

## To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context

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### INTRODUCTION

The premarital agreement,<sup>1</sup> which permits prospective spouses to plan for divorce, may well be the world's most unromantic document.<sup>2</sup> Envisioning the end of a marriage not yet begun, prospective couples must divide property not yet acquired. They must select a legal framework governing their marriage and divorce. Lawyers are often invited to participate in the negotiations, fuelling prospective spouses in their demands. Unsurprisingly, therefore, many people prefer to avoid requesting a premarital agreement, despite judicial and social gains in the acceptance of such agreements.

However, odds do not favor lifelong marriages<sup>3</sup> and when divorce ensues, many people resent their divorce settlements.<sup>4</sup> Premarital agreements will therefore always have an important role in many engagements, particularly when one of the partners

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<sup>1</sup> For a precise definition of the premarital agreement in United States law, also known as a prenuptial or antenuptial agreement, see *infra* Part I.A. In Europe, the term "marital agreement" is used to describe both premarital agreements and marital agreements, but not agreements made by spouses after a divorce. See *infra* Part II.

<sup>2</sup> Most unromantically, premarital agreements signal divorce to many prospective spouses. See, e.g., Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405, 1441 (2008) (suggesting premarital agreements signal the possibility of divorce); Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 2021 (2000) (suggesting premarital agreements signal distrust); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1718 (2008) (identifying, as a classic example of signaling behavior, the lack of a prenuptial agreement as a means of signaling love prior to a marriage).

<sup>3</sup> In 2003, there was one divorce for every two marriages. *National Vital Statistics Reports: Births, Marriages, Divorces, and Deaths: Provisional Data for 2003*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (United States Department of Health and Human Services), June 10, 2004, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52\\_22.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf).

<sup>4</sup> See *infra* notes 67, 78, and 81 for examples of potential inequalities of bargaining power between spouses.

has noteworthy assets. For example, Hollywood actress Catherine Zeta-Jones reportedly contracted with actor Michael Douglas to receive \$2.8 million per year of marriage upon divorce, and if she proved his infidelity, for an additional \$5 million.<sup>5</sup> Meanwhile, the premarital agreement between actress Nicole Kidman and singer Keith Urban would purportedly pay Urban about \$640,000 for every year that he spent with Kidman, unless he used illegal drugs during the marriage, in which case he would receive nothing.<sup>6</sup> Finally, in light of the public speculation on his marital fidelity, golfer Tiger Woods reportedly amended his premarital agreement, contracting to pay his wife significantly more upon divorce if she refrained from filing for divorce in the immediate future.<sup>7</sup>

These illustrations underscore the inordinate power of premarital agreements in shifting wealth between spouses and discouraging undesirable marital behavior. They also symbolize, to people around the world, the typical use of the premarital agreement: to divide property upon divorce. The simplicity of this popular understanding, however, belies the complexity of premarital agreements. In essence, the premarital agreement permits a circumvention of the statutory defaults governing spouses' rights and responsibilities not only during divorce or death, but also during marriage. Furthermore, when legislation or case law alters these rights and responsibilities,<sup>8</sup> premarital agreements protect spouses from being governed by the unexpected changes in the law.

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<sup>5</sup> Jae-Ha Kim, *Split Ends*, CHICAGO SUN-TIMES, Sept. 29, 2004, <http://jaehakim.com/articles/lifestyles/preup.htm>.

<sup>6</sup> *Ten Craziest Prenuptial Agreements*, MYWEDDING.COM, <http://www.mywedding.com/blogs/mywed/2008/02/ten-craziest-prenuptial-agreements.html> (last visited Oct. 14, 2009).

<sup>7</sup> See, e.g., Bill Zwecker, *Woods, Wife In Intense Marriage Counseling*, CHICAGO SUN-TIMES, Dec. 2, 2009, <http://www.suntimes.com/entertainment/zwecker/1916410,zwecker-tiger-woods-marriage-elin-preup-120209.article>.

<sup>8</sup> One example of shifting divorce laws is found in England. See Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, N.D. LAW REV. (forthcoming 2010). Nonetheless, premarital agreements are still rare in England; currently only 2% of married and divorced people in the United Kingdom have them. *Divorce Lawyers Braced for Busiest Week Ever*, TIMES ONLINE, January 5, 2009, <http://business.timesonline.co.uk/tol/business/law/article5450552.ece>. One reason for the rarity of such agreements might be their unenforceability, although courts often defer to them in determining appropriate ancillary relief. However, the enforceability of premarital agreements may soon be guaranteed in England, particularly if that is the recommendation of the influential Law Commission. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM AND MARY L. REV. 145, 150 n.18 (1998); *Pre-nuptial and Post-nuptial Agreements*, LAW COMMISSION, available at [http://www.lawcom.gov.uk/marital\\_property.htm](http://www.lawcom.gov.uk/marital_property.htm) (last visited Dec. 21, 2009).

However, premarital agreements are not without their problems. Their enforceability in the United States is subject to procedural and substantive review.<sup>9</sup> They also universally raise public policy issues with regard to the meaning of fairness and the limits on freedom of contract. Such issues heighten in the case of mobile couples, which include those who move both interstate<sup>10</sup> and internationally.<sup>11</sup> Given these issues, it is beneficial to consider the premarital agreement in the comparative context. This is particularly true as state courts and legislatures continue to encounter and address the unresolved issues surrounding premarital agreements.

Although England and the United States have similar understandings of such agreements,<sup>12</sup> the meaning and consequences of premarital agreements in continental Europe markedly differ from the Anglo-American common law tradition, heightening the opportunity for a comparative study. However, while the European approach inherently offers significant insight into the purpose, limits, and effects of premarital agreements, this approach is not as well-known—even to many Europeans—as the American approach, made so famous through Hollywood examples.

This Article therefore endeavors to consider and develop the notion of the premarital agreement in the comparative law context, addressing some of the universal issues surrounding premarital agreements, as well as the particular nuances of certain regulatory frameworks governing this type of agreement. Part I begins by exploring premarital agreements in American law, while Part II reviews the European approach to such agreements, focusing on Poland's representative approach, but also considering the approaches of France, Germany, and Switzerland. Part III draws lessons from a comparison of these various approaches, concluding that much of the distinction between American and European law on premarital agreements stems from the differing limits placed on the prospective spouses' freedom of contract. Part III also considers the desirable level of freedom of contract, the ideal characteristics of the regulatory framework of premarital agreements, and, finally, the popularity of such agreements.

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<sup>9</sup> See *infra* Part I.D.1 for further discussion.

<sup>10</sup> See *infra* note 49.

<sup>11</sup> International dating and marriage has been facilitated by online dating and mail order bride programs. Premarital agreements in such cases can be particularly one-sided. See, e.g., *In re Marriage of Shirilla*, 89 P.3d 1, 2–4 (Mont. 2004).

<sup>12</sup> But see *supra* note 8 (noting the unenforceability of premarital agreements in England, which is different from the enforceability of such agreements in the United States).

## I. PREMARITAL AGREEMENTS IN THE UNITED STATES

In the United States, family law has traditionally remained in the domain of the states.<sup>13</sup> Therefore, American law regarding premarital agreements has developed independently in each state, whether by statute or case law. Even with the introduction of the Uniform Premarital Agreement Act (1983) (“UPAA”), the law on premarital agreements is far from uniform.

The premarital agreement in the United States has been rapidly developing since 1970, when courts began abandoning their public policy reasons against enforcing such agreements.<sup>14</sup> *Posner v. Posner*<sup>15</sup> became one of the first cases permitting the enforceability of premarital agreements in the 1970’s, while the UPAA prompted state legislatures to begin drafting statutes on the subject in the 1980’s.

Even today, premarital agreements are subject to certain procedural and substantive limits before a court will uphold their validity. Such agreements also raise important questions of fairness, which state law strives to resolve. Before turning to these questions, however, this Article reviews the brief history and current meaning of premarital agreements in the United States.

### A. Definition of Premarital Agreement

At the outset, it is important to define the American premarital agreement, also known as a prenuptial or antenuptial agreement, because its meaning and consequences differ notably from those of the European marital agreement.<sup>16</sup>

The UPAA defines a premarital agreement as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.”<sup>17</sup> This definition, however, does not reflect the inordinate power of the premarital agreement, which permits prospective spouses to regulate their

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<sup>13</sup> See, e.g., *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”).

<sup>14</sup> However, the *notion* of a premarital agreement has a long history in both England and the United States. For a brief description of this history, see Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact Upon Estate Planning, and Proposed Solutions to Problems Arising at Death*, 28 IDAHO L. REV. 833, 840 (1992) and Judith T. Younger, *Lovers’ Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352–54 (2007).

<sup>15</sup> 233 So. 2d 381 (Fla. 1970).

<sup>16</sup> Continental Europe and the United States significantly differ in their approaches to premarital agreements, while England shares more similarities with the United States on the subject. See *infra* Part II and note 107. *But see supra* note 8.

<sup>17</sup> UNIF. PREMARITAL AGREEMENT ACT § 1 (1983).

rights and responsibilities not only during divorce or death,<sup>18</sup> but also during marriage.<sup>19</sup>

In the United States, spouses have significant freedom of contract when it comes to premarital agreements. Spouses may use the agreement to simply assign a piece of property, such as a house, to one of the spouses. Spouses may also completely opt out of the default property distribution regime of their state,<sup>20</sup> which would otherwise govern their property distribution upon divorce.

Specifically, each state has a default property distribution regime of either: 1) equitable distribution, which means a fair but not necessarily equal division between the spouses,<sup>21</sup> or 2) community property, which often results in a roughly equal division of marital property between the spouses.<sup>22</sup> Given their

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<sup>18</sup> “Since [the mid-nineteenth century] an arrangement in advance regarding each spouse’s rights to the other’s estate at death has been an acceptable subject for a premarital agreement.” Smith, *supra* note 14, at 840. Estate planning should therefore carefully consider the property classifications created by a premarital agreement. *See id.* at 855.

<sup>19</sup> Describing different types of prenuptial agreements:

First, a prenuptial agreement may shield wealth acquired by one spouse before marriage from the other. *See, e.g.,* Osborne v. Osborne, 384 Mass. 591, 594, 428 N.E.2d 810, 813 (1981); DeLorean v. DeLorean, 211 N.J. Super. 432, 435, 511 A.2d 1257, 1259 (Ch. Div. 1986). Second, a prenuptial agreement may stipulate a division of property that is acquired during marriage. *See, e.g.,* Ferry v. Ferry, 586 S.W.2d 782, 783 (Mo. Ct. App. 1979); Gant v. Gant, 329 S.E.2d 106, 109 & n.1 (W. Va. 1985). Third, the contract may predetermine the amount and timing of support one spouse will pay to the other after separation or divorce. *See, e.g.,* Lewis v. Lewis, 69 Haw. 497, 499, 748 P.2d 1362, 1364 (1988); Volid v. Volid, 6 Ill. App. 3d 386, 387-88, 286 N.E.2d 42, 43-44 (1972). Finally, some commentators have advocated the use of prenuptial agreements to structure the terms of the ongoing relationship. *See* L. WEITZMAN, THE MARRIAGE CONTRACT 225-54 (1981); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 219-23 (1982).

