2014

The Contractualization of Family Law in the United States

Fernanda Nicola

Adrienne Hunter Jules

ADRIENNE HUNTER JULES* AND FERNANDA G. NICOLA**

The Contractualization of Family Law in the United States†

TOPIC II. A

This article is the word-restricted response of the authors as the U.S. national reporter to an expansive request of the International Academy of Comparative Law (IACL) issued to the reporters of twenty-one different member nations.[1] *As any U.S. report on family law requires discussion of the varied laws of the fifty U.S. states, our report necessarily contains a vast summary component with broad generalizations in order to provide the requested context for U.S. law. The authors also explore larger themes and scholarship in order to illustrate some of the important developments and theories advanced by U.S. lawyers and scholars in the areas discussed.*

I. BASIC FRAMEWORK FOR U.S. FAMILY LAW

A. *Family Law as a State Prerogative*

The legal system of the United States is a system of separation of powers, "both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive, and

** Professor of Law, American University Washington College of Law, JD Turin Law School, PhD Trento University, SJD Harvard Law School. The authors would like to thank Martha Ertman, Nancy Polikoff, Ann Shalleck, and Macarena Saez for their comments and expertise, and Chelsea Rubin and Nicole Anouk Leger for their stellar research assistance and editorial help.

† DOI: http://dx.doi.org/10.5131/AJCL.2013.0022

1. In summary, the IACL requested, *inter alia*, that the authors, within 10,000 words, situate family law within the U.S. legal system; describe the applicability of international instruments in U.S. family law; describe any general boundaries of contractual freedom in family law; describe the types of intimate partnerships legally recognized by U.S. law, the legal conditions of formation and dissolution and whether it is possible contractually to opt in or opt out of these default rules (horizontal family law); describe the parent-child relationship, if and how one might establish legal parenthood contractually, e.g. through artificial insemination (vertical family law); describe whether legal parents may contract with civil effect in regard to a host of decisions regarding children, particularly upon divorce or separation; describe which ADR-techniques apply in family law matters and how they apply; describe whether or not family law agreements need judicial approval and which conditions and standard of judicial review apply; and, describe the standard of judicial review, if any, in regard to modifying a family law agreement.

judicial authority)."[2] Substantive family law, as understood in its narrow sense as the laws governing the entrance and exit from marriage and all related ancillary issues, e.g. marital property division, spousal support, child custody, child support, is a state prerogative.[3] The Tenth Amendment to the U.S. Constitution generally secures this authority for the states.[4] Adhering to a common law system within this framework of federalism, the states adopt statutes and procedural rules governing these areas of family law, as narrowly defined, and the highest state courts interpret and apply the resulting rules and regulations, issuing binding decisions that have precedential value upon lower state courts and in effect become the substantive family law.

B. Federal Family Law

The fact that the states exercise authority over family law generally does not mean that federal law has no role in governing the family.[5] As just one example, there exist over a thousand federal laws in which "federal rights and benefits are conditioned upon marital or spousal status."[6] In the area of child support, the federal government takes an instructive role, through federal legislation requiring states to identify parents and create state child support guidelines.[7] Further, efforts of the Uniform Law Commission to create uniform laws among the states have resulted in various draft legislation, some of which the states have adopted.

The U.S. Supreme Court has issued opinions on family law issues, addressing topics such as abortion, termination of parental rights, and state criminalization of sexual conduct.[8] These decisions, the authors argue, deal generally with an individual's right to privacy, an individual's right to make decisions regarding the most intimate aspects of her life, free from intrusion by the government or

---

2. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 7 (3d ed. 2000).

3. United States v. Windsor, 133 S. Ct. 2675, 2691 (2013); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12-13 (2004); Rose v. Rose, 481 U.S. 619, 625 (1987).

4. Lavine v. Cincent, 401 U.S. 531 (1971).

5. *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 539 (2008); *See also*, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383 (2007); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999).

6. *Windsor*, 133 S. Ct. at 2683 (2013).

7. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (conditioning federal funding for state welfare programs on implementation of state programs to establish paternity and enforce child support payments); Family Support Act, Pub. L. No. 100-485, 102 Stat. 2345 (1988) (conditioning federal funding for child support enforcement on state establishment of presumptive child support guidelines.)

8. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Santosky v. Kramer, 455 U.S. 745, 758-759 (1982); Lawrence v. Texas, 539 U.S. 558 (2005); *see also* Linda D. Elrod, *The Federalization of Family Law*, 36 HUM. RTS. 6 (2009).

others, a right generally carved out of the guarantees of the U.S. Constitution and the Bill of Rights.[9]

The Supreme Court recently considered same-sex marriage. In *U.S. v. Windsor*, the Court declared key provisions of the federal Defense of Marriage Act (DOMA) unconstitutional. DOMA, enacted by the U.S. Congress in 1996, before any state had legalized same-sex marriage, prevented federal recognition of any same-sex marriage lawfully granted by any U.S. state.[10] By the time of this writing, thirteen of the fifty U.S. states permit same-sex marriage.

The authors assert that *U.S. v. Windsor* presents evolving U.S. jurisprudence, extending beyond the right to privacy, that people acquire a constitutionally protected public dignity and status through marriage, as do their children,[11] that the government cannot diminish by refusing legal recognition.[12] Logically following *Loving v. Virginia*,[13] which commands legal recognition of interracial marriages, this jurisprudence should lead to the conclusion that no state can refuse legal recognition of valid out-of-state same-sex marriages, and, eventually, should invalidate state laws denying marriage licenses for same-sex marriages.[14] These latter two developments have not yet occurred, but are surely on the horizon.

---

9. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161-62 (2004).

10. The U.S. Supreme Court this year also considered *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) held that proponents of a state law banning same-sex marriage (Proposition 8) lacked standing to appeal a lower federal court decision that the law was unconstitutional. Although there was no substantive discussion of same-sex marriage, *Hollingsworth* effectively means that Proposition 8 is gone. Without Proposition 8, California officials are free to resume issuing marriage licenses for same sex couples, and these marriages will have full status and recognition under the laws of the state of California.

11. *Windsor*, 133 S. Ct. at 2693 ("And [DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). Macarena Saez, immediately following the issuance of the decision, commented on the prevalent use of the word "dignity" in the decision and the ways in which this prevalence perhaps represents both a transplant from foreign jurisprudence but also a newer "American" understanding of a dignity-conferring institution of marriage, oral comments at a forum following the decision, American University, Washington College of Law (June 27, 2013); *see also* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & LAW 387, 417 (2012) (decrying the reappearance of previously denounced illegitimacy as the new rationale for striking down same-sex marriage prohibitions which purportedly harm children of same-sex couples by making it impossible for their parents to be married).

12. *Windsor*, 133 S. Ct. at 2693 ("DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.").

13. Loving v. Virginia, 388 U.S. 1, 11 (1967); *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("The right to marry is of fundamental importance for all individuals.").

14. *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (foreshadowing this development); *See also* Jeffrey Toobin, *Adieu, DOMA!*, THE NEW YORKER (July 8, 2013) http://www.newyorker.com/talk/comment/2013/07/08/130708taco_talk_toobin.

C. *International Family Law*

International law also affects U.S. family law in disputes implicating specific international conventions to which the U.S. is a signatory.[15] For example, the Hague Convention on the Civil Aspects of International Child Abduction provides procedures for the return of children unlawfully removed from or retained outside of the country of their habitual residence.[16] The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption regulates international adoption.[17] These Conventions respectively provide procedures for the return of children unlawfully removed from or retained outside the state of their habitual residence and regulate international adoption.[18] Even though these conventions are important human rights instruments, they have spurred criticism among U.S. scholars.[19] These scholars have disputed the goals and implementation of the Convention on Adoption, some arguing that it should be less burdensome and encourage international adoption,[20] others arguing that international adoption abuses such as child-buying and coercion abound, and strict regulation is necessary and desirable in order to protect vulnerable birth parents.[21]

Finally, prominent Human Rights norms advanced by regional courts such as the European Court of Human Rights interpreting Article 8 of the ECHR famously influenced the U.S. Supreme Court

---

15. *See* D. KELLY WEISBURG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 857 (5th ed. 2013). *See generally* Anne Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80-84 (2010); Barbara Stark, *The Internationalization of American Family Law*, 24 J. AM. ACAD. MATRIMONIAL LAW. 467, 469 (2012); Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 635-37 (2008). With respect to International Human Rights instruments affecting family law, women and children, the U.S. has failed to ratify some significant human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, and the Convention on the Rights on the Child, *opened for signature on* Nov. 20, 1989, 1577 U.N.T.S. 3.

16. Implemented in the U.S. through the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610, and 22 C.F.R. §§ 94.1-94.8 (2013). *See* Linda D. Elrod & Robert G. Spector, *Review of the Year in Family Law 2011-2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471 (2013).

17. Implemented in the U.S. through the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. § 14901 (2000). *See* Elrod & Spector, *supra* note 16.

18. *See* Estin, *supra* note 15, at 80-84 (quoting Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 101-03 (1980)); *see also* WEISBURG & APPLETON, supra note 15, at 857.

19. *See* Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1600 (2006).

20. *See* Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 115, 165 (2007).

