

MARRIAGE AGREEMENTS AND RELIGION

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There is a tension in government policy regarding marriage agreements: between wanting to reinforce the family unit and wanting to protect individual interests and liberties. This is further complicated when agreements involve religious provisions. This Article looks at the way courts approach religious provisions in premarital, marital, and separation agreements, and discusses the need to balance societal interests and the interests of all parties while maintaining fairness and religious neutrality. As the number of religious provisions likely increases, the hope is to find a balance that can set minimal standards, provide exit opportunities, and minimize exploitation and oppression.

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I. INTRODUCTION

The challenge posed by religion to family law generally, and to marriage agreements¹ in particular,² is not that different from the challenge religion poses elsewhere to law (and, more generally, to society): the concern that applicable legal standards be both neutral³ and accommodating. We want religious preferences and practices to be treated no worse (but also no better) than other kinds of preferences and practices, but we also think that treating such preferences and practices properly sometimes means trying to accommodate them when we can, even if that accommodation may entail some stretching of our usual standards.⁴

Beyond issues of neutrality and accommodation, the intersection of marriage agreements and religion also raises an additional set of issues, relating to (First Amendment) entanglement with religion⁵ and the free exercise of religion. For example, when the parties to a marriage agreement agree to resolve disputes before a religious arbitrator or a religious panel or court, or when parties to a premarital agreement or separation agreement have agreed to do actions that have specifically religious sig-

1. In this Article, “marriage agreement” encompasses three different kinds of legal agreements entered by spouses or those about to be spouses: premarital agreements, marital agreements, and separation agreements. The definition of those sub-categories will be discussed, below, when they are the focus of analysis.

2. This Article will not cover the regulation of agreements between never-married parents, though many of the issues and legal responses would likely be similar. *See generally* Kimberly C. Emery & Robert E. Emery, *Who Knows What Is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 L. & CONTEMP. PROBS. 151 (2014). This Article will also not cover covenant marriage, or efforts to enforce covenant marriage terms or a covenant-marriage-like agreement in a non-covenant marriage state. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2007 & Supp. 2015) (covenant marriage statute); ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (2015) (covenant marriage statute); LA. REV. STAT. ANN. §§ 9:272 to 9:276 (West 2008 & Supp. 2015) (covenant marriage statute); *Blackburn v. Blackburn*, 180 So.3d 16 (Ala. Civ. App. 2015) (Louisiana covenant marriage terms not enforceable in Alabama divorce); *cf.* Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255, 262–71 (2002) (urging greater ability of spouses to opt into other states’ marriage laws, including covenant-marriage laws).

3. Some commentators have complained that in some areas of family law, we do not have neutrality in the sense that the law currently favors religion and the religious, at least when the religious beliefs and practices in question are conventional ones. *See Note, The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1709 (1984) (concluding that courts frequently favor religious parents in custody disputes). Whether the law does (or should) favor religion and the religious in custody matters is beyond the scope of this Article.

4. There is thus a real question of when “accommodation” becomes “preference,” which I do not have time to get into in this Article. One context in which the question arises is in a custody contest, when considering a practice that is arguably authorized by a parent’s sincere religious belief is also a practice that arguably harms the child: is it an accommodation or special preferential treatment to not treat the practice as a reason to give custody to the other parent? *Compare* Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. App. 1967) (reversing grant of custody to father that had been based on mother’s religious belief in “separation” and its effects on their child), *with* Leppert v. Leppert, 519 N.W.2d 287 (N.D. 1994) (reversing grant of custody to mother, as mother’s religious practices were held to be harmful to the children).

5. *See* U.S. CONST. amend. I; *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (stating that government action must not “foster an excessive government entanglement with religion”) (internal quotation marks omitted); *see also* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998) (considering entanglement issues when secular law is used to enforce religious standards or religious practices).

nificance (to perform certain religious activities with a child, or to give a spouse a “*get*”⁶), or when they agree to raise children under a certain religion or in certain religious ways, does court enforcement of such provisions always, sometimes, or never raise issues of entanglement with religion or improper constraint of a parent’s free exercise of religion?⁷

As always, with discussions of agreements, it is important to recall that the question is *not* whether parties should be able to order their lives on these matters through express agreement. Spouses and other partners are free, within the quite broad boundaries of the criminal law and social welfare legislation, to live according to religious principles, to raise their children according to those same principles, and to agree to do these things in the future. And, of course, spouses are free to continue to abide by those agreements and understandings even after their marriage has ended. Legal issues generally only arise when one party no longer wishes to abide by an agreement, and the other party seeks government (court) help in enforcing the agreement; additional complications arise when the agreement purports to alter the usual processes of enforcement (*e.g.*, by choosing a different forum for dispute resolution).

