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MARRIAGE AS PARTNERSHIP†

Sanford N. Katz*

I. INTRODUCTION

Twenty years ago, Professor Mary Ann Glendon turned her attention to the relationship of decedents’ estates and labor law to contemporary family life, which resulted in the publication of her book, The New Family and the New Property.¹ She was the first comparative law scholar knowledgeable in the three fields to see certain connections. For example, in decedents’ estates, she saw the connection between how family relationships are perceived within the family structure itself, and the assumption the law makes about those relationships, and whether the assignment of property upon divorce laws should mirror succession laws. She noted that one’s job or profession (and the tangible and intangible economic benefits that accrued to it), not one’s family ties, was becoming the important source of one’s wealth and status.² Further, Professor Glendon saw, as few others had seen, that at the same time that the marital tie was weakening by the advent of no-fault divorce, the law was stepping in to provide greater protection for the employment relationship. Subsequently, however, the employment relationship itself has become insecure.³ Put simply, while in the 1980s it was easier to divorce a spouse than for an employer to fire

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2 Professor Glendon discusses this point as well in MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 135 (1996).

3 This phenomenon is discussed in Thomas C. Kohler, Individualism and Communitarianism at Work, 1993 BYU L. Rev. 727, 736 (1993) (citations omitted):

It may be that instability increasingly characterizes many of the significant relationships among Americans: employment relationships in the U.S. now last an average of 4.5 years, while the average marriage lasts but seven. Trends are not wholly clear, but the average length of both may be on the way down.
an employee, since then there has been a dramatic weakening in both marital and employment relationships.\textsuperscript{4}

Professor Glendon believed that treating marriage as a "partnership" of equals placed the emphasis on the individual in the family, overshadowing the sense of community. To her, the partnership model of marriage gave rise to a new ideology for compensating a spouse through equitable distribution, or what she would later label "discretionary distribution."\textsuperscript{5}

In her writings, Professor Glendon has worried about the plight of women and children who need legal protection in their post-divorce lives. She argued that in awarding alimony and assigning property upon divorce, a distinction should be made between marriages with children and those without, as exists in many succession laws. In the latter case, she proposed that courts adopt a "children-first principle"—a principle that requires an inquiry into the welfare of the chil-

\textsuperscript{4} Professors Kohler and Finkin have written:

In his \textit{Commentaries}, William Blackstone famously observed that the "three great relationships of private life are" those of "husband and wife," "parent and child," and "master and servant." . . .

Family and work relationships may be elemental to any form of stable and well-ordered social and political life. But, in the American context, there is no denying that at least the first two of the bonds that Blackstone enumerates hardly are flourishing. Although other nations are beginning to become more competitive in this arena, the United States continues to have the highest divorce rate in the world. As one group of researchers report about the American domestic scene, "the probability that a marriage taking place today will end in divorce or permanent separation is calculated to be a staggering 60 percent." Similarly, Frank Furstenberg and Andrew Cherlin estimate that sixty per cent of children born in the United States during the 1990's will live in a single-parent family before age sixteen. If employment, like marriage and, at least for men, parenthood, comes to assume the character of a spot (one hesitates to say a "just-in-time") relationship, we should not be surprised. One need pass no value judgments on any of these developments to suggest that they are not entirely unrelated. Although it may represent something of a "trailing" indicator, there is no reason to expect that the employment bond, which we strongly tend to characterize as representing purely economic association, should be any more durable than life's other significant relations. Our habits not only delay any such expectations, but prepare us to accept serial affiliations as the norm.

children of the marriage as trumping other considerations.\textsuperscript{6} Professor Glendon's work in family law has had a major impact on the economic aspects of marriage and divorce.\textsuperscript{7}

At the same time as Professor Glendon was engaged in her research for that book, Professor Walter O. Weyrauch and I were studying the application of legal theory to the practice of family law. One particular part of our work which related to hers was our observation that, throughout our history, there have been a variety of models of families found in America that were established through formal and informal marriages, through no marital relationship at all, or by the use of certain procedural devices.\textsuperscript{8} As she wrote (and we agreed), "the new family is no family in the sense of a single model that can be called typical for modern industrialized societies. The new family is a concept that represents a variety of co-existing family types."\textsuperscript{9} It should be noted, however, that the law has not treated the family as a protected legal unit like a corporation or a labor union. Rather, family law is the study of the establishment, supervision, and termination or reorganization of family and family-like relationships like husband and wife, parent and child, and unrelated persons living with each other in a committed relationship.\textsuperscript{10} Family law also examines the individual's role in those relationships.

\begin{itemize}
\item \textsuperscript{6} See Glendon, \textit{Family Law Reform}, supra note 5, at 1560–61; see also Mary Ann Glendon, \textit{Abortion and Divorce in Western Law} 94–95, 98–101 (1987).
\item \textsuperscript{7} Most recently Professor Glendon's work has been cited in \textit{American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations} § 4.07 (Proposed Final Draft Part I, February 14, 1997).
\item \textsuperscript{9} Glendon, supra note 1, at 4.
\item \textsuperscript{10} Professors Joseph Goldstein and Jay Katz have written:

Family law . . . is defined as the process for deciding what relationships should be labelled "family," under what circumstances such relationships may be established, administered, and reorganized, and what consequences should accompany these determinations. In perceiving the cycle of state and family interaction in terms of the three basic problems for decision—establishment, administration, and reorganization—we further define family law to include the processes for determining to what persons or agencies, should be assigned, under what circumstances, the role of promulgating, invoking, implementing, and appraising these decisions.

