Insuring the Knot: The Massachusetts Approach to Postnuptial Agreements

"Postnups, while much less common than prenuptial agreements, are gaining in popularity. Nearly 50 percent of attorneys polled by the American Academy of Matrimonial Lawyers reported an increase in the number of postnups from 2002 to 2007."[1]

I. INTRODUCTION

As divorce rates in the United States continue to skyrocket, couples keep searching for new ways to protect their relationships and their wallets.[2] Thanks to the contractual nature of the marital relationship, the wary fiancé or exhausted spouse may dictate certain terms relating to his impending marital union or dissolution in the form of a prenuptial or separation agreement.[3]

1. Robert DiGiacomo, *Quit Fighting—Get a Postnuptial Agreement*, CNN.COM (Apr. 2, 2008), http://articles.cnn.com/2008-04-02/living/postnuptial.agreement_1_prenuptial-postnuptial-agreements-inheritance-money?s=PM:LIVING.

2. *See* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 4.02, at 4-4 (38th ed. 2006) (acknowledging couples' desire to determine fiscal repercussions of divorce); NAT'L MARRIAGE PROJECT, UNIV. OF VA., & INST. FOR AM. VALUES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2009 75-77 (W. Bradford Wilcox ed., 2009), *available at* http://www.virginia.edu/marriageproject/pdfs/Union_11_25_09.pdf (charting rise in divorce over past half-century). *But see* Elizabeth Lopatto, *Marrying Smarter, Later Leading to Decline in US Divorce Rate*, BOS. GLOBE (May 12, 2007), http://www.boston.com/news/nation/articles/2007/05/12/marrying_smarter_later_leading_to_decline_in_us_divorce_rate/ (stating people savvier about divorce and their interests leading to decline in divorce rates). In 1950, the U.S. Department of Health, Education, and Welfare estimated the U.S. marriage rate at approximately 11.1 per 1000 population and the divorce rate at 2.5 per 1000 population. HALBERT L. DUNN, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, VITAL STATISTICS OF THE UNITED STATES 1950 66, 71 (1954), *available at* http://www.cdc.gov/nchs/data/vsus/vsus_1950_1.pdf. In stark contrast, in 2009, the National Center for Health Statistics reported the country's marriage rate at 6.8 per 1000 population and the divorce rate at 3.4 per 1000 population. Betzaida Tejada-Vera & Paul D. Sutton, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2009*, 58 NAT'L VITAL STAT. REP., Aug. 27, 2010, at tbl.A, *available at* http://www.cdc.gov/nchs/ data/nvsr/nvsr58/nvsr58_25.pdf.

3. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (rejecting concept of marital couple as independent entity in favor of association of two individuals). *But see* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW xix (1981) (arguing label of marriage as pure contractual relationship misnomer). *See generally* OLDHAM, *supra* note 2, § 4.06 (discussing difference between premarital and postmarital agreements). Historically, the marital relationship was not acknowledged as a contractual relationship wherein both parties retained their individual identities, which in turn prevented the couple from contracting with one another as separate entities. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (3d ed. 1768) (declaring contracts between married couples void because husband and wife constitute one legal person); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11-13 (2000) (discussing history of coverture in America); *cf.* ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND

While both agreements are widely accepted options for defining and restricting the rights and liabilities one assumes upon entering or ending a marriage, many jurisdictions recently began entertaining and sanctioning a third method, the postnuptial agreement.[4] The conditions and components required to produce a legitimate postnuptial agreement, however, differ radically from state to state.[5]

Massachusetts, having declined to address the issue in the past despite acknowledging the opportunity, recently spoke up in the case of *Ansin v. Craven-Ansin*,[6] rejecting the theory that postnuptial agreements are per se

COMMUNITY: THE CASE OF TORTS 63 (2004) (explaining concept of marital unity prevented spouses from suing each other in tort). Once the law acknowledged the ability of spouses to contract, premarital agreements, also known as prenuptial agreements, designating how assets would be disposed of upon divorce became an acceptable option for defining the future rights of those parties to the marriage. *See* Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970) (establishing validity of prenuptial agreements). Similarly, husband and wife retain the ability to contract their respective property rights in contemplation of the dissolution of marriage in the form a separation or settlement agreement. *See* 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 11:7 (4th ed. 2010) (acknowledging ability of divorcing parties to enter separation agreements that survive divorce action).

4. *See* Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (endorsing enforcement of prenuptial agreement without judicial review of substantive terms of such agreements); Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 4 (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 436, 2003), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf (recognizing most states appear to enforce majority of prenuptial agreements); *see also* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 24:14 (2011) (explaining rise of "no-fault divorce" diminished judicial reluctance in enforcement of postnuptial agreements). A 2007 study conducted by the American Academy of Matrimonial Lawyers found that 49% of its members reported an increase in the number of postnuptial agreements in the past five years. *See* Jillian Mincer, *New to Marriage: The Postnup, Some Already Wed Couples Agree to Disagree*, WALL ST. J. (Mar. 7, 2007), http://finance.yahoo.com/family-home/article/102544/New_to_Marriage:_the_Postnup. Although couples draft these contracts after their wedding vows in an effort to spell out what will happen in the event the relationship falls apart, the purpose of the agreement is often to keep the couple together. *See* Abigail Trafford, *A Mid-Marriage Change in the Rules May Make Sense*, WASH. POST (May 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/23/AR2008052302562.html (describing aging couple's use of postnuptial agreement to create predictability in their financial future); *see also* Patricia Wen, *Sealing a Contract After the Marriage: Couples Spell out Duties, Finances*, BOS. GLOBE (Dec. 19, 2005), http://www.boston.com/yourlife/relationships/articles/2005/12/19/sealing_a_contract_after_the_marriage/ (retelling story of quarrelling couple who delineated finances and familial obligations to reduce marital tensions).

5. *Compare In re* Marriage of Tabassum & Younis, 881 N.E.2d 396, 405 (Ill. App. Ct. 2007) (labeling consideration to remain married in postnuptial-agreement context as past consideration and thereby insufficient), *and* Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004) (declaring valid postnuptial agreements require consideration beyond continuation of marriage itself), *with* Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991) (holding marriage as sufficient consideration to support postnuptial agreement when executed shortly after wedding), *and* Flansburg v. Flansburg, 581 N.E.2d 430, 435 (Ind. Ct. App. 1991) (holding extension of marriage that would otherwise have dissolved without postnuptial agreement sufficient consideration); *compare* Pacelli v. Pacelli, 725 A.2d 56, 62 (N.J. Sup. Ct. App. Div. 1999) (rejecting use of Uniform Premarital Agreement Act to judge validity of postnuptial agreements), *with* Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003) (reasoning similarities surrounding policy concerns justify employing prenuptial-agreement standards of enforceability to postnuptial agreements); *compare* Crane v. Crane, 824 N.Y.S.2d 225, 226 (App. Div. 2006) (holding oral postnuptial agreement invalid as against Statute of Frauds), *with* Cox v. Mixon, No. C158147, 2000 WL 274155, at *2 (Va. Cir. Ct. Jan. 4, 2000) (finding oral postnuptial agreement valid).

6. 929 N.E.2d 955 (Mass. 2010).

against public policy.[7] Instead, the court held that such agreements are valid, provided, however, that the circumstances prompting the agreement and the terms of the agreement satisfy certain requirements.[8] The Massachusetts standard for upholding postnuptial agreements is moderate as compared to other states' approaches.[9] Ohio, for instance, falls at one end of the spectrum, statutorily abolishing postnuptial agreements as per se against public policy, while Utah takes the opposite position, treating postnuptial agreements no differently than prenuptial agreements.[10]

This Note will first look at how marital law has evolved, specifically focusing on the Massachusetts law that paved the way for the *Ansin* decision.[11] It will then address the general policy concerns associated with postmarital contracting, focusing on the differing levels of scrutiny that select state courts and legislatures apply to postnuptial agreements, all while exploring the underlying philosophies fueling these decisions.[12] In doing so, it will also consider how the Massachusetts approach, as reflected in the *Ansin* decision, comports with not only these assorted viewpoints but also with the state's position on related topics pertaining to marriage, namely, how the judiciary's rationale behind defending same-sex marriage ought to be considered when assessing the appropriateness of its present approach to postnuptial contracting.[13] Lastly, this Note will consider the most effective means of protecting the policy concerns, such as threats of unfair bargaining power and general inequities, ultimately concluding that Massachusetts may wish to

7. *Id.* at 961-62 (declaring postnuptial agreements enforceable despite policy concerns). Before the court issued its decision in *Ansin*, it simply assumed, without deciding, that agreements made after a husband and wife were married, but not in anticipation of divorce, were valid as enforceable marital contracts. *See* Fogg v. Fogg, 567 N.E. 2d 921, 922 (Mass. 1991) (assuming *arguendo* postnuptial agreements generally enforceable in absence of fraud or coercion).

8. *See Ansin*, 929 N.E.2d at 963-64 (listing minimum requirements for valid postnuptial agreement); *see also* Jonathan Saltzman & John R. Ellement, *In a First for Mass., SJC Approves Post-Nuptial Contracts*, BOS. GLOBE (July 16, 2010), http://www.boston.com/news/local/breaking_news/2010/07/sjc.html (describing reasons for safeguards implemented by the Massachusetts court).

9. *Compare* MINN. STAT. ANN. § 519.11(1a)(2)(c) (West 2006 & Supp. 2012) (requiring both parties represented by counsel), *with Ansin*, 929 N.E.2d at 963 (requiring both parties presented with opportunity to consult counsel). Unlike other states that have statutorily addressed the issue, the Massachusetts legislature has yet to weigh in on the enforcement of postnuptial agreements. *See, e.g.*, COLO. REV. STAT. ANN. 14-2-304 (West 2011) (outlining specific terms for which parties may contract); LA. CIV. CODE ANN. art. 2329, 2331 (2009) (providing explicit procedural restrictions for agreements); WIS. STAT. ANN. § 766.58(6) (West 2009) (providing marital contracts not enforceable under certain conditions).

10. *Compare* OHIO REV. CODE ANN. § 3103.06 (LexisNexis 2008) (enforcing only those marital agreements providing for immediate separation), *with* D'Aston v. D'Aston, 808 P.2d 111, 112-13 (Utah Ct. App. 1990) (applying same standard of review to postnuptial as prenuptial agreements). *See generally* Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827 (2007) (cataloguing those states imposing stricter requirements on postnuptial than prenuptial agreements).

11. *See infra* Part II.A (reviewing law in Massachusetts prior to *Ansin*).

12. *See infra* Part II.B (noting goals of law governing postnuptial agreements in different jurisdictions).

13. *See infra* Part III.A (comparing Massachusetts's recently announced position concerning postnuptial agreement with other states).

bolster its standard of review as the current considerations may not provide adequate protection.[14]

II. HISTORY

A. The Evolution of Marital Contracting

In order to thoroughly analyze the function and future of postnuptial agreements in Massachusetts, it is helpful to trace the evolution of marital contracting in general.[15] In the early years of the twentieth century, marital contracting, as we know it today, was a foreign concept in Massachusetts because the common law defined a husband and wife as one legal person represented by the husband.[16] The wife was essentially the husband's chattel, with no legal existence of her own, making it impossible for her to contract.[17] Slowly, this common-law concept was modified by statute, as societal changes demanded that a married woman have the ability to retain and dispose of property independent of her husband.[18] It was not until married women

14. *See infra* Part III.B (predicting the effectiveness of the Massachusetts approach).

15. *See* Paul Brewer, Comment, Bratton v. Bratton*: The Tennessee Supreme Court Considers Postnuptial Agreements and Allows Married Parties to Agree that They May Eventually Disagree*, 35 U. MEM. L. REV. 579, 581 (2005) (explaining analysis of one form of marital agreement requires discussion of all other forms).

16. *See* Nolin v. Pearson, 77 N.E. 890, 890 (Mass. 1906) (asserting doctrine of unity suspended wife's legal existence during marriage); *see also* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 14-15 (1986) (explaining women could not enter contracts under common law).

