The Enforcement of Marital Contracts in the United States, Great Britain, France and Quebec

Susan Vogt Brown

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I. INTRODUCTION

A new attitude exists in the United States regarding marriage. The profound social changes which have occurred during recent years have caused many Americans to change their perceptions of marriage. Fewer people are now marrying, as cohabitation without marriage has become increasingly popular and acceptable. Couples are also waiting until they are older before they marry. In addition to these statistics, the divorce rate has risen steadily to a record high.


2. Clark, The New Marriage, supra note 1, at 442-43. Clark notes particularly the reduction in the marriage rate, the increase in alternatives to marriage, the decrease in sexual stereotypes and a change in the function of marriage itself. Weyrauch, supra note 1, at 418-25. Weyrauch notes the increase in equality between spouses, the increase in informal contracts, the trend to recognize the economics of marriage and the increase in informal marriage. Id. Glendon, Modern Marriage Law, supra note 1, at 444-46. Glendon notes the increase in informal marriage, the ease of divorce, neutrality toward lifestyles and new assumptions regarding equality and individual autonomy. Id.

3. Clark, The New Marriage, supra note 1, at 442. According to the Statistical Abstract of the United States, the marriage rate for 1970 was 10.6 per 1000 population while the rate for 1976 was 10.0 per 1000 population. BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 83 (101st ed. 1980) [hereinafter cited as STATISTICAL ABSTRACT]. For a detailed analysis of marriage rates of this century, see H. CARTER & P. Glick, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY (1976) [hereinafter cited as CARTER & Glick].


5. Clark, The New Marriage, supra note 1, at 442 n.16; STATISTICAL ABSTRACT, supra note 3, at 67; 1890-1970: U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 20-21 (1975). In 1960, among men ages 20-24, 53% had never been married; by 1978, the percent that had never been married had risen to 66%. Among women, ages 20-24, the percent that had never been married was 28% in 1960 and 48% in 1978. G. MASNICK & M. J. BANE, THE NATION’S FAMILIES, 1960-1990, at 149 (1980).

6. STATISTICAL ABSTRACT, supra note 3, at 67 (in 1950, the divorce rate was 2.6 per 1000 population;
The law has kept pace with these changing perceptions of marriage. American family law has responded dramatically with new treatment of informal marriage, increased recognition of the economic aspects of marriage, and a growing respect for personal privacy and autonomy of individuals. Divorce has become more readily obtainable; no fault divorce is now the dominant method of divorce in the United States. In response to the changing attitudes toward marriage and divorce, courts have sanctioned new devices to deal with the termination of marital relationships. These devices include express or implied contracts of cohabitation, partnership, quasi-contractual arrangements and

in 1960, the rate was 2.2 per 1000 population; in 1970, the rate was 3.5 per 1000 population; and in 1979 the rate was 5.3 per 1000 population — which exceeded the highest divorce rate ever before recorded in the United States, which was 4.3 per 1000 population in 1946. See CARTER & GLICK, supra note 3, at 394; Blakesley, Child Custody and Parental Authority in France, Louisiana and Other States of the United States: A Comparative Analysis, 4 B.C. INT’L & COMP. L. REV. 293 (1981). Blakesley notes a disturbing by-product of the increase in marital break-ups, namely, the problem of child custody.

One observer of this trend suggests that emotional detachment may now be desirable in marriage. Weyrauch, supra note 1, at 424. As evidence to support his viewpoint Weyrauch notes the increase in the importance of individual autonomy, separate bookkeeping, sexual tolerance and the increasing equality between the sexes. Id.

7. Weyrauch, supra note 1, at 417. Weyrauch stresses that marriage is increasingly governed by contract notions. In addition, he notes the trend of marriage as co-ownership for profit, with attendant mutual support obligations. Id. at 418-22. Glendon, Modern Marriage Law, supra note 1, at 444. Glendon emphasizes the greater regulation of economic aspects of marriage, in contrast to regulation of marriage formation and dissolution. Her thesis is that the family has become legally less important as work and government entitlements have increased in importance. Id. at 456. She notes "the decline of marriage as a support institution and the decline of the family as a status determinant." Id. at 447.

8. Weyrauch, supra note 1, at 428-32. Weyrauch suggests that an express agreement, enforced by the courts, may take the place of "formal statutory marriage." Id. at 428.

9. Id. at 421.

10. Clark, The New Marriage, supra note 1, at 446; Weyrauch, supra note 1, at 418.

11. Glendon, Modern Marriage Law, supra note 1, at 444. Glendon refers to the fact that divorce has become a "normal" mode of marriage termination. Id. Clark, The New Marriage, supra note 1, at 444. Indeed, Clark observes that permanence is no longer part of the legal definition of marriage. Id.

12. UNIFORM MARITAL PROP. ACT at ii (National Conference of Commissioners on Uniform State Laws, Discussion Draft 1981) [hereinafter cited as UMPA]. By 1981, only Illinois and South Dakota retained fault-based divorce. Id. No fault divorce is a type of divorce in which a marriage can be ended on an allegation that the marriage is irretrievably broken or there are irreconcilable differences. Fault need not be shown or proven. BLACK’S LAW DICTIONARY 945 (rev. 5th ed. 1979). See also UNIFORM MARRIAGE AND DIVORCE ACT (UMDA), §§ 302, 305; Clark, The New Marriage, supra note 1, at 444.

13. Weyrauch, supra note 1, at 427.


We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties’ lawful expectations.

resulting and constructive trusts.

The changes in the social patterns and perceptions of marriage demonstrate that marriage is no longer the only desirable and acceptable lifestyle for many couples. Because of the availability of alternative lifestyles, couples tend to consider the social, economic and legal aspects of marriage more carefully before entering into the marital relationship. One manifestation of this new attitude is the use of marital contracts, both antenuptial and postnuptial.


See, e.g., Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937), finding the putative wife was entitled to compensation for the amount her services exceeded the value of the maintenance provided her; and Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948), finding a putative wife was entitled to compensation for the value of her services rendered and for money she had contributed to the household expenses.


See, e.g., Omer v. Omer, 11 Wash. App. 386, 525 P.2d 957 (1974), finding a constructive trust because the former husband was unjustly enriched because he held sole title to property acquired through joint efforts; Humphries v. Riveland, 67 Wash. 2d 376, 407 P.2d 967 (1965).

Weyrauch, supra note 1, at 424. Cohabitation without marriage is increasingly common. Id. at 424-25. See note 4 supra. Indeed, the law favors cohabitation to some degree. Such favoritism is the result of the lack of legal duties arising from cohabiting relationships, in contrast to the many legal implications, most particularly support obligations, arising from marriage. However, this favored position may be changing. Weyrauch, supra note 1, at 426. Now, non-marital relationships are increasingly having marriage-like consequences. Clark, The New Marriage, supra note 1, at 449. Weyrauch notes:

If one behaves as if he is married, he is often treated as if he were married. If one behaves as if he is not married, he is nevertheless often treated as if he were married. In effect this means that a marriage or at least some of its consequences, may be imposed on the parties if the circumstances, as seen by the courts, warrant it.

Weyrauch, supra note 1, at 426. By way of example, Weyrauch cites a Florida case in which a court imposed a common law marriage in an "almost punitive way" upon the recalcitrant "husband." Chaachou v. Chaachou, 135 So. 2d 206 (Fla. 1961).

Clark, The New Marriage, supra note 1, at 442. Some authors have concluded that the recognition of female equality has led to wariness of marriage among women. They note that many women are fearful that marriage will become a tool for their repression. Id. at 442 nn.12, 15. See generally, L. WEITZMAN, The Marriage Contract: Spouses, Lovers, and the Law (1981).


Antenuptial agreements generally determine property rights between the spouses. LINDEY, supra, at 90-26. The recent trend has been to allow spouses to determine rights upon divorce, in addition to
These contracts can serve as mechanisms for legalizing a couple’s perceptions of their marital rights and duties and for insuring fulfillment of their carefully considered expectations. A couple undertakes the formalities of a marital contract as a way of safeguarding its marital assumptions in the face of the uncertainties of the future.

A new use for marital contracts has developed as a result of changing social patterns. Traditionally, courts have held that marital contracts contemplating divorce violated public policy because such contracts were said to encourage divorce. However, courts now increasingly permit marital contracts which establish couples’ rights upon divorce. This dramatic reversal by the courts has expanded the permissible scope of marital contracts. Nevertheless, courts have...
failed to treat marital contracts like other contracts. This Comment demonstrates that the widespread assumption that marital contracts, like other contracts, will be enforced as written is highly suspect. What appears to be a viable system of contracting out of otherwise applicable rights and duties is really a system subject to broad judicial discretion.

After examining U.S. courts' treatment of marital contracts, the author compares the manner in which the courts in Great Britain deal with marital contracts or "settlements." As in the United States, the enforceability of marital contracts in Great Britain is largely a function of the court's discretion. However, in contrast to U.S. law, British law explicitly states that courts have the power to vary antenuptial or postnuptial settlements after the termination of the marriage or after the death of one spouse.

Finally, this Comment suggests an alternative model for marital contracts in the United States, based on the civil law systems of France and Quebec. Those systems enforce marital contracts as written after the parties have complied with procedural requirements, including contract execution by a notary. The author recommends that courts modify their approach in favor of the civil law system and adopt a more protective posture with respect to a couple's contractually stated intent. Thus, the author suggests use of an attestation procedure for marital contracts to provide a preliminary establishment of validity. Further, the author advocates the use of a disinterested third party, similar to the civil law notary, in the execution of marital contracts. Such procedural devices would insure voluntariness and fairness in the United States, while providing significant contractual freedom.

