

Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer

by
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I. Introduction

It may well have been rapper Kanye West's "Gold Digger," which topped the charts a few years ago, that ultimately brought prenuptial agreements into the cultural mainstream. In extolling the virtues of the prenuptial agreement, the song warns that without one, the football star you see "on TV any given Sunday" win[s] "the Superbowl and drive[s] off in a Hyundai." Later, the chorus pounds away "we want prenup! we want prenup!"¹

Kanye's enthusiasm for prenuptial agreements is hardly unique, and they have become more popular in the past several years.² This makes it all the more imperative that matrimonial lawyers understand the permissible scope of this critical document. This article focuses on the scope of what is permissible to include in a prenuptial agreement.

A prenuptial agreement is "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage that fixes the respective financial obligations

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¹ Kanye West, "Late Registration," (Roc-A-Fella Records, LLC 2005).

² Jonathan E. Fields, *Prohibited Subject Matter in Prenuptial Agreements*, § 1.01 2006 FAMILY LAW UPDATE (Ronald L. Brown & Laura W. Morgan, eds., Aspen Publishers, 2006).

and consequences of married couples upon death and/or divorce.”³

II. Agreements That Promote Divorce

At common law, one of the rationales in support of the proposition that prenuptial agreements were void *ab initio* was that they were thought to promote divorce.⁴ While this is no longer the case, a particular agreement that “tends unreasonably to encourage divorce or separation” will be unenforceable.⁵ Indeed, modern courts continue to express this rule in *dicta* but have only invalidated prenuptial agreements on these grounds in a handful of cases—two of them from California, a state that appears to have retreated from that position.

The first case, *In re Noghrey*,⁶ involved an agreement whereby, in the event of divorce, the prospective husband would give the prospective wife an amount the appellate court found to be both oversized in comparison to the rest of the estate and so financially tempting to the wife that it spurred her into getting a divorce. The agreement, therefore, was invalidated.

In the second case, *In re Dajani*,⁷ the agreement provided that the wife receive the equivalent of 5,000 Jordanian dinars (about \$1,700), upon divorce. Incredibly, despite the fact that the wife stood only to receive \$1,700 (in 1988), the court held that “the contract clearly provided for the wife to profit by a divorce,” and found it invalid. It is difficult to imagine any agreement in contemplation of divorce that would survive a *Dajani* analysis.

California’s appellate court, in a subsequent case, *In re Marriage of Bellio*,⁸ reiterated the general rule that agreements promotive of divorce are unenforceable, but expressly stated its belief that *Dajani* was wrongly decided. “A dowry worth

³ See Fields, *supra* note 2, at §1.01.

⁴ See generally *id.*

⁵ *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981). See also 7 *Williston on Contracts* § 16:19 (4th ed. 2007)(stating that a contract promoting divorce will not be upheld). See also *McHugh v. McHugh*, 436 A.2d 8, 12 (Conn. 1980).

⁶ 215 Cal. Rptr. 153 (Cal. Ct. App. 1985).

⁷ 251 Cal. Rptr. 871 (Cal. Ct. App. 1988).

⁸ 129 Cal. Rptr. 2d 556 (Cal. Ct. App. 2003).

\$1,700,” noted the court, “is insufficient to jeopardize a viable marriage.”⁹

For the most part, the practitioner seeking to invalidate a prenuptial agreement on the grounds that it encourages divorce has a difficult challenge. One area, however, where it may be possible to persuade a court on this score concerns escalator clauses (in which the amount of property or support increases upon attaining certain marriage milestones). Arguably, if the spouse can save himself money by filing before a certain deadline, this might promote divorce. Consider the high profile case of Donald Trump when he filed for divorce against Marla Maples on the eve of an anniversary deadline.¹⁰ Although the issue has hardly been addressed in the case law, a Connecticut court has held void a prenuptial agreement providing a lump sum of \$25,000 for each year of marriage on the grounds that it facilitated and promoted divorce.¹¹

III. Spousal Waivers in ERISA Plans

A. Survivor Benefits

ERISA-covered pension plans pose special challenges for the domestic relations practitioner.¹² The anti-alienation provisions prevent them from being divided or transferred except through the mechanism of a qualified domestic relations order (QDRO).¹³ The drafter of a prenuptial agreement needs to take

⁹ *Id.* at 559.

¹⁰ LAURA W. MORGAN & BRETT R. TURNER, *ATTACKING AND DEFENDING MARITAL AGREEMENTS* 380 (ABA 2001).

¹¹ *Davis v. Davis*, No. FA 950144807S, 1996 WL 456335 (Conn. Super. Ct., July 29, 1996).

¹² The Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1001-1461 (2007).

¹³ A QDRO is a type of domestic relations order that “creates or recognizes the existence of an alternate payee’s rights to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.” 29 U.S.C. § 1056(d)(3)(B) (2007). The purpose underlying the anti-alienation provision was to operate as a spendthrift, to safeguard and to prevent dissipation of retirement funds, *Boggs v. Boggs*, 520 U.S. 833, 850, *reh’g denied*, 521 U.S. 1138 (1997). Congress created the QDRO mechanism as a limited exception in order to protect the financial security of ex-spouses and dependents after divorce. *Id.* The United States Supreme Court recently granted certiorari on the issue of whether the Fifth Circuit was

special care, as well, with regard to ERISA qualified plans, since the statute limits the ability of parties to waive certain ERISA rights.

At the crux of the matter is the Retirement Equity Act of 1984,¹⁴ which amended ERISA for many reasons, one of which was “to ensure that a participant’s spouse receives survivor benefits from a retirement plan even if the participant dies before reaching retirement age.”¹⁵ It dictated that defined benefit and certain other covered pension plans¹⁶ were required to provide for a “qualified pre-retirement survivor annuity” that, by operation of law, would go to the participant’s surviving spouse unless waived in favor of another beneficiary with the written consent of the *spouse*.¹⁷

Regarding whether a waiver in a prenuptial agreement constitutes an effective spousal waiver, the position of the Department of the Treasury is unequivocal. According to the regulations, “an agreement entered into prior to marriage does not satisfy applicable consent requirements.”¹⁸ Because the signatories to prenuptial agreements are not yet “spouses,” most courts have interpreted the law similarly and have found that a

correct in holding that a QDRO was the only valid way a divorcing spouse can waive her right to receive her ex-husband’s pension benefits under ERISA. *Kennedy v. Plan Adm’r for Dupont Savings and Inv. Plan*, 2008 WL 423542, 76 USLW 3276, 76 USLW 3425 (U.S. Feb 19, 2008) (NO. 07-636).

¹⁴ Pub. L. No. 98-397, 98 Stat. 1429, amending 26 U.S.C. §§ 401. This law is also referred to by its acronym “REA.”

¹⁵ *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992). *See also* *Hawxhurst v. Hawxhurst*, 723 A.2d 58, 64 (N.J. Super. Ct. 1998) (citations omitted) (“ERISA, as amended by the Retirement Equity Act of 1984, also acts to safeguard the financial security of widows by mandating that pension plans provide automatic survivor benefits.”).

