

Private Ordering and Family Law

by

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Until recently in American family law (and the family law of most countries), private arrangements to alter the legal rules surrounding family status were rarely enforced. There was, of course, “private ordering” of a basic sort: e.g., one chose whether to marry or not, and whom to marry; but once one married, the legally enforceable rules of marriage, the ability to exit through divorce or annulment, the financial obligations upon divorce, and so on, were all set by the state, which might also limit the power of the parties to distribute their own property upon death, as with a spouse’s “statutory share.” Similarly with parenthood: one could choose whether to have (and whether to adopt) children, but once one was a parent, one’s obligations and rights were set by the state, which would also determine the limited circumstances and set terms under which one could surrender parental rights to a child.

Much has changed in recent decades, with American states increasingly allowing different types of private ordering in a range of different family law areas. One can speak of premarital agreements, marital agreements, separation agreements, open adoption agreements, co-parenting agreements, agreements on the disposition of frozen embryos, and agreements to arbitrate disputes arising out of any of the above agreements. This article will offer an overview of the changes and limits to private ordering in American family law, while considering the extent to which these changes have been a positive development.

Part I discusses some of the general justifications for private ordering, while Part II looks at some of the general justifications for limitations on private ordering. Part III discusses the histori-

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cal hostility of family law to private ordering, while Part IV examines the current treatment of a wide range of private ordering within domestic relations, before concluding.

I. General Justifications for State Enforcement of Private Ordering

A. Preliminary Note on Private Ordering

One should note, first, a word about terminology. Though the term used is “private ordering,” truly *private* ordering is not the actual focus. Within quite broad limits, consenting adults can act and interact as much as they please in domestic matters; it is only when they seek recognition by the state of their arrangements or enforcement of their commitments that the issue of “private ordering” arises.

Consider an example: for a long time (until relatively recently) state marriage laws reflected gendered roles within marriage. The statutes would commonly declare that the husband (not the wife) had the right to set the couple’s domicile, and the wife (but not the husband) had a right to support. Against this legal background, *Graham v. Graham*,² a 1940 case, involved a married couple where the husband had agreed to follow the wife on her travels in return for a monthly payment. After divorce, the husband sought to recover unpaid amounts he claimed were due under the agreement. The court refused to enforce the agreement, concluding that it was unenforceable because it attempted to alter the legal duties of marriage. However, the court noted in passing:

There is no reason, of course, why the wife cannot voluntarily pay her husband a monthly sum or the husband by mutual understanding quit his job and travel with his wife. The objection is to putting such conduct into a binding contract, tying the parties’ hands in the future and inviting controversy and litigation between them.³

The court’s statement is not entirely precise: certainly there is no objection to the parties “tying their own hands” through making a commitment each feels bound to keep. What is objected to is a commitment the state would be bound to enforce. Of course,

² 33 F. Supp. 936 (E.D. Mich. 1940).

³ *Id.* at 939.

state enforcement only becomes an issue if one of the parties later changes his or her mind about the value of going forward with what had originally been agreed to. At that point, it is still open to the other party to try to persuade the first party to comply with the agreement, or to use social pressures to coerce compliance. The question of *Graham v. Graham* is whether and when *the state* should make its vast (and expensive) institutional structure available to persuade and coerce compliance. On that point, one can reasonably ask what public policy is being served by enforcement, such that the use of significant public resources would be justified?⁴

B. Parties Have the Best Knowledge of Their Own Interests

The basic idea behind private ordering – whether under the rubric of contract, capitalism or family – is that individuals know better than do other people (including those in government) what is in their own best interests. On one level, this is the justification against paternalistic intervention by government (as in John Stuart Mill’s “harm principle,” from his *On Liberty*⁵). On a more general level, it is an argument for the value of liberty.

Certainly, it would seem strange to think that government bureaucracies know more than a given person does about what sort of domestic arrangements would best suit that person’s interests and needs. Just as we would not have government tell people whether to marry or whom, whether to have children or how many,⁶ it seems but a small step to say that individuals should have comparable freedom to select or modify some of the terms of their domestic ties.

C. Respecting Autonomy

A different, but overlapping point relates to the value of autonomy to living a good life – a point most famously articulated

⁴ See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).

⁵ JOHN STUART MILL, ON LIBERTY (1869), available at <http://www.bartleby.com/130/>; the “harm principle” is discussed in chapter 4 of Mill’s text.

⁶ We do not mind the government *encouraging* certain decisions in these areas, and backing up this encouragement with selective subsidies, but there is a world of difference between modest promotion of an outcome and requiring it.

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by the German philosopher Immanuel Kant,⁷ but which has its roots, in different ways, in the classical Greek philosophers and in a variety of religious traditions. It is not merely doing the right things, but also that the things we do are due to *our own choices*, that is important. Living a good life is not merely doing the right things, but also *choosing to do* the right things.⁸ “Autonomy” means self-governance, and we can only be said to be governing our lives in any significant sense when we have a variety of tenable choices, and can make un-coerced choices among them.⁹ Thus, to the extent that the state offers a variety of institutional options, or allows individuals, through express agreement, to alter the terms of the options offered, individuals are given greater governance over their own lives.

Arguments of autonomy often overlap with arguments about consent: e.g., within contract law (that purported paradigm of private ordering), about the extent to which provisions should be enforced because the parties have assented to the provisions. In the context of contract scholarship, this raises the question of the extent to which “consent” to most agreements is “full consent” (morally significant consent),¹⁰ an issue that also, obviously, arises in the private ordering of domestic relations, whether such “ordering” has been done through written contracts or in other ways. Limitations or distortions of consent can become an argument *against* the state enforcement of private arrangements.

⁷ See generally J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* (Cambridge, 1998). While Kant is considered the foremost exponent of autonomy as central to a good life, his own understanding of autonomy is narrow, compared to its common usage today. For Kant, autonomy (self-rule) means acting according to the dictates of reason, while following an emotion or an inclination, even if it is entirely benevolent, is, for Kant, an example of heteronomy, being governed from outside. See, e.g., *id.* at 508-530; see also Michael Rohlf, *Immanuel Kant*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, available at <http://plato.stanford.edu/entries/kant/> (2010).

⁸ E.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369-429 (Oxford, 1986).

⁹ See *id.*

¹⁰ Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251-279 (Franklin G. Miller & Alan Wertheimer, eds., Oxford, 2010).

D. Efficiency

In American legal scholarship generally, the economic analysis of law (the “law and economics” school) is ascendant, though its influence is perhaps less in family law than in most other areas. Where some scholars might speak of autonomy (as in the previous section), law and economics theorists would speak in terms of efficiency. Private ordering is efficient (increases overall social wealth¹¹) because, as discussed earlier, individuals are best placed to know their own preferences; thus, objects and services are likely to end up with individuals or entities that value them the most if voluntary transactions are allowed, and individual commitments are enforced.

II. Justifications for Limits on the State Enforcement of Private Ordering

A. Public Policy

One standard justification for the regulation of private transactions is the public interest: there are reasons for public (governmental) promotion of transactions that work to the general benefit, and for placing burdens upon, or prohibiting outright, transactions that work against the general benefit.

The prior paragraph is an argument that sounds purely consequentialist – that we should compare the benefits of authorizing and perhaps enforcing private ordering against the costs that these particular kinds of ordering might cause. Alternatively, some arguments about regulating or prohibiting certain categories of private ordering are better understood in a more deontological way: that these transactions are (or at least are viewed as being, by some significant portion of the population) simply wrong, and should be discouraged or prohibited even if bad consequences cannot be quantified.

In the past, marriage was considered sufficiently important both for individuals and for society that significant legal and so-

¹¹ More precisely, “efficiency” is often equated with Kaldor-Hicks efficiency, or more generally with “wealth maximization” (where “wealth” is understood very broadly). See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 31-115 (Harvard, 1981); JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 67-132 (Cambridge, 1988).

cial penalties were imposed on those who sought to maintain relationships, cohabit, or raise children outside of marriage, and to impose significant penalties also on children born to such unions.¹² This is no longer the case.¹³ From a different ideological perspective, some commentators would today have the state, in the interest of both individuals and society, strongly encourage equality within the family.¹⁴ (Of course, “strong encouragement” still leaves room for private ordering, in a way that the coercive social and legal sanctions of prior generations did not.¹⁵)

B. *Externalities (Third-Party Effects)*¹⁶

Even those most opposed to paternalistic governmental interference with private arrangements (like John Stuart Mill,¹⁷ or a wide range of contemporary economic theorists) concede the need for government regulation when those private arrange-

¹² The nineteenth century legal commentator James Fitzjames Stephen wrote:

Take the case of illegitimate children. A bastard is *filius nullius* – he inherits nothing, he has no claim on his putative father. What is all this except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society? . . . It is a case in which a good object is promoted by efficient and adequate means.

