
**THE UNCERTAIN ENFORCEABILITY OF PRENUPTIAL
AGREEMENTS: WHY THE “EXTREME” APPROACH IN
PENNSYLVANIA IS THE RIGHT APPROACH FOR
REVIEW**

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ABSTRACT

Couples marrying in the United States are increasingly requesting prenuptial agreements. These agreements offer a substantial benefit, as they allow couples to set their own standards for property distribution at divorce. However, their enforceability remains uncertain. Prenuptial agreements were initially viewed with suspicion during a time when the state was much more involved in regulating marriage, and they remain subject to heightened standards of review in many jurisdictions. Not only are the standards heightened; they are also unclear and vary between jurisdictions, resulting in much uncertainty as to whether a particular agreement will be enforced. The justifications for heightened review are no longer warranted, given that women now occupy a societal position in which they should be viewed as equally as capable as men. To review prenuptial agreements differently from other contracts, as they are reviewed in many states, is to perpetuate stereotypes about women’s capabilities. This Note posits that Pennsylvania has adopted the best approach, as prenuptial agreements are reviewed exactly as other contracts are (with the additional requirement of financial disclosure). The Pennsylvania approach could be improved, however, by the adoption of minor procedural requirements. These include providing couples with information about their rights upon divorce before they marry, and imposing a brief waiting period, much like that required for marriage licenses, to allow couples considering a prenuptial agreement to discuss their expectations and negotiate better bargains.

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INTRODUCTION

In the United States, we highly value the “tradition” associated with weddings.¹ But marriage itself is changing in a way that is perhaps not quite so traditional. This is excellently demonstrated by two main characters on television’s hit sitcom, *Parks and Recreation*. Consider the following scenario:

Leslie Knope and Ben Wyatt are getting married.² The ambitious, always-optimistic Leslie serves as the Pawnee, Indiana, Deputy Parks Director, and has recently been elected to City Council. Ben had managed Leslie’s successful run for office, and subsequently passed on offers to lead larger campaigns to stay with his fiancée in Pawnee. It is months before their wedding, and Leslie and Ben are attending a black-tie Parks Department fundraiser they had jointly planned. Seizing the romantic moment, Ben suggests they get married then and there. Leslie reminds him of the wedding plans she has been working on: “[Our] parents aren’t here . . . [W]e reserved a space for May 16th. And we just ordered 200 white chocolate top hats You did, actually. It’s under your name.” Despite their plans, the couple agrees to marry right then, and manages to plan a fairly traditional wedding before midnight.

Leslie and Ben epitomize the modern engaged couple. They are ambitious, independent, supportive of one another, and they continuously navigate the contours of sharing their resources. They value tradition (they refused to face one another for the rest of the night so the groom would not see the bride before the ceremony). But they also support one another’s ambitions and do not let tradition impede their own independence (Leslie is shocked when Ben tells her she must take his last name before she realizes he was joking). Though it might have detracted from the episode’s romantic air, imagine if shortly before their wedding, Ben, the cautious and frugal former auditor, asked Leslie to consider signing a prenuptial agreement to address how their shared finances would be divided in the event of divorce. The scenario could easily be reversed: what if Leslie, who has spent much of her life independently pursuing a career in public service, asked Ben to consider signing a prenuptial agreement? After all, although not strictly traditional, a prenuptial

1. This is not surprising, as the wedding industry is big business, generating seventy billion dollars annually in the United States. See VICKI HOWARD, *BRIDES, INC.: AMERICAN WEDDINGS AND THE BUSINESS OF TRADITION* 1 (2006).

2. The facts presented in this scenario are from an episode in the fifth season of the show. *Parks and Recreation: Leslie and Ben* (NBC television broadcast Feb. 21, 2013).

agreement may be an important part of planning for a modern marriage.

The changing nature of marriage and partnerships should promote and encourage the use of prenuptial agreements. These contracts can provide substantial benefits for couples who enter into them, as well as for the state and society. The case law examining these agreements, however, is filled with scenarios in which one party surprises the other with a contract soon before the wedding. In many jurisdictions, the enforceability of prenuptial agreements depends on a variety of factors surrounding the execution and content of the bargain; this allows for heightened review of the nature of the contract and the circumstances surrounding its signing. This heightened review also tends to expose judicial assumptions about each party's ability to contract effectively. The outcomes of these cases, whether or not in favor of the challenging spouse, often reflect a set of subjective assumptions about women and contracts, marriage, and the meaning of fairness. On the one hand, prenuptial agreements seem beneficial and worth encouraging. On the other hand, if their enforceability is unpredictable and subjective because of heightened review, that lack of predictability eviscerates a major benefit of these contracts.

We are thus faced with the unique problem of determining how to encourage couples to use prenuptial agreements without conducting heightened review should the agreement later be challenged. This Note argues that Pennsylvania's treatment of prenuptial agreements—as ordinary contracts—is the best approach. Part I of this Note provides a brief history of developments in marriage and divorce law in the United States, as well as how those developments support the need for prenuptial contracting. It then summarizes the various ways prenuptial agreements are enforced in state courts. Part I concludes with a more detailed description of Pennsylvania's treatment of prenuptial agreements, which differs somewhat significantly from that of other jurisdictions. Part II posits that the current approach in most jurisdictions—subjecting prenuptial agreements to heightened scrutiny—reinforces stereotypes and perpetuates uncertainty. Instead, a better approach is the contract-like standard adopted by the Pennsylvania Supreme Court in *Simeone v. Simeone*.³

Although the Pennsylvania approach is preferable to heightened review, it can be improved. This Note argues that Pennsylvania

3. 581 A.2d 162, 165 (Pa. 1990).

could take certain steps to account for the unique context in which prenuptial agreements are signed to better accomplish the goal of encouraging well-negotiated bargains. First, Pennsylvania could inform couples applying for marriage licenses of the default rules for property distribution at divorce and the couple's right to change those rules with a premarital contract. Second, Pennsylvania could require a brief waiting period between the time of drafting the prenuptial agreement and the time of execution. This approach would ensure protection of the parties' freedom to contract, promote better bargains, and lessen the need for subjective, gendered inquiry into the circumstances and terms of the agreement. These two additional steps would improve what is already the best approach for evaluating prenuptial agreements.

I. BACKGROUND

A prenuptial agreement is a contract entered into by an engaged couple before marriage.⁴ It takes effect once the couple marries and becomes enforceable if the couple later divorces.⁵ This Note focuses on the enforceability of the most common type of prenuptial agreements: those that establish the financial rights of prospective spouses should they later divorce.⁶ These agreements generally include a predetermined division of the couple's property, and may set or waive ongoing financial support obligations.⁷ Prenuptial agreement enforceability is determined by individual state family law and jurisprudence. Accordingly, a brief history of how this broad area of law has developed may provide useful background for a contemporary proposal on prenuptial agreement enforcement.

4. UNIF. PREMARITAL AGREEMENT ACT § 1(1), 9C U.L.A. 39 (1983). Prenuptial agreements are referred to by a variety of terms, including "premarital" and "antenuptial" agreements. Throughout this Note, the term "prenuptial agreement" will be used.

5. *See id.*

6. Prenuptial agreements are also used to establish rights upon the death of one spouse. These agreements have historically been treated with greater deference, as they were not thought to encourage or promote divorce. 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, 153 (1998).

7. *See* UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 43 (1983).

A. Historical Underpinnings: Two Become One (The Husband)

Marriage was an integral component of society during the nation's founding.⁸ Puritan colonists in New England sought freedom to practice a religion that emphasized individualism, but at the same time promoted marriage as vital to the strength of civil society.⁹ To reconcile the contradiction inherent in respecting the individual while promoting the partnership of marriage, colonists adopted the English common law doctrine of coverture.¹⁰ Under the doctrine, a married couple was not viewed as a partnership of two individuals, each with his or her own rights and values, but as one legal entity – the husband – who served as head of the household and had a duty to support his wife and children.¹¹ English jurist William Blackstone described the doctrine's unifying effect in his influential treatise: "By marriage, the husband and wife are one person in law . . . the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing"¹² Coverture was intended to protect "stability" in marriage by ensuring that, should the interests of the individuals conflict, the interests of the assumed provider, the husband, would prevail.¹³

If the marriage became unstable or dissatisfying, there were few legal exit options. Divorce laws were restrictive throughout the colonies, and divorce was not permitted at all in many areas.¹⁴ Where divorce was allowed, it was considered a shameful matter and was granted in very limited circumstances, usually upon a showing of adultery, cruelty, or desertion.¹⁵ Marriage laws continued in this way well into the nineteenth century: with men considered heads of their households and with the state recognizing only limited grounds for divorce.¹⁶ The prevailing perception of marriage as a single entity represented by the husband provided justification for many laws that left women under the complete control of their

8. See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 40–42 (2009).

9. *Id.*

10. *Id.* at 43.

11. *Id.*

12. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *430.

13. See CHERLIN, *supra* note 8, at 43.

14. *Id.* at 49.

15. See *id.*

16. See *id.* at 49–50.

husbands, often to great detriment.¹⁷ For example, women were not permitted to own property or initiate lawsuits on their own behalf.¹⁸ Men were permitted to hit their wives.¹⁹ Access to birth control was scarce or non-existent, and marital rape was not a crime.²⁰

As the country developed, marriage became less necessary than it had been in the early agrarian colonies.²¹ States began to increasingly pass laws recognizing the rights of women as individuals.²² Courts, however, often interpreted these laws with respect to *married* women in a way that maintained the authority of their husbands.²³ For example, despite the passage of Married Women's Property Acts, which were intended to give women control over assets that they brought into marriage, courts often refused to permit women to freely dispose of their own property without their husbands' approval.²⁴ When the District of Columbia enacted legislation permitting married women to initiate lawsuits, the Supreme Court held that in the interest of "domestic harmony," the law did not apply to women attempting to sue their husbands for damages suffered as a result of abuse.²⁵ Despite increasing legal recognition of women as autonomous individuals, the norms of coverture persisted in judicial interpretations; a married woman's rights were balanced against the interests of her husband, even when her husband's interests directly conflicted with her own.

By the late nineteenth and early twentieth centuries, the country moved toward urbanization and industrialization.²⁶ These changes decreased the pervasive role of religion in daily life, and increased young people's mobility and independence.²⁷ This was followed by a steady rise in "companionate marriage" based on emotional

17. See *id.* at 53–66. See also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1392–95 (2000) (describing how language of nineteenth-century rape laws was carefully drafted to ensure that no man could be prosecuted under them for raping his wife).

18. See CHERLIN, *supra* note 8, at 43.

19. *Id.*

20. *Id.* at 66.

21. See *id.* at 63.

22. See *id.* at 57–58.

23. See *id.* at 64.

24. See, e.g., *Cole v. Van Riper*, 44 Ill. 58, 64 (1867) ("It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty, practically, to annul the marriage tie at pleasure . . .").

25. *Thompson v. Thompson*, 218 U.S. 611, 617–19 (1910).

26. See CHERLIN, *supra* note 8, at 66.

27. See PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 13 (2007).

connection, friendship, romantic love, and sexual compatibility.²⁸ Though people had more freedom in deciding who, when, and why to marry, the view of men as primary wage earners and, thus, as “heads of households,” persisted.²⁹ A number of Congressional laws were designed to promote and provide benefits for families with men working outside the home.³⁰ This division of labor—between men who worked and women who remained in the home—was often referenced as the ideal structure of the “traditional” American family. This division, it was thought, allowed families to maximize efficiency and economic gains.³¹

B. The Rise of Divorce and Property Division by Default

The United States experienced a marked shift in perceptions of family, marriage, and individuality in the 1960s that continued through the cultural and sexual revolutions of the 1970s. Between 1950 and 1970, the rate of young adults graduating from college doubled.³² Americans increasingly questioned the mores and expectations of the status quo, both in marriage and throughout society.³³ The feminist movement challenged the normative “male head of household” scheme by advocating for increased recognition of a woman’s right and ability to maintain autonomy over her own life. Specific means for achieving that goal included access to family planning,³⁴ protection from physical and sexual abuse,³⁵ and

28. See CHERLIN, *supra* note 8, at 67–68.

29. See *id.* at 68–69.

30. See *id.* at 69–70 (describing how legislation such as the Social Security Act of 1935 and the 1944 GI Bill of Rights, while conferring benefits, perpetuated and encouraged the idealized perception of the nuclear family with men as heads of households and women as primary caretakers).