Recent Developments, *Family Law—Prenuptial Agreements—Pennsylvania Supreme Court Rejects Substantive Review of Prenuptial Agreements—Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), 104 HARV. L. REV. 1399, 1399 n.3 (1991).

<sup>20</sup> *See, e.g.,* Christine Davis, Note, *‘Til Debt Do Us Part: Premarital Contracting Around Community Property Law—An Evaluation of Schlaefter v. Financial Management Service, Inc.*, 32 ARIZ. ST. L.J. 1051, 1055-57 (2000) (describing the effects on creditors of a prospective spouse’s decision to opt out of a default community property regime through a premarital agreement); Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115 (1997) (examining both default property distribution regimes in the United States).

<sup>21</sup> For further discussion of the equitable distribution principle, see Ryznar, *supra* note 8.

<sup>22</sup> In the community property regime, marriage is treated as a partnership in which property and debts acquired during the marriage belong to both spouses in equal, undivided shares. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2d ed. 1971). The community property approach to the distribution of property upon divorce is the default approach in only a minority of states, which currently includes Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See generally* Jeffrey G. Sherman, *Prenuptial*

contractual freedom, if prospective spouses reside in an equitable distribution state, they may contract for a community property division. If they reside in a community property state, they are free to write a premarital agreement that would keep their property separate.<sup>23</sup> Prospective spouses may also enter into a premarital agreement that changes the characterization of particular property that would otherwise be characterized as community under the state's default regime.<sup>24</sup>

The characterization of property is especially important in terms of determining which property one spouse's creditors may collect against.<sup>25</sup> This is particularly true in community property states.<sup>26</sup> A debtor's marriage in an equitable distribution state has no impact on creditors, unless the debt is incurred to buy household necessities.<sup>27</sup> In a community property state, however, creditors' rights expand as a result of the debtor's marriage: debt may be collected from the spouse's resources brought into the marriage.<sup>28</sup>

Premarital agreements or, if entered into after wedlock, matrimonial agreements may therefore impact how property is

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*Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 370 (2005–06). See also CAL. FAM. CODE §§ 2550–56 (West 2004).

<sup>23</sup> See, e.g., *Elia v. Pifer*, 977 P.2d. 796, 806 (Ariz. Ct. App. 1998) (“We therefore conclude that a valid premarital agreement abrogating community property rights precludes a creditor of one spouse from proceeding against the separate property of the other spouse on a claim arising during marriage.”); *Leasefirst v. Borrelli*, 17 Cal. Rptr. 2d 114, 116 (Cal. 1993) (holding that a “third-party creditor will not be entitled to recover against former community assets transmuted into separate property” by a premarital agreement (citing *Olean Tile Co. v. Schultze*, 169 Cal. App .3d 359, 365-65 (Cal. 1985)). See also Smith, *supra* note 14, at 836.

<sup>24</sup> Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 43 (2007).

<sup>25</sup> Erik Paul Smith, Comment, *The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law Is Uncertain, There Is No Law*, 30 IDAHO L. REV. 799 (1994).

<sup>26</sup> For background on when and how creditors can reach community property to satisfy the debts of one of the spouses in community property states, see *id.* See also Smith, *supra* note 14 (analyzing the impact of premarital agreements under California law).

<sup>27</sup> “In many non-community property states, a nonearning spouse also may incur debts for which the earning spouse is liable. Under the doctrine of necessities, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.” Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn*, 58 LA. L. REV. 73, 94 (1997). “Necessity” is determined by examining factors such as the spouses’ means, social position, and circumstances. *Id.*

<sup>28</sup> Carroll, *supra* note 24, at 29. See also Lisa R. Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & L. 45, 78–79 (2006) (“Since creditors can potentially garnish all community property in a joint account, in community property states when a creditor of one spouse wants to garnish a joint account, courts must first determine whether the money in the account is community property, separate property or joint tenancy property.”).

held during the marriage and its effect on third persons, such as creditors. This is particularly important in the nine community property states, and, to give notice to creditors, sometimes these agreements must be recorded in order to be binding on third parties.<sup>29</sup> Nonetheless, as the vast majority of states utilize equitable distribution as a default—thereby blocking a creditors' access to the property of the debtor's spouse—the premarital agreement in the United States typically has the most significance upon divorce when the agreement governs its terms.

Premarital agreements may be drafted to either significantly favor or disfavor the more vulnerable spouse upon divorce.<sup>30</sup> For example, a homemaker might include a provision that if his or her spouse is unfaithful, and therefore caused the divorce, that spouse must pay a significant portion of the assets.<sup>31</sup> On the other hand, a significantly lower-income spouse might contract to keep his or her minimal financial marital contributions, leaving the other spouse with the bulk of the assets. Premarital agreements may also be drafted more neutrally toward both parties, so that each maintains some significant assets.

It is important, however, to distinguish the premarital agreement from the separation agreement, which permits already married spouses to contract the terms of their divorce. Cohabiting couples, meanwhile, may not enter into premarital agreements, which become effective only upon marriage.<sup>32</sup>

Another important distinction is that between premarital and postmarital agreements—a distinction that does not clearly exist in the European countries.<sup>33</sup> Postmarital, also known as postnuptial, agreements are similar in substance and procedure to premarital agreements, except that they are signed after marriage. They are used to change provisions in the premarital agreement, or if not already covered by a premarital agreement, to make initial provisions, during the marriage, on the rights and responsibilities of the parties upon divorce or death. Therefore, the main difference between premarital and postmarital agreements is their timing in relation to the marriage.

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<sup>29</sup> Carroll, *supra* note 24, at 32; *see also infra* Part III.B.

<sup>30</sup> “Since premarital contracting could be utilized by women to overcome gendered inequalities through marriage, summarily dismissing [premarital agreements] would deny women the possibility of using private ordering for empowerment and advancement.” Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 *WOMEN'S RTS. L. REP.* 147, 152 (1996).

<sup>31</sup> *See, e.g., supra* note 5 and accompanying text.

<sup>32</sup> For a survey of the law on property distribution following an unsuccessful cohabitation, *see* Ann Laquer Estin, *Ordinary Cohabitation*, 76 *NOTRE DAME L. REV.* 1381 (2001).

<sup>33</sup> *See infra* Part II.

The premarital agreement is thus an important type of contract with the power to govern a marriage and potential divorce.<sup>34</sup> The terms, meaning, and consequences of such agreements in the United States have further been clarified through judicial and legislative law.

## B. A Brief History of the Premarital Agreement

Among the most important milestones in the evolution of the American premarital agreement are *Posner v. Posner*,<sup>35</sup> the first notable judicial recognition of the enforcement of premarital agreements, and the UPAA,<sup>36</sup> an influential draft of statutory law on the subject.

### 1. Case Law

*Posner v. Posner* is often cited as the first case upholding the validity of premarital agreements, making Florida the first state to recognize such agreements.<sup>37</sup> In its opinion, the *Posner* court noted the artificial distinction in other states' case law that skirted the issue of the validity of prenuptial agreements, but permitted spouses to contract their own property settlements under narrow circumstances.<sup>38</sup> The court also took "judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states."<sup>39</sup> Therefore, the court concluded that premarital agreements may be upheld under certain conditions.

The *Posner* court also noted the differing viewpoints of the appellate judges it overruled in the case, whose views summarized the predominant stances on the premarital agreement at the time. These views included that 1) the trial court need not be bound by premarital agreements, though they are permissible, 2) premarital agreements may be void on public policy grounds, and 3) premarital agreements may be as binding on the trial court as an agreement settling one spouse's property

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<sup>34</sup> This power of the premarital agreements might be used to achieve fairer results between the spouses following divorce. Currently, many women struggle to keep their households running on a reduced income after a divorce. In 1993, the mean income for divorced American mothers was \$17,859, while for divorced fathers it was \$31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1995). *But see generally* Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 THE JOURNAL OF HUMAN RESOURCES 411 (2005) (arguing that divorced women live in households with more income per person than never-divorced women).

<sup>35</sup> 233 So. 2d 381, 384 (Fla. 1970).

<sup>36</sup> UNIF. PREMARITAL AGREEMENT ACT (1983).

<sup>37</sup> 233 So. 2d at 384.

<sup>38</sup> *Id.* at 383.

<sup>39</sup> *Id.* at 384.



rights upon the death of the other spouse.<sup>40</sup> In overruling the lower court, *Posner* marked the shift from the judicial practice of voiding premarital agreements to a policy that recognized premarital agreements as binding.

Although most states acknowledged the enforceability of premarital agreements soon after *Posner*,<sup>41</sup> state courts continued to play a significant role in defining the appropriate parameters of premarital contracts.<sup>42</sup> For example, the Supreme Court of Ohio outlined procedural safeguards in *Gross v. Gross*,<sup>43</sup> while a Massachusetts court recently found that pregnancy does not negate a bride's free will to enter into a premarital agreement.<sup>44</sup> In Rhode Island, both parties need not have counsel in order for a premarital agreement to be valid.<sup>45</sup> In New Jersey, the doctrine of equitable estoppel cannot be used to validate an otherwise invalid agreement.<sup>46</sup>

However, states have become clearly divided on certain issues, such as the formalities that must attend such agreements<sup>47</sup> and whether parties could contract on issues such as spousal support.<sup>48</sup> These interstate inconsistencies were most problematic for mobile couples.<sup>49</sup> The UPAA, considered next, aimed to remedy some of these inconsistencies.

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<sup>40</sup> *Id.* at 382.

<sup>41</sup> *See, e.g.*, *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (finding that a less deferential approach to the enforcement of premarital agreements would entail "[p]aternalistic presumptions and protections [that sheltered] women from the inferiorities and incapacities which they were perceived as having").

<sup>42</sup> *See, e.g.*, *Bakos v. Bakos*, 950 So. 2d 1257, 1260 (Fla. Dist. Ct. App. 2007) (deciding that a premarital agreement signed the day before a wedding was voidable, but aggrieved party may ratify it); *Chubbuck v. Lake*, 635 S.E.2d 764 (Ga. 2006) (finding that a premarital agreement was void and unenforceable when it failed to meet the statutory requirement that it be witnessed by two people); *Seherr-Thoss v. Seherr-Thoss*, 141 P.3d 705, 712 (Wyo. 2006) (determining that the laws governing the enforceability of contracts also govern premarital agreements).

<sup>43</sup> 464 N.E.2d 500, 506 (Ohio 1984). The *Gross* court stated that:

[Premarital] agreements are valid and enforceable . . . (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce.