17. *See* Dixon v. Amerman, 63 N.E. 1057, 1057-58 (Mass. 1902) (defining wife as husband's servant lacking power to consent); *see also* Declaration of Sentiments and Resolutions, Seneca Falls Convention (July 19, 1848) [hereinafter Declaration], *available at* http://www.fordham.edu/halsall/mod/Senecafalls.html (declaring women "civilly dead" upon marriage). *But see* GEORGE A.O. ERNST, THE LAW OF MARRIED WOMEN IN MASSACHUSETTS 65 (2d ed. 1897) (identifying married woman as legally "distinct and independent person from her husband"). A husband's promises to his wife regarding business and property were not legally binding. *See id.* at 99 (describing married woman's inability to conduct business with husband). Although courts of equity could potentially hold a husband to his word, such an event was unlikely. *See id.*

18. *See Nolin*, 77 N.E. at 890 (explaining how remedial legislation regarding women's property rights impaired unity of husband and wife). Prior to the Married Women's Property Act of 1848, everything a woman owned or inherited was automatically transferred to her husband, meaning that if her husband were to die first, she could lose everything. *See* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 346-47, 355 (1979) (explaining how concept of coverture did not comport with protecting a woman's familial wealth). In 1848, activists called the Seneca Falls Conference, the first ever conference of its kind to address women's rights and issues. *See* Carolyn S. Bratt, *The Sesquicentennial of the 1848 Seneca Falls Women's Rights Convention: American Women's Unfinished Quest for Legal, Economic, Political, and Social Equality*, 84 KY. L.J. 715, 715 (1965). The conference resulted in the publication of a Declaration of Sentiments, demanding that the rights of women as independent people be acknowledged and respected. *See* Declaration, *supra* note 17. Some suggest that it was not until the Industrial Revolution that the doctrine of unity ultimately unraveled. *See* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 461 (2002). In Massachusetts, statutory enactments slowly helped curtail the doctrine of unity and recognize married women as people unto themselves. *See Nolin*, 77 N.E. at 890 (crediting 1842 Mass. Acts. 527 as initial statutory enactment gauged toward recognizing married women's independent legal existence); *see also* Bradford v. Worcester, 69 N.E. 310, 311-12 (Mass. 1904) (crediting legislature with freeing married women of common-law limitations); Butler v. Ives, 29 N.E. 654, 654 (Mass. 1885)

secured their independent legal status, and thus their ability to contract, that the validity of marital agreements became an issue.[19]

1. Premarital Agreements in General

Forty years ago, in the landmark case of *Posner v. Posner*,[20] the Florida Supreme Court approved the per se legitimacy of prenuptial agreements, despite a national trend to the contrary.[21] The institution of marriage was no longer the impervious familial and societal cornerstone it had once been.[22] The

(acknowledging statutes made "great changes as to the rights and liabilities of married women").

19. *See* WEITZMAN, *supra* note 3, at 338 (explaining rights granted under Married Woman's Property Acts prompted use of contractual agreements between spouses). As contracting between husband and wife became widely acceptable, courts were forced to grapple with whether and how such agreements could alter the marital relationship. *See id.* (addressing concerns that marital contracts ought not encourage divorce or alter traditional elements of marriage); *cf.* S. 2175, 183d Gen. Ct., Reg. Sess. §§ 1-2 (Mass. 2003) (highlighting concept of marriage as institution built on tradition).

20. 233 So. 2d 381 (Fla. 1970).

21. *See id.* at 385 (holding antenuptial agreements no longer "void Ab initio as 'contrary to public policy'"). While Oklahoma issued a similar opinion ten years earlier, the other states were not ready to follow its lead. *See* Hudson v. Hudson, 350 P.2d 596, 597 (Okla. 1960) (upholding antenuptial agreement in which spouses waived alimony in event of divorce); *see also* Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 715 (1972) (noting how courts declined to follow *Hudson* rationale pre-*Posner*). In *Posner*, the Florida Supreme Court recognized, "It has long been the rule in a majority of the courts of this country . . . that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy." 233 So. 2d at 382. As such, the *Posner* court's decision marked a radical change from the norm. *See, e.g.*, Motley v. Motley, 120 S.E.2d 422, 424 (N.C. 1961) (holding prenuptial agreement absolving husband of duty to support wife void as against public policy); Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964) (holding prenuptial agreement void as against public policy); Strandberg v. Strandberg, 147 N.W.2d 349, 353 (Wis. 1967) (holding prenuptial agreement dividing property in event of divorce void); *see also* Lewis Becker, *Premarital Agreements: An Overview*, *in* PREMARITAL AND MARITAL CONTRACTS 1, 6 (Edward L. Winer & Lewis Becker eds., 1993) (categorizing majority of pre-*Posner* marital agreements addressing economic repercussions of divorce void against public policy); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 1.1 (2d ed. 1988) (discussing restrictions on the scope of antenuptial agreements).

22. *Compare* J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL L. 1, 3 (2008) [hereinafter *History of Contemporary Marriage*] (suggesting mid-twentieth century Americans sought domestic perfection), *with* Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?* 52 OHIO ST. L.J. 55, 62 (1991) (explaining rise of "no-fault" divorce in 1970s and 1980s transformed divorce into act of personal autonomy), *and* BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 5-6, 54 (1997) (describing divorce as a means to personal happiness). Prior to no-fault divorce, many states restricted grounds for divorce so as to keep married couples married. *See* William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 445 (1996); *see also* J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 559 (2007) (noting adultery as only grounds for divorce in New York until 1967). At this time, remaining in a troubled marriage was arguably considered a better alternative than divorce. *See* ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA, 25 (2008) (describing limited career opportunities for educated women); *see also* JAMES GILBERT, ANOTHER CHANCE: POSTWAR AMERICA, 1945-1985 62 (2d ed. 1986) (citing post-WWII Gallup poll wherein only 9% of those polled supported relaxation of divorce laws). By 1985, however, some version of "no-fault" divorce was available in every state, essentially liberalizing divorce law in ways people rejected only thirty years earlier. *See History of Contemporary Marriage*, *supra*, at 21 (discussing consequences of "no-fault" divorce).

Posner court recognized that as divorce became an easier, and thus more popular, option for resolving marital strife, the public-policy concerns regarding antenuptial agreements had to adjust to a growing likelihood that marriage would end in divorce.[23] The court's rationale was that an individual's right to protect himself against the real possibility of divorce outweighed the degree to which such an agreement might encourage divorce.[24] Furthermore, the court could not find a real difference between those antenuptial agreements made in contemplation of divorce and those in contemplation of death, which were generally accepted at the time.[25]

In upholding the validity of prenuptial agreements governing divorce, the *Posner* decision represented a growing social and legal trend that defined the marital relationship as contractual in nature, prompting agreements between husband and wife to be judged exclusively using contract principles.[26] The

23. *See Posner*, 233 So. 2d at 384 (noting frequency of divorce required reassessment of public-policy considerations surrounding antenuptial agreements).

24. *See id.* (recognizing public-policy concerns should not condemn married couples to a "lifetime of misery"). Prior to this decision, courts had been distinguishing between those "marriage settlement" agreements entered into before marriage that aimed to fix property interests in the event of death with those that assigned assets in the event of divorce. *Compare* Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (noting antenuptial agreements designed to fix property rights at death "conducive to marital tranquility"), *with Crouch*, 385 S.W.2d at 293 (denouncing use of premarital agreement in divorce because it allowed husband to "buy" bargain divorce). Upon acknowledging that societal norms had changed and the capacity for divorce played a far greater role than ever before, the court refuted the distinction between antenuptial agreements made in anticipation of death as opposed to divorce. *See Posner*, 233 So. 2d at 385 (upholding validity of prenuptial agreement designed to control in event of divorce). By the time of *Posner*, a few other states had announced a similar position. *See, e.g.*, LeFevers v. LeFevers, 403 S.W.2d 65, 67 (Ark. 1966) (acknowledging validity of antenuptial agreement restoring to wife her own property in event of divorce); *In re* Estate of Muxlow, 116 N.W.2d 43, 45 (Mich. 1962) (upholding validity of premarital agreement fixing rights of the parties at death and divorce); Sanders v. Sanders, 288 S.W.2d 473, 479 (Tenn. Ct. App. 1955) (holding contract forfeiting assets upon divorce did not promote divorce when filed in good faith). Although some other states had spoken on the issue prior to *Posner*, the *Posner* case ultimately grew to represent the idea that if a prenuptial agreement structured to settle property rights in the event of divorce complied with the rules governing prenuptial agreements structured to control at death, and a divorce action was brought in good faith on proper grounds, the agreement would not promote divorce and thus should not be viewed as per se void against public policy. *See Posner*, 233 So. 2d at 385 (permitting antenuptial agreement in contemplation of divorce).

25. *See Posner*, 233 So. 2d at 385 (utilizing enforceability standard for premarital agreement drafted in event of death for agreements governing divorce).

26. *See generally* Anne B. Brown, Note, *The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917 (1998) (tracing concept of marriage as contract). Some scholars have argued that the rise of prenuptial agreements governing divorce represented the demise of the marriage-as-status viewpoint. *See* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 376 (2005-2006) (arguing per se unenforceability of prenuptial agreements represented marriage "as a state-regulated public status"). After *Posner*, traditional contract principles were noticeably affecting the realm of premarital agreements. *See* Simeone v. Simeone, 581 A.2d 162, 165-66 (Pa. 1990) (judging antenuptial agreements using same standards as commercial contracts); *see also* UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 35 (2001) (promoting enforceability of antenuptial agreements unless entered into involuntarily or unconscionable when executed); *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2077-80 (2003) [hereinafter *Future of Antenuptial Agreement Law*] (discussing trend to regard antenuptial agreements as ordinary contracts and marriage as contractual relationship). *But see*

problem with treating marriage as a contractual relationship, which has plagued some decision makers for years, is that the parties to a prenuptial agreement do not stand at arm's length, but rather share "a relation of mutual confidence and trust that calls for the highest degree of good faith."[27] In an attempt to reconcile these two competing ideas, states impose different standards for judging the validity of premarital agreements, often focusing on the reasonableness of the provisions.[28]

2. Massachusetts Approach to Premarital Agreements

*a. Pre-*Osborne *(Before 1980)*

Massachusetts has recognized some form of the antenuptial contract since at least the late 1800s.[29] In 1845, Massachusetts passed the Married Women's Property Act, presently codified in chapter 209 of the Massachusetts General Laws, abrogating those common-law principles that prohibited a husband and wife from contracting with one another.[30] As to be expected, the interpretation

Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 13 (1989) (arguing marriage as status relation whereby "statutory rules fix the legal relationship," not contract). As previously discussed, the contractual nature of marital agreements was not always clear due to a woman's inability to contract with her husband. *See supra* notes 16-17 and accompanying text (discussing limits on contracting).

27. *In re* McClellan's Estate, 75 A.2d 595, 598 (Pa. 1950); *see also* Sherman, *supra* note 26, at 382 (asserting majority of courts today appreciate "special circumstances" involved in execution of prenuptial agreement); *Future of Antenuptial Agreement Law*, *supra* note 26, at 2096 (identifying circumstances surrounding execution of prenuptial agreements markedly different from traditional contract); *cf. In re* Estate of Hillegass, 244 A.2d 672, 675 (Pa. 1968) (recognizing spousal relationship of parties engaged in marital contracting presents unique issues absent in business contracts).

28. *See* McHugh v. McHugh, 436 A.2d 8, 11 (Conn. 1980) (invalidating antenuptial agreement where parties' circumstances change greatly between time of execution and separation); *see also* Newman v. Newman, 653 P.2d 728, 736 (Colo. 1982) (acknowledging health and employability of spouse may change during marriage rendering antenuptial agreement unconscionable). Some states substantively restrict what sort of provision may be placed in an antenuptial agreement while others do not. *Compare In re* Marriage of Winegard, 278 N.W.2d 505, 512 (Iowa 1979) (holding antenuptial agreements may not limit alimony), *with* Laub v. Laub, 505 A.2d 290, 293-94 (Pa. Super. Ct. 1986) (upholding antenuptial agreement wherein parties release alimony and support rights). These differing approaches for analyzing antenuptial agreements depend largely on how much weight the particular state gives to the traditional principles of contract law in the marital-contracting context. *See In re* Marriage of Bonds, 83 Cal. Rptr. 2d 783, 795 (Ct. App. 1999) (distinguishing different states' philosophies for reviewing prenuptial agreements), *rev'd in part*, 5 P.3d 815 (Cal. 2000). Wisconsin, for instance, reviews prenuptial agreements for "substantive unfairness." *See* Greenwald v. Greenwald, 454 N.W.2d 34, 40-42 (Wis. Ct. App. 1990) (judging prenuptial agreement based on substantive terms), *abrogated on other grounds by* Meyer v. Meyer, 620 N.W.2d 382 (Wis. 2000). Pennsylvania courts, on the other hand, reason that it is paternalistic and archaic to use a heightened standard of review to judge the capabilities of parties to marital agreements or the reasonableness of their bargains. *See Simeone*, 581 A.2d at 165 (applying traditional contract-review principles to premarital agreements).

29. *See* Freeland v. Freeland, 128 Mass. 509, 510 (1880) (declaring couple's premarital contract relating to "estate of the other during the coverture" enforceable); *see also* Jenkins v. Holt, 109 Mass. 261, 261-62 (1872) (acknowledging applicable Massachusetts statute empowered couples, before marriage, to contract terms regarding distributive shares in other's estate).

30. *See* Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (explaining legislative purpose of MASS. GEN. LAWS ch. 209, § 25); *see also* Welch v. King, 181 N.E. 846, 848 (Mass. 1932) (identifying purpose of

of the statute has evolved since it was first enacted and presently allows parties to enter into written contracts before marriage that are intended to limit the property interests of the other at the dissolution of the marriage.[31]

The present-day reading of section 25 of chapter 209 of the Massachusetts General Laws, as it relates to premarital agreements intended to govern in the event of divorce, took over a century to develop because Massachusetts courts traditionally considered such agreements to contravene public-policy goals.[32] For example, in the 1935 case of *French v. McAnarney*, the Massachusetts Supreme Judicial Court (SJC) held that an antenuptial contract in which the wife promised not to seek support from her future husband, and father of her child, violated public policy because "[t]he interests of society and the public welfare in maintaining unimpaired the integrity of the marriage relation and its essential obligations are superior to the apparent relief gained by the [husband] under such a contract."[33] As such, the court voided the agreement.[34] In 1955,

statute to ameliorate severity of common-law doctrine).