¹⁶ *See* 29 U.S.C. § 1055 (stating that all defined benefit plans plus various other plans defined in the statute are subject to the requirement).

¹⁷ “Specifically, the waiver of a surviving spouse’s right to benefits is not valid unless (1) it is in writing; (2) it either recites the alternative beneficiary or expressly permits the employee to designate an alternate without further consent of the spouse; and (3) it ‘acknowledges the effect’ of the waiver and is notarized or witnessed by a plan representative. In addition, the waiver must be made within the “applicable election period.” *In re Marriage of Rahn*, 914 P.2d 463, 465 (Colo. Ct. App. 1995), *citing* 29 U.S.C. §§ 1055(c)(2)(a) and 1055(c)(1)(A).

¹⁸ 26 CFR §1.401(a)-20.

prenuptial agreement is ineffective to waive survivor benefits.¹⁹ The concept is rudimentary; as one court put it, “a spouse-to-be is not a spouse.”²⁰ Considering the judicial deference that courts must give to agency interpretations, this is a difficult hurdle for proponents of prenuptial agreements to jump.

As litigants continue to feel that the intentions of their dearly departed are being frustrated by the procedural requirements of the law, they have urged courts, without much success, to consider the *intentions* of the parties. Most courts find, however, the fact of the purported waiver in the prenuptial agreement, along with the fact that the deceased named people other than his surviving spouse as survivor beneficiaries with the plan administrator, to be irrelevant.

As to the scope of the waiver, practitioners should remember that ERISA only protects surviving *wives* and, more importantly, that the statute is construed quite literally: one has to be both *surviving* and a *wife* to enjoy the protections of ERISA’s spousal waiver law.²¹ Practitioners must also remember that most courts have held that the law only applies to survivor

¹⁹ Hagwood v. Newton, 282 F.3d 285 (4th Cir. 2002); National Auto Dealers v. Arbeitman, 89 F.3d 496 (8th Cir. 1996); Pedro Enter. v. Perdue, 998 F.2d 491 (7th Cir. 1993); Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (6th Cir. 1992); Nellis v. Boeing Co., 1992 WL 122773 (D. Kan. 1992); *see also* Greenbaum Doll & McDonald PLLC v. Sandler, Nos. 06-6494, 06-6496, 2007 WL 4232825 (6th Cir. Dec. 3, 2007); John Deere Deferred Savs. Plan For Wage Employees v. Propst, 2007 WL 4594681 (E.D. Wis. 2007). *But see* Hurwitz v. Sher, 982 F.2d at 781 (finding prenuptial agreement to be ineffective waiver but reserving judgment whether the agreement might have been an effective waiver “if its only deficiency were that it had been entered into before the marriage.”); In re Estate of Hopkins, 574 N.E.2d 230 (Ill. App. Ct. 1991) (appearing to be the only decision holding that a premarital agreement constituted a valid waiver of survivor benefits).

²⁰ “Because the IRS is an agency ‘entrusted to administer’ the tax counterpart of ERISA, we defer to its interpretation of 26 U.S.C § 417 (a),” citing Chevron U.S.A., Inc. v. National Res. Def. Council, Inc., 467 U.S. 837 (1984), and Hurwitz v. Sher, 982 F.2d at 782 (applying Treas. Reg. § 1.40 1(a)-20 to support a conclusion that premarital agreement did not waive spousal benefits under § 205 of ERISA). *See also* Hagwood v. Newton, 282 F.3d at 290.

²¹ *See generally* Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919 (2007).

benefits. ERISA does not protect “a divorcing spouse’s *marital interest* in a surviving spouse’s pension plan.”²²

In *In re Marriage of Rahn*,²³ the parties prepared (one week before the wedding and without the assistance of counsel) and entered into a prenuptial agreement, in which each party waived all claims to the property of the other. At the time, the husband had a vested interest in a pension plan provided by his employer, an airline.

Ten years later, the parties filed a co-petition for divorce and the trial court held that the prenuptial agreement was an effective waiver of any interest in the husband’s pension plan. The wife appealed, arguing *inter alia* that the prenuptial agreement did not constitute an effective waiver of her spousal rights to the husband’s pension because she never executed a post-marital waiver as required by ERISA. The husband argued that the spousal waiver statute²⁴ applies only to waivers of *survivor benefits* and not to any other pension benefits, and that his wife was therefore free to waive rights to his pension *other than survivor benefits*. The court agreed. As an ex-wife whose ex-husband was alive, she probably took little comfort in the court’s finding that the prenuptial agreement was ineffective to waive survivor benefits.²⁵

The *Rahn* interpretation has been almost universally followed.²⁶ In *Critchell v. Critchell*,²⁷ the court found that the pre-

²² *Savage-Keough v. Keough*, 861 A.2d 131, 137 (N.J. Super. Ct. 2004) (emphasis added).

²³ 914 P.2d 463 (Colo. Ct. App 1995)

²⁴ 29 U.S.C. § 1055.

²⁵ *See also* *Sabad v. Fessenden*, 825 A.2d 682, 695 (Pa. Super. Ct. 2003) (citations omitted), noting that “the spousal rights under ERISA do not survive a judgment of divorce and once a divorce is granted, the survivorship benefits are moot”.

²⁶ *Savage-Keough*, 861 A.2d at 131; *Moor-Jankowski v. Moor-Jankowski*, 222 A.D.2d 422 (N.Y. Ct. App. Div. 1995); *Edmonds v. Edmonds*, 710 N.Y.S.2d 765 (Sup. Ct. 2000); *Stewart v. Stewart*, 541 S.E.2d 209 (S.C. 2000). *But see* *Richards v. Richards*, 640 N.Y.S.2d 709 (1st Dept. 1995) (holding that a prenuptial agreement did not bar a nonparticipant spouse from equitable distribution of her participant spouse’s pension). The *Richards* decision has been criticized for its failure to distinguish between survivor benefits and other interests in ERISA plans. *See* *Sabad*, 825 A.2d at 697, in which the Pennsylvania court, interpreting New York law, rejected *Richards* in favor of *Moor-Jankowski*, 222 A.2d 422.

nuptial agreement at issue operated to waive a former spouse's property interest (as distinct from her survivor annuity)²⁸ in her former husband's pension. In *Critchell*, as in *Rahn*, the court noted that ERISA's spousal waiver provision²⁹ does not address a former spouse's capacity to waive her property interest in her husband's pension at the time of divorce. The spousal waiver statute "does not create or afford a former spouse any substantive rights."³⁰ The divorcing spouse's right to a property interest in pension benefits, the court reminded, is only a function of state domestic relations law.

Even if a spouse executes a valid post-marital ERISA waiver, there can be problems with enforcement if that spouse is under 35 years of age at the time of execution. Practitioners should note that the statute provides that the waiver becomes ineffective on the nonparticipant spouse's 35th birthday and the spouse must execute a new waiver.³¹

B. Rollovers

The question of rollovers can complicate matters. What happens, for example, when a pension in existence at the time that a prenuptial agreement is executed has been rolled over to an IRA by the time of the parties' divorce?