21. *See* KATHRYN JOYCE, THE CHILD CATCHERS (2013); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 128 (2008).

decision in *Lawrence v. Texas.*[22] The Inter-American Human Rights system originating out of the Organization of American States is gaining momentum among LGBT groups for interpreting the contours of sexual discrimination and gender equality.[23] The Inter-American Commission of Human Rights condemned the United States in the case Jessica Lehahan, finding that through police non-intervention in a domestic violence case, the U.S .failed to exercise its good faith duty to enforce antidiscrimination provisions for the protection of women.[24]

II. CONTRACTING HORIZONTAL INTIMATE RELATIONSHIPS

In accordance with the framework set forth in the IACL request, this article first addresses horizontal intimate relationship contracting and then vertical intimate relationship contracting. This article then discusses the contract method of alternative dispute resolution and provides some final words on contracting permanence within family law.

A. Marriage as Contract?

Contracting horizontal intimate relationships concerns marriage and its alternatives, a discussion about which, the authors believe, requires discussion of the changing relationship of marriage to contract, within the U.S. Not always worthy of its occasional appellation, the so-called "marriage contract" is qualitatively different from a standard contract.[25] Janet Halley traces the beginnings of U.S. treatment of marriage as a contract to the early nineteenth century; Halley then notices a profound shift in the mid-nineteenth century, when contemporary thinkers began to conceive of marriage as more of a status than a contract.[26] This transformation corresponded with the rise of free market *laissez faire* ideology and actually pitted fam-

22. 123 S. Ct. at 2481.

23. *See* Atala Riffo and Daughters v. Chile, *Decisions and Judgments*, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Rosa M. Celorio, *The* Case of Karen Atala *and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 354 (2012).

24. *See* Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

25. While mutual asset seems always to have been a requirement in Western marriages, the reasons why people marry have changed over time, people now expecting personal fulfillment instead of or in addition to other goals such as property control or political advantage. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY; OR HOW LOVE CONQUERED MARRIAGE 24-31 (2005); *see also* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 87-115 (2009); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 56-58 (2011).

26. Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 2 (2011).

ily relationships against contractual relationships within the market: "the husband, wife, and child constituted 'the family' and lived in an affective, sentimental, altruistic, ascriptive, and morally saturated legal and social space. The market was the family's opposite: rational, individualistic, free, and morally neutral."[27] Many regard *Maynard v. Hill* (1888) as the seminal U.S. case establishing marriage as more than a mere contract, as also a status, properly regulated by the government.[28]

And so it is today, marriage based on the free assent of the parties immediately subjects the parties to legal rights and obligations, often without their full knowledge or consent. Further, states set the terms under which the parties may abandon the marriage. In this manner, we may describe U.S. marriage more appropriately as an institution of public status with accompanying rights and obligations created by the public will versus a form of private contract. Nevertheless, the view of marriage as more status than contract is an ongoing, fluid debate, many arguing that contract is more important in defining this relationship and the behavior of individuals within it. Notably, Martha Ertman emphasizes the view that marriage is and long has been a mix of status and contract, in varying proportions over time, with status not necessarily winning, in the past or present.[29]

B. Contracting In and Out of Marriage Default Rules

The use of civil contracts to govern horizontal relationships between intimate partners represents an effort by private individuals to circumvent the underlying default laws of marriage. We see this form of contractualization of family law in the distinct scenarios described below.

C. No Marriage and No Contract

As it was necessary first to reflect briefly on the relationship of marriage to contract, it is now appropriate that we take another break in the discussion to make clear who we are talking about and who we are not talking about, when we discuss marriage and contractual circumvention of marriage law. Increasingly, more U.S. citizens are spending more of their adult lives outside of a marriage, whether or not they have children.[30] There are important class and racial dis-

27. *Id.* at 3.
28. *Maynard v. Hill*, 125 U.S. 190 (1888).
29. *See* Martha Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17, 66-68 (1998) [hereinafter Ertman, *Commercializing Marriage*]; Martha Ertman, *Marriage as a Trade*, 36 HARV. C.R.-C.L. L. REV. 79, 92-98 (2001) [hereinafter Ertman, *Marriage as a Trade*].
30. *See* Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES, Feb. 17, 2012, at A1; *see* Sabrina Tavernise,

tinctions in this overall trend. Generally speaking, the class qualities of greater education and higher income predict higher levels of marriage.[31] As a striking racial distinction, African-Americans, in particular, after correcting for education and income, spend fewer of their adult years in marriage.[32]

Generally speaking, those persons in non-marital intimate relationships have legal obligations to one another that are no different than between strangers. There are exceptions to be sure. As the most prominent, striking exception, Washington State currently allows non-married cohabitating partners participation in the state's community property regime, so that non-married, cohabitating partners may request division of assets acquired during their cohabitation upon dissolution of their relationship.[33] More generally, across more states, domestic violence statutes in many jurisdictions impose obligations and bestow rights upon persons in intimate relationships, irrespective of their marital status. Certain jurisdictions also transmute the status of cohabitating persons into the status of married persons, through common-law marriage. Some private organizations and companies also have made available benefits, such as health and retirement benefits, to the non-married domestic partners of their members and employees.

Further, certain state legislatures have created new categories of legally recognized horizontal relationships that these states statutorily deem virtually equal or very similar to the relationship of marriage, i.e. civil unions and domestic partnerships. There is reason to believe these legislative developments have been efforts of inclusion for same-sex couples who cannot marry under the laws of those states. Accordingly, as those state laws change, and same-sex couples gain the right to marry, these newer legally recognized categories for unmarried intimate partners might cease to exist.[34]

Further, the legal effect of the *Marvin* decision, discussed below, has been the creation of equitable theories of recovery for individuals who split after years cohabitating without marriage to recover some division of the assets acquired by each other during their time together or some ongoing monetary support after they part ways. These

---

Married Couples Are No Longer a Majority, Census Finds, N.Y. TIMES, May 26, 2011, at A22.

31. *See* CHERLIN, *supra* note 25, at 114-15.

32. *See* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); *see also* Ralph Richard Banks and Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage,* 11 MICH. J. RACE & L. 115, 122 (2005).

33. *In re* Marriage of Lindsey, 678 P.2d 328, 332 (Wash. 1984); Connell v. Francisco, 898 P.2d 831, 837 (Wash. 1995).

34. *See, e.g.*, Michael Dresser & Carrie Wells, *With Same-sex Marriage Now Available, State to End Benefits for Domestic Partners*, BALT. SUN (May 3, 2013), http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502_1_domestic-partners-health-benefits-state-employees#.Uk3RAqPdmsk.email.

theories include theories of implied contracts, joint venture, constructive trust or resulting trust, and have been adopted by some but not all U.S. courts.[35] These theories, where accepted, allow parties to avoid marriage and the technical requirements of contract execution and still receive some of the dissolution rights associated with marriage.[36]

Not all states have been eager to expand dissolution rights to cohabiting intimate partners who neither marry nor contract for marriage-like benefits. A few states reject the theories described above as disingenuous attempts to create contracts where none really exist in order to avoid their state laws prohibiting the recognition of common law marriages.[37] Some states require an express contract, whether oral or written;[38] others require an actual written contract.[39]

Getting back to the subject of our inquiry regarding the contractualization of family law, do we consider those persons in intimate horizontal relationships outside of marriage who do not execute contracts to govern their relationships to be privately ordering their family lives? What if the laws of their states might grant them some equitable relief when they split?

To be sure, horizontal intimate relationships outside of marriage and contract are not necessarily completely without some form of informal private ordering. As just one example, in her work on low-income single mothers, Katherine Edin explores the ways in which

35. *See, e.g.*, Donovan v. Scuderi, 443 A.2d 121, 128 (Md. App. 1982) (oral agreement); Kinkenon v. Hue, 301 N.W.2d 77, 81 (Neb. 1981) (oral agreement); Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. 1983) (oral agreement); Carroll v. Lee, 712 P.2d 923 (Ariz. 1986) (implied agreement); Kaiser v. Strong, 735 N.E.2d 144, 149 (Ill. App. 2000) (constructive trust); Akers v. Stamper, 410 S.W.2d 710, 712 (Ky. 1966) (joint venture). *See generally* ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 707-08 (3d ed. 2012).

36. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 (2002). Having abandoned the contract approach to resolving cohabitation disputes, the ALI recommends the presumption of a legally cognizable domestic partnership, akin to marriage in rights upon dissolution, after three years of cohabitation.

37. *See e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1208-09 (Ill. 1979) ("It is said that because there are so many unmarried cohabitants today courts must confer a legal status on such relationships. This, of course, is the rationale underlying some of the decisions and commentaries . . . If this is to be the result, however, it would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts . . ."); *see also* Devaney v. L'Esperance, 949 A.2d 743, 754 (N.J. 2008) (Rivera-Soto, J., concurring) ("The vast majority of states that do not acknowledge common law marriages also have rejected a cause of action for palimony [payments akin to alimony following the dissolution of cohabitation] . . .").

38. *See, e.g.*, Levar v. Elkins, 604 P.2d 602, 603 (Alaska 1980); Dominguez v. Cruz, 617 P.2d 1322, 1322 (N.M. Ct. App. 1980); Monroe v. Monroe, 413 N.E.2d 1154, 1158 (N.Y. 1980); *see generally* OLIPHANT & VER STEEGH, *supra* note 35, at 708.