31. See *id.* at 78–79. See also GARY S. BECKER, A TREATISE ON THE FAMILY 14–37 (1981) (positing that the most efficient households are those in which members with different comparative advantages specialize in either the market or the household, with women possessing a “biological” comparative advantage for household specialization). As recently as 1992, Becker was recognized as the Nobel Laureate in Economic Sciences for his work in this area. See Press Release, The Royal Swed. Acad. of Sci., This Year’s Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human Behavior and Relations (Oct. 13, 1992), available at http://www.nobelprize.org/nobel_prizes/economics/laureates/1992/press.html.

32. See CHERLIN, *supra* note 8, at 89.

33. See *id.* at 89–90 (discussing the powerful, and largely unexpected, impacts of the feminist and civil rights movements, the sexual revolution, urban riots, and anti-war protests).

34. See MYRA MARX FERREE & BETH B. HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS FOUR DECADES OF CHANGE 152–55 (Routledge, 3d ed. 2000) (1995).

35. See *id.* at 165–73.

opportunities to work and support a family independently.³⁶ These calls for reform did not go unnoticed.

Numerous changes in the law promoted recognition of women as autonomous actors who are capable of making independent, private decisions, both as individuals and as relationship partners.³⁷ Although the contours of family law are largely determined by the case law and statutes of the individual states, the Supreme Court took steps to ensure individuals were free to enter marriage on their own terms,³⁸ and were equally free to exit it.³⁹ The Court expressly commented on the changing nature of marriage, noting that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”⁴⁰ Such language signaled a changed legal view of marriage; where the coverture doctrine once assumed a married couple became one legal entity represented by the husband, couples were now recognized as individuals who came together of their own choosing as equal, independent partners. The Court further recognized that families whose structure did not include the traditional male as the head of the household were entitled to equal treatment before the law.⁴¹ In *Frontiero v. Richardson*, for example, the Supreme Court held that husbands of female veterans could not be required to show “actual dependency” on their wives before they were eligible to receive housing and medical benefits –

36. See Alice Rossi, *Job Discrimination and What Women Can Do About It* (1970), reprinted in “TAKIN’ IT TO THE STREETS:” A SIXTIES READER 468, 468–73 (Alexander Bloom & Wini Breines eds., 1995).

37. Women’s changing position was often, and continues to be, reflected in custom, statutes, and the decisions of state courts. Although the United States Supreme Court rarely addresses questions of family law, it has handed down a number of decisions promoting women’s equality both in society and the family. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (right to terminate pregnancy before viability); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (individuals, not just married couples, have right to access to contraception); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (state may not require preference for men in estate administration); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (employer impermissibly discriminates by refusing to hire women with small children while hiring similarly situated men); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (right of marital privacy ensures access to contraception).

38. See *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (fundamental right to marry prohibits requirement that those with child support obligations must seek court approval before re-marrying); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (fundamental freedom to marry prohibits state anti-miscegenation laws).

39. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (state cannot deny access to divorce courts based solely on applicant’s inability to pay fees).

40. *Eisenstadt*, 405 U.S. at 453.

41. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 681, 688 (1973).

as no such showing was required for wives of male veterans.⁴² Not only was the law beginning to recognize women's ability to control and order their own lives; it would also no longer sanction the view that husbands, or the state, maintained unilateral control of relationship decisions.⁴³

Against this changing backdrop, California became the first state to grant "no fault" divorce.⁴⁴ The Family Law Act of 1969 permitted divorce on the grounds of "irreconcilable differences which have caused the irremediable breakdown of the marriage."⁴⁵ Under the new law, divorce could be granted at the request of only one spouse, without showing that either party was at fault for the marriage's dissolution.⁴⁶ The change was prompted by the many couples who had been forced to manufacture false allegations of fault when they sought to end their marriages.⁴⁷ By adopting no fault divorce, the California legislature promoted a conception of marriage as a contract-like relationship between individuals.⁴⁸ These individuals were free to enter the partnership largely on their own terms, and were equally free to exit it should it no longer provide personal satisfaction. This view of marriage, as a partnership that could be terminated by one member should he or she desire, was quickly recognized as preferable in other states.⁴⁹ By 1985, almost every state had incorporated no fault grounds for divorce into their family laws.⁵⁰

Not surprisingly, divorce rates rose significantly following the widespread adoption of no fault rules.⁵¹ In response, states had to address how a divorcing couple's property and assets should be distributed between them if the couple could not agree. Two different property distribution regimes arose, both of which persist today.⁵²

42. *Id.* at 681.

43. *See id.* at 689.

44. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 83 (1991).

45. *See id.* (citing CAL. CIV. CODE §§ 4506, 4507 (West 1983) (repealed 1994)).

46. *See* CHERLIN, *supra* note 8, at 95-96.

47. *See id.* at 96.

48. *See* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 336-37 (2004).

49. *See id.* at 336-37, 340.

50. *See id.* at 340 n.125.

51. Couples marrying in 1980 had just below a 50% chance of eventually divorcing. *See* CHERLIN, *supra* note 8, at 97.

52. *See* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 368-70 (2005-06).

Nine states currently follow a community property system,⁵³ in which all property acquired by either spouse during the marriage becomes “community property” that is jointly owned by both spouses.⁵⁴ If the marriage ends, each spouse is entitled to his or her one-half share of all community property.⁵⁵ The majority of states, however, follow an equitable distribution system, in which property acquired during marriage is treated as “marital property.”⁵⁶ Upon divorce, judges in these jurisdictions must divide the marital property “equitably,” but need not divide it equally between the former spouses.⁵⁷ To determine an equitable division, judges look to specific statutory factors, including (but not limited to) the duration of the marriage, the contributions by each spouse to the property’s value, the economic circumstances of each spouse, and the characteristics of each spouse, including age, health, skill set, employability, liabilities, and needs.⁵⁸ Although equitable distribution statutes do not require equal property division at divorce, many courts have gradually come to presume that an *equitable* division means an *equal* division.⁵⁹ Accordingly, in both community property and equitable distribution jurisdictions, divorcing couples without prenuptial agreements who seek judicial division of their property are likely to have an equal division under that jurisdiction’s default rules.⁶⁰

Despite the perception of marriage that currently places greater priority on the autonomy of the individuals involved, the state continues to maintain a prominent role in the event of divorce through legislative or common law property division schemes. Many

53. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin currently follow a community property system. See Internal Revenue Serv., Publ’n 555 (2013), available at <http://www.irs.gov/publications/p555/ar02.html>.

54. See Sherman, *supra* note 52, at 368–70.

55. *Id.* at 370.

56. See Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 333.

57. *Id.* at 334.

58. See Margaret Ryznar, *All’s Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115, 121 (2010); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1237 (describing factors courts must account for in making equitable distribution determinations, including “tangible and intangible contributions to the acquisition of marital property, need, job market skills, age, health, and, in some states, marital misconduct”).

59. Baker, *supra* note 56, at 333–35 (describing how courts in equitable distribution jurisdictions, seeking a baseline from which to begin their analysis for division, have largely established a presumption of equal property distribution by relying on norms from community property states and partnership theories of marriage).

60. See *id.*

couples attempt to maintain *some* control over the process by negotiating property settlement agreements, but this autonomy is limited.⁶¹ These agreements, reached between spouses who have already initiated divorce proceedings, are often negotiated in an adversarial context fraught with stress, creating greater opportunities for exploitation of emotional and psychological vulnerabilities between the former partners.⁶² If later challenged, the state's default scheme—whether a community property or equitable distribution framework—serves as the standard by which the fairness of these settlement agreements is measured.⁶³

Although the default rules for division are an attempt to achieve what the state considers to be most fair, the default rules may not be appropriate for all couples.⁶⁴ The default rules often require the state to reach into a couple's private affairs. Accordingly, couples are increasingly relying on prenuptial agreements to opt out of the default rules and set their own expectations for property division before they enter marriage.⁶⁵

C. Protecting the Ability to Opt Out: Recognizing the Role of Prenuptial Agreements

Prenuptial agreements are not a new phenomenon. Throughout history, they have been used to protect a woman's property, especially in societies and legal systems that placed little value on the

61. Over 90% of divorcing couples reach property settlement agreements through negotiation at divorce. See Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 12–13 (2012).

62. See Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1406 (1984).

63. See Baker, *supra* note 56, at 355; see also Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEGAL F. 265, 270.

64. See, e.g., Baker, *supra* note 56, at 350–57 (arguing that theories cited for equal property division are normative expectations of what legislatures hope marriage should be, but are largely arbitrary and do not necessarily reflect the preferences or realities of marriage for those within it).

65. Evidence suggests that rates of premarital contracting tripled between 1978 and 1988 alone. See Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 151 (1996). In a recent poll by the American Academy of Matrimonial Lawyers, 73% of attorneys surveyed reported increased requests for prenuptial agreements in the previous five years; 52% reported an increase in women initiating the request. Press Release, Am. Acad. of Matrimonial Lawyers, *Big Rise in Prenuptial Agreements Says Survey of Nation's Top Divorce Lawyers* (Sept. 22, 2010), available at <http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/big-rise-prenuptial-agreements-sa>.

woman as an individual once she married.⁶⁶ An ancient form of prenuptial agreement is the traditional Jewish *ketubah*, which set a payment to be awarded to the wife should her husband either die or exercise his right to unilaterally end the marriage.⁶⁷ Later on, courts in sixteenth-century England routinely enforced prenuptial agreements designed to protect the inheritance and property women from wealthy families brought into marriage upon divorce or the death of the husband.⁶⁸ Typically insisted upon by a wife's family, these agreements ensured that she maintained "proprietary capacity" over her own property, a right she otherwise would have lost upon marriage.⁶⁹

Despite their use throughout history, prenuptial agreements did not come into general use or acceptance in the United States until much later.⁷⁰ Until 1970, prenuptial agreements were presumptively invalid as against public policy, as they altered the "terms" of marriage and were thought to encourage divorce.⁷¹ Marriage was considered a "public institution" that necessarily involved the state, and couples were not free to alter the terms the state imposed to protect it.⁷² The presumption of invalidity necessarily changed, however, with the rise of no fault divorce.

The Florida Supreme Court was first to recognize that such a stringent view of prenuptial agreements was no longer warranted.⁷³ In *Posner v. Posner*, the court acknowledged that "we cannot blind ourselves to the fact that the concept of the 'sanctity' of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades."⁷⁴ The court further recognized that the introduction of no fault divorce made it reasonable for prospective

66. See Sherman, *supra* note 52, at 365–66.

67. See Debra Band, *What's this Ketubah Mean, Anyway?*, *MOMENT*, June 1999, at 72, 73–74.

68. See Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 *WM. & MARY J. WOMEN & L.* 349, 352 (2007).

69. *Id.*

70. See Atwood, *supra* note 61, at 13.

71. See *id.*

72. See, e.g., *Gallemore v. Gallemore*, 114 So. 371, 372 (Fla. 1927) ("The law is well settled that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy. . . . The reason for the rule . . . is that a suit for divorce is in reality a triangular proceeding in which the husband, the wife, and the state are parties. The marital relation, unlike ordinary relations, is regarded by the law and the state as the basis of the social organization. The preservation of that relation is deemed essential to the public welfare.") (internal citations omitted).

