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ARE ALL CONTRACTS ALIKE?

Margaret F. Brinig*

This Article compares two sets of contracts that are structurally and contextually similar. They originate in two quite different fields, however: the commercial arena and the family.¹ The contracts come from two separate empirical investigations. The first investigation studied 131 telecommunication interconnection agreements made between SBC Communications, Inc. (“SBC”)² and various local phone companies in Michigan beginning in 1998.³ The second investigation involved 141 divorce cases granted in 1998 in Johnson County, Iowa, all of which involved children, and 130 of which involved contracts, or “stipulations” as they are called locally.⁴ Though each empirical project has been described separately elsewhere, this Article will consider them together.

What happens if a contract is not launched with rose-colored expectations,⁵ but rather because one has to? This is the problem

* Fritz Duda Family Professor of Law, University of Notre Dame. I thank my colleagues and others who have encouraged me as I pursued this project, especially Ian Ayres, Herbert Hovenkamp, Stephanos Bibas, and Randall Bezanson.

1. See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (discussing the separate law that developed for thinking about the family and the market and its gendered effects).

2. SBC now hosts the former Southwestern Bell, Pacific Bell, Nevada Bell, and Ameritech communication companies.

3. This project is described at length in Margaret F. Brinig, “*Unhappy Contracts: The Structure and Effect of Telecommunication Interconnection Agreements*” (Univ. of Iowa Legal Studies Research Paper, Paper No. 04-02, 2004), available at <http://ssrn.com/abstract=634223> [hereinafter *Telecommunications Agreements*].

4. This project is described and analyzed at length in Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241 (2005) [hereinafter *Divorce Settlements*].

5. An analogy to securities purchases was made by Lynn A. Stout, and to engaged couples by Lynn A. Baker and Robert E. Emery. Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 637 (1995) (describing how “personally successful” investors will trade based on the “statistically mistaken belief that they are better, brighter, or luckier than their fellow traders”); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and*

faced by incumbent and competing local phone companies who need to negotiate contracts under the Telecommunications Act of 1996.⁶ It is also the problem that divorcing couples face when they negotiate separation agreements. When the law forces parties to contract over an extended period and they are not both willing entrants into the new or reconfigured relationship, what characterizes the contracts? What makes some contracts successful?

The punch line of this Article is that the two sets of agreements are similar enough—and produce similar enough results—to be studied together. There is much we can learn about how to write long-term contracts when we see how clauses operate similarly—and successfully—in two such different areas. However, skeptics are right when they decry attempts to draw perfect analogies between corporate affairs and marriages. In particular, the role of fault in dissolving marital partnerships overwhelmed other considerations that might have produced more successful contracts.⁷ It remains to be seen whether it is the prior bad relationship (leading to the fault) that is responsible or just the emotional nature of these marital dissolutions.

The role of child custody, or what some have described as a public good or marital-specific investment, is another difference between the divorce settlements and the interconnection agreements. With dissolving families, what was jointly and completely shared by both parents (their time with, control and direction over, and enjoyment of children) changes to a pattern where one parent's role largely remains the same (the custodial parent) and the other parent's role converts to a qualitatively different, and frequently quantitatively much smaller, status. The presence of minor children (who economists would call third party externalities and who may or may not be third party beneficiaries in the legal sense) is what requires the majority of separation agreements to be long-term relational contracts, and therefore makes them similar to the telecom agreements. At the same time, then, the change from the preseparation parenting relationship and the complexities of trying to parent in the post-divorce reality make these contracts different and raise the stakes well beyond those typical of most commercial ventures.

The hypothesis that marriage contracts are different could be tested empirically by examining a different species of contract from

Expectations of Divorce at the Time of Marriage, 17 LAW & HUM. BEHAV. 439, 446 (1993) (describing how people about to be married “express thoroughly idealistic expectations about both the longevity of their own marriages and the consequences should they personally be divorced”).

6. See 47 U.S.C. §§ 251–52 (2000).

7. See *Divorce Settlements*, *supra* note 4, at 260, 269 tbl.IX.

the one studied here, such as a commercial agreement formed after the parties had been disputing rather than at the beginning of their business relationship. For example, a forced licensing of a patent after successful litigation by the firm not holding the patent might work, as might a long-term court-supervised order regulating competition by someone who has left a firm, such as a real estate or law firm. The answer to this interesting question will have to wait for another day.

Realizing, too, that many readers will not be familiar with both family law and complex commercial transactions, this Article will first lay out the major similarities and differences between the contracting environments and the agreements. The following sections will briefly discuss the legal and factual backgrounds of each area, and then will turn to detailed comparisons of the development of contract terms, the terms themselves, and the results they apparently cause. In each dimension in the Tables that follow, only the factors that turned out to be statistically significant are listed. For example, though hypothetically income and custody would have played significant power roles in the divorce stipulation, they did not.

TABLE I – SIGNIFICANT POWER FACTORS

Factor of Interest	Telecom Agreements	Divorce Stipulations
Attitude of the parties	SBC always reluctant; CLECs always enthusiastic	Varies; Both spouses may be enthusiastic, one may, or both may write the stipulation with reluctance
Power dimensions	Size and political power of CLEC; Agreements are usually, but not always, one-sided, with the balance towards SBC	Experience of attorney, fault, independent assets of spouse
Method of reaching terms	Made no difference whether negotiated or arbitrated	Very important; Litigated resolutions were much less successful and provided for children less often
Specific provision for modification or duration of contract	Length of contract very important; No specific modification provisions included	Length of contract (age of children) not important; Case-specific modification provisions very important
Contract provision for dispute resolution	Payment dispute mechanism important	Never important
Power of termination left in stronger party	Very important; Showed up in termination provisions, bank provisions, payment terms	Unimportant, at least with respect to custody provisions
Method of adjustment	Amendment; Sometimes positive appearance before PSC	Amendment or stipulation that agreement satisfied
Negative post-contractual experiences	Usually SBC hearing, sometimes litigation, including appeals	Usually motions in District Court, sometimes litigation, including appeals
Biggest surprises of study	Power of in-state location; Conclusion that method of resolution did not matter	Power of experienced attorneys; Conclusion that custody and related terms did not matter for measured outcomes.

I. THE TELECOM AGREEMENTS

Congress passed the Telecommunications Act of 1996⁸ in order to resolve various monopoly problems in the local telephone industry.⁹ The Act required that the five large regional telephone

8. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 251–61).

