' [was] not the law of Massachusetts and the agreement [was] unenforceable as against public policy."⁵⁶⁶ Three justices dissented; they would have enforced the defendant's promise to pay child support as in society's and the child's best interests.⁵⁶⁷

2. Substantive Unfairness at Execution and/or Enforcement Based on Disparity in Spouses' Finances and Earning Power

One can see that, at least in jurisdictions where prospective spouses are held to be in confidential relationships, disparity between the provision made for one party to the agreement and the other's resources can raise a rebuttable presumption of undue influence or fraud.⁵⁶⁸ As parties to premarital agreements are usually unequal in terms of wealth and their ability to generate income, and the purpose of such agreements is to protect the assets of the wealthy party

559. *Id.* at 846.

560. *Id.* at 848.

561. *Id.*

562. UNIF. PREMARITAL AGMT. ACT § 3(b) (1983).

563. 813 N.E.2d 1244, 1246 (Mass. 2004).

564. *Id.*

565. *Id.* at 1246.

566. *Id.*

567. *See id.* at 1255-58 (Greaney, J., concurring in part, dissenting in part) ("Even though we do not recognize parenthood by contract, an agreement between the parties has been proved, which includes a promise of support. . . . The child may have been abandoned by the defendant, but he should not be abandoned by the court."). *Id.* at 1258.

568. *See, e.g.,* Banks v. Evans, 64 S.W.3d 746, 751 (Ark. 2002); Sogg v. Nevada State Bank, 832 P.2d 781, 784 (Nev. 1992).

from the other's reach, it is unusual to find the disparity alone argued as constituting substantive unfairness or unconscionability at execution or enforcement. Yet since 2000, wives in six cases advanced such an argument, winning acceptance in four lower courts, failing ultimately in three courts of last resort, and achieving limited success in the fourth.

a. Georgia

In *Adams v. Adams*, Andy's wealth at execution of the agreement far exceeded that of his wife-to-be Kay; he was worth \$4.5 million and was an established businessman, and she had thirty thousand dollars and was employed as a beautician.⁵⁶⁹ Andy presented the agreement to Kay two days before the wedding.⁵⁷⁰ She was not represented by counsel in signing it.⁵⁷¹ Under the agreement, Andy's sole obligation to her on divorce was ten thousand dollars per year for every year of marriage with a cap of one hundred thousand dollars.⁵⁷² When Kay sought a divorce after eight-and-a-half years of marriage, she challenged the agreement as unconscionable at execution and enforcement based on the disparity between its provisions for her and her husband's assets.⁵⁷³ Both the trial court and the Supreme Court of Georgia upheld the validity of the agreement.⁵⁷⁴ The supreme court asserted that because Andy had given Kay full and fair disclosure before voluntarily entering into the agreement, and she knew the legal impact of it, having the opportunity to consult counsel about it,⁵⁷⁵ the

569. *Adams v. Adams*, No. 03HV25T, Exhibit A at 5-6 (Sup. Ct. Ga. Oct. 16, 2003) (the premarital agreement). According to the Supreme Court of Georgia, however, Kay "successfully ran her own business" at the time of its execution. 603 S.E.2d 273, 274 (Ga. 2004).

570. *Adams*, 603 S.E.2d at 274.

571. *Id.* at 274-75.

572. *Id.* at 274. It also provided that if, at divorce, husband's net worth declined below its premarital level the payment to wife was to be decreased proportionately. *Adams*, No. 03HV25T, Exhibit A at 9. The agreement contained no corresponding provision for increase in payments to wife if his net worth rose above its premarital level. *Id.* If wife committed "unforgiven" adultery she forfeited all payments. *Adams*, 603 S.E.2d at 274.

573. *Adams*, 603 S.E.2d at 274.

574. *Id.* at 275.

575. Although the court record does not divulge when Andy first presented the agreement to Kay, she signed it two days before the wedding. *Id.* The agreement says that the drafting attorney was retained by Andy and "Kay acknowledges that she has sought advice elsewhere and in no manner relies on any representations . . . from Andy's attorney to her." *Adams*, No. 03HV25T, Exhibit A at 3. Nevertheless she appears to have been unrepresented. See *Adams*, 603 S.E.2d at 274-75. The supreme court seemed satisfied however to take the agreement's recitals at face value. See *id.* at 275. But see *Corbett v. Corbett*, 628 S.E.2d 585 (Ga. 2006), discussed *supra* text accompanying notes 275-84, a later Supreme Court of Georgia decision in which the court specifically found all such representations in the premarital agreement to be untrue.

fact that the agreement preserved the disparity between the parties' estates did not in itself make the agreement unconscionable.⁵⁷⁶

In *Mallen v. Mallen*, discussed in the procedural fairness context earlier,⁵⁷⁷ Catherine argued, among other things, that the disparity in financial situations and business experience between her and Peter made the premarital agreement unconscionable at execution and that the increase in disparity by the time of enforcement — Peter's assets had grown by fourteen million dollars — made it unconscionable then as well.⁵⁷⁸ The Supreme Court of Georgia rejected both contentions summarily.⁵⁷⁹ Peter did not commit fraud, and the agreement was not unconscionable despite the fact that it perpetuated the disparity between the members of the couple. Neither did the increase in Peter's assets during marriage constitute a sufficient change in circumstances to make enforcing the agreement unfair and unreasonable.⁵⁸⁰ The court thought that significant growth in a rich man's assets over many years was foreseeable.⁵⁸¹

b. Massachusetts

At the time *DeMatteo v. DeMatteo* came to the Supreme Judicial Court of Massachusetts, the test for the validity of premarital agreements under state law was that they be fair and reasonable at both the time of execution and of enforcement.⁵⁸² In the *DeMatteo* case, Susan was an executive secretary at a local bank before she and her daughter moved in with Joseph.⁵⁸³ She then stopped working and became financially dependent on him.⁵⁸⁴ Ultimately she found herself pregnant, and the two decided to marry.⁵⁸⁵ At the time, the parties' financial situations were disparate.⁵⁸⁶ Joseph's net worth as disclosed by the premarital agreement was between one hundred eight and one hundred thirty-three million dollars derived from family businesses and investments; Susan's financial statement showed assets of less

576. *Adams*, 603 S.E.2d at 275. The court also upheld the trial court's refusal to admit evidence of the husband's alleged infidelity during the marriage. *Id.* It acknowledged, however, that "there may be rare circumstances where such evidence could be relevant to demonstrate unconscionability or changed circumstances." *Id.* at 275.

577. See *supra* text accompanying notes 250-74.

578. 622 S.E.2d 812, 816-17 (Ga. 2005).

579. *Id.*

580. *Id.*

581. *Id.* at 817.

582. 762 N.E.2d 797, 806, 808 (Mass. 2002); Brief of Petitioner-Appellant at 4, *DeMatteo v. DeMatteo*, No. 2001-P-439 (Mass. Ap. Ct. May 7, 2001).

583. *DeMatteo*, 762 N.E.2d 801, 803.

584. *Id.* at 813.