We also saw that family law was in flux and was difficult to conceptualize. Family law responded to the rights movements of the sixties and seventies. As Americans changed their behavior, lawyers and judges reacted to new patterns of living arrangements by reshaping and reinterpreting old laws, creating legal constructs accompanied by legal language to fit these patterns for legal planning or for resolving conflicts. Eventually, what first was a legal fiction became a reality, and a body of law followed by language developed to conform to the construct. This has been particularly true of marriage, now regarded in the law as a partnership contract, and marriage-like relationships, which in certain circumstances are now treated as de facto marriages. By using the partnership metaphor with emphasis on the individual in that relationship, equality in marriage seems to have taken root. Whether this equality is in fact meaningful or merely rhetoric depends upon individual cases in particular contexts. That any marriage has elements of a co-ownership for mutual profit can hardly be doubted.

In this essay honoring Professor Mary Ann Glendon, I should like to discuss the contract of partnerships concept of marriage as it ap-

11 On this point Professor Carl Schneider has written: "It is hard to produce a systematic view of an unsystematic subject, and perhaps family law must always be ad hoc, responsive to local conditions, sensitive to the day's sensibilities, and willing to compromise irreconcilable differences." Carl E. Schneider, The Next Step: Definition, Generalization, and Theory in American Family Law, 18 U. Mich. J.L. Reform 1039, 1048 (1985).


13 My co-authors Walter O. Weyrauch, Frances Olsen, and I have written: A major trend over the past two centuries has been toward greater equality in marriage. This greater equality has generally taken the form of allowing the wife more autonomy within the marriage. While women have benefited from this increased autonomy, some observers believe that the solidarity of "the family" has suffered. It is striking how few reforms have aimed directly at allowing wives greater say in family decisions—democratizing the family—rather than just at allowing wives to opt out of decisions made by the husband, such as the "family" domicile....

Most commentators support the trend toward increasing equality within marriage. Less consensus exists, however, about what greater equality in marriage really means and about who should bear the brunt of the disruption during the period of readjustment.

plies to antenuptial agreements, cohabitation contracts, and marital property, the three contexts about which Professor Glendon has written. First, it is important to define marriage as a contract of partnership.

II. Marriage as Contract

Marriage in American law has ordinarily been thought of as a status entered into for life and regulated by the state. The American legal source of this concept is the nineteenth century United States Supreme Court case of Maynard v. Hill. In that case, the Court held that the legislative assembly of the territory of Oregon had the authority to dissolve the “bonds of matrimony” between David Maynard and his wife Lydia. It was in that case that Justice Field wrote what has perhaps become the most famous quotation about marriage in American appellate court opinions:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Thirty-seven years before Maynard was decided, the Supreme Court of Florida stated in Ponder v. Graham that marriage was a contract. This concept was, of course, not new, having its roots in common law, incorporated in colonial practice, and is consistent with what Professor Grossberg has described as a “displacement of patriarchalism by contractualism” in the nineteenth century. However,

14 See Glendon, supra note 1, at 61; Glendon, supra note 2, at 135–40.
15 125 U.S. 190 (1888).
16 Id. at 205.
17 4 Fla. 23 (1851).
18 Michael Grossberg, Governing the Hearth 19 (1985). Professor Michael Grossberg’s excellent work on the law and the family in nineteenth century America discusses this point. He has written that in the post-revolutionary era:

[T]he law continued to portray marriage as a civil contract, [but] in a vital transition the accent shifted from the first word to the second. The new emphasis was on the consensual nature of marriage. It also reflected the broader use of contract as the central metaphor for social and economic relations in early nineteenth-century America... Contractualism gained strength from the same forces that were eroding the hierarchical conception of society. Rather than viewing the body politic as an amalgam of interdependent, status-defined groups, contract ideology stemmed from a world
the Florida court's labeling of marriage as a contract in the context of the case did not mean that parties were completely free to set their own terms. It meant that the Florida legislature had no power to dissolve a marriage contract, for by so doing it would be impairing the right to contract. Yet Justice Semmes' words in *Ponder* help to define marriage as contract. He wrote, "I know of no reason why the word contract, as used in the [C]onstitution, should be restricted to those of pecuniary nature, and not embrace that of marriage, involving as it does, considerations of the most interesting character and vital importance to society, to government, and the contracting parties."19 The two concepts of marriage, that of status and that of a special kind of contract, seemingly contradictory, have co-existed throughout the nineteenth century and are still referred to today.20

In contemporary times, however, it is difficult to fit marriage neatly into the legal construct called contract.21 Normally contract law assumes freedom of contract, party autonomy, and equal bargaining power. The marriage contract is not totally free of governmental regulation, and therefore parties have limited freedom of choice. Party autonomy and equal bargaining power may not be present in

view whose lode star was the untrammeled autonomy of the individual will. Relations of all kinds were to be governed by the intentions, not the ascribed status, of their makers. The English philosopher Sir Henry Maine characterized this transition as the "movement from status to contract."

*Id.*

The concept of marriage as partnership could also be found in eighteenth century America. Professor Grossberg finds support in quotes from the 1792 *Lady's Magazine*:

A self-described "Matrimonial Republican" defined the new perception. . . . She objected to the word "obey in the marriage service because it is a general word, without limitations or definitions." Instead, the writer insisted that the "obedience between man and wife, I conceive, is, or ought to be, mutual. Marriage ought never to be considered as a contract between a superior and inferior, but a reciprocal union of interests, an implied partnership of interests, where all differences are accommodated by conference; and decision admits of no retrospect."

*Id.* (citations omitted).

19 *Ponder*, 4 Fla. at 45.

20 See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888), for the proposition that "marriage is a social relation subject to the State's police power."). See also *Ryan v. Ryan*, 277 So. 2d 266, 268 (Fla. 1973) (citing *Ponder* for the proposition that "marriage is a contract" in holding that Florida's no-fault divorce law was constitutional).

marriage. Perhaps the most that can be said is that while in the past the marital relationship was wholly defined by the state, now certain aspects of the relationship can be negotiated by the parties. Also, by including the marriage contract within the world of contract, one effect is a change in the attitudes of the couple and the courts. Presumptions that actions are motivated by a donative intent are less difficult to overcome. Vocabulary changes from words of intimacy to the language of commerce (for example, profit and investment) and self-interest. Spouses become parties, participation becomes contribution, and divorce becomes dissolution.