39. *See, e.g.*, MINN. STAT. § § 513.075, 513.076 (2008); TEX. BUS. & COM. CODE ANN. §26.01(b)(3) (West 2007). *See generally* OLIPHANT & VER STEEGH, *supra* note 35, at 708.

these mothers operate within well-defined informal systems of financial obligations and entitlements created and sustained by various forms of non-marital horizontal intimate relationships.[40] Many others have documented the ways in which some adults historically have formed extended kinship communities, the members of which undertake significant monetary and in-kind exchanges in order to assist one another.[41]

As an additional consideration, some lament the focus on marriage and approximations of marriage (perhaps contractually created) as a failure in our collective imagination to envision other institutions for providing social and economic security to individuals.[42] This discussion regarding our collective values and priorities points to significant socio-political concerns, mostly located outside of family law, narrowly defined, but this discussion is beyond the focus of this work.

D. Cohabitation Contracts

Now that we are clear regarding who we are (and who we likely are not) talking about in the U.S. context, and now that we have acknowledged though not weighed in on an ongoing debate regarding the degree to which we should value marriage,[43] below is the discussion of unmarried cohabitants who legally contract for marriage-like contractual obligations and rights.

The actual tally of how many unmarried intimate partners endeavor (or would endeavor) to go through the trouble and bear the expense of executing contracts to create rights and obligations to govern their relationships is unknown, but is presumably small.[44] Surely some do. Of note, some particularly diligent same-sex couples rely

40. KATHERINE EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).

41. *See* Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 18-19 (2005); Melissa Murray, *The Networked Family: Re-framing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391-92 (2008).

42. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228-36 (1995); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008); Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 MICH. L. REV. 977, 995 (2013); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 209-10 (2007).

43. For further discussion in this ongoing debate, specifically in the context of marriage promotion initiatives instituted during Bush era, see Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 288 (2009); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1675-78 (2005); Theodora Ooms et al., Ctr. for Law & Soc. Policy, *Beyond Marriage Licenses: Efforts in States to Strengthen Marriage and Two-Parent Families* 5-10 (2004).

44. *See* Ira Mark Ellman, *"Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (Oct. 2011).

upon such contracts in order to provide them with the legal protections upon dissolution afforded married couples, where these same-sex couples may not marry within their state of residence.

Marvin v. Marvin is an early U.S. case regarding the enforceability of cohabitation contracts, holding, "[t]he fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses."[45] In *Marvin*, the court addressed an alleged oral contract between unmarried persons for post-relationship support and equitable division of assets. The court took pains to distinguish this alleged contract from a contract for sexual services (prostitution), which would be against public policy and illegal.

In this decision, we therefore see approximations of the market/family divide discussed earlier in this work, as the court struggles with the notion that persons involved in a romantic relationship could execute a contract between themselves. Are the parties contracting for sex? No, the court answered, the parties are contracting *despite* the sex, and the sex doesn't invalidate their contractual arrangements.

Though spurring academic debate and some court decisions, discussed above, regarding expanded equitable remedies for cohabitating couples to recover marriage-like benefits upon dissolution of their relationships, the *Marvin* case actually was quite limited in its legal holding; the holding firmly requires the existence of an express or implied contract for remedy. Indeed, upon remand, the trial court denied relief, finding that the parties never agreed to share interest in all property acquired during their relationship and never agreed that one partner would provide for all of the financial needs of the other for the rest of her life.[46] Further, the trial court on remand awarded the plaintiff money for the purposes of rehabilitation, but the appellate court struck down this award as an improper equitable remedy where there was no valid agreement.[47]

E. Premarital Contracts

The second way in which parties circumvent the default system of marriage laws through contract is through prenuptial (or antenuptial) agreements. Although states previously maintained that prenuptial agreements specifying how spouses would divide assets and/or support one another following a divorce were void, as against

45. 557 P.2d 106, 113 (Cal. 1976), *remanded to* 176 Cal. Rpt. 555 (Ct. App. 1981).
46. *Id.* at 559; *see* OLIPHANT & VER STEEGH, *supra* note 35, at 710.
47. *Marvin*, 176 Cal. Rpt. at 559.

public policy in encouraging divorce,[48] today, prenuptial agreements in contemplation of divorce are not *per se* unenforceable.[49] To the knowledge of the authors, opposition to these contracts did *not* engage in a discussion of whether the parties' sexual relationship or future sexual relationship makes these agreements illegal, as the *Marvin* decision queried.[50]

The Uniform Premarital Agreement Act (UPAA), created in 1983, adopted, in whole or in part, by half of the states, allows fiancées wide latitude in opting completely out of a state's statutory and common law scheme for division of assets and alimony upon divorce. The one blanket restriction within the UPAA concerns child support, a child's right that "may not be adversely affected by a premarital agreement."[51] Parties generally also may not contract freely on issues child custody, though in less specified ways.

The rules applicable to the enforcement and interpretation of contracts generally apply to prenuptial agreements, both in states that have adopted the UPAA and the others. Both the UPAA and the specific laws of most states consider standard contract concepts of unconscionability and voluntary consent, with the specific concerns of coercion, fraud, duress, and undue influence. The extent to which these concepts and concerns prevent enforcement of prenuptial agreements that greatly disadvantage one party is all over the board, nationally. Of particular interest is a court's understanding of the relationship of the parties upon signing: how similar or different is the relationship of betrothed spouses signing a prenuptial agreement to the relationship between parties in an arms-length commercial negotiation? Are the parties in a confidential or fiduciary relationship thereby heightening the standards of their financial disclosure prior to execution?[52]

---

48. *See, e.g.*, McCarthy v. Santangelo, 78 A.2d 240, 241 (Conn. 1951). *See generally* 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, 148-58 (1998); Premarital agreements allowing parties to set forth their wishes upon the death of a spouse generally speaking always have been enforceable.

49. *See, e.g.*, Van Kipnis v. Van Kipnis, 900 N.E.2d 977, 980 (N.Y. 2008). This development was not universally heralded as progress. *See generally* Bix, *supra* note 48, at 148-58; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 207-11 (1982); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352-59 (2007).

50. Although avoided by practitioners and policy advocates, parallels between marriage and prostitution, immensely taboo, have indeed been made by well-respected economists, such as Richard Posner, champion of the "law and economics" discipline. *See* Viviana A. Zelizer, *The Purchase of Intimacy*, 25 L. & SOC. INQUIRY 817, 825 (2000).

51. UNIF. PREMARITAL AGREEMENT ACT, § 3(b) (1983).

52. U.S. States answer this question somewhat differently. *See, e.g.*, Mallen v. Mallen, 622 S.E.2d 812, 815 (Ga. 2005) (no confidential or fiduciary relationship prior to marriage); Ansin v. Craven-Ansin, 929 N.E.2d 955, 966 (Ma. 2010) (parties to a

There are a few ways in which interpretation of prenuptial agreements clearly veers from standard contract interpretation. First, when determining whether or not to enforce a prenuptial agreement, some states consider not only the circumstances surrounding execution of the agreement, but also the circumstances at the time of enforcement of the agreement. Also interesting for the authors of this work, while most states understand that the *marriage itself* may be valid and sufficient consideration for a prenuptial agreement, upon an implicit understanding that the parties would not marry but for the prenuptial agreement, the UPAA explicitly states that prenuptial agreements are enforceable *without* consideration, in contradiction of a very basic tenet of standard contract interpretation. Curiously, the UPAA also states that an amendment or revocation of a prenuptial agreement also is enforceable without consideration. Unless we consider that continuation of a marriage would qualify as consideration, this provision of the UPAA is a serious abrogation of standard contract interpretation.[53]

At a much broader level, a distinction generally may be made between the prenuptial agreement as a "partnership agreement," taking from the modern view of marriage as a partnership between spouses,[54] and a typical business partnership agreement, which would not concern exclusively the terms of dissolution (the exit package) but also presumably would include some discussion regarding the expectations of the partners during the course of the partnership and the terms of breach that would void or require amendment of some or all of the terms governing dissolution (termination for cause provisions). There is no legal requirement for prenuptial agreements to contain any provisions regarding the expectations of the spouses during the marriage.[55] Indeed, although many states retain their

premarital agreement are in confidential relationship with one another but not a fiduciary relationship, owing a duty of absolute fidelity to one another).

53. *See generally* Whitmore v. Whitmore, 778 N.Y.S.2d 73 (App. Div. 2004).

54. This view, for example, undergirds the modern legal shift away from title to equitable division of marital property.

55. Linda McClain, in her work, *Family Constitutions and the (New) Constitution of the Family*, 75 FORDHAM L. REV. 833 (2006), undertakes a thoughtful discussion of a new phenomenon of families drafting their own "family constitutions" to govern the operation of their families and compares these family constitutions to the U.S. Constitution and corporate mission statements. These family constitutions however have no legal enforceability. Martha Ertman has argued for an expanded view of the purpose and benefits of contractual bargaining in intimate relationships and proposes contracts that indeed include detailed discussions of expectations during marriage along with other unenforceable inclusions, i.e. professions of love, arguing that these inclusions help govern the behavior of the parties during the marriage, reduce the likelihood of dissolution, and the likelihood that the dissolution terms of the agreement will be accepted and not contested upon dissolution. *See* MARTHA M. ERTMAN, LOVE & CONTRACTS (forthcoming from Beacon Press 2014). Ertman, *Commercializing Marriage*, *supra* note 29, at 66-68; Ertman, *Marriage as a Trade*, *supra* note 29, at 92-98.

fault grounds for divorce (i.e. adultery, cruel and inhuman treatment, abandonment) along with their no-fault option, many prenuptial agreements do not contain any mention of this potential bad behavior during marriage as cause for modification of the terms of a prenuptial agreement. This reality exists even while some states still consider one of these cause categories—adultery—a criminal offense.[56]

Of course, some good attorneys are mindful of negative potentialities and advise clients to include so-called "bad boy" clauses in prenuptial agreements for protection. But "bad boy" clauses in prenuptial agreements are neither required by law nor particularly common. On the other end of the spectrum, there is an open question as to whether positive behavior expectation terms in prenuptial agreements, terms such as the obligation to reside in the same home, provide sexual affection, or provide housekeeping labor would be enforceable, either because courts consider these terms essential obligations of marriage and therefore without consideration or because judges just do not feel comfortable enforcing these obligations, with or without a contract.[57]

Of note, somewhat ironically in light of the original rationale for prohibiting certain prenuptial agreements, a newer form of premarital contract has appeared on the scene, one expressly designed to make it *harder* to divorce—the covenant marriage contract. The authors characterize the covenant marriage contract only partially as contractual private ordering, for the reasons discussed below.