31. *See* MASS. GEN. LAWS ANN. ch. 209, § 25 (West 2007) (providing for use of antenuptial agreements). The statute provides:

> At any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party may be seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract. Such contract may limit to the husband or wife an estate in fee or for life in the whole or any part of the property, and may designate any other lawful limitations. All such limitations shall take effect at the time of the marriage in like manner as if they had been contained in a deed conveying the property limited.

Id.; *see also* 1 CHARLES P. KINDREGAN, JR. & MONROE L. INKER, FAMILY LAW AND PRACTICE, § 1:10 (3d ed. 2002) (asserting most legislative enactments abolishing marital disabilities presently compiled within MASS. GEN. LAWS ch. 209, §§ 1-13).

32. *See* French v. McAnarney, 195 N.E. 714, 716 (Mass. 1935) (refusing to allow parties to waive marital obligations by means of antenuptial agreement). Section 25 of chapter 209 developed from a statute first enacted in 1845. *See Osborne*, 384 Mass. at 600 (explaining origin of MASS. GEN. LAWS ch. 209, § 25 while announcing statute allows for antenuptial agreements controlling property at divorce).

33. *See* 195 N.E. at 716 (rejecting wife's contractual waiver of support as against public policy). The *French* court reasoned that, upon marriage, a husband incurs a legal duty to support his wife and this duty cannot be voided through contract. *See id.* at 715-16 (asserting "[m]arriage is not merely a contract," and status of relationship imposes certain nonvoidable duties); *see also* England v. England, 107 N.E.2d 30, 31 (Mass. 1952) (explaining duty to pay alimony grounded in legal duty to support wife); Bradford v. Parker, 99 N.E.2d 537, 538 (Mass. 1951) (reiterating certain obligations automatically arise out of status of marriage); Coe v. Coe, 46 N.E.2d 1017, 1019 (Mass. 1943) (explaining wife has legal right to receive support from husband by virtue of marital relationship); CLARK, *supra* note 21, § 6.1 (noting inability of spouses to contract regarding support prior to drafting separation agreement); Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473, 478-79 (1941) (representing old philosophy of marriage as more than contract thus making certain duties inalienable). While *French* did not address a divorce, courts in subsequent cases have recognized that the philosophy driving the decision could easily be applied to a divorce scenario because a husband's obligation to pay alimony is based on the same traditional legal duty of spousal support. *See Osborne*, 428 N.E.2d at 814 (reasoning *French* era would prohibit parties to contract away rights and duties owed upon divorce).

34. *See French*, 195 N.E. at 716.

the SJC reiterated its position in *Kovler v. Vagenheim*,[35] stating that "a contract tending to divest a husband of any obligation incidental to his marriage is invalid."[36] It was not until 1981 that Massachusetts finally directly endorsed and upheld the use of prenuptial agreements, entered into by husband and wife, intended to fix property distributions in the event of divorce.[37]

b. Osborne v. Osborne *(1981)*

Osborne v. Osborne marked the first time that a Massachusetts court agreed to enforce the terms of an antenuptial agreement designed to dictate the distribution of property at the time of divorce.[38] The *Osborne* court dismissed the opinions found in *Fox*, considering them either as not controlling or mere dicta.[39] While acknowledging the public-policy concerns that other states relied on to justify prohibiting such agreements, the SJC held that antenuptial agreements were not per se void as against public policy.[40] Instead, safeguards

35. 130 N.E.2d 557 (Mass. 1955).

36. *See id.* at 558. In *Kovler*, the husband and the wife's brothers entered into a premarital contract. *See id.* In consideration for marrying their sister, the brothers promised to indemnify the husband for any support and maintenance he might owe to the sister. *Id.* When the couple later divorced and the husband sought to enforce the contract, absolving himself of all spousal duties, the court upheld the contract because they felt that the agreement was in aid, not derogation, of the marriage. *See id.* (reasoning agreement secured unimpaired support obligation). The court was careful to point out that "a contract tending to divest a husband of any obligation incidental to his marriage is invalid," implying that had the wife signed a waiver divesting her husband's support obligations, a different conclusion would be warranted. *Id.* (citing *French*).

37. *See* Osborne v. Osborne, 428 N.E.2d 810, 814-15 (Mass. 1981) (identifying case as one of first impression). Prior to *Osborne*, the closest the court came to addressing the issue was *Kovler v. Vagenheim*. *See id.* (discussing history of decisions pertaining to marital contracting in Massachusetts); *see also supra* note 36 (describing *Kovler* case). At the time of *Osborne*, Massachusetts had also already ruled on the validity of prenuptial agreements that were intended to alter one spouse's rights, created by virtue of marriage, in the event of the other spouse's death. *See* Rosenberg v. Lipnick, 389 N.E.2d 385, 388-89 (Mass. 1979) (abandoning requirement that common-law fraud must be proved to invalidate antenuptial contract), *rev'g* Wellington v. Rugg, 136 N.E. 831 (Mass. 1922). Antenuptial agreements intended to govern in the event of death were considered valid so long as there was "no fraudulent conduct on the part of either party, or . . . where the parties have acted honestly and fairly and have fully disclosed their assets one to the other." *Osborne*, 428 N.E.2d at 814. It is important to note that when the court declared the rule of the common law in 1981, it was necessarily also declaring what the law had always been. *See* Robbat v. Robbat, 643 So. 2d 1153, 1156 (Fla. Dist. Ct. App. 1994) (discussing implications of *Osborne*).

38. *See Osborne*, 428 N.E.2d at 816 (holding antenuptial agreement made in contemplation of divorce valid).

39. *See Robbat*, 643 So. 2d at 1154-56 (summarizing *Osborne* analysis).

40. *See Osborne*, 428 N.E.2d at 815-16 (adopting reasoning of *Posner*). As is suggested in *Posner*, the *Osborne* court based its acceptance of the antenuptial agreement on "the significant changes in public policy during the last decade in the area of domestic relations." *Id.* The court reasoned that such changes justified a more-tolerant approach to the use of antenuptial agreements relating to divorce. *See id.* It further defended its decision citing to the then-recent changes in Massachusetts divorce law that abolished recrimination and allowed for irretrievable breakdown as grounds for divorce. *See id.* at 815; *see also* An Act Providing for an Irretrievable Breakdown of the Marriage as a Ground for an Action for Divorce, ch. 698, § 1, 1975 Mass. Acts 866, 866-67 (codified as amended at MASS. GEN. LAWS ch. 208, § 1 (2007)) (permitting no-fault divorce). Once the legislature removed the major obstacles interfering with one's ability to obtain a divorce, it made little sense to deny engaged couples the ability to settle their rights in the event that their marriages failed. *See*

in the form of "guidelines" would be considered before deciding if a particular agreement violated public policy.[41]

These guidelines placed legal limitations upon antenuptial agreements, whereby a party's ability to waive or limit his legal rights upon divorce was not unrestricted.[42] As was the case with antenuptial agreements drafted in contemplation of death, antenuptial agreements relating to divorce would be judged using "fair disclosure rules" to determine if the agreement was valid when executed.[43] Additionally, the court insisted that the agreements be fair and reasonable at the time of the judgment nisi.[44] It also acknowledged that some situations might allow for the court to modify the agreement.[45] The

Osborne, 428 N.E.2d at 815-16. By creating an antenuptial agreement, couples, acting on their own initiative, were simply removing another obstacle from possible divorce proceedings, just as the legislature aimed to do when it amended the divorce laws. *See id. But see* Sherman, *supra* note 26, 384-93 (condemning prenuptial agreements as inequitable and thus unenforceable).

41. *See Osborne*, 428 N.E.2d at 816 (rejecting public-policy concerns as reason to absolutely invalidate prenuptial agreements); *see also* Ferry v. Ferry, 586 S.W.2d 782, 785-86 (Mo. Ct. App. 1979) (discussing different states' approval of and guidelines for prenuptial agreements at time of *Osborne*); 2 ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 110.69 (cataloging warranted policy concerns surrounding antenuptial agreements). Instead of declaring all antenuptial agreements limiting or waiving a spouse's legal rights relating to divorce void as against public policy, the *Osborne* court imposed guidelines to determine the extent to which such agreements should be enforced. *See Osborne*, 428 N.E.2d at 816.

42. *See Osborne*, 428 N.E.2d at 816 (restricting enforceability of antenuptial agreements). The Massachusetts SJC had previously recognized the importance of the ability to settle property rights prior to marriage and sought not to "regulate destructively." *See Rosenberg*, 389 N.E.2d at 389 (identifying ability to dictate terms regarding property rights as "valuable personal right"). The concern remained, however, that the agreements be "executed fairly and understandingly and be free from fraud, imposition, deception, or over-reaching." *Id.* The guidelines established in *Osborne* were intended to give full effect to the parties' intentions while remaining mindful of the valid concerns stemming from the nature of the parties' relationship. *See Osborne*, 428 N.E.2d at 816 (conceding agreements made in contemplation of divorce require same policing as separation agreements).

43. *See* Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (applying *Rosenberg* standard to all prenuptials agreements regardless of what situation agreement intended to control). In establishing the fair-disclosure rules for prenuptial agreements contemplating the death of one party, the *Rosenberg* court rejected the requirement that a party seeking to invalidate an antenuptial agreement show fraud because "the parties to an antenuptial agreement generally do not deal at arm's length. Rather, they occupy a relationship of mutual trust and confidence and as such must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement." Rosenberg v. Lipnick, 389 N.E.2d 385, 387-88 (Mass. 1979). *Rosenberg* criticized *Wellington* for treating the parties as though they stood at arm's length and, consequently, relying on cases set in a commercial context. *See id.* at 388. As a result, *Rosenberg* set forth the principle that the parties to an antenuptial agreement carry with them a burden of full disclosure if they want an enforceable agreement. *See id.* (dispelling with acceptance of "mere silence" when negotiating prenuptial agreement).

44. *See Osborne*, 428 N.E.2d at 816 (equating policy concerns governing prenuptial agreements in contemplation of divorce with separation agreements).

45. *See id.* (explaining instances in which court may modify antenuptial agreement). The court has the authority to modify the agreement if enforcing the original agreement could result in a spouse becoming a public charge or where a provision speaks to custody rights of a minor child that are not in the best interest of the child. *See id.* (intimating agreement creating such burden is not fair and reasonable); *cf.* Knox v. Remick, 358 N.E.2d 432, 437 (Mass. 1976) (holding separation agreement terms cannot absolutely bar probate court from modifying child-support payments); RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981) (asserting separation agreements containing custody provisions subject to plenary power of court). If the contesting party

Osborne court also emphasized that its adoption of *Rosenberg* and the related guidelines would not negate the possibility of an antenuptial agreement being found unenforceable if it unreasonably encouraged divorce, thereby clearly violating public policy.[46]

*c. Post-*Osborne *(1981- Present)*

While *Osborne* represented a relaxation of the Massachusetts approach to marital contracting, in 2002 the SJC decided *DeMatteo v. DeMatteo*[47] and reminded the legal world that "[m]arriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise."[48] As such, the court refused to apply the Uniform Premarital Agreement Act's (UPAA) unconscionability standard to antenuptial agreements, primarily because the court considered it inappropriate to use commercial-law standards when reviewing private contracts borne of confidential relationships.[49] In

is arguing that payment should be made in excess of the amount dictated by the agreement, the agreement itself may be used as a possible bar within that proceeding. *See Osborne*, 428 N.E.2d at 816 (explaining role of antenuptial agreement where terms challenged and modification requested).

46. *See Osborne*, 428 N.E.2d at 816 (acknowledging argument that antenuptial agreements unduly encourage divorce still appropriate in certain situations); *see also* Capazzoli v. Holzwasser, 490 N.E.2d 420, 422-23 (Mass. 1986) (holding agreement requiring woman to leave husband unenforceable because unreasonably encouraged divorce); RESTATEMENT (SECOND) OF CONTRACTS § 191 cmt. a (1981) (stating agreements changing "essential incident of the marital relationship" unenforceable when harmful to public interest). Such an exception is consistent with the Massachusetts legislature's views regarding the import of marriage. *See* MASS. GEN. LAWS ANN. ch. 119, § 1 (West 2008 & Supp. 2011) (asserting Commonwealth's policy as "strengthening and encouragement of family life"); *see also* Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983) (suggesting legislative regulations demonstrate government's broad concerns surrounding marriage).

47. 762 N.E.2d 797 (Mass. 2002).

48. *Id.* at 809. Just one year later, the court reiterated and relied upon the idea that marriage imposes a unique status when explaining why the state cannot bar same-sex marriage. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (listing benefits flowing from marriage); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (rejecting contention "civil unions" equal to "civil marriage"). *But cf.* Nathan Koppel, *Hawaii Legalizes Same-Sex Civil Unions*, WALL ST. J. L. BLOG, (Feb. 24, 2011, 5:21 PM), http://blogs.wsj.com/law/2011/02/24/hawaii-legalizes-same-sex-civil-unions/ (reporting how state senator described civil unions as "same-sex marriage with a different name"). *See generally Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16430 (last visited July 14, 2011) [hereinafter *Defining Marriage*] (listing states allowing only civil unions for same-sex couples instead of marriage).

