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Asset Protection Through the Use of Premarital Agreements

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ASSET PROTECTION THROUGH THE USE OF PREMARITAL AGREEMENTS

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Chapter 1. Introduction

The number of multi-million dollar divorce settlements has been increasing rapidly in the last decade. Although Donald Trump's divorce from his first wife, Ivana, wherein $25 million was awarded to the former spouse, may have seemed like a significant sum in 1992, this amount appears quite minuscule today.[1] In December of 2011, Mel Gibson's soon to be ex-wife Robyn Moore received $425 million in the couples' divorce settlement.[2] In March of 2012, Frank McCourt was forced to sell his professional franchise, the Los Angeles Dodgers, in bankruptcy during his divorce proceedings with Jamie McCourt.[3] It seems as if every month we hear details of another celebrity divorce settlement involving hundreds of millions of dollars, begging the obvious question: do athletes and celebrities who stand to make fortunes during a contemplated marriage, need to be more aware of the consequences of divorce and how to better protect themselves in such a case, before repeating the words "I do"?

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[1] Joanne Kaufman, "The Art of the Divorce," People,http://www.people.com/people/archive/article/0,20105577,00.html (accessed April 19, 2012).
[2] Ken Lee, "Mel Gibson's Ex Wife Takes Half His Estimated $850 Million in Divorce Settlement," People, http://www.people.com/people/article/0,20556666,00.html (accessed April 19, 2012).
[3] Stephen Dunn, "Why the McCourt Marital Agreement Failed," Forbes,http://www.forbes.com/sites/stephendunn/2011/12/14/why-the-mccourt-marital-agreement-failed/ (accessed April 19, 2012).

Chapter 2. History of Marriage

2.1 Marriage Until the 20th Century

The origins of the custom of marriage and its rules and restrictions can be traced back to times before Christ. In 1400 B.C. a man was prohibited from marrying his, mother, stepmother, granddaughter, granddaughter-in-law, sister, or half-sister, in accordance with Mosaic Law. The Bible has long been a source in determining the standards of marriage. Genesis 2:24 states that the husband is to leave the home of his parents to join the wife and that the two are to become one in flesh. Many scholars believe marriage began to truly evolve into what it is today during the end of the Roman Empire. Subsequent to this modification, marriage was considered a private affair, by which the government was not to interfere. In the fourth and fifth centuries after Christ's birth, the Church of Rome altered this standard considerably and a systematic theology began to emerge. In England, The Church steadily gained more control of marriage regulation until the thirteenth century, when they seemingly had sole jurisdiction over marriage and separation. This control lasted through the 15th century, and its ideals are still a large part of Catholic theology today.[4]

Protestant reformation in the 16th century resulted in a different perception of marriage and divorce. Up until this point, Catholics held that a married couple was to remain married up until the husband or wife's death. A divorce *a mensa et thoro* meant separation of bed and board, or rather, the couple lived separately but were still legally married, and the husband was required to provide for the wife throughout her lifetime.

[4] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 1-2.

Protestants rejected this idea, arguing that a couple could divorce, if there was just cause, and be free to enter into marriage with another.[5] These reformers argued that: "marriage and divorce should be regulated by secular legislative authority courts of equity, rather than by the Church".[6] They believed that certain offenses committed by a spouse, such as adultery, cruelty, and desertion, qualified for an absolute divorce, or divorce *a mensa et thoro.*[7] A rift between King Henry VIII and the Church, in which the Church denied him a divorce in 1529, played a key role in the evolution of marriage. Even after the Pope refused Henry VIII a divorce, the King was able to secure dissolution of the marriage through an archbishop. Many citizens of England supported their King on this issue, and so the number of Reformers grew.[8]

As America became colonized, a new set of marriage and divorce standards was established, similar to that of the old country.[9] John C. Miller, a professor of American history wrote that during this period: "the principle objectives of marriage were wealth, social position, and love — usually in that order."[10] Parents did not consider their children to be qualified in making spousal decisions, and therefore the father of the

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[5] Ibid., 2.
[6] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 768-769.
[7] Ibid., 769.
[8] Chris Trueman, "The Reformation," History Learning Site, http://www.historylearningsite.co.uk/reformation.htm (accessed April 19, 2012).
[9] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 3-4.
[10] John C. Miller, *This New Man, the American: the Beginnings of the American People,* (New York: McGraw-Hill Inc.,US, 1974), 414.

female could legally deny a proposed marriage. The union was supposed to last forever, and laws made divorce and separation difficult.[11]

Marriage and divorce laws in the United States adapted steadily over time. By the 1800s, the union of husband and wife resembled a patriarchic model. Marriage was viewed as a way to consolidate wealth and resources, and had much more to do with economics than romance. The husband was the head of the household and in charge of supporting it, while the wife was in charge of matters within the home, such as cooking and caring for the children. The husband, wife, and children were considered a single entity, with the husband charged with the duty to support the wife until one's death. Divorces were not common, but in the occurrence of one in which the wife is not at fault, the husband was required to provide for her until her death.[12]

2.2 Modern Marriages

Modern family law has seen an increasing amount of government involvement in almost every part of family life. Twentieth century common law marriages were slowly disposed of in most states as they were making it difficult to determine who could marry. Common law marriages are marriages that are created with express agreement of the two parties, without a ceremony, witnesses, or government validation. Rising numbers of unhappy couples seeking termination of marriage led to a large reformation of divorce laws in the 1960s. Since then, divorce has become increasing available to troubled couples, and as a result, divorces have become much more common.[13] The US Census

[11] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 4.
[12] Ibid., 4-5.
[13] Ibid., 5.

Bureau estimates that about 67% of men married for the first time during 1960-1964 were still married on their 25th anniversary, while only about 54.5% of men married from 1975-1979 were still married twenty-five years later.[14] This increase in the percentage of divorces represents the evolution of laws that more easily allowed for people to get divorced.

Up until the dramatic marriage revolution of the 1960s a divorce, or dissolution of marriage, was only granted if one spouse could prove the other was at fault. This meant that a spouse would have to prove that their partner had committed adultery, cruelty, or desertion for the court to grant the divorce. Some states adapted the material wrongs that constitute being at fault to include insanity, conviction of a crime, and drunkenness and drug addiction. As a result of these difficult mandates required for divorce, many unhappy couples fabricated stories of material wrongdoing. As it became clear that the fault-based divorce system wasn't preventing unhappy couples from divorcing, California adopted a law that made irreconcilable differences of either spouse and insanity the sole grounds for divorce. Shortly after, the Uniform Marriage and Divorce Act was proposed by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association recommended its approval by the states in 1974.[15] Today all states have adopted some type of no-fault divorce, although some states may use fault as a factor when determining alimony upon dissolution of marriage.[16]

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[14] Rose Kreider and Renee Ellis, "Number, Timing, and Duration of Marriages and Divorces: 2009," Census Reports, http://www.census.gov/prod/2011pubs/p70-125.pdf (accessed April 19, 2012).
[15] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 769-770.
[16] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 286.