As the question is, ultimately, when the state will offer its assistance for enforcement, or at least its recognition of purported changes in legal status, the analysis here (as in contract law generally) will normally be one about when it is beneficial to enforce particular agreements, or particular kinds or categories of agreements. Inevitably, these sorts of evaluations will sometimes involve speculation by lawmakers, judges, and commentators which they may not be competent to make, or at least require evaluation of consequences for which there is not nearly enough data available. Still, recommendations need to be offered and decisions need to be made.

In this Article, I will look at the way courts have treated religious provisions in marriage agreements, and evaluate whether those rules and standards should be changed. In what follows, Part II offers a rough overview of current rules and practices regarding marriage agreements and religious provisions within such agreements. Part III will then reflect on general values and concerns, offering some conclusions regarding what approach courts and legislatures *should* take towards religious provisions in marriage agreements.

6. For an argument that providing a “*get*” is “not a sacerdotal or religious act,” see J. David Bleich, *A Proposal to Withhold Divorce Decrees on Grounds of Equity*, 5 INT’L J. JUR. FAM. 215, 216 (2014).

7. See, *e.g.*, Final Divorce Decree, *Soleimani v. Soleimani*, 2012 WL 3729939 (Kan. Dist. Ct. 2012) (giving entanglement with religion as one of multiple reasons for refusal to enforce a *mahr* provision); *Avitzur v. Avitzur*, 446 N.E.2d 136, 136–37 (N.Y. 1983) (stating that enforcement of *ketubah* does not violate the First Amendment); *Aflalo v. Aflalo*, 685 A.2d 523, 543 (N.J. 1996) (stating that an order compelling husband to grant “*get*” would violate husband’s free exercise of religion); *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. 1990) (finding that a court order requiring husband to obtain “*get*” did not violate husband’s First Amendment rights); *cf. Lang v. Levi*, 16 A.3d 980, 989 (Md. 2011) (upholding a Jewish arbitration decision, with the court refusing to evaluate the decision for First Amendment reasons).

II. CURRENT RULES AND PRACTICES

In this Part, I will offer brief summaries of the three main forms of marriage agreements—premarital agreements, marital agreements, and separation agreements—considering first their general legal treatment, and then looking at issues relating to agreement provisions touching on religion.

A. Premarital Agreements

1. General Overview of the Legal Treatment of Premarital Agreements

Premarital agreements (also known as “prenuptial agreements” and “antenuptial agreements”) are agreements entered on the eve of marriage with the purpose of altering the rights of the spouses in case of divorce or in the case of the death of one of them.

Until the 1970s, premarital agreements (at least, their divorce-focused provisions)⁸ were considered unenforceable because they were seen as being contrary to public policy.⁹ The justifications for the refusal to enforce usually included that spouses (and spouses-to-be) had no power to alter the legal “status” terms of marriage; courts also often asserted that provisions that reduced either party’s obligations upon divorce improperly encouraged divorce.¹⁰ Marriage was considered to be a social good in which society had as much interest as did the spouses,¹¹ and, partly for that reason, it was considered inappropriate for spouses (or those about to become spouses) to have the legal power to alter the

8. Historically, courts have been more willing to enforce premarital agreement provisions that went to the rights of a spouse upon the death of the other spouse. For example, the ability of a wife to waive her right to dower goes back many centuries, to the English Statute of Uses, 27 Hen. VIII, c. 10, § 6 (1535).

9. For a brief overview of the history of the legal treatment of premarital agreements, see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998) [hereinafter Bix, *Bargaining*]; see also LINDA J. RAVDIN, *PREMARITAL AGREEMENTS: DRAFTING AND NEGOTIATION* 6–9 (ABA, 2011); BRETT R. TURNER & LAURA W. MORGAN, *ATTACKING AND DEFENDING MARITAL AGREEMENTS* 361–65 (ABA, 2nd ed. 2012).