9. The Justice Department had specifically charged that AT&T used its service monopoly to restrict competition in the phone equipment manufacturing market for the benefit of its subsidiary Western Electric. 141 CONG. REC. S7881, S7882 (daily ed. June 7, 1995) (statement of Sen. Larry Pressler).

companies ("ILECs") allow local competitors ("CLECs") access to their bandwidth, lines, switches, other facilities, and such services as directory assistance and 911.¹⁰ They were to bargain "voluntarily" with the CLECs, or, if they could not agree, submit to arbitration by the local utility commission.¹¹ The outcome of bargaining or arbitration was to be a written contract that would have to be approved by the commission.¹² In return, the ILECs would be allowed to continue to operate and would also be able to enter the already competitive long distance market.¹³

These contracts, called Telecommunications Interconnection Agreements, are hardly what the ILECs would choose. (The ILECs

10. The Act imposed this requirement by allowing cable companies (and others) to compete in phone service, and the Regional Bell Operating Companies ("RBOCs") could begin to compete in long distance, should they satisfy the "in region" test. An RBOC can satisfy the test as soon as a competitor can compete independently. In some regions, especially New York, cable companies were already capable of competing with the RBOC. Further, the RBOCs can enter the equipment manufacturing market again. Regulation of the telephone system is removed by the Act from the judiciary to the FCC. The ILEC would no longer hold a monopoly in a local area. *Mergers and Competition in the Telecommunications Industry: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong. (statement of William P. Barr, Senior Vice President and General Counsel, GTE Corporation), available in Westlaw, 1996 WL 517476 (Sept. 11, 1996). Therefore, it is no longer an antitrust concern that a local exchange carrier can leverage its monopoly power into other products markets.

11. In Michigan, the local utility commission is the Michigan Public Service Commission, or the PSC. See Michigan Public Service Commission, <http://www.michigan.gov/mpsc> (last visited Mar. 2, 2008).

12. Commission rules usually require that an approved utility charge a reasonable rate, make a profit that is not overly large, and generally act in the public interest. The Telecommunications Act of 1996 required close monitoring of the agreements between the ILECs and CLECs, including state regulatory approval of the rates the ILECs could charge. 47 U.S.C. § 252(e). Although the state had to approve the rates, the ILECs were allowed to make a small profit on the sales of services and space to the CLECs. *Mergers and Competition in the Telecommunications Industry: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong. (statement of James D. Ellis, Senior Executive Vice President and General Counsel, SBC Communications, Inc.), available in Westlaw, 1996 WL 517574 (Sept. 11, 1996) (testifying about the merger between SBC and Pacific Telesis) [hereinafter Ellis Statement].

13. Section 271 of the Act allows the ILEC to expand its service beyond its Local Access and Transport Area ("LATA") if it satisfies an "in region" test. 47 U.S.C. § 271(b)(1), (d)(3). The test is satisfied if the ILEC can show that a facilities-based competitor is present within the LATA. *Id.* § (c)(1)(A); see also H.R. REP. NO. 104-458, at 170 (1996) (Conf. Rep.). A competitor becomes facilities-based when it can "offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service." *Id.* at 147-48.

were, to the extent that corporations can possess such feelings, happy with being regulated monopolists and extracting the greater than average return such a monopoly may provide, and attempted to extract more than a larger profit from the CLECs until that pricing was foreclosed by the FCC.)¹⁴ The CLEC, or entering local company, generally expects to make money by providing low cost phone service. Because both parties are not entering into these long-term arrangements with the excitement and enthusiasm of most large commercial ventures, I call the interconnection agreements "unhappy contracts."

These contracts are complex (especially those that go beyond phone service resale). Commensurate with the complexity and the large amount of money involved, they are all in writing.¹⁵ Because of the federal statute, they are all filed with the state utility commission.¹⁶ They require performance over a relatively long period. This performance may be of many kinds, including such "intimacies" as physical access to the ILECs' facilities.¹⁷ As the

14. SBC responded to the Act by hiring fifty negotiators, account managers, and lawyers. Within six months it had entered into seventeen interconnection agreements. Because they did so in order to enter into the interLATA (long-distance) market, the Bells, including SBC, were initially enthusiastic. However, in August 1996, the FCC issued a regulatory scheme that left virtually nothing open to negotiation or arbitration. The specific problem was the FCC's pricing below cost scheme that gave the ILECs no incentive to invest in their relationship with the CLECs and the CLECs no incentive to create their own independent networks, which was the necessary prerequisite for the Bells entering long distance. See Ellis Statement, *supra* note 12, at *9. Immediately after the FCC issued its regulations, each RBOC filed an action to enjoin or overturn the rules. MCI Communications Corporation further alleged that each agreement signed between an RBOC and a CLEC was interim in nature and did not cover all the requirements of the checklist of Section 271. Also, MCI has had to go to arbitration in twenty-eight states, while in other situations the RBOC refused to negotiate with MCI. *Mergers and Competition in the Telecommunications Industry: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong. (statement of Michael H. Salsbury, MCI Communications Corporation), available in Westlaw, 1996 WL 520160, at *8 (Sept. 11, 1996).

15. See *Telecommunications Agreements*, *supra* note 3, at 5.

16. 47 U.S.C. § 252(a)(1), (e)(1). The state agency in Michigan is the Public Service Commission. Michigan Public Service Commission, <http://www.michigan.gov/mpsc> (last visited Mar. 2, 2008).

17. 47 U.S.C. § 251(c)(3) (providing for unbundled access). The Act also provides for collocation:

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical

“baby bells” have consolidated over time, at least one of the parties to the agreements is a giant.¹⁸

II. THE DIVORCE CONTRACTS (PROPERTY SETTLEMENT AGREEMENTS OR STIPULATIONS)

When couples divorce, they usually do not leave the sorting out of their financial affairs and custody of their children to the courts.¹⁹ About ninety percent of divorcing couples at some point file with the court what is variously known as a separation agreement, a property settlement agreement, or a stipulation.²⁰ Like the telecom agreements, these are complex documents in most cases, becoming more so as the marriages lengthen and children are involved. They must pass court muster to the extent they provide for children,²¹ and

collocation is not practical for technical reasons or because of space limitations.
§ 251(c)(6).

18. For the year 2003, SBC had revenues of \$40.8 billion and had over 172,500 employees. See AT&T News Room, SBC Reports Strong 4th-Quarter Long Distance Launch in Midwest, Improved Retail Access Line Trends, Record Gains in Long Distance, DSL, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=20921> (last visited Mar. 2, 2008) (reporting 2003 revenue); see also SBC Commc'ns, Inc., Quarterly Report (Form 10-Q) (Nov. 12, 2003), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271703000897/q303.htm>. Current quarterly reports (since SBC merged with AT&T) are available at <http://www.att.com/gen/investor-relations?pid=262> (last visited Mar. 2, 2008).

19. They may settle out of a general reluctance to litigate, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956 (1979), or because a statute allows them to divorce sooner if they do, see, for example, VA. CODE ANN. § 20-91(9) (2004) (allowing for divorce after a six-month separation when the parties have entered into a separation agreement and have no minor children). They may also wish to keep their financial affairs more private than they could expect if they went to court.

20. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992) (discussing the prevalence of divorce settlements). Eighty-eight percent of the couples in our study settled. See *infra* tbl.III. In Iowa, having a written agreement allows the parties to be divorced without a court hearing. IOWA CODE ANN. § 598.8.2 (West 2001) (requiring that the parties agree there is no prospect for reconciliation and that jurisdictional requirements are met). In states such as Virginia, VA. CODE ANN. § 20-91(9) (2004) and New York, N.Y. DOM. REL. LAW § 170(6) (McKinney 1999), written agreements are required for a couple to divorce under the “no fault” ground. In New York, amendments adding irreconcilable differences have been suggested and seem to be making some progress this term. See Assemb. 6978, 2007 Assemb., Reg. Sess. (N.Y. 2007).

21. See, e.g., ALASKA STAT. § 25.24.220(h)—(i) (2006) (describing how the court shall use a heightened level of scrutiny of agreements concerning a minor child to determine if the agreement is in the child’s best interest); FLA. STAT.

will need to do so if either party later wishes to resort to the court's contempt power.²²

Courts, and even the Restatement (Second) of Contracts,²³ note that these family agreements are just a species of contract.²⁴ However, their complexity, their subject matter, and the special conditions under which they are made causes courts, and sometimes legislatures, to be particularly careful when interpreting or evaluating them.²⁵ This care may take the form of scrutiny for unconscionability²⁶ or a special attention to procedural regularity,²⁷

ANN. § 61.183(2) (West 2005) (describing how a consent order agreed to through mediation shall be reviewed by the court and, if approved, entered); TEX. FAM. CODE ANN. § 153.007(a)–(b) (Vernon 2002) (providing that the court shall order agreement between the parties for conservatorship and possession of the child if it finds that the agreement is in the child's best interest); WIS. STAT. ANN. § 767.11(12)(a) (West 2001) ("The court may approve or reject the [mediation] agreement, based on the best interest of the child."); *Miller v. Miller*, 620 A.2d 1161, 1165 (Pa. Super. Ct. 1993); *Schwab v. Schwab*, 505 N.W.2d 752, 758 (S.D. 1993). *But see* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06(1) (2002) ("The court should order provisions of a parenting plan agreed to by the parents, unless the agreement (a) is not knowing or voluntary, or (b) would be harmful to the child."). Comment a to Section 2.06(1) notes that "the law in most jurisdictions grants courts, as part of their *parens patriae* authority, the authority to review a private agreement at divorce to determine whether it serves the child's interests. This section takes a more deferential view." *Id.* § 2.06, cmt. a.

22. Further, in some states, the agreement followed by divorce will provide the final adjudication of spousal rights and responsibilities. *See, e.g.*, NEV. REV. STAT. ANN. § 125.184 (LexisNexis 2004). If, after divorce, either discovers a contractual defect, it may be too late to provide for relief under the court's equitable powers since the jurisdiction over the marriage will have ended.

23. *See, e.g.*, *Swift v. Swift*, 391 N.E.2d 930, 932 (Mass. App. Ct. 1979) (citing RESTATEMENT (SECOND) OF CONTRACTS § 138 (Tentative Draft No. 3, 1967) (applying the third party beneficiary doctrine)); *State ex rel. LaBarge v. Clifford*, 979 S.W.2d 206, 209 (Mo. Ct. App. 1998) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (duty of good faith)).

24. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 21, § 7.01 cmt. d ("A premarital or marital agreement is a contract, and must therefore satisfy all the applicable requirements of contract law.").

25. *See generally* Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 45 (Peter Benson ed., 2001).

26. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 21, § 7.01, cmt. d ("Among the ordinary principles of contract law also applicable to the contracts addressed by this Chapter is the rule of § 208 of Restatement Second, Contracts, allowing a court to decline to enforce a contract term that it finds 'unconscionable at the time the contract is made.' Courts have sometimes gone beyond this rule to deny enforcement, under the rubric of unconscionability, to a premarital agreement whose terms seem very unfair as of the time enforcement is sought, even though its terms were not

assistance of counsel,²⁸ and disclosure.²⁹

Negotiation of these agreements has been discussed elsewhere in the legal and particularly the social science literature.³⁰ The results the parties reach will be affected by their relative bargaining skills, the help provided by their attorneys, what they anticipate they will receive if they go to court because they cannot reach settlement,³¹ and other power dynamics. Hiding of assets and other fault such as adultery, abuse, or substance abuse by either spouse will also affect the bargaining outcomes.³² Because these contracts are made under less than auspicious circumstances and because they are conditions, factually or legally, to exiting the marriage, these, too, are “unhappy contracts.”

III. BEHAVIOR PREDICTABLE IN UNHAPPY CONTRACTS

One possible outcome we might expect from unhappy contracts would be the “separate spheres,” or minimal performance, solution envisioned by Lundberg and Pollak for unhappy couples remaining

unconscionable as of the time of contracting.”).

27. *See id.* § 7.04 (creating a rebuttable presumption that a premarital agreement was made with informed consent and not under duress when the contract was executed at least thirty days before the parties’ marriage, both parties were advised to obtain independent counsel and had reasonable opportunity to do so before execution, and in the case of unrepresented parties, the language was easily understandable by an adult of ordinary intelligence with no legal training).

28. *Id.* § 7.04(3)(b)–(c).

29. *Id.* § 7.04(5) (“To enforce terms that limit claims the other party would otherwise have . . . a party must show that prior to the agreement’s execution the other party knew, at least approximately, the moving party’s assets and income, or was provided by the moving party with a written statement containing that information.”).

30. Mediation of divorce cases, producing final agreements of this kind, has become a legal trend as well as a powerful social movement. In some states mediation is required in all such cases, and in others in cases where custody is involved. *See* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC’Y REV. 149, 152–53 (1994). It may be ordered by the court or requested by either or both parties. Mediation was not much of a feature in the Iowa cases (where only three of them were mediated). *Divorce Settlements*, *supra* note 4, at 244 n.16.

31. This result is called the Best Alternative to a Negotiated Agreement, or BATNA. *See* Alex J. Hurder, *The Lawyer’s Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 268 (2007).

