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Contractualizing Custody

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ARTICLES

CONTRACTUALIZING CUSTODY

Sarah Abramowicz*

Many scholars otherwise in favor of the enforcement of family contracts agree that parent-child relationships should continue to prove the exception to any contractualized family law regime. This Article instead questions the continued refusal to enforce contracts concerning parental rights to children’s custody. It argues that the refusal to enforce such contracts contributes to a differential treatment of two types of families: those deemed “intact”—typically consisting of two married parents and their offspring—and those deemed non-intact. Intact families are granted a degree of freedom from government intervention, provided that there is no evidence that children are in any danger of harm. Non-intact families, by contrast, are subject to the perpetual threat of intervention, even in the absence of harm. The result of this two-tier system is that non-intact families are denied the autonomy and stability that intact families enjoy, to the detriment of parents and children alike.

The goal of this Article is to address inconsistent scholarly approaches to custody agreements, on the one hand, and parentage agreements, on the other. Marital agreements about children are largely unenforceable, and even scholars who otherwise favor the enforcement of marital agreements largely approve of this approach, concurring that a court should be able to override a contract concerning children’s custody if it finds that enforcement is not in the children’s best interests. By contrast, those who write about parentage agreements, such as those made in the context of assisted reproductive technology or by unmarried, single, or multiple (i.e., more than two) parents, are more likely to favor the enforcement of such agreements. This Article argues that many of the rationales for enforcing parentage agreements extend to custody agreements as well.

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* Associate Professor of Law, Wayne State University Law School. I am thankful, for their helpful suggestions and insights, to Kerry Abrams, Erez Aloni, Mary Pat Byrn, James Dwyer, Clare Huntington, and Chris Lund. Earlier versions of the Article benefited greatly from presentations at the annual meeting of the Association for the Study of Law, Culture and the Humanities and at the Emerging Family Law Scholars and Teachers Conference.

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INTRODUCTION

Many scholars otherwise in favor of the enforcement of family contracts agree that parent-child relationships should prove the exception to any contractualized family law regime.¹ This Article questions the continued refusal to enforce contracts concerning parental rights. It does so by focusing on a subset of parental-rights contracts that have received little attention or support in recent scholarship: custody contracts.

This Article addresses the potential benefits of enforcing custody contracts by drawing on discussions of another subset of parental-rights contracts that has received greater attention in recent years: parentage contracts. While custody contracts allocate rights and responsibilities among those who are parents, parentage contracts determine who is a parent in the first place by creating or terminating parental rights.

Custody contracts are typically understood as a subset of marital agreements, and have thus been addressed primarily by scholars of marital contracts.² Marital agreements about the custody of children are largely unenforceable.³ Even scholars who otherwise favor the enforcement of marital contracts largely approve of this approach, concurring that a court should be able to override a contract concerning children's custody if it finds that enforcement is not in the children's best interests.⁴ By contrast, those who write about parentage agreements, such as those made in the context of assisted reproductive technology⁵ or by unmarried, single, or

1. See, e.g., Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 475 (1998) (advocating greater enforcement of marital contracts, with the exception of provisions relating to custody or otherwise affecting children's interests); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1554–56 (proposing greater limits on privatization in families with children); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1525–26 (2001) (recommending continued judicial determination of children's best interests in proposed regime facilitating greater customization of marriage); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 830 (advocating greater enforcement of postnuptial contracts, with the exception of provisions related to child custody or child support).

2. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 90–91, 105–07 (1998) (contending that the parental interest in custody is an integral component of the family economy within which marital bargains are formed).

3. See *infra* Part I.A.

4. See *infra* Part II.A.

5. See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (recommending making “bargained-for intentions” determinative of parentage for children born through assisted reproductive technology); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1,

multiple (i.e., more than two) parents,⁶ are comparatively more likely to favor the enforcement of such agreements.⁷ Parentage scholars, however, have not generally considered custody agreements to be a species of parentage agreement, and thus these scholars for the most part have not explicitly disagreed with those who endorse the unenforceability of custody agreements.⁸

On closer examination, these two strands of the literature are in tension with each other. This Article argues that many of the rationales for enforcing parentage agreements extend to custody agreements as well, and that custody contracts have a currently unrecognized potential to work in tandem with parentage contracts to provide families with benefits such as stability, certainty, and freedom from state intervention.

This argument is advanced as follows. Part I of the Article reviews current judicial approaches to custody contracts and to parentage contracts. Custody contracts are not typically enforceable. Courts are least likely to enforce custody contracts entered into when the parents' relationship is intact, even though such contracts have the most promise of any custody contracts for providing certainty and stability, and are less likely than contracts agreed to at separation or divorce to be the product of a bargaining imbalance created by a primary caregiver's fear of losing custody. Judicial attitudes are a function both of judges' view that they must ensure the best interests of children and of their concern that agreements may not be truly voluntary. But the best interests of children might be best advanced by rules that privilege parental agreements over judicial supervision, at least absent evidence of unequal bargaining power or harm to children. Courts are more likely to defer to custody agreements entered into at or after separation, but only if the courts find them to be in the children's best interests (or, in some states, not adverse to their interests), thus maintaining a central judicial role in the lives of non-intact families even where those families are able to come to an agreement about custody.

Courts are more likely to enforce parentage agreements, though certainly not uniformly, and there is considerable resistance to the enforcement of certain types of such agreements. Judicial approaches to parentage

22–26 (2003) (describing benefits of privatization in the context of assisted reproductive technology).

6. See, e.g., Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222 (2010) (arguing that defining parenthood with reference to consent in the context of assisted reproductive technology would better protect children born to single or unmarried parents); Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 243–46 (2009) (recommending recognition of agreements extending parental status to a third parent, such as a sperm donor who agrees to raise a child along with lesbian co-parents); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 38–61 (2004) (arguing for contractual approach to parental status, and for recognition on this basis of both single parenthood and parenthood by unmarried same-sex couples).

7. See *infra* Part II.B.

8. See *infra* Part II.B.

agreements vary tremendously depending on both the jurisdiction and the type of agreement; responses can range from enforcing parentage agreements without any reference to children's interests to refusing to take such agreements into account at all. Parentage agreements include co-parenting agreements, often employed by same-sex couples, whereby a child's legally recognized parent agrees to jointly raise the child with a co-parent;⁹ gamete donation agreements, where anonymous or known donors of ova or sperm agree either to relinquish or to retain their parental status;¹⁰ and surrogacy agreements,¹¹ including gestational surrogacy, where the ovum is not the surrogate's. Part I shows that the differences between custody and parentage agreements are not as stark as may appear, and that both lie on a spectrum of parental agreements.

Part II describes the divergence of scholarly approaches to custody and parentage agreements. Since the 1980s, the scholarly consensus has increasingly been in favor of using contracts to define family rights and obligations, at least where agreements are fairly procured.¹² Contract has facilitated arrangements not only between spouses but also between those who cannot marry or prefer not to.¹³ Some scholars have worried that these contracts may be unfair to women, particularly if they are pressured into signing prenuptial agreements, but most have viewed such problems as demanding oversight rather than wholesale invalidation of such contracts.¹⁴ The literature, however, has largely assumed that this approach has no applicability to custody agreements,¹⁵ both because children are not parties to these agreements¹⁶ and because parents are unlikely to be able to predict their children's interests, especially before their children are born.¹⁷

At the same time, however, a robust literature on parentage agreements has been significantly more favorable toward enforcing such agreements. The literature on custody and marital contracts has ignored the fact that the literature on parentage agreements provides counterarguments that extend easily into the custody context, addressing concerns about unpredictability, duress, and child welfare that are common to both contexts. Moreover, it has ignored that parentage and custody agreements are often intertwined. For example, co-parenting agreements often include provisions relating to custody.¹⁸ Scholars have given no defense of the implicit claim that it is acceptable to contract about whether one will have the status of a co-parent,

9. See *infra* notes 136–55 and accompanying text.

10. See *infra* notes 157–73 and accompanying text.

11. See *infra* notes 174–200 and accompanying text.

12. See, e.g., Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 328–34 (1982) (proposing contractual ordering of marriage).

13. See *infra* Part II.A.1.

14. See *infra* Part II.A.1.

15. See, e.g., Schultz, *supra* note 12, at 211 (excepting agreements affecting children from proposed regime of contractualized marriage).

16. See *infra* notes 240–42 and accompanying text.

17. See *infra* notes 262–63 and accompanying text.

18. See *infra* notes 136–39 and accompanying text.

but unacceptable to contract about the portion of co-parenting rights each parent will have should they raise their children in separate households.

The argument in Part II leaves open the possibility that the best course is for the courts to enforce neither custody nor parentage agreements, but Part III offers an affirmative argument for enforcing custody contracts along with parentage contracts. The principal argument is that the current judicial refusal to enforce custody contracts contributes to a differential treatment of two types of families: those deemed “intact”—typically consisting of two married parents and their offspring—and those deemed non-intact. Intact families are granted a degree of freedom from government intervention as long as there is no evidence that children are in any danger of harm. Non-intact families, by contrast, are subject to the perpetual threat of intervention, even in the absence of harm. The result of this two-tier system is that non-intact families are denied the autonomy and the stability that intact families enjoy, to the detriment of parents and children alike.

In an age of serial divorce, unmarried parentage, new family forms, and assisted reproductive technology, marriage can no longer suffice to render families intact. Rather than force parent-child relationships into a marital paradigm that is increasingly out of touch with current realities, we should permit and encourage parents to use contract to create the intact status that marriage can no longer provide. While children’s welfare and relationship security should be the primary consideration here, enforcement of custody contracts can promote other values as well, such as gender neutrality, diversity of family forms, and parental autonomy.

Finally, Part IV advances a concrete proposal for enforcement of child custody agreements. A modified version of the American Law Institute’s (ALI) approach toward enforcing prenuptial agreements should be extended to the custody context,¹⁹ as should the ALI’s view that such contracts merit more stringent policing than commercial contracts.²⁰ This proposal resembles the ALI’s approach toward enforcing parenting agreements reached when the parents’ relationship dissolves²¹ (which currently has been adopted by only one state),²² while extending this approach to prior agreements between the parents and modifying it accordingly. Procedurally, courts should ensure that custody contracts are made with voluntary and informed consent, rather than under undue pressure or duress. Substantively, courts should not enforce custody agreements that would

19. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.07 (2000) (excepting custody agreements from ALI provisions on premarital agreements).

20. See *id.* § 7.04 (requiring party seeking enforcement of premarital agreement to establish that it was voluntary and knowing); *id.* § 7.05 (requiring party contesting enforcement of premarital agreement to establish that enforcement would inflict a substantial injustice).

21. See *id.* § 2.06 (providing for enforcement of post-dissolution custody arrangements to which both parents agree as long as these are knowing and voluntary and do not pose a risk of harm to the child).

22. See W. VA. CODE ANN. § 48-9-201(a)(2) (LexisNexis 2009) (adopting ALI approach to parenting agreements).

harm a child's emotional, intellectual, or physical development; this is a considerably higher bar than a best-interests analysis. Concerns about insufficient judicial scrutiny of custody agreements under this more deferential standard can be addressed through presumptions that certain situations are harmful to children, such as an award of custody to a parent who has engaged in domestic violence.

This Article also questions the commonplace view that custody contracts made after the parents' relationship has dissolved should be given the greatest deference. Vulnerable parents may have greater leverage prior to or during a marriage than afterward. While it may be difficult to anticipate the needs of a child, premarital or marital custody agreements can be negotiated as those needs evolve. Meanwhile, agreements should continue to be enforced post-dissolution, or at least to receive substantial deference, even as a child's needs and situation change. The value of such agreements is that they provide predictability and security, not just for the parents, but also for the child.

I. CURRENT JUDICIAL APPROACHES TO PARENTAL AGREEMENTS

This part will review current judicial approaches to enforcing custody and parentage agreements, respectively. Part I.A provides an overview of judicial enforcement of custody agreements. As Part I.A demonstrates, courts are especially reluctant to enforce custody agreements reached before the parents' relationship has dissolved, but are beginning to give greater deference to certain types of post-dissolution custody agreements that are seen as promoting parental cooperation, such as agreements to share custody. Even such favored custody agreements, however, are largely unenforceable if a court finds them to be at odds with a child's interests.