49. *See DeMatteo*, 762 N.E.2d at 810 (rejecting UPAA's standard of review). *See generally* UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. (2001) (setting forth recommended requirements for enforceable antenuptial agreement). In 1983, a conference of commissioners drafted the UPAA. ARLENE G. DUBIN, PRENUPS FOR LOVERS 129 (2001). The creation of the UPAA was prompted by the growing popularity of prenuptial agreements and a desire to relax the strict standards of enforceability. *See id.* While many states have utilized the UPAA's standards in establishing how to judge premarital agreements, there is great variance in which sections are adopted. *See id.* Section 6 of the UPAA addresses enforceability. *See* UNIF. PREMARITAL AGREEMENT ACT § 6. Section 6 of the UPAA stands for the idea that "unconscionability at the time of execution is insufficient to render an agreement unenforceable; there must also have been less-than-adequate disclosure." *See Future of Antenuptial Agreement Law*, *supra* note 26, at 2080-81 (discussing ways in which UPAA treats marital contracts similar to ordinary contracts). As such, states that have adopted the

DeMatteo, the husband appealed the Massachusetts Probate and Family Court's decision to invalidate his antenuptial agreement as not fair and reasonable.[50] The SJC took this appeal as an opportunity to clarify the test for determining the validity of premarital contracts and to organize the standards, tests, and buzzwords mentioned in prior cases.[51] Although the court did not adopt the UPAA, its analysis took a surprising turn in further relaxing prenuptial-agreement standards.[52]

To begin, the court pointed out that because an antenuptial agreement is essentially a contract between a husband and wife, the agreement must comport with the traditional rules governing contract formation.[53] As such, an

UPAA are not obliged to entertain substantive fairness considerations at the time of enforcement. *See id.* at 2081 (explaining how UPAA "embrace[s] . . . ordinary contract law doctrines").

50. *See DeMatteo*, 762 N.E.2d at 800-01. The Probate and Family Court found that the agreement was neither fair and reasonable at the time of execution nor at the time the couple wed. *Id.* at 800. At the time the couple wed, the wife worked as a secretary earning $25,000 a year with few assets and no real property, and the husband was a wealthy businessman. *Id.* at 801. At the time they entered into the marriage, both parties were aware of the other's financial status. *Id.* When the husband proposed, he did so under the condition that his future wife sign a prenuptial agreement; after considerable negotiations, she obliged. *Id.* at 801-02.

51. *See id.* at 805-06. The SJC made a point to highlight the trial court's failure to differentiate its analysis regarding the agreement's fairness at the time of the execution and fairness at the time of the trial. *See id.* at 803. The trial judge simply found that the agreement was unfair at both points in time, basing her decision on "the lack of substantial negotiations involved before the agreement was executed, [the] sophistication of the issues involved [and] the lifestyle of the parties during the marriage and the vast disparity between the parties' ability to acquire future assets and income." *Id.* (internal quotation marks omitted). The trial judge also applied a fair-and-reasonable test developed in *Dominick v. Dominick*, traditionally used to judge the enforceability of separation agreements. *See DeMatteo*, 762 N.E.2d at 804-05; *Dominick v. Dominick*, 463 N.E.2d 564 (Mass. App. Ct. 1984). The *Dominick* court enumerated eight factors for determining whether a separation agreement is fair and reasonable:

> (1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in [chapter 208, section 34 of the Massachusetts General Laws].

Dominick, 463 N.E.2d at 569-70. Chapter 208, section 34 requires judges, when determining alimony to be paid or fixing the nature and value of property to be assigned, to consider: "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2007). When deciding the nature and value of the property to be assigned, judges should also consider

> the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Id.

52. *See infra notes* 74-76 and accompanying text (explaining result of *DeMatteo* decision).

53. *See* DeMatteo v DeMatteo, 762 N.E.2d 797, 805 n.16 (Mass. 2002) (explaining rules of contract formation apply to marital contracting); *see also* Rosenberg v. Lipnick, 389 N.E.2d 385, 389 (Mass. 1979)

antenuptial agreement will be void if it lacks consideration or is tainted by fraud, misrepresentation, or duress.[54] Absent such basic contractual concerns, the court will ask if the antenuptial agreement was valid at the time of execution, and fair and reasonable at the time of divorce (the judgment nisi).[55]

Whether an agreement is valid at the time of execution depends upon the "fair disclosure rules" first set forth in the case of *Rosenberg v. Lipnick* and later relied on in *Osborne*.[56] To satisfy the test, the provisions of the agreement affecting the contesting party must have been fair and reasonable at the time the agreement was executed, the contesting party must have been fully informed or had or should have had independent knowledge of the other party's worth prior to execution, and the agreement should have contained a waiver signed by the contesting party.[57] In explaining how to determine whether a specific agreement satisfies the first condition, the *DeMatteo* court noted the existence of a statutory grant permitting parties contemplating marriage to arrange and protect their finances as they see fit; however, in the same breath, the court pointed out that a marriage is not a typical contract because the union imposes a legal status upon both parties whereupon they automatically incur certain rights and obligations.[58]

(identifying "fraud, imposition, deception, or over-reaching" as legitimate concerns in premarital contracting).

54. *See DeMatteo*, 762 N.E.2d at 805 n.16 (establishing baseline requirements).

55. *See id.* at 805 (announcing proper test by which to judge antenuptial agreements). In pointing out that the trial judge's opinion failed to differentiate between the two separate steps of analysis, the court clarified that the evaluation of an agreement must occur in stages. *See id.* at 811 (declaring trial judge's assessment of agreement's fairness at divorce unnecessary upon ruling agreement invalid). Although *DeMatteo* clearly presents a strong case for enforcement, the fact remains that procedural and substantive safeguards cannot be completely abolished because most people continue to enter marital relationships overly optimistic. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 225 (1995). For example, when researchers asked a group of soon-to-be-married people how many married couples will likely divorce, most respondents correctly speculated 50%. *Id.* at 217. Nevertheless, when asked what the likelihood was that the respondent, himself or herself, would divorce, most estimated 0%. *Id.* Such optimism also pervaded the questions regarding alimony and child custody. *Id.* at 217-18.

56. *See* Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (stating *Rosenberg* gave rules to determine validity of agreements). In Massachusetts, *Rosenberg* established a fair-disclosure test when reviewing an antenuptial agreement intended to control at the time of the spouse's death, a test that *Osborne*, two years later, adopted as controlling in the divorce context. *See Osborne*, 428 N.E.2d at 816 (adopting *Rosenberg* test); *see also DeMatteo*, 762 N.E.2d at 805-06, 808 (summarizing requirements of fair disclosure); Austin v. Austin, 839 N.E.2d 837, 840-41 (Mass. 2005) (recapping requirements set forth in *Rosenberg*, *Osborne*, and *DeMatteo*). To determine whether "the agreement contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement," the first factor set forth in *Rosenberg*, "reference may appropriately be made to such factors as the parties' respective worth, . . . ages, . . . intelligence, literacy, business acumen, and prior family ties or commitments." *Austin*, 839 N.E.2d at 841.

57. *See DeMatteo*, 762 N.E.2d at 806 (defining fair disclosure rules).

58. *See id.* at 808-09 (explaining impossibility of judging antenuptial monetary provisions in isolation); *compare* MASS. GEN. LAWS ANN. ch. 209, § 25 (West 2007) (permitting couples, before marriage, to enter into contracts limiting or designating distribution of property), *with Rosenberg*, 389 N.E.2d at 387-88 (recognizing nature of relationship in marital contracting necessitates heightened scrutiny). In what appears to be an attempt to resolve this troublesome dichotomy, the court settled on labeling its approach as a "fair and reasonable" test as opposed to one of unconscionability. *See DeMatteo*, 762 N.E.2d at 809-10 (defending the use of fair-and-

In deference to the statutory grant, the court made clear that "[t]he relinquishment of claims to the existing assets of a future spouse, even if those assets are substantial . . . does not necessarily render an antenuptial agreement invalid."[59] Therefore, an agreement need not and should not be considered unfair and unreasonable simply because it is one-sided.[60] A judge can only condemn an antenuptial agreement as unfair and unreasonable if the contesting party is "essentially stripped of substantially all marital assets."[61] It should be noted, however, that despite the statutory allowances promoting one's freedom to contract, the court cautioned that marriage is a status, which creates special rights.[62] Thus, the court cautioned parties that it would not enforce an antenuptial agreement that prohibited a spouse from keeping his or her marital rights, "however disproportionally small."[63]

The *Dematteo* court also noted that despite a shared name, the fair-and-reasonable standard used to judge the validity of an antenuptial agreement is far

reasonable standard as opposed to the unconscionability standard); *cf.* Upham v. Upham, 630 N.E.2d 307, 310-11 (Mass. App. Ct. 1994) (recognizing overlap in standards but insisting two standards are distinct). The court justifies the fair-and-reasonable standard, arguing that "antenuptial agreements by their nature concern confidential relationships, and a standard for testing the validity of a business agreement seems . . . inappropriate in this context." *DeMatteo*, 762 N.E.2d at 810.

59. *See* DeMatteo v DeMatteo, 762 N.E.2d 797, 809 (Mass. 2002) (suggesting fair-and-reasonable test does not require equal division). The ability of engaged parties to contract pursuant to chapter 209, section 25 of the Massachusetts General Laws would essentially be meaningless if "fair and reasonable" meant that the agreement approximated "an alimony award and property division ruling a judge would be required to make under [chapter 208, section 29 of the Massachusetts General Laws]." *See id.* Today, for practical purposes, prenuptial agreements seem to make more sense than ever—parties are marrying later in life and are therefore bringing more assets into the marriage, divorce rates are higher than ever, and second marriages are common. *See* Sherman, *supra* note 26, at 373; *see also* DUBIN, *supra* note 49, at 43 (arguing prenuptial agreement practical for just about anyone).

60. *See DeMatteo*, 762 N.E.2d at 809 (demonstrating breadth of "fair and reasonable"). The fact that a contesting party is left with "considerably fewer assets" and a "far different lifestyle after divorce" than was available to her during the marriage does not mean the agreement was not fair and reasonable and thus invalid at execution. *See id.* (providing instances of unequal yet fair results).

61. *Id.* (establishing limit of "fair and reasonable"); *see also Austin*, 839 N.E.2d at 841 (noting agreement leaving one spouse with "different lifestyle" insufficient to constitute stripping of all marital assets). Despite defining the limits of the standard quite broadly, the *DeMatteo* court insisted it was not requiring a showing of unconscionability to invalidate an agreement by expressly distinguishing itself from states that use an unconscionability standard. *See DeMatteo*, 762 N.E.2d at 809 (citing Georgia, Kentucky, Missouri, and New Hampshire as states requiring greater inequities than Massachusetts); *see also* LINDEY & PARLEY, *supra* note 41, § 110.66 (explaining unconscionability requires "greater showing of inappropriateness than the fairness test"). *But cf.* Eisenberg, *supra* note 55, at 257 (suggesting many courts use term unconscionability incorrectly with regards to antenuptial agreements). The classic definition of unconscionability is "a showing that one party unfairly exploited the other at the time the contract was made, or that the contract was unfairly one-sided at that time." *Id.* at 256-57. The court ultimately held that the antenuptial agreement was valid, and thus fair and reasonable at the time of execution, because it actually provided the wife with more assets and benefits than she had before the marriage. *See DeMatteo*, 762 N.E.2d at 811.

62. *DeMatteo*, 762 N.E.2d at 813.

63. *Id.* (forbidding agreements that prevent spouse from retaining marital rights like maintenance and support); *see also* Knox v. Remick, 358 N.E.2d 432, 437 (Mass. 1976) (allowing judge to alter antenuptial terms if enforcement otherwise results in spouse becoming public charge).

less demanding than the identically termed test used to judge the validity of a separation agreement.[64] This distinction is based on the greater level of freedom the parties to an antenuptial agreement hold prior to executing the agreement.[65] Upon the dissolution of a marriage, a judge will use the factors set forth in chapter 208, section 24 of the Massachusetts General Laws to assist in his decision-making process regarding how to divide up the couple's property interests.[66] Courts find it appropriate, therefore, to use these same factors when judging the validity (fairness and reasonableness) of a separation agreement because "[t]he separation agreement is, after all, a substitute for the independent application by a judge of those same statutory factors."[67] In contrast, an antenuptial agreement provides couples with the luxury of "defin[ing] the material aspects of their relationship before they enter into the status of marriage."[68] "If the terms of a proposed antenuptial agreement are unsatisfactory, a party is free not to marry."[69] Regrettably, the option not to marry is only a memory for those parties drafting separation agreements.[70]

After determining that the agreement contained a fair-and-reasonable provision at the time it was executed—the first of three considerations to be evaluated when determining whether an antenuptial agreement is valid—Massachusetts courts will look to whether there was full and fair disclosure of each party's financial circumstances in determining whether a party was "fully informed"—the second consideration.[71] As for the third consideration, a

64. *See DeMatteo*, 762 N.E.2d at 810 (noting substantive provisions of fairness test different depending on timing of marital agreement). Essentially, there would be no purpose in drafting an antenuptial agreement if the parties entering into the agreement could not rely on its effectiveness. *See* 1 CHARLES P. KINDREGAN, JR. & MONROE L. INKER, FAMILY LAW AND PRACTICE § 20:10 (2d ed. 1996) (explaining antenuptial agreements serve no independent purpose if judge analyzes them using separation agreement factors).