*Id.*

<sup>44</sup> *Biliouris v. Biliouris*, 852 N.E.2d 687, 693 (Mass. App. Ct. 2006).

<sup>45</sup> *Marsocci v. Marsocci*, 911 A.2d 690, 698 (R.I. 2006).

<sup>46</sup> *In re Estate of Shinn*, 925 A.2d 88, 96 (N.J. Super. Ct. App. Div. 2007).

<sup>47</sup> UNIF. PREMARITAL AGREEMENT ACT, § 2 cmt (1983).

<sup>48</sup> *Id.*

<sup>49</sup> Such movement often triggers conflict-of-law issues. The UPAA, which permits prospective spouses to select "the choice of law governing the construction of the agreement," was specifically drafted to address "[t]he problems . . . exacerbated by the mobility of our population." UNIF. PREMARITAL AGREEMENT ACT Prefatory Note, § 3 cmt (1983). *See also infra* note 51.

## 2. Statutory Law

The National Conference of Commissioners on Uniform State Laws promulgated the UPAA in 1983 to provide a uniform law on premarital agreements. Approximately half of the states have now adopted some variation of the UPAA.<sup>50</sup>

One of the most important characteristics of the UPAA is its strong support of the freedom of contract. Section 3 of the Act lists several topics a premarital agreement may cover, including property rights, spousal support, and the choice of law governing the agreement.<sup>51</sup> Significantly, this list is not exhaustive and parties may contract on any topic not in violation of either a public policy principle or a criminal statute.<sup>52</sup> The only topic explicitly forbidden from premarital contracting is child support that adversely affects the child, although as a general rule many child-related provisions are typically considered to be against public policy.<sup>53</sup>

Enforcement of premarital agreements is considered in section 6 of the UPAA.<sup>54</sup> This section provides that a premarital agreement is unenforceable against a spouse who did not execute the agreement voluntarily.<sup>55</sup> The premarital agreement is also unenforceable if it was unconscionable when executed and the spouse: (1) was not provided fair disclosure of the other spouse's financial details; (2) did not waive the right to receive such disclosure; and, (3) did not have adequate knowledge of those financial details.<sup>56</sup> Therefore, a person with knowledge of a spouse's financial status or reason to know of it, coupled with voluntary execution, cannot contest the premarital agreement.<sup>57</sup>

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<sup>50</sup> Charles W. Willey, *Effect in Montana of Community-Source Property Acquired in Another State (And Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate)*, 69 MONT. L. REV. 313, 365 (2008). For examples of various states' UPAA-based laws, see CAL. FAM. CODE § 1615 (West 2004); 750 ILL. COMP. STAT. 10/1 *et seq.* (West 1993); and R.I. GEN. LAWS § 15-17-6 (2003).

<sup>51</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 (1983). *See also* Montoya v. Montoya, 909 A.2d 947 (Conn. 2006); Bradley v. Bradley, 164 P.3d 537 (Wyo. 2007). For an excellent discussion of choice of law issues in premarital agreements, see Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 MO. L. REV. 793 (2007).

<sup>52</sup> UNIF. PREMARITAL AGREEMENT ACT § 3 cmt (1983).

<sup>53</sup> *Id.*

<sup>54</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (1983). For constructive criticism of the UPAA's enforcement provision, see Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993). Meanwhile, section 7 of the UPAA governs enforceability of agreements in marriages that were subsequently determined to be void. *See* UNIF. PREMARITAL AGREEMENT ACT § 7 (1983).

<sup>55</sup> UNIF. PREMARITAL AGREEMENT ACT at § 6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at § 6 cmt.

Similarly, a person who waived knowledge of these financial details and voluntarily executed the agreement is bound by it.<sup>58</sup>

Although the UPAA is a source of some guidance, the law on premarital agreements remains in the realm of the states and any generalization is therefore difficult. Nonetheless, it is a fair observation that American states typically provide prospective spouses significant contractual freedom and premarital agreements are enforceable unless they fail judicial review.<sup>59</sup>

### C. Theoretical Underpinnings

The modern premarital agreement is rooted in contract law theories.<sup>60</sup> Parties to a premarital agreement, viewed as independent negotiators,<sup>61</sup> have almost full discretion over the contents and scope of their agreement, enabling them to dictate the terms of their divorce absent any enforceability issues.<sup>62</sup> This is particularly important for community property states such as California, where parties may waive their rights to share property.<sup>63</sup>

Many commentators have noted that marriage itself has evolved from a relationship based on status to one regulated by contract.<sup>64</sup> This shift from marriage as regulated by the state to marriage as determined by the private ordering between parties has been called “the privatization of family law.”<sup>65</sup>

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<sup>58</sup> *Id.* There is an additional provision that bars enforcement of a premarital agreement to the extent that it would force the lower income spouse onto welfare. *Id.* at § 6(b).

<sup>59</sup> See *infra* Part I.D.1.

<sup>60</sup> “[A] premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement.” UNIF. PREMARITAL AGREEMENT ACT § 2 cmt (1983). The UPAA also draws upon contract and commercial law for the standard of unconscionability. *Id.* at § 6 cmt.

<sup>61</sup> See Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 201 (F.H. Buckley ed., 1999) [hereinafter FALL AND RISE OF CONTRACT].

<sup>62</sup> See *infra* Part I.D.1.

<sup>63</sup> See *supra* Part I.A.

<sup>64</sup> Scott & Scott, *supra* note 61, at 201. Marriage as status means, in essence, that family law automatically bestows a set of rights and obligations upon people who are marrying, which can be altered only by divorce, not by mutual agreement. For an excellent discussion of the interplay between marriage as status and marriage as contract, see Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701 (2001); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60 U. CHI. L. REV. 67 (1993). For a description of freedom of contract in covenant marriage, which is a more binding form of marriage available in a few states, see Margaret F. Brinig, *Contracting Around No-Fault Divorce*, in FALL AND RISE OF CONTRACT, *supra* note 61, at 275.

<sup>65</sup> Scott & Scott, *supra* note 61, at 203. It is important to note here, however, that there is a major distinction between (1) marital behavior being governed by contract and (2) divorce being governed by contract. See, e.g., Marsha Garrison, *Marriage: The Status*

However, there are obvious distinctions between contracts and premarital agreements, casting doubt on whether contract law provides an appropriate framework for premarital agreements.<sup>66</sup> Most problematically, the bargaining process in the marital context is not at arm's length, but "may be afflicted by unreflective love, even infatuation."<sup>67</sup> Additionally, the characteristics of marriage, so dependent on life circumstances and children, are sufficiently unique to prevent the blind application of pure contract principles.<sup>68</sup>

Nonetheless, premarital agreements are often defended on partnership principles as well.<sup>69</sup> There are inconsistencies, however, in the notion that premarital agreements inherently advance the prospective spouses' equality. Specifically, a court's ability to invalidate a premarital agreement suggests that one of the partners is too weak to contract.<sup>70</sup> Conversely, if a court upholds skewed premarital agreements, then spouses may bargain for unequal treatment. It has been suggested that premarital agreements must move in the direction of dividing property equally, or else they are at odds with the view of marriage as a partnership.<sup>71</sup> This proposition, however, would defeat the entire purpose of a premarital agreement, which is to provide parties a method of contracting around defaults. Therefore, it is not entirely clear whether premarital agreements enhance or undermine the idea of marriage as an equal partnership. They may certainly be used by parties to effectively do either, depending on the terms of the agreement.

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*of Contract*, 131 U. PA. L. REV. 1039 (1983) (reviewing LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981)).

<sup>66</sup> Eric A. Posner, *Family Law and Social Norms*, in *FALL AND RISE OF CONTRACT*, *supra* note 61, at 256.

<sup>67</sup> Michael J. Trebilcock, *Marriage as a Signal*, in *FALL AND RISE OF CONTRACT*, *supra* note 61, at 254. For the argument that premarital contracting creates greater equality of bargaining power than either intramarital or postmarital bargaining, see generally *id.*

<sup>68</sup> *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2096–97 (2003).

<sup>69</sup> See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 6 cmt (1983), which prioritizes protecting spouses "against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other." (emphasis added).

<sup>70</sup> This recalls the days when women could not legally contract. See, e.g., *Poole v. Perkins*, 101 S.E. 240 (Va. 1919).

<sup>71</sup> *Developments in the Law—The Law of Marriage and Family*, *supra* note 68, at 2096:

[D]eference to freedom of contract in antenuptial agreement law is undesirable. . . . [A]cknowledgment of the partnership conception of marriage demands that parties desiring to execute antenuptial agreements approximate the fifty-fifty division of property implicit in the partnership approach or stand prepared to prove the agreements' substantive fairness at the time of divorce.

Although both the partnership and contractual frameworks have flaws when applied to the marital context, they have underpinned and legitimized premarital agreements. As a result, couples have benefited from the opportunity to contractually circumvent judicial and statutory defaults in the case of divorce.

#### D. Enforceability

Section six of the UPAA,<sup>72</sup> or the corresponding state statute, governs the enforceability of premarital agreements. However, it is the courts that are the ultimate arbiters of whether a particular premarital agreement governs the terms of divorce.<sup>73</sup> The issue of enforceability arises most frequently following a court's procedural and substantive review of a premarital agreement.<sup>74</sup>

##### 1. Judicial Review

In order to be upheld by the court, a premarital agreement must survive substantive and procedural review.<sup>75</sup> Occasionally, these separate inquiries are blurred.<sup>76</sup> In other words, if the substance of the agreement appears fair to the court, defects in the bargaining process may be of lesser importance. However, if the agreement seems particularly unfair to one spouse, courts may examine the procedures surrounding its execution more closely.<sup>77</sup>

In terms of substantive review,<sup>78</sup> some courts have departed from the standard unconscionability doctrine by which

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<sup>72</sup> UNIF. PREMARITAL AGREEMENT ACT § 6 (1983). *See supra* Part I.B.2.

<sup>73</sup> *See* UNIF. PREMARITAL AGREEMENT ACT § 6(c) (1983) ("An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.").

<sup>74</sup> Some commentators have warned that enforcement of premarital agreements must be done carefully so as to not disadvantage women. *See, e.g.,* Atwood, *supra* note 54, at 129.

<sup>75</sup> For the argument that courts rarely invalidate premarital agreements following procedural and substantive review, see Younger, *supra* note 14, at 358–59, 422–23. One commentator suggests that the procedural and substantive fairness protections placed on premarital agreements reflect each state's view of the appropriate balance between individual autonomy and state oversight of premarital agreements. McLaughlin, *supra* note 51, at 853.

<sup>76</sup> Younger, *supra* note 14, at 356–57.