Chapter 3. Property Distribution Upon Death or Divorce

3.1 Marital vs. Separate Property

A contract of marriage by law is viewed much differently than an ordinary contract. While an ordinary civil contract establishes rights, duties, and obligations by the consent of both parties, the rights, duties, and obligations of a marriage contract is determined by state laws or statutes. An ordinary contract can be rescinded or terminated by consent of the parties, but the termination of a marriage contract cannot be accomplished solely by the agreement of husband and wife: "The state always remains a third party and sets the grounds for ending the relationship."[17]

When a couple gets divorced, there are a number of ways to avoid litigation in a family court when determining the distribution of marital property. They can amicably agree to some division of property, or the couple can go through mediation or arbitration. If the husband and wife cannot come to a settlement through these means, the case is resolved by a family court. The first and primary goal of the court is to divide the couple's assets up into marital and nonmarital assets, usually termed community or separate property. Marital assets, or community property, are those assets which were acquired during the marriage and nonmarital assets, or separate property, are those assets which were owned by one spouse prior to marriage. Next the court attempts to assign value to the various elements of marital property so that it can be divided. The nonmarital assets are distributed solely to the spouse that owned them prior to marriage.[18]

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[17] Ibid., 10.
[18] Ibid., 269.

3.2 Community Property vs. Equitable Distribution States

The way in which property is distributed upon divorce or death varies from state to state. There are no federal laws relating to division of property upon death or divorce unless a spouse owns a federal pension or retirement plan. Prior to the marital property reform of the 1980s, property was divided by the separate property system theory. This theory stated that property was to be distributed to the person bearing title. This theory was seen as unjust for women as they would be left with only a claim for alimony.[19]

Today, there are two main theories as to how the property should be distributed: community property and equitable distribution. Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington are considered community property states, while Wisconsin's laws are closely aligned with this theory. Although these states share a common theory of property distribution, they are not uniform and each has different laws.[20]

Community property states view the divorce of a couple similarly to the dissolution of a business. Regardless of economic standing or moral turpitude during the course of partnership in business, each partner is entitled to a portion of the assets consistent with their partnership interest. In the case of a marriage, the husband and wife are considered one economic entity in which each spouse receives co-ownership of assets acquired during marriage, so each is entitled to 50% of the marital property. Assets acquired after marriage but still included as nonmarital property include gifts and

[19] Ibid., 269-270.
[20] Ibid., 270-271.

inheritances to one spouse and not the other. Similarly, when a spouse dies, the surviving spouse is entitled to half of the community property.[21]

Women's rights to community property have grown significantly in the past two centuries. California's community property theory of the division of assets upon dissolution of marriage shows this progress. The state adopted the community property system in 1848, with its roots coming from Mexico and Spain. The system attempted to protect a wife's separate property from their husband's debts, although the management of this property was still at the husband's control. In 1860 the California Supreme Court established what is today known as the "source rule," and exempted the proceeds of separate property, such as interest on a spouse's separate bank account, from community property. It wasn't until the early 1950s when wives were given the right to manage and control their separate property, and not until 1975 were they given equal management of community property. Today, the statutes of California's community property system are mostly concerned with the division of assets upon divorce. Consistent with most states, California statutes define separate property as property acquired before marriage; after separation; through gift, bequest, devise, or descent; or through the profits of this property by one spouse. Property acquired during marriage while a resident of California is considered marital property and is to be distributed equally upon dissolution.[22]

Determining whether property is separate or marital is a complicated issue that a court needs to resolve if divorcing spouses cannot come to an agreement. Since property

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[21] Ibid., 271-273

[22] Marshall W. Waller, *California Family Law For Paralegals*, 5th ed. (New York: Aspen Publishers, 2009), 231-237.

acquired after separation is deemed separate property, determining the date of separation is quite important. This question has been highly debated in many cases, and post-separation is generally described as when the couple lives "separate and apart," although this statement is very misleading. A California court ruled in 1931, in the case of *Makeig v. United Sec. Bank and Trust Co.*, that living apart for 14 years was not sufficient enough to demonstrate "separate and apart."[23] The court stated: "living separate and apart…does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons, but applies to a condition where the spouses have come to a parting of the ways and have no intentions of resuming the marital relations…"[24]

Another issue that makes the determination of separate and community property complicated, is a situation where property has both separate and community aspects. For example, a husband may buy a house prior to marriage with his own separate money but use community funds for the home's payments or improvements. In this case, if the husband is able to trace his separate property contribution, he will receive that amount back as a credit against the division of other assets. General tracing is accomplished when a spouse is able to show that the source funds of an asset were separate property. For example, if a man buys a boat before entering into marriage, and subsequently sells the boat and buys a car with the proceeds from the boat after marriage, the car is considered separate property. Other types of tracing are used when the assets have already been determined to be community property, but the husband/wife can trace separate property

[23] Ibid., 237-240.
[24] Ibid., 240.

to the attribution of this shared property. In such a case, the spouse will be able to receive the amount of separate funds used to attribute the property back. A way to change the status of property is through transmutations, in which the parties agree to change property from community to separate or separate to community.[25]

In the remaining 41 states that do not use the community property system, property is divided by the equitable distribution theory. Instead of dividing community property equally, the courts in these states take many factors into consideration, only one of which is money.[26] While hearing the case Krafick v. Krafick to determine if a vested pension benefit constitute property eligible for equitable distribution the Connecticut Supreme Court described its interpretation of equitable distribution as: "a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."[27] Other factors that contribute to a court's ruling of how to distribute assets upon dissolution include efforts of raising children, performing personal services, making the home, and providing emotional and physical support. While some states have a set list of factors that are to be considered, others have lists of factors that may be used but are not limited to the list. The New Jersey State Legislature created a set of factors that the court is not limited to in N.J.S.A. 2A: 34-23.1, which are:

a. The duration of the marriage.
b. The age and physical and emotional health of the parties.
c. The income or property brought to the marriage by each party.

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[25] Ibid., 248-254.
[26] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 273.
[27] *Krafick v Krafick*, 234 Conn. 795 (1995). http://www.lexisnexis.com.ccl.idm.oclc.org/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch.

d. The standard of living established during the marriage.
e. Any written agreement made by the parties before or during the marriage concerning an arrangement of property distribution.
f. The economic circumstances of each party at the time the division of property becomes effective.
g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become selfsupporting at a standard of living reasonably comparable to that enjoyed during the marriage.
h. The contribution by each party to the education, training or earning power of the other.
i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker.
j. The tax consequences of the proposed distribution to each party.
k. The present value of the property.
l. The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects.
m. The debts and liabilities of the parties.
n. The need for creation now, or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children; and
o. Any other factors which the court may deem relevant [28]

As in community property states, equitable distribution states attempt to divide marital and nonmarital property. Assets that are included in nonmarital assets include property that was acquired before the marriage, gifts and inheritances from a third party, and property in which there was a valid agreement to be nonmarital. When determining how to separate the property, the court begins with the presumption that each spouse contributed equally to the marriage, and that each should receive half of the marital

[28] "Equitable Distribution," LexisNexis, http://bookstore.lexis.com/bstore/sample/michie/0327005750.pdf(accessed April 20, 2012).

property. Only after this presumption does it look at other factors to shift the percentage of property to a certain spouse.[29]

There are a number of factors that can lead a court away from this presumption, many of which are listed above. Another way a spouse may be able to shift an asset from marital property to nonmarital property is to prove that the asset that is now considered marital property was paid or exchanged for nonmarital assets. Furthermore, some jurisdictions allow for the labeling of nonmarital property to assets that were acquired by one spouse without the direct or indirect influence of the other spouse. When attempting to claim nonmarital property, the burden of proof is placed upon that party to show that a previously owned nonmarital asset was used to acquire the new asset.[30]

Equitable distribution states are categorized as either "dual property" or "all property." The majority of equitable distribution states are "dual property" states, meaning that a judge may equitably distribute marital property but cannot divide their separate property. Sixteen equitable distribution states are considered "all property" states including: Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, and Wyoming. Washington, a community property state, also follows this "all property" theory, which states that a judge may divide a spouse's separate property if there is insufficient marital property to provide for the needs of a spouse.[31]

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[29] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 273-274.
[30] Ibid., 274-275.
[31] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 874-875.