32. Meg Lundstrom, *A Way to ‘Take the War Out’ of Divorce*, BUS. WK., Nov. 16, 1998, at 228 (“[Mediation is] not recommended for dissolving marriages troubled by violence, alcoholism, or mental impairment. And without the courts’ discovery process, it doesn’t work if either party is intent on hiding assets.”).

together.³³ Lundberg and Pollak argued that instead of threatening divorce, couples who were no longer happy would revert to the minimum performance required of husbands and wives, or “separate spheres” behavior.³⁴ That is, wives would perform as good housewives, and husbands as good breadwinners, because they could not be criticized by outsiders or their spouses for this performance.³⁵ The parallel predicted behavior in the telecom context would be minimal compliance by SBC, which would draft (adhesion) contracts that the CLEC was required to adopt if it wanted to enter the market at all.³⁶

In a related vein, we might also expect behavior to cluster around certain foci or norms, as anticipated by Richard H. McAdams in his important paper on social norms.³⁷ The prediction for these contracts would be a strong similarity of contract terms among contracting parties. In fact, both the separate spheres and focal point predictions seem borne out by my earlier work. In my previous study of Michigan interconnection agreements, many of the variables examined had only one or two solutions and gave tremendous power to the incumbent telephone company.³⁸ Similarly, despite drafting by different attorneys, many of the

33. See Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993).

34. *Id.* at 990.

35. By extension, upon divorce, the parties would fall into the custody-in-the-mother, child-support-in-the-father pattern that many couples adopt though there is no legal reason to do so. Some couples may elect this expected pattern even though these roles would not be their preference. See generally Maria Cancian & Daniel R. Meyer, *Who Gets Custody?*, 35 DEMOGRAPHY 147, 147–49 (1998); Judith A. Seltzer & Vida J. Maralani, *Joint Legal Custody and Child Support Payments: Are There Lasting Custody Effects?* 10 (Cal. Ctr. for Population Research, Working Paper No. 004-01, 2001). A more modern norm, not seen in these Iowa cases but suggested by the Iowa custody statutes enacted in 2004, may be that the father needs to ask for custody (or at least joint custody), even when that is not his true preference or the way the couple parented before separation. The new Iowa statutes make joint physical custody the “default” position, awarded whenever both parties are fit, one spouse has asked for it, and there has not been any physical violence, unless the court makes specific findings of fact and conclusions of law that joint physical custody would not be in the child’s best interest. IOWA CODE ANN. § 598.41 (West 2000 & Supp. 2007). For a critique of this rule, see Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779 (2006).

36. The thirteen-state agreements drafted by SBC have this characteristic. See *Telecommunication Agreements*, *supra* note 3, at 6.

37. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000). For a discussion of social norms generally, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

38. *Telecommunications Agreements*, *supra* note 3.

divorce stipulations from Johnson County, Iowa, followed clear patterns.³⁹ In particular, many provided for joint legal custody and gave physical custody to wives with very substantial visitation by husbands.⁴⁰ Property was nearly always divided equally.⁴¹

Unhappy contracting strategies aim to minimize losses, or minimax, a term coined by Von Neumann and Morgenstern in their discussions of game theory.⁴² How should contracts be structured to achieve minimaxing, and how does a difference in the size or power of the bargaining entities change the final settlement or contracting result? Considering these contracts as a whole, and as if from a distance, the observer is struck by how franchise-like they are.⁴³ Many of them, and particularly the ones that have been successfully amended over time, give great power to the CLEC or custodial parent because so much is left unspecified. (Though the custodial parent might be seen as the stronger party, analogous to SBC in our Michigan agreements, custodial responsibilities make no difference along power dimensions.⁴⁴ However, the custodial parent is left with making numerous day-to-day decisions.) On the other hand, many of the more successful contracts are for relatively short periods of time (one to three years before modification based upon the

39. *Divorce Settlements*, *supra* note 4.

40. *Id.* at 250–51.

41. *Id.* at 250, 262 tbl.I.

42. These discussions later turned into a book. See JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

43. For a law-and-economics discussion of franchise arrangements, see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990) (explaining characteristics of franchise agreements where the franchisor has bargaining power but difficulty monitoring the franchisee). For its theoretical application to families, including divorcing families, see Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393 (explaining that franchise-like relationships exist after children are grown because parents want to preserve certain family characteristics) and MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 188–91, 194–96 (2000) (extending franchise-like relationship theory to divorced couples and their children).

44. Of course, the parent with the power to break ties when the two conflict does enjoy more power. See, e.g., *Elk Grove Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing noncustodial parent's action for lack of standing because he does not have an unrestricted right to inculcate in his daughter his beliefs). However, to the extent that the noncustodial parent can threaten a custody modification action or restrict the custodian's behavior such as smoking, see, for example, *Heagy v. Kean*, 864 N.E.2d 383 (Ind. Ct. App. 2007), or relocating out of state (without being himself restricted), see, for example, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004), that parent may enjoy significant power as well. Because custody of a child is linked to child support, there may be economic leverage as well.

children's age).⁴⁵ Because they are for more than one year, they are nonetheless specimens of relational contracts.⁴⁶ General characteristics of relational contracts are thus important to our consideration of unhappy contracts.

Most relational contracts literature begins with the work of Stewart Macaulay, who studied the contracting practices of Wisconsin firms in the early 1960s.⁴⁷ More recently, Professors Ian Macneil⁴⁸ and Robert Scott⁴⁹ have taken up the challenge of writing

45. Consensual modifications to the contracts occurred more often when the oldest child was older (i.e., when the time for performance was relatively short). *Divorce Settlements*, *supra* note 4, at 247 n.36.

46. See Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 828 (2000).

47. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Macaulay found that the parties specified time of performance, price, and quantity, but left most other terms unspecified. See *id.* at 58–60. They did not resort to legal enforcement when they “cancelled a contract,” but rather freely adjusted contractual relations as they went along. See *id.* at 61. Macaulay later extended his work to several foreign countries in *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977). A more recent empirical look at contract terms is Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1. Weintraub sent a questionnaire to the general counsels for 182 firms eliciting information on contract practices and views as to desirable contract policy. *Id.* at 1–2. “Information included contract devices used to protect against market shifts during long-term contracts, the frequency with which companies request relief from or modification of contractual obligations, the results of such requests, and the use of and extent of reliance on firm offers.” *Id.* at 1. Weintraub also asked whether corporate executives would make more or less legalistic responses to a set of three hypothetical business problems than would general counsel. *Id.* at 2. Weintraub stresses nonlegal sanctions such as reputation costs, but notes the increased use of litigation for contract disputes and the tendency of judges to award even punitive damages for breach of contract cases. *Id.* at 7–8 & n.28.

In California from 1980 to 1984, “punitive damages were assessed against 35% of defendants who were found to have breached contracts.” From the 1960s to the 1980s, the number of punitive damage awards in business contract cases more than quintupled in Cook County, Illinois, and more than quadrupled in San Francisco. The total awards in constant dollars increased from less than \$500,000 in each of those jurisdictions in the 1960s to \$14 million in Cook County and \$17 million in San Francisco during the first five years of the 1980s.

Id. at 8 n.28 (quoting MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS viii (1987)) (citations omitted).

Two of Weintraub's respondents were from “utilit[ies] other than gas or electricity.” *Id.* at 15.

48. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); see also Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (describing terms that may be

about relational contracts, each generating several useful papers on the subject. Macaulay, Macneil, and Scott all assume that in complex, long-term contracting, many terms will be deliberately left vague or not included at all. The parties, because of the strength of their relationship and the substantial investments each has in the venture,⁵⁰ are likely to mutually agree to alter the contract as things

useful to promote easier modification). For a recent discussion of Macneil's work, see Speidel, *supra* note 46. For a highly critical essay, see Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992).

49. See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 849-53 (2000); see also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (applying the relational contracting theory to family law). For related work, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). All these works suggest that the courts will fill the gaps left in contracts with "default rules": what the parties would probably have agreed to had they thought about the problem at the time of contracting. But see Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 313-15 (1992) (concluding that courts, lacking sufficient information about party intent and market alternatives, are reluctant to intervene if the parties have failed to agree).

50. On the role of reputation as a substitute for contract remedies, see Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691 (1983). See also Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 559-60 (1985) ("The existence of a custom and practice of adjustment in a particular contractual setting indicates that parties in that setting are comfortable with the allocation of risks that flow from that custom."); Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV. 1165, 1168 (2002) ("Reputation is particularly effective in relational situations because long-term contracts tend to be incompletely contingent; as a consequence, the specific obligations of the parties, and hence the existence of breach, are highly uncertain. Ex post enforcement costs will therefore be high, and ex ante constraints such as reputation can therefore compensate for the risk of underenforcement."); Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 3 (1990) ("It is well known . . . that in long-term, frequent bilateral exchange, the value of the relationship itself may serve as an adequate bond to ensure honest behavior and promote trust between the parties."); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2026-27 (1987).

change.⁵¹

Thus, Macneil's colleague Richard Speidel writes in a recent piece (that also summarizes previous scholarship on relational contracting):

First, the exchange relationship extends over time. It is not a "spot" market deal. Rather, it is more like a long-term supply contract, a franchise or distribution arrangement, or a marriage. Second, because of the extended duration, parts of the exchange cannot be easily measured or precisely defined at the time of contracting. This dictates a planning strategy that favors open terms, reserves discretion in performance to one or both parties, and incorporates dispute resolution procedures, such as mediation or arbitration, into the contract. The inability of the parties to "presentiate" the terms of the bargain at the time of contracting shifts the focus to circumstances and conduct that occur *ex post* contract. Third, in the words of Lewis Kornhauser, in a relational contract the "interdependence of the parties to the exchange extends at any given moment beyond the single discrete transaction to a range of social interrelationships."⁵²

To summarize, unlike most contracts, through which parties seek to maximize profits, unhappy contracts feature terms designed to minimize the losses of at least one contracting party. In the telecom agreements, the least happy party is the ILEC, the incumbent forced by the state to allow competing companies access

51. Professor Weintraub notes:

Relational contracts involve parties who are presently performing a long-term contract or have dealt with one another many times in the past and are likely to do so in the future. Discrete contracts involve parties who have not dealt with one another before or, if they have, probably will not contract again. Relational contracts are likely to predominate in well-organized markets; discrete contracts will typify sales that take place sporadically, such as sales of real estate. There are important differences between situations in which parties have developed a relationship and those in which the contract is an isolated occurrence. When a dispute arises, parties with a history of mutually beneficial dealings are less likely to resort to litigation than are strangers. Efficiency is one incentive for amicable resolution of a relational dispute. Each party has custom-shaped its operations to meet the other's needs and these transaction costs would be wasted if the relationship ended. Moreover, in well-organized markets where relational contracts predominate, a reputation for litigiousness is particularly undesirable.

Weintraub, *supra* note 47, at 19-21 (footnotes omitted).

52. Speidel, *supra* note 46, at 823-24 (footnotes omitted). For other work by Speidel, see Symposium, *Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461, 483-579 (selected bibliography in app. A). The existence and importance of relational contracts in the real world has also been verified in an empirical study. Weintraub, *supra* note 47, at 16-24.

not only to the local market but also to equipment and services. The goals of the ILEC (in addition to being profitable generally) are to minimize conflict, minimize money spent (particularly transaction costs), and minimize the impact on the firm of doing business with CLECs. The terms of the interconnection agreements are constrained by the need to get the approval of the local public utility commission.⁵³ Because the contracts (and any amendments) are required to be filed in one place, and because all subsequent disputes are to be litigated in federal district court in the state of contracting, it would theoretically be possible to get a complete set of these agreements. In the interest of time, I focused on one state and one ILEC, SBC (formerly known as Ameritech and as Michigan Telephone). This group of contracts was attractive because they were all available for downloading from the SBC website,⁵⁴ and because the proceedings of the Michigan Public Service Commission were also all available on its website.⁵⁵

Though one spouse must ultimately file for divorce, spouses typically do not do so joyously or with thought of great profit, but reluctantly, fearfully, and with some sadness.⁵⁶ Typically, as noted above, it is the woman who actually files for divorce,⁵⁷ and there is some evidence that they, more often than their husbands, are the ones who “want out.”⁵⁸ Divorce is usually a last resort, an admission that one has made a mistake or that difficulties just could not be worked out. Divorce is the lesser of two evils (the greater seen as staying married).⁵⁹ The contract itself is another step towards

53. 47 U.S.C. § 252 (2000).

54. AT&T Regulatory Documents, http://www.att.com/search/regulatory.jsp?category=INTERCONNECTION_AGREEMENTS/MICHIGAN (last visited Mar. 2, 2008).

55. Michigan Public Service Commission, Schedules, Agendas, and Minutes, <http://www.cis.state.mi.us/mpsc/orders/minagen.htm> (last visited Mar. 2, 2008).

56. Interestingly, this situation parallels with some wedding ceremonies. See, e.g., Manchester City Council, How to Arrange a Marriage, http://www.manchester.gov.uk/site/scripts/documents_info.php?documentID=644 (last visited Mar. 2, 2008); Traditional Christian Wedding Ceremony, <http://jstephenconn.com/page8.html> (last visited Mar. 28, 2008) (“[Marriage] is therefore not to be entered into unadvisedly or lightly; but reverently, discreetly, advisedly and in the fear of God.”)

57. Margaret F. Brinig & Douglas W. Allen, *“These Boots Are Made for Walking”: Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 126–27 (2000). Seventy-eight percent of the divorce filings in the Johnson County sample were by women. *Divorce Settlements*, *supra* note 4, at 250–51.

