

DOMESTIC AGREEMENTS

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I. INTRODUCTION

In this Article I want to explore the treatment of certain domestic agreements in family law and to see what can be learned about law and families.

It is a cliché, in discussions of family law and agreements, to point to Sir Henry Maine's famous quotation that society has moved "from Status to Contract."¹ I will not disappoint expectations here. The Maine quotation is usually offered ironically—and perhaps defiantly—in family law articles, as this is one area where status has stoutly, and largely successfully, resisted being overtaken by contract.

Status remains important—both practically and symbolically—in family law, and the state guards its prerogatives in setting status. It was once the case that the status that mattered most in family matters was marital status—not only was this the only context in which sexual behavior was legally authorized and socially condoned, it also was a status that determined one's rights (or lack thereof) over children.² Married parents had full rights and obligations—a child of unmarried parents was *fillius nullius*, "the child of no one."³ It is not that marital status has entirely lost importance—as debates over same-sex marriage make crystal clear, this status continues to have great significance to many, who fight vigorously to be allowed into the club, or to keep others out.

However, I think it equally clear that it is parental status that now has primary importance in American family law. And this remains an area where the states have been slow—arguably much too slow—in letting parental status be in part established by, or modified by,

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1. SIR HENRY SUMNER MAINE, *ANCIENT LAW* ch. 5, at 141 (Geoffrey Cumberlege ed., Oxford Univ. Press 1954) (1861) ("[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.").

2. On the change of importance of marital status to parental rights, see generally JUNE CARBONE, *FROM PARTNERS TO PARENTS* (2000).

3. Diane Harriford & Mary L. Shenley, Essay, *Revisioning Family Law*, 30 *LAW & SOC'Y REV.* 437, 438 (1996).

agreement.

This Article will focus on a series of situations in which parties attempt to affect parental status or parental rights through agreements. Part II will look at co-parenting agreements between same-sex parents; Part III will explore separation agreements; Part IV will consider premarital agreements; and Part v. will discuss agreements with sperm and egg donors and, briefly, surrogates.

The response to these different domestic agreements varies widely. The possible state responses to such agreements include: (1) substantial deference to party autonomy; (2) distrustful and hesitant partial recognition of party choice; and (3) a defiant refusal to enforce the agreements in any way.

The current treatment of domestic agreements can be understood in terms of the state setting boundaries on the ability of individuals to affect status by contract. There was a time, some centuries back, when the state did not concern itself with marital status at all, but left such matters either to individuals or to the Church (and the Church courts).⁴ However, from the point when the state got into the business of regulating marital status, it has been rigid in guarding its boundaries, and the modern state remains a jealous guardian of marital status—even as that status begins to mean less and less.

One thing we will see along the way is how anomalous the law's treatment is towards co-parenting agreements, with the state turning its back on parents who want to be responsible for children. The question is not merely whether the courts should change their attitude towards these agreements, but what we might learn from these anomalies in the state's treatment.

II. CO-PARENTING AGREEMENTS

A same-sex couple is interested in having and raising a child together.⁵ In the state in which they live, however, they are not allowed to marry, and state law also does not allow them to create equal parental status through stepparent adoption.

The partners try to help themselves, by entering into a detailed agreement, in which they commit to each other that they want both partners to be legal parents to the child they will have, and neither will

4. In England, it took until 1857 for marriage jurisdiction to be withdrawn from the Church. Until then, "for the most part, the marriage law of the Church was the law of England." R. H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 3 (1974).

5. There has been at least one comparable case with an opposite-sex unmarried couple. *See* *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 48 (Ct. App. 2000).

challenge the parental rights of the other.

Such co-parenting agreements have regularly been written.⁶ When things go well, we hear no more about them. However, one does come across cases where such couples break up and then, despite the agreement, one of the partners tries to exclude the other from parental rights. For example, consider these facts from a 1991 New York case:

Petitioner Alison D. and respondent Virginia M. established a relationship in September 1977 and began living together in March 1978. In March 1980, they decided to have a child and agreed that respondent would be artificially inseminated. Together, they planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing. In July 1981, respondent gave birth to a baby boy, A.D.M., who was given petitioner's last name as his middle name and respondent's last name became his last name. Petitioner shared in all birthing expenses and, after A.D.M.'s birth, continued to provide for his support. During A.D.M.'s first two years, petitioner and respondent jointly cared for and made decisions regarding the child.