Chapter 4. Divorce Jurisdiction

Since all states have different divorce laws, it is worth noting the jurisdiction requirements of state Courts over the dissolution of marriage. When deciding if a court has jurisdiction to hear a case involving a marital dispute, it must decide if it has both subject matter jurisdiction along with personal jurisdiction over both parties. If the court does not have subject matter jurisdiction, meaning it does not hear marital disputes, the court cannot hear the case. If the court does have subject matter jurisdiction, it must then determine if it has personal jurisdiction over both parties. If the court has subject matter jurisdiction but lacks personal jurisdiction of one of the parties, the court is limited in its ability to resolve all of the marital issues. In these circumstances, a court may issue a divorce decree but cannot impose personal obligation like alimony and child support upon a party it does not have jurisdiction of. Federal courts generally do not have jurisdiction to hear cases involving marital disputes and have only a narrow exception to the rule, called the "domestic relations" exception. This exception requires that the parties be citizens of different states, involving matters of $75,000 or more, and does not involve a divorce decree, child support, alimony, or custody.[32]

Requirements for a court's jurisdiction on marital disputes are different throughout the states, although all have a common domiciliary requirement for subject matter jurisdiction. "Domicile" refers to the location of one's physical existence and the intent on making that place their home. Most states require that the spouse filing for divorce has been living in the state in which they are filing for at least 6 months and plan

[32] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 533-535.

to continue to live there. Other states have as little as a 6 week requirement (Idaho and Nevada), while others have a one year requirement (Connecticut and New Jersey). The reason states have these requirements is so that a spouse cannot pick the state they wish to divorce because of that state's divorce laws, which may favor one spouse in a particular case.[33]

The ability to easily move residency from state to state within the US generates the question of: what happens when a spouse moves to another state, establishes his/her domicile, and then wishes to have that state grant them a divorce? The court has subject matter jurisdiction over the case since the spouse has fulfilled his/her residency requirement and also has personal jurisdiction over this new resident. However, the court does not have personal jurisdiction over the other spouse since he/she is not a residence of the state, nor did they voluntarily submit to that state's jurisdiction. Therefore, a "divisible divorce" will be issued. This type of divorce, also called an *Ex Parte* divorce, results in the recognition of the dissolution of the marriage in both states but limits each state's ability to issue personal requirements, such as alimony.[34]

A court can establish personal jurisdiction over a nonresident if the state has a statute that allows them to serve nonresidents, also known as long-arm statutes, and if the nonresident has sufficient contacts with the state requesting his/her appearance. Although long-arm statutes were created for business purposes, some courts have held broad definitions of the language within these statutes. For an example, courts have considered

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[33] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 772-780.
[34] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 544-545.

not paying child support a "tortious act" in order to apply the state's long-arm statute and require the spouse to pay alimony, child support, ect.[35]

While it may be difficult to establish personal jurisdiction of a nonresident through long-arm statutes, a court can exercise personal jurisdiction of a nonresident quite easily if they are served with the divorce papers while they are physically within the state. In the 1990 case of *Burnham v. Superior Court* a wife moves to California from another state with her and her husband's children. When the husband comes to visit his kids, the wife brings a divorce action in California and serves the husband with divorce papers. The Supreme Court ruled that the California court established personal jurisdiction when he was served the papers in California. Even when the husband leaves California, the state will still hold jurisdiction over him because it possesses continuing jurisdiction. Continuing jurisdiction means that if a court holds personal jurisdiction over an individual at the time the divorce papers were served, they continue to hold that jurisdiction regardless of where that individual resides. If an *Ex Parte* divorce occurs, the dissolution of the marriage is recognized by all other jurisdictions, however the division of marital property can only be determined by a court with personal jurisdiction over both parties.[36]

[35] Ibid., 547-548.
[36] Ibid., 553-559.

Chapter 5. Premarital and Postmarital Agreements

5.1 History of Premarital Agreements

Premarital agreements, also called antenuptial or prenuptial agreements in other jurisdictions, if created validly: "permit the parties to agree before they marry to waive or limit certain 'rights' or 'benefits' that generally flow from the marital relationship via state law."[37] Although premarital agreements are primarily used to distribute property to spouses upon one's death or divorce today, they haven't always had the same purpose. The first appearance of prenuptial agreements dates back to 16th century England.[38] During this time, premarital agreements were typically made by widows and widowers who were about to enter into another marriage but wanted property acquired before or during the first marriage to go to the children of the first marriage upon their death.[39] Prior to these agreements including property division upon divorce, they were looked at with a relatively positive connotation, being: "favored by the law as promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation."[40]

As marriage and divorce became revolutionized in the 1970s with the advent of no-fault divorces, the limits of premarital contracts were also dramatically changed. The 1970 Florida Supreme Court case *Posner v. Posner* resulted in the court's opinion that has shaped the ability to enforce premarital contracts today:

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[37] Ibid., 303.
[38] Ibid.
[39] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 1232.
[40] *Buffington v. Buffington*, 51 N.E. 328-329 (1898). http://www.lexisnexis.com.ccl.idm.oclc.org/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch

> "With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid premarital contract settling their property rights upon the death of either, might want to consider and discuss also — and agree upon, if possible — the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail."[41]

While it is common for a divorced spouse to still care about his/her ex and have an aspiration to support them and their shared children, these factors are provided by rules relating to spousal support and child support. Young celebrities and athletes who stand to make fortunes in the future may desire to retain most of these assets as separate property. Although it may have appealed to Mel Gibson to support his ex-wife for the rest of her life, he surely didn't want her to receive $450 million. With rising probabilities of divorce, more young couples are entering into premarital agreements to protect personal property and earnings during marriage. Many scholars opposed to premarital agreements argue that they: "invariably harm women by waiving legal and financial protections offered by state law, and by magnifying an unequal distribution of wealth along gender lines."[42]

5.2 Execution and Enforcement

A premarital contract is significantly different than an ordinary civil contract. First, the state has a greater interest in premarital contracts than ordinary commercial contracts and acts as *parens patriae* with respect to protecting a spouse against unfair property distribution. Also, the parties to a premarital contract are viewed as having a

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[41] *Posner v. Posner*, 233 So. 2d 384 (2009). http://www.lexisnexis.com.ccl.idm.oclc.org/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch

[42] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 1231-1232.

confidential relationship, while the parties of an ordinary civil contract are expected to have an arm's-length relationship and one party may have considerably less bargaining power than the other.[43]

Historically, courts have upheld premarital agreements that were fair and reasonable, but usually limited enforcement to those agreements made in contemplation of a spouse's death. Courts had generally refused to enforce agreements determining property and support rights upon divorce, since these kind of contracts were viewed to be detrimental to a stable marriage and made it too easy to divorce.[44] As divorce law has evolved, so has the enforcement of premarital agreements. The court hearing the case of *Gant v. Gant*, in 1985, stated:

> "This staggering divorce rate can only place any reasonable person on notice that divorce is as likely an outcome of any given marriage as a permanent relationship…it should be obvious that a person like our appellant…, who enjoys a financial position that places him in the top 1% of all income-earning Americans, will be reluctant to marry when modern divorce law places both his property and his future income at jeopardy."[45]

Further, the court stated that men like this appellant do not need to get married and can live with a woman for years without any social or financial pressure. Since couples do not need to get married, courts have allowed for contracts that determine their rights and obligations upon divorce to encourage parties to take a chance on marriage. Today, all