73. *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970).

74. *Id.*

spouses to establish the division of their property *before* marrying.⁷⁵ Finding prenuptial agreements presumptively valid, the court abandoned arguments against enforcement based on the interest in preserving the marriage.⁷⁶ As California had done by introducing no fault divorce, the Florida Supreme Court further promoted a view of marriage as a relationship of individuals in which each member has the right to express his or her preferences and expectations.

Courts in other states soon followed the *Posner* court's lead and rejected the default presumption of invalidity.⁷⁷ Prenuptial agreements are now theoretically enforceable in all fifty states.⁷⁸ Several courts have commented on their usefulness and desirability,⁷⁹ and some courts find them favored by the law.⁸⁰ Despite their widespread acceptance, however, these agreements remain subject to a wide variety of vastly different enforcement standards when challenged. These differing enforcement standards have resulted in great uncertainty about whether a given agreement will be upheld in a particular jurisdiction.

D. The Uncertain Enforceability of Prenuptial Agreements Today

When a couple enters a prenuptial agreement, the couple sets its own terms and opts out of the state's default rules for property division and spousal support.⁸¹ The agreement remains in force through

75. *Id.*

76. *See id.* at 385.

77. *See Developments in the Law – The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2079 (2003).

78. Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 264 (2010).

79. *See, e.g.,* *Valid v. Valid*, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972) ("It may be . . . argued that a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability."); *In re Marriage of Dawley*, 551 P.2d 323, 333 (Cal. 1976) ("Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage."); *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982) (en banc) ("We cannot say that public policy . . . is eroded by agreements which anticipate and provide for the economic arrangements upon dissolution of a marriage. On the contrary, it is reasonable to believe that such planning brings a greater stability to the marriage relation by protecting the financial expectations of the parties, and does not necessarily encourage or contribute to dissolution.") (internal citations omitted).

80. *See, e.g.,* *Irvine v. Irvine*, 685 N.E.2d 67, 70 (Ind. Ct. App. 1997) ("Antenuptial agreements are favored by the law as 'promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation.'" (quoting *In re Marriage of Boren*, 475 N.E.2d 690, 693 (Ind. 1985))).

81. *See Sherman, supra* note 52, at 366–67.

the marriage, and takes effect should the couple divorce.⁸² At the time of divorce, one party may challenge the agreement and argue that it should not be enforced.⁸³ When that occurs, courts look to a variety of factors, established either by common law or by statute, to determine whether a challenged prenuptial agreement is valid and thus enforceable.⁸⁴ If the court finds that the agreement or a provision within it is not valid, it will not be enforced and the default rules will apply.⁸⁵

The analysis of enforceability is not unique to prenuptial agreements. When any contract is challenged, the court looks to certain factors to determine whether the agreement is valid.⁸⁶ Notwithstanding that prenuptial agreements are, in essence, simply contracts, courts in every jurisdiction review prenuptial agreements for validity in ways that differ from the review of ordinary contracts. This difference in review stems from the belief that, unlike parties to commercial contracts, the parties who enter prenuptial agreements do not bargain at arm's length,⁸⁷ but instead, occupy a position of "mutual confidence and trust."⁸⁸ Accordingly, in many jurisdictions, a prenuptial agreement is only valid if the parties can demonstrate that at the time of signing they were aware of one another's financial assets, either through adequate disclosure or independent knowledge.⁸⁹ This requirement ensures that a party entering a

82. See *id.* at 366.

83. See, e.g., *Simeone v. Simeone*, 581 A.2d 162, 163-64 (Pa. 1990).

84. See *infra* subsections I.D.1-2.

85. See, e.g., *Corbett v. Corbett*, 628 S.E.2d 585, 585 (Ga. 2006) (invalidating prenuptial agreement where husband did not disclose his income, a critical factor to wife, who waived right to spousal support).

86. All contracts, including prenuptial agreements, are challengeable for a number of reasons other than validity. Parties can pursue litigation over the terms of the contract, for example, without contesting the validity of the agreement as a whole. This Note focuses specifically on disputes surrounding the validity and enforcement of prenuptial agreements.

87. Arm's-length transactions include transactions between two parties who are not related or not on close terms and transactions between parties who avoid a conflict of interest, despite the closeness of their relationship, by conducting the transaction as if they were strangers. See BLACK'S LAW DICTIONARY 1635 (9th ed. 2009).

88. See, e.g., *Simeone*, 581 A.2d at 167; see also *McNamara v. McNamara*, 40 So. 3d 78, 80 (Fla. Dist. Ct. App. 2010).

89. Lack of financial disclosure is an independent basis for finding prenuptial agreements invalid in some jurisdictions. See, e.g., CONN. GEN. STAT. ANN. § 46b-36g(a)(3) (West 2013); IOWA CODE ANN. § 596.8(3) (West 2013); MINN. STAT. ANN. § 519.11(1)(a) (West 2013); *McNamara*, 40 So. 3d at 80; *Corbett v. Corbett*, 628 S.E.2d 585, 586 (Ga. 2006); *Cannon v. Cannon*, 865 A.2d 563, 587 (Md. 2005). In others, lack of financial disclosure will only invalidate the agreement if it is also unconscionable at signing. ARIZ. REV. STAT. ANN. § 25-202(C)(2) (2013); CAL. FAM. CODE § 1615(a)(2)(A) (West 2013); DEL. CODE ANN. tit. 13, § 326(a)(2)(a) (West 2013); KAN. STAT. ANN. § 23-2407(a)(2)(A) (West 2013); MONT. CODE ANN. § 40-2-608(1)(b)(i) (West 2013). In just

prenuptial agreement is aware of his or her future spouse's financial position before committing to waive financial or support rights upon divorce.⁹⁰

Even when accounting for the parties' unique relationship by requiring financial disclosure, very few jurisdictions find that prenuptial agreements should be treated like ordinary contracts in other respects.⁹¹ Citing the differences between prenuptial agreements and ordinary contracts, these jurisdictions subject the former to heightened scrutiny.⁹² However, the exact method and standards for conducting this review vary widely, leading to much uncertainty.

In an attempt to reduce some of the uncertainty surrounding prenuptial agreement enforcement standards, the National Conference of Commissioners on Uniform State Laws put forth the Uniform Premarital Agreement Act (UPAA).⁹³ The UPAA is a model act that attempts to encourage enforcement of prenuptial agreements and has been adopted by twenty-six states and the District of Columbia.⁹⁴ Under the UPAA, prenuptial agreements are not enforceable if they were not executed voluntarily, or if the agreement was unconscionable at execution and the challenging party did not have knowledge of, or was not provided "a fair and reasonable disclosure" of the other party's property and financial obligations.⁹⁵ Many

one jurisdiction, financial disclosure is not required. See IND. CODE ANN. § 31-11-3-8 (West 2013).

90. Because it is widely accepted that parties to prenuptial agreements do not bargain at arm's length, this Note does not criticize a financial disclosure requirement, even though it may increase uncertainty of enforcement in some cases. See Faun M. Phillipson, Note, *Fairness of Contract vs. Freedom of Contract: The Problematic Nature of Contractual Obligation in Premarital Agreements*, 5 CARDOZO WOMEN'S L.J. 79, 85 (1998) (noting that the financial disclosure duty can be vague, which leaves courts with substantial discretion regarding its application and definition).

91. Pennsylvania is often cited as the jurisdiction most unlike the others in its treatment of prenuptial agreements. See, e.g., Atwood, *supra* note 61, at 31-32 ("Pennsylvania, in particular, has established itself as a leading pro-enforcement jurisdiction with regard to premarital and marital agreements.").

92. Three differences are often cited as the justification for subjecting prenuptial agreements to heightened review: the subject matter is arguably of greater interest to the state than other contractual matters; enforcement will occur, if at all, in the future when the parties' circumstances may have changed; and some jurisdictions find the parties share a confidential relationship, requiring greater protection for the party of weaker bargaining power. Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1, 3-4 (1992).

93. UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 36-37 (1983).

94. *Id.* at 35. The UPAA has been proposed in a twenty-seventh state, West Virginia, but has not been adopted as of this writing. H.B. 2089, 81st Leg., 1st Sess. (W. Va. 2013).

95. § 6(a), 9C U.L.A. 49 (1983). The UPAA additionally provides that an agreement is unenforceable to the extent that it waives or modifies one party's right to spousal support pay-

adopting states have incorporated changes to the UPAA as promulgated, often imposing more stringent enforcement standards.⁹⁶ In response, the Commissioners put forth the Uniform Premarital and Marital Agreements Act in 2012, reflecting the more stringent standards adopted by many states.⁹⁷

Despite the widespread acceptance of the proposition that prenuptial agreements should be enforceable, the various applications of enforceability standards across jurisdictions make certainty difficult.⁹⁸ In non-UPAA jurisdictions, prenuptial agreements are governed by common law, where their review may be similar to, or more stringent than, review under the UPAA.⁹⁹ A prenuptial agreement that is considered valid and enforceable in one state may not be valid or enforceable in another.

The uncertainty surrounding enforceability is primarily the result of two standards that courts apply to prenuptial agreements in ways that differ from their application in ordinary contract review. The first of these is “voluntariness.”¹⁰⁰ All enforceable contracts must be entered voluntarily, but the meaning of “voluntariness” with respect to prenuptial agreements depends on certain fact-specific inquiries that are often not considered relevant to other contracts.¹⁰¹ Additionally, prenuptial agreements can be reviewed for substantive sufficiency, and invalidated if found “unfair” or “unconscionable,” two standards that are open to much interpretation and depend heavily on the facts of a particular case.¹⁰²

ments, if the waiver or modification would result in that party’s eligibility for public assistance. § 6(b), 9C U.L.A. 49.

96. For example, under the UPAA, lack of financial disclosure will only invalidate an agreement if it was also unconscionable at signing. § 6(a)(2), 9C U.L.A. 49. In many adopting states, this provision has been modified so that lack of financial disclosure may be raised as an independent basis for invalidation, even if the agreement is not found unconscionable. See Phillipson, *supra* note 90, at 90. For a more detailed discussion of state modifications to the UPAA, see generally Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIM. LAW. 355 (2010).

97. See UNIF. PREMARITAL & MARITAL AGREEMENTS ACT prefatory note, 9C U.L.A. 11-13 (Supp. 2013).

98. See, e.g., Younger, *supra* note 68, at 364-78 (discussing conflicting cases within individual jurisdictions, including South Dakota, Montana, New Hampshire, and Georgia).

99. See cases discussed *infra* subsections I.D.1-2.

100. See *infra* subsection I.D.1.

101. As will be discussed, these considerations include the execution’s proximity to a particular event (a wedding) and the opportunity to consult counsel.

102. See Younger, *supra* note 68, at 357 (“Courts are certainly not meticulous in distinguishing between procedure and substance and sometimes confuse the two so thoroughly that the grounds of their decisions are completely obscured.”).

The use of these two standards heightens the review of prenuptial agreements as compared to the review of all other contracts. These requirements are not applied in the same manner in all jurisdictions, and there is usually some overlap in their applicability to a particular agreement.¹⁰³ These heightened requirements have increased the uncertainty regarding the likelihood of enforcement of prenuptial agreements. Moreover, the requirements have given rise to entire bodies of case law—even within the same jurisdiction—the outcomes of which are difficult to reconcile.¹⁰⁴ A brief overview of the heightened requirements, and the different results they produce, is provided below.