In November 1983, when the child was 2 years and 4 months old, petitioner and respondent terminated their relationship and petitioner moved out of the home they jointly owned. Petitioner and respondent agreed to a visitation schedule whereby petitioner continued to see the child a few times a week. Petitioner also agreed to continue to pay one-half of the mortgage and major household expenses. By this time, the child had referred to both respondent and petitioner as "mommy." Petitioner's visitation with the child continued until 1986, at which time respondent bought out petitioner's interest in the house and then began to restrict petitioner's visitation with the child. In 1987 petitioner moved to Ireland to pursue career opportunities, but continued her attempts to communicate with the child. Thereafter, respondent terminated all contact between petitioner and the child, returning all of petitioner's gifts and letters.⁷

In this case, as in nearly every case involving a co-parenting agreement, the excluding parent's decision is supported by the courts.⁸

6. There are Internet sites that offer advice and assistance for couples considering co-parenting agreements. See, e.g., Human Rights Campaign, Co-Parenting Agreement, <http://www.hrc.org> (search "co-parenting agreement") (last visited Sept. 9, 2007).

7. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (1991). Because of the procedural posture of the case, the facts reported by the court are those alleged by the petitioner. *Id.* at 28 n.*.

8. *Id.* at 29; see also *Sporleder v. Hermes (In re Interest of Z.J.H.)*, 471 N.W.2d 202, 211 (Wis. 1991). One case that came out the other way had the distinctive extra fact that the agreement was an "Agreed Entry" signed by the court. *In re Fairchild*, No. 01 JU-03-2542 (Ohio Ct. C.P. Franklin Cty., Jan. 7, 2007), 33 BNA Fam. Law Reporter 1178 (Feb. 20, 2007). One must be cautious about overstating the significance of some of the co-parenting agreements in these cases.

The other partner is entirely excluded from the child's life, a child she had done everything to help raise.

Additionally, in the few cases where the court denies a parent the right to exclude his or her partner—that is, when the partner retains some right of contact with the child—that decision is rarely grounded on the parties' express agreement, but rather is based on the partner's acquisition of some quasi-parental status through his or her actions.⁹

It is hard to find the words to describe the removal of a parent—if some would object that this begs the question, let one say the removal of “someone who is acting in the role of a parent”—from a child's life, and the child from that person's life, and this after a solemn promise was made not to engage in this action. Many appalling things happen in this world, but I doubt that there are many harms more shameful than this, where it is also the case that the perpetrator publicly seeks judicial approval for her actions, and has a good chance of obtaining it. (And I would add that the effort to exclude the other parent would be shameless even without the express agreement; if the agreement adds anything, it is the removal of possible ambiguity about the parties' expectations.) However, enough gratuitous editorializing. I want to look at how these cases illuminate issues of choice and status in family law.

Let us begin with the basics. The legal custodians of a child¹⁰ have the right to authorize another person to spend time with the child, and provide care for the child.¹¹ The state imposes few limits on that right—at an extreme, certain companions and caregivers may be so harmful to a child that leaving the child in such company would be a justified basis for suspension or termination of parental rights and perhaps also criminal charges, but these are, thankfully, rare and highly exceptional

They may not be fully negotiated statements of the parties' preferences. For example, in some cases, the agreements are part of a sperm donation, IVF or surrogacy process. *See Wakeman v. Dixon*, So. 2d 669, 670 (Fla. Ct. App. 2006) (agreement as part of sperm donation agreement), and may be imposed as a requirement by an agency the couple is using. In other cases, the voluntariness of the agreement may be under dispute. *See Z.J.H.*, 471 N.W.2d at 204 n.2 (reporting allegations that the agreement was signed under duress in response to threat to disrupt adoption process).

9. *See, e.g., J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996); *cf. Holtzman v. Knott*, (*In re H.S.H.-K.*), 533 N.W.2d 419, 434-35 (Wis. 1995) (overruling *Z.J.H.*, 471 N.W.2d 202, but allowing visitation on the basis of general parental function; stating in dicta that visitation could also be sought on the basis of a co-parenting agreement). Other states, it should be noted, have been quite reluctant to use doctrines like “*de facto parent*” or “*in loco parentis*” to protect the parental rights of partners in a same-sex couple. *See, e.g., Jones v. Barlow*, 154 P.3d 808, 810 (Utah 2007) (denying standing to seek visitation, on the basis that *in loco parentis* doctrine did not apply to former domestic partner who had helped to raise the child).

10. The legal custodians of a child are usually that child's legal parents, but there are exceptions.

11. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

circumstances.¹² However, in general, allowing or directing access is a central part of what caregivers do. The Supreme Court in *Troxel v. Granville*,¹³ the grandparent visitation case, can be seen as turning on the constitutional right of legal parents to control the child's access to grandparents and other third parties.¹⁴

Co-parenting agreements are about one person giving the other advance permission to spend time with a child, purporting to waive his or her right to object at some later time.¹⁵ Looking at this in the most general terms, there is nothing that unusual here. This is, after all, the basic structure of all promises and agreements: The reduction of one's own future liberty, often in exchange for a reciprocal reduction by another party. In this case, the restriction of one party's parental prerogative is likely given in exchange for the other party's commitment to parent, to contribute to the care, comfort, and support of the child.

