

Family Law and the Boundaries of Contract
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- I. Family law and contract intersect in at least two places: family law cases studied in first year contracts, and occasions during family relationships where contracting is explicitly used. However, family law and contract are not coextensive, nor is family law likely to become a subset of contracts.
- II. Family law cases included in standard first year casebooks teach (among other things) about contracts against public policy
 - a. *In re Baby M*,¹ a surrogacy case, is used to discuss situations of duress (as Michael Trebilcock did in his article with Rosamin Keshvani)² and incommensurability (and was used as an example by Margaret Radin)³.
 - b. *Hewitt v. Hewitt*⁴ or *Marvin v. Marvin*,⁵ palimony cases, are used to discuss illegalityBoth types of contracts are now enforceable in at least some states.
- III. Sometimes relationships themselves require the execution of enforceable contracts
 - a. Marriage (As is discussed in the Supreme Court case of *Maynard v. Hill*,⁶ it begins as a civil contract)
 - b. Foster care by unrelated adults begins with a contract between the state and the parents, and indeed, it is this contract that distinguishes the rights of foster parents from relationships beginning without contracts.
 - c. Antenuptial (premarital contracts), which even have their own U.C.C., the Uniform Premarital Agreement Act, currently adopted in 25 states plus the District of Columbia.⁷

A famous example: *In re Marriage of Bonds*⁸
Restriction in Section 3 of the UPAA's catch-all provision against contracts attempting to regulate child support.⁹

¹ 525A.2d 1128 (N.J. 1987).

² Michael P. Trebilcock, M. and Rosamin Keshvani, *The Role of Private Ordering in Family Law*, 41 U. Toronto L.J. 533 (1991).

³ Margaret Jane Radin, *Market Inalienability*, 100 Harv. L. Rev. 1849, 1853 (1987).

⁴ 394 N.E.2d 1204 (Ill. 1979).

⁵ 557 P.2d 106 (Cal. 1976).

⁶ 125 U.S. 190, 205 (1888).

⁷ See, e.g., Iowa Code Ann. §§ 596.1 to 596.12 (2004).

⁸ *In re Marriage of Bonds* 24 Cal.4th 1, 99 Cal.Rptr.2d 252, 5 P.3d 815 (2000) (abrogated by West's Ann.Cal.Fam.Code § 1612, which added

(c) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

⁹ Uniform Premarital Agreement Act §8 (b) provides, "The right of a child to support may not be adversely affected by a premarital agreement."

- d. Separation agreements (property settlement agreements) which account for 90% of all dissolving marriages (now estimated to be 40-50% of all marriages)
 - e. Treatment of agreements to obtain advanced degrees during marriage under contract, or contract-like principles. *DeLa Rosa v. DeLa Rosa*¹⁰ used the concept of restitution. Reimbursement alimony¹¹ may be thought of as a reliance remedy.¹²
- IV. Why isn't family law a subset of Contracts?
- a. Special concern for children (At least in some states, including Iowa Nevada and New Mexico, parties can't contract out of spousal support in premarital agreements, either.)
 - b. Special concern about unconscionability (These concerns might be thought of as a relic of gender inequality or a recognition that these are relational contracts with tremendous opportunities for "bad faith" or opportunistic behavior.)
 - c. Concern about commodification: destroying relationships by making them the subject of exchange, as discussed in the work of Katherine Silbaugh.¹³ Example from Nock and Brinig's paper on sharing of housework and marital stability.¹⁴
 - d. States' desire to regulate the entrance and exit from marriage. Examples are contracts that penalize no-fault divorces or that provide for limited term marriages with options to renew.
 - e. Limitations placed by privacy. The case of *Favrot v. Barnes*,¹⁵ attempting to regulate the frequency of intercourse. Lloyd Cohen's discussion about preparation of food with love: specific performance just won't work.¹⁶
 - f. implied duties of support: the doctrine of necessities and the statutory duties (the alimentary obligation) to support aged parents.¹⁷

¹⁰ *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981)

¹¹ *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982)

¹² See generally Margaret F. Brinig and June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *Tulane L. Rev.* 855 (1988)

¹³ Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *Nw. U. L. Rev.* 1 (1995); Katherine Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 *Duke J. Gender L. & Pol'y* 203 (2001).

¹⁴ Steven L. Nock and Margaret F. Brinig, "Weak Men and Disorderly Women: Divorce and the Division of Labor," in *Marriage and Divorce: A Law and Economics Approach* (Dnes and Rowthorn, eds., Cambridge University Press, 2002).

¹⁵ *Favrot v. Burns*, 332 So. 2d 873 (La. Ct. App. 1976)

¹⁶ Lloyd Cohen, *Marriage, Divorce and Quasi-Rents, Or 'I Gave Him the Best Years of My Life,'* 16 *J. Legal Studs.* 267, 300 (1987)

¹⁷ French Code Civil art. 205 (L. no 72-3 due 3 janv. 1972): « Les enfants doivent des aliments à leurs père et mère or autres ascendants qui sont dans le besoin. »

Appendix: Family law in some first year Contracts casebooks

1. Taught during first year
 - a. Steven J. Burton, Principles of Contract Law (2nd ed. 2001)
 - i. In re Baby M, 525A.2d 1128 (N.J. 1987) (duress)
 - ii. Spaulding v. Morse 76 N.E.2d 137 (Mass. 1947) (interpretation and implication of terms)
 - iii. Wood v. IRS (third party beneficiary)
 - b. Scott & Leslie, Contract Law and Theory (2nd ed. 1993)
 - i. Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (illegality)
 - ii. In re Baby M, 525A.2d 1128 (N.J. 1987)
 - iii. In re Soper's Estate, 264 N.W. 427 (Minn. 1935)(meaning of "wife" when court interpreted a provision)
 - iv. Drake v. Drake, 455 N.Y.S.2d 420 (App. Div. 1982) (children as third party beneficiaries of parents' separation agreement)
 - c. Edward J. Murphy, Richard E. Speidel, and Ian Ayres, Studies in Contract Law (6th ed. 2003)
 - i. Kirksey v. Kirksey, 8 Ala. 131 (1845) (Gratuitious promises,)
 - ii. Bogigian v. Bogigian, 551 N.E.2d 1149 (Ind. 1990) (No consideration for release of judgment)
 - iii. Watts v. Watts, 405 N.W.2d 303 (Wis.1987) contract against public policy (cohabitation). Also Comment on Baby M
 - iv. Tweeddale v. Tweeddale, 93 N.W. 440 (Wis. 1903) (other siblings as 3rd party beneficiaries of contract between mother and son)
 - d. John D. Calamari, Joseph M. Perillo, Helen Hadjiyannakis Bender, Cases and Problems on Contracts (4th ed. 2004)
 - i. Balfour v. Balfour (need to intend that the contract be actionable), 2 K.B. 571 (Ct. App. 1919)
 - ii. Dienst v. Dienst, 141 N.W. 591 (Mich. 1913)(statute of frauds as applied to antenuptial contract)
 - iii. Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979)(against public policy)margaret-
 - e. Randy E. Barnett, Contracts: Cases and Doctrine (Little Brown 1995)
 - i. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976)
 - ii. Posner v. Posner, 257 So. 2d 530 (Fla. 1972)(antenuptial agreement allowed in principle, though no disclosure and inadequate provision for wife in the instant case)
 - iii. Kay v. Kay, 334 A.2d 585 (Pa. 1975)(separation agreement-upheld without consideration where husband noted that he intended to be bound by it)
 - iv. In re Baby M, 525A.2d 1128 (N.J. 1987)(fraud about infertility, etc. as well as unconscionability)