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[43] Robert E. Oliphant and Nancy Ver Steegh, *Family Law*, 3rd ed. (New York: Aspen Publishers, 2010), 306.
[44] Linda Ravdin, *Premarital Agreements: Drafting and Negotiating* (Chicago: American Bar Association, 2012), 1-5.
[45] Ibid., 7.

state courts enforce premarital agreements and are not allowed to ignore the contents of the contract.[46]

With rising numbers of divorces and changes to the limits of premarital contracts, the National Conference of Commissioners on Uniform State Laws created the Uniform Premarital Agreement Act (UPAA) in 1983. This act provided states with a model statute for governing premarital contracts along with the formalities of their execution and enforceability. As of 2010, 27 states have adopted some form of the act and more are expected to do so shortly.[47]

"A premarital agreement allows parties who intend to marry to contract regarding their property and financial rights and obligations at the end of marriage by death or divorce."[48] Such a contract usually addresses three key areas of rights and claim, which are: property rights upon death, property rights upon divorce, and support rights upon divorce. Other financial rights and obligations that are sometimes found in premarital agreements include: lawyer's fees for negotiations, rights to manage property during marriage, financial provisions for children, and nonfinancial rights and obligations. These rights and obligations may be limited in enforceability or may be deemed unenforceable. A premarital agreement must be valid for it to be enforced, although a valid agreement will not always have all of its provisions enforced. For example, some states always consider waiving spousal support unenforceable so this kind of provision would not be

[46] Ibid., 6-8.
[47] Ibid., 8.
[48] Ibid., 9.

enforced in such a state, but it does not make the contract invalid or allow for a court to ignore the remaining part of the agreement.[49]

All states share the similar view that a premarital contract must be in writing and signed by both parties. Some states have additional particular requirements, such as recognition in the land records for real estate involved in the contract. Premarital agreements are no different than ordinary civil contracts in the sense that both parties must have legal capacity at the time of entering into the agreement. If a court deems that one spouse lacked legal capacity, the contract will likely be ruled unenforceable. Another requirement for enforcement is substantive fairness of the agreement, and state courts take two different approaches when determining its existence. Most courts follow the theory that a prenuptial contract is no different than any other contract and parties are assumed to be equally capable of protecting themselves. These states make it quite difficult for a party to invalidate an agreement on the grounds substantive unfairness. A minority of states take substantive fairness, or conscionability of terms, into larger consideration. These states are: Alaska, Connecticut, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, North Dakota, South Carolina, Vermont, West Virginia, and Wisconsin.[50]

The party who is relying on an agreement is placed with the burden of proving that the contract exists and its terms.[51] However, this does not mean that only the client relying on the agreement should keep a signed original and photocopy of the contract, since the opposing party will want to check the accuracy of the terms and make sure

[49] Ibid., 9-13.
[50] Ibid., 14-16, 69.
[51] Ibid., 18.

nothing was changed. The party that the burden of proof is placed upon for the validity of an agreement is different amongst the states. Most states, including UPAA and some non-UPAA states, place the burden upon the opponent of the contract at all times. Some non-UPAA states place the burden on the proponent at all times, and others place it on the opponent until they make a *prima facie* case. Pennsylvania, Maryland, and Oklahoma place the burden upon the proponent until they make a *prima facie* case. It is also important to note that in the absence of actual advice of independent counsel to one party, some states require a written waiver of the right to this advice. Various states also have certain particular advice requirements. For an example, in California, the claimant needs to have advice of counsel for an alimony waiver to be enforceable.[52]

The UPAA provides a set of criteria for determining whether an agreement is enforceable, and a number of non-UPAA states also follow similar guidelines.[53] The general criteria of the UPAA for Enforcement are as follows:

> § 6. Enforcement.
> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
> (1) that party did not execute the agreement voluntarily; or
> (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and

[52] Ibid., 18-20.
[53] Ibid., 21.

> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party[54]

Under the UPAA, voluntariness is the main requirement, and not much else is needed for the contract to be enforced except disclosure or waiver of disclosure. Although independent counsel is not a requirement of the UPAA, some courts may take it into consideration when determining the party's voluntariness. Under the UPAA, a valid contract may only be modified if its execution leaves one spouse eligible for public assistance. Some non-UPAA states, including Alabama, Maryland, Pennsylvania, Ohio, Oklahoma, Washington, and Wyoming, follow similar requirements as the UPAA. A few states, including Arkansas, California, Connecticut, and New Jersey have additional requirements along with those of the UPAA. In Connecticut for example, the agreement must have been voluntarily executed, full-disclosure must have been given, and each party must have had at least the opportunity to meet with independent counsel.[55]

The states that require substantive fairness for enforcement, listed above, take into account a minimum threshold of fairness. A court must rule that the substantive terms of the contract be fair or conscionable at the time of execution. Four of these states, Indiana, Iowa, Maryland, and Missouri only require fairness at the time of the contract's execution, while the others, known as "second-look" states, also require the agreement to be fair or conscionable at the time of divorce. If a premarital contract is signed in a state requiring substantive fairness, the stronger party must make sure that not only is the agreement fair at the time of its execution, but will also stay somewhat fair over time.

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[54] UPAA § 6(a) (1983), 6-7. http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/upaa83.pdf.
[55] Linda Ravdin, *Premarital Agreements: Drafting and Negotiating* (Chicago: American Bar Association, 2012), 22-24.

The American Law Institute, or ALI, has come up with recommendations as to how courts should handle the enforcement of premarital contracts. It provides that the proponent of the agreement must show that the contract was signed voluntarily and not under duress. In order to satisfy this requirement, the contract should be executed at least 30 days before marriage, both parties should be advised to obtain independent counsel, and in a case where one of the parties does not obtain such counsel, the wording of the contract should be able to be understood by an adult with ordinary intelligence. Although no states had adopted this recommendation by 2010, many lawyers follow these suggestions to ensure that a court will view the opposing party's actions as voluntary.[56]

5.3 Capacity and Voluntariness

The legal capacity that a party must possess to enter into a valid contract means that they have "sufficient mind to understand, in a reasonable manner, the nature, extent, character, and the effect of the act or transaction…"[57] The proposing party's best defense to an insufficient legal capacity argument is by showing that the opposing party had the advice and guidance of independent counsel. Since independent counsel is essential for a valid contract, whenever there is a doubt of another party's capacity, the lawyer of the proposing client should do everything possible to cause that party to obtain such counsel.[58]

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[56] Ibid., 25-28.
[57] Knowlton v. Mudd 116 Idaho 262, 264, 775 P.2d 154, 156 (Ct. App. 1989). http://www.lexisnexis.com.ccl.idm.oclc.org/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch
[58] Linda Ravdin, *Premarital Agreements: Drafting and Negotiating* (Chicago: American Bar Association, 2012), 31-34.