31. The Uniform Marriage and Divorce Act (UMDA) notes this explicitly; Section 307(A) of the UMDA directs the court to consider any antenuptial agreement between the parties as merely one factor in dividing property incident to divorce. Thus, judicial discretion often prevents couples from determining their own rights regarding their property.
33. Rayden's Law and Practice in Divorce and Family Law Matters in All Courts 790 (J. Jackson ed. 1979) [hereinafter cited as Rayden's].
34. Matrimonial Causes Act, 1973, ch. 18, § 24(1)(c); Rayden's, supra note 33, at 790.
II. The Treatment of Marital Contracts in the United States

Marital contracts were at one time exclusively a tool of the rich.37 However, with the change in attitudes regarding marriage, marital contracts have come to serve couples from varying economic spheres.38 This increased use of marital contracts over the past few decades has been significant.39 American couples are becoming more interested in exercising the full extent of their contractual freedom when making the commitment of marriage.40

A. The Perception of Marital Contracts as Enforceable

Because marital contracts are now increasingly enforceable,41 couples assume their marital contracts will be enforced.42 As a result of this perception, prospective spouses are increasingly turning to marital contracts.43 A couple's expectation that a court will enforce their carefully drafted agreement is reasonable, especially in light of the fact that many couples engage in legal formalities, such

37. Katz & Weyrauch, supra note 4, at 1; Neely, supra note 25, at 9; Weyrauch, supra note 1, at 419.
38. Neely, supra note 25, at 9; Weyrauch, supra note 1, at 419.
40. Several authors have responded to this heightened demand for information by writing instructional books for lay people. See P. Ashley, Oh Promise Me But Put It In Writing (1979) [hereinafter cited as Ashley]; and Burger, supra note 25. Clark notes that because of recent social change, antenuptial agreements are serving new functions and achieving new importance. Clark, Antenuptial Contracts, supra note 21, at 164.
41. See note 28 and accompanying text supra.
42. See Ashley, supra note 40; Burger, supra note 25. Both authors urge couples to use these valuable contracts.
as the use of lawyers, negotiations, form contracts and a formal signing ceremony. Such formalities are unnecessary if couples merely seek to define their marital roles in an informal, non-binding manner. However, couples believe that the legal formalities assure enforcement of their contract.

Another manifestation of the belief that marital contracts are enforced as written is evidenced by the use of the contracts as protection in the event of divorce. When two individuals terminate their marriage, they must divide their property. Although there are a variety of systems for property division upon divorce, the predominant method in the absence of a contract is through judicial discretion. Under this approach, a judge distributes a couple’s marital property in whatever manner the judge considers to be just and equitable. Therefore, couples risk forfeiting control over their property to the courts. As a counterbalance to this broad judicial power, couples rely on the validity of their marital contracts to protect themselves from the unpredictability of the present property division system.

46. See Ashley, supra note 40; Burger, supra note 25. For a treatise that provides sample forms, see A. Lindey, 1, 2 Separation Agreements and Antenuptial Contracts (1978).
47. E.g., Rocker v. Rocker, 13 Ohio Misc. 199, 203, 232 N.E. 2d 445, 449 (1967). In this case the parties signed the contract in duplicate before two witnesses, one of whom was a court clerk. Id. A notary acknowledged the signatures at the court ceremony. Id.
49. See notes 52-55 and accompanying text infra.
51. Glendon, Modern Marriage Law, supra note 1, at 445 n.18, citing Interspousal Relations, supra note 36.
52. Neely, supra note 25, at 7. Judge Neely states:

The only general rule places most of the crucial decisions regarding litigated domestic-relations matters within the discretion of the trial judge. Consequently any man who marries is placing all his worldly goods, the welfare of his future children, and all his future income for so long as his wife shall live into the hands of a semiliterate trial judge.

Id.
The belief that marital contracts are useful and enforced by the courts is also held by the drafters of the Uniform Marital Property Act, who based the provisions of the Act on the premise that courts generally enforce marital contracts. The Act, which proposes to "identify and rectify problems in the economic area of marriage," offers several innovative concepts in its proposal for a uniform marital property system. Among these new concepts are the notions that: (1) all property that a couple acquires during marriage is marital property; (2) marital property should be divided equally between the spouses upon dissolution of the marriage by a strong presumption; and (3) marital property should be divided equally between the surviving spouse and the deceased spouse's estate. The Act emphasizes that, under its provisions, spouses have the option to contract on their own to avoid operation of the Act. Indeed, the Act's preface speaks approvingly of individual "custom systems" which couples may use to tailor their agreements to their circumstances and expectations.

Section 13 of the proposed Act specifically provides that spouses may make marital property agreements at variance with otherwise applicable state laws of

Unstated by the courts is the primary impetus for the startling increase in the desire to utilize antenuptial contracts effective at marriage dissolution: the newly broadened discretionary power of courts to divide property equitably at divorce. The uncertainty concerning future manner of division and the relative impossibility of challenging divisions as abuse of discretion impel attorneys to counsel clients to consider entering antenuptial contracts.

54. The cited tentative draft of the Act is the work of the Drafting Committee of the National Conference of Commissioners on Uniform State Laws. The Commissioners represent all U.S. jurisdictions. The cited draft is one of several drafts written by the Drafting Committee. The National Conference of Commissioners first considered the final draft in Summer 1982. The Act must go through three annual readings of the Commissioners before it becomes sanctioned by the National Conference of Commissioners. At that point, if the Commissioners decide to seek approval as a Model Act, then the Model Act will go to the states to be passed on individually. However, before the Model Act goes to the states for their approval, the American Bar Association must pass the Uniform Act. Thus, the Act is several years away from state passage.

55. UMPA, supra note 12. The purpose of the Marital Property Act is to establish a new system of economic relations during marriage, at marriage dissolution and at the death of a spouse. The new system will attempt to correlate economic relations during the marriage with the economic relations created if the couple divorces. Such a new system of marital sharing is called for by the high incidence of two-worker families and the increase in the divorce rate. Id. at iv-v.

56. See UMPA, supra note 12, at 27. The Act presumes the validity of marital contracts in its several provisions allowing parties to "contract out" of the Act as desired. Section 13 of the Act provides: "Spouses may make one or more marital property agreements in which they agree to . . . classification of any of their property at variance with this Act." But cf. note 31 supra and note 74 infra.

57. UMPA, supra note 12, at vi.
58. Id. at vi-x.
59. Id. at vi.
60. Id. at vii.
61. Id.
62. Id. at 27.
63. Id. at vii.
64. Id. at 27.
property succession and create any mutually agreeable system for managing and controlling their property. Moreover, the Act provides that upon marital termination the court shall divide marital property according to the Act's provisions "unless the spouses have otherwise agreed in a marital property agreement." This provision demonstrates that the lawyers who drafted the Act presumed the availability of antenuptial and postnuptial contracts as a legally viable alternative to property succession statutes. This perception is quite problematic, as a close examination of relevant cases demonstrates.

B. The Distinction Between Marital Contracts and Ordinary Contracts

Despite the fact that marital contracts are theoretically valid and enforceable, in practice courts do not treat such contracts like ordinary contracts. In fact, courts do not even treat marital contracts as they treat contracts between persons in other confidential relationships, such as the attorney-client relationship. Instead, courts routinely disregard marital contracts, treating them as merely

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65. Id.
66. Id. at 28.
67. Id. at 34.
68. The writings of two prominent family law scholars, Homer Clark and Walter Weyrauch, similarly do not discuss the reluctance of courts to enforce marital contracts. Their works may, as a consequence, fail to provide a comprehensive analysis of the situation. See Clark, Antenuptial Contracts, supra note 21; Clark, The New Marriage, supra note 1; H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS (1974); Weyrauch, supra note 1; WYRAUCH & KATZ, supra note 4.
69. See notes 27 and 28 and accompanying text supra.
70. GLENDON, THE NEW FAMILY, supra note 29, at 67 n.60. Glendon notes this trend in the law, speaking of "the existing uncertainty about the extent to which antenuptial contracts will be enforced."
71. Id. Glendon notes duress and a presumption of concealment as two illustrations of the recent invalidation of marital contracts. For a discussion of these rationales, see notes 141-45 and 154-70 and accompanying text infra.
72. See note 70 supra.
73. A. CORBIN, CORBIN ON CONTRACTS §§ 1456, 1457 (1962).
74. See note 70 supra.
one factor among several to be considered in deciding what is fair between the parties. The Uniform Marriage and Divorce Act codifies this posture explicitly; section 307(a) of the Act directs the court to consider an antenuptial contract between the parties as merely one factor in dividing property incident to divorce.

The high degree of judicial discretion which courts exercise with respect to property settlement at divorce seems to have influenced the treatment of marital contracts. Judges apparently feel that they should be able to construe marital contracts with as much discretion as they have with respect to separation agreements and property division. This reasoning serves as justification for the close judicial scrutiny afforded marital contracts.

The major factor which distinguishes marital contracts from ordinary contracts, and provides judges with an opportunity to exercise their discretion is the lack of arm's length dealings in marital contracts. Whether the parties are contemplating marriage or are already married when they make their contract, they are in a relationship of mutual confidence that requires good faith, candor and sincerity regarding the marital contract.

73. See, e.g., In re Marriage of Thompson, 39 Colo. App. 400, 568 P.2d 98 (1977); Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972). See also § II.B & C supra.

74. UMDA § 307(a). The Act provides:

In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income.

Id.

75. See notes 50 and 51 and accompanying text supra.

76. Neely, supra note 25, at 9. Neely observes that judges today have a “less-than-healthy regard” for the inviolability of marital contracts. Id. Weitzman notes the extensive judicial discretion regarding marital contracts; observing that the family law standards of adequacy and fairness allow broad latitude for judges. L. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSE, LOVERS, AND THE LAW 355 (1981) [hereinafter cited as WEITZMAN].