1. *Voluntariness*

As is the case for all contracts, an enforceable prenuptial agreement must be entered voluntarily. An ordinary contract may be unenforceable if it was the product of duress¹⁰⁵ or undue influence,¹⁰⁶ as these factors are thought to overcome the will of the challenging party. The standard of what constitutes “voluntariness” in the prenuptial agreement context, however, is difficult to define precisely. In many jurisdictions, the concept of “voluntariness” is broader than “freedom from duress,” especially if the court finds that the couple shares a confidential relationship.¹⁰⁷ Typically, one party’s refusal to go through with the marriage without a prenuptial agreement is insufficient to invalidate the contract as involuntary.¹⁰⁸ As one court of

103. *See id.*

104. *See* Atwood, *supra* note 61, at 28 (“Placing the burden on a party defending the marital agreement and requiring broad judicial review for fairness and reasonableness inevitably creates uncertainty.”); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *IND. L.J.* 453, 462 (1998) (“Even where courts are not clearly hostile [to prenuptial agreements], uncertainty in the law reduces the appeal of such agreements.”).

105. *RESTATEMENT (SECOND) OF CONTRACTS* § 174 (1981) (contract invalid if one party does not truly assent, because he or she was “physically compelled by duress”); *RESTATEMENT (SECOND) OF CONTRACTS* § 175 (1981) (contract voidable where assent induced by threat that leaves challenging party no reasonable alternative but to agree).

106. *RESTATEMENT (SECOND) OF CONTRACTS* § 177 (1981) (undue influence arises when one party is “under the domination of the person exercising the persuasion or who by virtue of relation between them is justified in assuming that that person” will act consistent with his welfare).

107. *See, e.g.,* Cannon v. Cannon, 865 A.2d 563, 574 (Md. 2005); *In re* Estate of Hollett, 834 A.2d 348, 351 (N.H. 2003); Griffin v. Griffin, 94 P.3d 96, 99–100 (Okla. Civ. App. 2004).

108. *E.g.,* Hiers v. Estate of Hiers, 628 S.E.2d 653, 657 (Ga. Ct. App. 2006) (husband’s request that wife sign prenuptial agreement as a condition of marriage not sufficient to find agreement was entered involuntarily).

appeal noted: “It is not a threat or duress for the proponent . . . to make it clear that there will be no marriage in the absence of the agreement. To hold otherwise would effectively provide a per se basis to invalidate most, if not all, [prenuptial] agreements.”¹⁰⁹ However, courts routinely consider two factors—the timing of execution and the presence of independent counsel—that have led to inconsistent case law and little guidance on what is required to find that a party voluntarily entered a prenuptial agreement.

a. Time of signing

In “voluntariness” determinations, the time at which the prenuptial agreement was signed is often a central consideration.¹¹⁰ If the parties signed the agreement shortly before their wedding, a court is more likely to find that it was not executed voluntarily.¹¹¹ In Ohio, for example, a presumption of overreaching or coercion arises if one party presents a prenuptial agreement to the other shortly before the wedding, if postponing the wedding would cause “significant hardship, embarrassment or emotional stress.”¹¹² But a close proximity between execution and the wedding is not, alone, always sufficient to invalidate an agreement. For example, if the couple had previously discussed it, or the challenging party expressed willingness to sign, the agreement is less likely to be invalidated even if executed shortly before the wedding.¹¹³ Some courts will make determinations about the parties before evaluating the timing of execution. These courts are more likely to invalidate an agreement signed

109. *Eager v. Eager*, 696 So. 2d 1235, 1236 (Fla. Dist. Ct. App. 1997). *But see Bakos v. Bakos*, 950 So. 2d 1257, 1259 (Fla. Dist. Ct. App. 2007) (finding prenuptial agreement voidable when presented to wife twenty-four hours before marriage “with ultimatum” to sign or there would be no wedding).

110. See J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL’Y 83, 88–99 (2011).

111. See *id.*

112. *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1348 (Ohio 1994).

113. See, e.g., *Lee v. Lee*, 816 S.W.2d 625, 627–28 (Ark. Ct. App. 1991) (finding that where wife signed agreement at husband’s attorney’s office one hour before ceremony, agreement was not involuntary because wife knew husband wanted agreement and had earlier told him she “would be glad to sign it”); *Cooper v. Guido (In re Cooper)*, 75 So. 3d 1104, 1107–08 (Miss. Ct. App. 2011) (finding agreement signed on wedding day not involuntary when it included typed list of wife’s assets, indicating she had known of its existence beforehand and had opportunity to ask questions of separate counsel before signing). *But see Norris v. Norris*, 419 A.2d 982, 984–85 (D.C. 1980) (finding agreement involuntary where wife signed on day of ceremony after refusing to sign in weeks prior and being advised by independent counsel not to sign).

shortly before the wedding if they find disparity in the “sophistication” of the parties or their relative bargaining power.¹¹⁴ In very few jurisdictions, statutes require that prenuptial agreements be executed within a specified time before the wedding.¹¹⁵

b. Opportunity to consult counsel

In determining the voluntariness of a prenuptial agreement, a factor closely related to the time of signing is the challenging party’s opportunity to consult independent counsel. Generally, presence of counsel is not a per se requirement for enforceability.¹¹⁶ Courts generally consider whether the challenging party had a reasonable *opportunity* to consult independent counsel.¹¹⁷ In some cases, however, even the presence of counsel is insufficient to find voluntariness.¹¹⁸ In *In re Estate of Hollett*, the court invalidated a prenuptial agreement as involuntary partly because the husband had hired separate counsel for his fiancée.¹¹⁹ The court invalidated the agreement even though the woman’s attorney met with her privately for more than three hours, explained the effects of the agreement to her, and negotiated substantial revisions for her benefit.¹²⁰ Emphasizing the

114. See, e.g., *DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986) (finding agreement executed hours before wedding between twenty-three-year-old wife and forty-eight-year-old business executive husband not involuntary even though wife signed against counsel’s advice for fear wedding would be cancelled; court found no disparity in bargaining power because wife had some business experience and a prior marriage and divorce).

115. See CAL. FAM. CODE § 1615(c)(2) (West 2013) (mandating agreement is per se involuntary if challenging party had less than seven days between time first presented and time signed); MINN. STAT. ANN. § 519.11 (West 2013) (requiring that prenuptial agreements be executed *prior* to wedding day).

116. See, e.g., *Robinson v. Robinson*, 64 So. 3d 1067, 1079 (Ala. Civ. App. 2010). *But see* CAL. FAM. CODE § 1615(c)(1) (West 2013) (stating that premarital agreement only valid if party against whom enforcement is sought was represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387–91 (W. Va. 2009) (requiring *access* to independent counsel, presumption of valid prenuptial agreement only arises if challenging party actually *consulted* independent counsel).

117. See, e.g., *Short v. Short*, 356 S.W.3d 235, 240 (Mo. Ct. App. 2011); *Sailer v. Sailer*, 764 N.W.2d 445, 464 (N.D. 2009). *But see In re Estate of Kinney*, 733 N.W.2d 118, 120 (Minn. 2007) (holding that lack of opportunity to consult independent counsel does not automatically invalidate agreement under common law).

118. See, e.g., *In re Marriage of Shirilla*, 89 P.3d 1, 4 (Mont. 2004) (finding agreement involuntary where wife signed after consulting counsel, partly because of wife’s limited understanding of English); *Orgler v. Orgler*, 568 A.2d 67, 69–70 (N.J. Super. Ct. App. Div. 1989) (finding agreement involuntary where wife signed against advice of independent counsel, partly because wife only met with attorney for one hour).

119. 834 A.2d 348, 350 (N.H. 2003).

120. *Id.*

heightened scrutiny applied to prenuptial agreements, the New Hampshire Supreme Court stressed that the wife had been upset about the negotiations, and “[by] that time, all of the plans and arrangements for the elaborate wedding, at which over 200 guests were expected, had already been made and paid for”¹²¹ The court invalidated the agreement and expressed much disapproval of the husband’s conduct, finding the wife’s bargaining power “vastly inferior” to his.¹²²

2. *Substantive sufficiency*

In contract law, the content of an agreement is not usually subject to judicial review; generally, “courts will not interfere with the party’s contractual obligations, as every person is presumed to be capable of managing his or her own affairs, and whether his or her bargains are wise or unwise is not ordinarily a legitimate subject of inquiry.”¹²³ However, in every jurisdiction, with the exception of Pennsylvania, courts are willing to review the contents of prenuptial agreements for substantive sufficiency.¹²⁴ In reviewing substantive sufficiency, the court determines “whether the property and benefits received by each party under the agreement meet a mandatory floor which would permit the enforcement of the agreement.”¹²⁵ The tests applied vary. Some courts require that prenuptial agreements are not “unfair,” while others prohibit only “unconscionable” agreements. The jurisdictions also diverge on when these tests are applied: in some, the terms are examined for substantive sufficiency at the time of execution;¹²⁶ in others, the sufficiency of prenuptial agreements is considered at the time of divorce.¹²⁷ Some jurisdictions apply both tests at different times, requiring the agreement to meet

121. *Id.*

122. *Id.* at 352–53.

123. 17A AM. JUR. 2D *Contracts* § 334 (2013). Ordinary contracts may be challenged as unconscionable. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). However, these challenges are usually limited to instances in which there is gross disparity in the values exchanged, or gross disparity in bargaining power between the contracting parties, coupled with terms unreasonably favorable to the stronger party. See *id.* at cmts. (b) and (c).

124. See Younger, *supra* note 92, at 36 (noting that *Simeone* “isolates Pennsylvania on the substantive legal map”).

125. David M. Cotter, *Substantive Sufficiency of Marital Agreements: Unconscionability and Unfairness*, vol. 17 no. 11 DIVORCE LITIG. 173 (Nov. 2005).

126. *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 806 (Mass. 2002). Those jurisdictions following the UPAA as promulgated adhere to this standard under UPAA § 6(a)(2).

127. See, e.g., *Bedrick v. Bedrick*, 17 A.3d 17, 21 (Conn. 2011); *Blue v. Blue*, 60 S.W.3d 585, 590–91 (Ky. Ct. App. 2001).

one standard at execution and allowing the court to take a “second look” for fairness upon divorce.¹²⁸ The uncertain contours of these standards are briefly summarized below.

a. Unfairness

Some courts find that because the parties entering a prenuptial agreement share a confidential relationship, the provisions of their agreement must not be “unfair.”¹²⁹ Fairness is often determined by comparing what the challenging spouse receives under the terms of the agreement with the property and support payments he or she would have been entitled to under the state’s default property distribution rules.¹³⁰ Prenuptial agreements challenged under the unfairness standard are often unenforceable if the contesting spouse receives nothing.¹³¹ Even if the challenging spouse receives some property under the agreement, a court may still find it unfair if the amount is significantly less than he or she would have been entitled to under the state’s default rules.¹³² In some states, a provision waiving or modifying the right to alimony is considered per se unfair, and thus, parties to a prenuptial agreement may not include these provisions at all.¹³³

b. Unconscionability

In some jurisdictions, prenuptial agreements are reviewed for unconscionability, a standard more rigorous than unfairness.¹³⁴ However, much like the “voluntariness” requirement, the exact defini-

128. See, e.g., *Korff v. Korff*, 831 N.E.2d 385, 388 (Mass. App. Ct. 2005) (describing test in Massachusetts as a “dual-pronged inquiry” in which judges must first determine whether a prenuptial agreement was fair and reasonable at execution, and then take a “second look” for unconscionability at the time of divorce).