JAMES FITZJAMES STEPHEN, *LIBERTY EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 156 (U. Chicago ed., 1991) (1874).

¹³ Some commentators would argue that while certain (in their view morally superior) forms of domestic arrangements are to be given public support and encouragement, and other (in their view immoral) forms not, it would be improper (as a matter of privacy and subsidiarity) for the government to *prohibit* immoral domestic arrangements. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 *NOTRE DAME L. REV.* 1049, 1051-55 (1994).

¹⁴ E.g., LINDA C. McCLAIN: *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (Harvard, 2006).

¹⁵ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (Yale, 2008) (arguing for a variety of forms of “libertarian paternalism,” that encourage particular outcomes, while leaving ultimate choices uncoerced and up to individuals to make).

¹⁶ While the category of “externalities” might be thought to be just a different label for the first category, “public policy,” I will consider the two separately.

¹⁷ See MILL, *supra* note 5.

ments directly and significantly harm third parties. In the case of agreements between intimates, the obvious vulnerable third parties are (minor) children. There are voluminous claims from social commentators and social scientists that unconventional family forms are unstable, and end up harming children born to such arrangements.¹⁸ It is not my place here to evaluate these claims, only to note their obvious relevance to claims that private preferences in this area should be encouraged or enforced.

Additionally, many of these same social scientists and commentators would list a different category of third-party effects: (negative) effects upon society generally, that purportedly come from “broken-down” families, and the like.¹⁹

In the context of domestic agreements, many observers at the opposite end of the ideological spectrum have raised gender equity concerns, arguing that the enforcement of certain kinds of agreements in this area tends systematically to work against the interests of women.²⁰

C. *Bounded Rationality*

If the general argument for private ordering is that private arrangements should be enforced because people are generally in the best position to determine what is in their best interests, then the circumstances when that is no longer the case would be the situations where “the greatest good of the greatest number” would point towards non-enforcement. This, of course, is the general justification for the significant limits on enforcement for agreements entered by those who are under-age or mentally incompetent. Additionally, when a party is coerced or defrauded,

¹⁸ See, e.g., DAVID POPENOE, COHABITATION, MARRIAGE, AND CHILD WELLBEING: A CROSS-NATIONAL PERSPECTIVE (The National Marriage Project, 2008), available at <http://www.virginia.edu/marriageproject/>.

¹⁹ See, e.g., ROBERT P. GEORGE & JEAN BETHKE ELSHTAIN (EDS.), THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS (Spence Publishing Co., 2006) (offering essays on unconventional family forms, many criticizing the bad social effects of such forms).

²⁰ See, e.g., Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349 (2007). Thus, those who are hostile towards the enforcement of premarital agreements might welcome the enforcement of (e.g.) co-parenting agreements, and vice versa.

one would say that this party has not *really* chosen, has not *really* assented. This is the grounding for other doctrinal defenses to enforcement of agreements in contract law, like misrepresentation, duress and undue influence. One might also add the doctrinal category of “fiduciary relationships,” dealings with trusted friends and advisors, where those in a situation of trust must show full disclosure and the substantive fairness of the agreement’s terms before a court will enforce an agreement.²¹

Beyond these relatively straightforward situations, there are also categories of circumstances where individuals are thought to be insufficiently self-protective due to basic limitations on the way (most) people reason. There are standard limitations, heuristics, and irrationalities that cause us to be insufficiently self-protective when dealing with high-pressure door-to-door salespeople, when selecting pension plans, or when considering post-employment restrictions in an employment agreement.²² The common law of contract has developed rules which regulate enforcement in some of these cases, and legislatures and administrative agencies have created consumer protection rules and regulations for many others.²³

The relevance of this to private ordering in domestic relations is that it has been widely argued that certain kinds of arrangements among intimates reflect situations where people will be less likely to understand their own interests or to protect them. Problems of bounded rationality and the absence of knowing consent have been noted even for the decision to get married.²⁴ Premarital agreements are standardly considered an

²¹ *E.g.*, Maksym v. Loesch, 937 F.2d 1237, 1241-42 (7th Cir. 1991) (discussing fiduciary obligations in context of lawyer-client contract).

²² On bounded rationality generally, see, *e.g.*, DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY (EDS.), *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Cambridge, 1982); DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2010).

²³ See generally Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211 (1995); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203 (2003).

²⁴ See, *e.g.*, Lynn A. Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *LAW & HUM. BEHAV.* 439 (1993), <http://www.springerlink.com/content/rt5p27088122n430/>; see also Thomas W. Joo, *The Discourse of “Contract”*

even stronger case of bounded rationality. A standard narrative for premarital agreements is that one party was motivated to ask for such an agreement by a bad experience he or she (usually he) had with a prior divorce; the other partner, however, often is marrying for the first time (and may thus have no experience with divorce), and is being asked to think seriously about a waiver of rights at divorce at a time when he or she (usually she) is fully in love, and assuming that this union will last forever.²⁵ Of course, being asked to sign a document about what happens at divorce and being asked to waive one's rights may be an effective way to shake someone out of romantic idealistic notions about love (and about one's partner); but the fact is that most people are poor at thinking well about events in the distant future, especially if it involves contingencies contrary to our optimistic assumptions.²⁶

In some ways, these domestic agreements may be *superior* to their conventional commercial analogues in relation to concerns about assent and rationality. First, agreements are far more likely to be negotiated, term by term, in a premarital or marital agreement than in a consumer purchase from a large company (usually executed on a standardized form). Second, in the closest analogue to a premarital agreement, an employment contract with a post-termination restrictive covenant, the potential employee's focus is clearly on the primary terms and conditions of employment, and the employee is far less likely to focus on the post-termination provisions. By contrast, in a premarital agreement, there are usually no provisions to distract a contracting party from the rights he or she is waiving; the whole focus of the agreement is on the waiver of rights.

and the Law of Marriage, in *LAW & ECONOMICS: TOWARD SOCIAL JUSTICE RESEARCH IN LAW & ECONOMICS* 161-87 (Dana L. Gold, ed., Emerald Group Publ'g Ltd., 2009).

²⁵ This is also putting aside the additional complication that someone who has not gone through a divorce is likely to have no idea – or only erroneous ideas – about what one's rights and duties are at divorce.

²⁶ See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (Vintage, 2007).

D. *Exploitation*

“Exploitation” is one of those concepts that is difficult to explain clearly²⁷—at a rough level, taking undue advantage of another’s bad circumstances—and while we think that “we know it when we see it,” many of the situations that might at first appear to us to be clear instances turn out to be highly debatable upon closer consideration.²⁸ For example, high interest rates, cross-collateral clauses, and a steep penalty for default may be necessary when dealing with parties with poor credit and no collateral, and the alternatives might be higher prices, or no sale at all, and many of the relevant consumer classes might prefer the “one-sided (exploitative) terms” to these other options.²⁹

Still, the basic point is that exploitation is, for most of us, a reality that occurs in some otherwise “voluntary” transactions, indicating that in certain categories of transactions the terms are more imposed than agreed to, that one of the parties may, by circumstance, have had little real choice in the matter, and that the imposed terms may have lowered rather than enhanced the welfare of the party that was already less well-off.

“Exploitation” most often comes up as a possible complaint when one of the parties is desperately poor and the other has significantly more resources, and where the transaction involves either an activity that could be characterized as degrading or as expressing a significant imbalance of power between the parties. One example within family law, discussed further below, is surrogacy, where critics of surrogacy agreements (and sometimes also of gamete donation) claim that the private ordering there is “exploitative.” Less frequently, one might also hear a similar complaint about premarital agreements creating one-sided property

²⁷ The best attempt may be ALAN WERTHEIMER, *EXPLOITATION* (Princeton, 1996); see also Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 *DENV. U.L. REV.* 889 (1997).

²⁸ For example, for the argument that the commercial transaction in the well-known unconscionability case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), was in fact reasonable to all parties, see Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J. L. & ECON.* 293, 306-08 (1975), <http://www.jstor.org/pss/725297>.

²⁹ Not that the preferences of those affected need be conclusive on the issue, but they are certainly relevant to any moral or policy debate in the area.

arrangements in a marriage or a non-marital cohabitation (at least where palimony or similar claims do not apply).

III. Historical Hostility of Family Law to Private Ordering

Family law has been one of the areas of law (and of life) most resistant to private ordering. This Part outlines some of the reasons for this resistance.