10. Even after premarital agreements became generally enforceable, there were occasional cases (neither frequent, nor any very recent of which I am aware) that refused enforcement on the basis that the agreement unduly encouraged divorce. See *In re Marriage of Noghrey*, 215 Cal. Rptr. 153, 157 (Cal. Ct. App. 1985) (refusing enforcement of payment provision in *ketubah*; commenting: “The prospect of receiving a house and a minimum of \$500,000 by obtaining [a] no-fault divorce . . . would menace the marriage of the best intentioned spouse”); *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (1988) (following *Noghrey* in refusing enforcement of delayed *mahr* payment as “encouraging profiteering by divorce”).

11. See, e.g., *Lester v. Lester*, 87 N.Y.S.2d 517, 519 (N.Y. Fam. Ct. 1949) (“The state and the community are interested in and concerned with the institution which marriage creates.”). This view was sometimes taken to extremes under the old fault-divorce regime. See, e.g., *Rankin v. Rankin*, 124 A.2d 639, 644 (Pa. 1956) (“The fact that married people do not get along well together does not justify a divorce. Testimony which proves merely an unhappy union, the parties being high strung temperamentally and unsuited to each other . . . is insufficient to sustain a decree [of divorce].”). On the topic generally of society’s interest in the marriages of its citizens, see Brian H. Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000).

legal terms of their marriage, especially in a way that could directly or indirectly encourage the dissolution of that marriage.

During the 1970s, at roughly the same time that most states were adopting no-fault divorce as either the exclusive grounds for divorce or at least an alternative to fault grounds for divorce, almost every state also began (by court decision or legislation) to permit enforcement of at least some premarital agreements.¹² Currently, all states treat premarital agreements as enforceable, though states generally subject premarital agreements to some requirements of procedural and substantive fairness greater than what is imposed on conventional commercial agreements.¹³ For those states who impose higher standards for substantive fairness, this inquiry is usually only relative to the time the agreement was entered; a minority of states also add a requirement that the agreement be fair relative to the time of enforcement.¹⁴

2. Ketubahs

Under Jewish religious law, men are allowed to divorce their wives (by giving them a religious document, called a “*get*”), but women have no power to divorce their husbands.¹⁵ A wife who has not received a “*get*” from her husband, even if the two have received a divorce from civil (secular) courts, is still bound to him (an “*Agunah*”).¹⁶ A wife who has not received a “*get*” cannot marry someone else; if she does, and the couple have children, those children will be considered outsiders to the religious community.¹⁷

To avoid potential problems around the issue of divorce, some Jewish couples have placed provisions in the traditional, ritual marriage “contract” (the “*ketubah*”), in which the husband agrees to provide a “*get*” to his wife if either seeks a civil divorce, agreeing to pay a penalty until such time as he provides the “*get*,”¹⁸ or in which the parties agree to bring disputes relating to the marriage to a Jewish arbitration panel (“*Bet Din*”), who would then have the power (under appropriate conditions, defined by Jewish law) to order the husband to give his wife a “*get*.”¹⁹ (In

12. Bix, *Bargaining*, *supra* note 9, at 150.

13. *See id.* at 148–50.

14. For an overview and case citations relating to fairness reviews at the time of execution and at the time of enforcement, see RAVDIN, *supra* note 9, at 69–77.

15. For information on the Jewish laws of marriage and divorce, see, e.g., Michael J. Broyde, *New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT 138–63 (Joel A. Nichols, ed., 2012).

16. Get Refusal Basics, GETYOURGET.COM, <http://www.getyourget.com/get-refusal-basics/> (last visited Mar. 19, 2016).

17. LINDA L. VEAZEY, *A WOMAN'S RIGHT TO CULTURE: TOWARD GENDERED CULTURAL RIGHTS* 134 (2015).

18. *E.g.*, *Light v. Light*, No. NNHFA124051863S, 2012 WL 6743605, at *7 (Conn. 2012) (enforcing agreement under which husband agreed to pay \$100 per day from the date of the couple's separation until he provided her with a “*get*”).

19. For an excellent general discussion of the use of arbitration provisions by religious parties to have disputes resolved in accordance with religious law, see Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3014–22 (2015). *See also* Mi-

New York, there are statutes, enacted with the support and assistance of the Orthodox Jewish community, meant to pressure Orthodox Jewish men to provide their wives with “*gets*” if and when either spouse files for divorce.²⁰ Discussion of those statutes, however, takes us too far from our present topic.)