585. *Id.*

586. *Id.*

than five thousand dollars and ownership of a 1977 Chevrolet Nova auto.⁵⁸⁷ Her salary at the bank had been twenty-five thousand dollars annually.⁵⁸⁸ In the period before execution of the premarital agreement, Susan was represented by the counsel recommended by Joseph's friend and paid for by Joseph.⁵⁸⁹ As executed, the agreement gave Susan thirty-five thousand dollars a year in alimony and medical insurance until her death or remarriage, the marital home free of encumbrances, and a car.⁵⁹⁰ It also provided that all jointly held property would be divided equally between the parties.⁵⁹¹ The agreement was signed after some, but not extensive, negotiation between the parties' lawyers.⁵⁹² When husband filed for divorce ten years later, Susan challenged the agreement's substantive fairness.⁵⁹³ The trial court held that the premarital agreement was not "fair and reasonable" at either execution or enforcement.⁵⁹⁴ It based its determination on what Susan was entitled to under the agreement: "the entirety of the financial settlement, the lack of substantial negotiations" at execution, the lifestyle the couple was accustomed to during the marriage, and the disparity between the parties' ability to earn future income.⁵⁹⁵ Noting the ten-year length of the marriage and the fact that it produced two children, the trial court called the settlement "less than modest."⁵⁹⁶ The Supreme Judicial Court of Massachusetts reversed,⁵⁹⁷ laying out the tests for fairness at execution and enforcement.⁵⁹⁸ As to substantive fairness at execution, it explained that only where the challenger is "essentially stripped of substantially all marital interests" will a premarital agreement not be "fair and reasonable."⁵⁹⁹ Additionally, it discarded the "fair and reasonable" standard for testing validity at enforcement and adopted "unconscionability" in its stead.⁶⁰⁰ The court purported only to be giving a new label to what was in essence the same standard, so as to distinguish the test for validity of premarital agreements from the test for separation agreements,⁶⁰¹ but the court contradicted itself when it said earlier that the

587. *Id.* at 802.

588. *Id.* at 801.

589. *DeMatteo*, 762 N.E.2d at 801.

590. *Id.* at 803.

591. *Id.*

592. *Id.* at 802.

593. *Id.* at 803.

594. *Id.*

595. *DeMatteo*, 762 N.E.2d at 803.

596. *Id.* at 804.

597. *Id.* at 814.

598. *Id.* at 813.

599. *Id.* at 809.

600. *Id.* at 813.

601. *DeMatteo*, 762 N.E.2d at 813.

test of unconscionability would require a "greater showing of inappropriateness" than the old.⁶⁰² To meet the new test a wife would have to be left "without sufficient property, maintenance, or appropriate employment to support herself."⁶⁰³ The court applied the new test to Susan, noting that she was "not unable to work should she choose to supplement her income."⁶⁰⁴

The same substantive issue came up before the court three years later in *Austin v. Austin*.⁶⁰⁵ Donna was represented by a lawyer who drafted the premarital agreement that the parties signed two days before their wedding.⁶⁰⁶ Again, there was a disparity in the parties' assets, with Craig disclosing one million dollars while Donna listed thirty-five thousand dollars consisting largely of fur and jewelry.⁶⁰⁷ At the time the parties signed the agreement, Donna worked at a Boston department store.⁶⁰⁸ She continued to work there until the couple's daughter was born when, by agreement with Craig, she became a full-time homemaker.⁶⁰⁹ The agreement contemplated the acquisition of marital property subject to division, but Donna waived all rights to alimony.⁶¹⁰ When the couple divorced twelve years later, Donna challenged the agreement.⁶¹¹ The trial court invalidated the alimony waiver as not fair and reasonable at either execution or enforcement in view of the great disparity of earning potential of the parties.⁶¹² It awarded Donna one thousand dollars a month in alimony, and, as her share of marital property, \$1.275 million in equity in the marital home plus over five hundred thousand dollars in cash.⁶¹³ The court noted that during the marriage, the "husband made it his mission . . . to prevent the creation of joint marital assets."⁶¹⁴ The intermediate appellate court affirmed the trial court, agreeing that

602. *Id.* at 809.

603. *Id.* at 812.

604. *Id.* at 813. But see the same court's refusal to apply a new test retroactively in *Sullivan v. Burkin*, 460 N.E.2d 572, 576 (Mass. 1984) (holding for the first time that a widow could elect against her husband's revocable *inter vivos* trust but applying the new rule prospectively only, not to the litigants in the case, because "[i]n the area of property law, the retroactive invalidation of an established principle [of law] is to be undertaken with great caution").

605. 839 N.E.2d 837 (Mass. 2005).

606. *Id.* at 839.

607. *Id.*

608. *Id.* at 841.

609. Immediately after the marriage she began, with husband's assistance, a year-long fertility treatment that was apparently successful. *Austin v. Austin*, 819 N.E.2d 623, 631 (Mass. App. Ct. 2004), *rev'd*, 839 N.E.2d 837 (Mass. 2005).

610. *Austin*, 839 N.E.2d at 839-40.

611. *Austin*, 819 N.E.2d at 625-26.

612. *Austin*, 839 N.E.2d at 840-41.

613. *Id.* at 841.

614. *Id.* at 842.

the alimony waiver was not fair and reasonable at execution.⁶¹⁵ The supreme judicial court reversed, finding the alimony waiver fair and reasonable at execution and not unconscionable at enforcement.⁶¹⁶ Two judges dissented, lamenting the agreement's effect: "The court today . . . denies a woman, in her fifties, with a high school education, and a child to raise, her right to receive alimony."⁶¹⁷ They argued further that in doing so the majority had "analytically transposed the proper order that governs examination of the validity of antenuptial agreements."⁶¹⁸ What the majority did here, they claimed, was to look first at the impact of the agreement on the wife at enforcement; finding that she was awarded some marital property, it then validated the alimony waiver at execution as well.⁶¹⁹ In their view the majority "implicitly overruled portions of the *DeMatteo* decision" by holding that an agreement that is proper at enforcement is valid even if it was unconscionable at the time of execution.⁶²⁰

c. Arkansas

The fifth case in which the wife raised the disparity issue is *Banks v. Evans* from Arkansas.⁶²¹ Christy and Jim signed a premarital agreement three or four days before their wedding.⁶²² Both were represented by counsel at the time.⁶²³ After a separation less than a year later and a failed reconciliation attempt ten months after that, Jim filed for divorce asserting the premarital agreement in which Christy had waived all marital property rights.⁶²⁴ Her counsel urged that the agreement was unconscionable because Jim "may be a millionaire and [Christy] has nothing."⁶²⁵ She argued that the disparity between husband's means and the lack of provision for her in the agreement raised a presumption of fraudulent concealment by husband.⁶²⁶ All three courts that ruled on the question thought that the

615. *Austin v. Austin*, 819 N.E.2d 623, 632 (Mass. App. Ct. 2004). It did not consider Craig's argument that in assessing its validity at enforcement, the trial court used the wrong standard, fairness and reasonableness, instead of unconscionability in accordance with *DeMatteo*. *DeMatteo v. DeMatteo*, 762 N.E.2d 801, 811 (2002).

616. *Austin v. Austin*, 839 N.E.2d 837, 843 (Mass. 2005).

617. *Id.* at 843 (Greaney, J., dissenting).

618. *Id.* at 844.

619. *Id.*

620. *Id.* at 844-45.

621. 64 S.W.3d 746 (Ark. 2002).

622. *Id.* at 748.

623. *Id.* at 751 (mentioning the wife's attorney; assumably based on the apparent sophistication of the husband, he too was represented by counsel).

624. *Id.* at 748.

625. *Evans v. Evans*, No. E-97-255, letter op. at 1-2 (Ch. & Prob. Ct. Ark. Nov. 11, 1998) (on file with author).

626. *Id.* at 1.

evidence of her actual knowledge of Jim's assets and her waiver of disclosure in the agreement sufficiently rebutted the presumption and held that the agreement was valid.⁶²⁷

d. Kentucky

Most recently in *Lane v. Lane*, the Kentucky Supreme Court ruled on the validity of an alimony waiver in a premarital agreement.⁶²⁸ David and Paula married in 1990 when he was twenty-six and she was twenty-nine.⁶²⁹ He was a college graduate and already a successful stockbroker earning \$166,000 a year; she had only a high school education, was working as a night desk clerk in a hotel, and earning nineteen thousand dollars a year.⁶³⁰ The couple, each represented by independent counsel, signed the premarital agreement three days before their wedding.⁶³¹ The parties waived rights to alimony; they also agreed that the separate property of each would be nonmarital and that David's interests in the partnership, profit-sharing, and pension plans connected to his firm would be sheltered from division as marital property on divorce.⁶³² The agreement also provided that if either breached the agreement, the defaulting party would be responsible for attorney's fees and other related expenses.⁶³³

The marriage lasted for nine and a half years and produced two children.⁶³⁴ Paula quit her job to take care of them while David pursued his career.⁶³⁵ By the time of the divorce, the financial disparity between spouses had expanded considerably. David's annual income had grown to over one million dollars a year.⁶³⁶ Paula challenged the premarital agreement arguing that circumstances thus so changed during the marriage would make its enforcement against her unconscionable.⁶³⁷ The trial court agreed, but only as to the alimony waiver and the provision on attorney's fees.⁶³⁸ It awarded her alimony of twelve thousand dollars a month for three years and attorney's fees of approximately fifty-nine thousand dollars.⁶³⁹ It also awarded her

627. See, e.g., *Banks*, 64 S.W.3d at 752.

628. 202 S.W.3d 577, 581 (Ky. 2006).