However, this is not the way the government, through the court system, sees these agreements. Why are the courts, usually so friendly to enforcing private arrangements, so unfriendly here? (As we will see, the courts, though perhaps suspicious generally of domestic agreements, are significantly more receptive to enforcing separation agreements and premarital agreements.) Perhaps the government's response to co-parenting agreements can be understood as expressing the view that such agreements are problematic because they are long-term or irrevocable consents to visits. It is not just: you can look after my child, or visit with my child, this afternoon. Rather, you have my blanket and irrevocable permission to be with my child for the indefinite future.

Perhaps this looks like a radical waiver of rights, from which the government should protect us. Or perhaps it just looks like a one-sided promise that is too unconscionable to enforce. However, that is to underestimate the value of enforceable promises, as well as to forget that co-parenting agreements are bargains, not just one-sided promises. The ability to make long-term commitments is not best understood as a limit to the parent's (or potential parent's) freedom, but rather as an enhancement of it. In this case, the ability to make a binding

12. See, e.g., *Wright v. Ark. Dep't Human Servs.*, 115 S.W.3d 332, 333-35 (Ark. 2003) (terminating mother's parental rights because of her exposing her child to sexual and physical abuse at the hands of her boyfriend).

13. 530 U.S. 57 (2000).

14. These are (constitutional and common law "family privacy") rights that legal parents have against governmental interference. See *id.* at 66 (discussing the constitutional rights of parents); *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (grounding refusal to intervene in marital dispute of intact couple on doctrine of "family privacy"). What rights of this sort each parent would have against the other within an intact family is less clear.

15. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 & n.10 (Mass. 1999).

commitment (or, at least, a commitment that the other party reasonably believes to be binding and enforceable) gives one parent (and a child) significant gains over the course of months and years. The only question is whether the state will enforce the exchange already made—with one side, having received significant benefits, now trying to renege on the deal rather than give what was offered in return for those benefits.

Of course, one should keep in mind the general truth that the state has little concern with agreements as such; people can, on the whole, make what arrangements they like, as long as such matters are kept between the parties. The problems only arise when an agreement is not kept, *and* one party seeks the state's help in coercing the other party to abide by the terms of the agreement, *or*, in these cases, when the other party seeks the state's help in excluding a parental figure from a child's life.

Back to the point: It is now commonplace to point out that the ability to enter binding commitments enhances our options significantly. In our particular case, the ability to make a binding commitment may allow someone to convince her partner to go forward with parenthood. This is a significant benefit that comes only with bindingness.

In other contexts, like separation agreements (the topic of the next section), the courts do go some way towards allowing parties to make binding long-term arrangements regarding their children.¹⁶

One should also note that the court decisions in co-parenting cases often are grounded partly or wholly on the interpretation of particular statutes—for example, legislation limiting who can petition for visitation.¹⁷ However, one can frequently respond to opinions grounded this way, that there remains the argument that the courts' reading of the legislation has been unduly restrictive and formalistic, especially compared to how the courts have treated other legislation concerning domestic relations.¹⁸

At times, when reading co-parenting agreement cases, it is hard to escape the suspicion that disapproval of homosexuality in general, and same-sex couples (and same-sex parents) in particular, is driving the courts' reasoning and conclusions. At the least, there seems to be a desire not to give its legal imprimatur, indirectly, to same-sex relationships¹⁹ or directly to same-sex parenting.

16. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979).

17. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29-30 (1991).

18. See *id.* at 30-31 (Kaye, J., dissenting) (providing an example of both points).

19. A Montana statute declares: "A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) [referring to a 'marriage

However, to be fair, one should perhaps not view the state treatment of co-parenting agreements as—always or only—reflecting an animus to same-sex couples, as something comparable occurs even with opposite-sex and married parents. When opposite-sex, married parents try to assign or waive rights regarding parenting after divorce, for example through premarital agreements assigning visitation rights, custodial rights, or even boundaries regarding religious upbringing, the courts consistently refuse to enforce such agreements.²⁰

The states view co-parenting agreements as interference with their role to protect the best interests of children. This is a protection that the states bestow through the combination of determining parental status and then guarding the prerogatives of parents.

Sometimes the courts ground refusal to recognize co-parenting agreements on the constitutional rights of parents,²¹ but as discussed above, this is, at the least, too quick.²² This is not a simple case of the state granting third parties rights with no consent of any kind from the legal parents. These are instead cases of a legal parent giving consent at an earlier time, making a commitment to continued assent, and then violating that commitment, and seeking the court's approval for the violation.

This, in turn, is often justified as a way of declaring that a household with opposite-sex married parents is the optimal context in which to raise children.²³ The argument is based on the further claim (sometimes unstated) that withholding rights from other household arrangements will encourage more parenting in a marital context.²⁴ This line of argument, though common, is deeply flawed. Among the problems to consider: (1) even if married opposite-sex parents are optimal, that does not mean that other forms of parenting are harmful; (2) even if other forms of parenting are harmful in some sense, any benefit obtained by encouraging optimal parenting must be balanced against the harm done to those parents and children left without legal

between persons of the same sex'] is void as against public policy." MONT. CODE ANN. § 40-1-401(4) (2005).