A voluntary act is described as "the free and unrestrained will of the person."[59] A court may look at a number of factors when determining if a party voluntarily entered into an agreement, including whether: the disadvantaged party received independent counsel, whether this party was disclosed of financial consequences, this party had a chance to renegotiate, both parties actually negotiated, the agreement was made 30 days before marriage, the parties are both intelligent and educated, and many other factors. A number of these factors usually need to be shown in order for an agreement to be deemed unenforceable. A proposing party can show that actual negotiation or the opportunity for negotiation occurred by an invitation to the other party to recommend changes to the agreement. Even if the non-proposing party does not propose any changes, this is still seen as the opportunity to negotiate. The longer the disadvantaged party has to acknowledge the proposed terms, the greater chance the court will decide the party acted voluntarily.[60]

When duress and/or undue influence are involved in the execution of a premarital contract, the agreement is not voluntary. A party under duress has been induced by a wrongful act and has no other reasonable alternative but to enter into the agreement. Undue influence arises when one party is so much more dominant than the other that they have obtained an unfair advantage. Showing that give-and-take negotiations occurred provides that an agreement was made between equal parties. The amount of time the execution of the agreement occurred before the marriage ceremony, along with the amount of time the non-proposing party was aware of such an agreement, have an effect

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[59] *Bonds v. Bonds*, 24 Cal. 4th 1, 16, 5 P.3d 815, 823 (2000). http://law.scu.edu/FacWebPage/Neustadter/contractsebook/main/cases/BarryBonds.htm

[60] Linda Ravdin, *Premarital Agreements: Drafting and Negotiating* (Chicago: American Bar Association, 2012), 34-37.

on validity. Although executing a premarital agreement the day before a wedding without any prior warning may spark doubt whether the contract was made voluntarily within a court, this factor alone will not invalidate an agreement and other factors, such as failure of disclosure, must be present.[61]

A number of other factors that do not constitute duress or undue influence alone are the threat not to marry, a pregnant bride, emotional distress, and passion. The threat not to marry is not unlawful or considered wrongful and therefore does not constitute duress. It is also not considered wrongful to not marry a woman because she is pregnant, so requiring that a premarital agreement be a prerequisite to marriage even if the woman is pregnant is not alone deemed duress. Emotional distress, or the opposing party claiming they did not want to enter into the contract, shows that they were aware of the terms and consequences of the agreement and made a voluntary choice to enter into it. When a dominant party gives favorable treatment to the weaker party to induce that party to marry because he/she is passionately in love with them, it is not considered duress because the dominant party was the one who insisted on the agreement.[62]

In all, most cases that challenge the validity of a contract are unsuccessful, and there usually needs to be multiple factors that show lack of capacity or involuntariness present in order for the agreement to be ruled invalid. The lawyer of the proponent should push for summary judgment, meaning there are no factual issues to be resolved and results in the immediate favorable ruling in the case. In order to be granted summary judgment, a proponent's lawyer should gather evidence of voluntariness, adequate and

[61] Ibid., 38-41.
[62] Ibid., 42-46.

accurate financial disclosure, and substantive fairness in states requiring it in their written record. Since requirements for proving voluntariness are quite low in most states, the proponent's lawyer should aim for a higher standard than the minimum requirement and show that the opposing party received a draft well in advance of the wedding, there was opportunity for that party to receive independent counsel, there were actual negotiations between the parties, and that the weaker party have some degree of financial stability upon death or divorce.[63]

5.4 Postmarital or Marital Property Agreements

Married couples enter into postmarital agreements, also called marital property agreements, when a divorce or separation is not imminent, and they are executed for many reasons. A husband and wife may wish to substitute a premarital agreement for a new postmarital agreement, they may have not been able to settle negotiations for a premarital agreement, and most often are entered into to protect assets from the creditors of one spouse or in estate planning for tax purposes.[64] The rules regarding postmarital agreements are similar to those of ordinary contracts. For the most part, courts have encouraged and upheld these agreements with the presence of mutual assent and absent fraud, overreaching, or nondisclosure.[65] Generally, state statutes provide that married couples entering into a marital agreement owe fiduciary duties to one another, which include acting in the highest good faith and fair dealing.[66]

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[63] Ibid., 78-79.
[64] Ibid., 162-163.
[65] John Tingley, Nicholas Svalina, and Nancy Mckenna, *Martial Property Law, Rev. 2d*, 2011. (Eagan, MN: Thomson West, 2011), 516-522.
[66] California Family Code Division 4, Part 1, Chapter 2, § 721

Chapter 6. High-Profile Divorces

6.1 The McCourt Divorce

Few would argue that Frank McCourt and his wife Jamie McCourt, the couple who purchased the Los Angeles Dodgers in 2004, did not have access to the best legal counsel money could buy. In fact, Jamie McCourt was an attorney herself. The McCourts are savvy business persons of tremendous wealth, and they could choose and afford any lawyers they desired. They employed lawyers both in their business dealings and when they purchased the Dodgers. Even though the McCourts had been married for over twenty years, they negotiated and signed a marital property agreement (MPA) shortly after purchasing the Dodgers. Attorneys, and very good ones at that, were employed to draft the MPA and to properly recite the true intent of the two parties.[67]

When the McCourts' marriage unraveled, the main issue of disagreement was in fact the MPA. Frank McCourt argued that the MPA purported to confirm his ownership of the Dodgers, while Jamie McCourt contended that the MPA offered by her husband was not authentic. This contention was made in spite of the fact that skilled counsel had been employed to draft and to oversee execution of the MPA. The issue of the validity and terms of the MPA was so contentious that the McCourts incurred and paid over twenty million dollars in legal fees and costs litigating and arguing this issue. Many would argue that had it not been for the divorce proceedings and the contentious nature of the litigation, the Dodgers would not have been forced to enter into bankruptcy.

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[67] Stephen Dunn, "Why the McCourt Marital Agreement Failed," Forbes,http://www.forbes.com/sites/stephendunn/2011/12/14/why-the-mccourt-marital-agreement-failed/ (accessed April 19, 2012).

Additionally, The Los Angeles Times reported it estimated that the parties to the divorce would be required to spend another fourteen million dollars in efforts to obtain a court ruling as to whom, or in what proportion, owned the Dodgers.[68]

6.2 Why Agreement Was Held Invalid

The execution of the McCourts' post-marital agreement was quite a confusing process. A partner at Bingham McCuthen LLP, Lawrence Silverstein, had helped the couple with estate planning since 2001. Shortly after Frank bought the Dodgers in 2004, Lawrence Silverstein had Frank and Jamie each sign six copies of a MPA. According to Jamie, she was under the impression that the papers she was signing were to protect the couples' homes from business creditors. On March 30, 2004, the couple signed copies of the MPA in Boston, which transmuted certain assets into separate property for both spouses. This version of the MPA stated that Frank's separate property was **inclusive** of all assets of the Los Angeles Dodgers baseball team. While Jamie signed all six of her copies on March 30, Frank signed three at the end of March and the remaining three on April 14, 2004 in California. The copies that he signed in California stated that Frank's separate property was **exclusive** of all assets of the Los Angeles Dodgers baseball team.[69]

The agreement also stated that once either of the McCourts became residents of California, any question regarding the division of their assets would be subject to

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[68] Bill Shaikin, "Frank and Jamie Mccourt Reach Settlement Involving Dodgers," Los Angeles Times, October 17, 2011. http://articles.latimes.com/2011/oct/17/sports/la-sp-1017-mccourt-divorce-settlement-20111017(accessed April 19, 2012).

[69] Stephen Dunn, "Why the Mccourt Marital Agreement Failed," Forbes,http://www.forbes.com/sites/stephendunn/2011/12/14/why-the-mccourt-marital-agreement-failed/ (accessed April 19, 2012).

California law. While Massachusetts follows an equitable distribution theory, California is a community property state. Jamie was presumably unaware of this provision in the agreement and believed she would be able to get a ruling in a Massachusetts court, where the franchise would be equitably distributed regardless of title.[70]

The Superior Court of the state of California ruled that the agreement was not a MPA, but rather a transmutation agreement. Further, it ruled that this agreement was not valid for a number of different reasons. First, the court found that there was no waiver of the parties' equitable distribution rights held in Massachusetts. Also, California Family Code § 721 states that a contract is invalid if a spouse breaches their fiduciary duty toward the other spouse. Here, Frank is breaching his fiduciary duty by not informing Jamie of the MPA's intentions of making the Dodgers his own separate property or changing the jurisdiction of a possible divorce hearing.[71] Family Code § 852 provides that "merely a signed paper is not sufficient enough to enforce a transmutation and that it must "contain language which expressly states that the characterization or ownership of the property is being changed."[72] Clearly, Jamie does not give express declaration of the transmutation of the Dodgers to Frank's separate property.