629. *Id.* at 578.

630. *Id.*

631. *Id.*

632. *Id.*

633. *Lane*, 202 S.W.3d at 578.

634. *Id.*

635. *Id.*

636. *Id.*

637. *Id.* at 579.

638. *Id.* at 578.

639. *Lane*, 202 S.W.3d at 579.

a portion of David's pension plan, despite the agreement.⁶⁴⁰ The court of appeals strictly enforced the premarital agreement, reversing the trial court's decision on alimony and pension rights.⁶⁴¹ It upheld the award of attorney's fees to Paula not because the prevailing party provision was unconscionable but rather because it did not consider Paula to be the breaching party.⁶⁴² The Kentucky Supreme Court did not consider the pension issue on appeal. It rejected, as had the trial court and the court of appeals before it, Paula's contention that the entire agreement was unconscionable; it found only that the trial court was well within its discretion in nullifying the alimony waiver and substituting a three-year award to Paula.⁶⁴³

3. When Enforcement Causes a Spouse to Go on Public Assistance

In three cases covered by this article,⁶⁴⁴ the wife argued that the premarital agreement was invalid because enforcement would force her on to the welfare rolls. Indeed, such a result at enforcement is one of the classic "horribles" used to justify the second-look review for one-sided, oppressive, unconscionable results.⁶⁴⁵ Surprisingly, the argument failed in all three cases. Two of the cases, *Binek* and *Lutz*, have been discussed in detail in earlier parts of this article. The third, *Hardee v. Hardee*, merits discussion here because of its unusual facts.

It arose in South Carolina, a jurisdiction that still allows divorce on fault grounds and permits the court to consider fault in making the division of marital property and alimony awards.⁶⁴⁶ At the time Jerry and Mary met, she was working full time as an office manager and paralegal at the law firm representing Jerry in divorce proceedings with his second wife.⁶⁴⁷ The parties lived together for about two years before they married.⁶⁴⁸ He was a wealthy man; Mary had serious health problems, including diabetes and sponge kidney disease, which

640. *Id.* at 581.

641. *Id.* at 578-79.

642. *Id.*

643. *Id.* at 580-81.

644. *In re Estate of Lutz*, 620 N.W.2d 589 (N.D. 2000), discussed *supra* Part II.B.9; *Binek v. Binek*, 2004 ND 5, 673 N.W.2d 594, 599, discussed *supra* Part II.B.2; *Hardee v. Hardee*, 585 S.E.2d 501 (S.C. 2003).

645. See, e.g., *Osborne v. Osborne*, 428 N.E.2d 810, 816 (Mass. 1981); *In re Yannalfo*, 794 A.2d 795, 798 (N.H. 2002); *Delorean v. Delorean*, 511 A.2d 1257, 1260 (N.J. Ch. Div. 1986).

646. S.C. CODE ANN. § 20-3-10 (2005) (permitting divorces on the grounds of adultery, desertion, physical cruelty, habitual drunkenness, and physical separation of more than one year); S.C. CODE ANN. § 20-7-472(2) (2005) (allowing the court to consider fault in making apportionment of marital property).

647. *Hardee v. Hardee*, No. 95-DR-43-1751, slip op. at 11 (Fam. Ct. S.C. Nov. 6, 1998).

648. *Id.*

Jerry knew prior to their marriage.⁶⁴⁹ He requested that she sign a premarital agreement that noted her health problems, provided that if the parties divorced they would do so only on the no-fault ground of living apart, and waived all Mary's rights to alimony and attorneys' fees.⁶⁵⁰ She took the agreement to her employer who acted as her attorney.⁶⁵¹ He fully explained its ramifications to her and unequivocally advised her against agreeing to its terms.⁶⁵² She signed it despite his advice.⁶⁵³

When Jerry left the marriage to continue his affair with a much younger woman, Mary sought a divorce on fault grounds and the usual marital property incidents: property division, alimony, and attorneys' fees.⁶⁵⁴ Jerry sought enforcement of the premarital agreement, taking the position that it barred the relief Mary requested.⁶⁵⁵ The trial court held that the agreement permitted division of marital property.⁶⁵⁶ It found no defects in the bargaining process but thought the provision requiring the parties to divorce only on a no-fault ground was void as against public policy and the provisions waiving alimony and attorneys' fees substantively unfair at both execution and enforcement.⁶⁵⁷ In discussing validity of the waivers on execution of the agreement, it noted the "substantial disparity" between the parties' economic circumstances and wife's history of health problems entering the marriage.⁶⁵⁸ The court also noted that the "agreement [did] not take into account the length of the marriage or potential changes in circumstances," especially in a spouse's health, and concluded that the agreement was not fair or equitable at execution.⁶⁵⁹ As to fairness at enforcement, the court found a material change in circumstances since the agreement's execution: Jerry's marital misconduct, including adultery, physical and emotional abuse of Mary, regular drunkenness, and desertion,⁶⁶⁰ which caused the break-up of

649. See *Hardee v. Hardee*, 558 S.E.2d 264, 265 (S.C. Ct. App. 2001), *aff'd*, 585 S.E.2d 501 (S.C. 2003).

650. *Hardee*, 585 S.E.2d at 502; *Hardee*, No. 95-DR-43-1751, slip. op. at 16-17. The agreement did require Jerry to pay Mary five thousand dollars for each year of the marriage and two thousand dollars for moving expenses on separation. Their respective financial statements showed assets of over one and a half million dollars for him and less than fifty thousand dollars for her. *Hardee*, 558 S.E.2d at 265.

651. *Hardee*, 558 S.E.2d at 265.

652. *Id.*

653. *Id.*

654. *Id.* at 266.

655. *Id.*

656. *Hardee*, No. 95-DR-43-1751, slip op. at 24-25.

657. *Id.* at 27.

658. *Id.* at 21, 23.

659. *Id.* at 23.

660. *Id.* at 36.

the marriage and contributed to the deterioration in Mary's health.⁶⁶¹ The court further found that Mary was totally disabled and would become a public charge if substantial support was not granted, asserting that "[i]t is not the public policy of this State to require the taxpayers . . . to support spouses under these circumstances."⁶⁶² The court awarded Mary a fault divorce against her husband, alimony, attorneys' and accountants' fees and costs, and thirty percent of the marital property.⁶⁶³

The intermediate appellate court approved the trial court's approach in determining the agreement's validity, specifically adopting Georgia's three-pronged test.⁶⁶⁴ However, it reversed the trial court's holdings on the validity of the waivers, and the supreme court affirmed this decision.⁶⁶⁵ Neither court seemed to grasp the essence of Mary's argument nor the trial court's holding that the agreement was unconscionable at execution. The intermediate court said that the agreement was saved by the fact that "although the parties had vastly different financial resources, the agreement bound each party equally."⁶⁶⁶ This statement glosses over the fact that Jerry's waivers were worthless because Mary had few assets and no income, having given up her job at her husband's request.⁶⁶⁷ The supreme court also failed to adequately address whether the agreement was unconscionable at execution. It unnecessarily concentrated on procedural fairness, even though Mary never raised that issue in the case.⁶⁶⁸ In its view, Mary could have chosen not to sign and not to marry Jerry.⁶⁶⁹ The court never focused on her waivers in light of her circumstances at execution. As to fairness at enforcement, both appellate courts thought that Mary's deterioration in health, leaving her unable to work, was foreseeable.⁶⁷⁰ Both completely ignored Jerry's misconduct during the marriage as a contributing cause and a change in material circumstances. Indeed the supreme court seemed to think

661. *Id.* at 39. The court clearly attributed much of the decline in Mary's health to Jerry's conduct during the marriage.