129. See, e.g., *DeMatteo*, 762 N.E.2d at 806; see also *Krejci v. Krejci*, 667 N.W.2d 780, 786–87 (Wis. Ct. App. 2003).

130. See *Cotter*, *supra* note 125, at 177–78.

131. See, e.g., *In re Marriage of Matson*, 730 P.2d 668, 672 (Wash. 1986).

132. See, e.g., *Stemler v. Stemler*, 36 So. 3d 54, 58 (Ala. Civ. App. 2009) (finding agreement unfair that provided wife would receive \$50,000 upon divorce and any property titled in her name; at divorce, only marital home was jointly held in her name and husband’s net worth was over \$5 million); *Krejci*, 667 N.W.2d at 788–89 (finding agreement unfair that excluded any appreciation in resort property from division at divorce where husband and wife operated resort as partnership for eighteen years).

133. See IOWA CODE ANN. § 596.5 (West 2001); N.M. STAT. ANN. § 40-3A-4 (2011); *Sanford v. Sanford*, 694 N.W.2d 283, 289 (S.D. 2005).

134. See *Cotter*, *supra* note 125, at 174.

tion of what constitutes an unconscionable agreement is not entirely clear.

The UPAA does not define unconscionability, but it does provide some guidance borrowed from the commercial context: “[U]nconscionability is used in commercial law, where its meaning includes protection against one sidedness, oppression, or unfair surprise [T]he court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made”¹³⁵ When reviewing a prenuptial agreement for unconscionability at the time of enforcement, courts generally consider a number of factors that are similar to those considered in property division litigation.¹³⁶ These include the marriage’s duration; the agreement’s purpose; the spouses’ income and earning capacities; obligations to children from previous marriages; the parties’ age, health, and standard of living; each party’s financial and homemaking contributions; and what the parties would have received under the default rules without the agreement.¹³⁷

Other states apply more stringent tests of unconscionability. In *Miles v. Werle*,¹³⁸ for example, the Missouri Court of Appeals applied a very strict standard in a prenuptial agreement challenge. Notably, the party challenging enforceability of the agreement in this case was the former husband.¹³⁹ Noting that the purpose of unconscionability inquiries is to protect the “unwary and ill-informed spouse,” the court found the agreement substantively sufficient, even though it left the husband with only the assets he brought into the marriage.¹⁴⁰ The court’s conclusion rested on a stringent test for unconscionability; it would refuse to invalidate an agreement unless “the inequality [is] so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.”¹⁴¹

No matter how the court articulates the standard, the tests for substantive sufficiency of prenuptial agreements reflect subjectivity and variation that often depend on the facts of a particular case.

135. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9C U.L.A. 10 (1983).

136. See UNIF. PREMARITAL & MARITAL AGREEMENTS ACT, *supra* note 97, at 16.

137. See *id.*

138. 977 S.W.2d 297 (Mo. Ct. App. 1998).

139. *Id.* at 303.

140. *Id.* (quoting *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979)).

141. *Id.* (quoting *McMullin v. McMullin*, 926 S.W.2d 108, 110 (Mo. Ct. App. 1996)) (alteration in original).

However, as demonstrated by Pennsylvania's approach, prenuptial agreements need not undergo such subjective or uncertain review.

E. The "Extreme" Approach in Pennsylvania: Respect for Freedom to Contract

In contrast to the review conducted in most jurisdictions, Pennsylvania takes an extremely pro-contract approach to prenuptial agreement enforcement.¹⁴² This approach was first articulated by the Pennsylvania Supreme Court in *Simeone v. Simeone*,¹⁴³ and was later incorporated into the state divorce code.¹⁴⁴ The facts of *Simeone* are similar to those of many prenuptial agreement challenges. On the night before their wedding, Frederick Simeone, a thirty-nine-year-old neurosurgeon earning \$90,000 a year, asked his fiancée Catherine Walsh, a twenty-three-year-old unemployed nurse, to sign a prenuptial agreement.¹⁴⁵ Frederick's attorney was present, but Catherine did not have independent representation before she agreed to sign.¹⁴⁶ By entering the contract, Catherine agreed that in the event of separation or divorce, she would receive alimony payments from Frederick limited to \$200 per week, with a maximum total payment of \$25,000.¹⁴⁷ Seven years after they married, the couple separated. Frederick made weekly alimony payments to Catherine during the separation, ultimately satisfying the \$25,000 limit.¹⁴⁸ When divorce proceedings commenced over two years later, Catherine filed a claim for alimony *pendente lite*.¹⁴⁹ A master's report, the Court of Common Pleas of Philadelphia, and the Pennsylvania Superior Court each rejected Catherine's alimony claim, citing the validity of the couple's prenuptial agreement.¹⁵⁰

The Supreme Court of Pennsylvania affirmed the Superior Court and, in doing so, overturned two cases that had previously set limits

142. See *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

143. *Id.*

144. 23 PA. CONS. STAT. ANN. § 3106 (West 2012).

145. *Simeone*, 581 A.2d at 163.

146. *Id.*

147. *Id.* at 164.

148. *Id.*

149. *Id.* Alimony *pendente lite* is a temporary award of spousal support intended to meet one spouse's living expenses during the pendency of divorce proceedings. See Sherman, *supra* note 52, at 371 n.52.

150. *Simeone*, 581 A.2d at 164.

on prenuptial agreements.¹⁵¹ In overturning these decisions, the *Simeone* court held that prenuptial agreements should be reviewed in the same way as other contracts.¹⁵² The *Simeone* court noted that previous limitations imposed on prenuptial agreements relied upon assumptions that spouses were of unequal status and bargaining power and that women lacked the knowledge to understand the nature of the contracts they entered.¹⁵³ The court rejected the “[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times”¹⁵⁴ The court further explained that such presumptions should not continue to color the law, recognizing that “[s]ociety has advanced . . . to the point where women are no longer regarded as the ‘weaker’ party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable.”¹⁵⁵

The court concluded that, when faced with a prenuptial agreement challenge, it would no longer conduct inquiries into the knowledge of the parties or the reasonableness of their bargain.¹⁵⁶ Instead, it would invalidate only those agreements that failed to satisfy the traditional contract law principles of freedom from fraud, misrepresentation, or duress.¹⁵⁷ The court found that in the case before it, Catherine did not sign the agreement under duress.¹⁵⁸ Though it was executed the night before her wedding, Catherine had been aware of Frederick’s desire for the agreement and the couple had discussed its terms months before the wedding date.¹⁵⁹ The

151. *Id.* at 168. The court’s 1968 decision in *In re Hillegass’ Estate* held that prenuptial agreements are only valid if they include a “reasonable provision” for the challenging spouse. 244 A.2d 672, 675 (Pa. 1968). The plurality decision in *In re Estate of Geyer* required evidence that the challenging party was aware of the statutory rights he or she was relinquishing by signing the agreement before it would be enforced. 533 A.2d 423, 429–30 (Pa. 1987), *abrogated by Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

152. *Simeone*, 581 A.2d at 165.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 166.

157. *Id.* at 165. The court did affirm the additional requirement of full and fair financial disclosure because of the parties’ position of “mutual confidence and trust.” *Id.* at 167. Without such disclosure, the challenging party is free to argue that there has been a material misrepresentation in the inducement of the agreement. The disclosure need not be exact, and it may be waived. If the agreement contains a provision indicating that full disclosure was made, “a presumption of full disclosure arises.” *Id.*

158. *Id.* at 167–68.

159. *Id.* at 167.

court reasoned that during this time, Catherine had ample opportunity to consult with independent counsel, but her decision not to do so and her lack of reluctance at signing demonstrated that she had not entered the agreement under duress.¹⁶⁰

More recently, in *Stoner v. Stoner*,¹⁶¹ Pennsylvania's Supreme Court further clarified that financial disclosure is the *only* additional requirement for prenuptial agreements in Pennsylvania.¹⁶² The *Stoner* court rejected the wife's argument that enforceable marital agreements require a showing that both parties understood the rights they were relinquishing.¹⁶³ Relying on the principles first articulated in *Simeone*, the court declined "to resurrect the paternalistic approaches to evaluating marriage contracts by requiring Husband to explain to Wife the statutory rights that she may be surrendering . . . [which] assumes that Wife lacks the intelligence or ability to protect her own rights."¹⁶⁴ Again, the court affirmed its unique approach of treating marital agreements largely like ordinary contracts.¹⁶⁵

In 2005, the Pennsylvania Legislature added Section 3106 to the state divorce code.¹⁶⁶ This section, which sets the standard for prenuptial agreement enforcement, was meant to embrace the holding of *Simeone* while adopting a modified version of the UPAA's section 6(a) to the Pennsylvania code.¹⁶⁷ Section 3106 adopts the voluntariness and disclosure requirements; parties challenging enforceability may have a valid claim if they can demonstrate, by clear and convincing evidence, that they did not execute the agreement voluntarily, or that they did not receive or waive fair and reasonable disclosure of the other party's property and financial obligations.¹⁶⁸ The legislature explicitly rejected the unconscionability and public assistance provisions of the UPAA, as those provisions require substantive review of an agreement's terms.¹⁶⁹

160. *Id.*

161. 819 A.2d 529 (Pa. 2003).

162. *Id.* at 533. Although *Stoner* dealt with a postnuptial agreement entered into by a couple after they were already married, Pennsylvania treats postnuptial agreements with the same interpretation and level of review as prenuptial contracts. *Id.* at 533 n.5.

163. *Id.* at 533.

164. *Id.*

165. *Id.*

166. See 23 PA. CONS. STAT. ANN. § 3106 (West 2012).

167. *Id.* at cmt.

168. *Id.* § 3106(a).

169. *Id.* at cmt.

The approach in Pennsylvania of interpreting and enforcing premarital agreements in the same way as other contracts has not been very well-received by some legal commentators.¹⁷⁰ Professor Jeffrey G. Sherman, for example, refers to *Simeone* as an “extreme” example of judicial deference to contractual aims.¹⁷¹ As will be discussed in Part II, however, this criticism is largely unwarranted given the changing nature of marital partnerships and women’s economic status.

II. ANALYSIS

A. *The Perks of Having a Plan: Why Prenuptial Agreements Should Be Encouraged*

Prenuptial agreements began with a bad reputation.¹⁷² Unfortunately, that reputation has seemed to stick, and very few couples actually enter these agreements before marrying.¹⁷³ It is not difficult to surmise why this might be; media reports on celebrity divorces, portrayals of prenuptial agreements in popular culture, and the facts of the cases described in Part I all seem rather unsettling. In essence, the concept of prenuptial contracting—creating a plan for what should happen if the relationship ends—does not quite conform to the traditional notions of love, romance, and trust that one might expect at the time of marriage.

Setting aside romantic notions, there are several practical reasons why so few couples consider prenuptial agreements. Couples may underestimate the benefits of such a contract, overestimate the likelihood that their marriage will last, or fear that suggesting an agreement will signal distrust.¹⁷⁴ Yet nearly half the people who

170. See, e.g., Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. L. 743, 782 (1994) (calling *Simeone* “an unfortunate and ill-considered decision”).

171. Sherman, *supra* note 52, at 381.

172. See *supra* notes 70–72 and accompanying text.

173. Because prenuptial agreements are private contracts, and many likely never take effect, it is difficult to determine exactly how many couples actually enter them. Anecdotal evidence indicates that between 5 and 20% of couples enter prenuptial agreements. See ARLENE DUBIN, *PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS* 15 (2001).

174. Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, HARVARD UNIV. JOHN M. OLIN CTR. FOR L., ECON. & BUS., 7–12 (Sept. 2003), http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf.

have already experienced divorce believe that prenuptial agreements make good financial sense.¹⁷⁵

Demographics—and experiences—are changing. Those marrying for the first time are now more likely than ever before to do so later in life, after obtaining an education and establishing financial independence.¹⁷⁶ Consequently, both partners are now likely to have more assets and personal aspirations at the time they enter the partnership. Even for those couples without substantial assets, prenuptial contracting can promote discussion on how their resources will be combined and how those resources should be divided.¹⁷⁷ Thus, prenuptial agreements can have substantial benefits both for the parties involved and for the state. Adopting certain policies could encourage engaged couples to consider these agreements, or at least could encourage discussion on what their expectations and preferences would be, should they ever divorce.