III. Antenuptial Agreements

If the terms of the marriage relationship were completely state-regulated with no opportunity for couples to set their own terms for their relationship, like a contract of adhesion, or the economic consequences of the termination of that relationship, antenuptial agreements could not exist to the extent they do now. In other words, the concept of marriage as partnership contract provides the legal foundation for antenuptial agreements. Professor Glendon believes that the movement toward discretionary distribution in the assignment of property under equitable distribution statutes in divorce necessitates the agreement for couples with significant, or potentially significant, financial resources.

22 Using the contract metaphor, the marriage contract, while not based on a printed form, has some of the elements of a contract of adhesion in the sense that some marital duties are imposed by law. See Weyrauch & Katz, supra note 8, at 2.

The Massachusetts case of French v. McAnarney, 195 N.E. 714 (Mass. 1935) illustrates this point. In French, the Supreme Judicial Court of Massachusetts refused to enforce an antenuptial agreement, which effectively released the husband from his common law duty to support his wife. In reaching this decision, the court stated:

The status of the parties as husband and wife was fixed when the marriage was solemnized. A marriage cannot be avoided or the obligations imposed by law as incident to the relation of husband and wife be relaxed by previous agreement between the parties. Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social institution of the highest importance.... The moment the marriage relation comes into existence, certain rights and duties necessarily incident to that relation spring into being. One of these duties is the obligation imposed by law upon the husband to support his wife.... The enlarged contractual capacity conferred upon married women by [Massachusetts law] does not relieve the husband from this liability.

Id. at 715–16 (citations omitted).

Historically, antenuptial agreements were entered into by wealthy people in their desire to preserve their estate plan, which was drafted before their marriage. Or the agreements were used by older people, usually after they had already been married at least once, who wanted an agreement that would order the distribution of assets upon death. They might do so to protect the financial interests of children from a previous marriage. If litigation over agreements arose, courts would interpret them against the background of the then contemporary social conditions and community values.\textsuperscript{24} If a term in an antenuptial

\textsuperscript{24} The case of \textit{In re Duncan's Estate}, 285 P. 757 (Colo. 1930), illustrates this point. In that case Charles Duncan died intestate. The administrator of his estate denied his widow her widow's allowance, claiming that the couple's antenuptial agreement barred her claim. The agreement provided that:

[S]hould at any time a condition exist that would disturb the harmony of the married life and domestic relations of said parties, they agree to a legal separation, with the following stipulations: The party of the first part [the husband] agrees to make a settlement with the party of the second part [the wife] at the rate of $100.00 for each year they shall have lived together as man and wife. . . . The said party of the second part agrees to accept said settlement within 24 hours of the time the said parties shall have ceased to live together as man and wife. The said party of the second part further agrees to vacate the house, rooms or premises the said parties shall have occupied, and to take from said house, rooms or premises all articles of household goods, furnishings, and wearing apparel which are her personal property, within 24 hours of receiving the foregoing settlement, and with no expense to the said party of the first part. In consideration of the foregoing, the party of the second part does hereby further agree to forever release the said party of the first part, his heirs and assigns, from any and all claims for alimony, support, maintenance, dower, or wife's or widow's rights; and not to contest any action for divorce that may be brought by the party of the first part.

\textit{Id.} at 757.

In less than a year the couple separated. The wife acknowledged the receipt of $110.00 in full settlement of all claims she had against her husband.

In holding that the antenuptial agreement was void and against public policy, the Supreme Court of Colorado stated that:

The antenuptial contract was a wicked device to evade the laws applicable to marriage relations, property rights, and divorces. . . . It was nothing more, in effect, than an attempt, on the part of the deceased, in whose favor the contract was drawn, to legalize prostitution, under the name of marriage, at the price of $100 per year.

\textit{Id.}

The court concluded its opinion with the following statement about marriage: The marriage relation lies at the foundation of our civilization. Marriage promotes public and private morals, and advances the well-being of society and social order. The marriage relation is so sacred in character that it is indissoluble except in conformity with legislative requirements and the sol-
agreement was written in contemplation of divorce, either the term or the entire agreement would have been unenforceable, due to the strong belief in the permanence of marriage and the possibility that enforcement could leave a spouse (probably the wife, given the social and economic reality of the time) destitute.\textsuperscript{25}

In 1970 the Supreme Court of Florida broke with tradition and, in \textit{Posner v. Posner},\textsuperscript{26} decided that in light of changes in social conditions in which divorce was a fact of life, an antenuptial agreement that settled alimony and property rights upon divorce was not contrary to public policy and ought to be enforced.\textsuperscript{27} Although the facts in \textit{Posner} concerned the couple’s successful attempt to order privately their economic relationship should they divorce, the case’s holding has had much broader significance. It provided the opportunity for couples to define their marital relationship, delineating the roles each person will play, who will make what decisions, and how children will be raised. Professor Weyrauch has suggested that even though some of these matters are legally unenforceable, “they function in a manner comparable to the traditional requirement of legal consideration or

\begin{quote}
emn decree of the court. It cannot be annulled by contract, or at the pleasure of the parties.
\end{quote}

\textit{Id.} at 758.

The outcome of this case would most likely be the same in 1998 although a contemporary judge might omit the lofty statement about marriage.