662. *Hardee*, No. 95-DR-43-1751, slip op. at 22, 39.

663. *Id.* at 56-57. Thirty percent of the marital property was valued at \$192,461. *Id.*

664. *Hardee v. Hardee*, 558 S.E.2d 264, 269, 270 (S.C. Ct. App. 2001), *aff'd*, 585 S.E.2d 501 (S.C. 2003).

665. *Hardee*, 585 S.E.2d at 504.

666. *Hardee*, 558 S.E.2d at 270.

667. *Id.* at 266; *Hardee*, No. 95-DR-43-1751, slip op. at 11.

668. The court specifically noted a premarital agreement will be held invalid where there is "the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Hardee*, 585 S.E.2d at 505.

669. *Id.*

670. *Id.*

that Mary had a good deal with the agreement and the marriage, observing she received substantial benefits in the form of "a heightened standard of living, owning several homes, and driving luxury cars."⁶⁷¹ To her argument that by enforcing the alimony waiver against her the court was making new law and applying it retroactively, the court said it was merely enforcing a contract.⁶⁷² Like the intermediate court, it was not concerned with the issue of public policy raised by enforcing a contract that resulted in one party going on the welfare rolls. Ironically, the court voiced fairness to the husband as a major concern: "We concur with Husband that it would be unfair and inequitable to permit a party who, fully aware of serious health issues and declining health, knowingly signs a prenuptial agreement against the advice of her attorney, to thereafter recover alimony and/or support."⁶⁷³ In contrast, however, other jurisdictions have invalidated agreements signed by spouses whose attorneys advised them against it.⁶⁷⁴

D. Interpretation

All agreements are vulnerable to problems of interpretation.⁶⁷⁵ Sloppiness and carelessness of the contracting parties, draftsmen, and courts all contribute to them.⁶⁷⁶ A recurring issue for premarital

671. *Id.* It referred to the marriage as of "five-year duration." *Id.* Actually it lasted nine years. See *Hardee*, No. 95-DR-43-1751, slip op. at 40.

672. *Hardee v. Hardee*, 585 S.E. 2d 501, 505 (S.C. 2003). It nevertheless thought it was necessary to overrule *Towles v. Towles*, 182 S.E.2d 53, 55 (S.C. 1971), which pointed to the conclusion that alimony waivers were void as against public policy. *Id.* at 504.

673. *Id.* at 505.

674. The crucial issue remains the impact of enforcing the agreement. See, e.g., *Gross v. Gross*, 464 N.E.2d 500, 510 (Ohio 1984) (upholding the invalidity of a premarital agreement in spite of the plaintiff's attorney advising plaintiff not to accept the agreement); *Norris v. Norris*, 419 A.2d 982, 984, 986 (D.C. 1980) (affirming a lower court's invalidation of a premarital agreement even though one party's attorney had unavailingly advised her not to sign it as it was).

675. Four cases not discussed in the body of this article involved questions of interpretation of premarital agreements: *Jangula v. Jangula*, 2005 ND 203, 706 N.W.2d 85, 88 (holding that husband's subsequent acts of commingling property gave meaning to premarital agreement provision that purported to keep property separate); *Rhodes v. Rhodes*, 2005 ND 38, 692 N.W. 2d 157, 164 (reviewing trial court's application of premarital agreement to assets item by item); *Rubino v. Rubino*, 765 A.2d 1222, 1224, 1226 (R.I. 2001) (holding that acceptance of five thousand dollars from parties' joint bank account as "advance equitable distribution" was not abandonment of premarital agreement); *Jakopovic v. Brown*, 622 N.W.2d 651, 656 (Neb. 2001) (holding that spouse had only waived rights to property specifically listed in premarital agreement); see also *Langley v. Langley*, 613 S.E.2d 614, 616-617 (Ga. 2005) (determining that husband was not allowed to set off temporary alimony against lump sum alimony obligation under the agreement) (discussed *supra* at notes 540-43).

676. MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS

contracts is the scope of the contract or one of its provisions. For example, does the agreement apply to dissolution of the marriage by divorce, by death of a spouse, or by both? Is a particular provision of the agreement a waiver of alimony or property division?⁶⁷⁷ The parties litigated the former issue in *Binek v. Binek*, discussed in Part II.⁶⁷⁸ Ruth argued, among other things, that the agreement did not apply if the parties divorced but only when one of them died.⁶⁷⁹ The pertinent language said:

Ruth Mayer hereby releases all rights in the property or estate of Theodore J. Binek which she might have by reason of their marriage, whether by way of dower, statutory allowance, widow's allowance, intestate share, or election to take against his will, under the laws of this or any other jurisdiction that may be applicable, and with particular reference to Section 30.1-05-04, North Dakota Century Code. . . .⁶⁸⁰

The section of the North Dakota Century Code cited in the agreement provided for waivers of spousal rights at death.⁶⁸¹ The court characterized the provision as "not ambiguous"⁶⁸² but proceeded to rewrite it, leaving out the enumerated spousal death rights after the word "marriage."⁶⁸³ Ignoring those words completely enabled the court to reason that "[a]ny rights in the property [Ruth] would acquire as a result of a property settlement upon divorce would be rights arising out of the marriage. Therefore, the agreement applies to property rights [Ruth] may have acquired from a divorce decree."⁶⁸⁴

In *Wilkes v. Estate of Wilkes*, also discussed in Part II,⁶⁸⁵ the court interpreted the premarital agreement as if it applied on dissolution of the marriage or on death of a spouse, even though the agreement did not mention that event or the spouses' estates.⁶⁸⁶ The *Wilkes* agreement said that "[e]ach [party] wishes to keep all of their [sic] separate

85 (4th ed., Foundation Press 2001) (asserting that lack of attentiveness and ineptitude on the part of contracting parties, scriveners, and courts contribute more to interpretation difficulties than do philosophical differences about the meaning of words).

677. For an example of where a husband argued unsuccessfully that language in the premarital agreement constituted a waiver of marital property division, see *Hardee v. Hardee*, discussed *supra* notes 646-74 and accompanying text.

678. *Binek v. Binek*, 2004 ND 5673, 673 N.W.2d 594 (N.D. 2004), discussed *supra* Part II.B.2.

679. *Binek*, 673 N.W.2d at 600.

680. *Id.*

681. See N.D. CENT. CODE § 30.1-05-04 (2005).

682. *Binek*, 673 N.W.2d at 600.

683. *Id.*

684. *Id.*

685. 27 P.3d 433 (Mont. 2001), discussed *supra* Part II.B.2.

686. *Wilkes*, 27 P.3d at 435, 437.

property, whether now owned or hereafter acquired, free from any claim of the other by virtue of the forthcoming marriage."⁶⁸⁷ Counsel for Mary did not raise the scope of the agreement and the courts did not discuss it.