65. *See* DeMatteo v. DeMatteo, 762 N.E.2d 797, 810 (Mass. 2002) (rejecting argument that separation and antenuptial agreements may be judged using same standard); *see also* Dominick v. Dominick, 463 N.E.2d 564, 569-70 (Mass. App. Ct. 1984) (listing permissible considerations for determining existence of fair and reasonable separation agreement).

66. *See* MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2007) (granting court power to issue judgment ordering divorced spouse to pay alimony); *see also supra* note 51 (listing permissible consideration under section 34).

67. *See DeMatteo*, 762 N.E.2d at 810 (justifying use of statutory considerations when calculating alimony payments to judge separation agreement's validity).

68. *Id.*

69. *Id.* (explaining why using same standard inappropriate). *But see* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 206 (1998) ("[F]or those without power, sometimes the . . . only alternative to a bad bargain is no bargain.").

70. *See DeMatteo*, 762 N.E.2d at 810 (explaining parties entering settlement agreements cannot simply walk away from relationship). The court reasoned that Mrs. DeMatteo could have walked away from her engagement if she found the terms of the antenuptial agreement—providing for a post-divorce standard of living considerably lower than that attainable during marriage—unacceptable. *See id.* at 811 (relying upon wife's ability to reject terms of marriage prior to marrying).

71. *See* DeMatteo v. DeMatteo, 762 N.E.2d 797, 806 (Mass. 2002) (explaining significance of disclosure requirement). This aspect of the test is considered vitally important because of the personal and confidential

waiver is essential because by signing an antenuptial agreement the parties acknowledge that they are giving up or limiting rights they are entitled to simply by the nature of marriage.[72]

Only when and if a judge finds that an antenuptial agreement is valid, using the above considerations, is he to take the famed "second look" and ask if there is any other reason not to enforce the agreement.[73] In doing so, the judge may analyze how the terms of the agreement affect the contesting party at the time of the divorce.[74] The agreement should be enforced "unless, due to circumstances occurring during the course of the marriage, enforcement . . . would leave the contesting spouse 'without sufficient property, maintenance, or

nature of the relationship between a future husband and wife. *See id.* (identifying trust relationship inherent as mandating full disclosure). The court did not and has not expressly stated what is required to satisfy this element, only that "it is sufficient that the disclosure be such that a decision by the opposing party may reasonably be made as to whether the agreement should go forward." *See id.*; *see also* KINDREGAN & INKER, *supra* note 31, § 20:7 (describing informed participant as spouse with enough information about other's worth to give informed consent). Other states similarly decline to put an exact definition on what informed means. *See In re* Estate of Lopata, 641 P.2d 952, 955 (Colo. 1982) (explaining fair disclosure contemplates having information "of a general and approximate nature" regarding spouse's worth); *see also* Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986) (requiring "fair and reasonable disclosure of financial status"). The fact that negotiations are squeezed into two-weeks' time does not show that one was uninformed when signing the agreement, particularly if there is no evidence to suggest that the time frame precluded the spouse from exploring his or her options. *See DeMatteo*, 762 N.E.2d at 807 (explaining "minimal negotiations" unsatisfactory to invalidate antenuptial agreement where financial positions disclosed). This sentiment is echoed by many states. *See, e.g.*, *In re* Yannalfo, 794 A.2d 795, 797-98 (N.H. 2002) (holding lack of notice alone insufficient to invalidate antenuptial agreement); Lebeck v. Lebeck, 881 P.2d 727, 734 (N.M. Ct. App. 1994) (stating no undue influence or coercion when husband demanded antenuptial agreement "several days" before wedding); Howell v. Landry, 386 S.E.2d 610, 617 (N.C. Ct. App. 1989) (holding time between presentation of prenuptial agreement and wedding insufficient to per se invalidate agreement). *But see* Rose v. Rose, 526 N.E.2d 231, 236 (Ind. Ct. App. 1988) (suggesting court should consider duress analysis if groom springs agreement on bride immediately before wedding).

72. *See DeMatteo*, 762 N.E.2d at 807 (explaining requirements of effective waiver). A waiver should relinquish all spousal rights except for those specifically provided for in the antenuptial agreement. *See id.* (describing valid waiver). In considering the validity of the waiver, courts may consider whether "each party was represented by independent counsel, the adequacy of the time to review the agreement, the parties' understanding of the terms of the agreement and their effect, and a party's understanding of his or her rights in the absence of an agreement." *Id.* at 808 (emphasizing import of waivers in representing parties' proactive choice to give up spousal rights). If a party has ample time to consult a lawyer but is never advised to do so, it is unlikely that they truly understand the rights they are waiving. *See* Eyster v. Pechenik, 887 N.E.2d 272, 282 (Mass. App. Ct. 2008) (holding waiver requirement not met as neither party understood their marital rights nor obtained counsel). *But see* KINDREGAN & INKER, *supra* note 31, § 20:6 (explaining competent person can represent himself so attorneys cannot be mandatory).

73. *See DeMatteo*, 762 N.E.2d at 811 (dismissing need for "second look" at antenuptial agreement where it fails "fair disclosure" test). In *Osborne*, the court previously identified the standard used during the second-look analysis as "fair and reasonable." *See* Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (requiring agreement "fair and reasonable" at time of judgment nisi); *see also* Eisenberg, *supra* note 55, at 257 (arguing improper to use unconscionability label as means to invalidate agreement on "second look"). *But see DeMatteo*, 762 N.E.2d at 812 (noting one scholar had argued "second look" requirement of *Osborne* actually judged using unconscionability standards).

74. *See DeMatteo*, 762 N.E.2d at 812 (explaining procedure surrounding second looks).

appropriate employment to support' herself."[75] In other words, enforcement should be refused if there is a showing of unconscionability at the time of the divorce.[76] The "second look" prong is basically utilized to "ensure that the agreement has the same vitality at the time of the divorce that the parties intended at the time of its execution."[77]

B. Postnuptial Agreements

1. Postnuptial Agreements Generally

Postnuptial agreements clearly stand on different footing than antenuptial or separation agreements.[78] The potential repercussions of rejecting a postnuptial

75. *Id.* at 812-13 (quoting HOMER H. CLARK, JR., DOMESTIC RELATIONS IN THE UNITED STATES § 1.9 & n.51 (2d ed. 1987)).

76. *See id.* (explaining when court should invalidate antenuptial agreement because of agreement's effect at time of divorce); *see also* Austin v. Austin, 839 N.E.2d 837, 841 (Mass. 2005) (noting agreement cannot leave spouse without necessary means of support at time of divorce). The court seemed far less concerned with the name of the standard than the substance of the review process, as analysis is highly contingent upon the facts and agreement driving each individual case. *Austin*, 839 N.E.2d at 813. Nevertheless, the court changed the name of the standard used at the time of enforcement from "fair and reasonable" to "unconscionable" in an attempt to further illustrate the differing approaches that must be applied to separation and prenuptial agreements. *See id.* (recognizing nomenclature change as signal to judges and practitioners to distinguish between different marital contracts). Such applicable circumstances might include the onset of a debilitating illness or where an economic phenomenon renders a previously agreed-on payment insufficient to satisfy the intent of the parties at the time they entered the agreement. *See id.* The requirement that the court approach its analysis on such a case-by-case basis is consistent with most other states that permit a "second look" after determining the agreement was validly executed. *See* MacFarlane v. Rich, 567 A.2d 585, 591 (N.H. 1989) (holding enforcement of agreement an "unconscionable hardship" due to unforeseeable changed circumstances); *see also Button*, 388 N.W.2d at 552 (permitting court to declare agreement unenforceable because significantly changed circumstances made agreement unfair at divorce).

77. DeMatteo v. DeMatteo, 762 N.E.2d 797, 813 (Mass. 2002) (stating purpose of "second look").

78. *See* KINDREGAN & INKER, *supra* note 31, § 50:15 (acknowledging contracts entered into in anticipation of marriage radically different from those created once married); *supra* note 76 and accompanying text (discussing how SJC expressly sought to distinguish prenuptial agreement from separation agreement analysis). Married couples often use postnuptial agreements as a tool to resolve marital friction in the hope that, once the problem is settled, the couple can achieve wedded bliss. *See* Ansin v. Craven-Ansin, 929 N.E.2d 955, 960 (Mass. 2010) (describing postnuptial agreement as attempt to "promote marital harmony"); *see also* Fogg v. Fogg, 567 N.E.2d 921, 924 (Mass. 1991) (explaining couple agreed to dispose of certain assets as means to eliminate marital strife). Inherent in these agreements are concerns that "[a] spouse is likely to be more generous in making financial concessions in the hope of keeping the marital relationship alive than in the case where the parties negotiate a final agreement in the hopeless context of divorce." KINDREGAN & INKER, *supra* note 31, § 50:15. Because of the differing circumstances that give rise to postnuptial and prenuptial agreements—which are further differentiated from separation agreements—some states judge the enforceability of premarital and marital agreements using different standards. *See* MINN. STAT. ANN. § 519.11(1a)(1) (West 2006 & Supp. 2012) (requiring enforceable postnuptial agreements meet prenuptial requirements plus additional, different requirements); *see also* LA. CIV. CODE ANN. art. 2329 (2009) (demanding judge find postnuptial, but not premarital, agreements serve both parties' best interests). *But see* N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2010) (applying identical principles to marital and premarital agreements); N.C. GEN. STAT. § 52-10(a) (2011) (granting persons "about to be married and married" identical ability to release rights acquired through marriage); WIS. STAT. ANN. § 766.58 (West 2009) (providing for premarital and marital agreements without distinguishing between the two); Epp v. Epp, 905 P.2d 54, 59-61 (Haw. Ct. App. 1995)

agreement are far different from the possible consequences of declining to sign an antenuptial agreement.[79] A bride-to-be can reject a disagreeable antenuptial agreement and walk away from the relationship, end of story.[80] When a postnuptial agreement is presented to a spouse, however, the contract might represent a final attempt "to save a long existing family relationship to which she has committed her best years."[81] Some courts have recognized that such pressures might encourage parties to threaten dissolution of the marriage as a way to "to bargain themselves into positions of advantage."[82]

2. Postnuptial Agreements in Massachusetts

Just as the controversy surrounding prenuptial agreements began to feel like a distant memory, Massachusetts was introduced to the postnuptial agreement.[83] With the growing popularity of this marital-contracting hybrid—a

(using same considerations when assessing validity of prenuptial and postnuptial agreements); Stoner v. Stoner, 819 A.2d 529, 532-33 (Pa. 2003) (utilizing same philosophy in judging postnuptial agreements as prenuptial); Reese v. Reese, 984 P.2d 987, 995 (Utah 1999) (applying same principles to premarital and marital agreements).

79. *See* Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, *in* THE THEORY OF CONTRACT LAW 45, 60-62 (Peter Benson ed., 2001) (discussing problems inherent when contracting parties already married).

80. *See DeMatteo*, 762 N.E.2d at 811 (explaining party presented with prenuptial agreement can decline marriage if terms unacceptable).

81. KINDREGAN & INKER, *supra* note 31, § 50:15 (identifying potential costs of rejecting postnuptial agreement); *see also* Pacelli v. Pacelli, 725 A.2d 56, 59 (N.J. Super. Ct. App. Div. 1999) (recognizing risk of not signing postnuptial agreement includes destruction of family and subsequent social stigma); Amy L. Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 603-04 (1998) (discussing theory purporting "divorce threat" may prompt one spouse to "strike disadvantageous bargain"); *cf.* Jennifer Cullen, *The Stigma of Divorce*, HUFFINGTON POST (Nov. 8, 2010, 10:30 AM), http://www.huffingtonpost.com/jennifer-cullen/the-stigma-of-divorce_b_778570.html (recounting hardships of own divorce). One appealing aspect of marriage is the social and legal predictability of it. *See History of Contemporary Marriage*, *supra* note 22, at 28. Such predictability and expectations have evolved over the years, seeing as, for instance, the laws mandating gender roles within a marriage have radically changed or have been completely eradicated. *See* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 60-61 (2006) (discussing termination of distinctions between men and women concerning obligations like alimony and child support). *But cf.* Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1515 (2005) (suggesting lower courts tend to minimize homemaker's contribution to the marital economic partnership). The retention of gender norms, however, is not as clear-cut. *Compare* JUDY GOLDBERG DEY & CATHERINE HILL, BEHIND THE PAY GAP 2-3 (Susan K. Dyer ed., 2007) (arguing expectations of fatherhood and motherhood still sharply distinct), *and* Trebilcock & Elliot, *supra* note 79, at 62 (suggesting in many marital relationships husband's designated role allows him to structure coercive bargains), *with* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194 (2007) (asserting "official gender role distinctions" have nearly been eliminated within family). In the event of divorce, a woman who stayed home to raise the children runs the risk that her investment in her family will be severely undervalued, whereas her husband's investment in his conventional work will not. *See* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 155 (1999).