20. See, e.g., LAURA W. MORGAN & BRETT R. TURNER, *ATTACKING AND DEFENDING MARITAL AGREEMENTS* 390-93 (2001) (premarital agreements cannot validly cover issues relating to custody, visitation, and religious upbringing).

21. See, e.g., *Wakeman v. Dixon*, 921 So. 2d 669, 671-72 (Fla. Ct. App. 2006).

22. Another possible argument might be one based on the common law doctrine of "family privacy," as in *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953). However, the argument grounded on the value of government interference in an intact marriage has little direct (or obvious analogous) application to an unmarried couple thinking of raising a child together.

23. *Wakeman*, 921 So. 2d at 672-73.

24. John Dewitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 182 (2002).

protections because they do not meet the law's requirements; and (3) while it is possible that some people who would otherwise enter same-sex partnerships might enter traditional marriages because of greater legal benefits of doing so, one can question (a) how many would do so; and (b) the relative stability of those relationships.

In any event, one should note the difference between the present context of co-parenting agreements by same-sex couples and other contexts in which the relative merits of different parenting options comes up. For example, in questions of foster care and adoption policies, the question often is the best setting for some existing child needing care.²⁵ By contrast co-parenting agreements relate to the creation of a new child, and maintaining legal protections for such a child, not the optimal placement among alternatives for a child already in existence.²⁶

As already noted, in the few cases where the rights of parties to co-parenting agreements have been recognized, the decisions upholding those rights were usually grounded not on the agreement, but rather on the *de facto* parental role that the party had (and the court's general role protecting the "best interests of the child").²⁷ This leads to a different line of inquiry: How strongly would I want to push the importance of enforcement of agreements here? What if a legal parent entered an agreement to recognize rights of access (regular visitation) to someone who otherwise had no role in the child's life (not the genetic parent or genetic donor, not a regular caretaker, and not the income-provider for the household)?

One response would be similar to what the courts have done: Agreements are relevant only when the non-parent partner has had a role sufficiently like a parent that it deserves official recognition, and the role of the agreement is just to help clarify the parties' intentions in ambiguous circumstances. This would seem to be the expected circumstances for the vast majority of co-parenting agreements, but it might overcome some opposition to a general enforcement of co-parenting agreements to make this a formal requirement.

A second possibility would be that agreements should only be enforceable where the non-parent partner has relied upon them in

25. Though arguments about optimality would only justify a preference, not the absolute exclusion one finds in some jurisdictions. See *Loften v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding Florida law refusing adoption to homosexuals). Comparable debates surround race matching in child placement. See generally Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (arguing against race-matching).

26. Though, of course, by the time a co-parenting agreement is litigated, the child that is subject to the agreement will normally already be in existence.

27. See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999).

substantial ways, as in the example of partners who only go forward with having and raising a child once they are assured that they are not at risk of being cut off later.

III. SEPARATION AGREEMENTS

The most deferential treatment of party choice, in terms of enforcing such agreements, occurs with separation agreements, which set the terms of divorce for the vast majority of couples who have their marriages dissolved.²⁸ For such agreements, the deference is substantial, though not total. In principle, courts are to review the financial terms between the parties covered by the agreement for basic fairness, and to give a hard look to the child-centered terms of custody, visitation, and child support (because of the state's *parens patriae* responsibility for children).²⁹ By most accounts, in practice, courts are generally rubber stamps, at least when the parties present the agreement without further objection.³⁰ Where one of the parties now objects to a separation agreement he or she had earlier signed, the court is more likely to give the agreement a substantive review, especially if the claim is that the agreement acts against the best interests of the children.³¹

One might note that the general rule is that post-divorce parenting arrangements are also subject to review and modification by later court challenge; they are thus not, effectively, indefinite waivers of rights as a co-parenting agreement purports to be. This is true, though one should also consider that many jurisdictions require a waiting period from the finalization of a divorce to any effort to modify the parenting arrangement, and some also impose waiting periods between one attempt to modify and the next one.³²

It is important to note that the enforcement here, when it occurs, is frequently *stronger* than that offered for conventional contracts, for when separation agreements are accepted as reasonable by the court, and merged into the final divorce decree, the terms of the agreement become orders of the court, subject to enforcement by a contempt decree.³³

28. One recent localized study found that eighty-eight percent of the divorce disputes had been settled through a separation agreement. Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. LAW & ECON. 241, 250 (2005).