Other authorities require greater specificity for death rights waivers. Two recent cases from Virginia illustrate the point. In *Pysell v. Keck*, the parties executed a premarital agreement like that in *Wilkes* that kept their property separate during marriage.⁶⁸⁸ When the husband died, his will made no provision for his wife.⁶⁸⁹ She attempted to assert her elective share; the executor of husband's estate argued that she had waived it in the premarital agreement.⁶⁹⁰ The court saw "nothing in the unambiguous language" of the agreement that supported the claim of husband's estate.⁶⁹¹ The court said that a waiver of death rights must be express or established by clear and convincing evidence.⁶⁹² The agreement did not mention death or either spouse's estate; it did not contain an express waiver of wife's elective share, nor did husband's estate present clear and convincing evidence that would allow the court to imply one.⁶⁹³ The court therefore held that the premarital agreement applied only to the parties as living persons.⁶⁹⁴ In *Dowling v. Rowan* the same court reached the opposite result on the basis of more specific language.⁶⁹⁵ The agreement in that case said: "The purpose of this agreement is to settle the rights and obligations of each of [the parties], during their marriage, upon death of either or both of them, or in the case of dissolution of the marriage."⁶⁹⁶ The court found that the words "upon the death . . . of both of them" was exactly the express language lacking in the *Pysell* agreement.⁶⁹⁷

In *Bloomfield v. Bloomfield*, the New York Court of Appeals was faced with determining the scope of a waiver in a premarital agreement executed more than thirty years before, when New York law provided that alimony waivers were void.⁶⁹⁸ In the agreement the wife waived all rights "she would otherwise be entitled to because of such

687. *Id.* at 435.

688. 559 S.E.2d 677, 678 (Va. 2002).

689. *Id.*

690. *Id.*

691. *Id.* at 679.

692. *Id.*

693. *Id.*

694. *Pysell*, 559 S.E.2d at 679.

695. 621 S.E.2d 397, 400, 403 (Va. 2005).

696. *Id.* at 398.

697. *Id.* at 400. Courts cannot always resolve this issue from the agreement itself and so must resort sometimes to extrinsic evidence. See *In re Estate of Barrows*, 913 A.2d 608, 613 (Me. 2006).

698. 764 N.E.2d 950, 951-52 (N.Y. 2001).

marriage, whether present or future rights, to any and all property which [prospective husband] has now, or which he may acquire in the future"⁶⁹⁹ When husband began divorce proceedings, wife counterclaimed, asking for an equitable distribution of marital property under the state's current law.⁷⁰⁰ Two years into the discovery phase of the case, husband first raised the premarital agreement, asserting it as a defense to wife's equitable distribution claim.⁷⁰¹ The trial court construed the provision as a waiver of spousal support, prohibited by the law in effect at the time of its execution.⁷⁰² After the intermediate appellate court agreed, the court of appeals reversed.⁷⁰³ Employing the rule that "where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law," it held that the wife waived only her right to the husband's property then owned or later acquired, not to support.⁷⁰⁴ The court asserted that this was consistent with the parties' intent because the husband never contested his duty to provide post-divorce support until the lower courts voided the agreement as a waiver of it.⁷⁰⁵ Even if the lower courts were right and the agreement was indeed intended as a waiver of support, the court reasoned that its validity should be governed by current New York law rather than the prohibition in effect at execution.⁷⁰⁶ Current law⁷⁰⁷ reflected an intervening change in public policy and thus trumped the law in effect at the time the agreement was executed.⁷⁰⁸

Three cases, two discussed earlier, raise another common interpretation question: the effect of an alleged oral understanding at odds with the written agreement. In *Estate of Lutz*,⁷⁰⁹ Lavilla alleged that Emanuel made an oral promise to take care of her outside the

699. *Id.* at 951. She also waived the right of election as it existed then or might exist in the future. *Id.*

700. *Id.* at 952.

701. *Id.*

702. *Id.*

703. *Id.* at 952, 954.

704. *Bloomfield*, 764 N.E.2d at 953.

705. *Id.*

706. *Id.*

707. New York law now permits alimony waivers but provides that courts may override them if a waiving spouse is in danger of becoming a public charge. N.Y. GEN. OBLIG. LAW § 5-311 (2006).

708. The court further held that noncompliance with present execution formalities did not invalidate the agreement made before their effective date. *Bloomfield*, 764 N.E.2d at 953. It remanded to the trial court for a determination of the question of the premarital agreement's conscionability. *Id.* at 954. The terms of premarital and postmarital agreements in New York must be "fair and reasonable at the time of the making of the agreement" and "not unconscionable at the time of entry of final judgment." N.Y. DOM. REL. LAW § 236B(3) (2006).

709. 2000 ND 226, 620 N.W.2d 589.

premarital agreement.⁷¹⁰ In reversing summary judgment against Lavilla during an earlier stage of the litigation, the North Dakota Supreme Court correctly analyzed the issue in the following terms: "The factual circumstances of an unfulfilled oral promise would be additional evidence on the voluntariness of the premarital agreement, and leaves an additional factual dispute for trial."⁷¹¹ The supreme court remanded for a trial of the factual questions on the voluntariness and enforceability of the written premarital agreement in light of the alleged oral promise.⁷¹² The trial court found against Lavilla on voluntariness, even though it never made a specific finding on whether Emanuel made the promise.⁷¹³ In affirming, the supreme court said that the trial court impliedly found he did not.⁷¹⁴

In *Cannon v. Cannon*,⁷¹⁵ Wendy alleged an oral understanding that the premarital agreement would be effective only until the ongoing bankruptcy proceedings involving her assets had ended.⁷¹⁶ The Court of Appeals of Maryland did not address the issue beyond acknowledging that one of John Cannon's contentions was "that the trial court incorrectly considered parole evidence in holding the Agreement invalid."⁷¹⁷ This lack of attention is stunning in view of the trial court's decision to invalidate the agreement on the basis of the oral understanding and the intermediate court's reversal of the trial court on the ground that the trial court gave the oral understanding too much weight.⁷¹⁸

In *Pierce v. Pierce*, a surviving wife sought to establish an implied understanding as part of a written postmarital agreement.⁷¹⁹ During their marriage Agnes worked full-time in a coal mine, and Ted was mostly unemployed.⁷²⁰ About ten years into the marriage, the couple executed a written agreement whereby Agnes agreed to give Ted her paychecks, keeping only a small amount of spending money for herself.⁷²¹ In return, Ted promised to leave Agnes his estate at death.⁷²² The agreement, lost by the time of the litigation, was apparently silent on the question of Ted's ability to transfer assets out of his estate

710. *Id.* at 592.

711. *In re Estate of Lutz*, 1997 ND 82, 563 N.W.2d 90 (*Lutz I*).

712. *Id.* at 102.

713. *In re Estate of Emanuel Lutz*, No. 94-C-2850, slip op. at 7 (S. Cent. Jud. Dist. N.D. June 30, 1998).

714. *In re Estate of Emanuel Lutz*, 2000 ND 226, 620 N.W.2d 589, 595 (*Lutz III*).

715. 865 A.2d 563 (Md. 2005).

716. *Id.* at 567.

717. *Id.* at 585-86.

718. *Id.* at 567.

719. 994 P.2d 193, 195, 199 (Utah 2000).

720. *Id.* at 195.

721. *Id.*

722. *Id.*

during his life without Agnes's consent.⁷²³ Less than two months before he died, Ted left home and moved in with defendants, his nephew and his nephew's wife.⁷²⁴ Ted made a number of gratuitous transfers to them of stock and real estate without Agnes's consent.⁷²⁵ Ted died intestate, and Agnes, individually and as his personal representative, challenged the transfers based on her understanding that they were prohibited by the postmarital agreement.⁷²⁶ The trial court, with the aid of a special jury verdict, found that the transfers did not violate the agreement.⁷²⁷ On appeal the Utah Supreme Court rescued Agnes by employing a combination of the doctrine of consideration and fiduciary principles.⁷²⁸ If Ted could give away substantial portions of his property, the agreement with Agnes would lack consideration flowing from him to her and would ignore his overriding fiduciary duty to her as his spouse.⁷²⁹ It thus rejected the trial court's holding and the special jury verdict that the postmarital agreement allowed Ted to give away his property freely.⁷³⁰ It remanded to the trial court for a determination of whether the gifts exceeded "the limitation the agreement placed upon [Ted's] ability to give away substantial portions of his property."⁷³¹

III. DISCONCERTING TRENDS

A. Overview

Premarital agreements are the primary tool of private breakup planning, and most of the cases within the scope of this article involve them. Therefore, in identifying trends, premarital agreements provide the focus of this discussion. Enforcing premarital agreements is consistently justified as enhancing the parties' autonomy by allowing them freedom to contract and tailor settlements on breakup to their own situations and satisfactions, exemplary goals.⁷³² Anyone who disputes the benefits of breakup planning may be accused of antiquarian paternalism.⁷³³ Yet it is perfectly clear from the cases that it is always

723. *Id.* at 195-96.