The husband in *Hawxhurst v. Hawxhurst*³² found out the answer the hard way. The prenuptial agreement provided that his wife was entitled to 50 percent of his assets in the event of a divorce after a marriage of five years or longer. About five months before he filed a complaint for divorce, Mr. Hawxhurst took an early retirement package from his employer, New Jersey Bell. As part of the package, he took a lump-sum distribution of his pension benefits which was accomplished by a rollover of the pension funds to an IRA (a non-ERISA asset) in his name. The

²⁷ *Critchell v. Critchell*, 746 A.2d 282(D.C. 2000) (citations omitted).

²⁸ *Id.* at 284. But, as noted earlier, this is of no comfort to the divorced spouse whose ex-spouse is still alive.

²⁹ 29 U.S.C. § 1055.

³⁰ *Critchell*, 746 A.2d 58 (N.J. Super. App. Div. 1998).

³¹ Denise K. Mills, *Beware of the Trap—Marital Agreements and ERISA Benefits*, 23 COLO. LAW. 577, 599 (1994); 29 U.S.C. § 1055(c)(7)(b).

³² 723 A.2d 58, 65 (N.J. App. Div. 1998).

funds were never commingled and were directly traceable to the pension funds.

Mr. Hawxhurst argued that, under ERISA, his wife was not entitled to the IRA because those funds originated from his pension and were therefore “forever sheltered” by ERISA. The court disagreed, holding that once the funds were distributed, ERISA’s anti-alienation provisions no longer protected them. The benefits of the pension, the court concluded, are protected “only while they are within the fiduciary responsibility of the fund manager.”³³

Considering the landscape of this area, creative drafting is imperative and, to that end, a few considerations are offered. Counsel would be wise to include in their agreements provisions requiring that the participant spouse provide to the nonparticipant spouse a waiver form within a certain time frame and that the latter be required to execute the waiver within a certain time period following their marriage. If the waiver is delivered and properly executed, of course, there is no problem.

If, however, the waiver is neither delivered nor executed, the participant spouse can take the extraordinary act of seeking specific performance of the contract. Although actions regarding issues arising during an intact marriage are “generally frowned upon as disruptive of marital harmony,” courts have intervened in some cases.³⁴ Of course, a plaintiff-spouse who files such a suit may soon find himself a defendant-spouse in divorce court.

This does not necessarily mean that a party who executed a prenuptial agreement purporting to waive survivor benefits cannot ultimately be held to his bargain. Assume that parties entered into a prenuptial agreement containing the provisions set forth above, and one party, the wife, failed to sign the waiver following the marriage despite a clear directive in the agreement to do so. The husband died and she sought her statutorily pro-

³³ *Id.*, citing *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 39 F.3d 1078, 1082 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

³⁴ See generally ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 110.75 (2d ed. 2002). See *id.* at § 110.75(2)(c) (“When the [prenuptial] agreement provided for the husband to purchase a life insurance policy in a specified amount for the wife’s benefit, she could sue during the marriage to specifically enforce the obligation.”), citing *Lloyd [sic] v. Lloyd [sic]*, 48 S.E.2d 365 (Ga. 1948).

tected survivor benefit. The plan refused to disburse, arguing that the prenuptial agreement operated as a waiver to benefits. The wife filed suit, taking the position, consistent with that of the Department of Treasury regulations and most courts, that the agreement did not constitute a valid waiver. The trial court and the appeals court found for the wife and directed the plan administrator to disburse proceeds in accordance with ERISA. The plan administrator disbursed the proceeds to the surviving spouse.

The executor of the decedent's estate may not, however, be out of remedies. He may have a cause of action against the surviving spouse for breach of the prenuptial agreement. As one court put it:

If [the decedent husband] was prevented from filing a fully executed designation form with the plan administrator because of a breach by [his wife, the surviving spouse] of her solemn undertaking to sign the form, we see no reason at all why [the executor] may not hold her to her bargain and require her to disgorge whatever benefits she receives as a result of the breach.³⁵

The counter suit by the executor is not itself without flaws. A surviving spouse seeking to avoid the agreement may argue that the action is merely a way to circumvent ERISA and thus should be dismissed. Indeed, in one case, the decedent's estate argued that the court should compel the surviving spouse to uphold her end of the bargain. The court rejected the estate's "attempt to circumvent the requirements of valid consent under ERISA."³⁶

To shore up the enforcement prospects of their agreement, drafters of prenuptial agreements may wish to attach the consent form as an exhibit to the agreement. An agreement might also require that if the waiver is not executed within a particular time frame, then the participant spouse is appointed as the non-participant spouse's attorney-in-fact for the specific purpose of completing the waiver.³⁷ (However, it is not clear that a particular

³⁵ Callahan v. Hutsell et. al. 1993 WL 533557 (6th Cir. 1993). See also John Deere v. Estate of Propst, 2007 WL 4594681 (E.D. Wis. 2007) in which the court held that ERISA preempted any such contract claim that the estate might assert.

³⁶ Zinn v. Donaldson Co., 799 F. Supp. 69 (C.C.D. Minn. 1992).

³⁷ Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB.

plan may be compelled to accept this as a valid waiver). Drafters could also include a provision that gives the owner's beneficiaries a cause of action against the surviving spouse if he fails to execute a spousal waiver.³⁸

Drafters may also wish "to include a provision whereby a spouse's share of other property passing by virtue of the agreement will be reduced if the spouse eventually receives the pension benefits which were [purportedly] waived in the agreement."³⁹ Akin to this provision is one that has a "specific remedy for failure to comply with the waiver, including damages."⁴⁰ In this case, the agreement should further stipulate that if the spouse does not sign the waiver, "he or she will pay damages to the designated beneficiaries."⁴¹ Similarly, an agreement might contain a clause stating that the failure to execute a post-marital waiver "will cause money received by the spouse from the retirement plan to go into a constructive trust for the designated beneficiaries."⁴²

IV. Waivers of Permanent Alimony, Temporary Alimony, and Counsel Fees

The Uniform Premarital Agreement Act explicitly allows parties to make agreements regarding "the modification or elimination of spousal support"⁴³ and "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."⁴⁴ The American Law Institute, in its *Principles of the Law of Family Dissolution: Analysis and Recommendations*, suggests a broad scope regarding what subject matter can be included in prenuptial agreements and, accordingly, the waiver of alimony is permissible in its rec-

& TR. J. 1 (2002). This author has found no case law in which these types of provisions are discussed.

³⁸ *Id.*

³⁹ Mills, *supra* note 31, at 579.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35, § 3(a)(4) at 43 (2001).

⁴⁴ *Id.* § 3(a)(8) at 43.

ommended statutory framework.⁴⁵ In states that have not adopted the UPAA, the trend has been to allow parties to make such agreement. No states have yet adopted the ALI Principles.