Three U.S. states maintain covenant marriage contracts, Louisiana, Arkansas and Arizona.[58] The statutorily prescribed contractual terms for a covenant marriage contract in all three states include limiting divorce to situations where there are proven allegations of serious fault, including adultery, conviction of a felony, abandonment for one year, or physical or sexual abuse of a spouse or a child of one

56. *See, e.g.*, MICH. STAT. ANN. § 750.30; N.D. STAT. ANN. § 12.1-20-09 (1991); MASS. STAT. ANN. CH. 272, § 14; GA STAT. ANN. § 16-6-19.

57. *See* Michigan Trust Co. v. Chapin, 64 N.W. 334, 334 (Mich. 1895) ("[P]romise to pay for services which the very existence of the relation made it her duty to perform, was without consideration."); N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471, 474 (N.C. 1987) (the law can enforce a duty of support but not a corresponding duty to render services in the home); OLIPHANT & VER STEEGH, *supra* note 35, at 510-14, 651-52.

58. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; *see also* Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 872-73 (2010); *see also* Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467, 482 (2006).

of the spouses.[59] The parties alternatively may obtain a divorce if they live separate for some period of time.[60]

Different from private ordering in the context of an ordinary premarital agreement, with covenant marriage contracts, the parties do not create their own terms; instead, the contract terms *already exist* as drafted by the state legislature. The parties contract by just signing up. In this manner, it is perhaps questionable whether the covenant marriage contract really qualifies as contractual private ordering.

On the other hand, the Louisiana legislation uniquely imposes upon the parties some of the terms customarily left out of standard prenuptial agreements, marriage obligations other than dissolution rights. For example, the Louisiana statute provides that parties must agree to mutual love and respect, mutual residence, decision-making in the best interest of the family, mutual duty for household management, and the teaching of children in accordance with their "capacities, natural inclinations, and aspirations."[61]

F. Postnuptial and Separation Contracts

The third way in which parties circumvent the default laws of marriage through contract is through postnuptial or separation agreements, agreements between married spouses. However counterintuitive the notion at first may seem, postnuptial and separation agreements are not meaningfully different as distinct legal categories. Both postnuptial and separation agreements with varying degrees set forth the terms for the continuation of the marriage (the later containing the explicit term of separate residences) as well as the agreed-upon consequences of divorce.

While courts sometimes treat these agreements similar to prenuptial agreements, postnuptial and separation agreements differ from prenuptial agreements in key ways.[62] First, unlike prenuptial agreements, these contracts cannot have the marriage as the consideration for the agreement.[63] Second, there is no doubt the parties are in a confidential or fiduciary relationship with one another, necessarily heightening the requirements of full and fair disclosure before

59. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

60. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); Ark. Code Ann. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

61. LA. REV. STAT. ANN. § 9:272 (2008); *see also* Spaht, *supra* note 58.

62. For a detailed discussion regarding the differing treatment of postnuptial agreements, see Barbara Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11 (2012).

63. This would be the case also with any amendment or revocation of a prenuptial agreement, a situation discussed previously in this work, *supra* note 46.

signing. Finally, as parties enter these agreements with the intention to stay married after some period of marriage and perhaps some marital discord, these contracts occasionally contain language regarding how the parties will govern themselves *during the marriage*, not just how assets will be divided and support provided upon divorce. Inclusion of terms regarding how the parties will conduct themselves during the marriage, whether or not the parties will reside in the same home, how money will be shared and assets managed during the marriage, distinguishes these agreements from prenuptial agreements in a profound way.

G. Divorce Settlement Contracts

The fourth and most common way in which parties contract horizontal relationships is through divorce settlement agreements, settling all matters of dispute between divorcing spouses, including matters involving the parties' children. The authors include divorce settlement agreements in our discussion of horizontal relationships, even though divorce settlement agreements also contract, in more limited fashion, vertical intimate relationships between parents and children, because these agreements originate primarily from the breakdown of the horizontal relationship and must be all-inclusive in resolving both horizontal and vertical disputes.

Somewhat different from the contracts already discussed, divorce settlement agreements do not, on the whole, represent attempts to create or veer from established family law, but instead present the results of negotiations *on the basis of* the established family law in the state with jurisdiction over the dispute. Parties executing divorce settlement agreements are not creating their own rules to govern all potential eventualities of their marriages; they are agreeing to compromise based on the situation and law existing at that time.

In their influential 1979 work, "Bargaining in the Shadow of the Law: The Case of Divorce," Robert Mnookin and Lewis Kornhauser discussed the ways in which legal rules create bargaining endowments for divorcing spouses.[64] The legal rules governing spousal and child support, child custody, and the division of marital assets give each spouse certain claims or bargaining chips in their negotiations with each other.[65] Mnookin and Kornhauser also discuss the effects that trial uncertainty, varying degrees of risk aversion, and transaction costs have on the negotiation process.[66] In what we believe is their most enduring contribution to the discussion of private ordering in family law, Mnookin and Kornhauser assert: "Discretionary stan-

64. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).
65. *Id.*
66. *Id.*

dards can substantially affect the relative bargaining strength of the two parties, primarily because their attitudes toward risk and capacities to bear transaction costs may differ substantially."[67]

Family law practice and procedure are rife with judicial discretion, statutorily created and bolstered by the relative lack of appellate review and accompanying precedent. Legislatures intentionally create systems for adjudication of disputes over child custody and visitation, distribution of marital assets, spousal support and even (though to a somewhat lesser degree) child support that provide judges with vast amounts of discretion upon which to base their decisions after consideration of the facts presented and the character of the parties presenting those facts (character being something greater than credibility and more closely resembling the concept of "moral dessert"). The standard of "best interests of the child" is just one significant example. There are equally vague and imprecise standards for spousal support (how long and for what purposes should it be awarded) and equitable division of marital assets (what is equitable).

Further, there often is a relative lack of judicial precedent. Beyond the real aversion of appellate courts generally to hearing family law cases, the costs, delays and further uncertainty involved in bringing cases up for appeal means that as a practical matter, few family law matters will reach the appellate courts for adjudication and establishment of judicial precedent. Some jurisdictions are better than others. Jurisdictions more hospitable to hearing family law appeals and having resident litigants with greater financial capacities to bring cases up for appeal have more case law, more precedent, and therefore offer a more predictive quality to negotiations. However, for the most part, one accurately may describe family law negotiations as bargaining in the shadow of the unpredictable Wild, Wild West. The virtual impossibility of predicting court outcomes causes unique challenges for adversarily-oriented spouses attempting to arrange their affairs upon divorce privately without resorting to litigation and third-party adjudication of their disputes.

When parties do resolve their divorce disputes by written settlement agreements, their agreements are subject to standard rules of contract interpretation and enforcement, without the sort of specialized contractual hurdles that may occasion premarital and post marital agreements. Absent immediate challenge by either party to the enforceability of these contracts based upon some principle of standard contract law (i.e. fraud), the parties together will present these contracts to the court for approval and incorporation into judgments of the court. Once incorporated into final judgments of the court, these contracts no longer maintain their status as mere private contract.

67. *Id.* at 980.

H. Default Rules of Intimate Horizontal Relationships

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate horizontal relationship, marriage, and the newer legally recognized horizontal relationships legislatively created in some states, absent an alternative contractual arrangement. Also, included is additional general discussion regarding any substantive restrictions on contracting around the default rules described.

I. Getting Married

There are various state restrictions on who may marry. These state restrictions include minimum age requirements and prohibitions against the marriage of persons related to one another, bigamy, polygamy, and (in most remaining states) same-sex marriage.[68] Restrictions against marriage due to income/wealth,[69] incarceration,[70] and race[71] have been struck down by the Supreme Court and no longer exist in any state.

Simply said, there is no way for private parties to contract around valid state restrictions on who may marry, nor may private parties limit the marriage prospects of others, including their sons and daughters, by contract. These contractual limitations notwithstanding, parties generally may work around existing restrictions, where state laws vary, by getting married in another state. Such marriages generally receive federal recognition and, with the exception of same-sex marriages, other state recognition.[72]

J. Rights and Responsibilities during Marriage

Historically, the states imposed a "duty of necessaries" upon husbands, requiring husbands to pay the necessary expenses of their wives.[73] By Supreme Court mandate, states now must apply this principle in a gender-neutral fashion, so that wives also would bear responsibility for their husband's necessary expenses.[74] However, some states have abandoned this principle altogether. Where the principle still applies, with the exception of ordering payment to third

68. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
69. Zablocki v. Redhail, 434 U.S. 374, 391 (1978).
70. Turner v. Safley, 482 U.S. 78, 79 (1987).
71. Loving v. Virginia, 388 U.S. 1, 12 (1967).
72. *See Windsor*, 133 S. Ct. at 2693; U.S. CONSTITUTION, art. IV, §1. Unchallenged provisions of DOMA currently prevent application of full faith and credit to out-of-state same-sex marriages.
73. *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003); s*ee, e.g.*, N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987).
74. Orr v. Orr, 440 U.S. 268 (1979).

parties to pay spousal expenses, courts have been reluctant to apply this principle and to quantify this ongoing duty during a marriage.[75]

Beyond this unspecific duty of financial support, states impose no real marital duties upon spouses toward one another, to the extent that spouses would have any cause of action in court for failure to perform. As discussed below, the advent of no-fault divorce and the potential that fault may be excluded as a factor relevant to the distribution of assets and alimony, means that obligations customarily understood to accompany marriage, such as sexual fidelity and kind treatment, lose the force of law.