724. *Id.* at 195.

725. *Pierce*, 994 P.2d at 195-96.

726. *Id.* at 196.

727. *Id.*

728. *Id.* at 199-200.

729. *Id.* at 200.

730. *Id.*

731. *Pierce*, 994 P.2d at 200.

732. *See id.* at 890.

733. *See, e.g., Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) ("Paternalistic presumptions and protections [impairing spouses' right to contract with each other] that arose to shelter women from the inferiorities and incapacities which they were perceived as

one member of the couple, the one with the assets, whose autonomy is preserved and whose satisfactions are achieved by execution and enforcement of these agreements.⁷³⁴ Similarly the reformers in this field have stated their goals in theoretically unexceptionable terms, for example, to eliminate "uncertainty" and "lack of uniformity," thought to be the product of a "spasmodic, reflexive response to varying factual circumstances at different times,"⁷³⁵ rather than of basic policy conflicts among the states, and to achieve "consensus . . . on the appropriate rules to apply" to premarital agreements and the rationales to explain them.⁷³⁶

Although it may be too soon to assess the effect, if any, of the proposed A.L.I. reforms, the accomplishments of the Uniform Act, now adopted in twenty-six jurisdictions, are clear.⁷³⁷ The Act has facilitated enforcement of an increasing number of these contracts.⁷³⁸ Interestingly, enforcement philosophy has been contagious; it has slipped over state borders and infected non-ULA jurisdictions as well. Thus, premarital agreements, one-sided by definition,⁷³⁹ are being enforced more frequently than ever across American jurisdictions. This increased enforcement would be tolerable as long as courts respected "minimum decencies"⁷⁴⁰ in the process. Three disconcerting trends suggest that courts are not meeting these standards: conflicting decisions on similar facts within the same jurisdiction, and other judicial errors in resolving these cases; removal of substance from substantive fairness reviews at both execution and enforcement with a concomitant disregard for dependent spouses; and mythifying procedural fairness by upholding agreements entered under subtle coercion, without independent representation or concern for legal ethics or proper disclosure.

having in earlier times have, appropriately, been discarded.").

734. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 67 (1998).

735. UNIF. PREMARITAL AGMT. ACT, pref. note, 9c U.L.A. 36 (2001).

736. PRINCIPLES, *supra* note 6, § 7.01 cmt. a.

737. UNIF. PREMARITAL AGMT. ACT, Table of Jurisdictions Wherein Act Has Been Adopted (2001).

738. See Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 234 (2001).

739. The courts readily concede that premarital agreements treat the contracting parties unequally. See, e.g., *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002) ("Many valid agreements may be one sided, and a contesting party may have considerably fewer assets and enjoy a far different lifestyle after divorce than he or she may enjoy during the marriage.").

740. See Karl Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)) (writing about the "minimum decencies . . . a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type").

B. Conflicting Cases and Other Errors

One can see that since 2000 the highest courts of four states have rendered conflicting decisions in cases with similar facts and issues.⁷⁴¹ In two of these jurisdictions, the courts did so without seeming to recognize the conflicts.⁷⁴² In two others, the courts offered unconvincing attempts to reconcile or distinguish the cases.⁷⁴³ Courts have also made elementary mistakes in interpretation, changed standards during the course of litigation, applied these standards without notice to the parties, and condoned results that offend established policy. Whether these bad decisions are deliberate or the result of negligence and inattention, the fault of lawyers or judges, they remain disturbing. Unfortunately, these decisions diminish the credibility of the legal system by according different legal outcomes to similar facts, defeating legitimate expectations of parties, and failing to produce just results.

C. Decline of Substance and Disregard for Dependent Spouses

Divorcing wives or widows made substantive challenges to premarital agreements in nineteen of the cases covered by this article. All but one failed. Courts upheld agreements containing “draconian” terms as fair at execution. At second-look reviews, courts deemed all subsequent events, including the birth of children; marital misconduct, such as physical abuse and adultery; lengthy marriages; disproportionate growth in one spouse’s assets; and being cast on to welfare by enforcement of the contract to have been “foreseeable” events at the time of execution so that enforcement of the agreement despite them was not unfair or unconscionable. In a single exception, financial disparity between the spouses at divorce was enough to invalidate an alimony waiver and to support a three-year rehabilitative award. Together the decisions display a lamentable disregard for the spouse who, in the interest of the relationship, gives up the production of income to devote herself to the joint family enterprise.⁷⁴⁴ Due

741. See *supra* Part II for a discussion of the *Wilkes* and *Shirilla* cases from Montana, the *Peters-Riemers* and *Binek* cases from North Dakota, the *Hollett* and *Yannalfo* cases from New Hampshire, and the *Alexander*, *Mallen*, and *Corbett* cases from Georgia.

742. See *supra* Part II.B.2 for a discussion of the *Wilkes* and *Shirilla* cases from Montana and the *Peters-Riemers* and *Binek* cases from North Dakota.

743. See *supra* Part II.B.3 for a discussion of the *Hollett* and *Yannalfo* cases from New Hampshire, and *supra* Part II.B.4 for a discussion of the *Alexander*, *Mallen*, and *Corbett* cases from Georgia.

744. Despite woman’s “emancipation,” traditional roles continue to prevail. See PRINCIPLES, *supra* note 6, at § 5.04 cmt c. (“[R]ecent data demonstrates a strong persistence in traditional marriage roles, such that wives continue, in the great majority of cases, to sacrifice earnings opportunities to care for their children, in reliance upon

to the enforcement of the one-sided agreement, she is left to carry the whole financial risk when the marriage fails. As the courts enforce alimony and other waivers that leave the formerly dependent spouse in a much worse financial position than she would have been under the otherwise applicable marital property regime, they make some revealing statements. As the court stated in *DeMatteo*, "it is only where the contesting party is essentially stripped of substantially all marital interests that a judge may determine that an antenuptial agreement is not 'fair and reasonable'" ⁷⁴⁵ Apparently, it may be fair and reasonable to enforce an agreement in favor of a wealthy ex-spouse that puts the other in need of public assistance. Another judge sought to justify such a result by asserting that "a spouse or widow . . . is in the same monetary position regardless of whether the support came from the estate of the deceased spouse or from the public treasury." ⁷⁴⁶ Thus, the dependent ex-spouse is treated as a disposable asset that can be discarded at the end of the marriage and whose support the other ex-spouse can pass off to the rest of society. Such a state of the law reflects badly on marriage, which modern rhetoric describes as an "equal partnership." ⁷⁴⁷ In a truly equal partnership, the partners' contributions may vary but they nevertheless share financial risks of the partnership's failure equally. If marriage is to survive as an institution, the partner who gives up income for the benefit of the family unit needs assurance that she can do so without risking destitution at the partnership's end.

D. The Mythification of Procedural Fairness

The decline of substantive review enhances the importance of procedural fairness, yet when one turns to the policing of procedure the picture is equally bleak. Parties in twenty cases made procedural challenges, including three involving postnuptial agreements. ⁷⁴⁸ Courts in only seven cases sustained these challenges. These numbers cannot be heralded as a sign that procedural fairness is the norm; five of the cases in which courts sustained the procedural challenges came from jurisdictions in which there was a conflicting decision on similar facts, thus making their precedential value questionable. Ten of the cases in which the procedural challenge failed were wrongly decided,

continued market labor by their husbands.").

745. *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002).