82. *See* Mathie v. Mathie, 363 P.2d 779, 783 (Utah 1961) (recognizing susceptibility of marital agreements to threats of divorce).

83. *See Ansin*, 929 N.E.2d at 961 (announcing case at bar represented case of first impression); *see also*

cousin of the prenuptial and separation agreement—the SJC was forced to decide whether to declare postnuptial agreements void as against public policy, and, if not, how courts ought to determine whether a particular agreement is enforceable.[84] The 1991 case of *Fogg v. Fogg* marked Massachusetts's first encounter with a postnuptial agreement drafted with the intention of controlling the contracting parties in the event of their future divorce.[85] Instead of addressing the per se validity of such an agreement, the SJC gracefully sidestepped the issue, declaring the specific postnuptial agreement in question invalid because it was induced by fraud.[86] It was not until the 2010 case of first impression, *Ansin v. Craven-Ansin*, that the court answered the long-lingering questions regarding the validity and enforceability of postnuptial agreements governing a subsequent divorce.[87]

In *Ansin*, the SJC concluded that postnuptial agreements are not void as against public policy, thereby rejecting the policy arguments such as postnuptial agreements innately coerce one spouse into entering the agreement, typically arise in marriages that are already failing, and inherently encourage divorce.[88] In reaching its conclusion, the court relied on the fundamental belief

Saltzman & Ellement, *supra* note 8 (reporting on Massachusetts's first ruling on postnuptial agreements). Presently, prenuptial agreements are universally recognized as a legitimate form of marital contracting. *See* Sherman, *supra* note 26, at 375; *see also* Williams, *supra* note 10, at 839 (declaring area of premarital contracting well settled).

84. *See* Ansin v. Craven-Ansin, 929 N.E.2d 955, 958 (Mass. 2010) (summarizing issue before court); *see also supra* note 4 and accompanying text (noting growing popularity of postnuptial agreements). A postnuptial agreement is made while the parties are married, but not in anticipation of divorce. *See* Fogg v. Fogg, 567 N.E.2d 921, 923-24 (Mass. 1991) (suggesting enforceable postnuptial agreements must meet threshold of other marital contracts).

85. *See* 567 N.E.2d at 921 (noting case represented court's first experience with postnuptial agreements).

86. *See id.* at 923 (declining to rule on the general validity of postnuptial agreements). The *Fogg* court determined that even if such agreements were valid, to be enforceable they must be free of fraud and coercion, similar to any other contract. *See id.* (refusing to enforce postnuptial agreement because of wife's fraudulent promise). In *Fogg*, the couple drafted a postnuptial agreement at a time when their marriage looked hopeless; both parties agreed that the agreement was an attempt to preserve the marriage, believing the disposition of certain assets and interests would assuage marital friction. *See id.* at 923-24. The agreement listed numerous property rights that the husband would transfer to the wife and provided for how assets would be distributed upon death or divorce. *See id.* at 923. After securing hundreds of thousands of dollars along with other substantial property interests, the wife notified her husband that she wanted a divorce. *See id.* at 924. The court found that the wife was only ever using the agreement as a means to gain financial security, not as an attempt to preserve the marriage, and thus her promise to attempt to maintain the marriage was fraudulent, rendering the agreement unenforceable. *See id.* at 923-24.

87. *See Ansin*, 929 N.E.2d at 961.

88. *See id.* at 961-62 (holding postnuptial agreements may be enforced). The court supported its decision by pointing to many other states that have addressed the issue and reached similar conclusions. *See, e.g.*, *In re* Estate of Harber, 449 P.2d 7, 15 (Ariz. 1969) (holding married couples may divide their property by contract as they see fit); Casto v. Casto, 508 So. 2d 330, 333 (Fla. 1987) (holding postnuptial agreements not per se against public policy); Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003) (upholding position that postnuptial agreements are not void against public policy); *In re* Estate of Gab, 364 N.W.2d 924, 925 (S.D. 1985) (describing postnuptial agreements as enforceable but warrant close scrutiny). *But see* Brewsbaugh v. Brewsbaugh, 23 Ohio Misc. 2d 19, 20 (Ct. Com. Pl. 1985) (holding postnuptial agreements per se invalid).

that marriage does not corrupt a party's ability to contract.[89] Furthermore, the court reiterated a reoccurring sentiment found in many of the state's foundational marital-contracting cases—a contract is not automatically coercive simply because it is not the product of arm's-length negotiations.[90]

Yet, the fact that a postnuptial agreement is not the product of an arm's-length negotiation did prompt the court to establish a set of guidelines for judges to use when assessing whether a particular agreement is enforceable.[91] At a minimum, the court will ask whether:

> (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce.[92]

89. *See Ansin*, 929 N.E.2d at 962 (rejecting wife's policy arguments against postnuptial agreements). While it may be that postnuptial agreements are not void merely because they usually arise during times of marital strife, in this instance, the couple was experiencing marital problems when they entered the agreement. *See* Brief of Defendant-Appellant at 10-11, *Ansin*, 929 N.E.2d 955 (No. 06D-2889-DVI) (describing events leading up to husband's request for postnuptial agreement). Such circumstances are not unusual. *See, e.g.*, DiGiacomo, *supra* note 1 (describing couple who relied on postnuptial agreement to end stress related to their financial differences); Trafford, *supra* note 4 (referencing couple on edge of divorce before postnuptial agreement helped them start over); Wen, *supra* note 4 (recounting couple who identified their marriage as on "brink of collapse" before signing postnuptial agreement). It is also worth noting that in rejecting the wife's claim, the *Ansin* court rebuffed the "assumption that marital agreements are typically executed amid threats of divorce or induced by illusory promises of remaining in a failing marriage." *See* 929 N.E.2d at 962. In fact, the court seemingly criticized the wife's attorney for failing to provide any evidence in support of the claim. *See id.* Yet, in a similar case twenty-years prior, the court, without ruling as to the general enforceability of postnuptial agreements, condemned a comparable agreement because the findings demonstrated that the wife fraudulently induced the husband to sign a postnuptial agreement under the guise that she would work to preserve their marriage. *See supra* note 86 and accompanying text (explaining rationale behind *Fogg* decision).

90. *See* Ansin v. Craven-Ansin, 929 N.E.2d 955, 962 (Mass. 2010) (recognizing contracting rights survive marriage and rejecting arm's-length requirement for valid contract formation); *see also* Osborne v. Osborne, 428 N.E.2d 810, 815-16 (Mass. 1981) (reasoning freedom to contract permits use of antenuptial agreement); Knox v. Remick, 358 N.E.2d 432, 435 (Mass. 1976) (noting freedom to contract permits use of separation agreement).

91. *See Ansin*, 929 N.E.2d at 963-64 (listing minimum factors to consider before judge sanctions agreement); *see also* Krapf v. Krapf, 786 N.E.2d 318, 323 (Mass. 2003) (labeling spouses as fiduciaries thus imposing highest standards of fair dealing regarding respective contractual obligations).

92. *Ansin*, 929 N.E.2d at 963-64. As to the second consideration, in recognition of the potentially coercive nature of marital contracting, the party looking to enforce the agreement has the affirmative duty to show that he did not obtain his spouse's consent through fraud or coercion. *Compare id.* at 964 (shifting typical enforcement burden), *with* LORD, *supra* note 3, § 69:3 (listing elements traditionally required before finding of fraud permitted). Shifting the burden is consistent with a number of other states, although Massachusetts does not require the enforcing party to provide proof by "clear and convincing evidence." *Compare Ansin*, 929 N.E.2d at 964 n.11 (rejecting clear-and-convincing standard), *with In re Estate of Harber*, 449 P.2d at 16 (placing burden on party seeking enforcement using clear-and-convincing standard). The court avoided addressing whether an agreement must be supported by consideration because lack of consideration

The fifth requirement mirrors the language found in separation-agreement guidelines, but just as the court made substantive distinctions between the identically named "fair disclosure rules" in the antenuptial- and separation-agreement context, the court also determined that the fair-and-reasonable standard must be interpreted differently in the postnuptial context than the separation context.[93] "[P]arties to a marital agreement do not bargain as freely as separating spouses may do" because they are still trying to preserve the marriage at the time of the agreement.[94] Valid considerations for whether an agreement is fair and reasonable at the time of execution include: the context in which the agreement was made; the representation of each party by independent counsel, or lack thereof; the difference between the outcome of a divorce under the agreement and the outcome under the "prevailing legal principles"; the purpose of the agreement with respect to benefitting children or other third parties and the impact of the agreement on children or third parties; the length of the marriage; the motives of the spouses; the respective bargaining position of each of the parties; and the degree of pressure endured by the contesting spouse.[95] Unlike other state governments, the Massachusetts legislature has abstained from enacting legislation expressly approving or prohibiting these agreements.[96]

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was not at issue in the case. *See Ansin*, 929 N.E.2d at 964 n.10 (explaining wife alleged "insufficient consideration"). It did suggest, however, that an allegation of inadequate consideration is simply an exemplification of the unfair-and-unreasonable concern. *See id.* (intimating consideration concerns probably need not be individually addressed).

93. *See Ansin*, 929 N.E.2d at 967 (reasoning postnuptial agreement more closely resembles separation agreement). Where it was inappropriate for a court to consider the factors listed in chapter 208, section 34 of the Massachusetts General Laws when analyzing the enforceability of an antenuptial agreement, such heightened scrutiny is appropriate for postnuptial agreements because of the similarities they share with separation agreements. *See id.* at 967-68; *see also supra* note 67 and accompanying text (discussing why court tightened appropriate review considerations in separation-agreement context).

94. *See Ansin*, 929 N.E.2d at 967-68 (distinguishing between postnuptial and separation agreements). The pivotal distinction is that at the time parties enter into a postnuptial agreement, they still owe "absolute fidelity" to one another, unlike separation agreements, which are entered into when divorce is imminent. *See id.* at 968.

95. *Ansin*, 929 N.E.2d at 968 (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (2002)) (enumerating factors to consider in evaluating reasonableness of agreement at time of execution). For example, if a spouse were to accept a postnuptial agreement out of concern that divorce could further harm an ill child, such circumstances could be sufficient to establish coercion or duress. *See id.* at 965 n.13.

96. *See, e.g.*, LA. CIV. CODE ANN. art. 2329 (2009) (allowing parties to enter into postnuptial contracts upon court approval); MINN. STAT. ANN. § 519.11(1a) (West 2006 & Supp. 2012) (permitting use of postnuptial agreements under certain circumstances); OHIO REV. CODE ANN. § 3103.06 (LexisNexis 2008) (forbidding use of postnuptial agreements); VA. CODE ANN. § 20-155 (2008) (permitting marital agreements and judging using UPAA standards); WIS. STAT. ANN. § 766.58(6) (West 2009) (governing both premarital and postmarital contracting). For those states that have not enacted legislation speaking directly to postnuptial agreements, the courts rely on case law that developed by considering how the statutes and common law governing prenuptial agreements should be applied to postnuptial agreements. *See, e.g.*, Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991) (applying prenuptial case law for governance of postnuptial agreement);

III. ANALYSIS

While hardly mainstream, postnuptial agreements are becoming a viable option in the world of marital contracting as state courts continue to reject the argument that such agreements are per se against public policy.[97] In reaching this conclusion, many courts rely on a rationale similar to that used to justify the enforceability of prenuptial agreements.[98] Some state legislatures have gone so far as to enact statutes recognizing the enforceability of postnuptial agreements, while other courts are simply interpreting existing statutes so as to permit postnuptial agreements.[99] Either way, postnuptial agreements are being enforced with greater regularity.[100] The question remains, however, whether enforcing such agreements is for better or for worse.[101]

A. Did Massachusetts Get It Right?

1. Why the Massachusetts Supreme Judicial Court Had to Impose a Heightened Standard of Review

At the time of the *Ansin* decision, the Massachusetts statutory scheme did not contain a provision that expressly allowed for postnuptial agreements, nor does it today.[102] As such, in issuing the *Ansin* decision, the SJC based its

Pacelli v. Pacelli, 725 A.2d 56, 62 (N.J. Super. Ct. App. Div. 1999) (reaching decision after thorough consideration of state law governing prenuptial agreement); Brewer, *supra* note 15, at 594-99 (summarizing one court's process in determining postnuptial agreement enforceability).

97. *See* Ansin v. Craven-Ansin, 929 N.E.2d 955, 962-63 (Mass. 2010); *see also* Clay Risen, *Postnuptial Agreements*, N.Y. TIMES (Dec. 9, 2007) (Magazine), http://www.nytimes.com/2007/12/09/magazine/09postnuptial.html (explaining postnuptial agreements' growing role in marriage law).

98. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.02(b) (2002) (acknowledging desire to recognize contractual autonomy in marital contracting justifies enforcing prenuptial agreements). While recognizing that marital-contract bargaining is not done at arm's length, courts must nevertheless consider the "general regard for contractual autonomy and their desire to allow private individuals to forge relations on their own terms." *See* Sherman, *supra* note 26, at 382 (explaining judicial balancing act). In deciding that premarital and postmarital contracts share the same risks, the contractual-autonomy counterargument used to justify the enforceability of premarital agreements can be identically applied. *See, e.g.*, *Tibbs*, 580 So. 2d at 1339 (reasoning prenuptial and postnuptial agreements subject to same risks prompting same analysis); Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003) (applying same treatment to postnuptial agreements as prenuptial); D'Aston v. D'Aston, 808 P.2d 111, 113 (Utah Ct. App. 1990) (treating postnuptial agreements in same manner as prenuptial agreements).