29. See, e.g., Mnookin & Kornhauser, *supra* note 16, at 954-55.

30. See, e.g., *id.* at 955.

31. See, e.g., *Stewart v. Stewart*, 278 P.2d 441, 445 (Cal. Dist. Ct. App. 1955).

32. See, e.g., MINN. STAT. § 518.18(a), (b) (2006) (general rule of one year from initial custody order to any petition for modification, and two years between one petition for modification and the next one); Uniform Marriage and Divorce Act § 409(a) 9A (Part II) U.L.A. 439 (1998 & Supp. 2006) (general rule of no modification until two years after custody order).

33. Merger does have one significant downside, as it usually makes the terms of the

No one is claiming that separation agreements are ideal. Even in the best of circumstances, these agreements are frequently entered into in circumstances where one or both parties might be feeling emotional distress or financial coercion. These are deviations from knowing consent that might cause judges to pause before enforcement with more conventional agreements. Also, a one-sided separation agreement can leave spouses and children in or near poverty. Sometimes, parties “come to their senses” after signing on to a separation agreement, and ask the judge not to enter the agreement, but judges will usually reject signed agreements only in a small percentage of cases, and usually only where the unfairness of the financial terms is quite egregious (again, objections covering child-centered terms frequently evokes more judicial attention and concern).³⁴

Separation agreements are not as “radical” as co-parenting agreements, as they do not purport to grant parental rights and obligations beyond what state-granted status already provides. However, there is a case currently pending in Utah where a same-sex partner is trying to establish legal parental rights based on a “visitation agreement” she had entered with her ex-partner after their relationship soured.³⁵ Similarly, a separation agreement is not a complete withdrawal of parental rights and status as some sperm and egg donation agreements, discussed later, effectively are. Finally, unlike premarital agreements, they deal with divorce as an imminent event, rather than as a speculative and perhaps-hard-to-imagine far-future contingency.

We understand the reasons for the courts’ deference to separation agreements. First and foremost, divorces settled by agreement do not need to be settled by (further) litigation, with all that means for saved court time, saved party resources, and less hostility between the parties. There is, additionally, the idea that an agreed settlement is more likely to reflect the parties’ needs, preferences, and interests than an imposed settlement, with all that might mean for greater party satisfaction and greater compliance.

agreement, in particular the terms of alimony, subject to modification. (Two things to note: child support is always subject to later judicial review and revision; and some states allow the parties to agree to have their alimony terms not subject to review. *See, e.g.*, MINN. STAT. § 518.552, subd. 5 (2006)).

34. *See* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 169 n.98 (1998) [hereinafter Bix, *Bargaining*].

35. *See* Ted McDonough, *Ms. v. Ms.: A New Legal Chapter Opens for Gay Couples with Children*, SALT LAKE CITY WEEKLY, Apr. 19, 2007, available at <http://www.slweekly.com/index.cfm?do=article.details&id=1CB7ECA1-2BF4-55D0-F1F60FB0FAEDC0C5>.

There are simply too many practical reasons to respect party autonomy, and few reasons of principle to object to most separation agreements.

IV. PREMARITAL AGREEMENTS

Until approximately thirty years ago, agreements entered by a couple prior to marriage, setting the financial terms of any subsequent divorce, were unenforceable as contrary to public policy.³⁶ Under such agreements, one partner (usually the wife) agrees to waive some or all of her rights to property or alimony upon divorce—in return, it is said, for the other party's agreement to get married.³⁷

Many of these agreements involved a wealthier partner who had already gone through a prior divorce, with property division and alimony payments, and wanted to avoid having to take on comparable financial obligations should the new marriage also end in divorce. A somewhat different sort of story is told by partners who had children from a prior marriage, and wanted to make sure that certain properties went to those children, or to grandchildren, despite whatever obligations might arise from a new marriage, and that new marriage's possible dissolution.

These divorce-focused premarital agreements were said to encourage divorce (in the sense, that they make divorce easy, that is, less costly, for one of the partners, even if they simultaneously make divorce more costly for the other partner).³⁸ Alternatively, the agreements were rejected on the related grounds that they purported to change the terms of a status set and protected by the state.³⁹

Here, again, the courts guarded their prerogative over status. If “status” meant anything, it was that a certain position in society—here, “spouse”—carried certain rights and obligations that could not be altered, even by the agreement of the two persons most interested in the relationship in question. A married couple could generally run their marital life as they saw fit, but they could not expect state enforcement of agreements or arrangements that varied the terms set by the state. In the bad old days of gendered rules regarding marriage, this meant that the husband would not waive his right to determine the domicile of the

36. Jurisdictions tended to look more favorably on premarital agreements that altered the financial rights of the couple at the death of one or both partners. *See* Bix, *Bargaining*, *supra* note 34, at 150-53.

37. *Id.* at 148 & n.11.

38. By altering the financial terms of divorce, premarital agreements make divorce relatively cheaper for one of the partners, thus perhaps creating greater incentives to divorce. Of course, the same agreement will create a lesser incentive to divorce in the other partner.