3. *Mahr Provisions*

Under Islamic religious law, marriage is a contract—literally so: a written contract that the spouses-to-be must sign. A standard part of this contract is a promised payment from the husband to the wife, known as *mahr*.²¹ It is normal practice for the payment to be divided, with a smaller portion given at the time of marriage, and the larger portion (sometimes called “delayed *mahr*”) due to the wife at the time of divorce, depending on the type of divorce and the grounds.²² If the husband divorces his wife by way of simple announcement, *talaq*, then the delayed *mahr* is due.²³ According to some sources, the delayed *mahr* is also due if the wife divorces the husband because of the husband’s bad behavior.²⁴

A relatively small number of American cases have considered the legal enforcement of the provisions for delayed *mahr* payments, usually in a context in which the husband is claiming that the *mahr* obligation supplants any other financial obligations (by way of property division or alimony) he might owe at or after divorce, though sometimes based on a claim by the wife wanting to enforce the payment. While courts often focus on whether the *mahr* agreements meet procedural requirements imposed on all premarital agreements,²⁵ or on contracts generally,²⁶ and some courts wonder whether enforcing *mahr* provisions is consistent with the constitutional separation of church and state,²⁷ few courts seem to ask the basic interpretive question: was the *mahr* provision intended to displace (to supplant, rather than simply supplement) the default financial

chael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111 (2015). For premarital agreement forms provided by the Bet Din of America, see THE PRENUP, <http://www.theprenup.org/> (last visited Mar. 19, 2016).

20. See Broyde, *supra* note 15.

21. Other terms are sometimes used for the same practice: e.g., “*sadaq*” and “*mehrieh*.” See Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN’S RIGHTS & ISLAMIC FAMILY LAW 177, 201 (Lynn Welchman, ed., 2004); Mojdeh M. v. Jamshid A., 2012 WL 2732169, at *34–*35 (describing a *mehrieh*).

22. Chelsea A. Sizemore, Comment, *Enforcing Islamic Mahr Agreements: The American Judge’s Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1087–88 (2011) (discussing *mahr* agreements and deferred *mahr*).

23. See Cyra Akila Choudhury, *(Mis)appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 45, 72–73 (2008).

24. See, e.g., Abed Awad, *Court Enforces Mahr Provision in Muslim Marriage Contract*, HG.ORG, <http://www.hg.org/article.asp?id=23753> (last visited Mar. 19, 2016).

25. See, e.g., *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008) (stating *mahr* agreement is unenforceable under criteria applicable to premarital agreements).

26. See, e.g., *In re Marriage of Obaidi and Qayoum*, 226 P.3d 787 (Wash. App. 2010) (finding *mahr* agreement unenforceable under general contract-law principles, in particular, duress and no meeting of the minds).

27. See *Soleimani v. Soleimani*, 2012 WL 3729939 (Kan. Dist. Ct. 2012).

terms the state sets for divorcing couples?²⁸ The point is that if the *mahr* provision is *not* intended to waive the wife's rights (to property division and alimony), there is a strong argument that it need not meet the special procedural and substantive requirements imposed on premarital agreements (though, of course, it would still be subject to more standard contract doctrines, like unconscionability).²⁹

4. *Other Provisions Relating to Religion*

Generally, premarital agreements are only enforced to the extent that they touch on the financial obligations of the parties *inter se* (e.g., property division and alimony).³⁰ Even within the category of purely financial obligations, agreements to restrict child support obligations are normally unenforceable.³¹ Provisions in premarital agreements that purported to regulate the religious behavior of the spouses during or after marriage,³² or the religious upbringing of the children of the marriage, would generally be unenforceable³³ because (among other reasons) they fall far outside the limited set of topics for enforceable contracting. There are, however, exceptions, seemingly including the recently enacted Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), which directs courts at divorce to allocate responsibility for a child's religious upbringing according to "any express or implied agreement between the parents."³⁴

28. See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT, § 2, Comment, 9C U.L.A. 12, 16–17 (West Supp. 2015) (suggesting that *mahr* provisions should not be subject to the rules covering premarital and marital agreements, because they "were not intended to affect the parties' existing legal rights and obligations upon divorce or death") [hereinafter, UPMAA]; Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law)—A Comment on Oman's Article*, WAKE FOREST L. REV. ONLINE (2011), <http://wakeforestlawreview.com/2011/05/mahr-agreements-contracting-in-the-shadow-of-family-law-and-religious-law-a-comment-on-omans-article/>.