<sup>77</sup> *Id.*

<sup>78</sup> *See* Karen Servidea, Note, *Reviewing Premarital Agreements to Protect the State's Interests in Marriage*, 91 VA. L. REV. 535, 540–41 (2005). Some critics argue that a substantive review of premarital agreements is paternalistic. *See* Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

commercial contracts are evaluated.<sup>79</sup> Instead, judges often examine the fairness of the premarital agreement at the time of divorce.<sup>80</sup> Furthermore, certain topics fall outside the scope of permissible contracting for public policy reasons,<sup>81</sup> including a child's religion,<sup>82</sup> child custody, child care payments, or parental visitation.

Meanwhile, the test for procedural fairness focuses on the parties' conduct in obtaining the premarital agreement.<sup>83</sup> First, each party must have voluntarily entered into the agreement, absent fraud, overreaching, sharp dealing,<sup>84</sup> or duress.<sup>85</sup> Additionally, at the time the parties entered into the agreement, disclosure of each party's financial status is required.<sup>86</sup> Significant departure from these accepted procedural practices provides courts with the opportunity to circumvent premarital agreements in resolving the issues arising during divorce proceedings.

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<sup>79</sup> *But see supra* notes 60 and 73; *Lane v. Lane*, 202 S.W.3d 577 (Ky. 2006) (finding that although public policy does not render antenuptial agreements per se invalid, such agreements may be analyzed by courts as unconscionable).

<sup>80</sup> *Servidea, supra* note 78, at 540–41.

<sup>81</sup> I. Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1169 (2008). *See also* Eric A. Posner, *Family Law and Social Norms*, in *FALL AND RISE OF CONTRACT*, *supra* note 61, at 256 (“Aside from the restrictions on termination provisions in prenuptial agreements, potential mates cannot bind themselves legally to marriages in which spouses’ domestic, financial, and sharing obligations are specified by contract. Polygamous and same-sex marriages are prohibited. These laws are not default rules, but restrictions on freedom of marital contract.”). For the argument that courts should lift restrictions on marital contracting to obtain less paternalistic and more efficient results, see *Milot, supra* note 64. Other scholars have similarly argued for even greater contractual freedom. *See, e.g.*, Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982). *But see* Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984) (arguing that absolute freedom of contract may hinder fair results upon divorce).

<sup>82</sup> *See Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990). *See also* Alexandra Selfridge, *Challenges for Negotiating and Drafting an Antenuptial Agreement for the Religious Upbringing of Future Children*, 16 J. CONTEMP. LEGAL ISSUES 91 (2007).

<sup>83</sup> *Younger, supra* note 14, at 357.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g., In re Estate of Hollett*, 834 A.2d 348 (N.H. 2003).

<sup>86</sup> *See, e.g., Blige v. Blige*, 656 S.E.2d 822 (Ga. 2008) (holding that both parties entering into an antenuptial agreement must provide a full and fair disclosure of all material facts); *Friezo v. Friezo*, 914 A.2d 533 (Conn. 2007) (determining that disclosure requirements for a premarital agreement are satisfied when the parties disclose a general approximation of their income, assets, and liabilities).

## 2. Formulaic Premarital Agreements

The question of enforceability plagues not only procedurally and substantively complicated agreements,<sup>87</sup> but also simple ones. Any internet search reveals premarital agreement packages with boilerplate language, allowing the prospective spouses to sign formulaic contracts without spending money on attorneys' fees.<sup>88</sup>

Ultimately, form premarital agreements are not inherently more or less enforceable than those drafted by lawyers.<sup>89</sup> They are subject to the same procedural and substantive limitations as any other premarital agreement, thus representing a reliable option for low cost divorce planning.

There are certainly advantages and disadvantages to an increased use of such unsophisticated premarital agreements. On the one hand, without lawyers, prospective spouses may not know the depth and scope of potential negotiations, lessening their bargaining power. On the other hand, inexpensive premarital agreements allow spouses of modest means to plan for a potential divorce.<sup>90</sup> Furthermore, because one side does not outmatch the other in legal power, perhaps the spouses achieve greater equality in such negotiations.

In many ways, the formulaic premarital agreement parallels the holographic will. Similar public policy reasons permit both, centering on the autonomy of the individual to dispose of his or her own property. Furthermore, the do-it-yourself premarital

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<sup>87</sup> For a good review of the complex financial issues that might be considered by a premarital agreement, see David M. Johnson, *Complex Financial Issues in Family Law Cases*, 37 COLO. LAW. 53 (2008).

<sup>88</sup> For examples of companies that sell asset protection in marriage, see <http://prenuptialagreementform.com> (last visited Oct. 11, 2009) (form premarital agreements for as low as \$29.99) and <http://www.legalformsbank.biz/premarital.asp> (last visited Oct. 11, 2009) (same for \$9.95). See also Andrew Blair-Stanek, Comment, *Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints*, 24 Touro L. REV. 31, 68 n.166 (2008).

<sup>89</sup> See, e.g., UNI. PREMARITAL AGREEMENT ACT, § 6 cmt. (1983):

Nothing in Section 6 [regarding enforcement] makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e.g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962)).

This UPAA provision would most likely be applicable to cases where only one of the parties was assisted by independent legal counsel.

<sup>90</sup> Somewhat counter-intuitively, those of modest means may need premarital agreements the most because marriages are particularly vulnerable to dissolution when spouses encounter financial trouble. See, e.g., HENRY J. SOMMER ET. AL., *COLLIER FAMILY LAW AND THE BANKRUPTCY CODE*, ¶6.05[5], at xiii (2009) ("In some parts of the country as many as half of all marriages end in divorce, often due, at least in part, to financial difficulties.").

agreement symbolizes the preference of the American philosophy for nearly complete freedom of contracting, permitting prospective spouses to enter into an agreement uninfluenced by judicial or legislative preferences.<sup>91</sup> This cornerstone of American philosophy, so favorable to freedom of contract, in fact drives many of the distinctions between American and European law on the subject of premarital agreements.

In sum, Americans may utilize the premarital agreement to avoid judicial and statutory defaults in their states, enjoying significant freedom of contract. The force of the premarital agreement has been effectively developed over the past several decades, resulting in an important role for premarital agreements in many American couples' engagements. Interestingly, however, premarital agreements have a longer history in many European countries, acquiring significantly different consequences and meaning.

## II. EUROPEAN LAW ON MARITAL AGREEMENTS AS EXEMPLIFIED BY POLAND

Europe generally does not share the distinction that exists in the United States between premarital and postmarital agreements. Instead, both types of agreements are treated as one type of contract: the marital agreement. The marital agreement may be concluded either before the marriage ceremony or during the marriage.<sup>92</sup>

This Part analyzes the approaches to marital agreements in Europe, focusing on France, Germany, Poland, and Switzerland.<sup>93</sup> The Polish approach is given more in-depth treatment, not only because it is representative of the others, but also because it illustrates notable differences from the American approach.

These European legal systems have several commonalities that are worth mentioning at the outset. Under the French Civil Code,<sup>94</sup> the German Bürgerliches Gesetzbuch ("BGB"),<sup>95</sup> the

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<sup>91</sup> *But see* sources cited *supra* notes 67 and 73.

<sup>92</sup> *But see* C. CIV. 1394–97 (France).

<sup>93</sup> "Comparisons among [England, France, Germany, and the United States] continue to seem fruitful, not only because of the great influence their legal systems exert in the civil and common law worlds, but also because each has generated a rich assortment of legal and social science materials." MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 3 (1989).

<sup>94</sup> C. CIV. (France).

<sup>95</sup> Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, as amended, §§ 1426, 1432, 1437, 1519, 1549.



Swiss Schweizerisches Zivilgesetzbuch (“ZGB”),<sup>96</sup> and the Polish Kodeks Rodzinny i Opiekuńczy (“KRO”),<sup>97</sup> there are a few optional systems of matrimonial property law aside from the statutory regime governing the marriage. As a general rule, spouses may modify the standard statutory regime that would apply to their matrimonial relations by means of a marital agreement.<sup>98</sup> Importantly, spouses are not obliged to choose any specific contractual system and can avoid at least some of the consequences of the standard statutory regime.<sup>99</sup> Nonetheless, spouses do not have entirely unrestricted autonomy with regard to their matrimonial property law in any of the countries considered, nor is entering into a marital agreement popular.<sup>100</sup>

#### A. Various European Countries’ Approaches

It should be mentioned that prospective spouses in many European countries resist marital agreements altogether because they think that such documents are only important upon divorce. Therefore, spouses often do not enter into such agreements because they want to underscore that they are not going to divorce.<sup>101</sup> Such an opinion of marital agreements derives from American movies and news regarding the divorces of celebrities. Very rarely, however, is the situation of these divorcing celebrities analyzed within a larger context and within the legal circumstances that are specific to the United States. This is understandable because the main aim of movies is not to teach.

Nonetheless, the result is that the opinion of marital agreements in Europe is built upon the false conviction that marital agreements in Europe have the same consequences as those in the United States, when in reality the meaning and consequences of such agreements in Europe differ from those in the United States. In Europe, the regime choice made by the spouses in a marital agreement mainly impacts how property is held during the marriage and which property is available to the creditors of one spouse.<sup>102</sup> While the rules of distribution of property upon divorce are also determined by the chosen regime,

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<sup>96</sup> Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 177–247 (Switz.).

<sup>97</sup> Kodeks rodzinny i opiekuńczy – The Family and Guardianship Code of 25th February 1964 - Dz. U. nr 9, poz. 59 with amendments [hereinafter “KRO”].

<sup>98</sup> See *infra* Parts II.A. & II.B. for further discussion.

<sup>99</sup> *Id.*

<sup>100</sup> In France, for example, only 10% of spouses decide to enter into a marital agreement, and they do so mostly when important assets or second marriages are involved. See CAROLYN HAMILTON & ALISON PERRY, FAMILY LAW IN EUROPE 261 (2d ed. 2002).

<sup>101</sup> This might also be a signaling problem. See *supra* note 2.

<sup>102</sup> See, e.g., *infra* Part II.A.1.

spouses may modify them only in a very narrow way through the marital agreement.<sup>103</sup>

Therefore, among the most important points to initially consider is that the marital agreement has a different meaning in Europe than in the United States, and differing meanings within Europe as well.<sup>104</sup> In certain European countries, all of the contracts between spouses are called marital agreements. The permissible scope of the marital agreement also differs from European country to country. In some countries, a marital agreement concerns only the relations between spouses, while in others, the agreement may regulate the consequences of a spouse's death.<sup>105</sup> Furthermore, in some countries, there are only a few models of property regimes from which spouses may choose. In other countries, spouses are not obliged to follow the statutory models of the regimes and have more freedom with regard to the content of their marital agreements.<sup>106</sup>

Nonetheless, two fundamental approaches to marital agreements can be distinguished in Europe.<sup>107</sup> According to the first approach, the marital agreement is a kind of general agreement, constructing the rules of the classification of property and the relations of the spouses, but on the other hand, not regarding any particular property.<sup>108</sup> The second approach is based on the rule that each contract between spouses is a marital agreement, even if it concerns only certain chattels belonging to one spouse.<sup>109</sup>

### 1. France

The meaning of the term "marital agreement" is quite broad in France. It covers not only the agreements in which spouses choose their matrimonial regime, but also the contracts

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<sup>103</sup> See, e.g., *infra* Part II.A.3.