Although such waivers were prohibited at common law, as of February 2008, 43 jurisdictions now permit parties to waive alimony in a prenuptial agreement or, more precisely, they are no longer void *per se*.⁴⁶

In all states that permit waivers of alimony, these waivers will not be enforced if the enforcement would render the spouse a public charge.⁴⁷ Furthermore, waivers in a given case may be stricken as a result of either the substantive or procedural fairness tests in a particular state as applied to the particular set of facts before the court. Although alimony in modern U.S. law is now generally a proper subject matter for inclusion in a prenuptial agreement, the alimony provision will rise or fall according to the factual circumstances of the case and the law of the applicable state.

The issue of temporary alimony is, however, a different matter altogether. The majority U.S. rule is that spouses have a duty to support one another during the marriage and that parties cannot agree to terms that hold them harmless from support obligations in coverture.⁴⁸ Because temporary alimony is support that is rendered prior to the judgment of final divorce and, therefore, during the marriage, many courts have viewed prenuptial agreements as invalid to the extent that they relieve one spouse of his duty to support the other spouse.⁴⁹ According to one treatise,

⁴⁵ American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendation, ch. 7 (2002) [hereinafter "ALI Principles"].

⁴⁶ *Id.*

⁴⁷ See, e.g., *Bassler v. Bassler*, 593 A.2d 82 (Vt. 1991) (enforcement of agreement was contrary to public policy when wife was on welfare at the time of the hearing).

⁴⁸ LINDEY & PARLEY, *supra* note 35, at § 110.69, citing *McHugh v. McHugh*, 436 A.2d 8 (Conn. 1980); *Eule v. Eule*, 320 N.E.2d 506 (Ill. 1974); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970); *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978); *French v. McAnarney*, 195 N.E. 714 (Mass. 1935); *Estate of Lord*, 602 P.2d 1030 (N.M. 1979); *Mirizio v. Mirizio*, 150 N.E. 605 (N.Y. 1926); *Motley v. Motley*, 120 S.E. 422 (N.C. 1961).

⁴⁹ LINDEY & PARLEY, *supra* note 35, at § 110.69, citing *Eule*, 320 N.E.2d 506.

even including such a provision in an agreement might render the whole agreement void.⁵⁰

Shortly after Florida opened the doors for prenuptial agreements in its state and the rest of the country in *Posner v. Posner*,⁵¹ the Supreme Court of Florida, in *Belcher v. Belcher*,⁵² confronted another prenuptial agreement. In fact, the line of Florida cases following *Belcher*⁵³ illustrates the policy concerns underlying the general prohibition against the waiver of temporary support.

As distinguished from *Posner*,⁵⁴ whose agreement sought only to apply following the party's divorce, in *Belcher*,⁵⁵ the agreement contained a blanket waiver of "any and all" claims that the wife would have against the husband. Mrs. Belcher filed a suit for alimony unconnected with a divorce. Mr. Belcher sought enforcement of the prenuptial agreement that he argued, barred his wife's claim of alimony and counsel fees.

The court rejected the husband's claim, holding that the duty of support includes the obligation to pay alimony and counsel fees for "so long as she has the legal status of wife."⁵⁶ Permanent alimony after divorce, the *Belcher* court noted, "is another matter."⁵⁷ Other Florida cases have followed *Belcher*.⁵⁸

In *Fechtel v. Fechtel*,⁵⁹ a Florida appellate court dealt with the issue of counsel fee waivers. The court there upheld a prenuptial agreement that provided that, in lieu of alimony and counsel fees, the husband would pay the wife ten dollars in the event of a divorce. The wife challenged the trial court holding that the agreement was valid. The appellate court found that the agreement was valid except for the provision waiving counsel

⁵⁰ FAMILY LAW AND PRACTICE § 59.05 (15)(a) (Matthew Bender 2004) (citations omitted).

⁵¹ 233 So. 2d 381, 383 (Fla. 1970).

⁵² 271 So. 2d 7 (Fla. 1972).

⁵³ *Id.*

⁵⁴ *Posner*, 233 So. 2d 381.

⁵⁵ 271 So. 2d at 12.

⁵⁶ *Id.* at 12.

⁵⁷ *Id.* at 10.

⁵⁸ For an article criticizing the *Belcher* rule, see Christopher Chopin, *Nuptial Dentistry: Adding Teeth to Waivers of Temporary Support, Attorneys' Fees and Costs in Marital Agreements*, 77 FLA. B.J. 48 (Aug. 2003).

⁵⁹ 556 So. 2d 520 (Fla. Dist. Ct. App. 1990).

fees. “A husband’s spousal support obligation during coverture includes liability (as determined using the usual needs/ability to pay test) for his wife’s pre-judgment attorney’s fees and cannot be contracted away.”⁶⁰

More recently, a Florida appellate court in *Lashkajani v. Lashkajani*⁶¹ struck down a provision in a prenuptial agreement that sought to award counsel fees to the prevailing party if the other spouse contested the validity of the agreement. The court held that the provision was invalid because it had the effect of waiving the husband’s obligation to pay counsel fees during the marriage.

A minority of courts have held that a waiver of temporary support is valid and enforceable. In those cases, traditional contract interpretations are fundamental to the outcomes.

The agreement in *Beal v. Beal*⁶² provided that the wife “shall receive no alimony upon divorce.”⁶³ The trial court had awarded temporary alimony to the wife and the husband appealed arguing that she had waived temporary alimony. The court rejected his claim. The *Beal* court held that, although a prenuptial agreement can permissibly waive temporary alimony, this one did not. By its terms, the agreement sought only to terminate alimony “upon divorce.”⁶⁴ Temporary alimony, by definition, occurs prior to the divorce. The lesson? Be careful what you wish for: the husband, to his dismay, was held to the agreement.⁶⁵

Finally, related to the duty of interspousal support are cases involving agreements that seek to define expenses shared during the marriage. A California case, *In re Mathiasen*,⁶⁶ is illustrative. In *Mathiasen*, the parties entered into a prenuptial agreement whereby the husband and wife agreed to share expenses on an equal basis. The parties filed for divorce and the wife sought reimbursement pursuant to the agreement on the basis that she paid more than her half. The court found that the agreement was

⁶⁰ *Id.* at 520.

⁶¹ 855 So. 2d 87 (Fla. Dist. Ct. App. 2003).

⁶² 88 P.3d 104 (Alaska 2004).

⁶³ *Id.* at 113.

⁶⁴ *Id.*

⁶⁵ See also *Darr v. Darr*, 950 S.W.2d 867 (Mo. Ct. App. 1997); *Rubin v. Rubin*, 690 N.Y.S.2d 742 (N.Y. App. Div. 1999); *Kelm v. Kelm*, 623 N.E.2d 39 (Ohio 1993); *Musko v. Musko*, 697 A.2d 255 (Pa. 1997).

⁶⁶ 268 Cal. Rptr. 895 (Cal. Ct. App. 1990).

void because it sought to affect the statutory obligation requiring spouses to support each other during marriage.