K. Getting Divorced

Some form of no-fault default divorce exists in all fifty U.S. states,[76] meaning spouses no longer must prove some element of fault in order to get a divorce. Parties generally cannot contract to limit (or expand) causes of action for divorce by contract. The one exception remains covenant marriage contracts, statutory creations of states expressly allowing parties to expand limitations on their rights to divorce.

L. Division of Assets upon Divorce

U.S. states generally classify assets upon divorce as either marital assets, assets acquired during the marriage, or separate assets, assets acquired before the marriage or through bequest, devise, or gift.[77] Once a court determines that certain property is separate, typically, the court will award this property to the spouse with title to the property.[78]

U.S. states then employ two alternate methods of dividing property upon divorce: community property or equitable distribution. In community property states, courts generally divide marital property equally (50/50). In equitable distribution states, courts generally divide property acquired during the marriage equitably, as determined by the court. Although not usually codified by statute, people involved in litigation in equitable distribution jurisdictions sometimes conceptually begin with consideration of 50/50 division of marital assets and then move back and forth along the percentages based on some combination of factors, including contributions to the acquisi-

75. McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).
76. *See also* OLIPHANT & VER STEEGH, *supra* note 35, at 514.
77. JOHN E.B. MYERS, EXPERIENCING FAMILY LAW 536 (2013).
78. There are some exceptions. In addition to alimony, which is precisely an award of separate property to the other spouse, some states authorize awards of separate property. *See* MASS GEN. LAWS. ANN. Ch. 208, § 34 (2011); CONN. GEN. STAT. ANN. § 46B-81(a) (1978); IND. CODE ANN. § 31-15-7-4(a)(1997); Williams v. Massa, 728 N.E.2d 932 (2000); Krafick v. Krafick, 663 A.2d 365, 370 (Conn. 1995); MYERS, *supra* note 77, at 539.

tions of the assets, marital fault, and need.[79] The laws of community property and equitable distribution embody the important notion of a marriage as a "partnership," and so property acquired through the effort or skill of ether "partner" belongs to the partnership.[80]

Significant fine distinctions and qualifications appear in the case law of equitable distribution and community property division, so that litigation regarding asset division upon divorce may become quite complex and expensive. As just a few examples, there are classification of asset issues, such the termination of the acquisition of marital assets, which could be the date of the divorce judgment or some date prior (when the parties ceased working together as a partnership), and the appreciation of separate assets, which could be due to the efforts of one or both of the partners and therefore arguably should be characterized as marital. There are valuation issues, prompting the use of an array of valuation experts, such as real estate appraisers and art appraisers. There are distribution issues, such as the method for dividing the value of a marital home (should the court order the parties to sell it?) and the method for dividing a closely held business between antagonistic spouses.

In addition, the state of New York has expanded notions of marital property to include future property not yet acquired. For example, New York State has well-established law on Enhanced Earning Capacity, a principle initially applied to the division of professional degrees, such as medical licenses, which enable one spouse an enhanced earning capacity, and if earned during the marriage, the principle holds, should be divided upon divorce.[81] The case law then expanded the principle to apply to other certifications and then merely to any professional advancement during the marriage enabling one spouse to earn a significantly higher income than he would have without such advancement. Once enhanced earning capacity becomes a marital asset, New York courts employ a complex system for valuing this asset and then awarding an equitable portion of it to the other spouse upon divorce, in a form of payments that may resemble alimony, but instead are explicitly property division.[82]

As before discussed, parties may displace these community property or equitable distribution regimes by prenuptial agreement, as long as the parties adhere to the governing contractual requirements. Often, the explicit goal of one of the parties initiating a prenuptial

79. *See* MYERS, *supra* note 77, at 536; *see, e.g.*, *In re* Dube, 44 A.3d 556, 575 (N.H. 2012) ("[New Hampshire's equitable distribution law] creates a presumption that equal distribution of marital property is equitable.").

80. *See generally* MYERS, *supra* note 77, at 536.

81. The case that started it all was O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).

82. *See also* Haugan v. Haugan, 343 N.W.2d 796 (Wis. 1984) (court also attempts to compensate a spouse for the enhanced earning capacity of the other acquired during the marriage).

agreement will be to avoid the acquisition of marital assets altogether or the transmutation of separate assets into marital assets based upon appreciation during the marriage. As long as the parties respect the relevant contractual requirements, as discussed earlier in this work, this goal is acceptable; the parties may do as they please according to their own consciences.[83]

M. Spousal Support upon Divorce

Alimony, also termed spousal support or spousal maintenance, is an award out of the separate estate of one spouse to the other spouse. Alimony may be periodic, over time, or lump sum (awarded in one chunk). Lifetime alimony is just that, alimony awarded periodically as long as both spouses shall live. Alimony is terminable upon the death of the receiving spouse (and usually the payor spouse) or upon the remarriage of the receiving spouse. In some cases, alimony terminates when the receiving spouse begins living with another person in a relationship akin to marriage. There is also temporary alimony otherwise known as temporary support or support *pendente lite*, payments from one spouse to another during the pendency of the divorce litigation. Some states consider awards of attorney's fees, designed to level the playing field between spouses so they both can afford equally effective counsel, part of temporary alimony.[84]

Courts award alimony generally based upon the need of one spouse and the ability to pay of the other. The frequency, in addition to the length and duration of awards of spousal support, has decreased rapidly over the years. Lifetime alimony has become almost non-existent. And the rationale for awards of alimony has moved over time generally from an emphasis on an enhanced conception of duty and need characteristic of a society with few opportunities for women to earn income and a system of laws that distributed assets upon divorce according to title, to an impoverished, sex-neutral conception of need,[85] allowing either spouse (perhaps) a limited period of alimony for quick rehabilitation based upon only those perceived educational and professional sacrifices made by that spouse. Alimony awards accordingly have become "more complicated and difficult to predict."[86]

Unlike property division, there are some substantive restrictions on private ordering of spousal support by prenuptial agreement. The

83. As before discussed, some jurisdictions impose contractual requirements that do indeed impose morality upon these agreements, employing principles of "unconscionability" and "unfairness based upon changed circumstances." These are contractual requirements not restrictions on contract terms, but the lines can become a little blurred.

84. *See* FLA. STAT. ANN. § 61.16 (West 1996); GA. CODE ANN. § 19-6-2 (West 1985).

85. Orr v. Orr, 440 U.S. 268 (1979) (holding that sex is not a "reliable proxy for need."); *see also* OLIPHANT & VER STEEGH, *supra* note 35, at 514.

86. OLIPHANT & VER STEEGH, *supra* note 35, at 510.

majority of states allow parties to waive alimony within the terms of a prenuptial agreement. However, 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.[87] Further, some states, even if they allow waivers of alimony, absolutely prohibit waivers of temporary alimony.

N. Fault?

Of particular note, although all states now have incorporated some form of no-fault divorce, states differ considerably on the issue of whether or not marital fault is relevant and admissible for purposes of determining the division of marital assets and alimony.

Some states require courts to consider the conduct of the parties in dividing assets.[88] Other states prohibit the consideration of conduct in dividing assets or awarding alimony.[89] Some states have some mixed version of allowing fault for considerations of division of marital assets but not alimony or vice versa.[90] Some states statutorily bar alimony awards to payee spouses who have committed adultery but have no similar statutory provision directing courts to increase alimony where the payor has committed adultery.[91]

Practically, some cunning attorneys may attempt to introduce evidence of fault, even where prohibited, as evidence otherwise relevant to financial matters, for example, the dissipation of marital assets on an extra-marital affair.[92] Whether or not fault is relevant, and whether or not fault is likely to be introduced at trial, may give greater bargaining power to one spouse over the other, thereby dramatically affecting divorce settlement negotiations.

O. Domestic Partnerships and Civil Unions

Currently, seven U.S. states offer domestic partnerships and/or civil unions to citizens who wish to take on many of the rights and responsibilities of marriage, without marriage. For a same-sex couple living in a state where marriage is not yet legal for same-sex partners, a domestic partnership or civil union is the only option for establishing a legally recognized intimate horizontal relationship. In

87. Bix, *supra* note 48, at 157.

88. *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169-170*; see, e.g.*, R.I. GEN. LAWS. ANN. § 15-5-16.1 (West 2004); Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992).

89. *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169-170; *see, e.g.*, *In re* Marriage of Tjaden, 199 N.W.2d 475 (Iowa 1972); Hartland v. Hartland, 777 P.2d 636 (Alaska 1989); *In re* Marriage of Boseman, 107 Cal. Rptr. 232 (1973).

90. *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169-70; *see, e.g.*, Chapman v. Chapman, 498 S.W.2d 134, 137 (Ky. 1973).