58. Sanford Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1, 7 (1993).

59. See, e.g., Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 37 (1978).

admitting failure. The goals may be to shorten the waiting period,⁶⁰ to prove that divorce is sought (or at least uncontested) by both,⁶¹ and to establish some financial or other certainty for a dependent spouse.⁶² Divorce agreements are filed during the divorce proceedings with the clerk of court and, because they are incorporated into a final decree, kept with the court's record for each case. After divorce, these agreements, along with all the other proceedings and discovery in the case, may be a matter of public record.⁶³

Thus, both the telecom agreements and the divorce stipulations involve relational contracts made subject to governmental supervision. The overwhelming bulk of the parties were able to reach agreements in both cases: only eleven percent of the telecom agreements were not consensual, and only twelve percent of the divorce cases did not result in stipulations.⁶⁴ The situations were not identical, however. Most obviously, the telecom agreements involve commercial enterprises, sometimes large ones. The family contracts were always made between husband and wife, though the ones examined here all involved their minor children as well. Moreover, the telecom agreements, while reluctantly executed by the incumbents (in our case, SBC), were enthusiastically approached by the local competing companies, or CLECs. In many cases of divorce, neither party is enthusiastic about obtaining an agreement. In many cases, the spouses may approach divorce itself reluctantly, and may only make an agreement because the alternative, litigating, is worse. The less happy nature of the divorce contract also affects post-divorce results: these cases averaged nearly two negative post-divorce contacts with the court compared to an average of slightly less than one negative post-agreement contact with the Public Service Commission or court in the telecom cases.⁶⁵

60. See, e.g., VA. CODE ANN. § 20-91(9)(a) (2004) (allowing for divorce after a six-month separation when the parties have entered into a separation agreement and have no minor children).

61. See, e.g., IOWA CODE ANN. § 598.8.2.a(1) (West 2001) (allowing couples with a written agreement to obtain a decree of dissolution without a hearing).

62. Cf. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 21, § 4.02(3) ("The objective of this Chapter is to allocate property by principles . . . that are consistent and predictable in application."); *Id.* § 7.02 cmt. b ("Agreements also give parties greater certainty about the future, and about the consequences of their actions.").

63. See, e.g., IOWA CODE ANN. § 236.10 (West 2000 & Supp. 2007) (domestic abuse files); *Id.* § 22.3A (open records law generally).

64. *Divorce Settlements*, *supra* note 4, at 266; *Telecommunications Agreements*, *supra* note 3, at 23.

65. *Divorce Settlements*, *supra* note 4, at 266; *Telecommunications Agreements*, *supra* note 3, at 43 n.34.

About thirty percent of the divorce cases had post-divorce modifications, while nearly two-thirds of the telecom cases featured subsequent amendments.⁶⁶ Both of these percentages were considered positive adjustments to changing circumstances.⁶⁷

Both sets of bargaining units used power to their advantage, though power had a different meaning in the two contexts. In the telecom cases, power was characterized sometimes by pure size: whether or not the company was publicly traded or how many employees it had. Sometimes the power seemed to be political: the companies that reached more generous bargains with SBC tended to be those located within the state of Michigan.⁶⁸ In the family law context, power sometimes meant higher income or more substantial individual assets.⁶⁹ In many cases, though, the better terms seemed to stem not from the parties but from the attorneys who were more experienced in family law.⁷⁰ (This, of course, may be directly related to wealth, or perhaps a better knowledge of the family law community.) Education, which might have indicated greater earning capacity for spouses ending marriages, did not appear to predict contract terms. (That is, it was not statistically significantly correlated with any terms.)

A. *Closer Comparison: Litigate Versus Settle*

The commercial and family law contexts differed substantially in one area. The arbitrate/reach agreement split in the telecom cases does not parallel the decision to go to divorce court as opposed to settling a divorce case. Arbitration seems to be correlated with power—publicly held parties, longer payment terms, longer initial terms, more flexible terms for disputed amounts, and broad general statements rather than minutia as in the thirteen-state agreements. The agreements that resulted in arbitration tended (at .05) to be written earlier than other agreements in our sample, and therefore had simply endured longer, which could possibly account for there being both more positive and more negative entries in the PSC minutes.⁷¹ The frequency of interaction could also indicate more feelings of security about access to the PSC (which also held the arbitrations, of course).

In family law, the decision to litigate rather than settle is more

66. *Divorce Settlements*, *supra* note 4, at 266; *Telecommunications Agreements*, *supra* note 3, at 23.

67. See *Divorce Settlements*, *supra* note 4, at 253; *Telecommunications Agreements*, *supra* note 3, at 14.

68. *Telecommunications Agreements*, *supra* note 3, at 13.

69. *Divorce Settlements*, *supra* note 4, at 250.

70. *Id.* at 253.

71. *Telecommunication Agreements*, *supra* note 3, at 29–30.

closely connected with fault grounds than with traditional indicators of power such as income. Not surprisingly, litigation results in more motions (both before and after divorce). Less obviously, the parents who litigate their divorce are very unlikely to provide for their children's college education or to provide for generous visitation by the non-custodial parent.⁷² (In either case, this could be because they dislike each other so much they are willing to sacrifice their child's well-being.) The presence or absence of fault grounds is also unrelated to traditional power. Fault is, however, correlated positively with the presence of a religious upbringing clause in the settlement agreement.⁷³ Perhaps more significantly, it is negatively related to terms providing for college education, maintaining life insurance, or providing for adjustment if there are changes in income (all provisions that would benefit the couple's children, who are certainly not parties to the agreement and frequently have nothing to do with their parents' marital problems).⁷⁴ Like cases that cannot settle (and perhaps because of the greater litigation associated with fault grounds), cases that begin with fault result in more pre- and post-divorce motions. Fault is thus probably a key difference between the two types of contracts. It is unclear from this evidence whether it is the emotional content of fault grounds—the essential violation of marital trust—that makes these cases different, or whether fault is merely a (powerful) symptom of a bad prior relationship preceding the contract (as opposed to one that is begun with no such bad prior history). It might be possible to tease out the real culprit here with a study of business contracts, some of which were preceded by a prior bad contracting experience between the parties, some not.⁷⁵ For example, theoretically the same firm

72. *Divorce Settlements*, *supra* note 4, at 254, 265.

73. *Id.* at 252, 265.

74. *Id.* at 264–66 tbl.II.

75. To the extent that we can tell from the current study, the “prior bad relationship” story is not inconsistent with the results. For example, AT&T, MCI, and GTE were all involved in litigation against SBC's predecessors under the Telecommunications Act of 1996. These three firms also have the largest number of post-contractual negative contacts. AT&T, which had nine negative contacts, was involved on opposite sides of litigation with Michigan Bell, SBC's predecessor. *AT&T Info. Sys. v. FCC*, 854 F.2d 1442 (D.C. Cir. 1988). Since the 1996 Act, it has joined or begun six different lawsuits against SBC (or Ameritech). *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) (naming Ameritech as a party); *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999); *Mich. Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993 (W.D. Mich. 1998); *Ind. Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998); *AT&T Comm'n of Mich., Inc. v. Mich. Bell Tel. Co.*, 60 F. Supp. 2d 636 (E.D. Mich. 1998); *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, No. 97 C 2225, 1998 WL 156678 (N.D. Ill. Mar. 31, 1998). GTE, involved in six negative PSC contacts, was involved in a suit against Michigan Bell both before and after the 1996 Act.

might license patents voluntarily and because a court ordered licensing. If the resulting licensing agreements were studied and compared (both as to contents and later durability), the two groups might produce differences similar to the differences in the fault divorce cases compared to those which did not reveal fault.