\textsuperscript{25} The leading case on antenuptial agreements in Massachusetts is \textit{Osborne v. Osborne}, 428 N.E.2d 810 (Mass. 1981). In that case Chief Justice Hennessey traced the history of the enforcement of antenuptial agreements. He wrote:

\begin{quote}
In many jurisdictions it has been held that an antenuptual contract made in contemplation of divorce is void as against public policy. The reason most frequently given for invalidating such contracts are (1) they are not compatible with and denigrate the status of marriage, (2) they tend to facilitate divorce by providing inducements to end the marriage, and (3) a contract waiving or minimizing alimony may turn a spouse into a ward of the State.
\end{quote}

\textit{Id.} at 814 (citations omitted).

\textsuperscript{26} 233 So. 2d 381 (Fla. 1970). Although \textit{Posner v. Posner} is widely cited as being ground-breaking, \textit{Hudson v. Hudson}, 350 P.2d 596 (Okla. 1960), predates \textit{Posner}. In \textit{Hudson}, the Oklahoma Supreme Court upheld a premarital contract in which alimony was waived.

\textsuperscript{27} Justice Roberts wrote:

\begin{quote}
We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptual agreements of the parties relating to divorce is clearly discernible.
\end{quote}

\textit{Posner}, 233 So. 2d at 384. Perhaps Justice Roberts was restricting his remarks to the United States. In 1970 a limited number of countries did not allow divorce.
form in the law of contracts by safeguarding deliberation and determining the intent of the parties."28

The major question about antenuptial agreements is whether they really are contracts governed by conventional contract law doctrine29 or whether they are a special kind of contract peculiar to family law.30 Professor Glendon has criticized the direction courts have taken in interpreting antenuptial agreements. In adopting "the spirit of discretionary distribution" into these agreements, she believes judges have introduced a major element of uncertainty.31 Also, if one takes seriously that stability and predictability are two of the fundamental principles of contract law, their absence is a fatal flaw. What seems to be becoming more clear is that contracts dealing with domestic relations—antenuptial agreements being an example—present a special contract model in which certain kinds of questions are posed. Whereas in commercial contracts, questions about industry practices and the impact on the economic relations of the parties—for example, maximizing profits—may be relevant to deciding a result, different questions, including family policy considerations that will be discussed, are posed as to whether an antenuptial agreement should be enforced.

Two theoretical questions asked when enforcement of a commercial contract is at issue concern process and substance. The same questions are relevant in antenuptial agreements but the basis for responding to them is quite different. A special body of law has developed to test the validity of antenuptial agreements, and it can be divided into matters dealing with process and substance.

In commercial contracts, other than adhesion contracts, courts are ordinarily not concerned with whether the terms of a contract are fair if true equal bargaining exists. What is of concern is that the process by which the contract was entered into is free from misrepresenta-

29 In *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990), the Supreme Court of Pennsylvania stated that "[p]renuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts." The court was unwilling to nullify an antenuptial agreement that had been signed on the eve of the couple's wedding. The court felt that "[c]ontracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains." *Id.*
30 Section 2 of the Uniform Premarital Agreement Act illustrates one break with the common law of contracts in stating that "[a] premarital agreement must be in writing and signed by both parties. It is enforceable without consideration." Unif. Premarital Agreement Act § 2, 9B U.L.A. 372 (1987).
tion, coercion, and duress. In antenuptial agreements both the process and the terms must be fair. A fair process includes a full disclosure of each person's financial worth, something totally foreign to the enforcement of commercial contracts where a confidential relationship does not exist, and in some instances representation by counsel.

The issue that has caused special concern among lawyers and for Professor Glendon is the time of determining the fairness of the terms of an antenuptial agreement—either at the time of execution or at the time of enforcement. Professor Glendon believes that using the time of enforcement as the critical point to determine whether an agreement is fair creates the same kind of uncertainty found in discretionary distribution of property upon divorce, something she abhors. This is a just criticism because so long as a disappointed

33 See Unif. Premarital Agreement Act § 6, 9B U.L.A. 376 (1987). That section reads as follows:

Section 6. Enforcement
(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or
(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

34 See Rosenberg v. Lipnick, 389 N.E.2d 385 (Mass. 1979). Rosenberg was the leading Massachusetts case on antenuptial agreements before Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981). In Rosenberg, the Supreme Judicial Court discussed how parties to an antenuptial agreement do not deal at arms length, but rather in an atmosphere of mutual trust.

35 See Glendon, Family Law Reform, supra note 5, at 1567. Professor Glendon differentiates between childless marriages and marriages with children. She believes
spouse can be successful in avoiding an agreement that was entered into at the time of marriage, many years before the divorce, in an atmosphere of complete openness, there is very little point in having such agreements except to force a discussion of certain matters that would ordinarily not be raised, or to serve as some kind of memorandum of understanding. Supporting the principle that the date of enforcement should be the time for determining fairness is the fact that antenuptial agreements can be modified or even rescinded during marriage should changes occur in the couple's relationship. Such actions by spouses should not be considered extraordinary, since individuals who are sophisticated enough to sign antenuptial agreements should be thoughtful enough to modify or rescind them. Also, depending on the facts of a case, the defenses of a defective process or of unconscionable terms can be raised in cases in which the result would be extraordinarily unfair or unjust to the party seeking to avoid the contract.

The issue of unfair or unjust antenuptial agreements may become less frequent as more and more women (in the past usually the economically disadvantaged person) obtain positions of equal importance and pay as their male counterparts and are able to accumulate wealth not through inheritance, but by their own efforts. At the

that where a couple has children, "substantial limitations on freedom of contract . . . are appropriate, at least if there are dependent children at the time of divorce." Id. Caselaw in Massachusetts supports this position. See, e.g., Osborne, 428 N.E.2d at 816; Knox v. Remick, 358 N.E.2d 432, 436 (1976).