Part I.B then surveys judicial approaches to three types of parentage agreements: co-parenting agreements, gamete donation agreements, and surrogacy agreements. As Part I.B shows, the judicial approach to parentage agreements varies widely according to both jurisdiction and type of agreement. There is a trend toward the enforcement, or at least the recognition, of certain such agreements. But courts nonetheless exhibit considerable reluctance to countenance the contractualization of parenthood.

A. Custody Contracts

The traditional rule has long been that agreements regarding the custody of children are unenforceable. When courts were first confronted with custody agreements in the early nineteenth century, the prevailing default rule was that fathers possessed superior rights to the custody of their children.²³ The custody agreements that made their way to court thus

23. See, e.g., *People ex rel. Barry v. Mercein*, 3 Hill 399, 408 (N.Y. Sup. Ct. 1842) (“[T]he mother, as such, is entitled to no power over [her child], but only to reverence and respect.”) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *478–79); *People ex rel. Brooks v. Brooks*, 35 Barb. 85, 92 (N.Y. Gen. Term 1861) (“If the husband is in all respects fit and

tended to involve the transfer of custodial rights to someone other than the father, typically either the children's mother or a third party, such as a grandparent. Such agreements were held unenforceable for a number of reasons—because a husband could not contract with his wife;²⁴ because agreements contemplating separation were unenforceable as a matter of public policy;²⁵ and because parents could not contract away rights that they possessed for the benefit of their children.²⁶

Even as courts refused to enforce custody agreements, however, they would at times award custody in accordance with the terms of such agreements nonetheless.²⁷ They did so on the basis of the doctrine that over the course of the nineteenth century emerged as the paramount consideration in child custody decision making: the welfare of the child.²⁸ Initially a factor that permitted courts to award custody to mothers in cases involving children of “tender years”²⁹—typically, under the age of seven—

proper to have the care of the child and to superintend its education, and other things are equal between the two, the recognized paramount right of the father must prevail over the otherwise equal claims of the mother.”); *Clark v. Bayer*, 32 Ohio St. 299, 305 (1877) (“As a general rule, the father is considered as being entitled to the custody of his minor children . . .”).

24. See *Mercein*, 3 Hill at 408 (“A man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself.” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *468)).

25. See, e.g., *Cook v. Cook*, 1 Barb. Ch. 639, 645 (N.Y. Ch. 1846) (expressing concern that enforcement of custody agreement would encourage collusion between divorcing spouses); *People ex rel. Barry v. Mercein*, 8 Paige Ch. 47, 67 (N.Y. Ch. 1839) (citing cases in support of proposition that an agreement for future separation is void as a matter of public policy); see also *Brooks*, 35 Barb. at 91, 93 (holding it necessary to “the interests of society . . . and good order” to find that “whenever the wife, without just cause, lives apart from her husband, she is deemed to have forfeited her claim to her children”).

26. See *Mercein*, 3 Hill at 410 (“I deny that he has, therefore, the right still farther to violate his duty by selling his children These he holds under the duty of a personal trust, inalienable even to [his wife].”); *Mercein*, 8 Paige Ch. at 67 (asserting that the parental duties imposed by virtue of the marriage contract “are imposed as much for the sake of public policy as of private happiness”).

27. See, e.g., *State v. Smith*, 6 Me. 462, 468–69 (1830) (noting that the father had voluntarily transferred custody to the mother under a postmarital agreement providing that the mother could separate and retain children's custody in the event of ill treatment, but resting refusal to grant the father's petition for custody on a finding that such an award would be contrary to the “permanent interest of the infant[s],” which required that they be left in the care of their mother).

28. See *id.* (refusing to enforce parental custody agreement but awarding custody in a manner consistent with that agreement nonetheless, on the basis of children's interests); Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37, 60–62 (2009) (describing resistance of nineteenth-century English courts to enforcing contractual transfers of parental rights, and their concomitant willingness to endorse the transfers of custody provided for by such contracts where to do so was consistent with a judicial assessment of children's welfare).

29. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 238–40 (1985); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 61–62 (1994).

the welfare of the child by the end of the nineteenth century became the predominant factor in child custody disputes.³⁰

By the late nineteenth and early twentieth centuries, as the doctrine of coverture was slowly dismantled³¹ and separation and divorce became more common,³² courts showed increasing willingness to take separation deeds and other forms of custody contracts into account in determining who should raise a child.³³ Some courts even deemed such contracts “binding.”³⁴ But they insisted in the same breath that such agreements could not “impede . . . that wide discretionary power given to courts in the disposition of the custody of children, in accord with their best interests.”³⁵ The agreements were relevant only insofar as they had bearing on, or were consistent with, children’s interests. They thus were not enforceable in any meaningful sense.

Despite considerable development of custody and parentage law over the course of the twentieth and twenty-first centuries,³⁶ the enforceability of custody contracts remains much the same today: such agreements are largely superfluous, in that courts retain the jurisdiction to override them in the name of children’s interests.

This section provides an overview of current judicial approaches to the enforcement of custody contracts. It begins by discussing those custody contracts that courts are most resistant to enforcing—premarital or mid-marriage custody agreements—and then proceeds to discuss the prevailing

30. See GROSSBERG, *supra* note 29, at 234–59 (charting emergence of the best-interests standard in nineteenth-century American custody law).

31. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–85 (1994) (tracing history of legislation that enabled married women to own property and to engage in legal transactions, while arguing that the structural inequalities of coverture persisted despite such changes).

32. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2133–34 (1996) (describing expansion of grounds for divorce in the post-Civil War period).

33. See, e.g., *Lee v. Lee*, 157 N.Y.S. 821, 823 (Sup. Ct. 1916) (“The right of the father to transfer the custody of his child to his wife, where they have separated, and where there is nothing in the agreement inconsistent with the welfare of the child, is generally recognized by the leading text-book writers and leading cases in other states and in England.”).

34. See, e.g., *Sargent v. Sargent*, 39 P. 931, 932 (Cal. 1895) (“Parents have a right to contract with each other as to the custody and control of their offspring, and to stipulate away their respective parental rights, and such contracts are binding upon them.”).

35. *Id.* at 933; see also, e.g., *Bonnett ex rel. Newmeyer v. Bonnett*, 16 N.W. 91, 93 (Iowa 1883) (awarding custody to grandparents over father on the basis that “[w]hen a parent has, either by abandonment or contract, surrendered his present legal right to the custody of a child, in all controversies subsequently arising respecting its custody, the matter of primary importance is the interest and welfare of the child”); *Cunningham v. Barnes*, 17 S.E. 308, 312 (W. Va. 1893) (same); cf. *Clark v. Bayer*, 32 Ohio St. 299, 305–06 (1877) (holding, in case concerning whether custodial grandfather could bring kidnapping action against third parties, that where “parents have . . . transferred their [child’s] custody to another” and “the custodian is, in every way, a proper person to have the care, training, and education of the infant, and the court is satisfied its social, moral, and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred . . . the new custody will be treated as lawful and exclusive”).

36. See generally, e.g., MASON, *supra* note 29.

approaches to custody agreements made at separation or divorce, both generally and with respect to certain types of such agreements, such as agreements governing modification of custody, agreements to arbitrate custody, parenting plans, and agreements for joint custody. As we shall see, it is precisely those agreements that attempt to provide certainty into the future—such as premarital custody agreements and agreements governing modification—that courts are least likely to enforce in awarding custody.

1. Premarital and Postmarital Custody Agreements

There are few published cases involving the enforceability of premarital custody agreements, perhaps because courts have consistently refused to enforce such agreements. Courts have been equally reluctant to enforce postmarital custody agreements, that is, custody agreements reached during an intact marriage, before separation occurs. In the handful of published cases on premarital and postmarital custody provisions, courts have been in accord that these are not enforceable.³⁷ As with custody agreements generally, the rule articulated in such cases is that parents cannot bind the courts by their private contracts when it comes to custody, because a court making a custody decision must be given the discretion to protect children's interests.³⁸

A further objection expressed in the context of premarital agreements is that a premarital custody agreement should be given especially little deference by custody courts, because it is highly unlikely to be either knowing or voluntary. How, it is asked, can a parent possibly know what is best for a child who has not yet been born? And how can a parent voluntarily consent to forgo custody of a child with whom she has not yet developed a relationship? Courts are quick to assert the absurdity of permitting parents to bind themselves, and to limit the discretionary power of the courts on matters of custody, on the basis of "an agreement entered into before the child in question has come into the world."³⁹

Premarital custody agreements are rarely contemplated in state statutory schemes regulating child custody. This neglect is visible in one of the more prominent cases to address such agreements, *In re Marriage of Littlefield*.⁴⁰ In *Littlefield*, the Supreme Court of Washington addressed the enforceability of a premarital custody provision under a statute intended to

37. See *In re Marriage of Garrity*, 226 Cal. Rptr. 485, 489 n.8 (Ct. App. 1986); *Spires v. Spires*, 743 A.2d 186 (D.C. 1999); *Alves v. Alves*, 262 A.2d 111 (D.C. 1970); *In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997); *Combs v. Sherry-Combs*, 865 P.2d 50 (Wyo. 1993). Courts are similarly unwilling to enforce pre-birth custody agreements between unmarried cohabitants. See, e.g., *In re Custody of Wendy*, 898 N.E.2d 889 (Mass. App. Ct. 2008).

38. See, e.g., *Spires*, 743 A.2d at 190 ("[T]he parents cannot by their agreement deprive [the court] of power to control the custody and maintenance of the child." (quoting *Emrich v. McNeil*, 126 F.2d 841, 844 (D.C. Cir. 1942))).

39. *Wood v. Wood*, 168 A.2d 102, 104 (Del. Ch. 1961); see also, e.g., *Littlefield*, 940 P.2d at 1371 n.9.

40. 940 P.2d 1362 (Wash. 1997).

govern parenting plans made at the time of separation or divorce.⁴¹ The custody provision at stake in *Littlefield* had little in common with the types of parenting plans that the statute envisioned. It was part of a more general premarital agreement that the father had presented to his fiancée three days before their wedding. The father was immensely wealthy—he had trust funds worth more than \$50 million—and, at the time of his marriage, his future wife, as the court noted, had “a guitar, a pickup truck, her clothing, and some furniture.”⁴² Among the provisions in the premarital agreement that he presented to her—and she signed—was that any child of the marriage would spend equal residential time with both parents in the event of divorce. It was this aspect of the agreement that the father sought to enforce, along with what he argued was an implicit agreement that the mother would remain in Seattle as a condition of custody.⁴³

Under the Parenting Act of 1987,⁴⁴ then in effect in Washington, courts could only order equally shared residential custody if both parents knowingly and voluntarily agreed to such an arrangement.⁴⁵ The trial court in *Littlefield* took the mother’s signing of the premarital agreement as indicating her consent to equally shared custody, to which she strongly objected at the time of separation. The court ordered that the child spend equal residential time with each parent, as well as that the mother, who had by then moved to California, relocate to Washington as a condition of custody, and that she live no more than an hour from the father’s residence.⁴⁶ In reversing the trial court, the Washington Supreme Court emphasized that the Parenting Act did not make parenting agreements enforceable. Instead, the Act provided that courts should consider such agreements as one among several factors relevant to determining the paramount concern in awarding custody—the best interests of the child.⁴⁷

The discussion of the custody agreements in *Littlefield* does not apply a distinct standard to premarital custody agreements. Instead, it primarily emphasizes the obligation of a custody court to override any parental custody agreement that is at odds with a child’s best interests. But the *Littlefield* court observes that a premarital custody agreement is unlikely to meet the statutory requirement that a court consider only those custody agreements that are “knowing and voluntary”:

The agreement in this case did not contemplate the needs of any particular child . . . and was made without the knowledge of how either party would act toward a child. Based on this record, we find it unlikely that these

41. *See id.* at 1368 (“The Parenting Act represents a unique legislative attempt to reduce the conflict between parents who are in the midst of dissolving their marriage The concept of a working ‘parenting plan’ is the primary focus of the Parenting Act.”).

42. *Id.* at 1363.

43. *See id.* at 1364.

44. 1987 Wash. Sess. Laws ch. 460 (codified at WASH. REV. CODE § 26.09.002–913).