An observer steeped in the Alternative Dispute Resolution ("ADR") literature would hypothesize that open-ended, or more relaxed, terms might signal the basic trust needed for a relationship to adjust well over time. In fact, this turns out to be so, at least for obviously financial terms, such as bank-related clauses in the telecom agreements⁷⁶ and child support arrangements⁷⁷ in the divorce cases. However, terms related to custody, and generous amounts of time given to each parent, surprisingly turned out to predict absolutely nothing about the agreement itself, nor about the parties' abilities to adjust.

B. *Thirteen-State Contracts: The Separate Spheres Solution*

A number of the Michigan contracts were thirteen-state agreements, negotiated with SBC for their entire territory. Although these companies all expanded beyond more than one state in terms of size, the resulting agreements demonstrate the much

Sw. Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990); Mich. Bell Tel. Co. v. Engler, 72 F. App'x 380 (6th Cir. 2003). The most litigious, both before and after the 1996 Act, has been MCI WorldCom (with twelve negative PSC appearances). Prior to the Act came Illinois Bell Telephone Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993) and MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990). Since the Act, MCI WorldCom has been involved in several cases. Mich. Bell Tel. Co. v. MCI MetroAccess Transmission Servs., Inc., 128 F. Supp. 2d 1043 (E.D. Mich. 2001) (regarding fax change orders); MCI Telecomm. Corp. v. Mich. Bell Tel. Co., 79 F. Supp. 2d 768 (E.D. Mich. 1999) (regarding performance benchmarks and local loop access); Mich. Bell Tel. Co. v. Strand, 26 F. Supp. 2d 993 (W.D. Mich. 1998) (regarding a "common transport" regulation); Mich. Bell Tel. Co. v. MFS Intelnet of Mich., 16 F. Supp. 2d 828 (W.D. Mich. 1998) (regarding reciprocal calls). Since the 1996 Act, these three companies have carried the burden of litigation that also benefits smaller carriers. For example, in the current case of Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic, 305 F.3d 89 (2d Cir. 2002), *cert. granted in part sub nom.* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 538 U.S. 905 (2003), AT&T is the real party in interest. Conversation with Professor Herbert Hovenkamp, University of Iowa College of Law, in Iowa City, Iowa (Feb. 17, 2004).

76. Such terms include the time within which the ILEC needed to be notified of the CLEC's bank and the time within which the ILEC needed to be notified of a change in bank, in addition to the extension of credit after the CLEC provided facilities, bandwidth, or services.

77. These terms include adjustments in child support related to the age of the child or children, adjustments related to the income of either or both parties, and other explicit adjustment provisions.

greater power of SBC than the CLEC in question. Being a thirteen-state agreement as opposed to one uniquely negotiated for Michigan was positively correlated with a number of characteristics. These contracts are significantly and positively related to various formal procedures, including longer periods for negotiation, longer periods of extension specified, longer notice to be given before termination for breach, more complicated and lengthier contracts, and ADR specified as a dispute resolution procedure.⁷⁸

The thirteen-state agreements were negatively related to a number of power-demonstrating characteristics, such as publicly held status, place of business in Michigan, initial term length, number of required meetings, number of days to request renegotiation of non-renewal, number of days to pay sums due, and number of days to notify of the CLEC's bank and change of that bank.⁷⁹ There were also fewer positive or negative entries in the PSC minutes for this group of contracts, perhaps reflecting a lack of confidence that appearances before the PSC would be fruitful (though these were also more recent contracts at .05 level).⁸⁰ Though this was not a significant correlation, the sign on amendments of the agreement was also negative.

C. Full Custody to Mothers and Child-Support by Fathers: Another Separate Spheres Solution

As noted above, a return to very traditional arrangements was the hallmark of Lundberg and Pollak's unhappy couples. Traditional marriages, where the wife did not work outside the home, might present the opportunity for a return to traditional roles upon divorce. In these relationships, the wives would continue to care for children, and the husbands would stop participating in household affairs and simply pay child support and alimony. But since most married women now work outside the home⁸¹ (particularly in Iowa, which has one of the highest rates of two-earner couples in the country),⁸² and very little alimony is awarded anywhere, and particularly not in Iowa, a post-divorce "separate spheres" model looks unrealistic. However, in 2002 it might still have been possible, at least in the parenting sense. Regardless of

78. *Telecommunications Agreements*, *supra* note 3, at 23–24.

79. *Id.* at 23–24 tbl.I, 25 tbl.II.

80. *Id.* at 29–30.

81. FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN AND WORK* 85 (4th ed. 2002) (showing sixty percent in 2000).

82. See *Lifestyle Statistics: Percent of Married-Couple Families with Both Husband and Wife in the Labor Force* (2004), http://www.statemaster.com/graph/lif_per_of_mar_fam_wit_bot_hus_and_wif_in_the_lab_for-both-husband-wife-labor-force.

how much time fathers spent with their children before separation, there may be very traditional and gendered patterns upon divorce.

In fact, although nearly all (90%) of the divorces involved "joint legal custody,"⁸³ and 69% involved generous sharing of custody, only 7.1% (ten cases) had approximately equal time shares,⁸⁴ and "[o]nly another 10 cases had father custody."⁸⁵ This means that the vast majority (roughly eighty-six percent) featured primary maternal physical custody.⁸⁶ The agreements varied widely in their treatment of visitation: some did not include schedules at all, while others had very complex visitation schedules (up to twenty-one paragraphs of treatment). The more complicated the schedule, the less likely that one parent had "sole custody," and the more likely that the attorneys involved were very experienced with other cases in the sample. These complicated schedules were also related to having provisions specifying religious upbringing and education.

"Generous sharing" means that most divorce settlements provided for each parent to get some reasonable share of physical custody. Complete loss of custody occurred in only a few extreme cases.⁸⁷ Additionally, a number of the agreements provided that the custodial parent could not move the children out of a specified area (sometimes the metropolitan area, sometimes within 50 or 100 miles, sometimes out of state) without the relocation becoming a

83. IOWA CODE ANN. § 598.41(5) (2001) provides:

Joint physical care may be in the best interest of the child, but joint legal custody does not require joint physical care. . . . If one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

In contrast, Michael Newdow, the plaintiff in the recent Supreme Court case of *Elk Grove Unified School District v. Newdow*, did not have prudential standing to attack the pledge of allegiance under the Establishment Clause because his wife had "sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of her daughter." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 14 (2004) (internal quotations omitted).