77. See Neely, supra note 25, at 9. As discussed in notes 49 and 50, the usual method of property division upon divorce is by equitable distribution. Similarly, judges have broad discretion regarding the enforcement of separation agreements. LINDEY, supra note 21, at 3-4.


relationship provides a greater opportunity for fraud than does the typical commercial, or arm's length relationship.\textsuperscript{80} Inherent risks exist in the formation of marital contracts when two people, who are in positions of trust, have very different legal and business experience.\textsuperscript{81} Courts have responded to the possibility of abuse of a confidential relationship by closely scrutinizing marital contracts.\textsuperscript{82}

Traditionally, the state controlled the marriage relation and all its incidents.\textsuperscript{83} The rationale for extensive state regulation was the importance of preserving the traditional family.\textsuperscript{84} The state set rigid obligations on the parties to achieve this end, such as the husband's responsibility for support and the wife's domestic responsibility.\textsuperscript{85} Some courts even characterized marriage as a union between the husband, the wife and the state.\textsuperscript{86} Ample precedent exists for intervention in the marital relation.\textsuperscript{87} Further, the state has an interest in ensuring that property settlements adequately provide for the parties so they will not become public charges.\textsuperscript{88}


\textsuperscript{80} Clark, \textit{Antenuptial Contracts}, \textit{supra} note 21, at 144; \textit{Weitzman, supra} note 76, at 344.

\textsuperscript{81} Clark, \textit{Antenuptial Contracts}, \textit{supra} note 21, at 144. Clark notes that often the prospective spouses are not equally knowledgeable about each others' financial position. \textit{Id.}

\textsuperscript{82} \textit{Weitzman, supra} note 76, at 344; \textit{Lindey, supra} note 21, at 8-3. Lindey notes that marriage is a unique civil contract which society controls strictly. \textit{Id.}

\textsuperscript{83} Glendon, \textit{Modern Marriage Law}, \textit{supra} note 1, at 443. Glendon notes the underlying assumption in turn of the century marriage law that "state regulation of [marriage] formation, organization and dissolution was proper." \textit{Id.} Clark observes the historical principle that marriage and all its incidents were subject to state control. Clark, \textit{The New Marriage, supra} note 1, at 442, citing Maynard v. Hill, 125 U.S. 190 (1888).

However, times are changing. Glendon notes "state regulation of the formation and dissolution of marriage [is] reduced, while regulation of the economic and child-related effects of marriage, . . . [is] expanded." Glendon, \textit{Modern Marriage Law, supra} note 1, at 444, citing M. Glendon, \textit{State, Law and Family Law in the United States and Western Europe}, chapters 2-6 (1977) [hereinafter cited as Glendon, \textit{State, Law and Family}].

\textsuperscript{84} \textit{Weitzman, supra} note 76, at 1-134; Lindey observes the state's vital concern for marriage and the organization of the family. He describes marriage as the foundation of society. \textit{Lindey, supra} note 21, at 8-4. \textit{See, e.g.,} Gonzalez v. Gonzalez, 6 Ill. App. 2d 310, 127 N.E.2d 673 (1955); \textit{In re De Pass}, 231 S.C. 134, 97 S.E.2d 505 (1957).

\textsuperscript{85} \textit{Weitzman, supra} note 76, at 23-97; Lindey, \textit{supra} note 21, at 90-22.

\textsuperscript{86} \textit{See} Ryan v. Ryan, 277 So. 2d 266, 273 (Fla. 1973). "It must be remembered that the state has always been considered a 'third party' or 'third interest' in divorce and the family tie." \textit{Id.} at 273. \textit{See also} Linneman v. Linneman, 1 Ill. App.2d 48, 116 N.E.2d 182 (1953); \textit{In re Dittman's Estate}, 232 Ind. 694, 115 N.E.2d 125 (1953).

\textsuperscript{87} Branca & Steinberg, \textit{Antenuptial Agreements Under California Law: An Examination of the Current Law and In Re Marriage of Dawley, 11 U.S.F.L. REV. 317 (1977) [hereinafter cited as Branca & Steinberg]. The authors note that courts impose rules on antenuptial contracts because of the importance of marriage. \textit{Id.} at 328 n.51. \textit{See notes} 78-88 and accompanying text \textit{supra}.

\textsuperscript{88} Glendon, \textit{State, Law and Family}, \textit{supra} note 83, at 170; \textit{see} Clark, \textit{Antenuptial Contracts, supra} note 21, at 150-51. \textit{See also} Unander v. Unander, 265 Or. 102, 105, 506 P.2d 719, 721 (1973). The
C. The General Requirements of Marital Contracts

The courts closely scrutinize marital contracts as shown by the various requirements the courts impose on antenuptial and postnuptial contracts. In general, courts follow a two step rule for determining the validity of marital contracts. First, the contract must be fair and reasonable in its financial provisions. Second, if the contract is not fair, the wealthier party must have fully disclosed, before contract formation, his or her finances to the party who did not receive a "fair" amount under the contract. However, even if the disclosure was inadequate, a court may uphold the contract if the less wealthy party had independent knowledge of the wealthier party's finances before contract formation. Therefore, this rule requires that marital contracts be substantively fair or, alternatively, procedurally fair.

In addition to meeting the scrutiny for substantive and procedural fairness, marital contracts must, like all contracts, be free of fraud, coercion and duress. Together these factors constitute a multitude of possible justifications for a court that decides to invalidate a marital contract and substitute its own judgment. Courts have not been hesitant to classify facts as falling within these exceptions.

1. Invalidation of Marital Contracts Because of Unfairness

Because of the alternate nature of the general rule for marital contracts, fairness is a threshold question for the determination of contract validity. If a court determines that a marital contract is fair, the court will enforce the contract even in the absence of disclosure or independent knowledge. However, courts
are quick to strike down an unfair contract when they find inadequate disclosure of a party's assets to the contractually disfavored party. 99

The term "fair" is subjective and not susceptible to a precise definition. 100 Courts will consider many factors in determining the fairness of a marital contract. 101 In deciding whether a marital contract is fair, courts will often compare what a spouse would have received under the otherwise applicable divorce statute with what that spouse would be receiving under the marital contract. 102 If the amount a spouse would receive under the marital contract varies greatly from the spouse's statutory entitlement, the court will consider the contract substantively unfair. 103 However, the main reason for the creation of a marital contract may have been to depart from the scheme of property division imposed by the statute. For example, when a marriage terminates by the death of one party, 104 the court will compare what the surviving spouse receives under the contract with the amount the spouse would receive under the applicable forced share statute. 105 A court will find that a contract is unfair when its terms provide a disproportionate benefit to one spouse. 106

Property division upon divorce is an equity determination, which involves many factors. 107 Even when couples have formally executed an agreement embodying their rights and obligations, courts often independently consider several factors in determining the fairness of the contract. 108 These factors include: (1) the situation of the parties; (2) the respective ages of the parties; (3) the respective property of the parties; (4) the parties' family ties; (5) all circumstances surrounding the contract's execution; (6) the length of the marriage; (7) both parties' understanding of the contract; and (8) the needs of the respective

99. LINDEY, supra note 21, at 90-56 to -58; Clark, Antenuptial Contracts, supra note 21, at 145.
100. See Clark, Antenuptial Contracts, supra note 21, at 145; LINDEY, supra note 21, at 90-53 to -54.
101. LINDEY, supra note 21, at 90-53.
103. See, e.g., Linker v. Linker, 28 Colo. App. 131, 133, 470 P.2d 921, 923 (1970), where the wife waived all statutory rights in her husband's estate of $100,000; Norris and Norris, 51 Or. App. 43, 624 P.2d 636 (1981), where the wife waived all her rights to the $750,000 her husband brought to the marriage.
104. E.g., Arnold v. Arnold, 261 Ark. 734, 746, 553 S.W.2d 251, 257 (1977). "The widow's rights would probably have been twice as valuable as the provision for her under the agreement." Id. See also Allison v. Stevens, 269 Ala. 288, 291, 112 So. 2d 451, 455 (1959) ("the value of the home which was devised to the complainant by the testator is greatly disproportionate to the value of complaintant's rights in the estate of the testator." Id.).
105. See note 104 supra.
106. See cases cited in notes 102 and 103 supra.
107. See notes 50 and 51 and accompanying text supra. For examples of cases in which antenuptial contracts operative at divorce were held void, see note 71 supra.
108. LINDEY, supra note 21, at 90-53. See, e.g., In re Estate of Hillegass, 431 Pa. 144, 244 A.2d 672 (1968); In re Estate of Vallish, 431 Pa. 88, 244 A.2d 745 (1968); In re Estate of Gelb, 425 Pa. 117, 228 A.2d 367 (1967).
spouses.\textsuperscript{109} In addition, a court may weigh other factors, such as the number of children of each spouse, the life experience of the parties and the marital standard of living of the parties.\textsuperscript{110} Thus, a court has many subjective factors upon which to base its decision to invalidate a marital contract.

One common type of marital contract involves mutual waivers of any interest in the other spouse’s estate upon death.\textsuperscript{111} Courts tend to invalidate complete waivers of rights in the decedent spouse’s estate when the estate is substantial.\textsuperscript{112} Similarly, courts have also invalidated alimony provisions if the terms provide disproportionate benefits to the spouses.\textsuperscript{113} Thus, the mere existence of a significant difference between the spouse’s rights without the marital contract versus those under the contract often renders the entire contract unfair and subsequently unenforceable.\textsuperscript{114}

Statutes operative upon divorce and death reflect what legislators determine to be fair.\textsuperscript{115} In this sense, the law determines legal fairness, namely, what will achieve justice between the parties. However, parties who enter into marital contracts do so to avoid the operation of otherwise applicable law.\textsuperscript{116} Many reasons may exist for avoiding the reach of these statutes.\textsuperscript{117} The law may not suit individual situations, with varying needs and responsibilities.\textsuperscript{118} By entering

\textsuperscript{109} Lindey, supra note 21, at 90-53.

\textsuperscript{110} Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); In re Estate of Kester, 486 Pa. 349, 405 A.2d 1244 (1979).

\textsuperscript{111} Lindey, supra note 21, at 90-31. One court notes that antenuptial contracts are usually designed to affect a spouse’s statutory rights of inheritance. In re Estate of Harrison, 456 Pa. 356, 359, 319 A.2d 5, 7 (1974).