45. *See Littlefield*, 940 P.2d at 1369 (citing WASH. REV. CODE § 26.09.187(3)(a)(ii) (1989)).

46. *See id.* at 1365 n.2.

47. *See id.* at 1371–72.

parties could have *knowingly* provided for the parenting of a child at the time the agreement was signed.⁴⁸

The court suggests here that any custody agreement made before a child is born is unlikely to be sufficiently “knowing” for a court to consider it as an important factor in awarding custody, let alone for a court to enforce it. To be “knowing,” the court indicates here, a custody agreement must be based on the needs of a particular, existing child, as well as on the relationship of each parent toward that child.

Littlefield thus demonstrates both the judicial reluctance to enforce custody agreements made *ex ante*—especially before a child is born—and some of the good reasons for that reluctance: the custody agreement in *Littlefield* was problematic in a number of ways. The agreed-to custody arrangement was unlikely to protect the child’s interests, and in fact arguably was likely to inflict harm on the child by exposing him to constant conflict. The agreement was adverse to the mother, who was the child’s primary caretaker and would likely have been awarded primary physical custody absent any agreement. And the agreement was obtained under unfair conditions that brought into question the mother’s ability to freely and knowingly consent to its terms: it was presented to her shortly before her wedding as part of a premarital agreement drafted by the attorney of her much wealthier fiancé, at a time when she had significantly fewer resources available to protect her interests.

But the fact that a premarital custody agreement may be unfairly obtained, or may contain terms that would harm a child, is not necessarily reason to dismiss premarital custody agreements generally. It is, instead, an argument for ensuring that such agreements are not enforced if they are obtained under duress or undue influence or if they contain terms that will be harmful to a child. As Mary Anne Case has argued in the context of enforcing agreements in an ongoing marriage, the very inequity of some such agreements argues for making courts the appropriate forum for determining whether they are to be enforced.⁴⁹ The prospect of legal enforcement will encourage couples to bring such agreements into courts of law instead of before religious tribunals or other nonlegal forums,⁵⁰ thereby giving courts an opportunity to review the agreements and—as the court did in *Littlefield*, and could have done even without reference to the best-interests standard—reject them as oppressive to the more vulnerable spouse and potentially harmful to the children involved.

Thus, custody case law periodically involves premarital or postnuptial contracts in which a wife has agreed to cede custody to her husband in the event of divorce, as part of a more general agreement by the wife to subjugate herself to her husband. This was the situation in *Spires v. Spires*,⁵¹ discussed by Case, where, after marriage but several years prior to

48. *Id.* at 1371 n.9.

49. Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL’Y 225, 247–49 (2011).

50. *See id.*

51. 743 A.2d 186 (D.C. 1999).

divorce, a wife agreed to submit to her husband in all respects during their marriage, including by “conduct[ing] herself in accordance with all scriptures in the Holy Bible applicable to marital relationships germane to wives and in accordance with the husband’s specific requests.”⁵² She also agreed, in the event of breach, to cede to her husband both complete custody of their children and possession of all marital property.⁵³ Similarly, in *Moran v. Moran*,⁵⁴ a would-be husband and wife agreed to be married (an agreement the court refused to enforce) under the laws of religion rather than of the state, and the “wife” bound herself, inter alia, to give her “husband” sole custody in the event that their relationship dissolved, as part of a more general program of wifely subjugation.⁵⁵

These agreements bring to light the extent to which private premarital custody agreements, like private marital agreements more generally, may contain troubling terms. However, the custody terms in each of these three agreements—in *Spires*, *Moran*, or *Littlefield*—would be unlikely to be enforced even if we granted sufficiently greater deference to such agreements than we currently do. Each contains terms that seem detrimental to the children in question (either by separating children from their primary caretaker or by imposing shared residential custody between highly conflicted parents), and all three agreements were arguably the product of sufficient pressure to vitiate a finding of voluntary and knowing consent.

While in each of these cases the parties seem to have settled their claims regarding property division and support, roughly half of the states will supervise premarital agreements on such matters for both procedural and substantive fairness before permitting enforcement.⁵⁶ This suggests that contract law—especially, for instance, as it has been modified to apply to premarital or postmarital contracts—is well-equipped to facilitate greater enforceability of premarital custody provisions than we currently permit, while still ensuring sufficient oversight of such agreements to protect children from harm and to prevent enforcement of those that are the product of undue pressure or duress.

2. Custody Agreements Made at Separation or Divorce

a. Generally

Most custody agreements are arrived at after the parental relationship has dissolved. The traditional rule in most jurisdictions is that courts are not bound by parents’ custody agreements even when reached at the time of separation or divorce, and instead must look to the welfare of the child. In a

52. *Id.* at 188 n.2.

53. *See id.* at 188.

54. 933 P.2d 1207 (Ariz. Ct. App. 1996).

55. *See id.* at 1209–10 (refusing to enforce a custody provision in a private contract purporting to create a marital union).

56. *See* Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAW. 249, 264 (2010).

typical formulation of this rule, “No agreement of the parties can bind the court presiding over custody matters to a disposition other than that which a weighing of all the factors involved shows to be in the child’s best interest.”⁵⁷

Even where separation agreements regarding custody are not binding, however, courts can consider them in awarding custody, and often award custody in accordance with the parents’ agreement, particularly where neither parent has decided to contest the agreement at the time the court makes its order. A number of custody decisions have emphasized the importance of considering the wishes of the parents in awarding custody, even while holding that the ultimate decision about custody rests with the trial court’s determination of the child’s interests.⁵⁸

There are two main approaches to considering such agreements. Under the more prevalent approach, followed by the majority of the states, courts will enforce custody agreements made by divorced or separated parents only if to do so is consistent with the child’s interests. Here, an agreement may be a factor to consider in assessing children’s interests, but is given no deference.⁵⁹ A substantial minority of states, on the other hand, require courts to enforce such agreements unless they find that to do so is adverse to the child’s interests.⁶⁰ Under this approach, the parental determination is

57. *Hutter v. Hutter*, 839 N.Y.S.2d 541, 543 (App. Div. 2007) (quoting *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 768 (N.Y. 1982)).

58. *See, e.g.*, *Z.S. v J.F.*, 918 N.E.2d 636, 641 (Ind. Ct. App. 2009) (“Though the wishes of the parent are to be given great weight, it is the duty of the trial court to determine if any agreement is in the best interests of the child.” (quoting *In re Paternity of T.G.T.*, 803 N.E.2d 1225, 1228 (Ind. Ct. App. 2004))); *Wist v. Wist*, 503 A.2d 281, 282 n.1 (N.J. 1986) (holding that while the trial court was required to consider the parents’ custody agreement in assessing the child’s best interests, “[w]hatever the agreement of the parents, the ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as *parens patriae*” (quoting *Sheehan v. Sheehan*, 118 A.2d 89, 92 (N.J. Super. Ct. App. Div. 1955))).

59. *See, e.g.*, IDAHO CODE ANN. § 32-717(1)(a) (2006) (providing that parents’ wishes as to custody are simply one factor to be considered in assessing children’s best interests); IOWA CODE ANN. § 598.41(3) (West 2001) (requiring court to determine whether parents’ agreed-upon joint custody arrangement is in child’s best interests); KY. REV. STAT. ANN. § 403.270(2)(a) (LexisNexis 2010) (providing that parents’ wishes as to custody are simply one factor to be considered in assessing children’s best interests); MO. ANN. STAT. § 452.375(2)(1) (West 2003) (same); MONT. CODE ANN. § 40-4-212(1)(a) (West 2009) (same); *Zahl v. Zahl*, 736 N.W.2d 365, 373 (Neb. 2007) (“[A] trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.”).

60. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56a(f) (West 2009) (providing that parenting plan agreed to by both parents “shall be approved by the court . . . unless the court finds that such plan as submitted and agreed to is not in the best interests of the child”); KAN. STAT. ANN. § 23-3202 (West 2011) (presuming that parents’ custody agreement is in the best interests of the child); *Keen v. Keen*, 629 N.E.2d 938, 941 (Ind. Ct. App. 1994) (holding that parental custody agreement should be enforced unless adverse to child’s interests); *Watson v. Watson*, 46 So. 3d 218 (La. Ct. App. 2010) (“If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.”); *Luce v. Cushing*, 868 A.2d 672, 676 (Vt. 2004) (holding that parental custody agreements entered into voluntarily are enforceable unless facts and circumstances establish that an agreement is not in the best interests of the child).

given greater deference. A number of states, moreover, have found that courts can agree with the parents regarding custody without holding a full hearing about the child's interests, which increases the likelihood that the courts will not have the information or inclination to review the agreement carefully.⁶¹ But courts in all of these states nonetheless retain the authority to refuse enforcement of the parents' agreement on the basis that the child's interests require a different custodial arrangement.

Only one state, West Virginia, follows the recommendation of the ALI to give greater deference to parental custody agreements reached at separation or divorce.⁶² The West Virginia/ALI approach provides for the enforcement of such agreements—termed “parenting plans”—unless a court finds that an agreement was not knowing or voluntary or that enforcement will impose harm on the child.⁶³ Even under the more deferential West Virginia/ALI approach to parental custody agreements, however, this deference seems limited to situations where parents have agreed to a parenting plan and then jointly asked the court to incorporate the plan into a court order. The West Virginia statute, following the ALI, indicates that a “prior agreement” regarding custody—an agreement to which one of the parents presumably no longer wants to adhere—is not enforceable, but instead only a factor for courts to consider in the event that the parents cannot agree on custody.⁶⁴

61. See, e.g., *Koron v. Melendy*, 523 N.W.2d 870, 872 (Mich. Ct. App. 1994) (“[I]n cases where the parties are in agreement regarding custody and visitation and present the court with such an agreement, the trial court need not expressly articulate each of the best interest factors.”); *Luhman v. Beecher*, 424 N.W.2d 753, 755 (Wis. Ct. App. 1988) (holding that court does not need to engage in fact-finding to accept stipulation modifying custody).

62. See W. VA. CODE ANN. § 48-9-201(a)(2) (LexisNexis 2009); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08 (2000).

63. See W. VA. CODE ANN. § 48-9-201(a)(2); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08. West Virginia is the only state to have adopted the ALI approach to child custody. Along with giving more deference to parental custody agreements, the ALI approach adopted by West Virginia rejects the best-interests approach to custody itself in favor of the approximation rule, under which courts allocate custody in a manner that approximates the time each parent spent performing caretaking functions for the child prior to the parents' separation. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08 (adopted by W. VA. CODE ANN. § 48-9-206(a)). Among the goals of the approximation standard is to provide a predictable background rule that, by reducing the uncertainty of litigation and allocating parental bargaining power in a manner consistent with parents' expectations, encourages parental agreements with respect to custody while minimizing strategic behavior, on the theory that negotiated custody agreements are more likely to be satisfactory to parents, and to reduce conflict between them, than judicially-imposed arrangements. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 643–56 (1992) (contending that the approximation approach to custody, with its predictability and its mirroring of parental preferences, would encourage custody settlements while reducing the opportunities for strategic behavior that might disadvantage the parent more invested in obtaining custody).

64. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08(e) (adopted by W. VA. CODE ANN. § 48-9-206(a)(5)). Moreover, the commentary to the ALI explicitly rejects enforcement of premarital or marital custody agreements, indicating that the provision encouraging enforcement of parenting plans “does not govern agreements made during or before marriage.” See *id.* § 206 cmt. a.