The opportunity to receive advice from independent counsel also comes into question. Although the trial court judge states that Silverstein advised the couple that they should retain independent counsel to represent them concerning the agreement, a conflict of interest would have been avoided if Silverstein had refused to represent Jamie on the

[70] Ibid.
[71] Ibid.
[72] Recommendation Relating to Marital Property Presumptions and Transmutation, 17 Cal. Law Revision Com. Rep. (1984) pp. 224-225

matter. Then-Rule 7 of the Rules of Professional Conduct of the California State Bar stated that: "California courts have repeatedly held that counsel should terminate a relationship when the discharge of duty to one client conflicts with duty to another." The court also ruled that the agreement lacked mutual assent because of the differing of the agreements signed in Massachusetts and California. The Superior Court also examined the enforceability of the MPA in Massachusetts and found that the state used a five-factor test to determine validity. One factor provided that each spouse knowingly and explicitly waived their rights to equitable distribution, which makes the agreement of the McCourts invalid.[73]

As mentioned above, a court of any state will rarely deem an agreement unenforceable due to a single factor. The McCourts' MPA contained many different factors that contributed to the contract's invalidity. However, had Silverstein printed out all the copies of the final MPA with identical terms and also refused to represent Jamie in entering the agreement, there would have been a much better chance of the contract being enforced. Had Jamie obtained independent counsel, she would have been informed of the consequences of entering the agreement and probably would have refrained from signing, saving the couple millions of dollars in attorney fees that were needed to settle the issue. No matter how in love one is, or how much they want to protect their assets upon death or divorce, it is always critical for each party to obtain separate independent counsel.

6.3 Settlement and Sale of the Dodgers

[73] Stephen Dunn, "Why the Mccourt Marital Agreement Failed," Forbes,http://www.forbes.com/sites/stephendunn/2011/12/14/why-the-mccourt-marital-agreement-failed/ (accessed April 19, 2012).

Once the Dodgers entered bankruptcy, Frank and Jamie McCourt settled the claim to ownership of the franchise by providing that Frank would pay Jamie $130 million in exchange for Jamie's relinquishment of all claims to Dodger ownership.[74] This staggering sum was negotiated by both parties with the aid and advice of the best legal counsel money could buy. Jamie McCourt was undoubtedly ecstatic by the result, but her feelings likely dramatically changed when the Dodgers were eventually auctioned in the bankruptcy proceeding.

In a deal likely to be finalized on April 30, 2012, a group led by the former Los Angeles Laker guard Magic Johnson, will pay about $2.15 billion for the franchise, the stadium, and joint-ownership in the parking lots. This amount almost doubles the previous record sales price for a United States sports franchise (Miami Dolphins in 2009 for $1.1 billion) and more than doubles the previous baseball franchise record (Chicago Cubs also in 2009 for $845 million).[75] Frank McCourt paid over sixteen million dollars in legal fees and bankruptcy expenses and seems as if it was well worth it. Forbes magazine reported that by controlling the bidding process approved by Major League Baseball and the bankruptcy court, Frank McCourt was able to obtain four hundred million dollars more than anyone could have expected.[76]

6.4 Concluding Thoughts

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[74] Ibid.
[75] Matthew Futterman, "$2 Billion Dodgers Price Tag Shatters Records," Wall Street Journal (March 29, 2012) http://online.wsj.com/article/SB10001424052702303404704577308483250633906.html (accessed April 19, 2012).
[76] Mike Ozanian, "Magic Johnson's Group Wins Dodgers Auction with Record $2 Billion Bid," Forbes,http://www.forbes.com/sites/mikeozanian/2012/03/28/group-led-by-magic-johnson-buys-dodgers-for-2-billion/(accessed April 29, 2012).

And here is, to me, the most telling aspect of this McCourt saga. The Los Angeles Times reported on April 6, 2012 that after payment of his divorce settlement and a one hundred and fifty million dollar bankruptcy finance loan, Frank McCourt will clear almost a billion dollars from the sale of the Dodgers. When Jamie McCourt, with all of her law and business expertise and all of her highly paid legal counsel, settled her claim to the Dodgers and other family assets for one hundred and thirty million dollars, she totally mis-valued what the Dodgers were worth, or what the Dodgers would bring at auction. Although she was required to factor into her position the fact that she may have ultimately been adjudicated to have little or no claim to the Dodgers, had she properly valued the amount the team would fetch in auction, she would not have settled for such a paltry sum.

6.5 Other High-Profile Divorces

Tiger Woods and his ex-wife Elin Nordegren, entered into a premarital agreement when they married in 2004. The agreement provided that Elin would receive $20 million if the marriage were to last for ten years.[77] When Tiger's sexual indiscretions started to become public, the couple, with the aid and advice of counsel, re-drafted the agreement to provide a shorter marriage term necessary for Elin to receive substantial sums. The couple ultimately divorced and Tiger paid Elin some $100 million. Most commentators believe that Tiger agreed to pay this sum in exchange for his wife's silence as to the

[77] Courtney Hazlett, "Woods' Wife Reportedly Revising Prenup," MSNBC, http://today.msnbc.msn.com/id/34243626/ns/today-entertainment/t/woods-wife-reportedly-revising-prenup/ (accessed April 19, 2012).

details of his infidelity. Again, the premarital offered little protection to the spouse earning the majority of the marriage income.[78]

Steven Spielberg, one of the most influential personalities in film history, paid his wife of four years, actress Amy Irving, half of the couple's marital property upon their marriage dissolution, which amounted to $100 million. Amy was awarded so much by challenging the couples' premarital agreement on the grounds that she had not received the advice of counsel before entering into the agreement.[79] It would be hard to argue that Spielberg did not have access to the best lawyers available. Donald Trump also surely has access to the finest lawyers in the world, and he and his wife, Ivana, entered into a premarital agreement prior to their marriage. However, the wife challenged the legal sufficiency of the agreement, and received, prior to any legal adjudication, over twenty million dollars and a fourteen million dollar mansion, far more than the prenuptial agreement provided.[80] On the other hand, Michael Jordon's premarital agreement provided that his wife would receive half of the couples' assets upon a divorce, yet his wife requested only one third of those assets when the couple divorced, which amounted to $168 million plus a seven-acre estate in Chicago.[81]

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[78] Steve Helling, "Tiger Woods and Elin Nordegren's Divorce Is Final," People,http://www.people.com/people/article/0,20414961,00.html (accessed April 19, 2012).
[79] Forbes Staff, "The 10 Most Expensive Celebrity Divorces," Forbes, http://www.forbes.com/2007/04/12/most-expensive-divorces-biz-cz_lg_0412celebdivorce.html (accessed April 19, 2012).
[80] Ken Lee, "Mel Gibson's Ex Wife Takes Half His Estimated $850 Million in Divorce Settlement," People, http://www.people.com/people/article/0,20556666,00.html (accessed April 19, 2012).
[81] "Jordan Divorce Settlement," e Divorce Papers, http://www.edivorcepapers.com/divorce-settlement/jordan-divorce-settlement.html (accessed April 19, 2012).