\textsuperscript{112} Linker v. Linker, 28 Colo. App. 131, 470 P.2d 921 (1970) ($100,000); In re Estate of Grassman, 183 Neb. 147, 158 N.W.2d 675 (1968) ($56,000); Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969) ($90,000). In striking down a waiver contract, one court noted the provision for the surviving wife was disproportionate to the husband’s wealth. Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969). In this case, the wife waived all rights in the husband’s estate when the estate was worth $90,000.

\textsuperscript{113} Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976). A provision allowing $1,000 per month for support is unfair when the husband is worth $3 million. Id. at 1115. Wilson v. Wilson, 554 S.W.2d 532 (Mo. Ct. App. 1962). A provision allowing only $5,000 for support in total when the husband is worth $100,000 is also unfair. Id. at 537. Bauer v. Bauer, 1 Or. App. 504, 464 P.2d 710 (1970). A provision for only $50 per month alimony is similarly unfair when the husband is worth $120,000. Id. at 506, 464 P.2d at 711.

\textsuperscript{114} See notes 102-06 and accompanying text supra.

\textsuperscript{115} Fellows, Simon & Rau, Public Attitudes About Property Distribution At Death and Intestate Succession Laws in the United States, Am. B. Found. Research J. 319, 321 (1978). Intestacy statutes, however, reflect what the testator would have wanted. Id. at 321. See note 197 and accompanying text infra.

\textsuperscript{116} Lindey, supra note 21, at 90-31. Lindey observes that parties enter an antenuptial contract to avoid the operation of law upon their property. Id. See In re Estate of Strickland, 181 Neb. 478, 149 N.W.2d 544 (1967); In re Perelman’s Estate, 438 Pa. 112, 263 A.2d 375 (1970).

\textsuperscript{117} Glendon, State, Law and Family, supra note 83, at 171. Glendon notes that couples may require differing financial arrangements depending on whether it is a first marriage, whether both spouses work, whether either spouse has children from a previous marriage and whether either spouse has substantial property. Id. She further notes the possible importance of family, regional and religious custom. Id.

\textsuperscript{118} Id.
into a marital contract, a couple creates its own marital equities.\footnote{119} A marital contract is thus presumptively unfair under the law merely because it varies from statutory standards of fairness.\footnote{120} Many marital contracts are therefore presumed by courts to be unfair, and thus courts require disclosure for validity.\footnote{121}

2. Nondisclosure Leads to Invalidation

As previously noted,\footnote{122} the basic rule for the validity of marital contracts provides that substantively unfair contracts may be valid if they are fairly made.\footnote{123} This procedural fairness requirement is rooted in the concept of disclosure.\footnote{124} If a contract is unfair, a court will uphold it only if the favored party under the contract has made a full disclosure of the nature and value of his property.\footnote{125} A finding of disclosure is conclusive;\footnote{126} if disclosure was proper, the contract is valid regardless of fairness.\footnote{127}

Courts stress the requirement of disclosure because a confidential relationship exists between the parties.\footnote{128} The objective of disclosure is to prevent overreaching\footnote{129} between parties, when trust may make one party vulnerable to the other.\footnote{130} As one court has stated: “the real test in a determination of the validity of an antenuptial agreement is whether there was overreaching, that is, whether in the atmosphere and environment of the confidential relationship there was unfairness or inequity in the procuring of the agreement.”\footnote{131} Thus, in looking at the disclosure between the parties, the court will subjectively determine if the making of the contract was fair.\footnote{132} While in some cases a finding of overreaching

\footnote{119. Gartner v. Gartner, 246 Minn. 319, 323, 74 N.W.2d 809, 813 (1956) (these contracts "exclude the operation of law in respect to the property rights of each insofar as these rights are covered by the contract"); and Estate of Slicht, 467 Pa. 619, 623, 359 A.2d 777, 775 (1975). See note 105 supra.}

\footnote{120. \textit{In re} Estate of Strickland, 181 Neb. 478, 487, 149 N.W.2d 344, 353 (1967). The court notes that every antenuptial agreement is designed to be unfair by the standards set forth in the statute of descent and distribution. \textit{Id.}}

\footnote{121. See notes 90-94 and accompanying text supra.}

\footnote{122. See notes 90-94 and accompanying text supra.}

\footnote{123. \textit{Linney, supra} note 21, at 90-52; \textit{Clark, Antenuptial Contracts, supra} note 21, at 145.}

\footnote{124. \textit{Linney, supra} note 21, at 90-54.}


\footnote{126. \textit{Linney, supra} note 21, at 90-54.}

\footnote{127. \textit{Id.}}

\footnote{128. See notes 78-82 and accompanying text supra.}

\footnote{129. \textit{Linney, supra} note 21, at 90-55.}

\footnote{130. \textit{Weitzman, supra} note 76, at 344; \textit{Clark, Antenuptial Contracts, supra} note 21, at 144.}


\footnote{132. \textit{Id. See also} Linker v. Linker, 28 Colo. App. 151, 153, 470 P.2d 921, 923 (1970), where the wife was “overreached” because she understood little English, did not understand the effect of the agreement, and had no knowledge of the husband's assets. \textit{Wilson v. Wilson, 354 S.W.2d 532 (Mo. Ct. App. 1962); Kosik v. George, 255 Or. 15, 452 P.2d 560 (1969).}}
may be justified, courts tend to overuse this subjective determination to invalidate contracts to which parties have freely agreed.\textsuperscript{133}

This high degree of judicial scrutiny is apparent in cases where courts have found inadequate disclosure even though a disfavored party has had general knowledge of the other party's assets.\textsuperscript{134} Courts are split on the issue of whether general knowledge of the other party's assets fulfills the general disclosure requirement.\textsuperscript{135} In one case, the parties had been married for a year and a half, had kept joint bank accounts and had filed a joint income tax return.\textsuperscript{136} Nevertheless, the court held that the husband inadequately disclosed his assets to his former wife, pursuant to the formation of an antenuptial agreement prior to their remarriage.\textsuperscript{137} Thus, the wife's knowledge gained from the previous marriage was not general knowledge and did not fulfill the disclosure requirement.\textsuperscript{138}

Another way in which courts expand the disclosure requirement is through shifting the burden of proof as to the validity of the contract.\textsuperscript{139} Usually, the burden of proof as to the invalidity of a marital contract is on the person who challenges it.\textsuperscript{140} However, once a court finds that a marital contract is substantively unfair because of disproportionate provisions, a presumption of intentional concealment arises.\textsuperscript{141} To rebut a presumption of intentional concealment,  

\textsuperscript{133} See notes 131 and 132 and accompanying text supra and notes 134-43 and accompanying text infra.  
\textsuperscript{134} See, e.g., Norris and Norris, 51 Or. App. 43, 624 P.2d 636 (1981), where the parties agreed to keep the money brought to the marriage separate, and the wife knew the husband was worth $468,000, when he was actually worth $750,000; Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969), where the parties waived all rights in the other's estate, and wife knew of the husband's real estate holdings, when the husband was actually worth $100,000; Arnold v. Arnold, 261 Ark. 734, 553 S.W.2d 251 (1977), where the parties had previously been married and had filed a joint tax return; and Linker v. Linker, 28 Colo. App. 131, 470 P.2d 921 (1970), where the wife had general knowledge of her husband's assets.  
\textsuperscript{135} LINDEY, supra note 21, at 90-95. Compare cases cited in note 134 supra with cases cited in note 98 supra.  
\textsuperscript{136} Arnold v. Arnold, 261 Ark. 734, 553 S.W.2d 251 (1977).  
\textsuperscript{137} Id.  
\textsuperscript{138} Id.  
\textsuperscript{139} LINDEY, supra note 21, at 90-109. See note 141 and cases cited infra.  
\textsuperscript{140} LINDEY, supra note 21, at 90-108.  
\textsuperscript{141} Id. at 90-109.  

If the agreement is unjust and unreasonable to the wife on its face, or is clearly disproportionate to the husband's wealth, a presumption of intentional concealment arises. The burden shifts, and it is then incumbent on those asserting the validity of the agreement to show that the wife entered into it with full knowledge of all the material facts affecting her interests.  

\textit{Id.} See also Hartz v. Hartz, 248 Md. 47, 53, 234 A.2d 865, 871 (1967), where the court noted "the burden is cast upon the one who relies on the agreement to prove that it was entered into voluntarily, freely and with full knowledge of its meaning and effect;" Wilson v. Wilson, 170 A.2d 679 (Me. 1961), in which the court stated "the person claiming under the contract has the burden of presenting evidence tending to make the nonexistence of fraud as probable as its existence;" Kosik v. George, 253 Or. 15, 18, 452 P.2d 560, 563 (1969), where the court placed "the burden on those claiming under it in his right to show that there was a full knowledge and understanding on the part of the wife at the time of execution of all the
the party asserting the validity of the contract must prove that the other party executed the contract "with full knowledge of all the material facts affecting her interests."142 This simple shift in the burden of proof prevents courts from enforcing marital contracts.143 The presumption assumes nondisclosure and unfair concealment; the balance is against validity.144 Moreover, some courts require rebuttal of this presumption by clear and convincing evidence.145

Courts have also strengthened disclosure requirements by placing an affirmative duty to inform regarding finances on the favored party under the contract, rather than treating the parties as equals.146 Courts have even required the favored party under the contract to ensure that the other party fully understands the terms of the contract.147 This duty requires explanation of the contract's effect on the disfavored party to the disfavored party.148 Such an explanation is especially necessary if the court finds a great disparity in education149 or business experience150 between the parties. Furthermore, courts often will not uphold a marital contract if the disfavored party did not have the benefit of independent advice to protect against overreaching.151 Some courts prefer that couples satisfy this requirement through independent consultation with legal counsel.152 Nevertheless, courts have held that couples may fulfill the requirement by consultation with any independent party.153

facts materially affecting her interests;" and In re Estate of Strickland, 181 Neb. 478, 485, 149 N.W.2d 344, 352 (1967), in which the court stated "[t]he burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured."