Professor Brod has written:

Premarital agreements have a disparate impact on women—and thereby discriminate against them. Thus, the enforcement of premarital agreements implicates public policy concerns related to the eradication of gender discrimination, as well as concerns with individual autonomy and "freedom of contract" principles.

Premarital agreements should be greeted with skepticism, not embraced with enthusiasm. In addition to strengthening the "freedom of contract" principle and supporting individual autonomy, the law governing the enforcement of premarital agreements should be fashioned to effectuate other public policies: the eradication of gender discrimination and the attainment of economic justice for the economically vulnerable spouse at the end of a marriage. The tension between these policies and the "freedom of contract" principle can be reconciled by the adoption of a regime that enforces a premarital agreement only if the agreement attains economic justice for the economically vulnerable spouse or, failing that, if the bargaining process culminating in execution of the agreement was demonstrably fair. In determining whether a premarital agreement should be enforced, the law
present time, because of the uncertainty of the enforcement of ante-nuptial agreements as written, even with procedural safeguards in place (for example, representation by counsel), some lawyers refuse to draft them for fear of malpractice actions brought by their clients after their antenuptial agreements have been made ineffective.

IV. CONTRACT COHABITATION

Long before the three Marvin cases were decided, cohabitation arrangements had been enforced using legal theories such as implied partnership or joint venture, constructive or resulting trust, or express or implied contract. Yet the Marvin cases are perhaps one of the most important set of cases in family law during the last quarter century, because the California Supreme Court placed its judicial imprimatur on the legality of two persons (nowhere in the opinion is the relationship limited to heterosexuals) living together in a non-common law marriage jurisdiction in a sexual relationship. It is even worth noting that the relationship began while one (in this case the male) was still married. Marvin provided disappointed cohabitants with a variety of legal theories for compensation upon break-up. No

may presume that an economically unjust agreement is the result of an unfair bargaining process and that an economically just agreement is the result of a fair process . . . . By enforcing agreements only if there are guarantees of substantive or procedural fairness, the law will mitigate the disparate impact of premartial agreements on women as a class, while avoiding paternalism and respecting the rights of women (and men) to contract in their own interests.

Gail Frommer Brod, Premarital Agreements and Gender Justice, 6 Yale J.L. & Feminism 229, 294–95 (1994).

Professor Brod states that “the law governing the enforcement of premartial agreements should be fashioned to effectuate other public policies: the eradication of gender discrimination and the attainment of economic justice for the economically vulnerable spouse at the end of a marriage.” Id. This description of a premartial agreement suggests to me that the agreement should be considered as a special kind of contract, perhaps like an adhesion contract, where the doctrines of public interest and superior bargaining power play a role in interpretation and enforcement. See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1192–97 (1983).


38 See, e.g., Leong v. Leong, 27 F.2d 582 (9th Cir. 1928); In re Estate of Thornton, 499 P.2d 864 (Wash. 1972); Omer v. Omer, 523 P.2d 957 (Wash. Ct. App. 1974). This issue is discussed in Weyrauch et al, supra note 8. For a thorough review of the extent to which Marvin has been followed in the United States, see Carol S. Bruch, Cohabitation in the Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?, 22 U.C. Davis L. Rev. 717 (1989).
longer was it necessary for lawyers or courts to create legal fictions or try to interpret the facts to have them conform to some pre-existing legal construct. Couples themselves could create an express cohabitation agreement.

The initial reaction to the Marvin cases was by no means totally positive. Illinois, a jurisdiction that seems particularly moralistic where marital relationships are concerned, and which has held that a divorced woman who lived with a man to whom she was not married was unfit to care for her child, rejected the Marvin approach in 1979. In Hewitt v. Hewitt, the Supreme Court of Illinois refused to provide a remedy to a woman, Victoria Hewitt, who had lived in a marriage-like relationship for fifteen years, and in which she had three children. Taking a particularly inflexible approach, the Illinois court was unwilling to affirm the appellate court’s decision, which had been sympathetic to the woman’s argument that she and her “companion,” with whom she shared the same last name, had lived a “conventional married life,” not as a formally married couple but as parties to an express oral contract. The court would not enforce the woman’s contractual claim, holding that to do so would contravene Illinois’ public policy. That policy was reflected in the state’s abolition of common law marriage in 1905 and its 1977 enactment of its marriage and divorce law, which had rejected “no-fault” divorce. The Supreme Court of Illinois seemed to be concerned about how enforcement of the Hewitt arrangement could be justified in a state that had recently reaffirmed “the traditional doctrine that marriage is a civil contract between three parties—the husband, the wife and the State.” The court also stated that Illinois had a strong interest in maintaining the marriage contract as one that cannot be terminated at will. To the court, the Hewitt arrangement was a “private contractual alternative to marriage.” In other words, the court seemed to be saying that enforcement of a cohabitation contract reflected values the Illinois court

39 See Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, the United States Supreme Court struck down an Illinois statute that prevented a biological father from participating in a child protection case which would have deprived him of the custody of his children. Mr. Stanley had lived with the mother of the children in a family arrangement. Yet, by virtue of his not having married the mother of the children, the Illinois statute did not provide him with notice or an opportunity to be heard at the hearing.


41 394 N.E.2d 1204 (Ill. 1979).

did not choose to advance. To do so would send the wrong message to Illinois citizens.

Judicial restraint may be another reason why the Supreme Court of Illinois refused to follow *Marvin*. Illinois courts had developed a pattern of deferring to the legislature in cases without Illinois precedent. For example, in 1963 the Illinois Appellate Court was asked to decide a case which would have established a new tort for wrongful birth. In *Zepeda v. Zepeda*, an illegitimate child sued his biological father in tort for causing him to be born "an adulterine bastard." In affirming the dismissal of the complaint, the court wrote, "The interest of society is so involved, the action needed to redress the tort could be so far-reaching that the policy of the State should be declared by the representatives of the people." This statement is similar in effect to the one made by the Supreme Court of Illinois in *Mogged v. Mogged*, where that court was unwilling to abolish or modify the defense of recrimination in divorce:

Whether or not the defense of recrimination should be abolished or modified in Illinois is a question involving complex public-policy considerations as to which compelling arguments may be made on both sides. For the reasons stated hereafter, we believe that these questions are appropriately within the province of the legislature, and that, if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change.