91. *See, e.g.*, GA. CODE ANN. § 19-6-1(c) (1979).

92. *See* Fernanda G. Nicola, *Intimate Liability: Tort Law, Family Law and the Stereotyped Narratives of Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445 (2013)

some states, the designation of domestic partnership or civil union affords the couple the same rights and obligations of marriage, without the marriage title.

For example, New Jersey's statute offering civil unions to same-sex couples provides individuals united by civil union with the same state benefits and protections afforded married persons, including dissolution rights.[93] Of note, the New Jersey civil union statute explicitly provides that parties in civil unions may use prenuptial agreements in the same manner as married spouses.[94]

III. Contracting Vertical Intimate Relationships

As we first tracked the various types of permissible horizontal relationship contracts before discussing the underlying default legal rules governing horizontal intimate relationships absent contracts, we now do the same for vertical relationships. Possible contracting occurs with regard to the establishment of parentage and with regard to disputes between legal parents.

A. Contracting Parentage in Assisted Reproduction

In recent decades, assisted reproductive technology has introduced new issues of multiple contenders for parenthood.[95] The technology has advanced much faster than the law, resulting in very different legal treatment in each state.[96] In response, the Uniform Law Commission adopted the Uniform Parentage Act of 2000 (UPA).[97] Although several states have adopted and expanded upon the UPA, jurisdictional differences abound. For this reason, below is a broad, general discussion of how individuals may contract parentage through assisted reproduction under current state laws attempting to regulate the practice and its consequences.

B. Egg or Sperm Donation Contracts

The enforceability of contracts pertaining to egg and sperm donation is varied and uncertain among the states' laws. This uncertainty exists against a backdrop of varied states laws governing the rights and responsibilities of the parties involved, absent a contract. As a

93. N.J. Stat. Ann. § 37:1-32 (West 2007).
94. *Id.*
95. *See* Judith Areen et al., Family Law Cases and Materials 572 (6th ed. 2012) (explaining that in the case of surrogacy using in vitro fertilization, there may be easily be six contenders for parenthood: two intended parents, one sperm donor, one egg donor, a gestational surrogate and her husband).
96. *See In re* F.T.R., 833 N.W.2d 634, 644 (Wis. 2013) ("The ability to create a family using ART has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage"); *see also* Elrod & Spector, *supra* note 16, at 624.
97. Unif. Parentage Act, prefatory note, at 2 (2002).

threshold matter, some states establish a default rule preventing egg and sperm donors from acquiring parental rights and obligations;[98] some states do the opposite and impose parentage upon donors. Contracts providing for alternative arrangements may or may not be enforced by the courts.

For example, some states and not others enforce contracts supporting sperm donors who wish to contract *for* parental rights and responsibilities, despite statutory bars against paternity for sperm donors.[99] Another example occurs in the case of "ovum sharing," where lesbian partners extract the egg from one partner, fertilize it and insert it into the other for gestation and birth. In contradiction of its general statutory rule that egg donors do not enjoy parental rights, at least one state appears statutorily to accept (and require) an actual written contract stating the intentions of the parties that the egg donor will assume parental rights before affording parentage to the egg donor.[100]

C. Surrogacy Contracts

Following the widely publicized 1988 *Baby M* case,[101] many states legislatively declared all surrogacy contracts void and unenforceable, and some states even instituted civil and criminal penalties for these contracts.[102] Several of these states have since invalidated or repealed their laws prohibiting and/or criminalizing

98. *See* UNIF. PARENTAGE ACT, § 702 cmt. (2002) (explaining that donors may not sue to establish parentage and may not be sued to obtain support for the child); *see, e.g.*, WIS. STAT. ANN. § 891.40 (West 2008).

99. *See e.g. In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (refusing to apply a blanket statutory bar to donor parental rights to the sperm donor in the case because he had evidence of an oral agreement with the mother to be considered the natural father of the child); *see also* N.H. REV. STAT. ANN. § 168-B:11 (West 2013) (stating that an agreement is writing is sufficient to privately guarantee a sperm donor's parentage); McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989), *cert. denied* 495 U.S. 905 (1990) (concluding that the blanket statutory bar to donor parental rights would violate the Due Process clause of the Fourteenth Amendment if the donor had an agreement to have rights and responsibilities as a parent). *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994) (imposing paternity on biological father despite agreement that he would be sperm donor only).

100. *See, e.g.* T.M.H. v. D.M.T., 79 So. 3d 787, 792 (Fla. Dist. Ct. App. 2011); *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009). *See generally* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

101. 537 A.2d 1227 (N.J. 1988)(concluding that the contract violates New Jersey public policy by privately arranging custody matters when the state is the ultimate arbiter of the best interests of the child in custody matters).

102. *See* Donald P. Myers, *7 States Prohibit Surrogacy for Pay*, L.A. TIMES (Mar. 6, 1989), http://articles.latimes.com/1989-03-06/news/vw-70_1_states-prohibit-surrogacy (explaining that in the year since *In the Matter of Baby M*, was decided, seven states had banned surrogacy and twelve additional states were considering similar legislation); *See, e.g.*, MICH. COMP. LAWS § 722.859 (1988).

surrogacy contracts, now permitting surrogacy contracts, under strict regulations with contractual requirements.[103]

While some states still will not enforce surrogacy contracts and statutorily mandate that a gestational mother is the parent,[104] the enforceability of surrogacy agreements with contractual requirements is the position now advocated in the Uniform Parentage Act,[105] and the position many states now follow.

As just a few examples of the types of contractual requirements states may impose before enforcing surrogacy contracts, some states have eligibility requirements, such as a minimum age; commissioning parent requirements, such as the gestating incapacity of the commissioning mother and her marriage; transaction requirements, such as non-mandatory surrender until expiration of a waiting period and prohibitions on "commercial surrogacy" or surrogacy for payment;[106] and judicial pre-authorization.[107]

D. Private and Open Adoption Contracts

We outline the basics of adoption default rules in the U.S. later in this work but wanted to mention here an important development in parentage by adoption accomplished through private contract. While a small number of states outright prohibit independent or private adoption contracts,[108] most states permit private adoption agreements between birth and adoptive parents, negotiated outside the confines of state-run adoption agencies, though typically with

103. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(a) (1989), *invalidated by* Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (declaring the law unconstitutional on equal protection grounds); Surrogacy Parenting Agreement Act of 2013, Council 32, Period Twenty (D.C. 2013) (proposing that surrogacy contracts complying with various requirements be considered presumptively valid); S.B. 4617, 236th Leg., Reg. Session (N.Y. 2013) (proposing that surrogacy contracts complying with numerous requirements be enforced through judgment of parentage).

104. *See, e.g.*, N.D. CENT. CODE § 14-18-05. *See* COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:9 (2012).

105. UNIF. PARENTAGE ACT § 801 (2002).

106. *See, e.g.*, KY. REV. STAT. ANN. § 199.590 (West 2005); LA. REV. STAT. ANN. § 9:2713 (1987); WASH. REV. CODE ANN. § 26.26.230 (West 1989). Scholars have criticized this altruistic rhetoric as reinforcing gender norms about motherhood and monetary motivation. *See* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 247 (2009); *see generally* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman and Joan C. Williams, eds., 2005).

107. *See, e.g.*, FLA. STAT. ANN. § 742.15 (West 1993) (providing minimum age requirement of eighteen years old and requiring commissioning parents to be married); N.H. REV. STAT. ANN. § 168-B:25 (West 2013) (providing mandatory terms including a term that allows a surrogate to keep the child if she signs a written intent to keep the child and delivers the writing to the intended parents within seventy-two hours of the birth of the child); N.H. REV. STAT. ANN. § 168-B:23 (West 2013) (requiring judicial pre-authorization); VA. CODE ANN. § 20-158 (West 2000) (requiring judicial validation).

108. *See* COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:4 (2012).

state oversight and regulation.[109] As a more recent development, some states now also allow parties to negotiate and contract various terms of an "open" adoption, permitting a birth parent to terminate her parental rights while retaining some right to post-adoption contact with the child.[110] As discussed later in this work, enforcement of open adoption contracts allows parties to avoid the default rule that an adoption severs completely the relationship with a birth parent.

E. Co-Parenting Contracts for Non-Legal Parents

Some non-legal parents preemptively execute co-parenting agreements with legal parents, demonstrating the desires of these adults to share parenting responsibilities for the child, even though one is not a legal parent. Co-parenting agreements may or may not be enforced, depending on the state.[111]

F. Contract Resolution of Conflict between Legal Parents

Once established as legal parents, parents may resolve disputes over custody and support for their children by contract. Here, again we take another break to put our inquiry into context. The general framework of legal rights and responsibilities that attach to legal parenthood (rights of access and decision-making with obligations of care and financial support) operates with little if any judicial oversight, except in two discreet scenarios. The first is state intervention caused by alleged abuse or neglect, undertaken according to a highly complex child protection system, where the state becomes an investigator and potentially a party in litigation against a parent on behalf of a child.

The second scenario of judicial oversight of parenting, of importance for the instant work, is private family law litigation, where parties invite state intervention because they cannot get along with each other regarding their children. As just one illustration, although courts are unlikely to review, much less scrutinize the parenting actions of two married parents, upon divorce, a court may scrutinize quite heavily the actions of both parents (with granular detail) in the context of a custody trial.[112]

---

109. *See* Does 1, 2, 3, 4, 5, 6, & 7 v. State, 993 P.2d 822, 829-30 (1999) (discussing the principle that private adoption agreements must conform to state statutory requirements in order to be enforceable, making them different from other types of contracts).