A. *Status Versus Contract*

Family law has traditionally been about status, not contract.³⁰ One has a choice to marry or not to marry and whom to marry, and, at least indirectly,³¹ one has a choice about whether to become a parent. However, once one becomes a spouse or a parent, certain rights and obligations follow. To some, this seems, at best, a description of what is the case, not an argument for its value. The further argument needed would be the claim that we encourage *this* status – this collection of rights and duties – and discourage other arrangements, because history and social science have taught us, the argument goes, the benefits of structuring domestic life this way. One sometimes hears a different, arguably more superficial argument (it occurs regularly in the debate about same-sex marriage): that a certain status, e.g., “marriage,” has a particular meaning grounded in history and tradition; one may conduct one’s private domestic affairs as one sees fit, but if those arrangements do not fit the category “mar-

³⁰ The reference here is in part to Sir Henry Maine’s famous (if now somewhat clichéd) quotation: “[W]e may say that *the movement of progressive societies* has hitherto been a movement from Status to Contract.” SIR HENRY SUMNER MAINE, *ANCIENT LAW* 174 (J. Murray, ed., 10th ed., 1920) (end of Chapter 5) (emphasis in original). What is often forgotten is that Maine, in the chapter in which the quotation appears, was talking about the family; it was domestic relations which gave him the evidence from which he derived his views about the “movement from Status to Contract.”

³¹ Becoming a parent by adoption is clearly a choice. Becoming a parent the conventional way is a choice in the sense that sexual intercourse clearly risks producing a child, and refraining from sexual intercourse will prevent one’s becoming a parent; additionally, a pregnant woman in the United States has a constitutional right to terminate her pregnancy, at least in the first trimester (though there may be practical burdens to the exercise of that right).

riage,” then there is no reason to give those arrangements that name, or to honor them as we honor status arrangements that *do* have the right tie to history and tradition.³²

B. *Protecting the vulnerable*

The government often sees, or at least portrays, itself as the protector of vulnerable parties. In family law, that clearly includes minor children. There is even a standard phrase, the state as “*parens patriae*” of all children. Under this rubric, courts have refused to enforce, or at least refused to defer to, provisions of agreements between spouses affecting custody, visitation, child support, and relocation of a custodial parent.³³

Concerns also arise about vulnerable adults within marriage: spouses (particularly, but not exclusively, wives) who might be left impoverished by the consequences of private arrangements. It has been a standard argument that the greater individual choice made available by (effectively unilateral) no-fault divorce has led to the significant impoverishment of many former wives and the children of whom they have custody.³⁴

IV. Treatment of Private Ordering in Family Law

A range of different sorts of private ordering exists within intimate relationships, but family law offers no uniform reaction.

³² Within the Christian religious tradition, marriage is more than a status: it is a sacrament (within the Catholic tradition) or a covenant (within the Protestant tradition). And those traditions of thinking of marriage as “much more than a contract” have motivated some of the resistance to private ordering in family law. See, e.g., John Witte, Jr. & Joel A. Nichols, *More Than a Mere Contract: Marriage as Contract and Covenant in Law and Theology*, 5 *ST. THOMAS L. REV.* 595 (2008), <http://www.stthomas.edu/law/programs/journal/Volume5num2/595-616.pdf>.

³³ See Model Marriage and Divorce Act § 3.06, 9A U.L.A. 169, 248-49 (West 1998 & Supp. 2010) (excluding terms “providing for the support, custody, and visitation of children” from the category of provisions binding on courts unless unconscionable); see also *Delamilleure v. Belote*, 704 N.W.2d 746 (Mich. App. 2005) (separation agreement provision in which father waived right to challenge custodial mother’s future relocation held not binding).

³⁴ See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (Free Press, 1985). Again, it is not my role here to evaluate the merits of the argument.

As will be seen, some forms of private ordering are implicitly encouraged, while others are treated by the law with suspicion or hostility.

A. Separation Agreements

When one spouse has filed or is about to file for dissolution of the marriage (most commonly by divorce, but marriages can also be dissolved by civil annulment), it is common for the spouses to try to resolve the issues between them—property division, alimony (also known as “spousal maintenance”), child custody, visitation,³⁵ and child support—by agreement. These “separation agreements” (also sometimes called “marital settlement agreements”), have for a long time received favorable treatment by the courts. This is in part because the courts may be positively inclined towards whatever reduces the overburdened docket of the family courts. However, another part of the favorable treatment goes to the heart of private ordering: that privately arranged agreements are likely better to reflect the interests and values of the parties, compared to judicially imposed settlements, and the parties are also more likely to comply with arrangements they have helped to settle.³⁶

The black-letter law about separation agreements (in all or almost all states) is that provisions dealing solely with the financial provisions between the partners – alimony and property division – are to be reviewed by the court with great deference, only to be invalidated in cases of unconscionability; by contrast, the doctrine states, provisions relating directly or indirectly to minor children – custody, visitation, relocation, and child support – are to be reviewed closely, to make sure that the best interests of the children are protected.³⁷

³⁵ In some jurisdictions, custody and visitation now go under the rubric of “parenting time.” See, e.g., WIS. STAT. ANN. § 767.41(4)(a)(2) (2009).

³⁶ Generally, a reconciliation of the parties voids the agreement. However, the parties may, by express language, make their separation agreement survive a reconciliation. See *Kuchera v. Kuchera*, 983 So.2d 776 (Fla. Dist. Ct. App. 2008) (marital settlement agreement with express term that it would survive reconciliation, applied to eventual divorce a decade later).

³⁷ See, e.g., MODEL MARRIAGE AND DIVORCE ACT, *supra* note 33, at § 306 (codified versions available at <http://www.law.cornell.edu/uniform/vol9.html#mardv>); most states, even those who have not passed the UMDA, have adopted similar standards by statute or court decision.

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By all accounts, though, courts tend to rubber-stamp agreements with comparable lack of supervision even for child-related provisions. As a practical matter, a court is unlikely to consider any provision in the agreement unless one of the parties objects. This will occur if the party changes his or her mind between when he or she agreed to the separation agreement and when the agreement is being presented to the court for approval.³⁸ If the objection occurs later, after the court has already approved the separation agreement (and, usually, incorporated all or parts of the agreement into the final divorce order), then the objecting party will have a very high burden to meet to persuade the court to modify or invalidate the agreement or any of its provisions.³⁹

There are additional levels of private ordering, where a number of states allow parties to modify the default procedural rules: e.g., allowing the parties to make alimony non-modifiable,⁴⁰ change the rule on how frequently changes to custody can

³⁸ If the party had previously agreed to the separation agreement, his or her subsequent repudiation does not make the agreement automatically unenforceable. To the contrary, it is usually enforced even over that party's objection. *E.g.*, *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2006). However, the objection by one of the parties creates an occasion, a reason for the court to focus on the substance of the agreement and its potential problems, in the way courts rarely do when neither party objects.

³⁹ Such post-judgment relief is sometimes granted, though. *See, e.g.*, *Eberle v. Eberle*, 766 N.W.2d 477 (N.D. 2009) (invalidating separation agreement as unconscionable nine months after judgment entered).

⁴⁰ *E.g.*, MINN. STAT. ANN. § 518.552, subd. 5 (West 2006 & Supp. 2010); MO. ANN. STAT. § 452.325(6) (West 2003 & Supp. 2010). The Missouri courts have taken non-modifiability by party agreement very seriously, to the point of continuing to enforce such a provision even after the wife (allegedly) tried to kill the husband. *Richardson v. Richardson*, 218 S.W.3d 426 (Mo. 2007). By contrast, at least one jurisdiction, Utah, gives such agreements only partial effect, reserving the right to override the non-modifiability agreement in extreme cases. *See, e.g.*, *Sill v. Sill*, 164 P.3d 415 (Utah Ct. App. 2007).

Comparable provisions, purporting to limit the modification of child support amounts, will generally be unenforceable. *E.g.*, *Wood v. Propeck*, 728 N.W.2d 757 (Wis. Ct. App. 2007).

In Alabama, parties can enter enforceable contracts for alimony obligations to survive the recipient spouse's remarriage, but if the agreement is incorporated into a divorce judgment, the court is required to terminate the alimony upon remarriage, despite the express agreement to the contrary. *Ex parte Murphy*, 886 So.2d 90 (Ala. 2003).

be sought, or change the standard for modification of custody.⁴¹ However, courts become more reluctant to allow party control in the area of child custody (and visitation and child support). Thus, courts have refused to enforce a provision in a separation agreement entirely prohibiting, or creating significant economic sanctions for, efforts to modify custody⁴²; and have refused to enforce a provision requiring change of custody if a custodial parent drank alcohol during the periods when the children were with that parent.⁴³ Most courts similarly refuse to enforce provisions in separation agreements which purport either to give the custodial parent blanket authorization to relocate in the future or to create a blanket prohibition on future relocation.⁴⁴ Finally, as will be discussed at greater length below, courts are becoming more willing to enforce arbitration provisions parties place in their separation agreements.⁴⁵

Overall, separation agreements are an area where family law encourages private ordering, though this is not a recent development; it is not distinctive to family law (settlement rates of private law disputes are consistently high across nearly all categories⁴⁶); and the encouragement of settlement is likely motivated as much by the desire to ease overcrowded dockets as any view about the benefits of private ordering.