To the same effect is another California case, *Borelli v. Brisseau*.⁶⁷ There, the parties had entered into a prenuptial agreement concerning rights to property in the case of divorce and death. Following the marriage, the husband became ill. Eager to leave the nursing home and return to his own bed, he struck a deal with his wife. If she would care for him at the marital home, he would “leave” to her certain property.

The husband died and the wife sought to enforce the modified agreement. The court found that because the wife already owed her husband a duty to take care of him in sickness, the modified contract was not supported by new consideration and, therefore, was unenforceable.⁶⁸

Finally, in *Towles v. Towles*,⁶⁹ the parties had entered into an agreement whereby the wife promised never to bring any suit, including a divorce suit, against her husband. The wife filed suit and the Supreme Court of South Carolina found the agreement to be void on the grounds that the husband had a duty to support his wife and that the wife had no means of enforcing that right if the agreement were enforced.

V. Child Support and Child Custody

Not surprisingly, provisions in a prenuptial agreement purporting to affect the rights of the parties’ children are void as against public policy. Provisions limiting child support are unenforceable, as are provisions that seek to dictate the custody of a child or a parenting schedule unless the disposition is also in the best interests of the child.⁷⁰

⁶⁷ 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

⁶⁸ *Id.*

⁶⁹ 182 S.E.2d 53 (S.C. 1971). Two things should be noted about *Towles*. First, it involved a post-marital “reconciliation agreement,” although the same rationale would clearly apply to a prenuptial agreement. Second, it was overruled on equal protection grounds insofar as it held that a husband had a duty to support his wife. The modern duty speaks to spousal obligations generally. *Hardee v. Hardee*, 585 S.E.2d 501, 504 (S.C. 2003)

⁷⁰ See *MORGAN & TURNER*, *supra* note 10, at 390, *citing* *Kilgrow v. Kilgrow*, 107 So. 2d 885 (Ala. 1958); *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990) (noting, in *dicta*, that issues of child support, child custody, and

One impact of this general rule that is less obvious but critical to understand concerns the ability of a custodial parent in the context of a divorce to remain in the marital home with the children until they are emancipated. In some states, this is referred to as a “traditional child support provision.”⁷¹ In the appropriate case, counsel should argue that, although a prenuptial agreement may be valid, the custodial parent’s rights to remain in the marital home is unaffected by the agreement.

The proscription against custody provisions can also affect prenuptial waivers of counsel fees in cases where such fees have been incurred for custody issues. In a Washington case, the parties entered into a prenuptial agreement containing broad fee waiver language.⁷² While the wife was still pregnant with their first child, the husband filed for divorce; both parties sought custody of the infant daughter, and the wife incurred about \$31,000 in connection with litigating these child-related issues.

The trial court denied the wife’s request for an award of counsel fees on the basis that the prenuptial agreement barred such relief. The wife argued that the state has an interest in protecting the ability of a financially weaker party to contest custody issues in the name of “protecting its youngest and most vulnerable citizens.”⁷³ To achieve this, the wife argued the parties must have a level playing field where both parents have “equal access to the courts to present their evidence regarding which parent is more fit to be the primary parent.”⁷⁴ The appeals court, accepting the wife’s argument, reversed; the court held that, to the extent a counsel fees prohibition in a prenuptial agreement seeks to bar fees incurred in litigating a parenting plan, it is unenforce-

visitation cannot be waived in a prenuptial agreement); *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986) (child support not waivable by prenuptial agreement). *See also* *Combs v. Sherry-Combs*, 865 P.2d 50, 54 (Wyo. 1993) (provision in post-nuptial agreement providing custody to be granted to the same-sex parent is void as against public policy); RESTATEMENT (SECOND) OF CONTRACTS § 191; LINDEY & PARLEY, *supra* note 35, at § 110.69. *See also generally* ALI Principles, *supra* note 46, at ch.7.

⁷¹ *Hartog v. Hartog*, 535 N.E.2d 239 (Mass. App. Ct. 1989); *see also* *Tatar v. Schuker*, 874 N.E.2d 481 (Mass. App. Ct. 2007).

⁷² *In re Marriage of Burke*, 980 P.2d 265 (Wash. Ct. App. 1999).

⁷³ *Id.* at 267.

⁷⁴ *Id.*

able.⁷⁵ In any event, the case should encourage counsel litigating prenuptial agreements to segregate child-related billing in these matters.

Way off the beaten track is the issue of pet custody. Animals have long been regarded as personal property in the law and, to that extent, a pet custody provision in a prenuptial agreement should, arguably, be specifically enforced. One argument against such specific enforcement might be that the person identified as the owner of the pet in the agreement has abused the animal in the past.⁷⁶

VI. Regulation of Conduct During the Marriage

Courts have rarely considered and generally refused to enforce prenuptial agreements regulating the rules of conduct during the marriage, in keeping with “the well-established rule that it is improper for courts to intervene in a married couple’s daily domestic affairs.”⁷⁷ At least one commentator sympathizes with this judicial reluctance, wondering whether “courts simply do not want to enforce agreements that provide that a treasured snowball collection may be kept in the freezer; that one party must walk the dog, or that a husband has the option to sue for divorce if his wife gains more than fifteen pounds.”⁷⁸

Cases actually litigated between spouses during an intact marriage are particularly rare. In one such case, during an intact marriage, parents became involved in a dispute regarding whether to send the child to a particular school. The court, in *Kilgrow v. Kilgrow*,⁷⁹ found that it was without jurisdiction to act in the matter because the “controversy involved a family dispute

⁷⁵ *Id.* at 266.

⁷⁶ See generally, Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 *ANIMAL L. & ETHICS* 231 (2007); see also Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 *J. AM. ACAD. MATRIM. LAW.* 1 (2006).

⁷⁷ Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 *J. AM. ACAD. MATRIM. LAW.* 1, 8 (1992).

⁷⁸ Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 *STAN. L. REV.* 887, 900 (1997), referring to actual agreements reported in Judith Rehak, *Prenuptial Accords: Walking Down the Aisle and Reading Fine Print*, *INT’L HERALD TRIB.* 14 (Feb. 25, 1995).

⁷⁹ 107 So. 2d 885 (Ala. 1959). The prenuptial agreement at issue provided that the children born of the marriage were to be educated in the religion of the

and there was no question concerning the custody of the child, and the parents and the child were all living together as a family group.”⁸⁰

Other reasons for the courts’ lack of enthusiasm for becoming involved in intact marriages are enforcement difficulties and the complexity of gauging economic injury. As one commentator notes, “a court would be ill-equipped to specifically enforce a provision allocating housework between the spouses, or to measure the value of such work in awarding damages for a spouse’s failure to perform.”⁸¹

While courts are less than eager to make pronouncements about which spouse should clean the bathroom or do the dishes, they are more inclined to render judgment if the issue is about money. Indeed, although still quite rare, courts have enforced agreements regarding the *financial consequences* of divorce or deaths even where the spouses are in intact marriages.