110. Open adoption agreements have become more popular in the U.S. *See, e.g.*, Weinschel v. Strople, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983).

111. COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:31 (2012).

112. *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 ch.1, topic 1, overview of the current legal context (2002).

This is important because we must realize that while parents privately order their intimate vertical relationships every day, without contracts,[113] and without judicial review, intraparental conflict brings legal parents (and sometimes others with interests in children, i.e. grandparents) before the courts and opens the possibility of private ordering by contract, in settlement, in order to avoid a final adjudication by the courts.

G. Child Custody Settlement Contracts

After a child custody matter is brought before a court in the nature of a custody action or as an ancillary issue in a divorce action, legal parents may resolve their disputes and agree upon a custodial arrangement, but not without presenting this agreement to the court for approval.[114] Indeed, many state statutes now *require* parents to execute and present parenting plan agreements, which in many states are pre-designed forms on which the parents select between pre-designed options for custodial arrangements and sign. Parties who prefer to execute more personalized, lengthy settlement agreements regarding custody often then will reference their lengthier agreements in such required forms. Such parenting plan agreements, whether outlined in lengthier agreements or as checked boxes on a form, often cover not only the residential location of the child, but also the specific time the child shall spend with each parent, how child transfers will take place, and which parent shall make daily decisions and those more significant decisions regarding, for example, schooling and religion.

While all states require some form of court oversight of agreements regarding children, states vary in the degree to which they allow judges to set aside, or abandon, these agreements based upon the judge's discretion regarding the best interests of the children involved.[115] In practice, unless an agreement—on its face—presents a child custody arrangement that seems clearly harmful to the children subject to the dispute, courts rarely will disturb it, as courts unlikely

113. *But see* McClain, *supra* note 55, at 845 (describing the ways that family constitutions guide daily life).

114. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.06 (2002).

115. Johnson v. Johnson, 9 A.3d 1003 (N.J. 2010) (setting forth a system for judicial review of arbitration awards, deferring to the agreements unless a party contests the agreement as being harmful to the child, and requiring a record of all documentary evidence from the arbitration be kept for the purpose of this review.); Illinois mandates that mediated agreements regarding financial assets be upheld unless the agreements are unconscionable, but mediated agreements pertaining to children must be determined to be in the children's best interest. *See* MODEL FAMILY LAW ARBITRATION ACT (Am. Acad. Matrimonial Law. 2004); Ronald S. Granberg & Sarah A. Cavassa, *Private Ordering and Alternative Dispute Resolution*, 23 J. AM. ACAD. MATRIMONIAL LAW. 287 (2010); *see also* John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411, 443 (2012).

have the information necessary to question its terms.[116] Likewise, parties may not amend custody agreements privately (at least not if they wish the amendments to have legal effect), as amendments also require judicial approval.

H. Child Support Settlement Contracts

In the specific area of child support, court supervision over contractual terms indeed may be more taxing. The Federal government mandates that states create guidelines for child support using specific descriptive and numerical criteria,[117] and while individual state child support guidelines vary, sometimes significantly, all state child support guidelines *explicitly* limit the terms upon which parties may agree privately regarding how they will divide the financial obligations of their children upon divorce.

Courts will require a joint showing by the parties that their agreements regarding child support conform to the child support guidelines of that jurisdiction. Agreements or awards not attaching an adequate showing of conformity often will be tossed out completely by the presiding judge, sometimes to the great frustrations of parties and their attorneys who have spent significant time negotiating those terms in the context of the overall settlement.

I. Default Rules of Intimate Vertical Relationships

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate vertical relationship of parent and child, absent an alternative contractual arrangement, first discussing generally who qualifies as a legal parent under default rules, and then discussing generally how states divvy rights and responsibilities between legal parents and others. This discussion is by no means exhaustive, as the law of parentage is ever-evolving and far too vast for this work.

J. Legal Parentage by Biology or Marriage

Absent a contract, or some other factual scenario, such as adoption or assisted reproduction, legal parenthood in the U.S. generally is a function of biology with a marital presumption, based on a two-parent model of one legal father and one legal mother. Maternity is traditionally easy to determine based on the woman giving birth to the child, and rarely gives rise to dispute, except where complicated by assisted reproduction.

---

116. Mnookin & Kornhauser, *supra* note 64, at 955-56.

117. Family Support Act of 1988, 42 U.S.C.A. § 1305 (1996); *see* Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews,* 43 FAM. CT. REV. 415 (2005); *see also* Lande, *supra* note 115, at 443.

Paternity is more typically contested, and courts have devised various sets of legal principles determining legal fatherhood. For example, courts generally presume a husband is the father of his wife's children born during the marriage, and for a short period after divorce or death.[118] A husband may challenge this presumption in court in most states, but it is a very strong presumption to overcome.[119] Outside the marriage context, courts usually determine paternity based on biology using genetic testing.[120]

Additionally, in 1996, Congress compelled each state to adopt procedures for men to acknowledge their paternity without adjudication.[121] Under the resulting state laws, men may sign standard forms voluntarily acknowledging or denying paternity, filing such forms with the state agency maintaining birth records.[122]

K. Legal Parentage by Adoption

Adoption is a parent-child relationship created by the states, authorized expressly by state statutes, and regulated intensely by the states.[123] The adoption process typically begins with the termination of the parental rights of the birth mother, and if known, the birth father, and relinquishment of the child to a state-regulated adoption agency.

Prospective adoptive parents typically then must seek approval directly from the adoption agency, which maintains minimum eligibility requirements, often state-mandated, and conducts extensive investigations to verify the appropriateness of the placement. Following agency approval, prospective adoptive parents typically must receive judicial approval in order for the adoption to proceed.[124]

The advent of step-parent and second parent adoption is particularly important to note, as an aberration of the standard adoption framework. While a typical adoption terminates the existing parent-child relationship of the birth parent and substitutes it with a new parent-child relationship with the adoptive parent, states allowing step-parent and second-parent adoption by statute or judicial precedent provide an exception to this framework, allowing adoptive parentage without destroying the parentage of the birth parent. Step-

118. *See* MYERS, *supra* note 77, at 143; *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105 (West 2013).

119. *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1053-54 (Pa. 1999) ("[T]hat a child born to a married woman is the child of the woman's husband-has been one of the strongest presumptions known to the law.").

120. *See, e.g.*, People *ex rel.* B.W., 17 P.3d 199, 201 (Colo. Ct. App. 2000) ("There is no presumption of paternity in regard to children born to unmarried parents.").

121. 42 U.S.C. § 666(a)(5)(C) (1996).

122. *Id. See also* UNIF. PARENTAGE ACT, § 303 (2002).

123. *See, e.g.*, CAL. FAM. CODE § 8600 (West 1992).

124. *See, e.g.*, FLA. STAT. ANN. § 63.022 (West 2012); Lofton v. Sec'y of Dep't of Children & Family Serv., 358 F.3d 804, 809 (11th Cir. 2004).

parent adoption permits the adoption by a married adult of his spouse's child. Second parent adoption permits the adoption by an intimate partner, including a same-sex partner, of his partner's child.[125]

Once a legal adoption takes place, the adoptive parents assume all of the rights and obligations of legal parenthood, including the rights and obligations of custody and child support.

L. Child Custody

States consider two main forms of child custody for legal parents—physical and legal custody. Physical custody refers to the right to have the child physically present with the parent. Visitation or parenting time is a part of physical custody. Legal custody refers to the right to make decisions concerning the child. Physical and legal custody do not have to be exclusive; parents may share physical and legal custody, so that the child travels between the care of the parents and both parents make decisions for the child or somehow divide decision-making authority by subject matter or according to physical custody.

States generally must make additional findings of parental unfitness before removing all forms of custody from a parent, essentially terminating his parental rights.[126] There is no longer a physical or legal custodial presumption in favor of the mother or the father.[127] Some states authorize courts to consider and sometimes defer to the wishes of the child (usually above a certain age) in determining physical custodial arrangements.

The majority of U.S. states authorize courts to use the legal standard of "best interest of the child" in making determinations about custody. While the Uniform Marriage and Divorce Act (UMDA) and various state statutes provide specific factors for courts to consider in determining the best interest of the child, this standard remains amorphous, allowing courts significant discretion in determining issues of child custody.

State laws on custody vary, and parents often litigate both the choice of law and the appropriate jurisdiction for resolving their child custody disputes, in no small part because custody jurisdiction outcomes also may limit a parent's ability to relocate across state lines with a child. The Uniform Child Custody Jurisdiction and Enforce-

125. *See, e.g.*, Sharon S. V. Superior Court, 73 P.3d 554 (Cal. 2003) (finding that a woman intending to coparent with another adult who has agreed to adopt the child is permitted to waive the statutory benefit of "giv[ing] up all rights of custody, services, and earnings" as provided on California's official independent adoption agreement form). *See generally* Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, FLA. ST. U. L. REV. 913, 914 (2007).

126. *See* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

127. *See, e.g., Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981).

ment Act (UCCJEA), codified into the statutes of all fifty states, provides detailed, though complex, procedures for courts to determine which state's substantive law applies and which state court has jurisdiction to adjudicate a family law dispute involving child custody.[128]

M. Child Support

States maintain specific child support guidelines, according to federal mandate. These guidelines vary widely from state to state in substance and specificity. Most states employ an "income sharing" model that dictates an appropriate amount of support for a child based on the combined incomes of the parents and then prorates this amount between the parents based on the percentage of income attributable to each of them. In contrast, some states maintain a "percentage-of-income" model that dictates the amount of support owed by the nonresidential parent as a state-mandated percentage of his or her income. States generally consider the number of children financially supported by the nonresidential parent in determining support. Some states, with significant variations in approach, also consider parenting time offsets for child support obligations based upon extensive physical custodial time. Parenting time offsets become particularly contested in situations where the parents share almost equal physical custody.