39. *See* Bix, *Bargaining*, *supra* note 34, at 150.

couple, and the wife could not waive her right to support.⁴⁰ One can still find cases invalidating agreements where the consideration involves either spouse waiving his or her right to care.⁴¹

Slowly, courts changed their attitudes about divorce-focused premarital agreements. Now, no jurisdiction treats such agreements as per se unenforceable, though many jurisdictions will enforce only those agreements that pass certain criteria of fairness.⁴²

The basic underlying message of the changed attitude interests me. States are now more willing to let the parties set the terms of their marriage, within certain limits. We need to consider the legal and social context: We live in a society now where both as a matter of legal regulation and social norms, there is limited constraint over when and whether people marry.⁴³ It is also a context with limited legal and social constraints on whether married couples stay married.⁴⁴ And, finally, we live at a time when legally, divorce is no longer either rare or granted only to innocent and victimized spouses, and, socially, in most communities, there is little stigma associated with divorce. Taking all this into account, there seems less reason to stop couples who want to enter marriage, but only on slightly altered terms.

Where the state and society seems less concerned on who gets married, and who stays married, one can see the argument for telling the state that it should allow marriage on terms altered by the parties. However, there is an additional consideration pointing in the other direction: We also have a state and a community much more accepting of cohabitation outside of marriage.⁴⁵ One could reasonably ask: Where cohabitation is an accepted alternative to marriage, why should the state admit couples to marriage on anything other than the state's preferred

40. See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 937-38 (E.D. Mich. 1940) (refusing to endorse an agreement waiving these terms).

41. See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 17-18 (Ct. App. 1993).

42. Bix, *Bargaining*, *supra* note 34, at 153-54.

43. Marriage remains primarily a publicly regulated status. If one goes far enough back in Western history one can find periods when the State delegated the regulation of marriage to the Church; and, further back, when marriage was a private matter of agreement between the parties, with no direct participation by either the Church or the State. See, e.g., Philip L. Reynolds, *Marrying and Its Documentation in Pre-Modern Europe: Consent, Celebration, and Property*, in *TO HAVE AND TO HOLD I*, 1-29 (Philip L. Reynolds & John Witte, Jr. eds., 2007) (summarizing some of the marital rules and practices of Roman Law and medieval Europe).

44. I do not mean to discount the unpleasantness—and expense—of divorce under any circumstances, but under a no-fault regime a divorce is all but inevitable for those who seek one. It was not always that way. See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 63-64, 76-80 (1987) (summarizing the substantial changes in American divorce law).

45. Six states still have statutes on their books prohibiting extramarital cohabitation, but they are rarely enforced. See Dale Wetzel, *N.D. Anti-Cohabitation Law Repealed*, FOXNEWS.COM, Mar. 1, 2007, <http://www.foxnews.com/wires/2007Mar01/0,4670,LivingInSin,00.html>.

terms? And the inverse need also be asked: Why do parties want to marry—especially if they do not like the terms on which the State offers marriage, and if cohabitation outside of marriage is available, and many arrangements between the partners can be achieved by contract and other legal documents? One part of the answer from the perspective of the partners is that there remains something of symbolic importance about being married—with all the historical, traditional, and religious connotations that marriage still carries. One might also note the state and federal benefits available only or primarily to married couples.

There are limits to the state enforcement of premarital agreements. As mentioned, many states impose substantive limits on financial terms (either of general fairness, limiting the ability to waive spousal support, or conditioning the waiver of rights on a spouse not requiring state support).⁴⁶ Additionally, all states refuse to enforce agreement terms that affect child custody, visitation, or child support, or that purport to limit the grounds for divorce.⁴⁷

That is, states have become far more tolerant about allowing couples to set the financial terms of the marriage they are entering, but remain protective about children and about controlling the ability to exit.

There are three states that have allowed couples entering marriage to agree to a state-sponsored option of a more binding form of marriage—so-called covenant marriage, offered by Louisiana, Arkansas, and Arizona⁴⁸—but no state courts, to my knowledge, have been willing to enforce private agreements by couples entering marriage to place comparable restrictions on their ability to exit their marriages, where a couple might agree, for example, not to seek a no-fault divorce available in their state, or abide by a longer waiting period for divorce than that mandated by their state.⁴⁹

On the subject of children, the contrast with separation agreements is interesting. Unlike premarital agreements, separation agreements can properly and enforceably deal with matters touching on the obligations towards children. With separation agreements, the doctrine is that the court should not defer to the couple in their terms regarding children (custody, visitation, support), but should offer an independent review to determine whether the terms are fair and in the children's "best

46. Bix, *Bargaining*, *supra* note 34, at 153-54.

47. Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 345 (2005).

48. ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (2007); ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (2002 & Supp. 2006); LA. REV. STAT. ANN. §§ 9:272-275 (2000 & Supp. 2007).