29. See *id.*

30. See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 3(a), 9C U.L.A. 25, 43 (West 2001 & Supp. 2015) (listing acceptable subjects for premarital agreement) [hereinafter UPAA].

31. See, e.g., UPAA § 3(b), 9C U.L.A. 43 ("The right of a child to support may not be adversely affected by a premarital agreement."); UPMAA § 10(b)(1), 9C U.L.A. 27 ("A term in a premarital agreement or marital agreement is not enforceable to the extent that it . . . adversely affects a child's right to support . . .").

32. Additionally, agreements that purport to regulate the behavior of spouses during marriage, even when the agreements are made during the marriage (and not before the marriage, as with premarital agreements), are generally unenforceable under the principle of "family privacy." See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to enforce agreement between spouses covering behavior during the marriage).

33. See, e.g., *In re Marriage of Nuechterlein*, 587 N.E.2d 21, 22 (Ill. App. Ct. 1992) (refusing to enforce provision in premarital agreement on religious upbringing of children). See generally Jocelyn E. Strauber, *A Deal is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should be Enforceable*, 47 DUKE L.J. 971, 984 (1998) ("Courts are remarkably consistent in their refusal to effectuate antenuptial religious upbringing agreements."). Strauber goes on to argue that such provisions *should* be enforced, for reasons roughly similar to those discussed in Part II, *infra*. There are a handful of cases, mostly from many decades ago, where the court enforced a premarital agreement provision regarding religious upbringing. See Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655, 667–68 (1992) (citing and summarizing three cases prior to 1950 where the court enforced such provisions).

34. 750 ILL. COMP. STAT. 5/602(b)(3) (2016).

B. Marital Agreements

1. Overview of Legal Treatment of Marital Agreements

Marital agreements are agreements entered between spouses during their marriage (when divorce is not yet imminent) with the purpose of modifying the rights of the spouses upon divorce or at the death of one of the spouses. The legal treatment of marital agreements is the least certain and least uniform of the three kinds of marital agreements discussed in this Article.³⁵ Many states have no statutes or case law expressly setting the legal standard for marital agreements. Other states, by statute or case law, have held marital agreements to be subject to the same standards as premarital agreements.³⁶ Still other states, by statute³⁷ or case law,³⁸ have held marital agreements to higher/stricter standards than premarital agreements. At least one state holds all marital agreements to be unenforceable.³⁹ A few states treat differently (and more favorably) a sub-category of marital agreements under the rubric “reconciliation agreements”—agreements in which a wronged party agrees to stay in the marriage in return for greater rights or benefits.⁴⁰

2. Provisions Relating to Religion

The issues for marital agreement provisions relating to religion are likely to have similar outcomes as the premarital agreement provisions relating to religion discussed in the previous section (assuming that the agreement meets whatever standards the state has set for enforcement of the agreement generally).

There is one important legal twist to keep in mind. Some couples choose to have both civil and religious marriage ceremonies. If the religious ceremony is held after (even if only a day or two after) the civil ceremony, any marriage contract signed in connection with the religious marriage may be treated as a marital contract (rather than a premarital contract), which can be significant in those states in which marital contracts are treated with greater suspicion and less deference than premarital contracts.⁴¹

35. See generally Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 829 (2007).

36. See, e.g., Va. CODE ANN. § 20-155 (West 2015); *D’Aston v. D’Aston*, 808 P.2d 111, 112–13 (Utah Ct. App. 1990).

37. See, e.g., MINN. STAT. ANN. § 519.11 (West Supp. 2016).

38. *Bedrick v. Bedrick*, 17 A.3d 17, 23–26 (Conn. 2011); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961–64 (Mass. 2010).

39. OHIO REV. CODE ANN. § 3103.06 (West 2015).

40. See, e.g., *Pacelli v. Pacelli*, 725 A.2d 56, 59 (N.J. Super. Ct. App. Div. 1999) (discussing the category of “reconciliation agreements”).

41. E.g., *S.B. v. W.A.*, 959 N.Y.S.2d 802, 820–21 (N.Y. Sup. Ct. 2012).

C. *Separation Agreements*

1. *Overview of Legal Treatment of Separation Agreements*

Separation agreements (sometimes called “marital settlement agreements”) are agreements entered when divorce is imminent—frequently after one of the parties has filed a petition for divorce. In contrast to premarital agreements and marital agreements (indeed, in contrast to most agreements in the domestic-relations area⁴²), courts and family law doctrine support and encourage separation agreements. Setting the terms (of property division, alimony, child custody, child support, etc.) by agreement of the parties rather than by judicial imposition (after trial), is a way to save on family court resources, to reduce the animosity of divorce proceedings, and to find dissolution terms with which the parties are more likely to comply (because they helped select them).