Indeed, a court's decision to reject the parents' custody agreement often occurs when one of the parents has contested the arrangement that he or she formerly agreed to. Sometimes, a court may reject an earlier agreement on the basis that it has proved "unworkable," as courts have done, for instance, where parents initially agreed to offer each other the option to babysit for their child before making any other caretaking arrangements, but one of the parents found this arrangement too cumbersome to carry out,⁶⁵ or, more typically, where parents have agreed to share decision-making authority but have not been able to do so without generating conflict.⁶⁶

Some contested custody agreements are unenforceable on constitutional or public policy grounds. Thus, the majority of courts have refused to enforce agreements regarding children's religious upbringing, on the basis that to do so would infringe on the resistant parent's First Amendment right of free exercise.⁶⁷ A minority of jurisdictions, on the other hand, find that the First Amendment does not prohibit the enforcement of agreements concerning religion, and will enforce religious upbringing agreements—and take them into account in awarding custody—where to do so is consistent with a child's interests.⁶⁸ Courts have refused as a matter of public policy to enforce certain agreements that express prejudice or stereotypes about race or gender, such as an agreement conditioning a mother's visitation on her not having African-American male companions in the child's presence,⁶⁹ or an agreement allocating custody on the basis of gender alone, with girls going to the mother and boys to the father.⁷⁰

More often, courts refuse to enforce contested custody agreements simply on the basis that enforcement would not be in the children's interests. Sometimes the court finds fault with the details of the agreed-upon arrangement rather than with the custody award itself. In one case, for instance, the court refused to enforce an agreement under which the children were given the right to have the final say about whether each of

65. See *Keen*, 629 N.E.2d at 939, 941.

66. See, e.g., *Howard v. Fortuna*, No. A-6304-06T3, 2009 WL 2031060, at *6 (N.J. Super. Ct. App. Div. 2009) (upholding modification of consent judgment giving father shared decision-making authority, where parents demonstrated continued hostility and conflict).

67. See, e.g., *Zummo v. Zummo*, 574 A.2d 1130, 1148 (Pa. Super. Ct. 1990) ("The great weight of legal authority is against enforcement of such [religious training] agreements over the objections of one of the parties."); see also *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 347 (Ct. App. 1996) (refusing to enforce religious upbringing agreement); *McLaughlin v. McLaughlin*, 132 A.2d 420, 421–22 (Conn. Super. Ct. 1957) (same); *Sotnick v. Sotnick*, 650 So. 2d 157, 160 (Fla. Dist. Ct. App. 1995) (same); *In re Marriage of Bennett*, 587 N.E.2d 577, 581 (Ill. App. Ct. 1992) (same); *Hackett v. Hackett*, 150 N.E.2d 431, 439–40 (Ohio Ct. App. 1958) (same).

68. See, e.g., *Rownak v. Rownak*, 288 S.W.3d 672, 674–75 (Ark. Ct. App. 2008) (enforcing agreement to raise child in Protestant church, where incorporated into divorce judgment); *Spring v. Glawon*, 454 N.Y.S.2d 140, 142 (App. Div. 1982) (finding religious upbringing agreements generally enforceable unless adverse to child's interests); see also *Stevenot v. Stevenot*, 520 N.Y.S.2d 197, 198 (App. Div. 1987) (holding that for a religious upbringing agreement to be enforceable, it must be in writing and must contemplate post-divorce status).

69. See *Turman v. Boleman*, 510 S.E.2d 532, 533 (Ga. Ct. App. 1998).

70. See *Combs v. Sherry-Combs*, 865 P.2d 50, 54 (Wyo. 1993).

their parents could have a romantic partner in their presence, finding that it was neither appropriate nor beneficial to give children the power to veto their parents' romantic arrangements.⁷¹

In other instances, a court may find that it is in a child's interests to live with the parent who agreed to forgo primary physical custody, or to have more or different visitation than the parents initially agreed to. A number of early judicial decisions to reject custody agreements when awarding or modifying custody rested on the court's determination that the mother's "promiscuous" behavior rendered maternal custody adverse to her children's interests.⁷² Other grounds for rejecting parents' custody agreements have included a finding that one or the other parent has a "bad temper,"⁷³ that the parents were too conflicted to carry out an agreement to share custody,⁷⁴ or that a parent had entered into a same-sex intimate relationship.⁷⁵

In the situation where parents come to court in agreement about custody, courts are apt to approve the parents' agreement. However, courts can—and sometimes do—reject a custody arrangement even at a time when both parents agree to it. Thus, for instance, a court might reject the parents' proposed visitation schedule, and instead impose the standard schedule recommended for a comparable situation, on the basis that the parents' arrangement is not appropriate given the age and developmental needs of their children.⁷⁶ Courts are especially resistant to custody arrangements that require too much back-and-forth for the children⁷⁷ and, at the other extreme, to arrangements where one parent forgoes custody or visitation rights altogether.⁷⁸ Courts have also consistently held that parents cannot bargain away their children's right to child support,⁷⁹ or agree to forgo all parental rights in exchange for a waiver of child support.⁸⁰

71. See *Giangeruso v. Giangeruso*, 708 A.2d 1232, 1234 (N.J. Super. Ct. Ch. Div. 1997).

72. See, e.g., *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982) (removing custody from mother despite earlier agreement in part because she had an overnight male guest); *Forbes v. Forbes*, 672 P.2d 428, 430 (Wyo. 1983) (awarding custody to father because shared custody arrangement harmed children where mother engaged in numerous "affairs").

73. See *Forbes*, 672 P.2d at 430.

74. See, e.g., *Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997).

75. See, e.g., *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (upholding transfer of primary custody to father, despite agreement that mother would be primary custodian, on basis of mother's same-sex relationship).

76. See, e.g., *Kelley v. Kelley*, 656 So. 2d 1343, 1346 (Fla. Dist. Ct. App. 1995) (upholding trial court's rejection of parents' custody agreement).

77. See, e.g., *Peek v. Berning*, 622 N.W.2d 186, 193 (N.D. 2001) ("Generally, it is not in the best interests of the child to bandy the child back and forth between parents in a rotating physical custody arrangement.").

78. See, e.g., *Blisset v. Blisset*, 526 N.E.2d 125, 129 (Ill. 1988) (refusing to enforce agreement terminating paternal visitation); see also *In re Marriage of Goodarzirad*, 230 Cal. Rptr. 203, 207–08 (Ct. App. 1986) (same).

79. See, e.g., *Ortman v. Ortman*, 695 N.Y.S.2d 805, 806 (App. Div. 1999) ("Because it is the right of every child to be supported by his or her parents, caution should be taken to ensure that the rights of children are not bargained away by their parents.").

80. See, e.g., *Blisset*, 526 N.E.2d at 129.

b. Agreements Regarding Modification of Custody

The rules governing deference toward parental custody agreements work in tandem with the rules governing modification of custody. Once a custody order has been issued, the courts retain continuing jurisdiction to modify custody until the child reaches the age of majority.⁸¹ A few states make it relatively easy for a parent to reopen the question of custody, permitting modification upon a showing that a change in custody is in the child's best interests.⁸² More typically, a parent wishing to modify custody must meet an initial evidentiary burden before a court will revisit the custody arrangement. This initial burden often involves establishing both a substantial change of circumstances and that this change renders it against a child's interests⁸³—or in some cases harmful to a child's welfare⁸⁴—to continue in the existing arrangement. State statutes or case law may also provide that certain events automatically establish the change of circumstances necessary to trigger a new best-interests analysis. For instance, Michigan law provides that, where both parents share legal custody, a parental move more than 100 miles away from a current place of residence requires a court to determine whether it is in the child's best interests to remain in the custody of the relocating parent.⁸⁵

The prevailing rule is that the same modification standard applies to all custody orders regardless of how they were arrived at, such that judicial custody decrees that incorporate an agreement of the parties are subject to the same modification standard as custody decrees that are the product of an adversarial hearing.⁸⁶ However, some states give less deference to a

81. *See, e.g.*, NEV. REV. STAT. ANN. § 125.510(1)(a) (West 2010) (“[T]he court may . . . [d]uring the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest.”); *Guss v. Guss*, 472 A.2d 790, 792 (Conn. App. Ct. 1984) (asserting “[t]he continuing jurisdiction of the Superior Court over the custody of minor children of a dissolved marriage”).

82. *See, e.g.*, NEV. REV. STAT. ANN. § 125.510(1).

83. *See, e.g.*, OR. REV. STAT. ANN. § 107.135(10) (West 2003); WASH. REV. CODE § 26.09.260(1) (West 2005). Many jurisdictions place more stringent restrictions on modification for the first two years following the initial custody order. *See, e.g.*, 750 ILL. COMP. STAT. 5/610(a) (2009) (“[N]o motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.”).

84. *See, e.g.*, MINN. STAT. ANN. § 518.18(d)(iv) (West 2006) (providing that, in the absence of a parental agreement to the contrary or other special circumstances, custody can be modified only upon a finding that “the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child”).

85. MICH. COMP. LAWS ANN. § 722.31(4) (West 2011).

86. *See, e.g.*, *Wade v. Hirschman*, 903 So. 2d 928, 934 (Fla. 2005) (“A decree for purposes of the substantial change test includes both a decree that has incorporated a stipulated agreement concerning child custody and a decree awarding custody after an adversarial hearing.”); Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1265 (1982). However, some

custody decree arrived at by stipulation of the parties.⁸⁷ Thus, for instance, the Supreme Court of South Dakota held that where a child custody decree is the product of the parents' agreement, modification can occur upon a showing that the child's interests require a change in custody, whereas custody orders that result from litigation can be modified only upon a showing of a substantial change of circumstances.⁸⁸

One issue that arises in the modification context is whether parents can make enforceable agreements that govern future modifications of the initial custody arrangement. Some parents try to contract around the default modification rules. Thus, for instance, in jurisdictions that make it easier to modify a parentally-agreed-upon custody arrangement than a judicially imposed one, parents may agree that should either of them wish to modify their agreed-upon custody arrangement, that parent must meet the heavier burden of proof that would typically apply only to court-ordered custody.⁸⁹ Other parents, by contrast, provide in their initial custody agreement that custody can be modified under a less stringent standard than would ordinarily apply.⁹⁰ For instance, in a 1999 Minnesota case, when the prevailing modification standard made it relatively difficult to modify custody—a court was required to find the child endangered by the existing arrangement in order to revisit the issue of custody—the parents had agreed to make modification easier by stipulating that a court could order a change of custody upon finding that to do so would be in the child's best interests.⁹¹ The Minnesota Supreme Court found the agreement unenforceable, on the basis that a parent cannot contract around the prevailing modification standard.⁹² The legislature responded by enacting a

courts have held that stipulated custody arrangements approved by court order are subject to a lesser modification standard—modification upon best interests rather than upon a change in circumstances—if the parents did not intend their arrangement to constitute a final custody determination. *See, e.g.,* *Montenegro v. Diaz*, 27 P.3d 289, 295 (Cal. 2001) (“[A] stipulated custody order is a final judicial custody determination for purposes of the changed circumstance rule only if there is a clear, affirmative indication the parties intended such a result.”).

87. *See, e.g.,* *Glaser v. McFadden*, 731 N.Y.S.2d 576, 579 (App. Div. 2001) (“When the existing custody arrangement arises out of a stipulation between the parties, that arrangement ‘is entitled to less weight than a disposition after a plenary trial.’” (quoting *Carl J.B. v. Dorothy T.*, 589 N.Y.S.2d 53, 54 (App. Div. 1992))).

88. *Stavig v. Stavig*, 774 N.W.2d 454, 458 (S.D. 2009) (“When a judgment and decree of divorce is based upon the parties’ agreement, custody may be modified in subsequent proceedings without the necessity of a ‘substantial change in circumstances’ . . . [such that] ‘the party seeking modification must only show that the best interests and welfare of the child requires a change of custody.’” (quoting *Hulm v. Hulm*, 44 N.W.2d 303, 305 (S.D. 1992))).

89. *See, e.g.,* *Adams v. Adams*, 899 So. 2d 726, 729 (La. Ct. App. 2005) (enforcing parental stipulation making custody modification subject to the heavy burden of proof that under state law applied only to custody orders based on judicial consideration of evidence of parental fitness).

90. *See, e.g.,* *In re Marriage of Johnson*, 591 P.2d 1043, 1043 (Colo. App. 1979) (refusing to enforce agreement that modification of custody arrangement would be governed by the best-interests standard rather than by the prevailing standard, which required a change of circumstances before the child's best interests could be considered).

91. *See* *Frauenshuh v. Giese*, 599 N.W.2d 153, 159 (Minn. 1999).