⁴¹ *E.g.*, MINN. STAT. ANN. § 518.18 (a), (b), (d)(i) (West 2006 & Supp. 2010) (allowing the parties, by express agreement, to modify how frequently modifications to custody orders may be sought, and which standard will be used).

⁴² *E.g.*, *In re Marriage of Rife*, 878 N.E.2d 775 (Ill. Ct. App. 2007).

⁴³ *E.g.*, *Snowden v. Snowden*, 985 So.2d 584 (Fla. Dist. Ct. App. 2008).

⁴⁴ *See, e.g.*, *Delamielleure v. Belote*, 704 N.W.2d 746 (Mich. Ct. App. 2005) (man's blanket waiver of right to challenge former wife's relocation does not bind the court; relocation of child governed by statute); *Helton v. Helton*, No. M2002-02792-COA-R3-CV, 2004 WL 63478 *5 (Tenn. Ct. App. Jan. 13, 2004) (separation agreement in which wife promised not to relocate without husband's written permission is not binding on the court; "parties cannot bargain away the court's continuing jurisdiction over the care of the child").

⁴⁵ At least one jurisdiction has faced the question of a provision in a separation agreement waiving the right to appeal the trial court's decision. In *Burke v. Burke*, 662 S.E.2d 622 (Va. Ct. App. 2008), the Virginia Court of Appeals held such provisions to be enforceable.

⁴⁶ *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEG. STUD. 111 (2009).

B. *Premarital Agreements*

Premarital agreements (also known as “antenuptial agreements” and “prenuptial agreements”) are agreements entered on the eve of marriage, intended to affect the characterization of property during the marriage (e.g., “community property” versus “separate property”), or the financial rights of the couple upon the dissolution of the marriage by death or divorce.

Courts historically viewed divorce-focused premarital agreements in particular with suspicion, and such agreements were until recently treated as unenforceable in almost all jurisdictions.⁴⁷ The two different, if overlapping, justifications for refusing enforcement were that the parties did not have the right to alter the state rules for the status of marriage, and that premarital agreements unduly encouraged divorce (at least for one party, as the other party’s waiver of rights potentially would make divorce less “expensive” for the non-waiving party).

Under current law, all jurisdictions make premarital agreements at least in principle enforceable. However, the scope of (enforceable) premarital agreements is relatively narrow: they can cover the characterization of property (e.g., separate versus community) during the marriage, financial rights between the parties at divorce (alimony and property division – but generally *not* child support), and the financial claims either party can have against the other spouse’s estate upon that spouse’s death. The agreements cannot (enforceably) cover child custody, visitation, relocation rights of the custodial parent, the grounds for filing for divorce, or the penalties for marital misbehavior.

The attitudes of the states towards premarital agreements lie on a wide range between being highly pro-enforcement and being very protective of the rights of potentially vulnerable parties, in the latter case establishing procedural or substantive requirements for enforcement. The substantive inquiry may be characterized as being in terms of “fairness,” “voluntariness” or “unconscionability,” and may relate to the time the agreement

⁴⁷ For an overview of the historical and doctrinal developments relating to premarital agreements, see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998).

was signed, the time it is being enforced, or both.⁴⁸ Additionally, the level of unfairness required to make a premarital agreement unenforceable is generally less than what would be required to make a conventional commercial agreement unenforceable for “unconscionability.”

Among the factors courts consider when judging fairness (voluntariness, unconscionability) is how much notice was given of the terms of the agreement (agreements presented just hours before the wedding, or just a few days before, are often – but not always – treated as being signed under duress⁴⁹), did both parties have the opportunity to consult independent counsel, were the terms clearly explained (especially if a party was not represented by counsel), would enforcement of the agreement leave one party below the poverty line or dependent on state benefit (almost always a basis for modification of the agreement’s provisions, or complete refusal to enforce the agreement⁵⁰), and what is the disparity between the outcome set by the agreement and the likely outcome under the state’s default rules for alimony and property division. Additionally, at least four states (California, Iowa, New Mexico and South Dakota) expressly refuse to allow parties to waive their right to alimony in a premarital agreement (while allowing waiver of property rights⁵¹).

On the pro-enforcement side are the Pennsylvania Supreme Court case of *Simeone v. Simeone*,⁵² which views premarital agreements under the same standards as commercial agreements

⁴⁸ Conventional unconscionability analysis focuses only on the time the agreement was entered. *See, e.g.*, U.C.C. § 2-302 (2002).

⁴⁹ *Compare* *Azarova v. Schmitt*, No. C-060090, 2007 WL 490908 (Ohio App. 2007) (agreement invalidated on “overreaching,” coercion, and duress when “mail order bride” presented agreement shortly before visa was to expire, wife had limited knowledge of English, no knowledge of state property division law, and no practical opportunity to consult a lawyer) *with* *In re Yannalfo*, 794 A.2d 795 (N.H. 2002) (duress argument rejected despite presentation day before wedding, threat marriage would not take place, and wife not represented by counsel).

⁵⁰ *See, e.g.*, Unif. Premarital Agreement Act § 6(b), 9C U.L.A. 35,149 (2001) available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/upaa83.htm>.

⁵¹ *See* CAL. FAM. CODE § 1620 (West 2004 & Supp. 2010); IOWA CODE ANN. §§ 596.5(2) (West 2001 & Supp. 2010); N.M. STAT. ANN. §§ 40-3A-4(B) (West 2003 & Supp. 2010); *Sanford v. Sanford*, 694 N.W.2d 283 (S.D. 2005).

⁵² 581 A.2d 162 (Pa. 1990).

(adding only the requirement of financial disclosure), and the original text of the Uniform Premarital Agreement Act (UPAA).⁵³ The UPAA actually makes premarital agreements *harder* to invalidate than commercial agreements, for a party opposing enforcement cannot prevail by “merely” showing unconscionability; she must also show a failure of financial disclosure.⁵⁴

The area of premarital agreements may be the place within family law where there has been the greatest movement towards recognizing private ordering, though even here, as noted, many states have reserved the right to refuse enforcement where fairness concerns arise, and there remain significant limits on the types of provisions the states will enforce.

C. *Marital Agreements*

Marital agreements are agreements that cover the characterization of property during the marriage or the parties' financial claims upon the dissolution of the marriage by divorce or by death of one of the spouses. What distinguishes these agreements from premarital agreements, on one hand, and separation agreements, on the other, is timing. Marital agreements are entered when the parties are already married, but when divorce is not imminent.

Some states treat marital agreements under their existing rules for premarital agreements; other states impose more rigorous procedural and substantive tests for validity⁵⁵; and at least

⁵³ See *supra* note 50. While approximately half of the states have adopted the UPAA, about half of those adopting states have modified its provisions to create greater protection for vulnerable parties (and, thus, less enforcement of agreements).

⁵⁴ UPAA, *supra* note 50, at § 6(a)(2); see Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 128-129 (1993). The “unconscionability and failure of disclosure” option can be bypassed if the party opposing enforcement can show instead that the agreement was not entered “voluntarily.” *Id.* at § 6(a)(1). Needless to say, what counts as “voluntary” here (like what counts as “unconscionable”) is rarely self-evident, and judicial outcomes tend to be unpredictable.

⁵⁵ Compare, e.g., MINN. STAT. ANN. § 519.11, subd. 1 (West 2006) (premarital agreements) with *id.* at subd. 1(a) (marital agreements): marital agreements under Minnesota law must meet all the requirements of premarital agreements, *plus* both parties must be represented by counsel, and any such agreement is presumed unenforceable if either party seeks a divorce within two

one state (Ohio) makes all such agreements invalid.⁵⁶ Why the different treatment? One British commentator could not understand how a person's capacity to contract could or should be radically changed over the course of a single day just because he or she got married.⁵⁷ The fact is, though, that marital agreements *are* radically different from premarital agreements. With premarital agreements, the parties are negotiating the terms on which they are willing to marry (each other). Even those who believe strongly in a status view of marriage emphatically endorse the freedom of parties to choose whether or not to marry (even if they would not endorse the right of parties to alter the terms of marriage). By contrast, a marital agreement is, by definition, an effort to alter the terms of an existing legal relationship between the parties. One close practical (and legal) analogy is the modification of an existing contractual relationship – e.g., when a contractor asks for more pay than the contract allows on an ongoing construction project. While such requests are commonplace, and often made and accepted for good reasons (which is why the Uniform Commercial Code makes them presumptively enforceable⁵⁸), there is a real danger of “bad faith” dealing: commonly, one party asking for more money, not because of some unforeseen increase in costs, but just because it knows that the other party would be in no position to obtain substitute performance in a timely way – it is a “hold-up.”

A comparable suspicion surfaces about marital agreements: that they involve one spouse trying to take advantage of the other spouse's vulnerability or dependency, by threatening to leave the marriage unless financial concessions are made.⁵⁹

years of its signing (subject to the party seeking enforcement showing the agreement to be fair).