In one such case, a prenuptial agreement provided that the husband purchase a life insurance policy in a specified amount for the wife’s benefit. The court in that case held that the wife could sue during the marriage specifically to enforce the obligation.⁸²

In another case, a spouse was permitted to seek a declaratory judgment during an intact marriage regarding the interpretation of a prenuptial agreement. The wife in *Trossman v. Trossman*⁸³ asserted that, if her husband predeceased her, she intended to exercise her rights to dower and to her intestate share. The husband, in response, filed a complaint for declaratory judgment that the prenuptial agreement barred her from taking under the intestacy statute. The wife sought to dismiss the action on the grounds that her husband’s complaint failed to state a cause of action. The court rejected the wife’s argument, finding

father. The school to which the father wanted the child to go was associated with his particular religious denomination.

⁸⁰ *Id.* at 888.

⁸¹ Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1060 (1993).

⁸² *Loyd v. Loyd*, 48 S.E.2d 365 (Ga. 1945). See also Faith H. Spencer, *Expanding Marital Options: Enforcement of Premarital Contracts During Marriage*, 1989 U. CHI. LEGAL F. 281.

⁸³ 165 N.E.2d 368 (Ill. App. Ct. 1960).

that there was an actual controversy between the parties and that the husband was entitled to a declaratory judgment.

Similarly, in *Sanders v. Sanders*,⁸⁴ the Tennessee Court of Appeals upheld an order of specific performance, during an intact marriage, of a provision in a prenuptial agreement requiring the husband to convey a particular piece of property and to execute a will with certain provisions.

The majority of cases in which conduct-related provisions of a prenuptial agreement are at issue occur in the context of a divorce or separate support action and not during a viable and intact marriage. Two cases in particular demonstrate the judicial unwillingness to enforce provisions in prenuptial agreements that relate to living arrangements.

In *Mengal v. Mengal*,⁸⁵ the parties had entered into an oral premarital agreement prohibiting the wife's two children from a prior marriage from living with the parties during the marriage. The court held that, assuming such oral agreements were enforceable,⁸⁶ this particular agreement was unenforceable because it "threatens the relationship between parent and children and hence would controvert public policy."⁸⁷ "Mothers," the court concluded, "should have their children live with them."⁸⁸

For the reverse proposition, that children should have their mothers live with them, consider *Koch v. Koch*, in which the parties orally agreed prior to their marriage that the husband's mother could live with the parties indefinitely.⁸⁹ The marriage had gone swimmingly, both parties agreed, "as perfect a marriage as any marriage could be,"⁹⁰ until shortly after the first Mrs. Koch arrived from her native Hungary to move in with the happy couple. The situation following her arrival had become unbearable, according to the wife.⁹¹ The parties consulted both a marriage counselor and a psychiatrist, both of whom advised that the mother should move out. The wife gave her husband an ultima-

⁸⁴ 288 S.W.2d 473 (Tenn. Ct. App. 1955).

⁸⁵ 103 N.Y.S.2d 992, 993 (N.Y. Dom. Rel. Ct. 1951).

⁸⁶ *Id.* The court did not decide this issue.

⁸⁷ *Id.* at 994.

⁸⁸ *Id.* at 994-995.

⁸⁹ *Koch v. Koch*, 232 A.2d 157, 158 (N.J. Super. Ct. 1967).

⁹⁰ *Id.* at 159.

⁹¹ *Id.*

tum, to the effect of “it’s either her or me.”⁹² The husband stuck by his mother, refusing to evict her, and the wife moved out with her two daughters.⁹³

The wife filed suit for support, and the husband defended that since the wife’s departure was unjustified, under the fault-based regime then in effect in New Jersey, she was not entitled to support. The husband testified that he probably would not have entered into the marriage without the promise and that he would welcome his wife back in the home if she would honor the agreement.⁹⁴ The trial court found for the husband, rejecting the wife’s claim for support.

The appellate court reversed, refusing to enforce the agreement on several grounds,⁹⁵ one of which was the public policy to “preserve the marriage and *eliminate contentious elements that do violence to it*”⁹⁶— language about her mother-in-law that surely pleased the wife.

Finally, the court offered this about that peculiar relationship between daughters-in-law and the female members of her husband’s family: “It is common knowledge to all experienced in such matters that the female members of the husband’s family frequently create, either intentionally or unintentionally an unsettled or disturbed condition of mind in the wife which is destructive of her happiness and comfort.”⁹⁷

Courts have also been most unenthusiastic about entering provisions in prenuptial agreements regarding sexual relations. In *Favrot v. Favrot*,⁹⁸ the parties at the husband’s insistence, entered in an oral prenuptial agreement limiting sexual relations to once per week.

In the ensuing divorce, the wife sought an alimony award; the husband argued that, pursuant to the Louisiana law at the

⁹² *Id.*

⁹³ *Id.* She had an infant daughter from the marriage with Mr. Koch and a teenage daughter from a previous marriage.

⁹⁴ *Id.* at 159.

⁹⁵ *Id.* at 160. The court noted that oral agreements in contemplation of marriage were unenforceable. In addition, the court noted that affirmative obligations of indefinite duration will rarely be enforced in perpetuity.

⁹⁶ *Id.* (emphasis supplied).

⁹⁷ *Id.* at 161, *citing* Verret v. Koelmel, 110 So. 421, 422 (La. Sup. Ct. 1926).

⁹⁸ 332 So. 2d 873, 875 (La. Ct. App. 1976), *rev’d on other grounds*, 339 So. 2d 843 (La. 1976).

time, the wife was not entitled to alimony because of her marital fault in violating the agreement by wanting to have relations three times a day. The wife testified that she abided by the agreement “despite her frustration at not being ‘permitted’ at other times even to touch her husband.”⁹⁹

The trial court rejected the husband’s claim and the appellate court affirmed, holding that a party cannot contractually modify the marital obligation to “fulfill ‘the reasonable and normal sex desires of each other.’”¹⁰⁰ In *Favrot*, the issue was before the court in connection with a divorce action. It appears doubtful for the reasons expressed earlier in this chapter, that, if the issue were raised in the context of an intact marriage, the court would intervene.

In some cases courts have refused to enforce agreements concerning a choice of marital domicile. The cases appear to turn, however, on the common law rule that the wife’s domicile is the husband’s domicile and that a prenuptial agreement cannot abrogate that right.¹⁰¹ In any event, although the rationale would be different, it is doubtful that the courts would enforce these agreements.¹⁰²

Finally, provisions in agreements that attempt to articulate the duties of each parent with respect to the other party’s children from a previous marriage have also been stricken.¹⁰³

Interestingly, notwithstanding the judicial unwillingness to wade through the minutiae of chore-sharing, toilet-cleaning and dog walking, the UPAA defines a much broader scope for what

⁹⁹ *Id.* at 875.