<sup>104</sup> This is a very important point given the current process of European unification and harmonization in the field of family law. See, e.g., Esin Örüçü, *A Family Law for Europe: Necessary, Feasible, Desirable?*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 551 (Katharina Boele-Woelki ed., Intersentia 2003) [hereinafter PERSPECTIVES].

<sup>105</sup> See Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] Justizgesetzsammlung [JGS] No. 946/1816, as amended § 1217 (Austria).

<sup>106</sup> Austria and France serve as examples of such countries. See HAMILTON & PERRY, *supra* note 100, at 12, 260–61.

<sup>107</sup> These remarks concern only continental Europe because the English approach to marital agreements is similar to the American one. See, e.g., Nigel Lowe & Roger Kay, *The Status of Prenuptial Agreements in English Law – Eccentricity or Sensible Pragmatism?*, in FAMILY FINANCES 395–413 (Bea Verschraegen ed., 2009) [hereinafter FAMILY FINANCES]. But see *supra* note 8 (noting the lack of enforceability of premarital agreements in England).

<sup>108</sup> See Lowe & Kay, *supra* note 107, at 395–413.

<sup>109</sup> *Id.*

regarding every chattel belonging to at least one spouse.<sup>110</sup> Spouses are free to regulate the rules concerning the management of their property and are entitled, by any kind of agreement, to modify the default statutory community property regime.<sup>111</sup>

There are a few models of property regimes known by the Civil Code in France: separation of property,<sup>112</sup> separation in acquisition,<sup>113</sup> universal community,<sup>114</sup> and community of movables and acquisitions.<sup>115</sup> Spouses may choose among these in their marital agreements, but are prohibited from electing former types of marital regimes, such as, for example, the dotal system.<sup>116</sup>

If the spouses were married without any provision concerning matrimonial property law, the default statutory system of a limited community property is applied.<sup>117</sup> In this system, only property acquired during the marriage is held in common, although gifts and inheritances acquired during the marriage are the separate property of each spouse.<sup>118</sup> Community property belongs to both spouses jointly, although each spouse is able to make ordinary acts of administration of community property. However, important transactions relating to this kind of property need the consent of both spouses.<sup>119</sup>

Importantly, when the record of marriage mentions that a marital agreement has not been made, third parties may assume

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<sup>110</sup> WALTER CAIRNS & ROBERT MCKEON, *INTRODUCTION TO FRENCH LAW* 69–70 (1995).

<sup>111</sup> See C. CIV. 1497 (France).

<sup>112</sup> See CAIRNS & MCKEON, *supra* note 110, at 71. In this regime, spouses hold property separately. *Id.*

<sup>113</sup> In this regime, spouses behave as if they were married under the regime of separation of property. At the dissolution of the regime, each spouse receives half of the value of the net acquisitions belonging to the property of the other spouse. *Id.*

<sup>114</sup> In this regime, “the community includes not only the acquets and gains of the marriage, but also any property brought into the marriage by either spouse.” Carroll, *supra* note 24, at 27. However, property that is separate by its nature—property delineated as such in C. CIV. 1404 (France)—does not fall into community property, unless otherwise stipulated.

<sup>115</sup> This system is similar to the limited community property system. The key characteristic of this system is that immovables are not part of the common property of spouses.

<sup>116</sup> The dotal system was in force during medieval times and in some areas later. It was also recognized by Roman law. In this system, the wife was typically given with a dowry, which was administered by her husband during the marriage and was given back to her upon the death of her husband. Being a former property regime, however, it is not currently mentioned by the Civil Code and therefore may not be chosen by spouses today. See CAIRNS & MCKEON, *supra* note 110, at 71.

<sup>117</sup> Some authors translate the name of this regime as the “community of ownership of matrimonial property.” See HAMILTON & PERRY, *supra* note 100, at 260.

<sup>118</sup> C. CIV. 1402 (France).

<sup>119</sup> C. CIV. 1421 (France).

that spouses have been married under the default statutory regime of limited community property.<sup>120</sup> However, this rule is not applied if the spouses have declared, in the transaction entered into with a third party, that they had made a marital agreement.<sup>121</sup>

The freedom of contract in the field of marital agreements is very well-developed in French law, especially when compared to the other European countries.<sup>122</sup> In their marital agreements, spouses in France may choose one of the property regimes mentioned by the Civil Code, but may also modify the rules of these regimes: spouses may mix different regimes and are even able to establish new regimes that are not recognized by the law.<sup>123</sup> Unlike the other European countries examined here, spouses in France are also able to make provisions for what should happen upon their death.<sup>124</sup> Spouses may also opt for universal community, which is not popular in Europe.<sup>125</sup>

However, there are some limitations on this freedom of contract. For example, the marital agreement cannot be against public order (public morals).<sup>126</sup> Furthermore, spouses are not able to modify the rules of the so-called primary regime (*régime primaire*)<sup>127</sup> and the statutory order of successions.<sup>128</sup> Finally, spouses are not permitted to derogate from the rules regarding parental authority or guardianship,<sup>129</sup> nor may they derogate from the duties and rights which result from marriage.<sup>130</sup>

In France, marital agreements should be concluded before wedlock. During the marriage, the marital agreement is immutable (*principe d'immutabilité*).<sup>131</sup> However there is an

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<sup>120</sup> The record of marriage is a certificate given to the spouses and serves as proof that they are married.

<sup>121</sup> C. CIV. 1394 (France).

<sup>122</sup> CAIRNS & MCKEON, *supra* note 110, at 52, 69.

<sup>123</sup> See HAMILTON & PERRY, *supra* note 100, at 260–61.

<sup>124</sup> This kind of provision may not necessarily be implicated in every case, as, for example, when certain property cannot be disposed of freely. *Id.* at 261.

<sup>125</sup> In this regime, “the community includes not only the acquets and gains of the marriage, but also any property brought into the marriage by either spouse.” Carroll, *supra* note 24, at 27. This prohibition in other countries is explained by the nature of some rights, the subject of which can only be one person.

<sup>126</sup> See C. CIV. 1387 (France).

<sup>127</sup> This is a catalogue of rules regarding the rights and duties of spouses from which no derogation may be made. This compulsory regime is laid down by the Civil Code. Its provisions regard, for example, the financial contribution of spouses to household expenses, to the upbringing of children, as well as to the family home.

<sup>128</sup> C. CIV. 1389 (France).

<sup>129</sup> C. CIV. 1388 (France).

<sup>130</sup> *Id.*

<sup>131</sup> C. CIV. 1396 (France).

exception to this rule:<sup>132</sup> spouses may change their financial relations after two years of having a particular regime.<sup>133</sup> In any case, the marital agreement should be agreed upon before a notary and approved by the court.<sup>134</sup> The marital agreement is enforceable after the decision of the court and has effect on third persons<sup>135</sup> three months after mention of it has been entered into the margin of both copies of the record of marriage.<sup>136</sup> Spouses should make a suitable motion to enter information about their marital regime into the record of marriage.

The marital agreement should be concluded by prospective spouses, or by spouses during the marriage, even if one of them has not gained full legal capacity. A minor who obtained consent for contracting into the marriage or an adult in guardianship or curatorship may enter into marital agreements, but must then be assisted by the person who is authorized to give consent for the marriage.<sup>137</sup> The spouses may also give power of attorney to an agent who will conclude the marital agreement acting on his or her behalf.<sup>138</sup>

It is very important that the parties be simultaneously present and that the marital agreement be made with the consent of both spouses or their agents.<sup>139</sup> As previously mentioned, the marital agreement needs to be in the form of a notarized deed. The notary public delivers to the spouses a certificate which confirms that the agreement has been

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<sup>132</sup> See C. CIV. 1397 (France).

<sup>133</sup> It must be demanded that the change of a matrimonial regime be made "in the interest of the family." *Id.*

<sup>134</sup> The court referenced here is the court of the spouses' domicile. *Id.*

<sup>135</sup> This means that spouses are able to rely on the provisions of the marital agreement in limiting their ownership in certain property, particularly when it comes to the creditors of one spouse. These provisions therefore actually determine the scope of property available to creditors. This issue is particularly important in countries where the community of property is the default statutory regime. In this regime, the creditor of one spouse typically has recourse against the community property. But if the spouses limited the community property through a marital agreement, the rights of the creditor would be restricted. On the other hand, if a creditor has recourse only against the separate property of the spouse who is the debtor, and the spouses extend the community property, the creditor's position is weaker. In this case, the creditor has recourse only against the separate property, such as when, for example, the debt regards the separate property of the spouse or the contract was concluded without the consent of the other spouse.

<sup>136</sup> See C. CIV. 1397 (France).

<sup>137</sup> See C. CIV. 148 (France).

<sup>138</sup> Katharina Boele-Woelki, *Matrimonial Property Law from a Comparative Law Perspective*, in C111 SERIES ARS NOTARIATUS 7 (Hans Warendorf trans., 2000) available at <http://www.reading.ac.uk/nmsruntime/saveasdialog.aspx?IID=7018&sID=34870> [hereinafter "Boele-Woelki, *Matrimonial Property Law*"].

<sup>139</sup> C. CIV. 1394 (France).

completed. This certificate must be lodged with the officer of civil status before the celebration of the marriage.<sup>140</sup>

Finally, in their marital agreements, spouses may make provisions for a spouse's death. Specifically, they may decide that the surviving spouse be authorized to receive from the common property "either a specified sum, or a specified property in kind, or a specified quantity of a determined kind of property."<sup>141</sup> Such a provision does not affect the rights of the surviving spouse under inheritance law.<sup>142</sup> Expenses arising during the marriage may also be allotted to each spouse by a marital agreement.<sup>143</sup>

## 2. Germany

According to German law, spouses enter into a marital agreement (Ehevertrag) to regulate their financial relationships.<sup>144</sup> This definition of marital agreement is quite broad and therefore the source of some doubts. For example, it is not clear whether contracts made between spouses in order to transfer ownership of a certain part of their property should be treated as marital agreements.

The marital agreement can introduce a marital regime or change the rules of the regime chosen by the spouses. This means that the marital agreement is a special kind of tool used to decide the financial consequences of marriage and the financial relations between spouses.<sup>145</sup> Through it, spouses may choose from the contractual property regimes in Germany, which include separation of property<sup>146</sup> and community of property.<sup>147</sup>

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<sup>140</sup> C. CIV. 1395 (France).

<sup>141</sup> C. CIV. 1515 (France).

<sup>142</sup> C. CIV. 1516 (France).