Doctrinally, courts are supposed to treat terms relating to the purely financial obligations between the parties (*e.g.*, property division and alimony) more deferentially than they treat terms relating to children (*e.g.*, custody and child support),⁴³ but by most accounts, judges tend to simply rubber stamp their approval of separation agreements without significant scrutiny of any of the provisions.⁴⁴ Invalidation of a previously entered separation agreement on grounds of unfair terms or unfair process is rare,⁴⁵ but it does occur.⁴⁶

2. *Provisions Relating to Religion*

The most common situation for separation agreement provisions relating to religion involves the divorcing spouses setting guidelines regarding the religious upbringing of children: whether they go to a parochial school, whether they attend religious services (and of which kind), whether they follow certain religious practices and restrictions, and so on. Obviously, this is most common when the parents are of different religious faiths or different levels of observance, and one parent is trying to prevent the other from (in the first parent’s perspective) undermining a particular religious upbringing earlier agreed upon.

Without express agreements on the subject, courts are reluctant to interfere with the religious practices of parents when they are with their

42. See, *e.g.*, Brian H. Bix, *Agreements in American Family Law*, 4 INT’L J. JUR. FAM. 115 (2013) [hereinafter, Bix, *Agreements*].

43. See, *e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 306(b), 9A (Part I) U.L.A. 159, 249 (1998 & Supp. 2015) (restating general law on separation agreements).

44. See, *e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979). See generally TURNER & MORGAN, *supra* note 9, at 65–176 (standards and cases relating to challenges to validity of separation agreements).

45. See, *e.g.*, Brennan-Duffy v. Duffy, 804 N.Y.S.2d 399, 400 (N.Y. App. Div. 2005) (“An agreement will not be overturned merely because, in retrospect, some of its provisions were improvident or one-sided, or because a party had a change of heart.”).

46. See, *e.g.*, *In re Marriage of Thornhill*, 200 P.3d 1083, 1084 (Colo. App. 2008) (finding property agreement to be unconscionable due to a combination of procedural and substantive factors).

children, or any religious training or exposure the parents offer their children.⁴⁷ Most courts seem to take the same view even if there has been an agreed provision on the topic in a separation agreement; a few courts, however, especially in New York State, have been willing to enforce religious upbringing provisions in separation agreements.⁴⁸

III. REFLECTIONS AND PRESCRIPTIONS

One reason for the resistance (past and present) to enforcing premarital and marital agreements is that they undermine one understanding of the spirit and purpose of marriage and family. That idea is one of the household and the family as a unit, a unit in which society generally has an interest—along with, but separate from the interests of the parties involved. Back in the time when marriages always (or even, almost always) ended only with the death of a spouse, it was easier to think of the interests of individual spouses as always being subordinate to the interests of the family or household as a unit (and subordinate, of course, also to the general interests of society—in this case, societal interests in marital and family stability). With divorce now more or less available on demand, it is clear that society recognizes rights and interests of individual spouses that often differ from that of the family or household generally. And if spousal interests separate from family interests are to be recognized, it is a small step to enforcing spousal agreements affecting marital rights and duties. If there is less social pressure for everyone to get married,⁴⁹ and we are less insistent that those who are married stay married, it is no surprise that we are also more tolerant of parties choosing the terms on which they will marry (premarital agreements) or stay married (marital agreements).

There is a parallel but different tension when religion is the topic of marital agreements. On one hand, religious communities have an interest in the recognition and protection of their rules and practices, an interest protected by allowing parties to opt into the use of religious decision-making bodies, and (to a lesser extent) by allowing parties to make bind-

47. See, e.g., *Zummo v. Zummo*, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990) (overturning restrictions on father's exercise of religion with children; claim that children suffered stress an insufficient ground for restraint of religious exercise, unless "the stress experienced is unproductively severe"). For one of the rare cases finding that the heightened standard of "severe harm" had been met, justifying restrictions on parental religious actions with a child, see *Kendall v. Kendall*, 687 N.E.2d 1228, 1233 (Mass. 1997).

