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# STANDARD ROLE SPECIFICATIONS AND DEFAULT-BASED PREMARITAL AGREEMENTS

XIAOYU LIN

*Premarital Agreements based on three standardized, or default, role specifications will help solve post-divorce financial inequalities created by current interpretations of no-fault divorce laws.*

**M**arriage is a contract in terms of the agreed upon long-term mutual commitment and the expected joint benefits from the relationship. Not only do spouses anticipate that marriage will provide companionship and the joys and fulfillment of child rearing, but they also expect it to secure their respective emotional and economic investments.<sup>1</sup> Traditional fault divorce law chose to protect these investments through prescriptions on proper marital behaviors of each party, an approach that often led to hostility and unpredictable results. Seeking to avoid these problems, laws since 1969 have generally utilized no-fault considerations to regulate economic decisions in divorce.

Despite this proper focus, however, laws based on no-fault principles have repeatedly failed to properly interpret key elements in a couple's economic partnership. Most notably, these laws have partially or completely neglected to take into account a domestic spouse's many investments in the well-being of his or her children and in the career-enhancement of the other spouse. Investments into these areas, called human capital by economists, have significant economic value and deserve more careful consideration. Unless this occurs, current no-fault

interpretations and nonsystematic premarital agreement practices will continue to facilitate opportunistic marital defections and disproportional burdens on homemakers.

One way to ensure economically equitable divorce decisions is to implement a system of standard role specifications. Based on an analysis of the partnership aspects of marriage contract, it seems that using three general standards, or default modes, of role specifications to guide court and other decisions would minimize current problems. Not only would these three default modes serve as guideposts for the courts, but they would make it easier for potential spouses to customize premarital agreements in areas such as property division, alimony, and child custody arrangements and support. This approach should better protect the economic investments of the domestic spouse should divorce occur.

### **Partnership and Human Capital**

The contractual nature of marriage contract signals a dual partnership for the parties in cases where there are children. In the production of human capital (the bearing and rearing of children), the parties are *equal* partners and marriage between them is a joint agreement.<sup>2</sup> Each spouse is equally responsible for feeding, nurturing, and educating their children; and both expect to enjoy the benefits of parenting. In terms of the human capital of each party, however, marriage can be an *unequal* partnership, especially where one spouse serves a primarily domestic role. Role specification within marriage usually means that one spouse must sacrifice his or her own career opportunities to enhance the human capital of the other spouse.

Although the career-enhancement of the nondomestic spouse is mostly due to “educational institutions and on-the-job training,”<sup>3</sup> the domestic spouse invests considerable time and effort to facilitate this option. As a result, the helping spouse has valid claims on compensation for his or her diminished or lost career opportunities. In this sense, post divorce spousal support might be understood as “legal enforcement of insurance payments” in return for the “substantial marriage-specific investment” undertaken by the domestic spouse.<sup>4</sup>

Similar instances of reduced human capital appear in situations where both spouses work but one chooses to work less in order to fulfill domestic or other responsibilities or interests. Even where both spouses

work full-time, research has shown that one spouse (usually the woman) will earn substantially less, again primarily because of domestic responsibilities. All of this points to the need for legal safeguards against post-divorce financial inequalities. One such safeguard is the premarital agreement.

### **Premarital Agreement**

Properly constructed premarital agreements can offer an effective avenue of security for couples seeking to protect themselves from potential post-divorce economic problems. Premarital agreement (often called prenuptial contract) is a way to reinstate legally the seriousness and commitment that a marriage relationship signals. Prospective couples that decide their own terms of marital contract regarding shared goals, labor division, and financial arrangements enjoy two main benefits. First, they are more motivated to invest emotionally in the relationship. Second, they have a more effective means of settling financial arrangements and/or disputes in case of divorce. The fact that premarital agreements are legally binding and enforceable decreases the likelihood of opportunistic behavior on the part of either spouse.<sup>5</sup>

The concept of premarital agreement is not new. Couples for centuries, especially celebrities, have chosen to form agreements with one another before marriage. However, in terms of whether premarital agreements are an effective way to solve current problems, contemporary theorists have differed in their views. Lloyd Cohen, for example, argues that current forms of premarital agreements do not adequately address the needs of those most needing them. Because these forms deal mostly with nontraditional instances of divorce (such as protection of several valuable assets), spouses in traditional marriages where divorce costs are most difficult to estimate are left without effective recourse. Based on these difficulties, Cohen believes that premarital agreements are ineffective in traditional marriages.<sup>6</sup>

Because of the above problems, theorists Elizabeth and Robert Scott assert that traditional marriages would be better served by replacing premarital contract with a device they call a “relational contract.”<sup>7</sup> This contract, they believe, would legally reinforce marriage vows by including considerations of several important aspects of the relationship. Although Scott and Scott correctly refute Cohen by showing how

at least the concept of premarital agreement can still function, they fail to create any concrete role specifications that would serve as defaults, or models, in constructing the type of contracts they propose.