92. *See id.*

statute that explicitly permitted parents to agree that custody could be modified upon a showing that to do so would be in a child's best interests, rather than under the default standard requiring that a court find a child to be endangered before ordering a change of an existing arrangement.⁹³

Parents may also attempt to provide for a change in custody upon the occurrence of a certain event. A number of such agreements involve parental relocation. Sometimes the agreements are meant to prevent the custodial parent from relocating by either prohibiting relocation altogether⁹⁴ or providing that custody will be transferred to the noncustodial parent should the custodian relocate out of a particular county, state, or region.⁹⁵ Parents contemplating relocation have also used agreements to set the terms of such relocation, for instance by delineating areas within which relocation can occur without an alteration of custody;⁹⁶ by prohibiting relocation without permission of the other parent⁹⁷; or by setting forth a procedure for arriving at future agreements in the event of relocation.⁹⁸

Some parental custody agreements provide for an automatic change in custody once the child reaches a certain age. In some cases, for instance, the parents initially agreed that the mother would have custody during the child's younger years, and that the child would then begin living with the father upon reaching a predetermined age.⁹⁹ Other parental custody agreements have used automatic reversion provisions to monitor or control a parent's behavior, such as by providing that custody would revert to the father if the mother should fail to attend alcohol abuse counseling,¹⁰⁰ or that

93. See MINN. STAT. ANN. § 518.18 (West 2006).

94. See, e.g., *Mize v. Mize*, 621 So. 2d 417, 418–19 (Fla. 1993); *Moore v. McIntosh*, 128 So. 3d 985, 986 (Fla. Dist. Ct. App. 2014).

95. See, e.g., *Zeller v. Zeller*, 640 N.W.2d 53, 59 (N.D. 2002) (refusing to enforce agreement that custody would automatically change from mother to father if mother moved out of state); *Guss v. Guss*, 472 A.2d 790, 792–93 (Conn. App. Ct. 1984) (same).

96. See, e.g., *Frizzell v. Frizzell*, 597 N.Y.S.2d 513, 515 (App. Div. 1993) (refusing to enforce agreement providing that mother residing in Albany could only relocate to Iowa, Boston, Washington, D.C., and New York City, where father had already relocated to Iowa and mother wanted to relocate to California).

97. See, e.g., *Porter v. Fryer*, 530 N.Y.S.2d 327 (App. Div. 1988) (permitting mother to relocate and to retain custody despite agreement providing she would not relocate without father's consent).

98. See, e.g., *Nelson v. Nelson*, 263 P.3d 49, 51 (Alaska 2011) (involving agreement providing that “[i]f a parent moves in the future, which the parents agree will occur eventually, they will have to create a parenting agreement for different communities. Until they have that agreement the children cannot be moved from their current community”).

99. See, e.g., *In re Marriage of Jacobsen*, 735 P.2d 627, 627–28 (Or. Ct. App. 1986) (refusing to enforce stipulated dissolution judgment that child would live with mother from infancy through the age of twelve, and that custody would then transfer to father); *Knutsen v. Cegalis*, 989 A.2d 1010 (Vt. 2009) (refusing to enforce what the father contended was an agreed-upon court order providing that the child would remain with his mother until starting kindergarten and would then live with his father); *Herstine v. Herstine*, No. 13873, 1994 WL 37209 (Ohio Ct. App. Feb. 9, 1994) (refusing to enforce separation agreement providing for transfer of custody to mother after one year of initial residence with father).

100. See *Mundon v. Mundon*, 703 N.E.2d 1130, 1133 (Ind. Ct. App. 1999) (refusing to enforce agreement providing that custody would revert to father if mother violated conditions related to alcohol abuse and related counseling).

a mother would lose visitation rights should she expose her children to African-American male companions.¹⁰¹

Courts have largely refused to enforce agreements providing for an automatic change of custody upon an agreed-upon event, even where the agreement has been incorporated into a court order. As the Vermont Supreme Court explained in refusing to enforce what the father contended was an agreement providing that custody would switch automatically from the mother to the father when the child started kindergarten, “changes in custody must be based on real-time determinations of a child’s best interests.”¹⁰² It went on to note that there was no way to know in advance how the child, the parents, and the relationships between them would develop over the years after the agreement was entered into, and that any number of new developments could affect the best-interests calculus at the time the child stood to enter kindergarten.¹⁰³ The dissent argued that refusing to enforce such agreements would make parents more reluctant to compromise and would increase litigation.¹⁰⁴ The majority, however, found it irrelevant that the father had acquiesced to the initial arrangement only upon the condition that the child start living with him upon starting school, because “a court is not bound by that agreement when the evidence demonstrates that the best interests of a child requires a different result.”¹⁰⁵

Courts have been similarly reluctant to enforce agreements that attempt to bypass the usual rules of parental relocation by providing for automatic transfer of custody should a parent move beyond a certain agreed-upon geographical boundary.¹⁰⁶ However, some courts have applied a more stringent standard to a custodial parent’s request to relocate where the parents had agreed that relocation would not occur.¹⁰⁷ Similarly, while

101. *See* *Turman v. Boleman*, 510 S.E.2d 532, 533 (Ga. Ct. App. 1998) (refusing to enforce agreement on the basis both that it relied on an impermissible racial classification and that it was at odds with the preference for a child’s continued contact with the noncustodial parent).

102. *Knutsen*, 989 A.2d at 1014 (citing cases in other jurisdictions refusing to enforce automatic custody transfer provisions); *see also* *Mundon*, 703 N.E.2d at 1133 (refusing to enforce agreement providing that custody would revert to father if mother failed to meet conditions relating to alcohol abuse, and holding that “[d]ivorcing parties are free to anticipate many future events and contingencies in maintenance and property agreements. . . . But where provisions are made in the interest of the support and custody of children, as opposed to those which merely set forth rights in property, our legislature and sound public policy dictate that the trial court must play a role”).

103. *Knutsen*, 989 A.2d at 1014.

104. *Id.* at 1018 (Dooley, J., dissenting).

105. *Id.* at 1017.

106. *See, e.g.*, *Guss v. Guss*, 472 A.2d 790, 792–93 (Conn. App. Ct. 1984); *Scott v. Scott*, 578 S.E.2d 876 (Ga. 2003); *Zeller v. Zeller*, 640 N.W.2d 53 (N.D. 2002).

107. *See, e.g.*, *Moore v. McIntosh*, 128 So. 3d 985, 986 (Fla. Dist. Ct. App. 2014) (“When the parties’ settlement or visitation agreement expressly prohibits a move, thus establishing that the parties had previously litigated the issue, the party who seeks to relocate must show a substantial change in circumstances to justify the relocation.”); *Mize v. Mize*, 621 So. 2d 417, 420 (Fla. 1993) (“[I]n cases where the final judgment incorporates a prohibition against the relocation of the child thereby reflecting that the issue was litigated, the parent with the primary residential responsibility must show a change of circumstances in order to justify the relocation.”).

courts typically will not enforce a provision for an automatic change in custody should a parent move or should a child reach a certain age, some courts have enforced provisions for judicial reevaluation of custody upon the occurrence of such events.¹⁰⁸

c. Agreements to Arbitrate Custody

In many states, special rules also govern the arbitration of custody disputes.¹⁰⁹ These rules can affect the enforceability both of agreements to arbitrate¹¹⁰ and of the custody determinations that result from arbitration.¹¹¹ Agreements to arbitrate in some cases delegate decision making to religious tribunals.¹¹² Parents may also agree to defer to the decision of a mutually agreed-upon expert, such as a child psychologist.¹¹³

Some states prohibit arbitration of custody disputes altogether. These states refuse to enforce agreements to arbitrate custody and prohibit courts from taking the results of arbitration into account in their determination of custody.¹¹⁴ In states that permit the arbitration of custody disputes, there is significant variation in the deference accorded to the custody decision arrived at by the arbitrator. Some states either permit¹¹⁵ or require courts to review such determinations de novo to ensure that the custody award is in the child's best interests, on the theory that parents cannot preempt the power of the state to protect children's interests.¹¹⁶ Other states grant

108. *See, e.g.*, Arrabal v. Hage, 19 So. 3d 1137, 1138 (Fla. Dist. Ct. App. 2009) (enforcing agreement providing for the automatic reevaluation of custody upon the child entering sixth grade, where the prevailing modification standard required a substantial change in circumstances before custody could be reevaluated).

109. *See generally* E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139 (2000) (reviewing current approaches to enforcing agreements to arbitrate custody and arguing for greater enforcement of such agreements).

110. *See, e.g.*, Glauber v. Glauber, 600 N.Y.S.2d 740, 744 (App. Div. 1993) (refusing to compel arbitration of custody despite parental agreement to arbitrate).

111. *See, e.g.*, Kovacs v. Kovacs, 633 A.2d 425, 437 (Md. Ct. Spec. App. 1993) (holding that court could not adopt rabbinical court's custody award without making an independent determination that this award was in children's best interests).

112. *See, e.g., id.* at 425; *Glauber*, 600 N.Y.S.2d at 740 (involving parental agreement to arbitrate custody in rabbinical court).

113. *See, e.g.*, M.F.M. v. J.O.M., 889 S.W.2d 944, 947 (Mo. Ct. App. 1995) (involving parental agreement to be bound by custody recommendation of child psychologist).

114. *See* Kelm v. Kelm, 749 N.E.2d 299, 301 (Ohio 2001) (refusing to enforce agreement to arbitrate custody and noting that "[a] two-stage procedure consisting of an arbitrator's decision followed by de novo judicial review 'is certain to be wasteful of time and expense and result in a duplication of effort'" (quoting Nestel v. Nestel, 331 N.Y.S.2d 241, 243 (App. Div. 1972))); *see also* *Glauber*, 600 N.Y.S.2d at 744 (refusing to enforce agreement to arbitrate custody); Crutchley v. Crutchley, 293 S.E.2d 793, 794 (N.C. 1992) (same).

115. *See, e.g.*, *In re* Marriage of Popack, 998 P.2d 464, 469 (Colo. App. 2000) (holding that custody can be submitted to arbitration, but that court retains jurisdiction to reconsider custody de novo upon the request of either party).

116. *See, e.g.*, Miller v. Miller, 620 A.2d 1161, 1166 (Pa. Super. Ct. 1993) (remanding for determination of whether arbitrator's determination was adverse to children's interests); *Kovacs*, 633 A.2d at 437 (holding that trial court erred by adopting custody determination of religious tribunal without making independent determination that this custody outcome was in the children's best interests); Harvey v. Harvey, 680 N.W.2d 835, 836 (Mich. 2004)

greater deference to an arbitrator's custody determination, for instance by requiring that a parent show a threat of harm to a child in order to obtain judicial review of an arbitrator's custody award.¹¹⁷

d. The Trend Toward Parenting Plans and Shared Custody

Against the backdrop of the longstanding judicial reluctance to enforce custody agreements, several states have recently adopted special rules that give greater deference to certain types of custody arrangements that are seen as promoting parental cooperation, such as parenting plans and agreements to share custody. Parenting plans are similar to custody orders but typically include more detail than a traditional custody order; for instance, a state may require a parenting plan to specify the procedures by which parents will communicate with one another about their children¹¹⁸ or resolve future disputes.¹¹⁹ The term "parenting plan" was intended to replace the winner-takes-all label of "primary custodian" and to encourage both parents to remain involved in their children's lives.¹²⁰ Under recent legislation designed to promote the use of parenting plans, a number of state custody statutes now provide that if both parties agree to such a plan, then the court must approve of the plan unless it makes factual findings supporting the conclusion that the plan is not in the best interests of the child.¹²¹ These statutes permit courts to override parenting plans on the basis that they are adverse to a child's interests but create a presumption that any such agreement is in the child's best interests.

Some states also give greater levels of deference to parents' agreements to share custody jointly, instead of allocating primary custody to one or another parent.¹²² The national move toward encouraging parents to submit parenting plans was driven by the goal of inducing both parents to

(holding that parents cannot circumvent the court's custody jurisdiction by agreeing to abide by the determination of a referee or arbitrator).

117. See, e.g., *Fawzy v. Fawzy*, 973 A.2d 347, 350 (N.J. 2009).

118. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.02(C)(7) (2013).

119. See, e.g., MINN. STAT. ANN. § 518.1705(2)(a)(3) (West 2006).

120. See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 1.1.II cmt. A (2000) ("As parenting plans move parents toward richer and fuller plans for the child, the limitations of traditional 'custody' and 'visitation' terminology become apparent. These traditional terms represent, and help to perpetuate, an adversarial, win-lose paradigm of divorce."); Peter V. Rother, *Balancing Custody Issues: Minnesota's New Parenting Plan Statute*, 57 BENCH & B. MINN. 27, 27-28 (2000) (characterizing parenting plan legislation as designed to promote parental cooperation and to replace the "all or nothing" approach to custody).