99. *See* OLDHAM, *supra* note 2, § 4.06, at 4-49 to -50 (discussing state statutes expressly referring to postnuptial agreements); *see also supra* note 96 (listing states utilizing statutory approach); *supra* notes 5-10 and accompanying text (discussing variety of viewpoints adopted by different states).

100. *See* Mincer, *supra* note 4 (asserting most states recognize postnuptial agreements assuming presence of fair disclosure and legal representation).

101. *See id.* (noting postnuptial agreements not yet really tested in courts). *Compare* Brewsaugh v. Brewsaugh, 23 Ohio Misc. 2d 19, 20 (Ct. Com. Pl. 1985) (holding postnuptial agreements per se invalid), *with* Stoner v. Stoner, 819 A.2d 529, 532-33 (Pa. 2003) (judging enforceability of postnuptial agreements using traditional contract standards also applied to prenuptial agreements), *and Ansin*, 929 N.E.2d at 967 (judging enforceability of postnuptial agreements using stricter standard than used for prenuptial agreements).

102. *See generally Ansin*, 929 N.E.2d 955 (analyzing enforceability of postnuptial agreements independent

decision on developments within the common law.[103] As societal perceptions of marriage have evolved over the past fifty years, so too has the court's approach to marriage and marital contracting.[104] The degree to which a divorce stigmatizes an individual in today's society may be up for debate, but the prevalence of divorce is indisputable.[105]

With rising divorce rates a societal reality, it is understandable—perhaps laudable—that a couple might wish to contractually protect their individual interests from the possibility of unhappily ever after.[106] As the SJC correctly acknowledged, however, entering into such a contract before marrying and entering into such a contract fifteen years into a marriage are simply not comparable transactions.[107] Whether or not one considers marriage to be the foundation of the American family, it is nevertheless an institution central to American society, the dismemberment of which is not to be taken lightly.[108]

Prenuptial agreements arguably transformed the marital relationship from a "sacred union" to a "legal arrangement shaped for the convenience of spouses and would-be spouses."[109] In Massachusetts, the tension between these two views of marriage was illustrated, interestingly enough, outside of the contracting context when the legal battles over same-sex marriage arose.[110] Opponents of same-sex marriage have traditionally argued that allowing same-sex marriage would chip away at the sacredness of the marital union, a position

of statutory considerations).

103. *See* Ansin v. Craven-Ansin, 929 N.E.2d 955, 961 (Mass. 2010) (relying on previous holdings explaining "marital relationship need not vitiate contractual rights between the parties").

104. *See supra* Part II.A (discussing evolution of marriage from status-based to contractually regulated). *See generally Future of Antenuptial Agreement Law*, *supra* note 26 (describing evolution of marriage and legal consequences). Americans are well informed that the nation's divorce rate is high. *See* Sherman, *supra* note 26, at 372-73 (indicating general population aware of divorce realities). This awareness coincided with a growing trend among the judiciary to disfavor alimony, opting instead for grants of property. *See id.* at 373.

105. *See supra* notes 2, 22 (explaining rise in divorce rate). *Compare* WHITEHEAD, *supra* note 22, at 68, 73 (explaining advent of no-fault divorce destigmatized divorce, recategorizing it as means to achieve personal happiness), *with* Cullen, *supra* note 81 (recounting personal divorce experience and stigma attached).

106. *See supra* note 2 and accompanying text (describing rising divorce rates and increased awareness as to consequences and reality of divorce). Even during the idyllic 1950s, the American legal system was considered a failure at limiting divorce. *See History of Contemporary Marriage*, *supra* note 22, at 18. When no-fault divorce was introduced, with the hopes of limiting the divorce rate by reducing animosity and promoting compromise, it too failed to curb the growing trend. *See id.* at 20.

107. *See Ansin*, 929 N.E.2d at 962 (rejecting use of same standards to judge prenuptial and postnuptial agreements).

108. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004) (quoting S. 2175, 183d Gen. Ct., Reg. Sess., § 1 (Mass. 2003) (aiming to protect "traditional, historic nature and meaning of the institution of civil marriage"). There are still many commentators who steadfastly believe that marriage benefits society. *See* Sherman, *supra* note 26, at 361-62.

109. *See* Sherman, *supra* note 26, at 392 (contending perfusion of prenuptial agreements renders societal commitment to sacredness of marriage illusory).

110. *See id.* (arguing exclusion of same-sex couples from marriage benefits "reflects a view of marriage as a sacred institution"); *see also* Brown, *supra* note 26, at 942-43 (classifying heterosexual marriage as traditionally sacred union threatened by acceptance of same-sex marriage).

that consequently prompts one to ask whether such a "sacred" status still exists.[111] While the SJC ultimately sanctioned same-sex marriage, it was the court's rejection of same-sex civil unions as a legitimate alternative to marriage that ironically validated part of the anti-same-sex marriage argument—the marital relationship is, in fact, a unique, time-honored tradition.[112]

In 2004, when the SJC issued an influential and undoubtedly controversial advisory opinion to the Senate rejecting the notion that civil unions and marriage were interchangeable, it reinforced the idea that the marital union is a one-of-a-kind institution and inherently declared the relationship as something more than just a "legal arrangement."[113] It would seem contradictory, therefore, for the SJC to judge an agreement reached within that revered marital union using the same standards that are used to assess an agreement created outside of that union—such as by strictly contractual principles or the analysis presently applied to prenuptial agreements—seeing as the court has consistently issued rulings dependent upon accepting marriage as a unique union.[114]

2. Why Some States Do Not Impose a Heightened Standard

So why is it that so many other states judge postnuptial agreements under the same standards as prenuptial agreements? Why do some states disregard the marital relationship—so revered by Massachusetts courts in the context of same-sex marriage—from which the postnuptial contract was born, in favor of a traditional contract-law analysis?[115] For those states that are less vocal than

111. *See* Brown, *supra* note 26, at 943 (stating same-sex marriage would "chip away at an institution already threatened by divorce").

112. *See infra* note 113 and accompanying text (discussing SJC's position on unique nature of marriage); *supra* note 48 (noting holding in *Goodridge*).

113. *See Opinions of the Justices*, 802 N.E.2d at 570 (distinguishing marriage from civil unions); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (noting "intangible benefits flow from marriage"). When one person marries another, the act of marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." *See id.* (attempting to characterize essence of marital bond).

114. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (holding marital relationship cannot be replicated through civil union). Married couples receive rights in property, probate, tax, and evidence law. *See id.* at 567. Yet, the one-of-a-kind nature of the marital relationship is perhaps better understood by considering the intangible components:

> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. 'It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.'

Goodridge, 798 N.E.2d at 954-55 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

115. *See* Williams, *supra* note 10, at 828-32 (advocating equal treatment of postnuptial and prenuptial contracting). Alabama, Florida, Hawaii, Indiana, Kentucky, Missouri, Pennsylvania, Utah, Virginia, Washington, and Wisconsin do not substantively distinguish between judging the enforceability of prenuptial and postnuptial agreements. *See id.* at 811 (categorizing states according to standards of review).

Massachusetts concerning the import of marriage—an institution incapable of replication—justifying the seamless transition between marital and premarital contracting seems understandable.[116] Similarly, another obvious and undoubtedly correct answer is that a new era of marriage has arrived—an individual's autonomy and right to contract supersede the theory that marriage is a partnership wherein contracting would require greater accountability.[117] Nevertheless, a more-basic, but ultimately increasingly problematic, explanation for the lack of uniformity could exist.[118]

3. The Underlying Problem

A significant reason for the lack of uniformity surrounding the proper standards by which to judge postnuptial agreements stems from the variety of scenarios the agreements can hypothetically cover.[119] Some postnuptial

116. *Compare* Epp v. Epp, 905 P.2d 54, 59-61 (Haw. Ct. App. 1995) (applying same rules to prenuptial and postnuptial agreements), *with* Koppel, *supra* note 48 (reporting on Hawaii passing bill allowing same-sex civil unions). Presently, Delaware, Hawaii, Illinois, Rhode Island, and New Jersey allow for civil unions in lieu of same-sex marriage, and Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and the District of Columbia will issue actual marriage licenses to same-sex couples. *Defining Marriage*, *supra* note 48. New Jersey, like Massachusetts, holds postnuptial agreements to a higher standard than prenuptial agreements. *See* Pacelli v. Pacelli, 725 A.2d 56, 59-61 (N.J. Super. Ct. App. Div. 1999) (focusing on significance of established marriage when assessing postnuptial agreements).

117. *See* Simeone v. Simeone, 581 A.2d 162, 165-66 (Pa. 1990) (holding traditional contracting principles govern marital contracts). The overwhelming acceptance of premarital agreements represents the mindset that marriage is a private contractual relationship entered into by two people, the terms of which are subject to modification by those same two people. *See Future of Antenuptial Agreement Law*, *supra* note 26, at 2078 (tracing reliance on traditional contract theory as applied to prenuptial agreements); *see also* UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48-49 (2001) (judging premarital agreements largely as ordinary contracts). In fact, the Uniform Premarital Agreement Act, which largely ignores the substantive fairness of prenuptial agreements at the time of enforcement, has been adopted by twenty-seven states and the District of Columbia; however, Massachusetts has declined to adopt it. *See* UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001); Janine Campanaro, Note, *Until Death Do Us Part? Why Courts Should Expand Prenuptial Agreements to Include Ten-Year Marriages*, 48 FAM. CT. REV. 583, 588 (2010). *But see Simeone*, 581 A.2d at 168-69 (McDermott, J., dissenting) (arguing marriage not contract for hire); deCastro v. deCastro, 616 N.E.2d 52, 56 (Mass. 1993) (stressing import of marriage as partnership within property-division context). *See generally Future of Antenuptial Agreement Law*, *supra* note 26 (discussing internal inconsistencies with dueling views of marriage as contract and partnership). To give an example of the confusion surrounding an individual's power to contract around his marriage, section 1500 of California Family Code states that a couple may alter their statutory rights by a premarital or "other" marital-property agreement. *See* CAL. FAM. CODE § 1500 (West 2004). One California court, however, found a reconciliation agreement unenforceable because the agreement contained a provision wherein an unfaithful spouse was required to pay the other spouse liquidated damages. *See* Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 495-96 (Ct. App. 2002) (finding private contract cannot override policy supported by legislature). The court justified ignoring the contractual aspect of the agreement for fear the terms vitiated "no-fault divorce." *See id.* at 496; *cf. In re* Marriage of Mehren & Dargan, 13 Cal. Rptr. 3d 522, 524 (Ct. App. 2004) (holding provision in which spouse waives rights in event of drug use inconsistent with no-fault divorce).

118. *See infra* note 119 and accompanying text (discussing lack of uniformity amongst styles of agreements).

119. *Compare* Ansin v. Craven-Ansin, 929 N.E.2d 955, 959 (Mass. 2010) (portraying postnuptial agreement as attempt at reconciliation after nineteen years of marriage), *with In re* Marriage of Friedman, 122

agreements start as prenuptial agreements that were not signed in time for the wedding.[120] An agreement intended as a prenuptial agreement can, therefore, automatically be recast as a postnuptial agreement simply because the couple said "I do" hours before the agreement was signed.[121] Yet, that same label of "postnuptial agreement" can be used to identify a contract entered into by a husband and wife who have been married for twenty years with three children.[122] In highlighting these two extremes, the challenge for legislatures and courts becomes obvious: it is impossible to cater to both ends of the spectrum at the same time.[123] Emphasizing traditional contractual principles seems appropriate for postnuptial agreements conceived in the early stages of a marriage, yet shortsighted when the agreement is the product of a long-term marriage.[124] In defining the law and standards surrounding the enforceability of postnuptial agreements, states are effectively predicting, or at least favoring, the likelihood of one scenario over the other; the more a state's laws allow for the triumph of traditional contracting principles in the postnuptial context, the more it appears as though the state envisions short-term marriage as the norm.[125] Fortunately, under Massachusetts's approach, the freedom to contract is still intact, yet the opportunity for one spouse to present the other with an

Cal. Rptr. 2d 412, 414 (Ct. App. 2002) (explaining happy couple entered postnuptial agreement in effort to shield wife from husband's medical bills), *and* Tibbs v. Anderson, 580 So. 2d 1337, 1338 (Ala. 1991) (noting contract wife signed technically "postnuptial" because signed hours after wedding).

120. *See* Williams, *supra* note 10, at 836 (identifying many postnuptial agreements as prenuptial agreement simply not signed in time for wedding).

121. *See id.* (explaining label of postnuptial agreement applied to contract initially designed as prenuptial agreement). In describing the different kinds of postnuptial agreements that exist today, Williams makes it clear that the agreements need not be "reconciliatory" in nature to be consideration postnuptial. *See id.* at 834. *But see Pacelli*, 725 A.2d at 59 (requiring valid reconciliation agreements occur during actual time of crisis). In *Pacelli*, however, the court made a point to distinguish between a reconciliation agreement, which is unenforceable unless entered into during a time of marital turmoil, and a "mid-marriage contract," thereby adding another layer of complexity to the term. *See id.* at 62.