⁵⁶ OHIO REV. CODE ANN. § 3103.06 (LexisNexis 2008 & Supp. 2010).

⁵⁷ Jens M. Scherpe, *Pre-Nups, Private Autonomy and Paternalism*, 69 CAMBRIDGE L.J. 35, 37 (2010), <http://journals.cambridge.org/action/displayFullText?type=1&fid=7328936&jid=CLJ&volumeId=69&issueId=01&aid=7328928>. Scherpe was actually responding to an argument in a Privy Council case that marital agreements should be *more* enforceable than premarital agreements, rather than the other way around. See *infra* note 59.

⁵⁸ UCC § 2-209.

⁵⁹ On the changes in spousal bargaining power over time, in particular how wives tend to have far less bargaining power as time goes on, see Amy L.

Commercial law deals with the problem of hold ups by imposing a duty of good faith on the parties, rejecting modification agreements where the modification was sought without a good reason for doing so, or where the assent to the modification was coerced by a threat of non-performance (where the party making that threat did not sincerely believe that it had a legal right not to perform). Some courts use a similar general review of the parties' good faith in seeking an agreement, and in following through on it, in evaluating the validity of a marital agreement.⁶⁰ Other jurisdictions try to avoid enforcing bad marital contracts through process and presumptions: *e.g.*, under a Minnesota statute, a marital agreement is "presumed to be unenforceable if either party commences an action for a legal separation or dissolution within two years . . . unless the spouse seeking to enforce the postnuptial contract . . . can establish that [it] is fair and equitable."⁶¹ Other jurisdictions express their suspicion of marital agreements by creating additional procedural requirements,⁶² or by limiting the scope or application of such agreements.⁶³ A recent Massachusetts case, *Ansin v. Craven-Ansin*⁶⁴ (determining the validity of marital agreements in that state for

Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?, 84 VA. L. REV. 509 (1998).

The British Privy Council in *MacLeod v. MacLeod*, [2008] UKPC 64, [2009] 3 W.L.R. 437, took the opposite view, that marital agreements are *less* problematic than premarital agreements; but the analysis in that case is short, and because it does not consider any of the arguments about why marital agreements might be problematic, it is (to this reader) unpersuasive.

⁶⁰ See, *e.g.*, *In re Marriage of Tabassum & Younis*, 881 N.E.2d 396 (Ill. Ct. App. 2007), *appeal denied*, 889 N.E.2d 1122 (2008) (enforcing reconciliation agreement assigning wife the house as non-marital property, where wife put off filing for divorce for five months, and made good-faith efforts to make the marriage work, while husband did not).

⁶¹ MINN. STAT. ANN. § 519.11, subd. 1a(d) (West 2006).

⁶² See, *e.g.*, MINN. STAT. ANN. § 519.11, subd. 1a(c) (West 2006) (for marital agreements, each spouse must be represented by separate legal counsel; no similar requirement for premarital agreements); LA. CIV. CODE art. 2329 (West 2009) (court approval required).

⁶³ *E.g.*, *In re Estate of Shaffer v. Hower*, No. 08-0653, 2009 WL 606003 (Iowa Ct. App. Mar. 11, 2009) (marital agreements cannot waive surviving spousal rights to elective share of other spouse's estate, though such rights can be waived through premarital agreements).

⁶⁴ 929 N.E.2d 955 (Mass. 2010).

the first time), set out a series of substantive and procedural grounds for review:

Before a marital agreement is sanctioned by a court, careful scrutiny by the judge should determine at a minimum whether (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce. Where one spouse challenges the enforceability of the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria.⁶⁵

One sympathetic (non-hold-up) story-line for marital agreements involves one party wanting to end the marriage because of the other party's actions (often an extramarital affair or an addiction problem); the badly behaving spouse wants the marriage to continue and makes promises of property at the time of agreement, or at the time of dissolution, in return for keeping the marriage going. Courts have been more inclined to enforce "reconciliation agreements" of this sort,⁶⁶ though the case-law remains sporadic, inconsistent, and unsettled.

When the story line is less sympathetic, the courts tend to be less willing to enforce. For example, in *Stutz v. Stutz*,⁶⁷ the court refused enforcement to a marital agreement in which the wife had waived almost all of her potential post-divorce claims against the husband in return for his consenting to adopt a child. When the wife filed for divorce three years later, the court refused enforcement of the agreement on public policy grounds, concluding that allowing the purchase and sale of a consent to adoption undermined the ability of courts to act in the best interests of the children being considered for adoption.

⁶⁵ *Id.* at 963-64 (footnotes omitted).

⁶⁶ *E.g.*, *Dawbarn v. Dawbarn*, 625 S.E.2d 186 (N.C. Ct. App. 2006) (after husband had affair, wife demanded transfer of jointly held property to her in exchange for keeping marriage going; when marriage ended nine years later, court held transfer to be valid).

⁶⁷ No. E2004-01399-COA-R3-CV, 2005 WL 2016828 (Tenn. Ct. App. Aug. 23, 2005).

In general, with marital agreements, the objections to enforcement seem not the ones we have seen elsewhere – protecting status from alteration by contract – but ones inherent within private ordering: the sort of questions of duress and good faith that even conventional commercial contracts sometimes face.

D. *Agreements Relating to Marital Behavior and Grounds of Divorce*

To what extent can parties, by express agreement, limit the grounds for filing for divorce, or otherwise create private rules for sanctioning (or condoning) marital fault? This is a topic that ranges across premarital agreements, marital agreements, and separation agreements; and there is relatively little case-law. To the extent that any sort of pattern or principle can be drawn from these scattered cases, it is that courts are more receptive to agreements waiving or opting out of *fault*, and less receptive to agreements that attempt to opt out of or waive the right to *no-fault*. Given this general tendency, it is perhaps unsurprising that courts have consistently refused to enforce agreements that attempt to create private rights of recourse for marital misbehavior.

In *Eason v. Eason*,⁶⁸ the court held that spouses *could*, in an agreement entered after separation, enforceably agree both not to seek divorce on the grounds of adultery, and not to use adultery as a bar to alimony.⁶⁹ By contrast, in *In re Marriage of Cooper*,⁷⁰ the court refused enforcement of an agreement under which a previously unfaithful husband had agreed to (more) generous alimony and property division provisions should further infidelities occur (as they did). The court in *Cooper* was unwilling to enforce any agreement that purported to affect spousal behavior during the marriage.

In *P.B. v. L.B.*,⁷¹ the parties had included in their separation agreement a provision prohibiting the husband from filing for divorce for five years without the wife's written consent, but the

⁶⁸ 682 S.E.2d 804 (S.C. 2009).

⁶⁹ *Eason* is a South Carolina case, and South Carolina is one of the few states that retains the old law that adultery is an absolute bar to receiving alimony. S.C. CODE ANN. § 20-3-130(A) (LCP Supp. 2009).

⁷⁰ 769 N.W.2d 582 (Iowa 2009).

⁷¹ 855 N.Y.S.2d 836 (App. Div. 2008).

provision was held unenforceable as both contrary to public policy and unconscionable.⁷² It is worth pausing to consider why a right to divorce might be considered something one would not be allowed to waive or bargain away. While one might be tempted to analogize an agreement to stay in an unhappy marriage with an agreement to be enslaved (even strong libertarians like J. S. Mill would refuse, or at least hesitate, to enforce agreements to be enslaved⁷³), agreeing to stay married is no indentured servitude. Staying married is not the same as being required to cohabit or share a life with the spouse one no longer likes or wants. One can leave the marital household, move far away, cohabit with another, bear children, etc., with no legal sanction (and, in most areas of the country, little or no social sanction). Generally, the only thing important one gives up by being required to stay married is the legal ability to marry another.⁷⁴ Still marital status, like parental status, looms large symbolically, even if marital status no longer has quite the legal and social significance it once had. And states generally will not let people completely waive their rights to exit (or enter) that status.

An exception that proves the general tendency comes from covenant marriage. In three states – Louisiana, Arkansas, and Arizona⁷⁵ – couples can (either at the time of marriage or after they have gotten married) opt into a more binding form of marriage. This covenant marriage limits the grounds for divorce, lengthens pre-divorce separation in most cases, and requires pre-divorce counseling (and, for those choosing covenant marriage at

⁷² The unconscionability was partly based on the fact that while the husband was barred from filing for divorce without his spouse's consent, there was no comparable bar on the wife. *Id.* at 841.

⁷³ When one values liberty, one can see the overall benefit (in general liberty) in parties being allowed to constrain their liberty in small ways for modest periods of time (as in contracts and other conventional commitments) in order to gain some significant advantage in return; however, the balance for liberty arguably comes out a different way when someone is agreeing to give up his or her entire liberty forever.

⁷⁴ There may be other legal implications as well, to be sure: *e.g.*, spousal rights to an elective share from the other party's estate, spousal constraints on property in community property states, certain obligations to pay outstanding debts of a spouse, etc.