121. See, e.g., CONN. GEN. STAT. ANN. § 46b-56a(f) (West 2009) ("If both parents consent to a parental responsibility plan under this section, such plan shall be approved by the court . . . unless the court finds that such plan as submitted and agreed to is not in the best interests of the child."); MINN. STAT. ANN. § 518.1705(3)(a) ("Upon the request of both parents, a parenting plan must be created in lieu of an order for child custody and parenting time unless the court makes detailed findings that the proposed plan is not in the best interests of the child.")

122. See generally J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213 (2014) (assessing trend toward presumptions favoring joint custody).

participate in childrearing after separation and divorce, as well as to work with one another in determining an optimal arrangement.¹²³ A related development was a shift in attitude toward joint custody (sometimes now called “shared parenting”).¹²⁴ Joint custody can consist of joint legal custody, which entails shared parental authority to make significant decisions about a child; joint physical custody, which entails shared physical custody of the child; or some combination of both.¹²⁵ Once disfavored, joint custody is today encouraged by many states, especially where parents agree to it, on the basis that, as articulated by the California Family Code, “it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship.”¹²⁶

Thus, a number of states have enacted statutes that favor joint custody agreements by creating a “presumption affecting the burden of proof” that joint custody is in the child’s best interests if the parents agree to it,¹²⁷ or, more forcefully, by providing that where parents agree to joint custody, a court must order it unless it determines on clear and convincing evidence that joint custody is not in the child’s best interests.¹²⁸ Other states, by contrast, give courts discretion to accept an agreed-upon joint custody plan as long as a court finds it to be in a child’s best interests, but do not require courts to give any particular deference to such a plan.¹²⁹

A number of courts, however, have resisted the statutory trend requiring them to extend greater deference toward certain types of agreements that promote parental cooperation in the aftermath of separation or divorce, such as parenting plans or joint custody agreements. The judicial habit of exercising unbounded discretion when overseeing custody arrangements

123. *See id.* at 226.

124. *See* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 497 (1988) (critiquing trend toward presumptive or judicially-imposed joint custody).

125. *See* DiFonzo, *supra* note 122, at 217 (noting that “[a] number of scenarios have been swept under the joint custody umbrella,” and arguing that “the joint custody-sole custody distinction is best viewed along a continuum, not as a sharp divide”).

126. CAL. FAM. CODE § 3020(b) (West 2004). *See generally* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 397–98 (2008).

127. *See, e.g.*, CAL. FAM. CODE § 3080; CONN. GEN. STAT. ANN. § 46b-56a(c) (West 2009).

128. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.26a(2) (West 2011); TENN. CODE ANN. § 36-3-101(a)(2)(A)(i) (West 2014). Florida goes further, and creates a strong presumption of shared custody regardless of whether the parents agree. *See* FLA. STAT. ANN. § 61.13(2)(b)(2) (West 2006) (“The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.”).

129. *See, e.g.*, OKLA. STAT. ANN. tit. 43, § 109(D) (West 2001) (“The court shall issue a final plan . . . based upon the [joint custody] plan submitted by the parents, separate or jointly, with appropriate changes deemed by the court to be in the best interests of the child. The court also may reject a request for joint custody and proceed as if the request for joint custody had not been made.”); *Haas v. Bauer*, 804 N.E.2d 80, 87 (Ohio Ct. App. 2004) (interpreting statute as requiring court to determine whether joint custody agreement facilitates child’s best interests).

has been hard to break. Thus, for instance, an appellate court in Wisconsin held that a family court could reject the parents' postjudgment agreement to modify custody, reaching this result by interpreting a statutory provision that "the court *shall* incorporate the terms of the stipulation into" its revised custody order as indicating that the family court "may" incorporate the parents' stipulation into its order but was not required to do so.¹³⁰ The court reasoned that, despite the clear statutory language indicating that parents' agreements to transfer custody should be enforced without further review, "the consequences would be absurd if [the statute] were read to prohibit an examination of the best interests of the child."¹³¹ As a New Jersey court explained in reaching a similar conclusion, "[t]he best interests of the child must serve as a polestar that guides the statutory analysis."¹³²

B. Parentage Agreements

To understand the function of custody agreements and to assess the judicial reluctance to enforce such agreements, it is helpful to place custody agreements within the context of all agreements that purport to allocate parental rights. Parental agreements form a spectrum. At one end of this spectrum are custody agreements—that is, agreements that set forth custodial and visitation rights among those who already possess the status of legal parent. At the other end of the parental agreement spectrum are parentage agreements—that is, agreements by which parents and would-be parents redefine parental status altogether, by creating or terminating parental rights. In the middle of the spectrum are hybrid agreements, such as parentage agreements that both create parental status and set the terms of custody and visitation should the parents' relationship dissolve.

With parentage agreements as with custody agreements, courts are often troubled by the use of contract law to make binding decisions about the parent-child relationship, and object that parental contracts should not be permitted to trump the judicial assessment of children's welfare. This section discusses current judicial approaches to three types of parentage agreements: co-parenting agreements, gamete donation agreements, and surrogacy agreements. Despite continued resistance to parentage by contract, there is a growing trend toward the enforcement of certain types of parentage agreements.

1. Co-Parenting Agreements

In recent decades, a new body of case law has arisen regarding the enforceability of co-parenting agreements. Courts had been asked for more than a century to enforce agreements by which parents transferred rights over their children to third parties, with most refusing to do so, and a

130. *In re Paternity of S.A. II*, 478 N.W.2d 21, 23 (Wis. Ct. App. 1991).

131. *Id.*

132. *Parks v. Poulter*, No. A-1947-08T3, 2010 WL 1329484, at *5 (N.J. Super. Ct. App. Div. Apr. 1, 2010).

minority finding the agreements enforceable if in the children's interests.¹³³ While some jurisdictions have applied this earlier case law to co-parenting agreements,¹³⁴ the two types of agreements differ in important respects. The earlier agreements, which I will call third-party custody transfer agreements, purported to transfer custody rights altogether from the parent to a third party, such as a grandparent or an adoptive parent. Co-parenting agreements, by contrast, do not purport to terminate the custodial rights of the original legal parent. Their goal in most cases is instead to share parental rights between the legal parent and a second parent, thus creating a parent-child relationship analogous to that of a traditional nuclear family.

Much of the recent case law on co-parenting agreements involves agreements between unmarried same-sex couples.¹³⁵ In many of these cases, the couple agrees to jointly share rights and responsibilities toward a child that one of the partners intends to conceive, or already has conceived, through assisted reproductive technology. Co-parenting agreements are also entered into with increasing frequency by stepparents.¹³⁶ In both situations, the goal of the agreement is to extend parental rights and obligations to a functional or intended parent who might otherwise have no legal status as the child's parent. These co-parenting agreements, unlike third-party custody transfer agreements, create parental status for a party without terminating the custodial rights of an existing parent.

In a number of instances, the co-parenting agreements that have surfaced in the case law have features that resemble premarital custody agreements. Such agreements are perhaps best described as a hybrid of an agreement to parent a child together during the parents' relationship and an agreement that both parents will continue to have legal rights to the child in the event that the parents separate.¹³⁷ While some co-parenting agreements of this nature merely indicate that both intended parents will have continued legal ties to the child in the event of separation, others include provisions that

133. See *supra* note 35 and accompanying text; see also *Masitto v. Masitto*, 488 N.E.2d 857, 860 (Ohio 1986) (awarding custody to grandparents over father on basis that "[t]he parents' agreement that custody of their child should be given to a third person is enforceable 'subject only to judicial determination that the custodian was in every way a proper person to have the care, training and education of the child'" (quoting *Rowe v. Rowe*, 97 N.E.2d 223, 225 (Ohio Ct. App. 1950))).

134. See *A.C. v. C.B.*, 829 P.2d 660, 664 (N.M. Ct. App. 1992) (citing cases upholding custody transfers to third parties as basis for finding that co-parenting agreements are not per se unenforceable); *In re Bonfield*, 780 N.E.2d 241, 249 (Ohio 2002) (citing *Masitto* for proposition that co-parenting agreements are enforceable if in a child's best interests).

135. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *Bonfield*, 780 N.E.2d at 241.

136. See, e.g., *In re Marriage of Garrity*, 226 Cal. Rptr. 485, 486 (Ct. App. 1986) (refusing to enforce premarital agreement that each party would act as parent to the other party's children); *In re Marriage of Engelkens*, 821 N.E.2d 799, 801, 806 (Ill. App. Ct. 2004) (refusing to enforce parental agreement to grant visitation with stepparent).

137. See, e.g., *E.N.O.*, 711 N.E.2d at 889 (involving co-parenting agreement executed before and after child's birth, and expressing both intent to co-parent and intent for nonbiological parent to retain her parental status should the parties separate).

specify the custody, visitation, and support arrangements that will apply should separation occur.¹³⁸

The goal of including a custody-in-the-event-of-dissolution provision in a co-parenting agreement is distinct from that of doing so in the premarital custody context, in that the signatories to a co-parenting agreement are concerned, as those to a premarital custody agreement typically are not, that both parents continue to have some legal right to their intended child in the event that their relationship dissolves. Nonetheless, it is significant that the parties to these hybrid co-parenting agreements—like those to premarital custody agreements—are concerned about disputes that might arise between them should their relationship deteriorate, and have attempted to employ contract law to ensure that their own *ex ante* decisions about their children's interests prevail over whatever they might feel *ex post*.

A related category of co-parenting agreements consists of those that resemble custody agreements between divorcing or separating couples. These agreements are reached between co-parents at the time their relationship dissolves or during a conflict that arises post-dissolution.¹³⁹ Some such agreements may be the product of a consensus on the part of the co-parents that they should both have continued ties to a child going forward, and thus constitute an *ex ante* attempt of the legal parent to self-bind, and thereby to protect the expectations of (and thus perhaps to encourage continued investment by) her co-parent. In other cases, the legal parent may have agreed to a custody arrangement in the face of a threat to litigate, such that the agreement may evidence not a collaborative decision about the child's interests going forward so much as a decision to avoid the costs and risks of litigation.

The states vary widely in their response to co-parenting agreements. Only a few jurisdictions have published case law declaring that courts can directly enforce such agreements.¹⁴⁰ The enforcing state with the most clearly developed law on the subject is Ohio. When faced with attempts to enforce co-parenting agreements, Ohio courts have applied the state's rule regarding parental transfers of custody to third parties, under which "[p]arents may waive their right to custody of [a child] and are bound by an agreement to do so."¹⁴¹ Under this approach, Ohio has found agreements to share custody with a same-sex co-parent enforceable as long as the agreed-to arrangement is in the child's best interests.¹⁴²

138. See, e.g., *Mason*, 660 S.E.2d at 61 (noting that "Parenting Agreement" executed when child was three years old, and when co-parents' relationship was intact, "set forth provisions relating to . . . custody, visitation, and financial support should the women's relationship terminate").

139. See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (involving right of *de facto* parent to enforce visitation agreement arrived at by the parties during post-dissolution litigation).

140. See *Bonfield*, 780 N.E.2d at 247 (agreement enforceable if in best interests of child); *A.C. v. C.B.*, 829 P.2d 660, 663–64 (N.M. Ct. App. 1992) (same).

141. *Bonfield*, 780 N.E.2d at 249 (citing *Masitto v. Masitto*, 488 N.E.2d 857 (Ohio 1986)).

142. See *id.* (remanding to trial court for determination of whether enforcement of co-parenting agreement between same-sex parents was in children's best interests).