48. See Weiss & Abramoff, *supra* note 33, at 668–72; see, e.g., *Spring v. Glawon*, 454 N.Y.S.2d 140 (N.Y. App. Div. 1982) (religious upbringing provision violated by child being sent to parochial school); *Perlstein v. Perlstein*, 429 N.Y.S.2d 896 (N.Y. App. Div. 1981) (reinstating challenge to custody based on mother's violation of separation agreement provision requiring that the child be raised in a household that followed Jewish dietary laws); *Smith v. Smith*, 17 Fam. L. Rep. (BNA) 1024 (N.Y. Fam. Ct. 1990) (enforcing an agreement that a child would be raised in the Catholic faith).

49. See, e.g., Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

ing agreements regarding the religious upbringing of their children.⁵⁰ On the other hand, there is an interest in protecting the rights of individuals from the claims of religious groups, and an overlapping (and constitutionally grounded) claim in the government not becoming an enforcement mechanism serving the interests of religious groups against individuals. There are also general concerns about enforcement of agreements: whether enforcing agreements might sometimes be less a matter of enforcing a mutually entered commitment and more a matter of an imposition on the weaker party or exploitation by the stronger party. These are the tensions we see in the cases dealing with religious provisions of marital agreements. On one hand, there is a value to allowing religious parties, by express agreement, to have aspects of their domestic lives subject to the rules of their religious community, and there is value to allowing parties to make binding commitments on matters relating to religion. (One can think of partners of different faiths, where one partner would be unwilling—or far less willing—to go forward with having and raising children as a couple without an enforceable commitment that the child will be raised in a particular faith. To have such provisions be unenforceable is to make it less likely that these sorts of couples will be willing to have and raise children together.⁵¹)

Another question is to what extent we want to allow couples to opt out of the local and secular legal system and into a different and religious legal system. In a recent case, *Ofer v. Sirota*,⁵² a New York court enforced a premarital agreement provision which made any divorce litigation subject to the jurisdiction of an Israeli court, over one party's objection that the standards that would be applied in Israeli courts would be religious standards.⁵³ By contrast, in an earlier case, *In re Marriage of Shaban*,⁵⁴ a provision in a premarital agreement that indicated that the property relations of the parties were to be governed by Islamic law was held as too vague to be enforced (and that because its terms were vague, it was held not to have met the writing requirement for premarital agreements).⁵⁵

Issues about opting into religious rules and institutions parallel questions about choice-of-law provisions on one hand, and matters of

50. For a collection of articles, both descriptive and prescriptive, regarding religious pluralism in the regulation of marriage, see MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols, ed., Cambridge 2012).

51. I made a similar point about the enforcement of coparenting agreements among same-sex couples (at a time when marriage was not an alternative option for most same-sex couples). See Brian H. Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753 (2007).

52. 984 N.Y.S.2d 312 (N.Y. App. Div. 2014).

53. In Israel, as in Kenya, India, and South Africa, the primary family law applied is that of the religion of the couple. See Joel A. Nichols, *Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT 11, 32–55 (Joel A. Nichols, ed., Cambridge 2012) (summarizing the situation in India, Kenya, and South Africa); Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 164–92 (2007) (summarizing the law of India, Kenya, South Africa, and Israel).

54. 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

55. *Id.* at 867–69.

comity on the other. With choice of law, parties are generally allowed to choose the law of another state or another country to govern their agreements. This power to choose another law is restricted in two ways: first, by standard conflict of law principles, which hold that the chosen law should not be applied if it would be contrary to the strongly held public policy of the jurisdiction with the strongest connection to the agreement;⁵⁶ and second, in some areas, only a jurisdiction with some connection to the underlying matter can be chosen.⁵⁷ Courts have generally enforced choice-of-law provisions in marriage agreements (at least in premarital agreements), at least where there were connections between the state whose law was chosen and one or both parties.⁵⁸ The issue of comity arises when a party wants to enforce the judgment of a court from another country.⁵⁹ Judgments from other countries are generally to be recognized if they are the product of legal processes that are fundamentally fair and not based on rules or principles contrary to the strong public policy of the forum where recognition is sought.⁶⁰

In general, we live in a multicultural, globalized world, where law (and society generally) does and should work to accommodate different normative systems—whether that be the (foreign) legal system in which a marriage agreement was entered, a legal or religious-rule system chosen by the parties to govern their agreement, or religious obligations to which the spouses consider themselves subject.⁶¹ The efforts to find a

56. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

57. Under the UCC, only the law of a state with some connection to the transaction can be chosen (and an effort to remove this restriction in the revised Article 1 process found no support in adopting state legislatures). See Keith A. Rowley, *The Often Imitated, but (Still) Not Yet Duplicated, Revised UCC Article 1* (2011), at 6-8, available at <https://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf>. In the *Restatement of Conflict of Laws*, there must either be a connection between the transaction and the state whose law was chosen, or some other legitimate reason for choosing the state (e.g., the choice of Delaware for corporate law, or New York for executive compensation—in both cases because the law in those areas is well developed in those states). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971); Exxon Mobil Corp. v. Drennen, 452 S.W.3d 319, 324–25 (Tex. 2014). In *The Hague Principles on Choice of Law for International Contracts*, there are no restrictions on the states whose law can be chosen. See Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 881 (2013) (describing *Principles'* application to business-to-business contracts).

58. See also UPMAA § 4(1), 9C U.L.A. 18 (enforcing choice of law if jurisdiction chosen “has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy.”); UPAA § 3(a)(7), 9C U.L.A. 43 (stating “choice of law” as permissible topic for premarital agreement).

59. When the judgment comes from a sister state in the United States, this is usually covered by either the Full Faith and Credit Clause of the United States Constitution, U.S. CONST. art. IV, or by federal law. See, e.g., Full Faith and Credit for Child Support Orders Act, 28 U.S.C.A § 1738B (West 2006 & Supp. 2015).

60. See generally Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 26 (1966).

61. On pluralism—a constrained and regulated pluralism—within (American) family law, see, e.g., Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004); Ayelet Shchar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES IN L. 573, 575 (2008). See also Ann Laquer Estin, *Foreign and Religious Law: Comity, Contract, and the Constitution*, 41 PEPPERDINE L. REV. 1029 (2014) [hereinafter Estin, *Foreign and Religious*]; Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation, in MARRIAGE AND DIVORCE IN MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 60–77* (Joel A. Nichols, ed., Cambridge, 2012).

process and structure for appropriate (and thus limited) recognition of this diversity and pluralism continues—even as there is also some generally misguided and misinformed populist push-back (under the rubric of instructing courts not to enforce foreign law generally or *Shari'a* Law in particular) in a handful of places.⁶² We want to recognize pluralism and party autonomy within limits: within (for example) the usual limits of strongly held public policy (including minimal due process and protection of vulnerable parties) and guarding the interests of third parties (in particular, children).

And, of course, one should not overstate what can be concluded *generally* about religious provisions in marriage agreements. As I have discussed at length on other occasions, agreements in family law are treated in different ways, in part because of the sharply different contexts, and subsequently, the varying values, fears, and objectives involved in the different types of agreement.⁶³ For example, while premarital agreements raise issues of bounded rationality, marital agreements raise questions of coercion; issues about government entanglement often conflict with issues of religious freedom (when a court is asked to order a spouse or former spouse to act according to some religious dictate), and these may in turn overlap with concerns about judicial supervision of the best interests of the child when the religious matter is the (future) religious activities or training of children, and so on. And the general support for parties' settling their own affairs under a separation agreement is in tension with the judicial supervision role for ensuring basic fairness between the ex-spouses at the time of divorce and for protecting children's interests.

IV. CONCLUSION

The trend towards greater enforcement of marriage agreements reflects a tension in government policy between wanting to reinforce the family unit and wanting to protect individual interests and individual liberty. Questions regarding the enforcement of religious provisions in these agreements involve negotiating the same sorts of tensions (group interests vs. individual interests, protecting commitments vs. protecting liberty), with the additional complications created by the First Amendment objectives of free exercise and non-entanglement.

Contract law in general is a balance, increasing autonomy by allowing parties to enter binding commitments (commitments that can be enforced in court), while creating many limits on both procedure and substance—dealing with misrepresentation, duress, unconscionability, limits on what damages can be agreed to, public policy, etc. With provisions about religion in marriage agreements, further questions of balance arise

62. See, e.g., Estin, *Foreign and Religious*, *supra* note 61, at 1030–32.

63. See, e.g., Bix, *Agreements*, *supra* note 42; Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL L. 249, 249 (2010).

along with those that come with all agreements. There is hope that a balance can be drawn which would give room for party choice and religious pluralism, while also setting minimal standards, providing exit opportunities, and minimizing exploitation and oppression.