<sup>143</sup> According to article 214 of the French Civil Code, when spouses do not regulate this matter, they shall contribute to the marriage expenses in proportion to their respective means. *See* C. CIV. 214 (France).

<sup>144</sup> Only spouses can be parties to these agreements. If other people are parties to the agreement, it does not qualify as a marital agreement. *See* GERMAN LEGAL SYSTEM & LAWS 467 (Nigel G. Foster & Satish Sule eds., 3d ed. 2002).

<sup>145</sup> *See* INTRODUCTION TO GERMAN LAW 257–58 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005). It should be emphasized that different contracts between spouses such as, for example, donation or loan contracts are not marital agreements and are governed by the general rules of BGB (German Civil Code), instead of by the provisions regarding marital agreements. INTRODUCTION TO GERMAN LAW 193 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

<sup>146</sup> Separation of property is a regime in which spouses hold their property separately. *See* Foster & Sule, *supra* note 144, at 468.

<sup>147</sup> *See* BGB §§ 1414–1415. Community of property is a regime in which there are three groups of assets: community property, the property of the wife, and the property of the husband. *See* Foster & Sule, *supra* note 144, at 468. This Part of the Article uses the term "community of property" to describe this specific property regime and the term

If the spouses have not concluded a marital agreement, they remain in the default statutory regime, which is community of surplus (Zugewinnngemeinschaft).<sup>148</sup> This name is misleading, however, because it is actually a regime based on separation of property during the marriage, with the surplus divided at the end of the marriage.<sup>149</sup> If the spouses decide not to contract around this default statutory regime, they are free to make some changes to this regime.<sup>150</sup> For example, spouses may eliminate some of the restrictions regarding the transfer of certain assets or change the rules concerning the equalization of accruals that determine the division of the surplus.<sup>151</sup>

Meanwhile, if the spouses contract into the community property regime, they are able to establish the rules on the composition of each spouse's separate capital and community property.<sup>152</sup> They may also change the rules of management of the community property, as well as the rules regarding the division of common property.<sup>153</sup>

Generally, there is some freedom of contract in marital agreements in Germany, but spouses must choose one of the regimes stated in the Civil Code.<sup>154</sup> It is also possible to modify some of the statutory rules, but only within certain limits established by law. Spouses are not allowed to introduce any foreign law's regime that is not recognized by German law.<sup>155</sup> It is also forbidden to mix different regimes.<sup>156</sup> Such limited freedom of contracting in marital agreements is justified by the desire for certainty of business and the guarantee of formality.

In Germany, the marital agreement can be concluded by spouses or prospective spouses. If a spouse does not have full legal capacity, German law is more restrictive than French law. A prospective spouse with limited legal capacity must be assisted by his or her legal representative and, in certain circumstances,

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"community property" to describe the property that belongs to both spouses in this regime.

<sup>148</sup> Foster & Sule, *supra* note 144, at 468.

<sup>149</sup> See Reimann & Zekoll, *supra* note 145, at 257. When analyzing this regime and its rules, one can come to the conclusion that it should actually be called the sharing of accruals or the community of increase. See GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 283 (4th ed. 2006).

<sup>150</sup> GERHARD ROBBERS, *supra* note 149, at 283.

<sup>151</sup> *Id.*

<sup>152</sup> BGB § 1474.

<sup>153</sup> See *id.*

<sup>154</sup> See, e.g., Reimann & Zekoll, *supra* note 145, at 257–58.

<sup>155</sup> See 2008 *Martindale-Hubbell Law Digest – European Law Digests* 1 GERMANY: LAW DIGEST OF THE FEDERAL REPUBLIC OF GERMANY 13.03.

<sup>156</sup> See BGB § 1409.

must have the approval of the court (Vormundschaftsgericht).<sup>157</sup> Still, both parties to the agreement must be present in front of the notary public.<sup>158</sup> As in French law, the marital agreement should be made before a notary, but the approval of a court is not necessary if the agreement needs to be changed.<sup>159</sup>

The marital agreement should be registered in a special register, kept by a court (Amtsgericht) and called the register of marital regimes (Güterrechtsregister).<sup>160</sup> The registration makes the marital agreement enforceable against third persons from the day of its registration.<sup>161</sup> This duty of registration ensures that third persons know the financial situation of the parties, including the property arrangements made in the marital agreement between the spouses that would impact the scope of property available to the creditors of one of the spouses. The motion to register the marital agreement may be made by either spouse.

Due to this registration, third persons are protected. They may rely on the fact that the spouses are in the regime mentioned in the register. If they are not mentioned because they have changed the regime but their marital agreement has not been published in the register, third parties are not affected.<sup>162</sup> Finally, the register is public and each person who is interested may access it without providing a reason.<sup>163</sup>

### 3. Switzerland

Another example of European regulation of marital agreements is found in Swiss law, which treats the marital agreement as a special kind of contract concluded by spouses or prospective spouses in order to choose or modify their marital regime.<sup>164</sup> In such agreements, spouses are free to introduce general rules regarding the classification of their property and to modify the rules of their marital regime.<sup>165</sup> Spouses are also able to choose their marital regime or change it within the limits introduced by law.<sup>166</sup>

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<sup>157</sup> BGB § 1411.

<sup>158</sup> BGB § 1318.

<sup>159</sup> BGB § 1410.

<sup>160</sup> BGB § 1558.

<sup>161</sup> See ROBBERS, *supra* note 149, at 283.

<sup>162</sup> It does, however, take effect between spouses.

<sup>163</sup> See BGB § 1558.

<sup>164</sup> See Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121, 123 (1998).

<sup>165</sup> See Jacques-Michel Grossen & Olivier Guillod, *Family Law*, in INTRODUCTION TO SWISS LAW, 59, 64 (F. Dessemontet & T. Ansay eds., 3d ed. 2004).

<sup>166</sup> HAMILTON & PERRY, *supra* note 100, at 670.



The default statutory regime is the deferred community of acquisitions (*Errungenschaftsbeteiligung*).<sup>167</sup> In this regime, each spouse has his or her separate property during the marriage and upon divorce there is a distribution of goods.<sup>168</sup> Spouses who decide to remain in this standard statutory regime are free to change the rules of the classification of property.<sup>169</sup> Importantly, if they are entrepreneurs, spouses may choose which property will receive income from their commercial activities.<sup>170</sup> They may also change each other's share in acquisitions.<sup>171</sup>

Spouses may also contract around this default and choose a separate property regime or one of a few types of community property.<sup>172</sup> If community of property is the regime chosen by the spouses, they may decide that their community property will consist only of accruals.<sup>173</sup> They may also establish the rules concerning shares in common property.<sup>174</sup> However, there is a catalog of marital agreements introduced by law and it is forbidden to create regimes containing only certain elements of these different regimes.<sup>175</sup>

The marital agreement (*Ehevertrag*) may be concluded by spouses during a marriage or by prospective spouses (*Brautleute*) before wedlock.<sup>176</sup> In order to conclude a valid marital agreement, spouses must possess legal capacity and the contract must be publicly authenticated.<sup>177</sup> Importantly, the marital agreement may be changed at any time during marriage.<sup>178</sup> Contrary to German law, the ZGB does not contain any requirements to publish the marital agreement in a register, however, a marital agreement can be mentioned in a commercial register.<sup>179</sup>

## B. The Polish Approach

The main subject of the European Part of this Article is Poland's approach to marital agreements. Polish law is interesting for two reasons. First, the Polish approach is different from the American one in many respects. Second,

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See ZGB art. 216–217.

<sup>172</sup> HAMILTON & PERRY, *supra* note 100, at 670.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 673.

<sup>175</sup> *Id.*

<sup>176</sup> ZGB art. 179.

<sup>177</sup> See ZGB art. 180–181.

<sup>178</sup> HAMILTON & PERRY, *supra* note 100, at 673.

<sup>179</sup> See generally ZGB.

Poland's present regulation of marital agreements is quite new and was influenced by the above mentioned regulations, which have longer traditions and are well-established.<sup>180</sup> Nonetheless, the concept of the marital agreement has a long history in Poland, especially when compared with the American history of premarital agreements. Even in communist times, Polish law guaranteed spouses the possibility of contractually opting out of the standard statutory regime.<sup>181</sup>

Marital agreements in Poland are special treaties for spouses.<sup>182</sup> According to Polish law, the marital agreement (*umowa majątkowa małżeńska*, *intercyyza*) is a contract concluded by spouses or prospective spouses in which their property is regulated in a different way than from the default statutory regime.<sup>183</sup> The marital agreement also organizes the property of the spouses and dictates the ownership of each spouse as a rule in the future.<sup>184</sup> The essence of marital agreements is that they classify property after the agreement comes into force. However, it is also possible to conclude an agreement in which spouses introduce separation of property and divide their common property.<sup>185</sup> In such a case, it is unclear whether this agreement should be treated as a marital agreement because it concerns the previous property as opposed to property which may be purchased in the future.<sup>186</sup>

In Poland, freedom of contract in regards to marital agreements is limited. Such limitations are justified by the aim for certainty of transactions, equity for spouses, and protection of family interests.<sup>187</sup> Spouses are free to introduce regimes named in KRO article 47 § 1,<sup>188</sup> but their freedom is confined to the systems provided by law.<sup>189</sup> When the circumstances causing the mandatory regime have ceased, spouses who were in the mandatory regime may decide to reinstate the previous regime or

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<sup>180</sup> It is worth noting that from 1918, when Poland regained its independence, to the end of 1946, German law was in force in west and north Poland and the source of civil law in the central part of Poland was the Napoleonic Code, which was replaced by the civil code of the Kingdom of Poland based on the Napoleonic Code. From 1836 to 1918, the matrimonial law in central Poland was regulated by provisions imposed by the tsarist authorities. For further background, see Andrzej Maczyński, *The Influence of European Family Law on the Family Law of Countries Acceding to the EU. The example of Poland*, in PERSPECTIVES, *supra* note 104, at 239.

<sup>181</sup> See DOMINIK LASOK, POLISH FAMILY LAW 92 (A.W. Sijthoff-Leyden, 1968).

<sup>182</sup> PERSPECTIVES, *supra* note 104, at 240–41.

<sup>183</sup> See generally KRO.

<sup>184</sup> PERSPECTIVES, *supra* note 104, at 240–41.

<sup>185</sup> KRO art. 47.

<sup>186</sup> LASOK, *supra* note 181, at 92.

<sup>187</sup> See PERSPECTIVES, *supra* note 104, at 240–41.

<sup>188</sup> KRO art. 47 § 1.