49. See Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY 372, 377 (Robin Fretwell Wilson ed., 2006) [hereinafter Bix, *ALI Principles*].

interests.”⁵⁰ As mentioned earlier, the reality is that (by all accounts) courts usually rubber stamp these terms, especially if neither (adult) party to the separation agreement objects at the time the divorce is finalized.⁵¹

This may be a good point to say a few words generally about both contract law and family law—about how those areas are understood, and to see, through opinions and commentaries, the fields’ self-understanding, their self-presentation to the world. The paradigm of contract law is the agreement hammered out by parties of roughly equal bargaining power, operating at arm’s length. However, the reality of modern contracting practice is that a large percentage of agreements are in fact not negotiated, but are presented, on standardized forms, on a take-it-or-leave-it basis, to consumers who have no power to force renegotiation, and neither the time nor the expertise to understand much of what they are signing.⁵²

Many premarital agreements—and other domestic agreements—whatever their other faults, can look good by comparison. They are usually not form contracts, and many states require disclosure and an opportunity to consult a lawyer, requirements rarely imposed on other agreements.⁵³ Additionally, the negative terms of premarital agreements are not hidden behind more positive inducements (as they are when covenants not to compete are placed at the end of employment agreements), but are rather the main focus of the agreement.⁵⁴ That is not to deny the problems such agreements still raise by way of power imbalances, bounded rationality, and coercive circumstances.⁵⁵

One might say that while contract law was once thought to be the arena of “freedom of contract”—obligations imposed to the extent, but only to the extent, that they are freely chosen—it is now a place where obligations are often largely determined by the interaction of company forms and government regulations.⁵⁶ Family law might be thought to be

50. *Id.* at 388.

51. Mnookin & Kornhauser, *supra* note 16, at 955.

52. See, e.g., Brian Bix, *Contract Law Theory*, 13 (Univ. Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 06-12), available at <http://ssrn.com/abstract=892783> (published in modified form as Brian Bix, *Some Reflections on Contract Law Theory*, 1 PROBLEMA 143 (2007)).

53. Bix, *Bargaining*, *supra* note 34, at 155 & n.38.

54. See Bix, *ALI Principles*, *supra* note 49, at 379-80.

55. These points were well highlighted by Judith T. Younger in her recent lecture. See Judith T. Younger, Professor of Law, Across Curricular Boundaries: Searching for a Confluence Between Marital Agreements & Indian Land Transactions, Reappointment Lecture for The Joseph E. Wargo and Anoka County Association Professor of Family Law, University of Minnesota Law School (Mar. 27, 2007) (on file with author).

56. On how the mixture of market and government differs between the United States and the

a kind of mirror image: An area which focuses on the obligations and rights automatically connected with certain statuses—parent, child, spouse—with little to no room for alteration of those obligations and duties. This is changing, albeit slowly, as the present Article reports.

V. AGREEMENTS RELATING TO THE PARENTAL RIGHTS OF EGG AND SPERM DONORS

An emerging area of discussion and litigation in domestic agreements involves egg and sperm donors.

Before considering this area, it is useful to consider the general background of agreements and parental rights. Sometimes one comes across situations where a couple has informally reached an agreement under which, for example, the biological father would waive all rights to a resulting child in return for having no duties of child support. However much a couple may want to waive the parental rights of one of the biological parents, or think it a good idea, the parents cannot legally waive one of the parent's (in the real world, usually the father's) support obligations.⁵⁷

It is a simple presumption: It is rarely in a child's best interests to have fewer adults with duties for the child's care. To put the point in the awkward terminology of economics so fashionable today, parental agreements waiving obligations to a child have strong negative externalities. The contrast with the co-parenting agreements, discussed earlier, that the courts also resist, is interesting. While an agreement by which a prospective parent tries to get out of parental status removes an adult, permanently, from a child's life (or at least removes the financial support of that parent), the co-parenting agreement is an effort to make sure that there is an additional, second adult in the child's life.

One countervailing consideration is the (often unstated) belief that having more than two (legal) parents may be contrary to the best interests of the child. This view either derives from, or feeds into, the visceral reaction many people have against polygamy. And it is present in the standard of the Uniform Parentage Act⁵⁸ and in the rules regarding stepparent adoption.⁵⁹ At the same time, the resistance to multiple parents may be slowly ebbing away in the face of the reality of blended

European Union, see for example, Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 175-90 (2006).

57. See, e.g., *Fleming v. Brown*, 581 So. 2d 202, 203 (Fla. Dist. Ct. App. 1991).

58. See, e.g., Uniform Parentage Act § 201 U.L.A. 309 (2001 & Supp. 2006) (establishing the legal status of father and mother only).

59. See, e.g., Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 309, 334-35 (2001).

families, where children face more (sometimes many more) than two parental figures—functionally, if not legally.