⁷⁵ ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2007 & Supp. 2009); ARK. CODE. ANN. §§ 9-11-801 to 9-11-811 (LexisNexis 2009); LA. REV. STAT. ANN. §§ 9:272 to 9:276 (West 2008 & Supp. 2010).

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the point of marriage, also pre-marital counseling). This is state-sponsored private ordering, an option created by the legislature, rather than a restriction created only by and for certain individual couples.

E. *Palimony*

Starting with a 1976 case from California, *Marvin v. Marvin*,⁷⁶ courts have been willing to consider arguments for contractual or quasi-contractual claims arising out of long-term non-marital cohabitation. The traditional rule had been that any such claim purporting to be based on an agreement between parties in such a relationship would be unenforceable, either as being connected to a “meretricious relationship” (that is, something in the nature of prostitution), or at least as contrary to the public interest, since refusing claims for non-marital cohabitation would encourage marriage. A small number of states still hold to that view,⁷⁷ but most at least allow such claims in principle, though they may limit them, e.g., through a requirement that only express written contract claims (not oral or quasi-contractual claims) will be upheld.⁷⁸ One state, Washington, allows for equitable property claims to arise from long-term cohabitation (either opposite-sex or same-sex), even without an express or implied contract.⁷⁹

The connection between palimony claims and private ordering is ambiguous at best. On one hand, the claim presents itself as simply recognizing private ordering: that unmarried cohabitants have as much right as others to enter agreements, including long-term agreements among themselves, express or implicit. On the other hand, critics of palimony claims say that with many palimony claims being grounded on (doubtful) oral testimony of

⁷⁶ 557 P.2d 106 (Cal. 1976).

⁷⁷ See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

⁷⁸ See, e.g., MINN. STAT. ANN. §§ 513.075, 513.076 (West 2002 & Supp. 2010) (requirement of express writing signed by the parties).

⁷⁹ E.g., *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995). Ironically, the Washington courts initially referred to the claims under the rubric, “meretricious relationship,” the same label used to *deny* such claims under traditional common law. The Washington courts, starting with *Connell*, now use the less ironic label of “committed intimate relationship.”

vague oral promises,⁸⁰ palimony could effectively approximate a status claim imposed on the parties (as is the law in Washington State), in the face of an express choice by one or both parties *not* to marry, where the choice not to marry is frequently motivated (whether we like it or not) by the desire *not* to be beholden financially to the other partner at the end of the relationship.

F. Co-Parenting Agreements

Partners sometimes enter agreements to parent a child together (or, a related matter, not to contest the other partner's parental rights in court). This occurs with some frequency among same-sex couples who live in states in which same-sex marriage or an alternative status ("civil union" or "domestic partnership") is not available.⁸¹ Additionally, fertility clinics will sometimes accept unmarried couples as patients only if they agree to sign a document of this sort; or the agreement may, in some other way, be part of a gamete donor arrangement.⁸²

Courts have been very reluctant to enforce co-parenting agreements.⁸³ One case where a co-parenting agreement was not directly enforced, but where it did play a role in the court's decision recognizing parental rights, is *Mason v. Dwinnell*.⁸⁴ In that case, a co-parenting agreement was one piece of evidence among many that the biological parent had chosen to share parental de-

⁸⁰ The justification some legislatures have offered for imposing a writing requirement for palimony claims.

⁸¹ Discussion of co-parenting agreements aimed at same-sex couples, and a sample agreement, can be found on the Human Rights Campaign site, <http://www.hrc.org/issues/parenting/adoptions/5286.htm>.

⁸² See *Wakeman v. Dixon*, 921 So.2d 669, 670 (Fla. Ct. App. 2006) (provision in sperm donor agreement); *In re Sullivan*, 157 S.W.3d 911 (Tex. App. 2005) (sperm donor who entered co-parenting agreement with intended mother has standing to maintain a proceeding to adjudicate parentage).

⁸³ See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Sporleder v. Hermes (In re Interest of Z.J.H.)*, 471 N.W.2d 202 (Wis. 1991); *Wakeman v. Dixon*, 921 So.2d 669 (Fla. Ct. App. 2006).

⁸⁴ 660 S.E.2d 58 (N.C. Ct. App. 2008). There are other cases where the agreement is noted, but plays no role in granting access rights to the party seeking those rights. E.g., *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996). In *Holtzman v. Knott (In re H.S.H.-K.)*, 533 N.W.2d 419, 434-35 (Wis. 1995), the court allowed visitation based on the party's past parental function, though dicta indicates that the decision might also have been grounded on the co-parenting agreement.

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cision-making with her partner, and for that reason could not later claim a constitutional right to exclude the partner from contact with the child.⁸⁵

It seems clear that this remains an area where courts (and legislatures) are reluctant to encourage private ordering. One justification and explanation is the courts' role as guardians of the best interests of children, combined with the view that this can be vouchsafed only when traditional institutions or state-created processes relating to parental status are followed. Of course, it is probable that another part of the explanation is that states that view same-sex unions as immoral or their recognition as contrary to strong public policy⁸⁶ are unlikely to be quick to recognize a contract process that would allow same-sex couples to opt in to state recognition of their status as "co-parents."

Even those sympathetic to the private ordering in co-parenting agreements might not want to grant full enforcement based on the agreement alone.⁸⁷ Such agreements are usually executed, and later litigated, in cases where partners share in the conceiving and raising of a child. If one of the parties to such an agreement rarely or never partook of the financial or care-giving obligations as regards a child, courts might reasonably be reluctant to ascribe parental rights to that party (courts and legislatures take a similar attitude towards unmarried biological fathers who have not taken on the obligations of parenthood⁸⁸).

G. *Open Adoption Agreements*

While adoption in some form has ancient roots, modern American adoption law and practice goes back to nineteenth century Massachusetts.⁸⁹ A statute was passed there in 1851 that allowed the court to transfer a child from one parent or set of parents to another, ending the legal parental status of the origi-

⁸⁵ *Mason*, 660 S.E.2d at 66-71.

⁸⁶ By one recent count, as of June 2010, 45 states prohibit same-sex marriage, and roughly 40 of those "expressly refuse to recognize same-sex marriage of other jurisdictions, and some of those more broadly refer to other same-sex relationships." Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, FAM. L. REP. (BNA) No. 122 at 1383, 1385 (June 22, 2010).

⁸⁷ I am grateful to Courtney Joslin for reminding me of this point.

⁸⁸ See *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁸⁹ See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971).

nal parent(s), and creating parental status for the adopting person or couple.⁹⁰

In recent decades there has been a growing use and acceptance of “open adoption” agreements, under which the birth parent(s) and the adopting parent(s) agree that the birth parent(s) can continue to have contact with the child being adopted.⁹¹

The greater use of such agreements is justified and explained in part by the work of some social scientists and commentators who believe that it is better for an adopted child to know of and have contact with its birth parents.⁹² A quite different part of the explanation is the reality that far more parents are seeking to adopt than there are healthy babies and infants available for adoption: creating a situation where (1) a parent considering putting his or her child up for adoption is in a position to set terms (e.g., of ongoing contact) that the adopting parents might not otherwise prefer; and (2) there is an interest in creating options (like enforceable open adoption) that “free up” more children for adoption.⁹³

At first, courts treated open adoption agreements as unenforceable; like premarital agreements, back when they were treated as unenforceable, the argument was that the parties had no power to alter the terms of a state-created status.⁹⁴ Gradually, courts and legislatures are moving towards making these

⁹⁰ *Id.* at 465-66.

⁹¹ See Kirsten Widner, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 357-61 (2007)

⁹² Additionally, there has been a sharp change in social norms. In the 1950s, it was generally considered shameful to have a child out of wedlock, and also a source of shame in some places for a child to be known to be adopted or for a couple to be known to be unable to have their own biological children. From this combination of social norms, the social practice of secrecy surrounding adoption, and the complete cutting off of the birth parents from the adopted child, was a natural result. As the shame of having children out of wedlock, and adoption itself, are now gone, or nearly so, the justification for cutting off the birth parents is far less clear.

⁹³ See generally Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483 (1996).

⁹⁴ *E.g.*, *In re Adoption of Hammer*, 487 P.2d 417 (Ariz. Ct. App. 1971). Again, it would be more precise to say that the parties were thought not to have the power to create *enforceable* alterations of the state-created status. Nothing

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agreements enforceable, but there still tends to be restrictions and limitations. For example, under the Minnesota statute, an open adoption agreement must be approved by the court, and is then subject to modification by the court (if “exceptional circumstances” have arisen that make modification necessary for the best interests of the adopted child).⁹⁵

H. *Agreements Relating to New Reproductive Technologies*

New reproductive technologies have allowed parties to separate sex from procreation, genetic origins from gestation, and intended parents from genetic or gestational parents. Embryos can be created (often using donor egg or sperm) outside the body, and implanted in a gestational carrier who may or may not be the intended parent of the resulting child.

