

# PRIVATE ORDERING IN FAMILY LAW – MOVING BETWEEN STATUS AND CONTRACT

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## I. Introduction

- a. Far-ranging diversity among state laws -- 50 laboratories on display
- b. Erratic public policy: fostering individualism and autonomy vs. commitment and interdependence
- c. Ongoing tension between benign paternalism and free market values
- d. Marriage as fixed status and marriage as negotiable contract

## II. Overview -- five contexts of intimate partner contracting

- a. Cohabitation agreements
  - i. From *Marvin v. Marvin* (Cal. 1976) to *Connell v. Francisco* (Wash. 1995) and the ALI model
  - ii. Skepticism toward cohabitants' claims and consequent insistence on express agreements.
  - iii. Problematic nature of using contract to determine rights between intimate partners
  - iv. Problematic nature of imposing remedies based on cohabitant status
  - v. The long shadow of common law marriage
- b. Premarital agreements
  - i. Growing acceptance in courts, from agreements about death to agreements about divorce

- ii. Common law standards in disarray (confidential relationship, voluntariness, duress, knowledge of rights being waived, advice of counsel, substantive fairness review, changed circumstances, burden of proof)
  - iii. Uniform Law Commission efforts – from UPAA to UPMAA – and the formidable challenges of codifying fairness and predictability in family contracts
  - iv. American Law Institute model and effort to protect vulnerable spouse
  - v. Critiques from feminists, economists, and feminist economists -- blind optimism, bounded rationality, autonomy, and reliance
  - vi. Enforcement of religious agreements in secular courts – the Mahr, the Ketubah, and fear of entanglement with religious doctrine
- c. Marital or post-nuptial agreements
- i. Fiduciary/confidential relationship between spouses as central impediment to contract
  - ii. Public policy and agreements that alter the “fundamentals of marriage” -- marriage as immutable, marriage as malleable
  - iii. Reconciliation agreements and bargaining within a marriage
  - iv. The problem of foreseeability and changed circumstances
- d. Separation or marital settlement agreements
- i. Review for procedural and substantive fairness
  - ii. Bargaining with eyes wide-open
  - iii. The illusion of judicial oversight
- e. Dispute resolution agreements

- i. Mediation, collaborative law, and the rise of binding arbitration by consent
- ii. ULC's Family Law Arbitration drafting project
- iii. Enforcing religious arbitration terms and the example of the Beth Din

### **III. Questions to ponder**

- a. Is the decline in marriage relevant to the legal framework governing family contracts?  
In other words, should we facilitate private ordering for the growing number of people who form families outside of marriage?
- b. Should the law enforce a couple's agreement to bind themselves to a particular forum for dispute resolution and to a particular set of laws? A religious forum and religious law?
- c. Through requirements for procedural fairness, can the law ensure that individuals think carefully about the terms of the agreements they sign and the possible consequences of the agreements in the future?