1. *Benefits for the parties*

Though many people overestimate the likelihood that their own marriage will last,¹⁷⁸ it is a common refrain that “half of all marriages end in divorce.” In reality, divorce rates have actually decreased in the last twenty years, but many Americans believe just the oppo-

175. Jerome H. Poliacoff, *What Does Love Have to Do with It?*, FAM. ADVOC., Winter 2011, at 12, 13.

176. See PEW RES. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 12 (2010) [hereinafter PEW, DECLINE IN MARRIAGE], available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

177. It is often argued that the potential usefulness of prenuptial agreements is limited to the very wealthy, as these are the individuals most likely to be able to afford the associated transaction costs. See, e.g., Rasmusen & Stake, *supra* note 104, at 461 n.40 (1998). Prenuptial agreements can provide benefits and protection, however, for anyone with “property, debt, a degree, a certificate or license, an established career, a business or professional practice, a creative product, expectations of inheritance or other receipt of assets, past matrimonial experience, or children.” Erika L. Haupt, *For Better, For Worse, For Richer, For Poorer: Premarital Agreement Case Studies*, 37 REAL PROP. PROB. & TR. J. 29, 29–30 (2002). Haupt describes the benefits of prenuptial agreements for couples in a variety of situations and life stages, including students, professionals, those with debt, those who have been previously divorced, and those with family businesses, for example. *Id.*

178. In a study conducted in the early 1990s, recent applicants for marriage licenses accurately reported the national divorce rate, but significantly underestimated the likelihood that their own marriage would end. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993).

site.¹⁷⁹ Even marrying people know that divorce is a common experience in American life.

Divorce has become very much a part of marriage today. Prenuptial agreements can mitigate many of the stresses associated with divorce. Divorce proceedings can certainly be amicable, but often they are not.¹⁸⁰ These proceedings can put significant strain on the physical, psychological, and emotional well-being of former spouses and their families.¹⁸¹ So too can distressed marriages, and prenuptial agreements can provide a sense of assurance for those who seek to exit an unhappy or unstable union, but fear the uncertain outcome of a divorce.¹⁸² Prenuptial agreements could greatly reduce the potential animosity and difficulty associated with divorce proceedings by ensuring the process is completed quickly. If the parties have already agreed on how their property will be disentangled, they avoid the possibility of protracted litigation when one or both partners may be emotionally vulnerable. The uncertainty of adjudication—which will rest on the judge’s considerations about the parties’ private lives—is eliminated.¹⁸³ Prenuptial contracting also replaces the need for divorce settlement proceedings, in which the parties attempt to hammer out a division of assets when tensions are likely at their highest. Instead, they can come to an agreement *before* the marriage, at a time when both partners feel most trustful and supportive of one another.

Similarly, when both parties are active in prenuptial agreement drafting, the unique context provides a separate benefit: the promotion of better bargains. Most couples attempt to establish these bargains at divorce, preferring the autonomy afforded by a divorce settlement to the uncertainty of adjudication.¹⁸⁴ But in many instances, the adversarial context of settlement proceedings prevents, or at

179. PEW, *DECLINE IN MARRIAGE*, *supra* note 176, at 19 (reporting that 66% of respondents surveyed on marriage and divorce incorrectly believed that the divorce rate has increased in the past two decades).

180. See Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 442 (2008).

181. *Id.* at 448–59.

182. Though divorce can take an emotional toll on the parties during the proceedings, there are actually longer-lasting adverse effects for people who remain in distressed marriages. Both men and women in unhappy marriages tend to have worse health than happily married or divorced people, and are twenty-five times more likely to experience episodes of major depression. Virginia E. Rutter, *The Case for Divorce*, in *FAMILIES AS THEY REALLY ARE* 159, 164–67 (Barbara J. Risman ed., 2010).

183. See Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1155 (1999).

184. See *id.* at 1153–55.

least hinders, the parties' ability to reach the best agreements.¹⁸⁵ If the highly tense context (negotiating at divorce) is replaced with one in which the partners are most likely to be understanding and supportive of one another (just before marriage), the agreements reached will likely be better for both parties.

Planning for the future prompts partners to consider their needs, desires, and expectations, both individually and with respect to one another. The negotiation provides an opportunity for partners to openly communicate about their expectations, which can set a pre-determined framework for ongoing decisions during the marriage. The couple could consider how they will handle issues like sharing finances, paying debts, providing childcare, and planning for retirement. Recall the hypothetical posed in the Introduction about Leslie and Ben. Had Ben asked Leslie to sign an agreement, they could have discussed how they would expect their finances to be combined and spent in the future. Ben could request, for example, that while Leslie need not seek his input before purchasing 200 white chocolate top hats, he would like to be consulted on major purchases if they will be made under his name.

The agreement can also provide a reference for later decisions the couple may face. For example, Leslie, who is likely to be the higher earner in the relationship, could propose an agreement that provides that both partners will waive any right to alimony and keep their separate property if they divorce. This creates an understanding that both partners will be free to pursue goals that allow them to remain financially independent and self-sufficient. This should not be shocking or controversial; two people who work full time is not only the norm in marriage today,¹⁸⁶ but it is also increasingly reported as the most preferable family structure.¹⁸⁷ With this in mind, couples might also discuss how non-monetary contributions to the

185. *Id.* at 1175-76. Some have suggested that the context of divorce settlement agreements is particularly unfair for women, who are more likely to be disadvantaged by financial, psychological, and social factors that create an uneven playing field on which bargaining takes place. *See id.* at 1169.

186. *See, e.g.,* AMATO ET AL., *supra* note 27, at 98 (noting that since the mid-1970s, dual-earner households have replaced breadwinner-homemaker households as the majority of household structures in the United States); PEW, DECLINE IN MARRIAGE, *supra* note 176, at 6 (reporting that in 2008, 61% of married women were in the work force, up from 32% fewer than fifty years earlier in 1960).

187. PEW, DECLINE IN MARRIAGE, *supra* note 176, at 12-13. In the Pew Center's study on family trends and attitudes about marriage, the vast majority (72%) of the youngest adults surveyed (those between the ages of 18 and 29) reported that dual-income partnerships provide a more satisfying way of life than marriages in which one partner works and one partner stays at home. *Id.*

partnership should be accounted for upon divorce. If Leslie and Ben later have children, for example, and Ben will stay home to care for them while Leslie serves on the city council, he could ensure that his non-monetary efforts are accounted for with spousal support upon divorce.

Prenuptial contracting can not only ease the strain of divorce; it can also be used as a process that serves to reduce tension, uncertainty, and unfulfilled expectations during an ongoing marriage. Of course, these benefits can only be achieved if both parties are prepared to come to the bargaining table. If one partner refuses, or does not know that he or she should have come prepared to negotiate, the contextual benefits are diminished. This risk can be accounted for, however, with certain procedural requirements.¹⁸⁸

2. *Benefits for the state*

Satisfying marriages promote good health, psychological well-being, and financial security for adults and their families.¹⁸⁹ Accordingly, the state benefits from marriage, and has long encouraged it as good social policy.¹⁹⁰ The state's involvement in promoting marriage is questionable, however, considering its decreasing role in regulating private relationships. The potential exists that the state's efforts can promote ineffective, ideological, or even discriminatory policies.¹⁹¹ Nonetheless, all states are involved in, and to some degree promote, marriage.

Assuming that marriage *is* worth encouraging for the benefit of the individuals who enter into it—and by extension, society as a

188. See discussion *infra* Section II.C.

189. AMATO ET AL., *supra* note 27, at 245.

190. *Id.* (describing federal welfare reform legislation such as the 1996 Personal Responsibility and Work Opportunities Reform Act and the Deficit Reduction Act of 2005, which both included funding for the promotion of marriage in individual states). Funding for marriage promotion has been reduced, but is still implemented, under President Obama's current administration, with more focus on responsible fatherhood programs. Many individual state governments have maintained, and continue to develop, large-scale marriage promotion efforts. See Paul R. Amato, *Institutional, Companionate, and Individualistic Marriages: Change over Time and Implications for Marital Quality*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 107, 122-23 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

191. See, e.g., Orit Avishai et al., *Marriage Goes to School*, CONTEXTS, Summer 2012, at 35 (arguing that marriage education as an anti-poverty measure can mask and fail to account for the root causes of poverty); Andrew J. Cherlin, *Should the Government Promote Marriage?*, CONTEXTS, Fall 2003, at 22 (suggesting that marriage promotion programs may promote ideological agendas rather than evidence-based social policy).

whole—then so too are prenuptial agreements. Prenuptial agreements can facilitate the administration of the family law system by expediting difficult divorce proceedings. If more widely accepted and understood, prenuptial agreements may actually encourage some individuals to marry who would be unlikely to do so otherwise.¹⁹²

Prenuptial agreements can help address what some believe is a current “crisis” in the United States: people are marrying less.¹⁹³ Marriage is not the necessity it once was. As women become increasingly self-reliant and have greater opportunities to pursue their own endeavors, they need not settle for, or stay with, a partner who will not support them in achieving their goals or share with them the responsibilities of family and home life.¹⁹⁴ As women surpass men in higher education and increasingly out-earn their partners, husbands receive more benefits by marrying than they ever have before.¹⁹⁵ If people can ensure that they will be able to maintain some control over the individual aspects of their lives that are important to them by setting the terms for marriage and division at divorce with their partner in advance, they may be more likely to marry in the first place. The declining marriage rate is arguably not the “crisis” some make it out to be, but marriage ensures access to the associated benefits for those who might not consider it otherwise.

192. This also raises additional benefits for the parties. By marrying, individuals receive the state-recognized benefits of marriage: hospital visitation rights, intestacy benefits, access to joint health insurance, income tax benefits, Social Security benefits, tort suits should their partner be injured or killed, and protection from separation if their partner is not a U.S. citizen. See Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 70, 87–88 (Anita Bernstein ed., 2006) (“Every day, the laws intended to protect families harm unmarried people and their families simply by leaving them outside the shelter of protections.”).

193. See, e.g., NAT’L MARRIAGE PROJECT & CTR. FOR MARRIAGE AND FAMILIES, *THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2012*, at xii (2012) (arguing that declining marriage rates in America coincide with the “disappearance of the middle class” and “strike[] at the heart of the American Dream”).

194. See Kathleen Gerson, *Falling Back on Plan B: The Children of the Gender Revolution Face Uncharted Territory*, in FAMILIES AS THEY REALLY ARE 378, 387–89 (Barbara J. Risman ed., 2010); see also Linda C. McClain, *What Place for Marriage (E)quality in Marriage Promotion?*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 106, 125 (Anita Bernstein ed., 2006) (“[W]omen’s expectations of gender equality and marriage quality, and their experience of gender inequality in marriage, appear to be significant factors leading to disenchantment with marriage and ultimately to divorce. These factors seem to hold true across class lines and across race.”).

195. See LIZA MUNDY, *THE RICHER SEX: HOW THE NEW MAJORITY OF FEMALE BREADWINNERS IS TRANSFORMING SEX, LOVE, AND FAMILY* 38–44 (2012).

Furthermore, women are either the sole or primary wage earners in 40% of American families.¹⁹⁶ More than five million of these women are married mothers who earn more than their husbands.¹⁹⁷ Despite their significant and increasing role in financially supporting their families, however, women still earn less than their male counterparts and face significant financial risks upon divorce.¹⁹⁸ Prenuptial agreements can thus serve as an effective tool for women who are, or may become, the primary breadwinner in their families by mitigating or eliminating the financial disadvantages they might otherwise experience upon divorce.