These new reproductive technologies have thus also led to a variety of different sorts of (attempted) private ordering. There are agreements to purchase donor egg and sperm for use, agreements to pay a surrogate to carry another person’s or couple’s intended child, and agreements with donors (usually sperm donors) declaring either that they will be included or excluded from parental rights and obligations.

1. *Surrogacy Agreements*

Consider the contrast between two well-known surrogacy cases, *In re Baby M*.⁹⁶ and *Johnson v. Calvert*.⁹⁷ *Baby M* was the first surrogacy case, and involved what is now called a traditional surrogate (in which the woman carrying the baby is also the genetic mother of the child). While the New Jersey Supreme Court ended up giving primary custody to the intended parents (on conventional “best interests” grounds), the court emphatically

prevents adopting parents from allowing or encouraging ongoing contact between the child and its birth parents.

⁹⁵ MINN. STAT. § 259.58 (2007). The Minnesota Supreme Court has not yet answered the question of whether “modification” of the agreement would include the power to invalidate it in total. *C.O. v. Doe*, 757 N.W.2d 343, 352 n.10 (Minn. 2008). Other states, e.g., Oregon and Washington, have nearly identical legislation. WASH. STAT. § 26.33.295 (West Supp. 2010); OR. REV. STAT. § 109.305 (West 2003 & Supp. 2010).

⁹⁶ 537 A.2d 1227 (N.J. 1988).

⁹⁷ 851 P.2d 776, 5 Cal.4th 84 (1993).

rejected the enforceability of the surrogacy agreement between the intended parents and the surrogate.

The court determined that the transaction approximated baby-selling, and that, in any event, money tainted the transaction, with its effect on the consent of the surrogate being close to coercive.⁹⁸ The surrogate's contractual surrender of custody also concerned the court, as it involved neither the mandatory waiting period of adoption (where a baby cannot be surrendered until a number of days after birth; here the "surrender" occurred long before birth) nor the determination by a neutral court regarding the fitness of the intended parents and the best interests of the child.

We see many of the arguments against private ordering in that case: a belief that parties are insufficiently self-protective, a worry about the effects on third parties (in particular, minors), and worry about the "exploitation" that can result when a contracting party needs money, and may therefore accept terms or transactions that others consider degrading.⁹⁹

Johnson v. Calvert involved a gestational surrogate (the carrier was not genetically related to the child she was carrying).¹⁰⁰ The primary question was who were the legal parent(s) of the child born to the surrogate. The court worked from the state's version of the Uniform Parentage Act, and quickly determined that the intended father of the child, who was also the genetic father, was the *legal* father. The question of the legal mother was trickier, as the statute made reference both to genetic ties and to carrying the child, and in this case the genetic mother and the gestational carrier were different people, but the statute only

⁹⁸ *Baby M*, 537 A.2d at 1240-50.

⁹⁹ See generally Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U.L. REV. 1215 (1997).

¹⁰⁰ As it happens, in *Johnson*, the intended parents were also the genetic parents of the child; it is common in gestational surrogate cases for one or both intended parents *not* to be genetically related to the child, needing to use donor egg or donor sperm instead. California law, post-*Johnson*, has continued to emphasize the priority of intended parents in surrogacy arrangements, regardless of whether they are genetically related to the child or not. *E.g.*, *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (1998).

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seemed to allow for a single mother.¹⁰¹ The court held that the tie-breaker was which parent was intentional, and the intended parent thus was named the legal mother, rather than the surrogate.

In passing, the California court rejected most of the New Jersey Supreme Court's arguments from *Baby M.*, both the general conclusion that surrogacy agreements were contrary to public policy, and the more specific claims that such agreements violated the policies relating to adoption, custody, and baby-selling. The court considered those laws and policies inapt to an agreement for gestational surrogacy, and thought that the activity was no more degrading than many other activities that those without means agree to do in order to make a living. The court offered standard arguments in favor of private ordering:

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna [the gestational surrogate], a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.¹⁰²

2. *Informal Sperm Donor Agreements*

With gamete donation, as with surrogacy, there is a division between the intended parent and the genetic or gestational parent. Which parent is to have the rights and obligations of legal parenthood? With conventional sperm and egg donation, the donors generally do not want parental rights and duties (they tend to donate for some combination of monetary and altruistic reasons), and the intended parents usually prefer this as well.

Sperm donation has been around for a long time, and the parental rights relating to it began to be developed around forty

¹⁰¹ Later California cases would read the statute to allow a child to have two mothers, if they were both the intended parents of the child in question. See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

¹⁰² *Johnson*, 851 P.2d 776 at 785, 5 Cal.4th at 97.

or fifty years ago, first through case-law, and later through legislation. Most states have legislation relating to the parental rights of the donor and the intended parents in sperm donor situations.¹⁰³ However, many states still do not have comparable legislation for egg donors; though most people assume that the legal outcomes would be similar. The donor statutes tend to set the default of intended parents as legal parents, with the donor having neither the rights nor the duties of a legal parent. Some states limit the application of this statute to intended parents who are married, and some statutes only apply if a physician is involved in the process.¹⁰⁴

Increasingly, sperm donation is being used by unmarried couples (both same-sex and opposite sex) and also by intended single parents. Additionally, the donated sperm is frequently being obtained from friends or acquaintances rather than from an anonymous donor from a sperm bank. Sometimes the parties want the donor to have a role in the life of the resulting child; sometimes they do not; and sometimes the parties have (or claim to have) different views of what the “shared understanding” is or was. Sometimes the parties put their understandings into writing, though more often they do not. And sometimes the parties’ subsequent behavior is contrary to their original understanding. All of this is private ordering, and much of it can lead to messy litigation.

Some examples:

¹⁰³ For example, Minnesota has a long-standing statute for sperm donation, MINN. STAT. ANN. § 257.56 (West 2007 & Supp. 2010), but no statute for egg donation.

¹⁰⁴ Both were the case with the sperm donor provisions (Section 5) of the original 1973 version of the Uniform Parentage Act, available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.htm>.

C.M. v. C.C., 377 A.2d 821 (N.J. Cumberland County Ct. 1977), was apparently the first court to deal with a known donor and an unmarried carrier and intended mother. Holding that there was a public policy in favor of children having both mothers and fathers, the court concluded that the donor had the legal rights and duties of a natural father. *Id.* at 823-24.

Both the married and licensed physician limitations are absent from the relevant part (Section 7) of the 2000 revised version of the Uniform Parentage Act. <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm>.

(1) In *In re Thomas S. v. Robin Y.*,¹⁰⁵ a lesbian couple had an informal relationship with a sperm donor – all three were lawyers, but (surprisingly) they wrote no formal document. The evidence was that the donor had agreed at the beginning not to assert parental rights, but after the child was born he continued to have regular contact with the two parents and the child. When the child was nine years old, a dispute arose that led to the litigation. The court held that the baseline was the donor's parental rights, and whether the parties had complied with New York's statutory requirements for relinquishing paternity. The oral agreement, especially in light of post-birth behavior, was held to be insufficient to divest the donor of his parental rights.

(2) In *Ferguson v. McKiernan*,¹⁰⁶ a man agreed with his former lover to donate sperm for in vitro fertilization (IVF), on the condition that he not seek visitation and that he not be liable for support for any resulting child. This agreement was held to be enforceable, where neither party later acted inconsistently with the agreement. The donor had not been involved with intended mother's prenatal medical care or paid any prenatal expenses (he did attend the delivery, but only when asked to do so as a friend); and he had no contact with the twins that were subsequently born or with their mother, until the mother sought child support from the donor when the children were five years old. The court held that there was a public policy reason to enforce the agreement, in order to allow women to secure known donors rather than use anonymous donors.¹⁰⁷

(3) In *In re J.M.K.*,¹⁰⁸ the lover of a married man gave birth to two children by IVF; the biological father had consented to the procedure, and signed a paternity affidavit for the first child, gave money for its support, and named it as an insurance beneficiary. He was held to be the legal father of both children, despite

¹⁰⁵ 209 A.D.2d 298, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

¹⁰⁶ 940 A.2d 1236 (Pa. 2007).

¹⁰⁷ *Id.* See also *Brown v. Gadson*, 654 S.E.2d 179 (Ga. Ct. App. 2007) (enforcing Florida agreement for man to donate sperm in return for being relieved of any parental responsibility); *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (upholding against constitutional challenge state rule creating a presumption against paternal rights for sperm donors, unless there is a written agreement to the contrary).

¹⁰⁸ 119 P.3d 840 (Wash. 2005).

sperm donor legislation language appearing to negate paternity. The court held that the legislation did not apply to IVF.

(4) In *Steven S. v. Deborah D.*,¹⁰⁹ the court ruled that a man who had donated sperm through a licensed physician to a female acquaintance, but also later tried to impregnate her through sexual intercourse, could not be declared the legal father, due to the state parentage act provisions on sperm donation, despite evidence that the mother had initially wanted the man to have a parental role.