¹⁰⁰ *Id.* citing *Mudd v. Mudd*, 20 So. 2d 311 (La. 1944). For an examination of the role of sexual intercourse in the legal status of marriage, see Laurence Drew Borten, Note, *Sex, Procreation and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002).

¹⁰¹ See, e.g., *Isaacs v. Isaacs*, 99 N.W. 268 (Neb. 1904); *Sprinkle v. Ponder*, 64 S.E.2d 171 (N.C. 1951).

¹⁰² See *Graham*, *supra* note 81, at 1046 (“Again, the dearth of published decisions regarding choice of domicile suggests that courts have been unwilling even to entertain the issue except in very unusual circumstances.”). See also Dennis I. Belcher, *A Practitioner’s Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TRUST J. 1 (2002); Dennis I. Belcher & Laura O. Pomeroy, *For Richer, for Poorer: Strategies for Premarital Agreements*, 12 PROB. & PROP. 54 (Dec. 1998).

¹⁰³ *In re Garrity and Bishton*, 226 Cal. Rptr. 485 (Ct. App. 1986).

may be included in a prenuptial agreement, asserting that parties to an agreement may contract with respect to “any” matter, “including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”¹⁰⁴ The ALI Principles are similarly permissive in terms of scope.¹⁰⁵

VII. The Religious Upbringing of Children

Prenuptial agreements relating to the religious upbringing of the children are unconstitutionally unenforceable according to the “great weight of legal authority.”¹⁰⁶ As one commentator states, it would be “unimaginable that a court would specifically enforce a contract governing the religious education of any children born of the marriage.”¹⁰⁷

Zummo v. Zummo,¹⁰⁸ one of the leading cases, is an excellent illustration of the principles at work here. Before the parties married, the future Mr. and Mrs. Zummo orally agreed that any children born of the marriage would be “raised in the Jewish faith.”¹⁰⁹ The parties had three children. Mrs. Zummo subsequently filed a complaint for divorce and the parties stipulated that she would have primary physical custody subject to the father having partial physical custody on alternating weekends.¹¹⁰

During the marriage, the children participated actively in Jewish activities; observing the Sabbath every Friday night, attending synagogue during the high holidays. In addition, the children were all formally given Hebrew names. The parents together even participated in couples groups at their synagogue as

¹⁰⁴ UNIF. PREMARITAL AGREEMENT ACT, *supra* note 44, at § 3(a)(8).

¹⁰⁵ See ALI Principles, *supra* note 46, at § 7.03(1)

¹⁰⁶ *Zummo v. Zummo*, 574 A.2d 1130, 1148 (Pa. Super. Ct. 1990).

¹⁰⁷ CHARLES P. KINDREGAN & MONROE L. INKER, FAMILY LAW AND PRACTICE § 20.5, at 647 (2d ed. 1996), cited in *Kendall v Kendall*, 687 N.E.2d 1228, 1230 (Mass. 1997). See also Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655 (1992). For an opposing view, see Jocelyn E. Strauber, Note, *A Deal is a Deal: Antenuptial Agreements Regarding the Religious Upbringing Agreements Should be Enforceable*, 47 DUKE L.J. 971 (1998).

¹⁰⁸ *Zummo*, 578 A.2d at 1148.

¹⁰⁹ *Id.* at 1141. This is the court’s characterization of the Zummo agreement and not necessarily a verbatim recording of the exact words used by the parties.

¹¹⁰ *Id.*

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well as at B'nai Brith. The eldest son was preparing for his bar mitzvah.

The parties were not able to resolve their differences over issues related to the children's religious upbringing. The father wanted to take them to "occasional Roman Catholic services," believing that they would benefit from a "bi-cultural upbringing."¹¹¹ The mother argued that "exposing the children to a second religion [would] confuse and disorient them."

The trial court ordered that the father could not take the children to religious services "contrary to the Jewish faith."¹¹² The father appealed and the court reversed, holding that to restrict a parent's post-divorce parental rights regarding the religious upbringing of the children, the court was required to find a "substantial threat" of "physical or mental harm to the child."¹¹³ To do otherwise would violate the father's free exercise rights and his constitutionally recognized authority over the religious upbringing of his children.¹¹⁴ In reviewing these matters, courts are required to use a "best interests of the child" analysis. Although the trial court had relied heavily on the prenuptial agreement of the parties, the appellate court held that this agreement should not be entitled to any weight whatsoever.¹¹⁵

Where courts have placed custodial restrictions on a parent's involvement in the religious training of a child, it is not in deference to a prenuptial agreement but rather based on substantial

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Zummo*, 574 A. 2d at 1138, *citing* *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990) ("explaining the hybrid nature of parental/religious rights of parents over their children's upbringing"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (collecting cases).

¹¹⁵ *Zummo*, as stated, represents the view of the substantial majority of courts considering the issue; however, some New York cases have upheld agreements regarding religious training of children but in the context of separation or divorce agreements, not prenuptial agreements. *See* *Stevenot v. Stevenot*, 520 N.Y.S.2d 197, 198 (App. Div. 1987); *Mester v. Mester*, 296 N.Y.S.2d 193, 198 (Sup. Ct. 1969). *But see* *Ramon v. Ramon*, 34 N.Y.S.2d 100, 112 (Dom. Rel. Ct. 1942) (upholding a prenuptial agreement providing for a Catholic education of the children). *See also* *Weiss & Abramoff*, *supra* note 114, at 664 n.36, collecting cases, mostly from New York, and most arising in the context of separation and divorce agreements.

harm to the child. In *Kendall v. Kendall*,¹¹⁶ for example, the parties, a Jewish woman and a Christian man, entered into an oral prenuptial agreement that the children would be raised Jewish. The parties did have children and indeed raised the children as Jews. A complaint for divorce was filed and the trial judge granted physical custody to the mother and shared legal custody to both parents. At issue on appeal was the judge's order prohibiting, *inter alia*, the husband from taking the children to his church, engaging them in prayer or bible study if it promotes rejection of their own Jewish self-identity.

The Supreme Judicial Court of Massachusetts upheld these restrictions on the grounds that exposure to the husband's religion was substantially damaging to the children's well-being. The father's behavior toward his children fostered negative and distorted images of the Jewish culture and specifically caused damage to their Jewish self-image.¹¹⁷ Again, the prenuptial agreement was irrelevant; the focus was on the children's well-being.

VIII. Enforceability of No Child Provisions in Prenuptial Agreements

A couple contemplating marriage may seek to enter into a prenuptial agreement whereby they agree not to have any children. Violation of this provision would typically result in some financial penalty, in terms of property division or termination of alimony. Although these sorts of agreements are said to be on the rise,¹¹⁸ virtually no case law exists on the subject.¹¹⁹ Even

¹¹⁶ 687 N.E.2d 1228 (Mass. 1997).

¹¹⁷ The father, for example, had cut off his son's religiously significant sideburns (payes), had threatened to cut off his religious clothing fringes (tzitzit), and when he took the children to his church, the children heard that nonbelievers are "damned to go to hell" where there would be "weeping and gnashing of teeth." *Id.* at 1230.