143. See notes 141 and 142 supra.

144. See note 141 supra.


148. See Friedlander v. Friedlander, 80 Wash. 2d 293, 299, 494 P.2d 208, 214 (1972). An Oregon court explained that it was the husband's duty to fully inform his wife of the rights she was surrendering. Kosik v. George, 253 Or. 15, 18, 452 P.2d 560, 565 (1969). See also Allison v. Stevens, 269 Ala. 288, 112 So. 2d 451 (1959), where an Alabama court required the favored party to ensure that the disfavored party had full knowledge of her interest in the estate. Id. at 291, 112 So. 2d at 453.


153. Allison v. Stevens, 269 Ala. 288, 112 So. 2d 451 (1959); Friedlander v. Friedlander, 80 Wash. 2d
3. Invalidation Through Duress

A third factor which many courts consider in determining the validity of marital contracts is duress. One court defines duress as overcoming someone's will by pressure which forces him to comply with demands he would not ordinarily succumb to. A finding of duress generally entitles the exploited party to void the contract.

Courts define duress more expansively in the area of marital contracts than they do in other areas of contract law. The general rule regarding marital contracts is that the disfavored party under the contract must not be too hurried into the contract. Thus, in their analysis, courts examine all the circumstances surrounding the execution of the contract as well as the possibility of the more traditional types of undue influence, such as physical and psychological threat. Courts have found duress when the making of the contract and the marriage have occurred too closely together. Courts have even extended the concept of duress to encompass a situation where a woman entered into a marital contract to avoid possible embarrassment before friends. Courts also void marital

293, 299, 494 P.2d 208, 214 (1972). The advising party must not be allied with the other contracting party. For example, the husband, his lawyer or his brother are not independent parties to the wife. Id.


156. WEITZMAN, supra note 76, at 344.

157. See notes 158-70 and accompanying text infra. See also GLENDON, THE NEW FAMILY, supra note 29, at 67 n.60.

158. LINDEY, supra note 21, at 90-88. See In re Maag's Estate, 119 Neb. 237, 228 N.W. 537 (1930); White v. White, 112 Neb. 850, 201 N.W. 662 (1924).

159. See, e.g., Petru v. Petru, 4 Ill. App. 2d 1, 12, 123 N.E.2d 352, 357 (1954). The court reviewed Illinois cases concerning marital contracts and noted:

These cases reveal that courts consider all the circumstances surrounding the marriage of the parties, their respective ages, abilities, experience and understanding, and the period of time which elapses between execution of the contract and the marriage. It has not been expressly stated, but obviously what courts have perceived in the case of antenuptial agreements made a day or two before marriage is the opportunity for undue pressure on the part of the husband.

Id. at 12, 123 N.E.2d at 357. See LINDEY, supra note 21, at 90-88.


161. Wilson v. Wilson, 354 S.W.2d 532 (Mo. Ct. App. 1962). In that case, immediately after the wedding ceremony, and in the presence of guests, the husband took the marital contract out of the glove compartment and asked the wife to sign it. The wife testified that although "she had never seen the instrument before, . . . because she did not want to create a scene before the guests, she signed it." Id. The wife's possible embarrassment operated to void the contract. Id.
contracts on the grounds of duress when one spouse holds the marital contract out as a precondition to the marriage.\textsuperscript{162}

A recent Florida case presents an extreme example of a court's willingness to find duress.\textsuperscript{163} In that case, the husband demanded that his prospective wife sign an antenuptial contract within twenty four hours of the wedding.\textsuperscript{164} The court noted that after all the wedding arrangements were set, the husband refused to participate in the ceremony until the prospective wife signed the contract.\textsuperscript{165} In its analysis, the court created a presumption of undue influence, based on the "coercive circumstances" and the fact that the contract provided the spouses with disproportionate benefits.\textsuperscript{166} Similar to a presumption of intentional concealment, a presumption of undue influence is difficult for the contractually favored party to rebut.\textsuperscript{167} Although the woman in the present case had been married twice previously, and had for a year discussed with her future husband the possibility of a marital contract, the husband could not rebut the presumption of undue influence.\textsuperscript{168} The court stated that the husband acted unfairly by placing the wife in a position in which she faced the possibility of losing a lifetime of great wealth.\textsuperscript{169} According to the court, the wife was unduly influenced by "a sudden stark awareness of the potential immediate loss of a future life of enormous grandeur."\textsuperscript{170}

D. The Importance of Enforcing Marital Contracts

Courts no longer consider marital contracts to be against public policy.\textsuperscript{171} In fact, marital contracts can do much to induce marital tranquility and avoid disputes.\textsuperscript{172} Theoretically, parties have the right to contract regarding their property; nevertheless, in practice, this right is often illusory.\textsuperscript{173} Thus, courts
give parties the right to enter into marital contracts, but later take this right away.\textsuperscript{174}

Although prevention of the abuse of marital contracts is important,\textsuperscript{175} many of the requirements imposed by the courts exceed this purpose.\textsuperscript{176} The basic rule of fairness or disclosure is the standard for compliance.\textsuperscript{177} However, many courts have significantly and needlessly expanded this requirement.\textsuperscript{178} General knowledge by one spouse of his partner's wealth seems adequate to safeguard against abuse.\textsuperscript{179} Classifying possible embarrassment\textsuperscript{180} or loss of riches\textsuperscript{181} as duress is an expansive exercise of judicial discretion. Moreover, a finding of duress by courts based merely on the fact that the parties executed the contract shortly before the wedding\textsuperscript{182} or the fact that the execution of the contract was a precondition of the marriage\textsuperscript{183} is similarly difficult to justify as actually being duress. The courts' invalidation of marital contracts through such an interpretation of contract requirements significantly expands the stated requirements of fairness or disclosure.\textsuperscript{184} In addition, the procedural burdens imposed by the courts regarding disclosure\textsuperscript{185} and the subjectivity\textsuperscript{186} expand the general requirements of marital contracts. The marital relationship should not deprive the parties of their autonomy and their right to contract as individuals.\textsuperscript{187}

Courts should enforce marital contracts whenever the parties act voluntarily and have a general appreciation of their conduct.\textsuperscript{188} Parties who have thoughtfully entered into such contracts should not be permitted later to disavow their contractual duties.\textsuperscript{189} Moreover, such contracts are no less voluntary because they resulted from one party's insistence on the contract as a precondition to the wedding or from a fear of a loss of riches or possible embarrassment.\textsuperscript{190} The creation of the contract is still a voluntary act. Further, inadequate disclosure

\begin{footnotesize}
\begin{enumerate}
\item[174.] Interspousal Relations, supra note 36, at 159.
\item[175.] See notes 78-82 and accompanying text supra.
\item[176.] See § II.B & C supra.
\item[177.] See notes 91-94 and accompanying text supra.
\item[178.] See § II.B & C supra.
\item[179.] See note 93 and accompanying text supra.
\item[180.] See note 161 and accompanying text supra.
\item[181.] See notes 169-70 and accompanying text supra.
\item[182.] See note 160 and accompanying text supra.
\item[183.] See note 162 and accompanying text supra.
\item[184.] See § II.B & C supra.
\item[185.] See notes 141-44 and accompanying text supra.
\item[186.] See notes 100-10 and 132-33 and accompanying text supra.
\item[187.] See generally WETZMAN, supra note 76.
\item[188.] Rocker v. Rocker, 13 Ohio Misc. 199 (1967). The court noted that the marital contract should be upheld because the woman knew what she was doing and did it voluntarily. Id. at 208.
\item[189.] Id.
\item[190.] Barnhill v. Barnhill, 386 So. 2d 749 (Ala. Civ. App. 1980). In that case, the prospective husband issued an ultimatum of "no contract, no wedding." While the woman subsequently signed with reluctance, it was still very much a voluntary act. Id. at 752.
\end{enumerate}
\end{footnotesize}
seems irrelevant to the disclosure requirement when the marital contract calls for a complete waiver of rights.\footnote{191} If a husband freely agrees to relinquish all interest in his wife's assets, the extent of her wealth is not important.\footnote{192}

A strong similarity exists between wills and marital contracts; both embody the clear intent of a party as to how the party desires to distribute his property upon the occurrence of a future event.\footnote{193} Courts are reluctant to rewrite a will;\footnote{194} in contrast, however, judges seem to be quite willing to invalidate a marital contract. Thus, with respect to marital contracts, the judge may have an impact on the ultimate disposition of the property. It is true that wills are executed with special formalities;\footnote{195} nevertheless, marital contracts are also solemn legal transactions.\footnote{196} The same reluctance of courts to vary provisions of a will should extend to the judicial treatment of marital contracts. The same personal freedom to determine the disposition of one's own property is in question with regard to both wills and marital contracts.

Intestate succession presents a special problem. In intestacy, a decedent dies without a will. Intestacy statutes attempt to reflect the distributive intent of the decedent.\footnote{197} The state attempts to do what the decedent would have wanted.\footnote{198} Marital contracts, on the other hand, spell out the intent of the decedent spouse. Theoretically, marital contracts obviate the need for intestacy statutes. However, courts may refuse to enforce a marital contract and instead apply the intestacy law.\footnote{199} Such an application violates the very purpose of the intestacy law which attempts to reflect the intent of the decedent.

Protection against possible abuses of a confidential relationship is important. However, the remedies imposed by U.S. courts have exceeded justifiable bounds by interfering with a couple's freedom to contract.\footnote{200} In addition, the unpredict-
ability of rulings regarding marital contracts may produce the undesirable result of encouraging suits by disaffected parties who no longer wish to honor their agreements.

III. THE ENFORCEMENT OF MARRIAGE SETTLEMENTS IN GREAT BRITAIN

Like the United States, Great Britain has a tradition of dealing with marital contracts. In Great Britain, spouses or prospective spouses may not contract regarding the economic consequences of a future possible divorce. Such contracts are void as against public policy, similar to the policy that formerly existed in the United States before the recent trend finding marital contracts contemplating divorce valid. However, prospective spouses may contract in advance regarding termination of their marriage by death. In Great Britain marital contracts are subsumed within the wider concept of "marriage settlements."