The benefits afforded by prenuptial agreements, both for the parties entering them and for the state, can only be realized if people are aware of such benefits. Once the benefits are known, however, they will only actualize if couples enter well-drafted agreements that are subsequently enforced. One approach for avoiding uncertain, highly subjective outcomes is to review prenuptial agreements much like other kinds of contracts.

B. For Better or For Worse: The Case for Pennsylvania as a Model of Prenuptial Agreement Enforcement

If the benefits of prenuptial agreements are to be fully realized, they must be enforceable with certainty. Subjecting prenuptial agreements to heightened review, as many jurisdictions do,¹⁹⁹ reduces this certainty. Perhaps of greater concern is that review for fairness of the substance of the agreement and the circumstances surrounding its execution provides a vehicle for substantial judicial discretion. In many cases, this discretion serves to perpetuate

196. WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 1 (2013), available at http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

197. *Id.*

198. Although the wage gap is narrowing, women continue to earn about 81% of what men earn in median weekly income. KATHARINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 58 (6th ed. 2013). Additionally, studies have shown that on average, women and their children tend to be worse off economically than men after divorce. *Id.* at 272. Divorced women raising young children are more than three times as likely to file for bankruptcy than single women without children. See ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

199. See, e.g., *Tibbs v. Anderson*, 580 So. 2d 1337, 1339 (Ala. 1991); *Friezo v. Friezo*, 914 A.2d 533, 551 (Conn. 2007); *In re Estate of Hollett*, 834 A.2d 348 (N.H. 2003).

gendered stereotypes about women and their ability to contract.²⁰⁰ The approach to prenuptial agreements in Pennsylvania, where they are reviewed much like every other type of contract,²⁰¹ is the best way to reduce uncertainty and subjectivity. Pennsylvania's approach does have its drawbacks, but fears about the effects of unfair agreements can be better addressed procedurally, reducing the need for subjective and uncertain judgments.

1. For better

The Pennsylvania approach to prenuptial agreements assures greater certainty of enforcement by promoting the parties' freedom to contract. This approach is appropriate because marriage has evolved into a very contract-like relationship.²⁰² Those who enter into marriage choose to commit to their partner in a particular way, but they also maintain their own identities and are equally free to leave the partnership should they later decide to do so. In other areas, the law has developed to assume that all similarly situated people, regardless of gender, stand on equal footing and should receive equal treatment under the law.²⁰³ It should do the same for those individuals about to enter into marriage.

When it comes to prenuptial agreements, courts often invoke the parties' unique relationship as a justification for heightened review. Invoking their relationship to justify heightened review assumes that the parties do not have equal bargaining power. Perhaps this is because until recently, the parties to a prenuptial contract have always necessarily been a man and a woman.²⁰⁴ In the past, this assumption may have arisen from the desire to protect financially dependent spouses. However, the law should not continue to assume that men and women, simply by virtue of their gender or relation-

200. See, e.g., cases discussed *supra* subsection I.D.2.

201. See *supra* Section I.E.

202. *Id.*

203. See cases cited *supra* note 37 and accompanying text.

204. It will be interesting to see how and if review of prenuptial agreements changes as more states remove restrictions that limit marriage to opposite-sex couples. Resistance to same-sex marriage is diminishing in most segments of the population, further indicating the modern belief that marriage should be defined by those individuals who choose to enter into it and not restricted according to the state's preferences. See Karen Tumulty & Tom Hamburger, *Opposition to Same-Sex Marriage Narrow and Concentrated, Study Finds*, WASH. POST (Mar. 6, 2013), http://www.washingtonpost.com/politics/opposition-to-same-sex-marriage-narrow-and-concentrated-study-finds/2013/03/06/99bfc3cc-8688-11e2-9d71-f0feafdd1394_story.html.

ship to one another, are not equally capable bargainers. Pennsylvania accomplishes this by ensuring financial disclosure at execution, and then treating both parties as they would be treated had they entered any other type of contract.²⁰⁵

Heightened review, in contrast, can serve to perpetuate gendered assumptions and stereotypes. Those jurisdictions applying heightened review strive to ensure fairness, but do so by relying on stereotypes and assumptions about women and marriage. This is reminiscent of a time in which women truly were treated differently under the law and were denied the same assumption of autonomy and decision-making capacity afforded to men.²⁰⁶ To better promote equality, and to better reflect women's position as equally capable actors, however, the law should treat both parties to a contract in the same way, regardless of gender.

a. Whose wedding is this, anyway?: The problematic nature of 'proximity to the wedding' as a basis for involuntariness

When a court invalidates a prenuptial agreement as involuntary because it was signed shortly before the couple's wedding, it perpetuates stereotypes about women and their ability to contract.²⁰⁷ Essentially, these holdings presume that an impending wedding is an event that can render women less capable of acting voluntarily when something jeopardizes the occurrence of that event.²⁰⁸ This presumption is inherently stereotypical. Consider the rule in Ohio, for example, where a presumption of coercion arises if the contract was signed shortly before the wedding, but only if the wedding could not be postponed without "significant hardship, embarrassment, or emotional stress."²⁰⁹ This presumption treats couples differently depending on the size and style of their wedding, and assumes that a woman's ability to voluntarily enter a contract varies depending on the nature of the event she has planned. Under this rule, a man who presents a prenuptial agreement on the way to a

205. *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

206. *See supra* notes 12-25 and accompanying text.

207. *Cf. DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986) (enforcing a prenuptial agreement presented to and signed by the wife the night before the wedding because the wife was not a "babe in the woods" and could have refused to sign).

208. This presumption, of course, rests on the assumption that the person worried about cancelling the wedding is the woman, and the person presenting the agreement is the man. Although this is often the case, it need not necessarily be. As this Section continues to argue, the law need not, and should not, make exceptions based on stereotypes about women.

209. *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1348 (Ohio 1994).

courthouse wedding does not act coercively, but one who asks his bride to sign while 200 guests are waiting does.²¹⁰

The law need not be so paternalistic. Instead, it should call on the parties to a prenuptial agreement—as it calls on the parties to every contract—to walk away from a deal they do not wish to enter.²¹¹ Of course, the societal expectations surrounding weddings may play a large role in the decision-making process. Girls and young women have been taught from childhood that marriage and the tradition of weddings are valuable and significant.²¹² But marriage itself presupposes a partnership between equal, autonomous individuals. Cancelling a large wedding may cause embarrassment, but the embarrassment should rest with the partner who chooses to wait until the last minute to present his or her partner with a binding contract.

In many instances, the rationale for this rule is to ensure that the challenging party had an opportunity to consult counsel.²¹³ This is certainly a desirable outcome, as it will likely result in better, well-negotiated bargains. But when a party is presented with an agreement before the wedding with no time to consult counsel, the law should not assume that he or she had no choice in deciding whether to sign. He or she always has the choice of telling the other party to wait until counsel is contacted, even if that means delaying the wedding.

Proximity to the wedding as a measure of voluntariness might also, in some cases, misconstrue the motivations of the person who proposed the agreement. It is widely accepted that one partner may require an agreement as a condition for marriage.²¹⁴ But under the rules for heightened review, one's ability to set this condition becomes diminished as the wedding draws closer. Agreements that were relied on as a condition of marriage can be rendered invalid simply because they were entered shortly before the ceremony.²¹⁵ Additionally, consider the fact that weddings can be expensive and extravagant affairs.²¹⁶ Planning a wedding is often one of the first

210. See *In re Estate of Hollett*, 834 A.2d 348, 350–53 (N.H. 2003).

211. See Sharp, *supra* note 62, at 1403–05.

212. See generally CHRYS INGRAHAM, *WHITE WEDDINGS: ROMANCING HETEROSEXUALITY IN POPULAR CULTURE* (2d ed. 2008).

213. See *supra* subsection I.D.1.b.

214. See cases cited *supra* notes 108–109 and accompanying text.

215. See, e.g., *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1347–48 (Ohio 1994).

216. In 2012, the average couple spent \$26,989 on their wedding (not including the costs of the honeymoon) with one-third reporting they exceeded their planned budget. Cathy Lynn Grossman, *Average Couple Spends \$26,989 on Wedding; Many Break Budget*, USA TODAY (Aug.

times an engaged couple must address—together—how large amounts of their money will be spent. Recall Leslie’s decision to purchase 200 white chocolate top hats under Ben’s name.²¹⁷ Though this is an exaggerated example, these types of decisions, frivolous as they may seem, might raise concerns for one or both partners before marriage. By creating a presumption that an agreement signed shortly before a wedding is involuntary, the law discredits the potentially legitimate concerns of the party who proposed it.

b. Marriage and divorce are not what they used to be: the troublesome role of substantive review

When the court conducts substantive review of prenuptial agreements, it decides whether the agreement is “fair” to both parties.²¹⁸ The measure of fairness varies among jurisdictions, but in all cases the determination is subjective and is likely to be assessed against the default rules for property distribution.²¹⁹ The purpose of prenuptial agreements, however, is to *avoid* application of the default rules—which reflect the state’s conception of fairness²²⁰—at divorce. Thus, the state’s interest in the subject matter of the agreement is not a strong justification for heightened review.²²¹ If prenuptial agreements are presumptively valid, then courts should respect the terms of those agreements. Couples demonstrate their desire to avoid state-imposed definitions of fairness by entering these agreements in the first place.²²²

Courts also justify substantive review of prenuptial agreements by emphasizing their differences from other contracts. These differences include the parties’ close relationship and the fact that the agreement may be enforced long after execution.²²³ These concerns, however, are not exclusive to prenuptial agreements, weakening the argument that these “differences” justify heightened scrutiny.²²⁴ Other types of contracts, such as loan agreements between banks

10, 2012), <http://usatoday30.usatoday.com/money/perfi/basics/story/2012-08-09/wedding-costs/56921020/1>.

217. See *supra* Introduction.

218. See Bix, *supra* note 6, at 153–54.

219. See *supra* subsection I.D.2.a.

220. See Baker, *supra* note 56, at 332–39.

221. See *id.*

222. See *id.*

223. See Younger, *supra* note 92, at 3–4.

224. See Guggenheimer, *supra* note 65, at 155.

and customers, involve parties of disparate bargaining power who do not negotiate at arm's length.²²⁵ Engaged couples should disclose certain information to one another to ensure that their prenuptial agreement is informed, but courts go a step further by finding that they share a "confidential relationship."²²⁶ This legal relationship is usually conferred upon marriage; applying it in prenuptial agreement review invites subjective fairness assessments that may be based on stereotypes and assumptions.²²⁷ If the court finds that one party's conduct in proposing the agreement was unsettling or distasteful, it may rely on the "confidential relationship" as a basis for penalizing that behavior by invalidating the contract.²²⁸

Furthermore, parties to corporate and partnership agreements often enter contracts that set expectations for dissolution that may not occur until much later in time.²²⁹ In this context, parties are expected to anticipate their future needs and only enter agreements they find reasonable.²³⁰ Similar reasoning should apply to prenuptial agreement review. If both partners in a marriage are viewed as equally capable actors, they can both be expected to anticipate their future needs and draft agreements to account for them.

Critics of this view might argue that an individual about to marry will likely underestimate the probability that the agreement will ever take effect, reducing his or her incentive to actively negotiate.²³¹ This concern, however, may be better addressed by procedural mechanisms that account for the unique context in which prenuptial agreements are executed, rather than by *ex post* substantive review. The possibility that the parties will not effectively account for future changes is present with any long-term agreement and this possibility need not justify invalidation.²³²

When courts conduct heightened substantive review of prenuptial agreements and disregard their similarities to other types of con-

225. *See id.*

226. *See Sharp, supra* note 62, at 1414.