The problem in this area is that there are public interests both in creating a mechanism for donors *not* to have parental rights (if that is what the relevant parties prefer) and for allowing them *to* have parental rights (if *that* is what the relevant parties prefer). Within that tension, one “just” needs clear default rules, and one begins to understand the value of a writing requirement to channel the parties towards clarifying their own views, and creating clear documentation of it in case of later challenge.¹¹⁰ Especially where such written forms are not made (though not only then), chaotic outcomes that seem unfair to some of the parties are inevitable.

3. *Division of IVF Embryos*

At the core of much of modern reproductive technology is medical science’s ability to bring egg and sperm together outside the human body to create a viable embryo (hence the old label, “test tube baby”). Though the embryo still needs to be implanted in a woman’s body to be carried to term, this medical breakthrough has made possible the use of egg donors and gestational surrogates. Additionally, scientists have learned how to freeze unused embryos, to allow implantation in a later “cycle” should a previous attempt not lead to a live birth. The process of creating and implanting embryos is uncertain and expensive, and it is thus understandable that couples using IVF will want to create as many “good” embryos as they can, to allow multiple cycles if necessary (and it often is) to get a child. However, if the couple splits up prior to IVF success, then there is the question of

¹⁰⁹ 25 Cal.Rptr.3d 482 (Cal. Ct. App. 2005).

¹¹⁰ See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-801 (1941) (on the evidentiary, cautionary, and channeling functions of form).

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what happens to the embryos that were produced (and are now frozen, waiting for use).

Some of the earliest cases dealing with the ownership or control of IVF embryos decided the case under the rubric of property division.¹¹¹ To avoid some of the uncertainty, IVF clinics began to make couples sign agreements regarding the disposition of embryos should the couple split up during the course of treatment. Thus, more recent cases have involved whether such agreements are enforceable. Different states have reached different results.¹¹² On one hand, courts seem inclined to defer to (and to encourage) private ordering here, to avoid having to make difficult and controversial choices regarding the disposition of embryos – where the two likely alternatives,¹¹³ the destruction of an embryo, or allowing the embryo to be used over the objection of one of the genetic parents of any resulting child, both evoke strong emotional objections.¹¹⁴ On the other hand, because arguably constitutional rights to procreate are involved,

¹¹¹ *E.g.*, *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (enforcing ex-husband's desire that embryos not be used; in dicta: rule is to enforce prior agreements, and, in the absence of prior agreement, to weigh the parties' interests, with the understanding that a desire not to parent will usually prevail over a desire to parent).

¹¹² *See, e.g.*, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (enforcing contract); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (no clear agreement in the case, but indicating that such an agreement would be enforceable, though each party could change his or her mind up to point of use or destruction; in case of dispute, the right not to procreate will usually prevail); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (prior agreement not enforced if one party has changed his or her mind; no use or destruction of embryos without present agreement of both parties); *Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006), *review denied* (Aug. 24, 2007) (agreement that frozen pre-embryos were to be discarded upon divorce was enforceable).

¹¹³ A third alternative, continue freezing of the embryos, is a sort of a "punt," avoiding doing anything controversial. However, (a) frozen storage is expensive, and the court must still determine who should pay; and (b) it is likely that indefinite storage is the equivalent of destruction, whether the court admits as much or not.

¹¹⁴ Without private ordering, most courts, both in this country and other countries, have favored the right *not* to be a parent (that is, an intended parent's veto on the use of the embryos) over the right *to be* a parent. The Israeli Supreme Court is one court that came out the other way. *See Nachmani v. Nachmani*, 50(4) P.D. 661 (Isr. 1996).

some courts have been reluctant to enforce a prior agreement if one of the parties has subsequently changed his or her mind.¹¹⁵

V. Arbitration

Family courts are showing a growing willingness to enforce arbitration agreements. Often, the arbitration provision is written into an existing agreement – e.g., premarital agreement or separation agreement – to cover disputes relating to the interpretation and application of those agreements. Occasionally, the agreement to arbitrate involves giving a whole dispute to an arbitrator, rather than just the interpretation of an existing document.

The courts' favorable reaction to arbitration in family law matters likely reflects a favorable view of arbitration generally: in part encouraged by federal and state laws,¹¹⁶ and also by recent court decisions interpreting those laws in a way favorable to arbitration.¹¹⁷ It may also help that a case sent to arbitration is one less matter crowding a court's docket (a subsequent arbitrator's decision can be appealed to the court, but the grounds for appeal are narrow, and such appeals rarely succeed).

Arbitration displays private ordering in two different (slightly idiosyncratic) senses. First, it is "private" ordering, in the sense that it is not the public institution, the court system, that is resolving the dispute, but rather private arbitrators.¹¹⁸ Second, it is "private" in the sense that it is the parties' agreement to take the agreement out of the court system that is being recognized.

In *Fawzy v. Fawzy*,¹¹⁹ the New Jersey Supreme Court affirmed the use of arbitration (combined with limited judicial review) for all divorce issues, including the resolution of child

¹¹⁵ See, e.g., *In re Marriage of Witten*, *supra* note 112.

¹¹⁶ The Federal Arbitration Act is codified at 9 U.S.C. §§ 1-14. Most states have their own arbitration acts, many of these based on the Uniform Arbitration Act, which itself is based on the federal act.

¹¹⁷ See, e.g., *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440 (2006).

¹¹⁸ Under both state and federal arbitration acts, there is court review of arbitration decisions, but it is a very limited review, that almost always leads to the enforcement of the original arbitration order.

¹¹⁹ 973 A.2d 347 (N.J. 2009).

custody and visitation. In that case, the couple agreed to arbitration on the eve of trial, but the husband had a change of mind at least as regards the arbitration of custody and visitation issues. The court modified the limited standard of review for arbitration decisions generally, only enough to allow reversal where an arbitrator's decision on custody or visitation would threaten harm to the child.¹²⁰

The court in *Fawzy* justified its decision in part based on a combination of private ordering and family privacy: "Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a family."¹²¹

Conclusion

One could reasonably describe family law's treatment of private ordering as inconsistent, incoherent, and frequently counterproductive. On the other hand, similar complaints could likely be brought against any area of law which has dealt with as much legal change and social change as family law has in recent decades.

It is to be recalled that when we speak of "private ordering," it is not actually private ordering, but something more and something different. Real private ordering would be what parties do on their own, and family law (combined with criminal law, tort law, and property law) offers relatively few restrictions on what arrangements individuals establish among themselves. "Private ordering" for our purposes means those arrangements and commitments for which the state will offer its coercive and dispute-resolution machinery for enforcement. While most of these forms of private ordering involve the state enforcing (or not enforcing) the rights of those in the arrangement against one another, on occasion it will also affect the rights parties have (as

¹²⁰ *Id.* at 361. To effectuate that standard, the court also modified the arbitration procedure, requiring that a record of testimony and documentary evidence be kept, and findings of fact and conclusions of law by the arbitrator, for child-custody and parenting time issues. *Id.* at 362.

¹²¹ *Id.* at 358.

parents, spouses, or property owners) against others who were not a part of the original arrangement.

The amount of private ordering in family law is significant, especially compared to just a few decades ago. And the trend seems to be towards greater private ordering. At the same time, domestic relations remains an area in which private ordering is viewed with significant suspicion and a significant part of family law is still shaped by mandatory rules and status. Part of the reluctance may be merely an instinctive opposition to the radically new or different – e.g., non-traditional forms of family life and new reproductive technologies.¹²² However, a significant part of the resistance to private ordering comes from legitimate concerns courts and legislators have in protecting vulnerable parties, as well as reasonable worries regarding the long-term societal effects of encouraging altered forms of marital or parental status.

Postscript:

The Uniform Law Commissioners are considering producing a new uniform law that would cover both premarital and marital agreements. An eminent committee has been selected, chaired by Barbara Atwood.¹²³ For my sins, I am the Reporter for the committee. The committee expects to work at least two years before a draft is ready to be presented to state legislatures. What the committee decides will likely reflect current thinking about private ordering in these areas, and may also affect its path going forward. All suggestions are welcome.¹²⁴

¹²² It is probably not a coincidence that the resistance to a child having three (or more) legal parents is greatest when unconventional family forms are combined with new reproductive technologies (e.g., with informal sperm donor arrangements), while comparable legal and social arrangements evoke little comment when they grow out of divorce and remarriage among more conventional opposite-sex couples. See Brian H. Bix, *The Bogeyman of Three (or More) Parents*, University of Minnesota Legal Research Paper No. 08-22 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1196562.

¹²³ The Committee list and links to related documents are available at <http://www.nccusl.org/update/CommitteeSearchResults.aspx?committee=337>.

¹²⁴ They can be sent to me at bix@umn.edu.

