

## ABSTRACT

### Private Ordering in Family Law – Moving Between Status and Contract

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This presentation explores the challenges facing law reform in the realm of intimate partner contracting, focusing specifically on cohabitation contracts, premarital and marital agreements, and agreements to submit family law disputes to binding arbitration. Through these agreements, people typically contract out of the default regime of property rights and support or, in the case of cohabitation agreements, contractually create property and support rights that don't otherwise exist. Despite a trend toward gradual acceptance, intimate partner contracting continues to confound courts and legislatures. Across the United States, the law vacillates between status and contract – that is, between the goals of protecting vulnerable individuals and affirming the institution of marriage or marriage-like relationships, on the one hand, and the goals of furthering individual choice, predictability, and reliance, on the other. As a commissioner with the Uniform Law Commission, I chaired a drafting project to improve on the Uniform Premarital Agreement Act – an act everyone loves to hate. With the indefatigable Brian Bix as reporter, we ultimately produced an act (the Uniform Premarital and Marital Agreements Act) that is a fairer structure than the UPAA and does a better job of promoting informed consent. It has met with a cool reception in the states and the practicing bar, to put it mildly. I'm currently chairing a drafting project to produce a family law arbitration act, again a contentious process. In addition to the ever-present challenge of ensuring voluntary and informed consent, the arbitration project raises another question: to what extent should we permit people to opt out of family law and the court system itself? In this era of marriage equality, diminishing gender norms, and a growing marriage gap, does it make sense to protect any element of marriage from being contractually swept off the table? I will examine the policy tensions that underlie these questions in explaining why changing family law is so hard to do.