Ohio places significant limits, however, on the enforceability of co-parenting agreements. It distinguishes between parentage and custody, holding that agreements can reallocate custody but cannot create parental status.¹⁴³ Moreover, the cases recognizing such agreements have tended to involve parents who are not in conflict, as was the situation in *In re Bonfield*,¹⁴⁴ where the Ohio Supreme Court affirmed the validity of a co-parenting agreement in the context of an intact co-parenting relationship in which the parents wanted judicial affirmation of their shared custodial arrangement. In a subsequent case where the co-parents were in conflict, the Ohio Supreme Court limited the practical significance of same-sex co-parenting agreements by finding that any agreements by the legal parent to share custody with her co-parent had been revoked, and finding it relevant in this assessment that the legal mother had permitted the donor father to play a role in the child's life.¹⁴⁵

In most of the states that take co-parenting agreements into account in allocating parental rights, courts do not enforce the agreements, but instead consider them as a factor relevant to assessing parental rights under a theory of de facto parentage. Under the de facto parentage test set forth by the Wisconsin Supreme Court in *Holtzman v. Knott*¹⁴⁶ and adopted by a number of states, a co-parenting agreement is some evidence of consent to a functional parenting relationship, which, if established, in turn permits a court to award the functional parent visitation with a child, as long as the court finds visitation to be in the child's best interests.¹⁴⁷ Other states have subsequently extended full parental status on the basis of de facto parentage.¹⁴⁸

Under the de facto parentage approach, a co-parenting agreement alone does not suffice to create parental status in the absence of functional parenting. The result is that intended parents cannot protect their

143. See *id.* at 248 (limiting recognition of co-parenting agreement to enforcement of its custody provisions, and refusing to deem co-parent the full legal "parent" of the children she had raised with her partner since birth).

144. 780 N.E.2d 241 (Ohio 2002).

145. See *In re Mullen*, 953 N.E.2d 302, 307 (Ohio 2011).

146. 533 N.W.2d 419 (Wis. 1995).

147. See *id.* at 421 (providing that functional parent can claim right to visitation where (1) biological or adoptive parent consented to petitioner's formation of a parent-like relationship with child; (2) petitioner and child lived together in same household; (3) petitioner assumed obligations of parenthood, including contribution toward child's support; and (4) petitioner has been in a parental role for a sufficient length of time to have developed a parental bond with the child); see also *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892–94 (Mass. 1999) (upholding award of visitation to de facto parent under best-interests test and finding it proper for trial court to consider co-parenting agreement as evidence of: intent to co-parent, absence of financial compensation for parental relationship, and biological parent's ex ante assessment of child's interests); cf. *Mason v. Dwinnell*, 660 S.E.2d 58, 61, 72–73 (N.C. Ct. App. 2008) (upholding shared custody award to a same-sex co-parent under third-party visitation statute, where the co-parent had entered into a co-parenting agreement with the birth mother and had acted as a functional parent); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (holding that, under state paternity statute, nonbiological same-sex co-parent had standing, on basis of de facto relationship with child, to enforce visitation agreement).

148. See, e.g., *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. App. 2004); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005).

expectations against the possibility that their relationship will dissolve before both parents have had the chance to develop a functional relationship with the child. For instance, where the nonlegal parent decides to walk away from her intended child shortly after the child is born, she cannot be held to her agreement to help support that child, even if the child was conceived with the expectation of that support. This was the case in *T.F. v. B.L.*,¹⁴⁹ where the Supreme Judicial Court of Massachusetts, which had previously recognized de facto parenthood and had permitted consideration of a co-parenting contract as a factor in determining de facto parenthood, refused to enforce parental support obligations on the basis of what it referred to as “parenthood by contract.”¹⁵⁰ The Massachusetts court reiterated its resistance to parenthood contracts in the subsequent case of *A.H. v. M.P.*,¹⁵¹ holding that, because “parenthood . . . can[not] be conferred by a private agreement,”¹⁵² a court could not award visitation rights on the basis of a co-parenting agreement where the co-parent trying to enforce the agreement had lived with and cared for the child but had not taken on a sufficient proportion of caretaking responsibilities to merit de facto parental status.¹⁵³

Several jurisdictions have refused to recognize co-parenting agreements altogether, often along with a refusal to recognize de facto parentage.¹⁵⁴ In these jurisdictions, then, functional co-parents alleging an agreement to co-parent are left without any basis for asserting parental rights or enforcing parental obligations. Other states that deny rights to de facto parents, however, have noted in so doing that the petitioners did not rest their arguments on an agreement to co-parent, thus suggesting that such an agreement might provide a viable basis for extending parental rights and obligations.¹⁵⁵

2. Gamete Donation Agreements

There is a widespread consensus that an agreement by an anonymous donor of gametes—whether in the form of sperm or ova—to relinquish parental status is binding and enforceable. In most states, largely as a matter of statutory law, anonymous donors terminate their parental status by agreeing to donate their gametes to intermediaries who then provide them to

149. 813 N.E.2d 1244 (Mass. 2004).

150. *See id.* at 1248–49.

151. 857 N.E.2d 1061 (Mass. 2006).

152. *Id.* at 1074 (quoting *T.F.*, 813 N.E.2d at 1254 (Greaney, J., concurring in part and dissenting in part)).

153. *See id.* at 1072–73.

154. *See, e.g., In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (refusing to enforce co-parenting agreement or to adopt theory of de facto parentage).

155. *See White v. White*, 293 S.W.3d 1, 15, 22–23 (Mo. Ct. App. 2009) (declining to adopt theory of de facto parentage, and noting, in denying mother’s petition for child support, that she had not preserved for appeal her argument that the co-parents had entered into an enforceable contract to share parental rights and responsibilities); *Stadter v. Siperko*, 661 S.E.2d 494, 496 (Va. Ct. App. 2008) (declining to adopt theory of de facto parenthood, but noting without comment that “there was no written pre-separation agreement concerning appellant’s parental rights”).

intended parents.¹⁵⁶ While such laws were originally drafted to address anonymous sperm donation, many states have since updated their statutes to include ova donation as well, and others have achieved the same result through case law.¹⁵⁷

Because of the consensus on anonymous gamete donation—as well as the infrequency of attempts by anonymous donors to contest their waiver of parental status—most of the case law on gamete donation involves parentage disputes between mothers and known sperm donors. Many states apply the same rules to sperm donors regardless of whether they are known or anonymous. Under a typical statutory provision, donation of sperm for the purpose of artificially inseminating a married woman other than the donor's wife through a physician-directed procedure terminates the donor's parental status.¹⁵⁸ Some states either extend this rule to the donation of sperm to an unmarried woman¹⁵⁹ or make no reference to the recipient's marital status.¹⁶⁰ A few further provide that a donor to a recipient other than his wife can retain parental status where the donor and recipient enter into a written contract to this effect, but that in the absence of such a contract the donor has no parental rights or obligations.¹⁶¹

A number of cases have arisen in which mothers and known sperm donors have reached parentage agreements in derogation of a state's default rules on the subject. Some of these agreements provide that a donor of sperm to an unmarried woman will retain his parental status even where the state statutory regime provides otherwise. In some of the cases, the donor was an acquaintance of the woman, and they had agreed to raise a child together, sometimes in conjunction with the woman's female partner; in others, the donor and recipient were in an intimate, but unmarried, relationship. In both situations, courts have largely, but not uniformly, decided to enforce the agreements providing the donor with parental status.¹⁶²

156. See NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 93–96 (2009).

157. See *id.*

158. See, e.g., ALA. CODE § 26-17-702 (2009) (“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction.”).

159. See, e.g., ARK. CODE ANN. § 9-10-201(c)(1) (2009).

160. See, e.g., CONN. GEN. STAT. ANN. § 45a-775 (West Supp. 2009) (“An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D.”); TEX. FAM. CODE ANN. § 160.702 (West 2008) (“A donor is not a parent of a child conceived by means of assisted reproduction.”).

161. See, e.g., N.J. STAT. ANN. § 9:17-44(b) (West 2013) (“Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.”).

162. See *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (en banc) (finding, in a dispute between a known sperm donor and an unmarried biological mother, that the “agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute” terminating them); *Browne v. D'Alleva*, No. FA064004782S, 2007 WL 4636692, at *12 (Conn. Super. Ct. Dec. 7, 2007) (holding with respect to dispute

The judicial response to agreements purporting to terminate or limit a known sperm donor's rights in the absence of statutes providing for such termination has been more mixed.¹⁶³ In the early case of *Thomas S. v. Robin Y.*,¹⁶⁴ an appellate court in New York recognized the donor as the full legal father, granting his petition for an order of filiation, despite an agreement prior to conception that he "would not assume a parental role" toward the child.¹⁶⁵ Almost a decade later, another New York court reached a similar conclusion in *Tripp v. Hinckley*,¹⁶⁶ holding that a sperm donor could not be limited to the terms of a preconception agreement making the mother and her partner the custodial parents of the child, with visitation to the father and his partner, but instead must be treated as a full legal parent with the right to whatever custodial arrangement a family court determined to be in the child's best interests.¹⁶⁷

Other states, by contrast, have enforced agreements by which known donors have terminated their parental rights and obligations. In *Leckie v. Voorhies*,¹⁶⁸ decided the same year as *Thomas S.*, an Oregon court enforced a written preconception agreement by which the donor relinquished his rights to paternity and custody and agreed to retain only "limited visitation rights" at "the convenience of" the mother and her partner.¹⁶⁹ More recently, in *Ferguson v. McKiernon*,¹⁷⁰ the Supreme Court of Pennsylvania

between known sperm donor and female couple that "if there is an agreement between the parties about the donor's parental rights and that he would have them, it would be a violation of his due process right to apply the statute [terminating the donor's rights] to him"); *McIntyre v. Crouch*, 780 P.2d 239, 244–45 (Or. Ct. App. 1989) (holding that application of a statute terminating a sperm donor's parental rights would violate the federal Due Process Clause if the donor could establish that he and the mother had entered into a pre-conception agreement that the donor would retain paternal rights); *L.F. v. Breit*, 736 S.E.2d 711, 722 (Va. 2013) (finding that despite the statutory termination of sperm donor's rights where he is not married to the mother, "[d]ue process requires that unmarried parents . . . be allowed to enter into voluntary agreements regarding the custody and care of their children"); *see also In re Sullivan*, 157 S.W.3d 911, 919 (Tex. App. 2005) (finding that a sperm donor had standing to adjudicate paternity despite a statute terminating his parental rights, while declining to address relevance of pre-birth co-parenting agreement to this determination). *But see In re K.M.H.*, 169 P.3d 1025, 1044 (Kan. 2007) (refusing to recognize parental status of donor who claimed oral agreement to retain parental status, where statute required such an agreement to be in writing); *In re H.C.S.*, 219 S.W.3d 33, 36–37 (Tex. App. 2006) (refusing to recognize donor's parental status on basis of alleged pre-birth agreement that he would play a role in the child's life, where statute provided for termination of donor's parental status and donor had not executed an acknowledgment of paternity).

163. In jurisdictions with statutes terminating paternal rights when a licensed physician performs the insemination, a number of courts have refused to enforce contracts purporting to terminate parental rights in situations where insemination did not follow the statutorily mandated procedure. *See, e.g., E.E. v. O.M.G.R.*, 20 A.3d 1171, 1176–77 (N.J. Super. Ct. Ch. Div. 2011) (refusing to enforce agreement to terminate donor's parental status with respect to child born of self-administered assisted reproductive technology, where donor and mother joined to request such termination).

164. 618 N.Y.S.2d 356 (App. Div. 1994).

165. *Id.* at 361.

166. 736 N.Y.S.2d 506, 507–08 (App. Div. 2002).

167. *See id.*

168. 875 P.2d 521 (Or. Ct. App. 1994).

169. *Id.*

170. 940 A.2d 1236 (Pa. 2007).

enforced an oral agreement by which a known donor terminated his parental rights and obligations, where the mother decided five years after her twins' birth to bring an action for child support.¹⁷¹ The court emphasized the value of enabling a woman to conceive a child using "sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child."¹⁷²

The court in *Ferguson* not only enforced the agreement relinquishing the father's paternal status, rejecting the lower court's decision that it violated public policy, but held that enforcement should not hinge on any analysis of the children's best interests. The court acknowledged that the children in this case would be disadvantaged by enforcement of the agreement, which would deprive them of financial support. But it found that the agreement should be enforced nonetheless, without reference to the children's interests.¹⁷³

This privileging of a contractual agreement over children's interests represents a significant departure from the custody case law, as well as from much of the case law on co-parenting agreements. As we have seen, to the extent that courts will enforce co-parenting agreements or consider them in determining parental status under a theory of de facto parenthood, any award of custody or visitation on this basis requires a finding that such an award is in the child's best interests. The *Ferguson* court was willing to overlook the children's interests in the name of facilitating certainty, stability, and predictability in their parents' arrangements, under the theory that promoting those goals would be beneficial both to the children involved and to children generally. In much of the case law on custody and other parentage agreements, however, there is no escaping the possibility of a best interests assessment that will undermine parents' and children's expectations about their future.