¹¹⁸ Joline F. Sikaitis, Comment, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 CATH. U. L. REV. 335, 336 (2004), citing Jill Brooke, *A Promise to Love, Honor and Bear No Children*, N.Y. TIMES 9 (Oct. 13, 2002); Sarah Baxter, *Rich Couples Write Babies Out of the Marriage Lines*, SUNDAY TIMES (London), Oct. 20, 2002 at 28. It is worth noting that this author's own anecdotal, unscientific survey of domestic relations practitioners in the Boston area did not reveal any attorney who has drafted or even seen one.

though courts are moving toward treating prenuptial agreements as quasi-commercial contracts, these “no child” agreements are not likely to be upheld. Considering the fundamental constitutional right to have the children,¹²⁰ the enforcement of such provisions would excessively entangle the judiciary in the infringement of a constitutional right. Therefore, as with the cases discussed previously involving the religious upbringing of the children, these provisions are unlikely to be enforceable.

Only one published case deals with the issue of a premarital promise not to have children. In *Height v. Height*,¹²¹ the court held that an agreement that “contemplates forbearance from having children” void because “marriage exists primarily for begetting offspring, and the right to normal and proper sex relations is implicit in the marriage contract.”¹²² Although the *Height* rationale is probably outdated,¹²³ and a modern court would most likely employ a constitutional analysis,¹²⁴ the same result would likely obtain if a court addressed this issue today.

IX. Limitation of Grounds For Divorce

The ALI Principles explicitly declare unenforceable agreements limiting or enlarging the “grounds for divorce otherwise available under state law.”¹²⁵ In *Massar v. Massar*,¹²⁶ an agreement sought to restrict the grounds upon which the wife could seek a divorce to the statutory no-fault ground in New Jersey requiring 18 months continuous separation. The husband left the marital home, and the wife, without having been separated for 18 months, filed for divorce on the grounds of extreme cruelty, in violation of the agreement. The husband moved to dismiss the

¹¹⁹ *But see* *Height v. Height*, 187 N.Y.S.2d 260 (Sup. Ct. 1959).

¹²⁰ *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (designating pregnancy as a fundamental civil right); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (declaring unconstitutional a statute that mandated sterilization for habitual criminals and holding that such a statute infringed upon the “basic civil rights of man” and that “procreation [is] fundamental to the very existence and survival of the race”).

¹²¹ *Height*, 187 N.Y.S.2d at 260.

¹²² *Id.* at 262.

¹²³ *See generally*, Borten, *supra* note 96.

¹²⁴ *See supra* note 117 and accompanying text.

¹²⁵ ALI Principles, *supra* note 45, at § 7.08 (1).

¹²⁶ 652 A.2d 219 (N.J. Super. Ct. App. Div. 1995).

action based on the prenuptial agreement. The wife argued that agreements seeking to limit the legal grounds for divorce should be *per se* unenforceable. The court enforced the agreement. In so doing, the court declined to adopt a *per se* rule of unenforceability, announcing instead that it would review each such agreement on a case-by-case basis.

X. Provisions Requiring Parties to Marry

Not surprisingly, but worth noting, is the fact that courts will not specifically enforce provisions in a prenuptial agreement requiring that the parties marry. On a related note, many states explicitly bar damages for breach of promise to marry.¹²⁷

XI. Miscellaneous

Following are some miscellaneous subjects not treated in this article about limitations on the enforceability of certain subject matter in a prenuptial agreement.

In Oklahoma, parties are not permitted to contract with respect to marital property.¹²⁸ In Louisiana, spouses are prohibited from waiving all rights to inheritance by agreement.¹²⁹ In Idaho, notwithstanding a prenuptial agreement, a party “at fault” in a divorce is not entitled to alimony.¹³⁰

XII. Consequence of Invalid Provisions: Severability

If a provision of a prenuptial agreement is held to be invalid, the entire agreement does not necessarily fail. If the whole or primary purpose of the agreement is found invalid, then the en-

¹²⁷ CAL. CIV. CODE § 43.4 (West 2008); MASS. GEN. LAWS ch. 207, § 47A (2008); , N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2008); OHIO REV. CODE ANN. § 2305.29 (West 2008). However, even in states with statutory bans, some jurisdictions permit recovery on the theory of unjust enrichment. *See, e.g.*, *Jury v. Ridenour*, No. 98 CA 100, 1999 Ohio App. LEXIS 3145, at 9-10 (Ohio Ct. App. June 15, 1999). *See also* *Bradley v. Somers*, 322 S.E.2d 665, 667 (S.C. 1984).

¹²⁸ *Taylor v. Taylor*, 832 P.2d 429 (Okla. Civ. App. 1991).

¹²⁹ LA. CIV. CODE ANN. art. 2330 (2007); *Norsworthy v. Succession of Norsworthy*, 704 So. 2d 953 (La. Ct. App. 1997).

¹³⁰ IDAHO CODE ANN. § 32-705 (2007).

ture agreement will be held invalid. If, however, the offending terms are collateral in nature, then only those provisions will be invalidated. In *Howell v. Landry*,¹³¹ for example, the court refused to enforce an alimony waiver provision in a prenuptial agreement but did not invalidate the entire agreement, holding that the alimony provision was severable from the contract. Similarly, in *Rogers v. Yourshaw*,¹³² the court struck the provisions in a prenuptial agreement relating to child support but enforced the remainder of the agreement.¹³³

The intent of the parties is persuasive and, for that reason, drafting counsel is urged to include a severability clause providing for the severance of unenforceable terms.¹³⁴

XIII. Conclusion

Notwithstanding the ascendance of private ordering, the trend toward increased individual autonomy in making contracts, the marriage institution remains a province in which the courts and society have a substantial vested interest. Moreover, as parties intending to be married deal at less-than-arm's-length in a confidential relationship, limitations on complete contractual freedom are appropriate. In any event, as these agreements become more prevalent in the coming years, the lawyer who is adept at understanding their limitations will be well served.

¹³¹ *Howell v. Landry*, 386 S.E.2d 610 (N.C. Ct. App. 1989).

¹³² 448 S.E.2d 884 (Va. Ct. App. 1994).

¹³³ In Missouri, at least with respect to prenuptial agreements, the law is quite clearly to the contrary. *Brennan v. Brennan*, 955 S.W.2d 779 (Mo. Ct. App. 1997) (holding prenuptial agreements are not severable: they must stand or fall as a whole). To the same effect is *Kester v. Kester*, 108 S.W.3d 213, 224 (Mo. Ct. App. 2003).

¹³⁴ 59 FAMILY LAW AND PRACTICE § 59.05(25), recommending the practice and citing *In re Marriage of Mathiasen*, 268 Cal. Rptr. 895, 897 (Cal. Ct. App. 1990) (“if an invalid provision is ‘inseparably linked’ to the agreement as a whole, the entire agreement will be void; if in contrast, an invalid provision is severable, the remainder of the agreement will be valid.”). *See also* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995).