<sup>189</sup> For further discussion, see LASOK *supra* note 181, at 89–96.

choose one of the regimes mentioned in KRO article 47 § 1.<sup>190</sup> The spouses cannot introduce any other regime apart from those regimes authorized by law.<sup>191</sup>

If spouses do not choose another regime through their marital agreement, the default statutory regime is limited community of property,<sup>192</sup> similar to that of French law.<sup>193</sup> This means that there are three types of assets in the marriage: the community property, the separate property of the wife, and the separate property of the husband. Both spouses own community property jointly, whether or not the property has been purchased jointly or separately.<sup>194</sup> In this regime, however, spouses cannot change the rules concerning the management of property.<sup>195</sup> This prohibition is in force for both the standard statutory regime of community of property and the contractual extended or limited community of property.<sup>196</sup> Spouses are not allowed to modify the rules of the primary regime and the rules concerning the liability of spouses.<sup>197</sup>

This statutory default of limited community of property is problematic, especially when either one or both of the spouses decide to start a commercial activity. The rules of management and liability for debts may make it difficult to be a married entrepreneur or even a shareholder,<sup>198</sup> increasing the importance of having alternate systems into which spouses may contract by means of a marital agreement.

If the spouses decide to extend community property through their marital agreement, however, they are not able to choose universal community property<sup>199</sup> and at least some chattels must belong to the separate property of each spouse, which is a group of chattels that cannot be part of community property. These are enumerated in KRO article 49.<sup>200</sup> Spouses are not allowed to

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<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

<sup>192</sup> For further background on the property system in Poland, as well as on the separation of property, see Elżbieta Skowrońska-Bocian, *Family and Succession Law, in INTRODUCTION TO POLISH LAW* 85, 96–98 (Stanisław Frankowski ed., 2005).

<sup>193</sup> *Id.*

<sup>194</sup> Skowrońska-Bocian, *supra* note 192, at 97.

<sup>195</sup> *Id.* at 98.

<sup>196</sup> To contractually expand or limit community property, couples simply designate more or less of their property as community property. *See also infra* note 204 and accompanying text.

<sup>197</sup> *See, e.g.*, KRO arts. 41 & 48.

<sup>198</sup> For more details, see ANNA STĘPIEŃ-SPOREK, *DZIAŁALNOŚĆ GOSPODARCZA Z UDZIAŁEM MAŁŻONKÓW* (2009).

<sup>199</sup> In this regime, all property is owned by the wife and husband in common. *See Carroll, supra* note 24, at 27.

<sup>200</sup> KRO art. 49.

extend the scope of community property to embrace inalienable rights, compensations for personal injury, or material damage or claims for remuneration for work or personal services outstanding at the time of the marriage.<sup>201</sup> If the spouses decide on a contractual community of property (extended or limited), the rules of administration of community property from the statutory regime are applied.<sup>202</sup> The agreement may have a provision for unequal division of common property upon the end of the regime.<sup>203</sup>

According to KRO article 47 § 1, spouses may extend or limit community property,<sup>204</sup> or choose separation of property<sup>205</sup> or the sharing of accruals.<sup>206</sup> If spouses choose extended or limited property, they may establish that in the case of the liquidation of the community of property, the fractions of each spouse will differ. By choosing the sharing of accruals, spouses may also change the rules of calculation of accruals.<sup>207</sup>

Therefore, the marital agreement regulates the spouses' property during the duration of the chosen agreement. Spouses are free to conclude different contracts, but only a few of these are considered marital agreements because they must fulfill certain conditions. For example, marital agreements must take a special form in order to be valid: if spouses wish to change their matrimonial regime (either the statutory standard regime or the contractual regime), a notary must be involved.<sup>208</sup>

Contrary to American law, the circumstances regarding the formation of the marital agreements in Poland are not as important and are rarely taken into account. For example, Polish law does not pay significant attention to the fair disclosure of each spouse's financial details.<sup>209</sup> However, the general rules concerning defects of a will are applied to marital agreements,

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<sup>201</sup> *Id.*

<sup>202</sup> KRO art. 47.

<sup>203</sup> The end of the community regime is upon divorce, legal separation, nullity of marriage, the introduction of another property regime, the death of a spouse, or in situations when the compulsory regime is applied. The compulsory regime is the separation of property. See Skowrońska-Bocian, *supra* note 192, at 99.

<sup>204</sup> See *id.* at 98–99.

<sup>205</sup> In this regime, spouses hold their property separately.

<sup>206</sup> This regime is similar to the German and Swiss statutory accrual system, as well as to the French deferred community (separation of acquisitions). The general rule of this regime is that during marriage, each spouse is the sole owner of his or her separate property. Upon termination of the regime, the surplus of separate property of both spouses is divided. For further details, see Anna Stępień-Sporek, *Rozdzielność Majątkowa z Wyrównaniem Dorobków*, 7 PAŃSTWO I PRAWO 73 (2008).

<sup>207</sup> Anna Stępień-Sporek, *Sharing of Accruals as the Best Solution for Marriage?*, in FAMILY FINANCES, *supra* note 107 at 371, 375.

<sup>208</sup> KRO art. 47.

<sup>209</sup> See generally KRO.

*i.e.*, the spouse should not be mistaken, under threat, or in a state of mind excluding the conscious making or expressing of the contract.<sup>210</sup>

In Poland, marital agreements may be concluded by both spouses and prospective spouses. If the marital agreement is concluded by prospective spouses, it will not come into force until they are married. If a prospective spouse or a spouse does not have full legal capacity, the consent of the legal representative is necessary, as is the consent of the court.<sup>211</sup> However, the marital agreement may also be concluded by a proxy.<sup>212</sup> The form of the power of attorney is essential. If the marital agreement is to be concluded by prospective spouses, the name of the other prospective spouse should not only be mentioned in the document of the power of attorney, but also given in notarial deed.<sup>213</sup>

The marital agreement—which takes effect either at the moment of conclusion or as established by the spouses—can be changed as often as the spouses desire to change their financial relationships.<sup>214</sup> A similar rule characterizes German and Swiss law.<sup>215</sup>

The marital agreement in Poland has effects in relation to third parties if they are informed of the agreement and of the regime chosen by the spouses.<sup>216</sup> This rule is essential. The regime can affect creditors, who are protected by the above mentioned rule. If the spouses have failed to inform third parties, however, the marital agreement does not have any effect on these third parties. In practice, this kind of situation is very common. Third persons who are not aware of the existence of the marriage contract may assume that the spouses are married under the statutory system.

In Poland, there is no special requirement to register a marital agreement,<sup>217</sup> however, information about marital agreements can be published in commercial registers such as the Krajowy Rejestr Sądowy, the register of companies and stocks, or Ewidencja Działalności Gospodarczej, the register of individuals who are entrepreneurs.

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<sup>210</sup> See Kodeks cywilny – The Law of 23rd April 1964 – art. 82–88 [hereinafter “Kc”].

<sup>211</sup> See KRO art. 101 § 3.

<sup>212</sup> Skowrońska-Bocian, *supra* note 192, at 92.

<sup>213</sup> See Kc art. 99 § 1 and KRO art. 47.

<sup>214</sup> KRO art. 47.

<sup>215</sup> See Boele-Woelki, *Matrimonial Property Law*, *supra* note 138, at 7–8.

<sup>216</sup> KRO art. 47.

<sup>217</sup> See generally KRO.

### III. A COMPARATIVE STUDY

While European countries may differ slightly in their approaches to marital agreements, they all differ markedly from the American approach.<sup>218</sup> These various contrasts illustrate the range of prospective spouses' possibilities in premarital contracting, as well as the options that legislatures have in terms of regulating premarital agreements. A comparison of these varying approaches to premarital agreements also offers important insights regarding the contractual autonomy of the parties, the possible characteristics of premarital agreements, and the popularity of such agreements.

#### A. Contractual Autonomy of the Parties

While European matrimonial property law is codified in each country's civil code, the American tradition of freedom of contract provides spouses with the power to contract around state statutory law on the subject.<sup>219</sup> Americans are therefore not restricted to the property regimes laid out in statutes—whether community property or equitable distribution—and may contract around them subject to few limitations by the court.<sup>220</sup> In fact, spouses may even import into their agreements any of the European property systems, such as a system of accruals.<sup>221</sup> Meanwhile, Europeans are often limited to selecting one of the property regimes statutorily permitted in their countries. Although this permits them to avoid the statutory default, they must nonetheless select one of the regimes recognized by law. Only occasionally may spouses alter the rules of those European systems. Americans therefore enjoy more autonomy in premarital contracting relative to Europeans.

These differing levels of contractual autonomy have differing consequences. For example, the general notion espoused by American law is that people should be able to manage their property as they choose,<sup>222</sup> which also justifies the significant

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<sup>218</sup> Only continental Europe, which abides by the civil law system, differs markedly from the United States. British common law is similar on this subject. *See supra* note 107.

<sup>219</sup> *See, e.g.*, *DeMatteo v. DeMatteo* 762 N.E.2d 797 (Mass. 2002) (discussing freedom of contract with regard to American premarital agreements).

<sup>220</sup> *See supra* Part I for further discussion.

<sup>221</sup> *See supra* Part II.

<sup>222</sup> *See, e.g.*, *Shaffer v. Shaffer*, 733 P.2d 1013, 1016 (Wash. Ct. App. 1987):

Because of this new freedom for marital partners to divide their property as they see fit, the old rule allowing the court to disregard the property division made by the parties in their [separation] agreement if the division does not conform to the trial court's view of an equitable property division, no longer is appropriate.

freedom provided to people in the contracting of their wills.<sup>223</sup> Furthermore, limited contractual autonomy is criticized as being paternalistic and less efficient.<sup>224</sup> However, one consequence of such significant contractual autonomy is that American courts must occasionally find a premarital agreement substantively unenforceable, particularly when one party's imaginative contracting significantly disadvantages the other. In the European countries considered, meanwhile, marital agreements will rarely be substantively or procedurally unenforceable because they must adhere to strict statutory requirements in the first place. Furthermore, European spouses cannot introduce their own regime, but instead must select one of the statutory systems recognized by the law. As the Polish approach illustrates, European courts may therefore be slower to find procedural defects in marital agreements.<sup>225</sup> This may also be due to the fact that these marital agreements must be concluded in the presence of the public notary, whose significant role in civil law countries is much greater than in common law countries.<sup>226</sup>

Nonetheless, there may be a relationship between contractual autonomy and the risk of an agreement's unenforceability. In other words, the less formulaic the premarital agreement, and the less deferential to statutory defaults, the more opportunity for a judicial declaration of unenforceability. In the quest for the right legislative framework to regulate premarital or marital contracting, then, the task becomes to find the right balance between autonomy and the risk of unenforceability.

However, complete autonomy may nonetheless be prioritized because it would permit prospective spouses to choose their own level of risk regarding the enforceability of their agreements. Of course, permitting spouses unrestricted contractual autonomy, thereby allowing them to choose their agreement's risk of

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See also Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206, 223 (Peter Benson ed., Cambridge U. Press 2001) ("Autonomy theories of contract are based on the concept that allowing an individual to freely own and dispose of property and freely exercise his will to make choices concerning his person, labor, and property, is a value that is paramount.").