A. Definition of Marriage Settlement

Marriage settlements, which have been popular for centuries in Great Britain, are more than contracts between spouses or prospective spouses. Such settlements, which are "deeply rooted in the customs of the propertied classes," traditionally allow property to be kept within a family. Parliament encourages these settlements through substantial estate tax advantages. A classic example of a marriage settlement is when some benefactor, such as a spouse or his family, places income producing property, such as money or land, in a trust from which the spouses receive income for life. Upon the death of the surviving spouse, the children receive the trust property.

Any property transaction which makes some "continuing provision" relating to marriage is a marriage settlement. British courts interpret this definition of

203. See § 1 supra.
204. Bromley, supra note 32, at 540.
205. See id. at 538-41.
207. On marriage settlements generally, see Bromley, supra note 92, at 537-43; S. Cretney, Principles of Family Law 170-72 (1973) [hereinafter cited as Cretney]; Rayden's, supra note 33, at 792-94.
209. Puxton, supra note 206, at 275.
210. J. Raymond & W. Martin, Every Woman's Lawyer 58 (1965) [hereinafter cited as Raymond & Martin]. As the authors note: "By far and away the most important [tax advantage] is the potential saving of estate duty." Id.
211. Stone, supra note 35, at 7.
212. Id.
213. Puxton, supra note 206, at 276. A settlement requires property to be "settled" upon some beneficiary, usually the parties or their children. Rayden's, supra note 33, at 792-93.
a marriage settlement broadly,214 and include within the concept of a marriage settlement such varied transactions as: (1) a husband's executing an insurance policy on his own life for his wife's benefit;215 (2) the husband's taking sole title to the house when the wife has made a contribution to the purchase price;216 and (3) any trust containing property.217 A settlement does not, however, involve an absolute assignment or gift of property.218 The settlement cannot give rights to any beneficiary in fee simple;219 there must be some restrictions.220

Marital contracts constitute only one species of marriage settlement. While marriage settlements traditionally were made by the couples' respective families,221 the parties themselves may make settlements before or after marriage.222 Such marital contracts make a continuing provision for a spouse's benefit.223

B. British Courts' Power to Vary Settlements Upon Divorce

While British couples may not contract regarding divorce,224 British courts have extensive discretionary powers regarding distribution of property upon divorce.225 Included within these broad powers is the power to vary a couple's marriage settlement upon divorce.226 The 1973 Matrimonial Causes Act (MCA)227 provides that, upon divorce, the courts in their discretion may vary marriage settlements for the benefit of either spouse or any children from the marriage.228 However, the MCA provides that a court should vary marriage

214. Bromley, supra note 32, at 538; Cretney, supra note 207, at 170; Rayden's, supra note 33, at 792-94.
216. Puxton, supra note 206, at 277.
217. Id. at 276.
218. Bromley, supra note 32, at 539; Rayden's, supra note 33, at 793, 795.
219. Bromley, supra note 32, at 539.
220. Rayden’s, supra note 33, at 793. Examples include restrictions upon powers of alienation, of devising, and of transmitting. Id.
221. Raymond & Martin, supra note 210, at 57; Stone, supra note 35, at 7.
222. Raymond & Martin, supra note 210, at 60. The authors note:

Of course, it is possible for one of the parties to the marriage him — or her — self to make an outright gift to the other spouse or a settlement on occasion of marriage. The same rules apply as in the case of a gift or settlement made by any other person.

Id.

223. Bromley, supra note 32, at 539.
224. See note 201 supra.
225. Hahlo, Matrimonial Property Regimes: Yesterday, Today and Tomorrow, 11 Osgoode Hall L.J. 455, 475 (1973) [hereinafter cited as Hahlo]. He notes that the courts have “far reaching discretionary powers” upon divorce to redistribute property and order the payment of maintenance. Id.
227. The Matrimonial Causes Act of 1973 is law in Great Britain and governs all matrimonial proceedings including divorce, annulments, and separations. For a discussion of this Act and other recent reforms in British law, see Glendon, State, Law and Family, supra note 83, at 148-54, 192-201, 255-58, 280-82.
228. Berklin & Young, supra note 226.
settlements only when necessary to provide relief unavailable from any other source, such as individually owned property.\textsuperscript{229} Thus, under the MCA, a court examines marriage settlements when necessary in dividing the property pursuant to divorce.\textsuperscript{230}

In examining a marriage settlement, the MCA requires that British courts consider several factors.\textsuperscript{231} As to each party, the court must examine: present and future resources, needs and responsibilities; marital standard of living; age, physical and mental condition; contributions to the family's welfare; and possible loss of future pension rights.\textsuperscript{232} The court thereby attempts to place each party in the same financial position as before the divorce.\textsuperscript{233} However, such an object is virtually impossible for the court to attain unless the couple is wealthy, because the same amount of money after divorce now must support two households.\textsuperscript{234} Because the court must subjectively weigh factors, the court has broad discretion to vary marriage settlements upon divorce.\textsuperscript{235}

C. British Courts' Power to Vary Settlements Upon Death

The British courts also have power to vary marriage settlements after the death of a spouse.\textsuperscript{236} The Inheritance (Provision for Family and Dependents) Act of 1975\textsuperscript{237} (IA) permits the variation of marriage settlements when one spouse has died,\textsuperscript{238} for the benefit of the surviving spouse, any child of the marriage or the entire family.\textsuperscript{239}

The IA is designed to protect the surviving dependents of a decedent
spouse.\textsuperscript{240} When a spouse dies, the surviving spouse or any other dependent may apply to the court for financial assistance.\textsuperscript{241} While Great Britain does give the surviving spouse and children rights of intestate succession,\textsuperscript{242} the dependents have no right of statutory forced share\textsuperscript{243} if they are excluded from the deceased's will.\textsuperscript{244} Thus, the IA helps to prevent possible destitution of surviving dependents.\textsuperscript{245}

Under the IA, the surviving spouse is entitled to a reasonable financial benefit, whether or not required for his or her maintenance.\textsuperscript{246} In contrast, the children or family may only receive reasonable maintenance.\textsuperscript{247} The determination of what is reasonable, whether for maintenance or not, is entirely within the court's discretion.\textsuperscript{248} The court must consider the same factors in determining the possible variation of marriage settlements in the case of death as it must consider in the determination of the possible variation of marriage settlements upon divorce.\textsuperscript{249} Again, the court uses its discretion in deciding what is "reasonable" for the applicant.

IV. A Possible Civil Law Solution to the Widespread Unenforcement of Marital Contracts in the United States

Under present U.S. law, marital contracts do not fulfill their promise as important mechanisms for embodying marital expectations. Although courts should police all contracts for fraud,\textsuperscript{250} U.S. courts go much further and tend to void a marital contract merely when they consider the contract to be a bad bargain.\textsuperscript{251} The U.S. courts too often substitute their idea of fairness for the spouses' contractually stated idea of fairness.\textsuperscript{252} Such an approach, while ensuring against fraud, promotes the loss of the great potential of marital contracts to allow self-determination of one's own marital property.

\textsuperscript{240} Inheritance Act § 1; Stone, supra note 35, at 161-64.
\textsuperscript{241} Inheritance Act § 1; Stone, supra note 35, at 162.
\textsuperscript{242} See Hahlo, supra note 225, at 471, for a discussion of how the Parliament has "substantially improved the rights of the surviving spouse on the death intestate of the first-dying spouse." Id.
\textsuperscript{243} A statutory forced share is a share of the decedent's estate that is guaranteed to the surviving spouse; this share is indefeasibly vested against any testamentary disposition. Rheinstein & Glendon, supra note 193, at 96.
\textsuperscript{244} Stone, supra note 35, at 159.
\textsuperscript{245} See id. at 162-64.
\textsuperscript{246} Inheritance Act § 1; Stone, supra note 35, at 162. As noted infra, the court will consider the same factors as noted in § III.B and including the spouse's conduct and any other relevant matter in determining a reasonable provision. Id. at 163. The court must also consider what the applicant reasonably might have received if the marriage had terminated by divorce and not death. Id.
\textsuperscript{247} Inheritance Act § 1; Stone, supra note 35, at 162.
\textsuperscript{248} Inheritance Act § 1; Stone, supra note 35, at 162-64.
\textsuperscript{249} Inheritance Act § 3; Stone, supra note 35, at 163. See section V(B) supra.
\textsuperscript{250} Glendon, State, Law and Family, supra note 83, at 170.
\textsuperscript{251} See § II supra.
\textsuperscript{252} Id.
One possible solution to this dilemma is enforcement of marital contracts by courts unless the contracts are unconscionable.\textsuperscript{253} Such a rule would alter the level of scrutiny U.S. courts give to marital contracts and permit invalidation of only the most extreme marital contracts.\textsuperscript{254} However, this proposal would not solve the difficulty of the widespread misuse of judicial discretion. Any workable solution must attempt to change the widespread judicial attitude that the judiciary has the right to determine the validity of marital contracts in derogation of the rights of the spouses.

A. Civil Law Alternative Approach to Enforcement of Marital Contracts

Civil law jurisdictions, such as France and Quebec,\textsuperscript{255} present an alternative approach to the use of marital contracts. Unlike the common law systems of the United States\textsuperscript{256} and Great Britain, which impose systems of separate property on couples,\textsuperscript{257} the systems of France and Quebec encourage couples to determine, before marriage, how their property will be owned after marriage.\textsuperscript{258} French and Quebec couples can pick their own “matrimonial regime,” which will govern property rights after marriage.\textsuperscript{259} The regime chosen by a couple determines the division of marital property upon dissolution, whether by divorce or by the death of one spouse.\textsuperscript{260} Thus, couples from France and Quebec may determine to a great extent the economic consequences of divorce, in advance of the marriage.\textsuperscript{261}

1. Legal Regimes Governing Marital Property

The systems of France and Quebec allow significant contractual freedom\textsuperscript{262} by permitting prospective spouses to choose their desired marital property system.