The primary advantage to creating default modes is that they provide traditional couples with an efficient way to customize premarital contracts. A second advantage is that traditional spouses can rely on more effective premarital contracts to better protect their economic investments in the relationship.

### **Default Modes and Applications**

Role specification is likely the most important factor in the development of default modes. Based on the most common types of role specifications, three default modes emerge as those best suited for standardized application. The first mode is that of the traditional marriage, in which one spouse serves as the sole breadwinner and the other assumes a solely domestic role. In the second mode, both spouses bring income to the family but one of them exerts more effort in domestic responsibilities, resulting in unequal financial contributions to the family. The third mode consists of two spouses with a combined income high enough for them to continue working while they rely on a third party to perform domestic duties.

To illustrate how these default modes might practically function, it may be useful to provide a few limited examples of divorce proceedings arising under each mode. In the third mode, current no-fault considerations may be safely utilized because these decisions are, as a rule, based on property division. If both spouses own similarly valued assets, equitable economic distribution is likely. When children are involved the law should mandate a minimum economic obligation of each parent. The main goal should be to ensure that the child's (or children's) standard of living will remain reasonably similar to what it was before the divorce.

For divorce cases arising under the first and second modes, and where children are not involved, modern no-fault considerations generally do not require alimony payments to the economically weaker spouse. The reason for this, correct or not, is due to the expectation that the spouse has the ability and the opportunity to secure gainful employment. However, if a spouse has forgone education or job training opportunities to support the career-enhancement of the other

spouse, he or she should be able to claim compensation for lost human capital. One way to address this need is through repayment of the domestic spouse's contribution. Such a contribution could best be determined by a legal analysis of the premarital agreement. Of course, authorities would need to take into account the length of the marriage.

If divorce occurs under the first and second modes, and the couple has children, the best way to determine custody rights is to analyze the level of each spouse's involvement with each child. According to Scott and Scott, custody rights should be "proportional to each party's investment in the relationship with the children prior to divorce, and each party [should] continue to invest at that [same] level afterward."<sup>8</sup>

Because marriage usually diminishes human capital for domestic spouses in the first and second modes, if there are children involved the nondomestic spouse should be responsible for the majority of each child's living and educational expenses. Moreover, the domestic spouse should receive monetary support if he or she stayed at home full-time or received minimal remuneration due to domestic obligations. In either case, barring remarriage, the domestic spouse should receive spousal support that includes assistance with living and job training expenses for a set period of time, based on the length of the marriage. For instance, ten years of marriage justifies ten years of financial support. If the duration of the marriage spans a period long enough that the domestic spouse has permanently lost a career opportunity, the law should consider the possibility of awarding alimony for the remainder of the domestic spouse's life.<sup>9</sup>

### **Conclusion**

To help remedy the ills of some current no-fault divorce practices, future laws would do well to more carefully consider the economic factors in divorce proceedings. This is especially true in cases where one spouse sacrifices career opportunities to take care of children or enhance the career of the other spouse. One effective way to address the situation is through the use of premarital contracts based on three standardized role specifications, or default modes. Customizing premarital contracts based on these default modes will not only serve to guide court decisions, but will protect rather than punish those couples who choose to form families.

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## Notes

<sup>1</sup>Elizabeth S. Scott and Robert E. Scott, "Marriage as Relational Contract," *Virginia Law Review* 84 (October 1998): 1229.

<sup>2</sup>Shirley P. Burggraf, *The Feminine Economy and Economic Man: Reviving the Role of Family in the Post-Industrial Age* (Reading, Mass.: Addison-Wesley, 1997), 51.

<sup>3</sup>Allen M. Parkman, "Human Capital as Property in Celebrity Divorces," *Family Law Quarterly* 29 (spring 1995): 148.

<sup>4</sup>Scott and Scott, "Marriage as Relational Contract," 1313.

<sup>5</sup>Scott and Scott, "Marriage as Relational Contract," 1298–99.

<sup>6</sup>Lloyd Cohen, "Marriage, Divorce, and Quasi Rents; Or 'I Gave Him the Best Years of My Life,'" *Journal of Legal Studies* 16 (June 1987): 197–98.

<sup>7</sup>Scott and Scott, "Marriage as Relational Contract," 1267.

<sup>8</sup>Scott and Scott, "Marriage as Relational Contract," 1278.

<sup>9</sup>Scott and Scott, "Marriage as Relational Contract," 1311.