*Hewitt* is a particularly troublesome decision from a woman's point of view. Victoria Hewitt relied on Robert Hewitt's statement that a formal marriage ceremony was not necessary for the couple to be considered married in Iowa, a common law marriage jurisdiction, where their relationship began while they attended college. He gave her every indication that theirs would be a shared relationship. Since the support of the Hewitt children was not a part of the case, the loser was Victoria Hewitt. She not only cared for the couple's children and the house, but also assisted Robert Hewitt financially in securing his professional degree so that he could establish a pedodontia practice, again with her money. If ever there was a case to which the *Marvin* remedies should have applied, it was *Hewitt*.

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44 *Id.* at 850.
45 *Id.* at 859.
46 302 N.E.2d 293 (Ill. 1973).
47 *Id.* at 225.
In *Morone v. Morone*, the highest court in New York refused to imply a contract from the conduct of the parties, but would have enforced an express contract. Like “Mrs.” Hewitt, “Mrs.” Morone had given birth to children fathered by Mr. Morone. She and Mr. Morone lived together for eight years, while holding themselves out to the community as a married couple. Their long term relationship based on a contract was both for domestic and business purposes.

“Mrs.” Morone sought, among other claims, to have Mr. Morone account for the moneys he had received during their contract of partnership. In dismissing “Mrs.” Morone’s complaint in the lower court, the judge interpreted her claim as an attempt to recover for “housewifely” duties within a marriage-type relationship. The Appellate Division affirmed the trial court because of “Mrs.” Morone’s failure to assert an express agreement.

In writing for the majority of the court, Judge Meyer pointed out that he was following precedent by requiring an express contract between a non-married couple that did not include illicit sexual relations as part of the consideration. He alluded to the fact that to enforce an implied-in-fact contract would be tantamount to resurrecting common law marriage, which the state had abolished. In addition, Judge Meyer listed a series of questions that he felt made a court-imposed contract (implied-in-fact) problematical.

The trial court’s statement that “Mrs.” Morone’s claim was for compensation for “housewifely” duties and therefore without merit illustrates the confusion about recovery in cohabitation relationships. The old common law view was that a wife performs household duties, not with the expectation of payment, but out of a legal obligation: a wife owes her husband the duty to perform household services. Also, a common law presumption exists that spouses act not for individual

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48 413 N.E.2d 1154 (N.Y. 1980).
49 This argument was also stated in *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) when Justice Tobriner wrote: “As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration.”
50 Judge Meyer asked:

Is the length of time the relationship has continued a factor? Do the principles apply only to accumulated personal property or do they encompass earnings as well? If earnings are to be included how are the services of the homemaker to be valued? Should services which are generally regarded as amenities of cohabitation be included? Is there unfairness in compensating an unmarried renderer of domestic services but failing to accord the same rights to the legally married homemaker? Are the varying types of remedies allowed mutually exclusive or cumulative?

*Morone*, 413 N.E.2d at 1156.
profit or advancement, but for altruistic motives. Yet the New York trial court applied the presumption to a marriage-like relationship. Thus, "Mrs." Morone was in a "no win" situation.

What should recovery be in termination of cohabitation contracts? If there is to be a meaningful distinction between formal or informal marriage and cohabitation contracts, then there ought to be distinct recoveries upon termination. Implied or express cohabitation contracts should be enforced, but the divorce model should not be used for fashioning the remedy.\(^5\) Surely one who terminates a cohabitation arrangement should not be required to support the other person in the same sense as alimony is used (based on need unless clear expectations have been expressed in a contract). "Palimony," the word that has been coined to relate to a cohabitation contract remedy, is misleading since it implies alimony, which is a support obligation only awarded upon a divorce.

Professor Glendon makes a strong case in her opposition to applying the same discretionary rules for property distribution upon divorce to termination of cohabitation contracts. She has written that in Kansas, Mississippi, and Washington, where courts distribute cohabitants' property as they do in divorce cases, cohabitants share with married couples the "same degree of uncertainty about their economic rights as the legislatures in their unfathomable wisdom have granted to married couples."\(^5\) However, applying the divorce model of equitable distribution of property to a cohabiting couple does make sense where property has been acquired jointly with the expectation that it would be jointly enjoyed.\(^5\)

\(^{5}\) However, that is precisely what the California Superior Court did when it heard Marvin on remand from the Supreme Court of California. It awarded Michelle Marvin $104,000 "for rehabilitation purposes." Marvin v. Marvin, 5 Fam. L. Rep. 3077, 3085 (1979). That award was reversed on appeal. See Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981). Thus, after at least five years of litigation, Michelle Marvin received nothing.

In Wilcox v. Trautz, No. SJC-07621 (Mass. April 21, 1998), the Supreme Judicial Court of Massachusetts enforced a cohabitation agreement between a man and a woman, which had been entered into during the period in which they lived together. In the course of the opinion, Justice Greaney briefly reviewed the status of persons in Massachusetts who live together without going through a ceremonial marriage. He stated, "we do not recognize common law marriage, do not extend to unmarried couples the rights possessed by married couples who divorce, and reject equitable remedies that might have the effect of dividing property between unmarried parties." Id., slip op. at 4.

\(^{5}\) GLENDON, supra note 2, at 281.