\textsuperscript{253} Clark, Antenuptial Contracts, supra note 21, at 151 n.50.
\textsuperscript{254} Id.
\textsuperscript{255} Quebec, Canada, is the single civil law province in common law Canada. One author refers to Canada as “bi-systemic,” but with little interaction between the two systems. Brierley, Husband and Wife in the Law of Quebec: A 1970 Conspectus, in STUDIES IN CANADIAN FAMILY LAW 795, 796 (D. Mendes da Costa ed. 1972) [hereinafter cited as Brierley]. Quebec models itself on the French system. Id. at 796.
\textsuperscript{256} Only the states of Arizona, California, Idaho, Louisiana, Nebraska, New Mexico, Texas, and Washington have adopted the community property approach. GLENDON, STATE, LAW AND FAMILY, supra note 83, at 147.
\textsuperscript{257} Interspousal Relations, supra note 36, at 149; F. Lawson, A. Anton & L. Brown, AMOS AND WALTON’S INTRODUCTION TO FRENCH LAW 253 (1967) [hereinafter cited as AMOS AND WALTON’S]. Quebec: C. civ. art. 1260; Brierley, supra note 255, at 819; Freedman, The Juridical Capacity of The Married Woman In Quebec: In Relation to Partnership of Acquests and Recent Amendments to the Civil Code, 21 McGill L.J. 518, 522 (1975) [hereinafter cited as Freedman].
\textsuperscript{258} France: C. civ. Title V. Contract of Marriage and Matrimonial Regimes; Interspousal Relations, supra note 36, at 149; AMOS AND WALTON’S, supra note 255, at 253. Quebec: C. civ. art. 1260; Brierley, supra note 255, at 819; Freedman, supra note 258, at 522.
\textsuperscript{259} France: C. civ. art. 1441; AMOS AND WALTON’S, supra note 258, at 266. Quebec: Brierley, supra note 255, at 839.
\textsuperscript{260} GLENDON, STATE, LAW AND FAMILY, supra note 83, at 170.
\textsuperscript{261} Interspousal Relations, supra note 36, at 149-53; AMOS AND WALTON’S, supra note 258, at 269.
through a marriage contract prepared before marriage.\textsuperscript{263} The Civil Codes of both countries provide several alternative regimes with attendant rules for the disposition of marital property.\textsuperscript{264} These alternatives are a legislative response to the differing needs throughout the population.\textsuperscript{265} If the couple does not choose an alternative regime, both France and Quebec impose a "legal regime" which will operate automatically.\textsuperscript{266} The legal regime will operate on the spouses only if the spouses fail to choose an alternative regime through contract.\textsuperscript{267} Furthermore, the Civil Codes of both France and Quebec allow the creation of individual matrimonial regimes beyond those listed in the Civil Codes.\textsuperscript{268} The limitations on these individualized regimes are basically only those of law and morals.\textsuperscript{269}

\textsuperscript{263} France: C. civ. arts. 1387, 1395; AMOS AND WALTON'S, supra note 258, at 269. Quebec: C. civ. art. 1260; Brierley, supra note 255, at 819.

\textsuperscript{264} France: C. civ. arts. 1497-1525, Regime of Community of Moveables and Acquests (all of the assets of the spouses fall into community property, with the exception of immovable owned before marriage or later received through succession or gift); C. civ. art. 1526, Regime of Universal Community, (all property is community property); C. civ. arts. 1536-1568, Regime of Separate Property (each spouse keeps all own property separate, while each contributes to household expenses); C. civ. arts. 1569-1581, Regime of Participation in Acquests, (basic separation of property which, at dissolution, terminates in a community).

Quebec: C. civ. arts. 1268-1425, Community of Moveables and Acquests (property owned before marriage and received through succession is separate, while all property earned or received during marriage is community property, including fruits and revenues from separate property); C. civ. arts. 1436-1450, Separation of Property (each spouse keeps all own property separate, while each contributes to household expenses).

\textsuperscript{265} Interspousal Relations, supra note 36, at 148.

\textsuperscript{266} France: C. civ. arts. 1387 and 1400; Quebec: C. civ. art. 1260.

\textsuperscript{267} France: Interspousal Relations, supra note 36, at 149. The authors note that the French legal regime is "stop gap" law, to be applied only if the parties have not provided for their own law. Id. Quebec: Brierley, supra note 255, at 819. In fact, marital contracts to choose alternative regimes are very popular in Quebec. McLeod & Baker, supra note 39, at 27-28. They note "a sizeable percentage of the population" contracts out of the legal regime. Id. Fifty-three and three tenths percent of couples contracted out of the legal regime between July 1, 1970 and Dec. 31, 1973. Jacobson, Recent Proposals for the Reform of Family Property Law, 21 McGill L. J. 1, 307-309 (1975). Seventy percent of couples contracted out prior to July 1, 1970. Report of the General Council of the Bar of Quebec, 27 Revue du Barreau 62 (1967). Brierley notes that most of these contracts choose separation of property, especially among the more wealthy. Brierley, supra note 255, at 826-28. Marital contracts are less popular in France. AMOS AND WALTON'S, supra note 258, at 272. The authors estimate that only 20% of French couples execute marriage contracts, which is consistent with tradition. Id.

\textsuperscript{268} France: C. civ. art. 1387; Interspousal Relations, supra note 36, at 149; AMOS AND WALTON'S, supra note 258, at 269. Quebec: C. civ. art. 1260; McLeod & Baker, supra note 39, at 28 n.217. They note couples in Quebec may contract "virtually any arrangement they please." Id.

\textsuperscript{269} France: C. civ. art. 1387 (contracts cannot be contrary to morality or the Civil Code); C. civ. art. 1388 ("spouses may derogate neither from the duties nor from the rights which result to them from the marriage, nor from the rules for parental authority, legal administration and guardianship"); C. civ. art. 1389 (spouses may not change the legal order of succession). See Interspousal Relations, supra note 36, at 149-50. Quebec: C. civ. art. 1258 (contracts cannot be contrary to good morals or any law); C. civ. art. 1259 (spouses cannot derogate from the rights conferred upon spouses by "Of the Obligations Arising from Marriage," "Of Parental Authority," or "Of Minority, Tutorship and Emancipation").
While the terms describing the legal regimes in France and Quebec differ,270 the respective systems are similar in practice. Community property is the marital property which courts will divide between the spouses upon marriage dissolution.271 Separate property is individually owned property which courts cannot divide between the spouses at any time.272 The French legal regime is a "community of after acquired property."273 The community property consists of profits from the spouses' work and savings during marriage as well as from the profits of their own separate property.274 Each spouse controls his or her own separate property, while the husband controls the community property.275 However, the husband must obtain the wife's consent for most important transactions affecting the community property.276

The Quebec legal regime of "partnership of acquisitions"277 similarly combines the equality and independence of separation of property with the sharing requirement of community property.278 Community property consists of the earnings, savings or revenues accumulated during marriage by the spouses (the acquisitions).279 Separate property consists of all other property, including gifts received after marriage.280 Unlike in the French legal regime, in Quebec both spouses control the community property.281 Independent control over the community property by each spouse is restricted only by the requirement that both spouses agree on gratuitous dispositions of the community property.282

2. Procedural Requirements for Marriage Contracts

Both France and Quebec require notaries to execute all marriage contracts.283 The civil law notary is significantly different from the common law notary.284

270. France: Glendon, State, Law and Family, supra note 83, at 144 (community reduced to acquisitions); Amos and Walton's, supra note 258, at 379 (community of acquisitions); Hahlo, supra note 225, at 469 (community of after acquired property). Quebec: C. civ. art. 1266c (partnership of acquisitions); see Hahlo, supra note 225, at 470.

271. Amos and Walton's, supra note 258, at 380-82; Brierley, supra note 255, at 821-26.

272. Amos and Walton's, supra note 258, at 380-84; Brierley, supra note 255, at 826-30.

273. Hahlo, supra note 225, at 469.

274. C. civ. art. 1401.

275. C. civ. arts. 1421-1440; Glendon, State, Law and Family, supra note 83, at 145; Amos and Walton's, supra note 258, at 382; Hahlo, supra note 225, at 469.

276. Glendon, State, Law and Family, supra note 83, at 145; Amos and Walton's, supra note 258, at 382.

277. C. civ. art. 1266c.

278. Brierley, supra note 255, at 835. Brierley notes that the new legal regime combines the fundamental features of the community and separate property systems. Id.

279. C. civ. art. 1266d; Brierley, supra note 255, at 837-38; Freedman, supra note 258, at 530-31.

280. C. civ. art. 1266e; Brierley, supra note 255, at 838; Freedman, supra note 258, at 551.

281. C. civ. art. 1266o. See Freedman, supra note 258, regarding the juridical equality of women in Quebec.

282. C. civ. art. 1266o; Brierley, supra note 255, at 838-39; Freedman, supra note 258, at 530.

283. France: C. civ. art. 1594; Interspousal Relations, supra note 36, at 149; Amos and Walton's, supra note 258, at 271. Quebec: C. civ. art. 1264.

The civil law notary is an important person in the legal process in that he drafts important legal instruments, authenticates instruments and keeps important records. The notary is a career professional, who must pass a professional examination before certification. He is often a trusted family advisor, who exercises considerable influence over his client's business.

For a valid marital contract, couples must comply with clearly stated procedural requirements. The notary must keep the contract on record. Further, the notary must register the marriage certificate, and must note the contract on the face of the marriage certificate. French law requires further registration if one of the spouses is a merchant. If the parties fail to give the contract the proper publicity, the contract may be invalid as to third parties, unless those third parties have actual knowledge of the contract's existence and terms.


Herzog, supra note 284, at 509. Herzog notes that most French notaries have a law degree and fulfill clerkships of four to six years. Id. See Merryman, supra note 284, at 457. See generally Chapter N-2, "Notarial Act," Que. Rev. Stat. (1977), for a general discussion of a notary's duties in Quebec.