<sup>223</sup> See, e.g., Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 *IND. L.J.* 513, 516 (1996) ("The freedom of testamentary disposition is a basic principle of property law. Though not a constitutional right, many states recognize freedom of testation as a deeply ingrained tradition in our society."). See also *supra* Part I.D.2.

<sup>224</sup> See *supra* notes 78 and 81.

<sup>225</sup> See *supra* Part II.B.

<sup>226</sup> See JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* 30, [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf) (last visited Dec. 28, 2009).

unenforceability, requires somewhat perfect information. Prospective spouses must not only know that straying from formulaic premarital agreements—as well as from typical legislative defaults—increases their agreements' risk of unenforceability, but they must also be aware of the advantages and disadvantages of choosing particular property regimes and contractual provisions. A lawyer representing each side could help assure this.

Another consequence of unbounded autonomy of premarital contracting, however, is that the courts must continually determine the enforceability of each individual agreement before applying its provisions to a divorce. Scarce judicial resources must therefore be spent, despite the American judiciary's traditional reluctance to meddle in family matters.<sup>227</sup>

Therefore, keeping prospective spouses informed of their options and expending judicial resources to monitor premarital agreements are the consequences to a high level of autonomy in premarital contracting, as illustrated by the American approach to premarital agreements and a comparison of it to European approaches. Nonetheless, every jurisdiction, whether an American state or an European country, must choose its own balance among these factors and costs.

#### B. Potential Characteristics of Premarital Agreements

In searching for an appropriate regulatory framework for premarital contracting, as well as the proper content of such agreements, it is instructive to analyze the desirability of the differing approaches to these agreements, including those that deal with aspects beyond the freedom of contract already considered.<sup>228</sup>

For example, some European countries permit, or even require, the registration of marital agreements in order to protect third parties.<sup>229</sup> This registration aims to give creditors notice as to which assets are available for collection. There is a similar requirement in some American community property states for the recording of separation of property agreements.<sup>230</sup> To give

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<sup>227</sup> As the courts do not typically become involved in the financial arrangements of intact families, spouses are permitted to determine their own responsibilities during marriage. *See, e.g.*, *Kilgrow v. Kilgrow*, 107 So. 2d 885 (Ala. 1958); *State v. Rhodes*, 61 N.C. 453 (N.C. 1868).

<sup>228</sup> *See supra* Part III.A.

<sup>229</sup> *See supra* Part II for examples and discussion.

<sup>230</sup> Carroll, *supra* note 24, at 32.



adequate notice to creditors, the agreement binds the spouses once executed, but binds third-party creditors only if recorded.<sup>231</sup>

Such registration indeed serves an important, albeit lesser-known, purpose of premarital agreements, which is to organize how the spouses hold their assets during the marriage. If spouses hold their property differently from the statutory default, it may be only fair to give notice of this arrangement to third parties who potentially rely on the spouses' property holdings when extending credit.

A third party would be most disadvantaged by a couple secretly opting out of a community property default. In such a case, the third party would ordinarily expect all of the marital assets to be held by each spouse, when in reality, each spouse holds smaller assets separately. However as already mentioned, only a minority of American states utilizes community property as the default system, whereas some European countries use this system as their statutory default. Therefore, public registration of marital agreements is significantly more relevant in the European context.

Americans, meanwhile, maintain the confidentiality of premarital agreements.<sup>232</sup> This effectively reduces third parties' ability to rely on such agreements. Such confidentiality also permits prospective spouses in the United States to contract on intimate details and on their private financial situations. In this way, however, American premarital agreements are often limited to affecting only the married couples who are parties to the agreements.

Finally, in many European countries, prospective spouses must adhere to particular formalities in order to conclude a legally enforceable premarital agreement, such as signing the agreement in front of a notary.<sup>233</sup> There is no such definitive list of requirements in the United States, although a court may subsequently analyze the procedural fairness of the agreement when called upon to enforce the document.<sup>234</sup> Such procedural review may, however, increase the opportunity for the court to find a premarital agreement unenforceable.<sup>235</sup> The level of required formality will therefore inevitably vary from jurisdiction to jurisdiction as each adopts a particular balance between

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<sup>231</sup> See, e.g., *id.*

<sup>232</sup> Guggenheimer, *supra* note 30, at 153.

<sup>233</sup> See, e.g., *supra* note 158 and accompanying text.

<sup>234</sup> See *supra* Part I.D.1.

<sup>235</sup> See *supra* Part III.A.

permitting contractual autonomy and protecting the parties from fraud.

Therefore, choices must be made not only among premarital contracting options, but also among the different regulatory frameworks for such agreements. In choosing the appropriate model, each jurisdiction and couple must therefore weigh the costs of their choices.

### C. Popularity of Premarital Agreements

Premarital agreements are more popular in the United States than in Europe, but not particularly popular in either.<sup>236</sup> There may be several explanations for this current lack of popularity in premarital contracting on both continents. Many commentators suspect, however, that the agreements' popularity will increase in the near future.<sup>237</sup>

Importantly, premarital agreements in the United States might be rare because they need not necessarily be drafted for a higher income prospective spouse to avoid an unfavorable statutory default. This is because the higher income earner would prefer an equitable distribution regime, which often results in an unequal distribution, rather than a community property one, which instead results in an equal division of assets.<sup>238</sup> However, most American states use equitable distribution as the default, mooted the need to alter this regime through a premarital agreement. Many European countries, on the other hand, have a statutory default of some type of

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<sup>236</sup> In the United States, however, the use of premarital agreements tripled between 1978 and 1988 alone. Guggenheimer, *supra* note 30, at 151. "Although it is difficult to get statistics on premarital agreements, it appears that 5% to 10% of couples marrying for the first time and 20% of remarried couples now enter into premarital agreements." Brian McDonald, Presentation to the Western Trial Lawyers Association (June 2005) (transcript available at <http://www.spomcman.com/doc/PREMARITAL%20AGREEMENTS.doc>). Meanwhile, only 2% of British couples marrying seek a premarital agreement. *Divorce Lawyers Braced for Busiest Week Ever*, TIMES ONLINE, January 5, 2009, <http://business.timesonline.co.uk/tol/business/law/article5450552.ece>. In France, only 10% of spouses conclude a marital agreement, and they do so mostly when important assets or second marriages are involved. See HAMILTON & PERRY, *supra* note 100, at 261.

<sup>237</sup> "Premarital agreements are gaining popularity as more people become conscious of the extensive financial rights and obligations arising out of a marriage, and the increasing statistical chance that any marriage will end in divorce." *In re Marriage of Leathers*, 789 P.2d 263, 265 n.5 (Or. 1990) (quoting 12 ABA Family Advocate, No. 3, 54-55 (Winter 1990)). See also Jennifer Kim, *Contesting the Enforceability of a Premarital Agreement*, 11 J. CONTEMP. LEGAL ISSUES 133, 133 (2000); Jennifer L. McCoy, Comment, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 523 (2005).

<sup>238</sup> For further background on the relationship between equitable distribution and community property regimes and their European counterparts, see Carroll, *supra* note 24, at 1.

community property, which might sooner prompt a higher income earner to seek a premarital agreement.<sup>239</sup>

Nonetheless, Americans may use premarital agreements to regulate many of their rights and responsibilities during marriage and divorce, particularly in regards to specific assets they own. Premarital agreements are especially useful to prospective spouses who fit a particular profile. For example, people with children from previous marriages may choose to protect these children's financial future by virtue of a premarital agreement.<sup>240</sup> People may also utilize such agreements when they are skeptical of the institution of marriage because of their own, or their parents', failed marriages.<sup>241</sup> Premarital agreements may also be more common among prospective spouses with significant income or age disparities.<sup>242</sup> Further, prospective spouses may choose to keep their property separate by such agreements so that one can use only his or her portion in paying off debts.<sup>243</sup> Finally, when one partner expects to inherit significant money or a family business, she may decide to request a premarital agreement.<sup>244</sup>

Still, premarital agreements are not frequently used in either Europe or the United States, with most commentators estimating that less than 10% of any of these populations use such agreements.<sup>245</sup> In Europe, this may be due to a potential misunderstanding of the role of the premarital agreement, which most Europeans associate with American celebrity divorces,<sup>246</sup> although the meaning and consequences of premarital agreements in Europe differ from those in the United States.<sup>247</sup> In the United States, meanwhile, the limited use of the premarital agreement may be due to Americans' rather unrealistic sense of optimism regarding their marriages and their fear of signaling divorce.<sup>248</sup> This, as well as the need to

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<sup>239</sup> However, it is true that premarital agreements are unpopular in Europe, as well. See *supra* notes 101, 236 and accompanying text.

<sup>240</sup> Guggenheimer, *supra* note 30, at 152.

<sup>241</sup> *Id.* at 151.

<sup>242</sup> *Id.* at 152.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See *supra* note 236.

<sup>246</sup> See *supra* Part II.A. This may also be because the average premarital agreement is highly confidential. Guggenheimer, *supra* note 30, at 153.

<sup>247</sup> See *supra* Parts I and II.

<sup>248</sup> For the argument that most couples are overly optimistic about their marriages, see Margaret F. Brinig, FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 64, at 276 and Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757-61 (2008). See also *supra* note 2.

protect children from a previous marriage,<sup>249</sup> may also explain why many people are more likely to seek premarital agreements upon second and subsequent marriages. Nonetheless, many prospective spouses around the world are currently choosing not to pursue the benefits offered by premarital contracting, although this may change in the near future.

#### CONCLUSION

In sum, the premarital agreement permits prospective spouses around the world to circumvent their jurisdiction's judicial and statutory defaults in organizing the terms of their marriage and potential divorce. To achieve this force in the United States, the premarital agreement has particularly undergone significant development over the course of the past few decades.

Although the American history of the premarital agreement is relatively short compared to its European counterpart, Americans have quickly achieved unparalleled levels of freedom in marital contracting. This heightened freedom of contract has become one of the most significant differences between the continental European and American approaches to such agreements.

Furthermore, a comparative analysis of these various approaches suggests that the level of autonomy in marital contracts implicates the risk of the agreement's unenforceability by the courts. A comparative study also offers some insights into improving the regulatory frameworks governing these agreements, as well as the reasons behind people's reluctance to use such agreements.

In conclusion, although the premarital agreement has attained significant stability and enforceability in countries around the world, issues surrounding such agreements undoubtedly remain. Specifically, premarital agreements in the United States are subject to procedural and substantive review. They also raise universal public policy issues, particularly in the case of mobile couples, concerning the meaning of fairness and the limits on freedom of contract. As state courts and legislatures continue to encounter and address these issues, they may therefore greatly benefit from a comparative study of such agreements.

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<sup>249</sup> Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J.L. & FEMINISM* 229, 238–39 (1994).