122. *See Ansin*, 929 N.E.2d at 959 (acknowledging couple married nineteen years before signing postnup).

123. *Compare supra* notes 81 and accompanying text (describing importance one party might place on saving investment in marriage), *with Tibbs*, 580 So. 2d at 1338 (noting marriage to be saved only hours old at time of signing postnuptial contract).

124. *See* OLDHAM, *supra* note 2, § 4.06, at 4-50 to -51 (acknowledging public-policy questions exist when some spouses will do anything to save marriage); *see also* Pacelli v. Pacelli, 725 A.2d 56, 58 (N.J. Super. Ct. App. Div. 1999) (showing spouse willing to "sign anything in an effort to preserve the marriage"). *But see* Sherman, *supra* note 26, at 394 (explaining how pressure exists to sign prenuptial when benefits of marriage outweigh one-sided agreement). The facts of *Pacelli* can easily be extrapolated to other situations to explain why a woman would rather take a chance and stay married, although the terms of the marriage have changed, than endure a divorce. *See* Wax, *supra* note 81, at 581-82 (arguing wife will often fight to preserve marriage at any cost); Williams, *supra* note 10, at 829-30 (acknowledging wives suffer noticeable decrease in their standard of living after a divorce). *But see* Williams, *supra* note 10, at 843-45 (arguing unequal bargaining power found in *Pacelli* represents exception, not rule).

125. *See Future of Antenuptial Agreement Law*, *supra* note 26, at 2077-79 (explaining growing tension in philosophies underscoring marital law). Antenuptial agreements are relying heavily upon the concept of marriage as contract, in contrast with the "dependence of modern divorce-related property division statutes on the conception of marriage as partnership." *See id.* at 2077.

ultimatum—sign or divorce—is radically curbed.[126]

B. What Is Next for Massachusetts?

1. The Court

Massachusetts's future is hard to predict, particularly because *Ansin* invited the SJC to develop general guidelines upon hearing a case marked by relatively straightforward facts.[127] The *Ansin* facts did not suggest that inequitable bargaining power or coercion tainted the agreement.[128] Nothing in the facts indicated that the wife truly felt internal or external pressures to sign the postnuptial agreement or else lose her marriage; however, not all cases will be so obvious.[129] While the court held that postnuptial agreements would be held to stricter standards than prenuptial agreements, how these standards will hold up when applied to more-complicated and muddled factual circumstances remains to be seen.[130] For instance, what would be the consideration required

126. *See supra* notes 91-95 and accompanying text (explaining why *Ansin* court permitted substantive-fairness review at time of enforcement). The "sign or divorce" scenario envisions a marital agreement entered into when at least one person in the marriage feels the need to restructure the relationship; there is tension, however, in whether postnuptial agreements should even fall within a reconciliation category. *Compare supra* note 121 (discussing *Pacelli* court's statement distinguishing mid-marital and reconciliation agreements), *with* Ansin v. Craven-Ansin, 929 N.E.2d 955, 961, 965 (Mass. 2010) (upholding validity of agreement in part because entered into as means of fresh start), *and* Wen, *supra* note 4 (profiling couples using postnuptial agreement to save their marriages). *But see* Williams, *supra* note 10, at 830 (arguing "spousal bargaining dynamics" self-regulate ability of one spouse to take advantage of other). Whether a postnuptial agreement is reconciliatory in nature adds another level of complexity to a term that already encompasses too many possible situations. *See supra* note 121 (discussing possibility of further distinguishing between agreements made during periods of strife and peace).

127. *See supra* Part II.B.2 (discussing *Ansin* case). It should not be overlooked that the court created a "minimum" standard in listing the appropriate considerations to use when judging the enforceability of a postnuptial agreement. *See Ansin*, 929 N.E.2d at 963-64. In *Ansin*, both parties were represented by counsel, they stayed married long enough after the agreement was entered into as to suggest the agreement was not a farce, the agreement was signed as an attempt at reconciliation, and both parties fully disclosed their assets before signing. *See id.* at 959-60, 966. These straightforward facts may very well be why the SJC opted to speak out when they did, despite years of refusing to address the topic. *See supra* note 92 (noting *Ansin* court did not need to address necessity of consideration); *see also* Fogg v. Fogg, 567 N.E.2d 921, 922 (Mass. 1991) (representing declined opportunity to address validity of postnuptial agreement). In fact, in analyzing the validity of postnuptial agreements in *Ansin*, the SJC dismissed the notion that such agreements could be easily executed in sordid situations. *See supra* note 89 (noting SJC's unwillingness to assume postnuptial agreements often executed pursuant to false promise to remain married). The court's absolute rejection of this suggestion is rather puzzling, however, seeing as the court in *Fogg*—the 1991 case marking the first time the court saw a postnuptial agreement—opted not to rule on the validity of postnuptial agreements but instead simply invalidated the agreement as a product of fraud because the wife had no intention of staying in the marriage, despite the fact that the postnuptial agreement was intended as a means of preserving the marriage. *See supra* note 86 and accompanying text (describing situation prompting *Fogg* court to dismiss agreement).

128. *See supra* note 127 and accompanying text (noting *Ansin* facts relatively straightforward).

129. *Compare supra* note 88 and accompanying text (tracing court's analysis with regards to facts of *Ansin*), *with Pacelli*, 725 A.2d at 58 (recognizing wife signed agreement against advice of attorney in desperate attempt to save marriage).

130. *See supra* notes 91-92 and accompanying text (discussing *Ansin* imposing stricter considerations on

to support an agreement if the agreement was signed during a time of marital peace?[131] While entering into a postnuptial agreement during a time of bliss seems to reduce the chance that one party is actually taking advantage of the other's desperation to preserve the marriage, can the continuation of a perfectly functioning marriage really act as new consideration for the agreement?[132]

Unfortunately, national trends suggest that Massachusetts courts will apply straightforward contract principles to the extent allowed by the guidelines, as evidenced by the widespread acceptance of prenuptial agreements.[133] If the legislature were to weigh in, however, the judiciary's interpretation of its own guidelines could be effectively preempted, and the safeguards employed by Minnesota, Louisiana, and other like-minded states could be used to protect spousal interests in Massachusetts with arguably minor infringements on freedom to contract between husband and wife.[134]

2. The Legislature

Because the legitimate concerns surrounding unequal bargaining power could easily prove warranted under a different set of facts, the Massachusetts legislature would be wise to adopt some additional safeguards in the form of rebuttable presumptions.[135] The fact that a marital relationship already exists, and possibly has for decades, when a couple enters into a postnuptial agreement necessitates the need for a higher standard of review than the standard applied to prenuptial agreements.[136] As such, if the Massachusetts legislature were to expressly allow postnuptial agreements, there is good reason to heighten the level of scrutiny under which the agreements are judged beyond what the SJC found appropriate.[137]

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postnuptial agreements).

131. *See* Brewer, *supra* note 15, at 598-99 (explaining why postnuptial agreement failed consideration test). Though other states have addressed the consideration issue, the *Ansin* court neglected to do so. *Ansin*, 929 N.E.2d at 964 n.10 (avoiding question of consideration). *Compare In re* Marriage of Tabassum & Younis, 881 N.E.2d 396, 408-09 (Ill. App. Ct. 2007) (determining wife's forbearance from filing for dissolution sufficient consideration for postnuptial agreement), *with* Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004) (declaring valid postnuptial agreements must be supported by consideration beyond continuation of marriage itself).

132. *See* Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991) (holding promise of marriage as sufficient consideration to support postnuptial agreement). *But see Bratton*, 136 S.W.3d at 600 (demanding consideration be something more than continuation of marriage).

133. *See supra* note 117 and accompanying text (discussing growing popularity of UPAA and contractual approach to marriage); *see also* DeMatteo v. DeMatteo, 762 N.E.2d 797, 812 (Mass. 2002) (applying unconscionability gloss to premarital agreement review). *See generally* Williams, *supra* note 10 (advocating postnuptial and prenuptial agreements require equal judicial treatment).

134. *See supra* note 96 and accompanying text (discussing states with legislation governing enforceability of postnuptial agreements).

135. *See supra* note 96 and accompanying text (identifying states with stricter review procedures).

136. *See supra* notes 78-81 and accompanying text (explaining significance of established marital relationship on bargaining power of parties).

137. *See supra* notes 78-81 and accompanying text (highlighting inherent shortcomings in bargaining

For instance, Massachusetts could follow Minnesota's lead and impose a rebuttable presumption that an agreement is invalid if the couple separates within a certain time period after the agreement is executed.[138] Alternatively, the state could require that both parties be represented by counsel at the time the agreement is executed, another Minnesota requirement.[139] Massachusetts could also easily adopt California's approach and impose a rebuttable presumption of undue influence when a postnuptial agreement benefits one spouse over the other.[140] The Louisiana approach tries to preempt problems of enforceability by requiring court approval of a postnuptial agreement when it is first signed.[141] The legislature might also consider taking a hard line on the consideration issue, as Tennessee courts have done.[142]

IV. CONCLUSION

While the Massachusetts legislature could further define the requirements of postnuptial agreements, the *Ansin* decision represents a possible move in the right direction regarding the validity and enforceability of postnuptial agreements in Massachusetts. It would have been utterly hypocritical to allow postnuptial agreements to be judged using the same standards as prenuptial agreements when, for several years, Massachusetts courts have been preaching that marriage is a one-of-a-kind relationship, the equivalent of which simply

capacity of spouses). *See generally* Pacelli v. Pacelli, 725 A.2d 56 (N.J. Sup. Ct. App. Div. 1999) (demonstrating instance wherein spouse knowingly enters bad bargain in attempt to save marriage). If, as a society, we continue to favor the marital relationship, as evidenced by policies and law supporting such unions, it will be difficult to determine what to do with a scenario like *Pacelli*, where a wife agrees to contract away her marital rights, despite instructions from her attorney not to, in an effort to save a marriage. *See id.* at 58.

138. *See* MINN. STAT. ANN. § 519.11(1a)(2)(d) (West 2006 & Supp. 2012) (imposing rebuttable presumption postnuptial agreement unenforceable if divorce occurs within two years of signing agreement). Such a requirement helps ensure that the party requesting the agreement was not employing unfair bargaining principles to leverage his position for what he already knew would be an imminent divorce. *See id.*

139. *See id.* § 519.11(1a)(2)(c) (requiring attorney involvement in contracting). *But cf. Pacelli*, 725 A.2d at 58 (ignoring advice of attorney by signing unfair agreement).

140. *See* CAL. FAM. CODE § 721(b) (West 2004) (subjecting transactions between husband and wife to rules governing fiduciary relationships); *see also In re* Marriage of Delaney, 4 Cal. Rptr. 3d 378, 381-82 (Ct. App. 2003) (explaining when interspousal contract advantages one party and disadvantages another, undue influence presumed). *But see In re* Marriage of Friedman, 122 Cal. Rptr. 2d 412, 418 (Ct. App. 2002) (affirming legality of postnuptial agreement). This approach is similar to a burden-shifting analysis employed by Arizona. *See In re* Estate of Harber, 449 P.2d 7, 16 (Ariz. 1969) (providing safeguards upon recognizing validity of postnuptial agreement). In Arizona, the courts require that if the party upon whom the agreement is being forced attacks the agreements on grounds of fraud, coercion, or undue influence, it is the enforcing party's responsibility to prove otherwise. *See id.*

141. *See* LA. CIV. CODE ANN. art. 2329 (2009) (requiring parties interested in entering postnuptial agreement to file joint petition with court). In Louisiana, if parties wish to modify their "matrimonial regime" while married, they must file a joint petition with the court. *See id.* Only once the court finds that the agreement serves the parties' best interests, and that they understand the governing rules, will the court allow the agreement. *See id.*

142. *See* Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004) (discussing Tennessee consideration requirement).

cannot be replicated. The force with which the SJC has belabored this point highlights the esteemed, yet nebulous and intangible, status and relationship marriage bestows upon a couple. When a couple enters into a contract while married, whereby one or both spouses waive certain legal rights in the event of divorce, it is the state's responsibility to strictly monitor such a transaction because the parties are bargaining at anything but arm's length. In fact, they are bargaining in the depths of one of the most legally, socially, and emotionally complex relationships that exists today.

Strict standards for judging the enforceability of postnuptial agreements do not vitiate the spouses' ability to contract. Rather, the criteria create rules within which such contracts may be entered and enforced; they do not forbid the existence of such contracts. Without tightly regulating this form of contracting, the risk that one spouse will recklessly relinquish his or her marital rights to save the marriage is too strong. This is especially true considering the universal acceptance of no-fault divorce, allowing for one spouse to independently decide when the marriage is over. Society cannot continue to promote and favor marital unions yet neglect to provide safeguards for those situations in which an individual attempts to do the same. It is too difficult, and oftentimes impossible, to ask a spouse to see the divorce through the marriage. As such, the Massachusetts legislature ought to follow in the footsteps of Minnesota, Louisiana, and other like-minded states by imposing rebuttable presumptions against the enforceability of postnuptial agreements, thereby bolstering the substantive-fairness assessments already endorsed by the state's Supreme Judicial Court.

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