Herzog, supra note 284, at 513. Herzog notes: "The very nature of the instruments for which [the notary's] assistance is required, such as ante-nuptial agreements, gifts, authentic testaments, and real estate transactions, brings him in close contact with family problems." Id.

Amos and Walton's, supra note 258, at 273. In practice, notaries often rely on popular standard forms, which they adapt as needed. Id. Brierley, supra note 255, at 828. Brierley notes the influence of notaries and the high incidence of printed marriage forms. Id.

Quebec law requires that a notary execute the marriage contract and keep it on record. C. civ. art. 1264. Further, the central register of matrimonial regimes must contain a notice of the contract. C. civ. art. 1266b. This notice must contain: names of spouses, birth dates, names of their parents, date of the contract, name and address of the notary. C. civ. art. 1266b. For discussion of the duties of the notary in Quebec, see Chapter N-2, "Notarial Act," Que. Rev. Stat. (1977).

C. civ. art. 1394; Interspousal Relations, supra note 36, at 162; Amos and Walton's, supra note 258, at 272.

C. civ. art. 1394; Interspousal Relations, supra note 36, at 162; Amos and Walton's, supra note 258, at 272.

C. civ. art. 1394; Interspousal Relations, supra note 36, at 162; Amos and Walton's, supra note 258, at 272.

See notes 292-94 and accompanying text supra.

France: C. civ. arts. 1394, 1396; Interspousal Relations, supra note 36, at 163. Such procedures are meant to give notice to a third party, who may consider giving credit to one of the spouses and should know of the state of each spouse's property. Amos and Walton's, supra note 258, at 272. Quebec: C. civ. art. 1266b.
3. Enforcement of Marriage Contracts

The courts in France and Quebec enforce marriage contracts. The Civil Code of each jurisdiction provides for the effect of contracts. Article 1134 of the French Civil Code provides: "Agreements legally made take the place of law for those who make them." Similarly, the Quebec Civil Code provides: contracts "can be set aside only by the mutual consent of the parties, or for causes established by law.

The strictness of the enforcement of contracts is further illustrated by the formalities required to modify a marriage contract. To modify their contract, spouses must apply to the court. The court will then allow the change only if it rules that the changes are in the best interests of the family. The judicially obtained approval of a change in a marriage contract ("homologation") requires prior publicity by the couple so that the change does not adversely affect a third party. In addition, a notary must execute the new agreement, and the original contract must note all the changes.

299. C. civ. art. 1134.
300. C. civ. art. 1022.
301. France: C. civ. art. 1397; Interspousal Relations, supra note 36, at 161; AMOS AND WALTON'S, supra note 258, at 388. Quebec: C. civ. arts. 1265, 1266, and 1266a; Brierley, supra note 255, at 832.
302. France: C. civ. art. 1397; Interspousal Relations, supra note 36, at 161; AMOS AND WALTON'S, supra note 258, at 388. Quebec: C. civ. arts. 1265, 1266, and 1266a; Brierley, supra note 255, at 832. The present matrimonial regime must have applied for two years before homologation is possible. C. civ. art. 1397; Interspousal Relations, supra note 36, at 161; AMOS AND WALTON'S, supra note 258, at 388. In Quebec, the modification must also not prejudice the rights of creditors. C. civ. art. 1265; Brierley, supra note 255, at 832.
303. France: Interspousal Relations, supra note 36, at 163. Quebec: C. civ. art. 1266; Brierley, supra note 255, at 832.
304. France: C. civ. art. 1397; Interspousal Relations, supra note 36, at 163. This publicity required by the Civil Code is as follows:
Both the petition requesting approval of a change of regime and the judgment approving the new agreement of the spouses must be published in a newspaper appearing in the jurisdiction of the court. In addition, the decision must be reported to the municipality where the marriage took place, so it can be mentioned on the margin of the marriage certificate . . . If one of the spouses is in commerce, the judgment approving the notarial act or modifying the matrimonial regime must be mentioned on the commercial register, on pain of being held invalid as to third parties in commercial matters. Interspousal Relations, supra note 36, at 163; C. civ. art. 1397. Quebec: C. civ. arts. 1266, 1266a, 1266b; Brierley, supra note 255, at 832. Quebec requires additional publicity, which Brierley notes is "rigorous." Brierley, supra note 255, at 832. He elaborates:
After notice to all creditors and parties to the original contract, the consorts' new agreement in notarial form must be presented for judicial "homologation" (i.e., approval contained in a judgment), which is then recorded with the notary who is the depositary of the contract. The change in the regime is only effective in regard to third persons upon registration of a further notice in the central registry of matrimonial regimes.
Id. C. civ. arts. 1266, 1266a, 1266b.
B. *The Civil Law Approach Provides a Possible Solution for the United States in Enforcing Marital Contracts*

With respect to the failure of courts in the United States to enforce marital contracts, U.S. courts may borrow a possible solution from the civil law systems. After executing their marital contract, a couple could execute an attestation document similar to a "self-proving" will. The civil law systems enforce marriage contracts as written, after compliance with specific procedures. The United States could attempt to achieve the certainty and stability of the civil law marriage contracts, without a loss of fairness, by a self-proving will type of procedure. As illustrated by the expansive judicial discretion exercised by the courts, U.S. courts are unwilling to allow any vestige of unfairness in marital contracts. The proposed procedure would give the same protection as judges have desired to provide, but through legislative decision, and not through individual fiat. In this way, the subjectivity of the individual judges would not pervade the system. Couples could be confident that their contracts would be enforced.

The application of the attestation procedure would be simple. As for a self-proving will, the couples would swear that they understood their rights and obligations under the marriage contract. This attestation would help to eliminate most of the litigation regarding proper disclosure, execution and acknowledgment of the content of marital contracts. The procedure would help to establish the prima facie validity of the contract. The courts could then enforce the contracts without the subsequent substitution of judicial judgment. Absent proof of fraud, the attestation procedure would be dispositive of the voluntariness and fairness of the contract.

As noted earlier in the discussion, wills are analogous in character to marital contracts. Thus, procedure regarding wills should adapt well in the marital contract area. In fact, the drafters of the Uniform Probate Code borrowed the procedure for a self-proving will from a civil law system. Such an appropriation could easily extend to include marital contracts. Many jurisdictions already have adopted the mechanism for self-proving wills and easily could exploit this mechanism for marital contracts. Thus, a relatively minor expansion could provide effective results.

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310. Rheinstein & Glendon, supra note 193, at 198-99.
311. See notes 193-96 and accompanying text supra.
312. Uniform Probate Code § 2-504.
313. Rheinstein & Glendon, supra note 193, at 198-99.
The use of a disinterested third party, similar to the civil law notary, would also help to ensure that both parties were entering into the contract freely, intelligently and with full disclosure of assets. Under this system, the third party would inform the couple of their rights under the law. Perhaps jurisdictions could adapt an aspect of the U.S. adversary process to perform a notarial function. For example, courts could impose a mandatory requirement of a lawyer for each party, or one disinterested lawyer for both parties, who could help to achieve the same goals of disclosure and free, knowing execution.

These procedures would help to reestablish the utility of marital contracts by facilitating individual autonomy to the benefit of parties and the courts. Courts could then discontinue their refusal to enforce many marital contracts on questionable grounds. Thus, contractual freedom would become a reality. Such procedural devices may also eliminate other problems which exist under the present U.S. system. For example, courts sometimes have difficulty reconstructing the circumstances which existed at the time the couple made the contract. Required attestation and use of a third party to advise a couple would help to diminish litigation over marital contracts. Compliance by couples with both procedures would help to determine the validity of the contract without litigation. Most important, however, the proposed system would give some necessary stability to this area of the law.

V. Conclusion

This Comment has examined the widespread assumption in the United States that marital contracts will be enforced as other contracts, and found that it rests on a tenuous foundation. In fact, judges routinely invalidate marital contracts in the exercise of their broad discretion.

Many requirements exist for valid marital contracts in the United States, including fairness, full disclosure, duty to inform or explain, independent counsel or advice, and freedom from duress. Noncompliance with any one of these requirements can serve to invalidate a marital contract. In addition, presumptions of concealment and duress militate against a finding of validity. Many of these marital contract requirements offer much latitude for judicial discretion. Determinations of fairness and overreaching are subjective and provide courts with the opportunity to substitute their own ideas of fairness for the contractually stated intent of the parties. With so many grounds upon which to challenge marital contracts, courts often invalidate these contracts.

315. See note 306 supra.
316. Courts sometimes have difficulty in determining circumstances at the time of making the contract. See, e.g., Wilson v. Wilson, 354 S.W.2d 532 (Mo. Ct. App. 1962). Further, mortmain or dead man’s statutes may make the determination even more difficult. See, e.g., In re Estate of Strickland, 181 Neb. 478, 149 N.W.2d 344 (1967).
317. WEITZMAN, supra note 76, at 356.
Similarly, British courts have broad discretion regarding the variation of marriage settlements, whether upon divorce or death. In Great Britain, as well as the United States, courts may substitute their judgment for the contractually stated intent of the parties. However, in Great Britain, the courts' discretionary power to vary settlements is clearly stated in the law, and is the result of a democratic decision by the legislative branch of government. The British public is not deceived, and the British courts have not delegated this broad power to themselves as have the U.S. courts.

In contrast, courts in civil law jurisdictions enforce marriage contracts. Spouses in the civil law jurisdictions of France and Quebec have wide contractual freedom in the formation of marriage contracts. Once a couple fulfills the procedural requirements, including the use of a notary to counsel parties and to ensure the proper execution of the contract, the couple may have confidence that courts will enforce their marriage contract.

The United States could adopt procedures analogous to those of the self-proving will to combat the courts' reluctance to enforce marital contracts. Such an attestation procedure could use the existing mechanism for self-proving wills, and would help to establish the prima facie validity of a marital contract. Further, an independent third party, or even a lawyer for each party, could help to ensure disclosure between the parties and free and knowing assent to the contract. By adhering to these specific procedures, couples would preclude the need and justification for judges to exercise judicial discretion when construing marital contracts.

Susan Vogt Brown