It would seem that, at least in the most high-profile of cases, even the most carefully drafted agreements prepared by the most skillful counsel are of uncertain value. Additionally, it seems that the best legal counsel should be obtained when contemplating a marriage involving a high earning spouse, and that the parties should be aware of the fact that the agreement will not necessarily provide the protection recited in the agreement.

Chapter 7. Ideal Theories and Conclusion

7.1 An Ideal Property Distribution Theory

Considering all the recent controversy and discussion regarding divorces and premarital agreements, I question whether there may be a better, more equitable way of distributing assets upon dissolution and enforcing, or not enforcing, prenuptial agreements. To begin with, a more uniform set of marital property laws among the states would be crucial to making divorce proceedings much less complex and confusing. Questions of jurisdiction would be highly decreased since a party would not be nearly as inclined to try to have the divorce proceedings heard in a state that gives them more of an advantage. While I believe the power to make divorce law should rest with the states, rather than with the federal government, creating more uniform statutes would negate some of the high cost of litigation and the cost to the states to hear to the cases.

While community property states strictly break up marital assets 50/50 absent a premarital agreement, and equitable distribution states equitably divide marital assets subsequent to reviewing a number of factors, there may be a fairer way. All states share the opinion that marital property is defined as assets acquired during marriage and separate property as assets acquired before marriage, after the date of separation, or through gift or inheritance during marriage. I believe states' current view of what consists of marital and separate property is uniform enough and reasonable. In my opinion, a court should review a number of factors to determine division of marital property upon divorce.

Although it is nice to think of marriage as a partnership, with each spouse contributing to the fruits of the estate, I do not necessarily see it as an equal partnership in

all instances. A husband (Husband A) who makes a middle-wage salary, let's say $70,000, and a wife (Wife A) who cooks, cleans the house, takes the children to school, ect. may have an equal partnership, but a professional athlete (Husband B) who makes millions of dollars a year and a similar wife (Wife B) do not really share an equal partnership. Why should Wife B be entitled to so much more money that Wife A? Wife A may be a better cook, a better cleaner, and a better living partner than Wife B, but she will be entitled to a much smaller amount for her services only because her husband earns less. Since it is very difficult, if not impossible, to value the quality of a wife's (or husband's) work at the home, it may be best to categorize these wives into one group. When determining how to distribute assets upon a divorce involving a working husband and a stay-at-home-mom/wife, the court should look at a number of factors, most importantly, the value of the marital estate and the amount of time married.

In such a divorce, the value of the marital estate should be a factor in determining marital property distribution because the wife should be entitled to a share of the estate congruent with their true contributions. While a stay-at-home wife who shares a marital estate of $200 million may deserve a larger amount of money than a stay-at-home wife who shares a marital estate of $500,000 because of higher standards and duties, I do not believe it is fair that one spouse receive $100 million and the other $250,000 for performing similar jobs and duties. To determine the value that a stay-at-home wife contributes to a marriage, I would make a schedule that compared the net worth of a couple with an approximate cost for a live-in nanny in each economic class. For example, a live-in nanny for a middle-class family may cost $50,000 a year, but an extremely wealthy family will choose the best possible candidate and probably pay them much

more, such as $200,000. The wife who marries the high-earning spouse may be that best possible "candidate" and deserve more money than the middle-class wife (whose husband may have had to lower his standards), but it is hard to imagine a homemaker whose true value to the marital estate is in the millions of dollars (they must really know how to cook). Although one may argue that the wife deserves more than a live-in nanny due to the additional duties and responsibilities they are given, the approximate salary does not deduct any expenses for themselves or their families. These numbers represent an approximate value for the wife's duties in particular economic classes and will be used as an annual "quasi-salary."

The court would also consider what the wife gave up to enter into marriage. If a woman has a $30,000 salary before entering marriage but quits her job in order to care for the home/children, the court does not need to factor this into their determination. On the other hand, if a wife gives up a job that has an average salary over the three years prior to quitting of more than a live-in nanny costs to support the family, this job salary, adjusted for inflation, will replace the value of a wife's duty calculated in the previous paragraph. Factors such as number of children, the standard of living established during marriage, and other factors used by equitable distribution states, will also be examined to determine small shifts in the wife's quasi-salary.

Once the court determines this quasi-salary, it should then look at the number of years the couple has been married. The number of years will then be multiplied by the quasi-salary in order to approximate a value for the wife's total contributions. Once this value is calculated, it will be compared to 50% of the marital estate, and the lower of the

two will be awarded to the wife. This method of distributing property upon divorce ensures that a wife, or the weaker spouse, will not be entitled to a drastically higher amount of money than she helped contribute to. If the economically weaker spouse has a job and takes care of the home, the quasi-salary will be determined by adding the total salary earned throughout the marriage to the appropriate quasi-salary (multiplied by number of years married) and deducting any expenses arising from being absent from the home, such as the cost of a nanny. Although the equitable distribution theory and my ideal theory contain many similar ideas, equitable distribution states rarely award beyond a 60-40 split. A 50/50 split would be the likely result of a common divorce under my ideal theory, but particular dissolutions could see a much more dramatic split than 60-40.

7.2 Applying Such a Theory

In April of 2009, Mel Gibson's wife Robyn filed for dissolution of their 30-year marriage, and the couple did not have a premarital agreement. Prior to their relationship, Robyn had worked as a dental assistant.[82] The average salary of a dental assistant today is about $35,000, so this is probably about what Robyn made in the 1970s if adjusted for inflation.[83] The net worth of the couple falls within the range of half a billion to a billion dollars, and a schedule described above would determine a quasi-salary of $200,000. Since the $200,000 is much larger than the average $35,000 she made prior to marriage, $200,000 will be used as the quasi-salary and would be multiplied by the number of years married, 30, which amounts to $6 million. The marital estate totaled about $850 million,

[82] Ken Lee, "Mel Gibson's Ex Wife Takes Half His Estimated $850 Million in Divorce Settlement," People, http://www.people.com/people/article/0,20556666,00.html (accessed April 19, 2012).
[83] "Dental Assistant Salary," Dental Assistant Research Center, http://www.jascas.com/dental-assistant-salary(accessed April 19, 2012).

half of which is more than $400 million. Since $6 million is the lesser of the two amounts, this would be the total award given to Robyn upon dissolution.

Robyn Gibson ended up receiving half of the marital estate, over $400 million.[84] Had Mel been able to use my theory to divide property upon divorce, he would have saved more than $394 million. In my opinion, $6 million is more than enough to live a comfortable life. Had Robyn not married Mel, she may have been promoted and made a larger salary than $35,000 but I highly doubt she would be worth even $1 million. I also believe that a job such as a dental assistant is much tougher, physically and mentally, than being a wife. If the burden of being married to Mel outweighs receiving $200,000 a year, then the two should probably have not been married.

Although it is reasonable to desire marrying a wealthy man in order to obtain a secure financial future, this should not be the sole reason for marriage. An economically weaker spouse should not be able to enter into a marriage for the sole purpose of obtaining marital assets upon divorce, and the community property and equitable distribution theories allow a spouse to do just that. California laws provide that once a marriage reaches 10 years, it is considered a lengthy one and the spouse is able to maintain his/her standard of living. Kobe Bryant's wife, Vanessa, recently filed for divorce in California after 10 years of marriage. According to Vanessa's mother, the couple did not enter into a premarital agreement.[85]

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[84] Ken Lee, "Mel Gibson's Ex Wife Takes Half His Estimated $850 Million in Divorce Settlement," People, http://www.people.com/people/article/0,20556666,00.html (accessed April 19, 2012).