Some states cap the level of income that courts consider in determining child support, so that a middle-class parent may have the same child support obligation as a very wealthy parent, these states reasoning that the financial needs of children should have limits.[129] Other states do not so cap the income levels, these states reasoning that children should be able to enjoy the standard of living they would enjoy if residing with the wealthy parent.[130] Even states that cap the levels of support usually allow some form of upward deviation based on high income, and all states allow for deviations based upon the extraordinary needs of a child. States also allow for downward deviations in cases where the support payments would leave the nonresidential parent without sufficient income to live above a determined poverty level.

Additionally, despite specified guidelines, and in many states, statutory child support worksheets, there is always room for contest and negotiation over the appropriate child support payments one parent should pay to the other. Of greatest importance is the method for determining parental income, as issues such as overtime pay, periodic but irregular income, and voluntary unemployment play a

128. The federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000), also governs these issues.

129. *See, e.g.*, GA. CODE ANN. § 19-6-15 (West 2011).

130. *See, e.g.*, CAL. FAM. CODE § 4058 (West 1993).

significant role in child support outcomes, as they can in alimony outcomes.

As state laws on child support vary significantly, parents often litigate both the choice of law and which jurisdiction is appropriate for resolving their child support disputes, as the law and jurisdiction may have enormous impacts on the amount owed. The federal Uniform Interstate Family Support Act (UIFSA) has been codified into the state statutes and is the law of all fifty states. This uniform law creates well-defined, though complex, procedures for courts to determine which state substantive law applies and which state court has jurisdiction to adjudicate a family law disputes involving child support.

N. Non-Legal Parents

In recent years, state legislatures began creating statutory protections for third-parties, most commonly grandparents, who are not legal parents but who desire legally guaranteed rights of access to children. In 2000, the U.S. Supreme Court in *Troxel v. Granville* confirmed that only legal parents have constitutionally protected rights to children, rights that third-parties, including grandparents, generally may not infringe.[131] There is still plenty of room for legally guaranteed third-party visitation and custody following the Troxel decision, and many third-party visitation and custody statutes remain good law.[132]

In addition, of note, though not discussed at length in this work, de facto legal parentage for adults who are not legal parents but who effectively behave as parents is an important principle recognized in at least one jurisdiction in the U.S.[133]

IV. CONTRACTING METHOD—ALTERNATIVE DISPUTE RESOLUTION

Individuals involved in disputes pertaining to legally recognized vertical and horizontal relationships may resolve their disputes through alternative dispute resolution (ADR) methods, including mediation and arbitration, as would litigants in any other civil action. In addition to typical ADR, as similar but distinctly different from mediation, collaborative family law is another ADR method.

Interestingly, although the application of civil procedure to family disputes historically has not been without vigorous debate and skepticism, leading, for example, to the specialty family law courts

131. Troxel v. Granville, 530 U.S. 57 (2000).

132. *See* OLIPHANT & VER STEEGH, *supra* note 35, at 336; *see also* Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009).

133. *See, e.g.*, D.C. CODE ANN. §§ 16-831.01 et seq. (providing that a "de facto parent" has standing to seek custody or visitation).

with their unique procedural rules[134] and to the many distinctive substantive rules applicable to the family, as discussed in this work, general receptiveness to the application of civil ADR to family disputes has been comparatively unremarkable.[135] Indeed, as scholar Amy Cohen documents, many indeed have presented the resolution of family disputes through ADR as the gold standard, a model for the resolution of ordinary civil matters.[136]

A. Mediation

Mediation is a process by which parties in family law litigation resolve their disputes through the assistance of a neutral, third-party facilitator who does not have authority to impose binding decisions upon the parties; the parties ultimately must agree to any resolution.[137] In an effort to encourage the use of mediation in resolving family law disputes, many states offer dispute resolution services through the court system at a reduced rate to make mediation affordable for most litigants. Often, courts order parties to mediate before proceeding to trial.[138] Typically, mediators meet certain mandated requirements in terms of training and experience, but mediator requirements vary substantially from state to state.[139]

There is a plethora of debate and scholarship, among academics, policy-makers and practitioners, regarding the appropriateness of mediation, especially court-ordered mediation, in situations where intimate partner violence exists or potentially exists, as mediation presumes parties come to the negotiation table with equal bargaining capabilities, free from the control of the other party, a situation thwarted by the presence of violence within the relationship.[140] This emphasis and concern are warranted.

---

134. *See* Halley, *supra* note 26; Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189 (2011).

135. Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91 (2011).

136. *Id.*

137. *See* Lande, *supra* note 115, at 423; Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001); *see also* Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview, in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 4-6, 10-13 (Jay Folberg et al., 2004).

138. *See* Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 669-70 (2008); *see also* Carrie-Anne Tondo, et al., *Mediation Trends,* 39 FAM. CT. REV. 445 (2001).

139. *See* Ver Steegh, *supra* note 138, at 662; *see also* Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 995 (2000); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 16 (Kenneth Kressel et al. eds., (1989).

140. *See, e.g.*, ABA COMM'N ON DOMESTIC VIOLENCE, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (2008), *available at* http://www.americanbar.org/content/damlabalmigrated/domviol/docs/mediation-jan-uary_2008.authcheckdam.pdf (listing of state rules); Amy Holtzworth-Munroe et al., *The Mediator's Assessment of*

What however is peculiar is the relative dearth of scholarship and debate on the impact of intimate partner violence in the contracting contexts discussed earlier in this work, i.e. cohabitation agreements, prenuptial agreements, surrogacy agreements, those that are pre-conflict but still adversarial in nature. Except for the specter of added involuntariness with respect to court-ordered mediation and, of course, the greater frequency of mediated divorce and child custody and support settlements in general versus these other agreements, there is no rational explanation for the discrepancy. Why does partner control in one contracting context matter but not in the other? Further, the concern specifically with "intimate partner violence" with its very well defined scholarship-driven definitional qualities may obscure the general concern over bargaining inequalities more broadly.[141]

B. Collaborative Law

Collaborative law differs from friendly negotiations in the mediation context or otherwise, in that parties agreeing to the collaborative process sign a pledge that prevents their attorneys from ever litigating their disputes, if the parties are unable to come to an agreement.[142] Popular[143] though controversial,[144] collaborative law is an ADR method that must be considered; although substantively, in terms of our inquiry into the ways in which parties privately resolve their disputes, there is little substantive difference between agreements reached collaboratively and those reached through mediation or other settlement negotiations.

C. Arbitration

Alternatively, arbitration is a process whereby parties in conflict agree to the substitution of a third-party in place of the judge with jurisdiction over the subject dispute and by agreement vest this third-party with the authority to hear evidence and decide the dis-

---

Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain, 48 FAM. CT. REV. 646 (2010); Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555 (2010).

141. *See* Jana Singer, *The Privatization of Family Law*, WIS. L. REV. (1992) (discussing bargaining inequalities, generally, and in the context of ADR).

142. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319-21, 326-32 (2004).

143. REGINA A. DEMETEO, HISTORY OF COLLABORATIVE DIVORCE (2011) (reporting that The International Academy of Collaborative Professionals has over 4,000 members in 24 countries around the world and estimates that there are over 22,000 collaboratively-trained lawyers worldwide).

144. Despite the increasing popularity of collaborative law, there is considerable disagreement among family law attorneys as to its benefits.

pute, in a decision that will bind the parties.[145] Parties would agree to use arbitration in order to control the *timing* of their litigation and the *identity* of the decision-maker, not necessarily to control the substance of the resolution,[146] and in this sense arbitration is not really private ordering by the parties. However, because arbitration involves removal of the matter from state control, and placement of the matter in the hands of a non-state actor, we discuss arbitration appropriately within this work.

V. Family Law Contracting Permanence

Modifications of Final Judgments in Family Law

Prenuptial, postnuptial, separation and settlement agreements incorporated into final judgments are not necessarily *final*, because the judgments themselves are not necessarily final with regard to all issues—presenting somewhat of a U.S. civil procedure aberration in apparent violation of the principle of finality of judgments. Specifically, a court may modify its judgment on issues of alimony, child support, and child custody.

Generally, a party seeking to modify a final judgment regarding one or more of these issues must first prove a material change in circumstances in order to maintain the modification action, in the first instance, and then prove the underlying standards supporting her claim, i.e. best interests of the child for child custody. There usually are some restrictions on the ability of a party to seek modification, for example, a time moratorium (e.g. two years) on custody modification actions to promote stability for children, and preclusions against modification of alimony duration.

145. Lande, *supra* note 115, at 442-43 (noting the prevalence of "private judges," usually retired judges statutorily authorized to decide family law disputes. Often these private judges are called "special masters" or "referees." Unlike general arbitrators, these private judges are bound by consideration of the law, and their decisions are generally appealable); *see also* George K. Walker, Arbitrating Family Law Cases by Agreement, 18 J. Am. Acad. Matrimonial Law. 429, 431 n.8 (2003); John W. Whittlesey, Note, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. § 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials,* 58 Case W. Res. L. Rev. 543, 543-46 (2008).

146. *Id.*