227. *See id.* at 1414-17.

228. *See, e.g.,* cases cited and discussed *supra* subsection I.D.1.

229. *See Guggenheimer, supra* note 65, at 154-55.

230. *See id.*

231. *See Bix, supra* note 6, at 193-96 & n.182 (summarizing arguments for heightened review resting on theories of parties' "bounded rationality").

232. Much like business partnership agreements, prenuptial agreements can be amended after marriage with postnuptial agreements. The distinct treatment of these agreements is beyond the scope of this Note, but postnuptial agreements are, in many jurisdictions, reviewed in the same way as prenuptial agreements. For additional background on these contracts, see Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827.

tracts, they reflect a view of relationships that assumes one partner is dominant and ignores the current nature of marriage as a relationship of equal, autonomous individuals. Analogy to the commercial context is increasingly beneficial, both in practicality and in the law,²³³ as it weakens the “naturalized” argument that families should operate in a particular way based on biology and assumed gender expectations.²³⁴ Emphasizing the “differences” between prenuptial agreements and other contracts to justify heightened review recalls a time when legal rules were interpreted to “protect” women who were thought incapable of ordering their own affairs and acting in their own best interests.²³⁵ Family law standards provide a vehicle for states to express conceptions of fairness, but because prenuptial agreements are contracts, contract law standards should apply.²³⁶ The contracting parties *become* family by marrying, but their decision to enter a prenuptial agreement reflects their desire to privately order one aspect of that family—property distribution—should the marriage later dissolve.²³⁷ If the agreement is subsequently challenged, the standards consistently applied in contract law should adhere, as “[a]ny overhaul of the contract regime necessitated by women’s contracting ‘problems’ would only detrimentally reify the cultural assumptions of women’s inferiority and lack of bargaining capacity.”²³⁸

2. *For worse*

The contract approach adopted in Pennsylvania,²³⁹ much like prenuptial agreements themselves, has received a less-than-glowing reputation.²⁴⁰ The concern with this approach stems from the reality that for much of history, women did not enjoy equality before the law.²⁴¹ When the law presumes equality for those who do not have a

233. American families are increasingly using methods extracted from the workplace like mission statements, progress reports, and financial transparency to improve functioning and reduce stress in the household. See Bruce Feiler, *Family Inc.*, WALL ST. J., Feb. 9, 2013, at C1.

234. See Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 85–92 (2001).

235. See *supra* notes 10–22 and accompanying text.

236. See *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

237. See, e.g., *Baker*, *supra* note 56, at 366–69.

238. Guggenheimer, *supra* note 65, at 155.

239. See *Simeone*, 581 A.2d at 165.

240. See, e.g., Beck & Baker, *supra* note 170, at 782.

241. See Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 240–42 (1994) (arguing that premarital contracts are harmful to women largely be-

long history of equal treatment, some people may be disadvantaged. Justice Papadako's concurrence in *Simeone* reflects this concern:

Mr. Justice Flaherty [writing for the majority] believes that . . . all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that "you women asked for it, now live with it."²⁴²

The language of the concurrence reflects the tension between formal and substantive theories of gender equality. Formal equality, or liberal feminism, is based on a simple principle: the law should not treat women differently from similarly situated men, nor should the law base decisions about individual women on generalizations about all women.²⁴³ A substantive theory of equality, sometimes called cultural feminism, posits that equal treatment, without consideration of the actual differences between men and women, will not always result in true equality.²⁴⁴ Arguments made by liberal feminists for equal treatment proved powerful for women's advancements in education and the workplace, but have been heavily critiqued when applied in family law.²⁴⁵ Martha Fineman has criticized the equality rhetoric associated with marriage as "inappropriate for resolving the difficult questions in situations such as divorce, where men and women, husbands and wives, stand in culturally constructed and socially maintained positions of inequality."²⁴⁶

In some prenuptial agreement cases, the concern about inequality is warranted.²⁴⁷ Efforts aimed at protecting those who need it with after-the-fact judicial review, however, perpetuate stereotypes about

cause men are disproportionately among the wealthy, while women are disproportionately among the poor and are likely to have an income significantly lower than that of men).

242. *Simeone*, 581 A.2d 162, 168 (Pa. 1990) (Papadako, J., concurring).

243. NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 16 (2006).

244. See, e.g., Dawn C. Nunziato, Note, *Gender Equality: States as Laboratories*, 80 VA. L. REV. 945, 959-60 (1994).

245. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 33 (2d ed. 2003) ("[R]ather than investigating the distinctive ways in which women were oppressed within the family, [liberal] arguments proceeded on the assumption that women actually exercised more power in the family than men did, and that it was only fair to require equalization in the domestic sphere to justify women's claims to equality in the larger society. The equality theme . . . had more backfire potential for women when applied to the family.").

246. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 29 (1991).

247. See, e.g., Brod, *supra* note 241.

women's abilities that are not reflective of reality.²⁴⁸ Fineman argues that "equal treatment in divorce . . . can only be fair if spouses have access to equal resources and have equivalent needs."²⁴⁹ Because women are no longer necessarily the spouses most likely to be disproportionately financially disadvantaged,²⁵⁰ prenuptial agreements can protect the wealth they have achieved. These agreements can also serve as a means for ensuring that women's non-monetary contributions to the family and acquisition of marital property are sufficiently accounted for upon divorce. Contractual autonomy can thus be protected and encouraged with the addition of certain procedural steps that will promote better bargains while avoiding gendered judicial assumptions.

*C. A Modern Proposal: Ensuring Knowledge and Time in
Prenuptial Agreement Drafting*

If the benefits of a prenuptial agreement are to be achieved for both parties, the agreement must be both enforceable and well-drafted. Pennsylvania promotes enforcement of prenuptial agreements by treating them much like ordinary contracts.²⁵¹ Nonetheless, there is more that could be done to ensure that these agreements are drafted in a way that benefits the interests and expectations of both parties. A simple proposal for achieving this goal involves two changes to the marital application process: (1) informing couples about the rights associated with marriage and the default rules on divorce; and (2) imposing a brief waiting period between the drafting of the prenuptial agreement and its execution.

*1. Know your rights (and your right to opt out): providing
information about the default rules*

Very few people are aware of the default rules for property distribution upon divorce.²⁵² Without knowledge of what the default rules are, couples are denied the opportunity to decide whether they might prefer a different set of rules. The state controls access to

248. See Guggenheimer, *supra* note 65, at 157.

249. FINEMAN, *supra* note 246, at 52.

250. See MUNDY, *supra* note 195, at 39.

251. See *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

252. See Baker & Emery, *supra* note 178, at 445 (noting that in a study of perceptions of divorce laws, all groups surveyed, including law students who had completed a course in family law, demonstrated highly inaccurate understandings of current divorce statutes).

marriage, and therefore it should also be responsible for informing those who enter marriage about the rights and requirements it entails. When a couple applies for a marriage license in Pennsylvania, the partners must do so together and in person.²⁵³ This provides an opportunity for the state to provide couples with useful information. Couples could be offered information about the rights associated with marriage (such as intestacy laws and tax benefits) and about the default rules for divorce (in Pennsylvania, equitable distribution).²⁵⁴ This information could also include descriptions of the options many couples face at divorce—litigation or settlement agreements, for example—as well as the availability of prenuptial agreements to decide these issues before marriage.²⁵⁵

The state could also provide a clear, plain-language description of what a prenuptial agreement is, how it may be used, and what requirements are associated with it (complete financial disclosure and perhaps, as described below, a waiting period).²⁵⁶ Additionally, the state could encourage couples to seek independent counsel if they decide to draft such an agreement. The information should also provide assurance that many couples enter these contracts simply to set expectations and reduce later complications, which might lessen the negative stigma surrounding prenuptial agreements and encourage discussion between partners.²⁵⁷ Providing this information to both parties may also relieve the pressure from a partner who desires an agreement but fears that he or she would be signaling distrust by broaching the topic. Although it might seem counterintuitive to provide couples with information about divorce when they are applying for marriage licenses, the goal is to encourage informed discussion about each party's desires and expectations.

2. *Time on your side: a brief waiting period between drafting and execution*

Pennsylvania state law requires a three-day waiting period between the application for a marriage license and the issuance of the license.²⁵⁸ Similarly, a brief, non-waivable waiting period between

253. *Instructions for Obtaining a Marriage License*, PHILADELPHIA REGISTER OF WILLS, <http://secureprod.phila.gov/wills/marriagelicense.aspx> (last visited Jan. 19, 2014).

254. 23 PA. CONS. STAT. ANN. § 3502 (West 2013).

255. *See, e.g.*, Atwood, *supra* note 61, at 12–16.

256. *See infra* subsection II.C.2.

257. *See Bix, supra* note 6, at 145–46.

258. 23 PA. CONS. STAT. ANN. § 1303 (West 2012).

the drafting and execution of a prenuptial agreement could also be reasonably imposed. In receiving information about their rights and options, couples could be informed that if they choose to enter a prenuptial agreement, they must wait to sign until at least three days after it is first drafted or presented. Ideally, the parties will have worked together with independent counsel in drafting an agreement that reflects both of their preferences, but this requirement would at least mitigate the potential problems (and subsequent subjective review) that can occur when one party surprises the other with an agreement shortly before the wedding.

If three days pass between the time the agreement is first presented or drafted by both parties and the time it is signed (even if signed on the wedding day), a rebuttable presumption would be created that the agreement was executed voluntarily. This avoids the need for a subjective assessment of “voluntariness” and allows couples some time to seek the assistance of counsel. A statutory waiting period does not necessarily impinge the parties’ freedom to contract. In fact, much like the financial disclosure requirement, it is a procedural step that promotes better bargains and protects the freedom of both parties to contract effectively by accounting for the unique context at execution.²⁵⁹ With information about their rights and options, and time to consider their own preferences, couples are more likely to draft prenuptial agreements that are more fully negotiated and better reflect the expectations and desires of *both* partners as individuals.²⁶⁰

CONCLUSION

Marriage laws have changed to reflect the nature of relationships today. Both men and women are considered equally capable individuals who have the right to define the terms of their relationship as they see fit. The law of prenuptial agreements, however, is fraught with uncertainty and inconsistent standards that reflect judicial assumptions about gender and family that are no longer necessarily warranted.

Pennsylvania’s approach to reviewing prenuptial agreements for enforceability best reflects current conceptions of marriage—as a partnership of equal individuals, each with his or her own interests, desires, and expectations. By reviewing prenuptial agreements

259. See Atwood, *supra* note 61, at 22–32.

260. See *supra* subsection I.D.1.b.

much like ordinary contracts, Pennsylvania respects the autonomous decisions of those entering marriage and avoids the gendered rhetoric often perpetuated by courts that conduct heightened review.

However, the Pennsylvania approach can be improved. Prenuptial agreements are occasionally presented in contexts that are not ideal for full negotiation. By informing couples who apply for marriage licenses of the default rules for property division upon divorce, and of their right to select their own terms via a prenuptial agreement, the state could have a positive impact by increasing parties' knowledge of these issues and encouraging the use of prenuptial agreements in a way that is beneficial to both parties. The state could further ensure these benefits by requiring a brief waiting period between the initial drafting and the execution of a prenuptial agreement to allow for better negotiation and opportunity to consult counsel. This approach would promote the substantial benefits that prenuptial agreements can provide for both the parties and the state. It would also encourage discussion among couples about their desires and expectations, perhaps allowing them to enter marriage better informed and with greater understanding. Both of these are positive outcomes. Other jurisdictions could and should adopt appropriate processes to achieve similar outcomes and to better reflect the current prevailing perception of marriage as a partnership of equals.