746. *In re Estate of Lutz*, 1999 ND 121, 595 N.W.2d 590, 592 (Glaser, J., dissenting) (*Lutz II*).

747. See, e.g., *Developments — The Law of Marriage and Family*, 116 HARV. L. REV. 2075 (2003) (arguing against total enforcement of premarital agreements based on "marriage as contract" theory because it is at odds with "marriage as partnership" concept).

748. See *supra* Part II.

and the challenge should have succeeded. The courts' sense of what is procedurally fair is just as deficient as their decisions on substance. The litigated cases reveal a recurring pattern: the prospective spouse with the greater assets and earning power wants the agreement, has it drafted by his lawyer, and presents it to the other spouse very close to the time of the impending marriage, when her mind is on wedding preparations and she has little patience for unromantic legal documents.⁷⁴⁹ More often than not the proposed agreement is accompanied by an ultimatum that if she does not sign it, the would-be husband will cancel the wedding. She signs it, and when the relationship deteriorates, the voluntariness of the agreement often becomes an issue. As the cases demonstrate, the prevailing view is that prospective husband's ultimatum⁷⁵⁰ is not the kind of coercion that makes an agreement involuntary. Interestingly the only case in which the court of last resort found the agreement coerced was one that husband had signed at wife's insistence.⁷⁵¹ Via their decisions, the courts need to acknowledge that the family context is different from the commercial. Both insistence on a premarital agreement as a condition for marriage and insistence on a postmarital agreement for staying in a marriage are potentially coercive. As Trebilcock and Elliott observe, "threatening to breach a contract may have a coercive effect if the contract cannot be effectively enforced."⁷⁵² Of course, neither promises to marry nor promises to stay married are presently capable of enforcement.

A further inquiry into voluntariness must consider the role of counsel. That a party was represented by independent counsel has been said repeatedly to be the "best evidence" that a party made an agreement voluntarily.⁷⁵³ Yet independent counsel for both parties is required in only two jurisdictions and limited to only two circumstances: in California for alimony waivers to be valid⁷⁵⁴ and in Minnesota for postmarital agreements.⁷⁵⁵ Other jurisdictions require

749. She may be suffering from other distractions, such as pregnancy, a fear that prospective husband will cease to love her if she does not sign, an altruistic trust in his assurances that he will take care of her, or blinding love that will prevent her from appreciating the possibility that the agreement could be enforced some day in the future.

750. These ultimatums are often accompanied by reassuring statements that prospective husband will take care of wife, that the agreement is a mere formality, that it is required by his parents, and the like. Several lower courts correctly held that such actions indeed constituted coercion. They were overruled by the courts of last resort.

751. See *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004) *supra* Part II.B.10.

752. Trebilcock & Elliott, *supra* note 5, at 59.

753. See, e.g., *In re Estate of Crawford*, 730 P.3d 675, 678 (Wash. 1986); *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985); *In re Estate of Lutz*, 1997 ND 82, 563 N.W.2d 90, 98 (Lutz I).

754. CAL. FAM. CODE § 1612 (2006).

755. MINN. STAT. ANN. § 519.11, subd. 1a(c) (2005).

only that each party have an opportunity to consult independent counsel, and in others the presence or absence of independent counsel is just one of the factors to be considered in determining whether an agreement was voluntarily entered.⁷⁵⁶ In a small number of cases both parties are represented by independent counsel, but clearly that situation is the exception rather than the norm.⁷⁵⁷ In fourteen of the twenty-six cases in which the wife challenged the premarital agreement, she was completely unrepresented at the agreement's execution.⁷⁵⁸ In a fifteenth, the challenger had a lawyer who did not speak his client's language and could not effectively translate the agreement or explain its terms or the rights his client gave up by signing it.⁷⁵⁹ In four other cases, both parties had some representation, but the challengers' lawyers were procured and/or paid by the other party or their counsel or were connected to them in some other way,⁷⁶⁰ thus raising questions about their independence. In many of these cases the prospective husband presented the agreement in such close proximity to the wedding date that the unrepresented party had no real opportunity to acquire meaningful representation (despite many courts' statements to the contrary).⁷⁶¹ In another, the lawyer who did represent the party had insufficient time to review and negotiate improvements to it adequately.⁷⁶² These common patterns raise ethical

756. For example, California looks at the presence of independent counsel only as a factor in determining voluntariness. CAL. FAM. CODE § 1615 (c) (2006).

757. See, e.g., *Lane v. Lane*, 202 S.W.3d 577 (Ky. 2006); *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 801 (Mass. 2002).

758. Namely, *Bonds*, discussed *supra* Part II.B.1; *Alexander*, discussed *supra* Part II.B.4; *Adams*, discussed *supra* Part II.C.2.a; *Mallen*, discussed *supra* Part II.B.4; *Corbett*, discussed *supra* Part II.B.4; *Hoag*, discussed *supra* Part II.B.7; *Cannon*, discussed *supra* Part II.B.9; *Wilkes*, discussed *supra* Part II.B.2; *Yannalfo*, discussed *supra* Part II.B.3; *Bloomfield*, discussed *supra* Part II.D; *Binek*, discussed *supra* Part II.B.2; *Peters-Riemers*, discussed *supra* Part II.B.2; *Lutz*, discussed *supra* Part II.B.9; *Marsocci*, discussed *supra* Part II.B.11.

759. *Shirilla*, *supra* Part II.B.2.

760. Namely, *DeMatteo*, discussed *supra* Part II.C.2.b (prospective wife's counsel paid by prospective husband); *Hollett*, discussed *supra* Part II.B.3 (same); *Porreco*, discussed *supra* Part II.B.5 (prospective wife's lawyer was prospective husband's tenant); *Friezo*, discussed *supra* Part II.B.6 (prospective wife's counsel was incompetent and was procured by prospective husband and his sister-in-law).

761. See, for example, *Binek*, discussed *supra* Part II.B.2; *Yannalfo*, discussed *supra* Part II.B.3.

762. See *In re Estate of Hollett*, 834 A.2d 348, 352 (N.H. 2003) ("Fairness demands that the party presented with the agreement have 'an opportunity to seek independent advice and a reasonable time to reflect on the proposed terms.'") (quoting *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116 (Fla. Dist. Ct. App. 1976)); see also CAL. FAM. CODE § 1615(c)(2) (West 2006) (requiring that a presenting party provide seven days between presentment and signing of a premarital agreement in order for the other party to obtain legal representation); PRINCIPLES, *supra* note 6, at § 7.04(a)(3) (requiring that the agreement was executed thirty days before the marriage in order to show that it was entered into with

questions that lawyers and courts generally ignore, and which the California legislature complicated when it amended the state's Uniform Premarital Agreement Act in response to the supreme court's decision in *Bonds*.⁷⁶³

The lawyer who faces the possibility of dealing with an unrepresented party does so at his peril. He has to be wary of misleading the unrepresented party about whom he represents.⁷⁶⁴ He cannot portray himself as disinterested or as having the interests of the unrepresented party at heart. The only advice he can ethically give the unrepresented party is to consult his or her own lawyer.⁷⁶⁵ However, he cannot stop there; if he is wise, he will memorialize that advice in writing and have the unrepresented party verify that he gave it by signing the writing. Similarly, if the unrepresented party does not follow the advice and refuses independent counsel, the lawyer should memorialize that choice in writing as well. If he does not, he may find himself in the unenviable position of having to take the stand in defense of his practices and reputation, as happened in *Wilkes*⁷⁶⁶ and *Lutz*.⁷⁶⁷ To its credit, the Supreme Court of North Dakota underscored the importance of the lawyer's duties in its first decision in *Lutz* by reversing the trial court's grant of summary judgment in favor of Emanuel's estate.⁷⁶⁸ It stated:

Here, the evidence conflicts on whether [Lutz's lawyer] actually advised [prospective wife] to obtain independent counsel. [He] testified he did. [She] . . . disputes this and testified she believed [he] was her attorney and relied on him as an advisor. Her belief is understandable since [he] also prepared her will. Whether [he] adequately advised [her] about his potential conflict of interest, her need to have independent counsel, and the effect of her consent to his dual representation are disputed material facts that preclude summary judgment.⁷⁶⁹

When the trial court later failed to make any express findings on the subject, the supreme court unfortunately chose not to press the point, instead implying trial court findings favorable to Emanuel's estate.⁷⁷⁰

informed consent, in part so that each party has ample time to seek representation before the wedding).