84. *Divorce Settlements*, *supra* note 4, at 251.

85. *Id.*

86. *Id.*

87. *Id.* at 261. For data describing different variables in cases resulting in sole custody arrangements or with less than thirty percent of the time going to the noncustodial spouse, see Table II, *infra*.

About a quarter of these involved allegations of abuse of a child or the other parent. *Id.* at 261 n.87.

change of circumstances requiring reassessment of custody.⁸⁸ For a noncustodial parent, the greatest fear may well be losing touch with one's children by having them move away.

TABLE II – VARIABLES IN THE EQUATION
SOLE CUSTODY ARRANGEMENT

Variables Entered on Step 1	B	S.E.	Wald	df	Sig.	Exp(B)
Age difference	.122	.080	2.297	1	.130	1.129
Number of minor children	-.151	.359	.178	1	.673	.859
Fault grounds for divorce	1.320	.665	3.946	1	.047	3.744
Substantial assets	-.650	.769	.714	1	.398	.522
Joint physical custody	.970	.763	1.615	1	.204	2.638
Case resolved by agreement	-.679	.672	1.022	1	.312	.507
Complicated custody arrangement	-.369	.099	14.039	1	.000	.691
Provision concerning removal of child from state	-.567	.653	.755	1	.385	.567
Constant	.228	1.213	.035	1	.851	1.256

Also, “[p]rovisions limiting or suggesting changes when the custodial spouse relocated were more common when the wife was older when she married, when the couple had assets of more than \$100,000 and when the husband possessed independent wealth.”⁸⁹ The first correlation suggests that these wives might be more mobile, while the last two suggest that there might be property in Iowa that would be difficult for the non-custodial parent to leave behind.

This observation relates to our original prediction that parties select contract terms to minimize potential losses. Unlike the

88. *Id.* at 261.

89. *Id.* at 254.

commercial franchise contract with which it shares many features, the separation agreement (or stipulation) typically cannot last for a short time specified in advance, thus reducing the risk of big losses. When children are involved, provisions for their custody and support must control during their minority,⁹⁰ in the analyzed cases at least four years.

However, many of the contracts in the Johnson County sample contained other terms that suggest the parties were trying to minimize their losses. For example, were the matter to be relitigated at a later date, the provisions for automatic adjustments (for age or income) would minimize the possibility of getting a larger (to the noncustodial spouse) or smaller (to the custodial spouse) child support award. In other words, these provisions reduce the variance in the amount of future child support.⁹¹

Other contract provisions further insulate one or both spouses from future losses. In the Johnson County contracts, "[a]ll alimony awards that were agreed to (and, remember, there were only 8 of these) were for fixed periods (in only two cases for more than 60 months, and one of these was for \$1 per month)."⁹² For the payor spouses (all husbands), this short term would limit their exposure, potentially for the remainder of their working careers.

CONCLUSIONS

Relational contracts entered into under less than happy circumstances differ from more common contracts. They are drawn to minimize loss rather than maximize gain. As the parties approach equal size, more terms are left open and terms become

90. Courts invalidate provisions designed to remove judicial oversight from child support or custody cases. See, e.g., *Anthony v. Anthony*, 204 N.W.2d 829 (Iowa 1973) (holding that an agreement by a custodial parent to waive child support in return for a promise by the noncustodial parent not to exercise visitation rights was void as contrary to public policy). See also IOWA CODE ANN. § 598.21(8) (West 2001) ("[A] modification of a support order . . . is void unless the modification is approved by the court, after proper notice and opportunity to be heard is given to all parties to the order, and entered as an order of the court."); *Goodpasture v. Goodpasture*, 371 S.E.2d 845 (Va. Ct. App. 1988).

91. For a discussion of the reduction of variance in the context of the parol evidence rule, see Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 543 (1998):

This alternative characterization would not affect the analysis for parties that are risk-averse, since such parties are willing to pay for a reduction in variance. Even risk-neutral parties would prefer the reduction in variance because the uncertainty of the legal decision in case of a dispute would cause parties to incur greater litigation costs than they would if the legal decision could be accurately predicted.

92. *Divorce Settlements*, *supra* note 4, at 261.

longer. These observations include both the commercial contracts studied and the family contracts. Yet the two realms differ in one important respect. Fault plays an important role in the divorce cases (perhaps not so much because private lives are involved, but because marriages are breaking up, that is, relationships are ending as the contracts are beginning).⁹³ Fault makes the contracts much less durable and inhibits the contracting spouses' ability to provide for their children. On balance, however, this preliminary study indicates that we can usefully make many comparisons between commercial and family contracting.

TABLE III – DESCRIPTIVE STATISTICS

Variable	Manifestation	Minimum	Maximum	Mean
Number of Contracts				
Telecom				131
Divorce				138
Year of Contract				
Telecom				1998
Divorce		1996	2002	2000.62
Term of Contract				
Telecom	Initial Term	1	3	1.82
Divorce	Age of youngest child	14	0	10.84
Percent to Settle				
Telecom	Consensual or arbitrated	0	1	.89
Divorce	Stipulation or court order	0	1	.88
Negative contacts				
Telecom	PCS hearing, litigation	.00	12.00	.5344
Divorce	Motion, litigation	0	13	1.96
Positive Contacts				
Telecom	Amendments, positive hearing PSC	0	5	.66
Divorce	Amendments, stipulations	0	3	.30

93. For a recent paper suggesting that fault (a negligence standard rather than strict liability) play some role in commercial contracts, see Eric A. Posner., *Fault in Contract Law* (Univ. of Chi. Law & Econ., Olin Working Paper No. 396, 2008), available at <http://ssrn.com/abstract=1106399>.

TABLE IV – POWER

Variable	Manifestation	Impact on Generosity of Terms ⁹⁴
POWER		
1. Political		
Telecom	In-state	+++
Divorce	Experienced attorney	+++
2. Financial		
Telecom	Publicly traded	+++
Telecom	Employees	++
Divorce	Income difference	+
	Individual assets (W)	–

TABLE V – DISPUTE RESOLUTION: EFFECT OF OPEN TERMS ON POSITIVE ENTRIES IN PSC MINUTES OR AMENDMENTS

Telecom	Notice of termination	
	Days to appoint representative	--
Divorce (child support adjustments)	Income difference of spouses	+++
Divorce (child support adjustments)	Individual assets of wife	–

94. The symbol “+++” means positive direction, statistically significant at .001. “++” means positive direction, statistically significant at .05. “+” means positive direction, statistically significant at .1. “–” means negative direction, statistically significant at .1. The terms are drawn from Tables II and III, *supra*.