Returning to the topic of agreements with egg and sperm donors, such agreements usually occur against a background of statutory regulation or established case-law, which holds that, if certain requirements are met, the gamete donor is to have neither the rights nor the duties of a legal parent to any resulting child, and the intended parents are to be the legal parents.⁶⁰

A current dispute before the Kansas Supreme Court arises from a statute that holds that sperm donors have no parental rights unless the relevant parties enter an express agreement to that effect.⁶¹ In the dispute before the court, the sperm donor was a friend of one of the intended parents, and he claimed that it was always intended that he would have a role in the child's life.⁶² While the dispute might turn on the policy arguments behind writing requirements (statutes of fraud), including the problems of proof in cases just like this one, the background issue is the state's willingness in these cases to allow a genetic parent *not to have* parental rights (to encourage sperm donors and the use of donated sperm), but also, at least where the parties expressly agree, to include sperm donors as parents.

An obvious connection can be drawn between these agreements and surrogacy agreements on the one hand, and agreements to place a child for adoption on the other. Both surrogacy agreements and agreements to place a child for adoption are agreements about the waiver of parental rights. However, surrogacy agreements are not enforceable in any state, though they are conclusive for determining parental status in California,⁶³ and can be the grounds for binding pre-birth orders in Illinois,⁶⁴ and perhaps one or two other states. At least in those states, the agreements serve their essential purpose—transferring or establishing parental rights—even if the agreement itself may not be enforceable.

Agreements to place one's child for adoption carry some suspicion in the law; parents (or, at least mothers) are usually not allowed to consent effectively to an adoption until a certain time after birth, and are frequently given an additional period of time after consent in which to

60. In Minnesota there is such a statute for sperm donation, but not for egg donation. MINN. STAT. § 257.56 (2006).

61. Steve Fry, *Court Weighs Parental Rights*, TOPEKA CAPITAL-JOURNAL (Dec. 5, 2006), available at http://www.cjonline.com/stories/120506/leg_parentalrights.shtml.

62. *Id.* At the time of writing, the Kansas Supreme Court has still not come down with a decision in this case.

63. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998).

64. 750 ILL. COMP. STAT. ANN. 47/1-75 (West Supp. 2007).

have a change of mind.⁶⁵ However, after that time passes, consents to adoption (unlike the vast majority of surrogacy agreements) work as effective transfers of parental rights.⁶⁶

One way to think about the different treatment of the various agreements affecting parental status is that the state (or society) should be naturally more favorably inclined to agreements that add a parent to a child's life than towards agreements by which someone tries to escape a parental role. Thus, we recognize why states will not allow a biological parent to effectively waive another biological parent's rights and duties towards a child through an agreement. The state will recognize the waiver of parental rights by sperm and egg donors and by parents giving up their children for adoption, because in those cases the waiver is needed in order to effectuate the interests of other—better placed—parties to take over the role of parents.⁶⁷

However, the analysis suggested only makes the state's attitude towards co-parenting agreements more mysterious, for here is an effort to secure a second legal parent for a child who would otherwise likely have only one legal parent. Still, one must note, as Justice Scalia commented in *Michael H.*, the case of the adulterous biological father arguing against a marital presumption of paternity, that one party's rights can only be recognized at the cost of another party.⁶⁸ In that case, the genetic father's right was made to yield to the rights of the married couple,⁶⁹ in co-parenting cases, the partner's right is in conflict with the parental prerogatives of the biological parent.

Some, I know, are very protective of the rights of parents,⁷⁰ and I certainly do not mean to denigrate the value of protecting parental rights. My only claim is that the value of promises, combined with the benefit of being able to secure two legal parents for a child-to-be, creates a situation where the claims of a parent, narrowly understood, may need to yield.

VI. CONCLUSION

I began this Article with the predictable reference to Sir Henry

65. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 541-48 (2005).

66. *Id.*

67. See, e.g., Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 896 (2000).

68. *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).

69. *See id.*

70. Cf. John DeWitt Gregory, *Whose Child Is It, Anyway: The Demise of Family Autonomy and Parental Authority*, 33 FAM. L.Q. 833, 833-34 (1999); Gregory, *supra* note 24, at 165.

Maine's assertion that the movement of progressive societies has been from status to contract. I noted that in family law "status" still has great importance, and "contract" has made only gradual headway. In particular, I have argued, states are very protective of the prerogative of determining parental status.

This is understandable in some contexts, perhaps even laudatory, though in other contexts, it is less impressive. Certainly, in dealing with co-parenting agreements by same-sex couples, nothing of great value is protected, and much of value is wasted, by not enforcing contractual commitments.

The law has always been skeptical of contracts between intimates, and modern commentators have added concerns phrased in terms of exploitation and bounded rationality to the historical concerns about "public policy," government prerogatives and family privacy. These are all real concerns, and not to be dismissed quickly. Nonetheless, I think we need to find more room for enforceable agreements in family law, to understand the circumstances where no significant public interests are threatened, and where the best interests of both children and their parents may even be furthered.