[85] Rick Rojas and Richard Winton, "Experts Say Bryant's Wife Stands to Make Windfall in Divorce," Los Angeles Times, December 20, 2011. http://articles.latimes.com/2011/dec/20/local/la-me-kobe-divorce-20111220(accessed April 19, 2012)

Kobe's alleged assault of a Colorado college student sparked headline news in 2003. Days later, Vanessa was seen with a new eight-carat diamond ring.[86] She probably did not file for a divorce after two years of marriage because she would not have gotten the diamond ring nor the 10-year mark, and would have received only two years of accumulated marital property. Now that 10 years have passed, and Kobe's career seems to be slowing down due to his age, Vanessa cites irreconcilable differences for their dissolution. It seems pretty obvious that she was only in the marriage for the money, and a new theory of property division is necessary to prevent such occurrences.

7.3 Ideal System of Premarital Agreement Enforcement

I think it is fair that parties to a marriage can at least expect certainty as to any agreement made before or during marriage that alters in any respect the property division rules applied by the state in which the marriage takes place. In this respect I would propose a checklist type form that must be filed and recorded by any couple entering into a premarital agreement or any agreement during marriage that purports to transmute any community or commonly owned property into separate property. The law of the state would mandate that no marital agreement that purports to alter the state's laws with respect to property ownership or division on divorce or death, is valid unless the form is executed and filed. The form would look something like this:

STATE OF CALIFORNIA

COUNTY OF _____

MARRITAL PROPERTY AGREEMENT

[86] Ibid.

□ We, the undersigned, plan to be married on or about (date) _____ _____.

Or

□ We, the undersigned, are presently married and reside in California.

□ We understand that California is a community property state and that property acquired by either of us during marriage, other than by gift or inheritance, is considered community property. We have had this property system explained to us by a licensed attorney.

□ It is our intent and desire to agree to treat our property in some manner that differs from the community property system. We have had the consequences of this agreement explained to us by licensed attorneys. Each of us have been appraised of the consequences of this agreement by separate attorneys.

□ We understand that unless we both agree to cancel or modify this agreement the agreement will control the division of our property upon the death of either of us or upon our divorce.

□ We affirm that we are entering into this agreement of our own free will and without duress. We understand that the court will not nullify or modify this agreement on the grounds that either of us was pressured or coerced into signing the agreement.

□ We affirm that we, and both of our independent counsel, have been given access to any and all records, accounts, business records, bank statements or other documents or records that we have requested be provided. We understand that the court will not nullify or modify this agreement on the grounds that we were not fully informed of the facts relating to any personal or business records of either of us or of any business we are involved in.

□ We and our attorneys have had ample time to review any and all materials and matters pertinent to our decision to enter into this agreement.

□ Each of us and our attorneys have fully reviewed the contents and meaning of the agreement and we affirm all of the provisions of the agreement. We understand that the court will not nullify or modify the agreement on the grounds that we did not understand or agree to any provision contained in the agreement.

□ The agreement is fair and equitable and cannot be modified or nullified on the grounds that it is unfair or inequitable.

□ Each of us, and our attorneys, have examined the agreement in detail and affirm that the agreement precisely recites the agreement as both of us have intended.

□ We both affirm that once this document is signed and recorded that the court will enforce the agreement, and every term of the agreement, upon either of our deaths or upon our divorce. The court will not nullify or invalidate the agreement or any of its terms.

□ We acknowledge the import of this agreement and agree to be bound by its terms unless and until we mutually nullify or modify the agreement. We understand that neither of us alone can alter or amend the agreement.

□ A true and correct copy of the agreement, signed by ourselves and our attorneys, is attached.

THIS DOCUMENT, AND THE PROPERTY AGREEMENT THAT ACCOMPANIES IT, MODIFY YOUR LEGAL RIGHTS. DO NOT SIGN THE AGREEMENT UNLESS YOU ARE CERTAIN OF THE TERMS, THE CONSEQUENCES THEREOF, AND FULLY INTEND TO BE BOUND BY THE TERMS.

Dated: _____ _____

Dated: _____ _____

AFFIRMATION OF ATTORNEYS

We, the attorneys undersigned, affirm that we have counseled our respective clients as to all of the elements recited in this form and that each of our respective clients have affirmed that they understand the meaning of the agreement, the consequences of its terms, and fully intend to be bound by its terms. Our respective clients understand that the court is not empowered to modify or nullify the agreement.

Dated: _____ _____

Dated: _____ _____

7.4 Marriage as a Partnership or Contract?

Most people today marry at some point in their lives, and nearly one in two marriages ends in divorce. While the number of divorces increases, the use of premarital agreements between couples marrying for the first or subsequent times has also increased.[87] As antenuptial or premarital agreements have increased in popularity and enforceability and no-fault divorces have become the norm, there have been two differing conceptions of marriage: one as partnership and one as a contract.[88]

Community property and equitable distribution states alike have held the conception of marriage as a partnership stating that: "spouses are partners who each make a set of meaningful, although perhaps different, contributions to the marital enterprise,"[89] and that each party is entitled to half of the marital property. Recent increases in the use and enforcement of premarital and postmarital has led to the conception of marriage as a contract, where the spouses can negotiate and decide their claims to property upon the dissolution of their marriage. The states that more favor the partnership model are less likely to enforce a premarital agreement, and the states that view marriage more akin to a contract are more likely to enforce such an agreement. We definitely do not have uniformity amongst the states, and it is clear that even with an artfully drafted marital agreement parties to a marriage have no expectation of certainty regarding what effect, if any, a court will apply to the agreement.

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[87] Peter N. Swisher, Anthony Miller, and Jana B. Singer, *Family Law: Cases, Materials and Problems, Second Edition*, Second Edition ed. (n.p.: LexisNexis, 1998), 1231.
[88] 116 Harv Biz Review 2075, pg 2076.
[89] Ibid., pgs. 2076-2077.

7.5 Conclusion

Although the enforceability of a premarital or marital property agreement cannot be known for certain before a court's ruling, the presence of such an agreement can provide a great deal of protection for a high-earning spouse. Tiger Woods earned an estimated $607 million from 2004 to 2010, and would have probably been required to give around $300 million to Elin Nordegren had they not entered into a premarital agreement.[90] Since the couple did enter into such an agreement, had Tiger not needed to give Elin extra money to keep her quiet, he would have only been required to give her a sum less than $20 million because the marriage did not last ten years. Mel Gibson did not enter into a premarital agreement with his spouse and ended up having to give her over $400 million.

As marriage has evolved over the past 3000+ years, so has the ability to divorce and the use premarital agreements. Although state court's recognition and strict enforcement of premarital agreements have led to the conception of marriage as a contract, property distribution upon dissolution of a marriage, absent such an agreement, applied by all states still show the conception of marriage as a partnership. I believe all 50 states need to adopt a new uniform set of statutes regarding such distributions to lead away from the partnership conception, at least in marriages with one high-earner. Marriage should be entered into because of a couples' love for one another and aspirations of having a happy family. State statutes that determine the distribution of

[90] "Tiger Woods' Net Worth According to Forbes," Celebrity Net Worth, http://www.therichest.org/celebnetworth/athletes/golfers/tiger-woods-net-worth/ (accessed April 19, 2012).

property upon death or divorce provide an incentive for a spouse to get married for the sole reason of obtaining a secure future. It does not matter whether an individual is really in love with another, or actually believes that the two will be married “for as long as both shall live.” What does matter is the fact that the spouse will receive a hefty sum if they can put up with the other spouse for a few years. A new theory, like the one described in Section 7.1, is necessary to return marriage to the Holy Matrimony it was intended to be.

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