\(^{5}\) See Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990). In Goode, the couple had lived together for twenty-eight years, had four children, and had held themselves out to the community as husband and wife. West Virginia does not recognize common
Couples living under a contract of cohabitation have not received the same kind of legal protection that exists in an informal or formal marriage.\textsuperscript{54} And except in limited circumstances, there does not seem to be any legislative movement to extend such protection. The cohabitation relationship is not considered confidential, and therefore an individual cannot claim any privilege to prevent a conversation with his or her companion from being revealed in court. Wherever status, rather than dependency, is the basis for obtaining financial benefits, cohabitants do not qualify.\textsuperscript{55}

There is a limit to which cohabiting couples enjoy the economic advantages of marriage. Perhaps the most important restriction is that unless the survivor of the relationship has left a valid will, he or she has no statutory rights in the decedent's estate.\textsuperscript{56} Cases have held that a cohabitant cannot recover for loss of consortium\textsuperscript{57} or wrongful death.\textsuperscript{58} Nor can a cohabitant recover social security benefits.\textsuperscript{59} Judicial responses to attempts by cohabitants to recover for workmen's compensation benefits have not been uniform.\textsuperscript{60}

At least two jurisdictions have allowed a same sex cohabitation couple to adopt a child who was the biological offspring of one of the

\textsuperscript{54} See Bruch, supra note 38, at 727–40.


\textsuperscript{56} Even where there is a will and the testator leaves his estate to his companion, an attack of undue influence can be successful in defeating the will. Such was the case of In re Will of Kaufmann, 247 N.Y.S.2d 664 (App. Div. 1964), aff'd, 205 N.E.2d 864 (N.Y. 1965). In that case, the heirs of Robert Kaufmann were successful in defeating the claim of Walter Weiss, Mr. Kaufmann's companion, on the ground of undue influence even though the testator had left a letter to his family describing his relationship with Mr. Weiss, his intention to leave him an inheritance, and his hope that his family would be pleased with his gratitude toward his friend. The case is discussed in Ray D. Madoff, Unmasking Undue Influence, 81 Minn. L. Rev. 571 (1997).


\textsuperscript{58} See, e.g., Garcia v. Douglas Aircraft Co., 184 Cal. Rptr. 390 (Ct. App. 1982).


cohabitants. This may be an important development in legally recognizing a cohabitation arrangement as establishing the first step in the formation of a family unit.

Without the legal sanction of cohabitation contracts, it does not seem possible that the current trend of municipalities enacting domestic partnership laws could have occurred. These domestic partnership laws are a successful attempt to regulate cohabitation contracts. Not only do they set down formal requirements for the establishment of the relationship (regardless of the sexual orientation of the couple), but they also provide the formal requirements for termination of the relationship. In a certain sense the domestic partnership laws define what some may say is the ideal marriage: an intimate relationship based on mutual trust and support.

For the most part, municipal domestic partnership laws are designed to provide cohabiting couples who have fulfilled the requirements of the registration law with employment benefits, most notably health care and sick leave. Objections to passing municipal domestic partnership laws have been based on economic reasons: enacting such laws will increase municipal budgets because of the need for more money to pay for additional employee benefits. Whether these arguments mask moral objections is not at all clear.

What is interesting about the domestic partnership law phenomenon is that so far no state has enacted a domestic partnership registration law. The Massachusetts State Senate passed one, but it is unlikely that the State’s House of Representatives will also pass the bill anytime soon. Should a state enact a domestic partnership law that recognizes cohabitation, and sets requirements for establishing and terminating the relationship, will other states give it full faith and credit? If one applies the conventional conflict of laws rules governing the recognition of contracts, cohabitation contracts should be recognized in other states.


63 See San Francisco Recognition of Domestic Partners Law § 121, reprinted in Weyrauch et al., supra note 8, at 304–06.

V. Divorce

Professor Glendon has lamented the "withering away of marriage as a legal institution" and the ease in which married couples can terminate their relationship. She is particularly critical of those jurisdictions which blur the distinction between spousal support and marital property. She questions the assumptions courts make about spousal self-sufficiency after divorce when awarding alimony or assigning property. And she believes equitable distribution statutes are an invitation to judges to use their discretion—in other words, personal values—in deciding the economic post-divorce life of the couple.

Professor Glendon has posed the question as to whether the discretionary distribution of marital assets in any way reflects either the intent or the behavior of a marital couple. She thinks not. Nor does she believe that couples in an ongoing marital relationship either intend or practice a partnership-like relationship or would like to subject their property, no matter how acquired, to be split according to the discretion of a judge. She reserves her severest criticism for the legal assumption, manifested either in statutes or by judicial action, that marriage is a "partnership of two equal individuals who may have been economically interdependent in marriage, but who are at least potentially independent upon divorce."

Treating a marriage as a partnership contract does not necessarily have to result in devastating economic consequences. If one were to consider marriage as a true partnership, certain benefits would accrue. What is the modern marriage? It is a contract in the sense that has already been described. It is also a partnership in that it is a fiduciary relationship of two individuals who retain their individuality, who love each other, and who share in and expect to reach mutual aspirations. Marital partners lead their lives with the hope that their conjugal and financial partnership will last. To that end each makes his or her contribution. Like some commercial partnerships, one person may contribute capital, the other may contribute human resources.

But the modern marriage partnership deviates from the commercial partnership in that, in making a contribution, one of the partners may have to make certain sacrifices, such as abandoning a career entirely or suspending one's plans for an uncertain future. Consistent
with partnership law, however, is the principle that a partner cannot benefit himself by using partnership assets to advance his self interest. If he does, the benefit accrues to the partnership. This is consistent with the emphasis that current laws dealing with equitable distribution place on contribution. One spouse may invest in the other spouse as part of the plans for the partnership. This investment may include contributing financially and emotionally to the spouse's education, career advancement, or business. It is unrealistic to think that any person entering into a partnership would expect to leave the partnership less economically secure than when she entered it.