763. CAL FAM. CODE § 1615 (C) (2006).

764. MODEL R. OF PROF'L CONDUCT R. 4.3 (2004).

765. *Id.*

766. 27 P.3d 433 (Mont. 2001), discussed *supra* Part II.B.2.

767. 563 N.W.2d 90, 98-99 (N.D. 1997) (*Lutz I*).

768. *Id.*

769. *Id.*

770. *In re Estate of Lutz*, 2000 ND 226, 620 N.W.2d 589, 595 (*Lutz III*).

Although this seems like a disappointing dropping of the ethical ball, none of the other courts ever managed to catch it. Like the California legislature, they seem aloof to the ethical duties and dilemmas of lawyers who deal with unrepresented parties, or to the fact that the parties in these cases had conflicting interests when the agreements were executed. In addition to advising an unrepresented party to seek counsel and memorializing the advice and any waiver in writing, the lawyer, if he is to do everything he can to make his client's agreement enforceable, will have to fully inform the unrepresented party of its terms and basic effects and the rights and obligations she will forfeit by signing it.⁷⁷¹ This advising seems to put the lawyer in a position of conflict, acting for his client as well as the unrepresented party. It has been suggested, therefore, that to protect himself in California, he needs still another writing signed by his own client recognizing the possible conflict from dual representation and waiving or consenting to it.⁷⁷²

In the second set of circumstances in which the represented party pays for the other's representation or has some other connection to that lawyer, ethical rules require that the lawyer disclose the fee arrangement or other connection, explaining it as creating a possible conflict of interest, and getting her to consent to or waive the conflict.⁷⁷³ This disclosure, explanation, and waiver or consent should be in writing as well.⁷⁷⁴ Apparently, in none of the cases posing this situation did the lawyer undertake all these steps, nor did any of the courts rebuke him for such inattentiveness. Most importantly, the single court to invalidate an agreement on the basis of an ethical infraction was reversed on appeal.⁷⁷⁵

In contrast to an unrepresented party, who is at a great disadvantage, the well-represented party is likely to have the information she needs to enter the agreement voluntarily. Her lawyer will see to it that the other party to the proposed agreement makes full financial disclosure and explain her legal rights if there were no agreement and

771. This too must be in writing and delivered to the unrepresented party on or before signing of the agreement. Additionally, the unrepresented party will have to execute a document declaring he or she received the information and who provided it before the signing of the agreement.

772. John G. Gherini, Comment, *The California Supreme Court Swings and Misses in Defining the Scope and Enforceability of Premarital Agreements*, 36 U.S.F. L. REV. 151, 178 (2001); see also PRINCIPLES, *supra* note 6, at § 7.04(3)(c)(iii) (requiring agreement to state that parties' interests may be adverse in a situation where not both parties are represented).

773. See MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8(f) (2004).

774. *Id.* R. 1.7(b)(4).

775. *Friezo v. Friezo*, No. FA020190070, 2004 WL 2165045 (Conn. Super. Ct. Aug. 27, 2004), *rev'd*, 2007 WL 268897 (Conn. Feb. 6, 2007).

what she forfeits by signing it. She will thus acquire what she needs to know by virtue of her lawyer's efforts on her behalf. This is not to say that the law governing required disclosure is entirely satisfactory. One of the backward steps the Uniform Premarital Agreement Act took, again in the interest of enhancing the enforceability of these contracts, was to relegate disclosure to secondary status by making it a requisite only to sanitize the unconscionable contract, and expendable altogether if waived or if the challenger had actual knowledge of the other's assets.⁷⁷⁶ Thus, under the Act as promulgated, an unconscionable contract will be invalid only if fair and reasonable disclosure was not made before execution.⁷⁷⁷ The Act contains no language that includes disclosure in the voluntariness requirement.

In this connection, the California "Bonds amendment" is an improvement. By requiring that an unrepresented party be given an explanation of the terms of the contract and its effect as well as the rights she forfeits by signing it, it ties disclosure to voluntariness.⁷⁷⁸ The amendment thus restores the primary importance of disclosure for contractual validity. Nevertheless, the cases further dilute its requirement by holding that the prospective wife "knew enough" about the prospective husband's finances when no disclosure was made, that disclosure was sufficient even though it attached no values to the listed assets, and by transforming the duty to disclose by the wealthier party into a duty to investigate by the less wealthy party. In the ideal world, neither party should have a duty to investigate, rather each party should have a duty to fully inform.

CONCLUSION

Premarital, postmarital, and cohabitation agreements, attractive in theory as giving power to parties to craft their own bargains, are becoming instruments of oppression in practice. By enforcing them the courts are enabling the dominant party to acquire financial advantages and to shift the risk of a failed relationship from him, even though he can afford to bear it, to her, the weaker party who cannot easily bear such a burden. These judicial decisions work not only to her detriment but to the public's detriment as well.

Certainly one should consider some improvements to ensure that minimum decencies for these contracts are observed. These minimum decencies would necessitate independent counsel for each party as a

776. UNIF. PREMARITAL AGMT. ACT § 6(a)(2) (1983).

777. *Id.*

778. CAL. FAM. CODE § 1615 (c)(3) (2006).

baseline requisite for enforcement with the concomitant conditions that a party would have ample time for legal consultation and money to pay for the services. The party who wants the agreement should have to provide both, and any possible conflicts must be explained and expressly waived in writing.

Two more specific rules seem essential to the minimum decencies. First, an agreement should be unenforceable to the extent it would place a party on the public rolls. Second, where one party gives up income and assumes the role of homemaker to benefit the relationship, the agreement must include some reasonable provision for that party's support after dissolution of the marriage. Courts should determine reasonableness in light of the length of the marriage and the financial resources of the dominant party.

A second possible improvement would be to require advance court approval for these agreements. This improvement would entail a judicial inquiry before the agreement was executed and findings by the court that the agreement serves the parties' best interests⁷⁷⁹ and that they understand the governing principles and rules.⁷⁸⁰ Perhaps the best solution would be to cease to enforce any of these agreements and to relegate them to merely advisory status, relevant only to show what the parties might have thought would be fair for their breakup at the time of execution. That solution is probably unacceptable to the vested interests, notably those of lawyers and wealthy clients who have assets they want to protect, although it is the law in England and parts of Canada.⁷⁸¹

779. An agreement in the best interests of the parties would, as a matter of law, leave no possibility for a dependent spouse to go on welfare as a result of the agreement's enforcement and must provide reasonable support for a dependent ex-spouse. Enforcing a best interests standard would ensure the agreement's substantive fairness.

780. Judicial preapproval is required for some postmarital agreements in Louisiana. LA. CIV. CODE ANN. art. 2329 (2006). Nevertheless, "the effect of [Louisiana] court approval is unclear, particularly in a subsequent proceeding to attack the matrimonial agreement." *Boyer v. Boyer*, 691 So. 2d 1234, 1243 (La. Ct. App. 1997). The procedure of "ante-mortem probate" in a few states serves as an analogous regime. In it, a testator initiates an adversary proceeding to determine the validity of a will before he dies, naming all beneficiaries under the will and heirs apparent as parties. See ARK. CODE ANN. § 28-40-202 (2006); N.D. CENT. CODE § 30 (2006); OHIO REV. CODE ANN. § 2107.081 (West 2006). For a discussion of ante-mortem probate, see generally John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978).

781. PRINCIPLES, *supra* note 6, at § 7.02 cmt. a.