How should assets be distributed following marital failure? Should there be a fifty-fifty split or should each case be examined on an individual basis? Professor Glendon recommends an equal distribution, and that spousal support remain distinct from the assignment of marital property. She also urges judges to be mindful of the lives post-divorce women lead. In the main, the burden falls on them to provide a home and comfort for the children of the divorcing parents. Also, given the current economic conditions, they suffer from employment inequalities. They are the ones who become impoverished upon divorce.

Before the adoption of equitable distribution in non-community property states, the title theory dominated. The old adage, "He who owns the property, gets the property," was followed. This unfair method of allocating property upon divorce allowed for no inquiry into the time of purchase, the use to which the property was put, or the identity of the person who was responsible for the appreciation of the property (not necessarily the same person who made the initial


70 The three questions asked in the assignment of property upon divorce in an equitable distribution jurisdiction are: (1) what is marital property; (2) when should it be valued; and (3) how should it be distributed. In order to answer the first question, courts have come up with three concepts: tracing, commingling, and transmutation. Tracing of assets consists of determining the source of the use of marital funds. Commingling takes place where separate funds are brought into the marriage but become commingled with other assets so as to be untraceable. Transmutation of an asset is the term used to describe the change in character of the property from separate to marital or from marital to separate. This can be accomplished through use, contract, or gift. For an illustration of the application of these concepts, see Quinn v. Quinn, 512 A.2d 848 (R.I. 1986). For a discussion of the concepts, see J. Thomas Oldham, Tracing, Commingling, and Transmutation, 23 Fam. L.Q. 219 (1989).

As to when marital property should be valued, three reference points are relevant: time of separation, time of the petition for divorce, and time of the divorce hearing.
financial investment).71 Basically, in many instances the title theory masked a reality favoring men.

A fifty-fifty split in property may be an easy formula for a termination of a commercial partnership, and may underscore the sense of community in a marriage. But it may result in unfairness in a marriage.72 There are too many variables in a marriage to support a mechanical formula. One of the most important variables is the length of the marriage. The key is the contribution of the individual to the marriage. If equitable distribution laws, like those modeled after Section 307 of the Uniform Marriage and Divorce Act,73 are applied with attention to current case law, they provide a fair method for distributing assets upon divorce. Rather than a mechanical formula or unlimited judicial discretion, they require a judge to consider certain factors. If a judge is required to make a finding for each factor, abuse of discretion can be checked on appeal. Also, the statutory factors provide attorneys with a checklist and a way of organizing their evidence for litigation. Legal scholarship may have a function here to keep watch that neither judges nor legislators continue to apply dated societal values.

71 See Glendon, supra note 2.
72 Professor Glendon recommends a fifty-fifty split “limited to property acquired by gainful activity during the marriage, in the absence of agreement to the contrary.” Glendon, supra note 1, at 63. Professor Glendon sees the difficulty in defending her rule as one of fairness, but “given what is just as true—that no human judge can ever ascertain or quantify the true contribution of each spouse—the equal division of ac-
quests commends itself as a rule of convenience without substantial demerit.” Id.
73 Section 307 [Alternative A] reads as follows:

(a) In a proceeding for dissolution of a marriage, separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, fi-
nally equitably apportion between the parties the property and assets be-
longing to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making ap-
portionment the court shall consider the duration of the marriage, any 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 mainte-
nance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a home-
maker or to the family unit.

The new property, of which Professor Glendon has written, is now part of both equitable distribution statutes and case law. Now, a wife who puts her husband through professional school can acquire a return on that investment by having an interest in his professional degree or license. She can receive a share of his pension and an interest in his business. The husband who helps to build the career of his wife who becomes a celebrity may expect to obtain an interest in that career. A homemaker who stays home to care for children may be compensated for her services by considering those services as a human capital contribution to the partnership. Consideration of, or recovery for, any of these contributions would have been unthinkable before equitable distribution became law. Today, divorce need not result in looking at the marriage partnership as an investment that did not pay off at all.

VI. Conclusion

Professor Mary Ann Glendon’s family law scholarship has greatly illuminated the difficulties that exist in trying to fit such family law matters as antenuptial agreements, cohabitation contracts, and property assignment upon divorce into neat legal constructs. The tension between adhering to traditional rules of contract or partnership law, and considering the unique social policy considerations in marriage, causes a certain amount of distortion. How can private ordering be respected or even encouraged if legal recognition is in doubt? Is family law, ordinarily classified as private law, moving toward being considered as public law? Will the questions posed in matters dealing with antenuptial agreements, cohabitation contracts, and property settlement agreements be similar to those asked when legislation is being

74 See O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985). In O'Brien, the Court of Appeals of New York applied the New York Domestic Relations Law and considered Dr. O'Brien’s license to practice medicine as marital property. New York is the only state that considers a license or a degree as property. The more common method of including it as part of the marital estate is to consider it as providing the holder of the degree as having an enhanced earning capacity because of the contribution of the supporting spouse and including it in an alimony award. For a full discussion of this issue, see American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 4.07 (Proposed Final Draft Part I, February 14, 1997).


interpreted? Must those kinds of private agreements serve the public interest to be enforced?

If we move away from the protection of the individual in family law matters, and toward communal values, we shall be breaking with fundamental traditions in this country. In the case of marriage, for example, communal values and public policy considerations may treat that relationship as a vehicle to enforce national concerns, for example in regard to national morality. The concept of privacy and individual assertion of rights, if only within a contractual context, may be in flux and changing. This leaves a number of questions unanswered, at least at this stage. A scholar with the breadth and ingenuity of Professor Mary Ann Glendon is ideally suited to cope with these evolutions, which by no means relate only to marriage and cohabitation, but can be witnessed in any aspect of private and public life.