3. Surrogacy Agreements

Surrogacy, in which a woman agrees to carry a pregnancy for the intended parent or parents, falls into two categories. In traditional surrogacy, the surrogate's own ova are fertilized through artificial insemination, and she then carries the resulting pregnancy to term. In gestational surrogacy, the surrogate is impregnated with fertilized ova from another woman, either an intended mother or a donor. Because gestational surrogacy requires in vitro fertilization, the procedures involved are both more complex and more expensive than those required for traditional surrogacy.

In the absence of any legislation addressing surrogacy, courts have uniformly refused to enforce traditional surrogacy agreements that purport

171. *Id.* at 1248.

172. *Id.* at 1247.

173. *See id.* at 1248.

to terminate parental rights prior to conception or birth.¹⁷⁴ Courts have generally been willing to approve a surrogate's post-birth consent to adoption by the intended parents.¹⁷⁵ But where the surrogate has instead changed her mind about relinquishing her biological child, courts have consistently declined to enforce the surrogate's preconception agreement to terminate her parental rights. In *In re Baby M*,¹⁷⁶ the highly publicized 1980s surrogacy dispute in which the surrogate refused to relinquish her rights to her child as she had contracted to do, the New Jersey Supreme Court proclaimed that even if the mother was capable of knowingly consenting to terminate her parental rights to her unborn child in exchange for financial compensation, "[t]here are, in a civilized society, some things that money cannot buy."¹⁷⁷ The *Baby M* court declined to enforce the agreement on a number of grounds, among them that parents cannot by contract circumvent the jurisdiction of the judiciary to ensure that any custody arrangement agreed to by parents is in the best interests of the child.¹⁷⁸

Courts have been more receptive toward gestational surrogacy agreements, both where the ovum was provided by the intended mother¹⁷⁹ and where it was obtained from a donor.¹⁸⁰ Not all states have found such agreements enforceable, however, and some that have refused to enforce such agreements have awarded parental status to the surrogate, particularly where there was no intended mother with a genetic tie to the child.¹⁸¹ In New Jersey, for example, a court following the lead of *Baby M* refused to enforce a woman's preconception agreement to relinquish her rights to the child she carried to term, where the child was conceived through a donated ovum and the sperm of her brother's partner.¹⁸² The contract was deemed unenforceable, and the surrogate was found to be the legal mother of the child to whom she had given birth.¹⁸³

A growing minority of jurisdictions, including Virginia,¹⁸⁴ Florida,¹⁸⁵ Illinois,¹⁸⁶ and Arkansas,¹⁸⁷ have enacted legislation rendering certain

174. See, e.g., *In re Moschetta*, 30 Cal. Rptr. 2d 893, 895, 901 (Ct. App. 1994); R.R. v. M.H., 689 N.E.2d 790, 796–97 (Mass. 1998); A.L.S. v E.A.G., No. A10-443, 2010 WL 4181449, at *1 (Minn. Ct. App. Oct. 26, 2010).

175. See, e.g., *In re Adoption of Baby Girl, L.J.*, 505 N.Y.S.2d 813, 815 (Sur. Ct. 1986).

176. 537 A.2d 1227 (N.J. 1988).

177. *Id.* at 1249.

178. *Id.* at 1248 (“Worst of all, however, is the contract’s total disregard of the best interests of the child.”).

179. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001); *Belsito v. Clark*, 644 N.E.2d 760, 764 (Ohio Ct. C.P. 1994).

180. See, e.g., *In re Buzzanca*, 72 Cal. Rptr. 2d 280, 286 (Ct. App. 1998); *Raftopol v. Ramey*, 12 A.3d 783, 797 (Conn. 2011); *J.F. v. D.B.*, 879 N.E.2d 740, 743 (Ohio 2007).

181. See, e.g., *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (awarding maternal status to gestational surrogate who agreed to carry the biological child of her brother’s partner).

182. See *id.*

183. See *id.*

184. See VA. CODE ANN. § 20-160 (2008 & Supp. 2013).

185. See FLA. STAT. ANN. § 742.15 (2010).

gestational surrogacy agreements enforceable. In a number of these jurisdictions, the agreement is enforceable only if the intended parents meet a number of statutory requirements, including establishing a medical need for surrogacy¹⁸⁸ and, in some states, obtaining judicial preconception approval of the agreement.¹⁸⁹ Some permit compensation to the surrogate,¹⁹⁰ but others prohibit it.¹⁹¹

Virginia and Arkansas also permit the enforcement of traditional surrogacy agreements.¹⁹² Virginia, however, in addition to requiring judicial preapproval of such agreements,¹⁹³ allows a surrogate who is also a genetic parent to revoke her consent for up to 180 days after the final attempt at conception,¹⁹⁴ thus negating much of the protection and certainty that such an agreement provides to the child and intended parents.

Other states, by contrast, have enacted statutes prohibiting surrogacy of any variety, rendering surrogacy agreements void¹⁹⁵ and, in some states, subject to criminal penalties.¹⁹⁶ Moreover, despite a general trend toward enforcement of gestational surrogacy agreements, there has been resistance toward embracing a regime in which parentage is truly a matter of private contract. Even in California, one of the jurisdictions most favorable toward gestational surrogacy, courts have insisted that they do not enforce gestational agreements when they award custody to the commissioning parents but rather look to such agreements as evidence of intent to parent, which is relevant under state parentage laws.¹⁹⁷ California has rejected making the parental status of children born through surrogacy hinge on an assessment of the children's interests, and in this sense favors private ordering in creating parental status.¹⁹⁸ But California courts have

186. See 750 ILL. COMP. STAT. ANN. 47/1-75 (West 2009).

187. See ARK. CODE ANN. § 9-10-201 (2010).

188. See, e.g., FLA. STAT. ANN. § 742.15(2); VA. CODE ANN. § 20-160(B)(8).

189. See, e.g., VA. CODE ANN. § 20-160(A).

190. See, e.g., 750 ILL. COMP. STAT. ANN. 47/25(d)(3).

191. See, e.g., FLA. STAT. ANN. § 742.15(4); VA. CODE ANN. § 20-160(B)(4).

192. See ARK. CODE ANN. § 9-10-201; VA. CODE ANN. § 20-160.

193. See VA. CODE ANN. § 20-160(A).

194. See *id.* § 20-161(B).

195. See, e.g., D.C. CODE § 16-402 (2012); IND. CODE §§ 31-20-1-1, -2 (2014); MICH. COMP. LAWS § 722.855 (2009); N.Y. DOM. REL. LAW § 122 (2011); N.D. CENT. CODE § 14-18-05 (1991).

196. See, e.g., MICH. COMP. LAWS § 722.859 (criminalizing entry into or arrangement of a compensated surrogacy agreement); N.Y. DOM. REL. LAW § 123(1) (same).

197. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998) (“There is a difference between a court’s *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed* in a surrogacy agreement.”); see also *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (looking to a surrogacy agreement to determine intent to parent and finding the agreement sufficiently consistent with public policy to take it into consideration in assessing intent to parent, while refraining from directly enforcing the agreement).

198. See *Johnson*, 851 P.2d at 782 n.10 (characterizing parentage determination on the basis of a child’s best interests as raising “the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy”); *Buzzanca*, 72 Cal. Rptr. 2d at 291 (rejecting proposition that parents who employ assisted reproductive technology should be screened in the same way as adoptive parents).

nonetheless resisted a regime of parenthood by contract, making clear that surrogacy contracts are not enforceable per se, but are considered only insofar as they have bearing on parental intent or other factors relevant to parental status under the state's parentage legislation.¹⁹⁹

Thus, courts are conflicted on the enforcement of agreements allocating parental status, whether in the form of surrogacy agreements, gamete donation agreements, or co-parenting agreements. While there is a trend toward recognizing certain forms of such agreements, this trend is far from uniform. And even courts that afford some recognition to parentage agreements may express antipathy toward the notion of "parenthood by contract."²⁰⁰ In the parentage case law as in the custody case law, courts convey significant discomfort about the prospect of contractualizing parenthood.

II. THE DIVERGENCE OF SCHOLARLY APPROACHES TO CUSTODY AND PARENTAGE AGREEMENTS

In recent decades, there has been extensive scholarly treatment of the role of contract in shaping rights and obligations within the family. The scholarly literature on the contractualization of marriage, however, often makes little mention of custody agreements; a typical move by those who assess the enforcement of marital contracts is to indicate in passing that different rules necessarily apply to contractual provisions regarding custody, since these affect children. To the extent that the literature on marital contracts addresses custody agreements, it tends to endorse the judicial view that such agreements should not be enforced unless a court finds enforcement to be in a child's best interests—a standard that renders custody contracts largely superfluous. Even those who otherwise favor permitting family rights and obligations to be determined by private agreement often argue that children must pose the limit to the contractualization of family law.

By contrast, family law scholars who focus on the definition of parentage—for instance, in the contexts of assisted reproductive technology and same-sex parents—tend to be considerably more favorable toward enforcing contractual arrangements. Opposition to enforcing parentage contracts is strongest with respect to surrogacy, both traditional and gestational, because of concerns regarding the exploitation of women, harm to children, and the commodification of children and of parenthood. With respect to other forms of parentage contracts, however, such as co-parenting

199. See *Buzzanca*, 72 Cal. Rptr. 2d at 289 ("In the case before us, we are not concerned, as [the intended father] would have us believe, with a question of the enforceability of the oral and written surrogacy contracts into which he entered with [the gestational surrogate]. This case is not about 'transferring' parenthood pursuant to those agreements. We are, rather, concerned with the consequences of those agreements as *acts* which *caused the birth* of a child.").

200. *T.F. v. B.L.*, 813 N.E.2d 1244, 1246 (Mass. 2004); see also *Buzzanca*, 72 Cal. Rptr. 2d at 289 (insisting that the court is not "enforcing" the surrogacy contract that it relies on to determine parentage).

agreements and gamete donation agreements, there is a widespread, while not uniform, consensus that such contracts should be enforced.

This part explores the divergence in views about the merits of enforcing custody agreements, on the one hand, and parentage agreements, on the other. It reviews the objections to enforcing custody agreements and shows that these apply with equal force in the parentage context. This part concludes that the divergence in scholarly attitudes toward the two types of agreements is incoherent, and employs the parentage literature to illustrate both the advantages of enforcing custody contracts and the weaknesses of the prevailing arguments against such enforcement.

A. *The Marital Contracts Literature:
Scholarly Opposition to Custody Contracts*

1. Increased Acceptance of Marital Contracts

Over the past thirty years, family law has become increasingly privatized. By the late twentieth century, the progression “from Status to Contract” that Henry Maine had described a century earlier had finally entered the specialized domain of family relations.²⁰¹ For most of the twentieth century, courts and scholars resisted the encroachment of contract into the family, insisting both that the state has an interest in determining the rights and obligations of family members and that the arms-length and self-interested nature of contractual negotiations is antithetical to the intimacy, altruism, and mutual trust that should prevail between family members.²⁰² Since the 1970s, however, both courts and scholars have moved toward increasing acceptance of a contractualized approach to certain family rights and obligations.²⁰³

The trend toward the contractualization of the family began with the availability of no-fault divorce, and later included an increasing willingness to enforce both prenuptial agreements setting forth the financial rights and obligations of spouses when marriage comes to an end and private contracts between unmarried cohabitants.²⁰⁴ As recently as the late 1960s, no state offered no-fault divorce,²⁰⁵ and courts routinely refused to enforce prenuptial agreements or agreements between unmarried cohabitants.²⁰⁶ The prevailing view was that because the state has an interest in marriage, individuals should not be able to contract around the rights and obligations that come with the status of being married, should not be encouraged to

201. HENRY SUMNER MAINE, *ANCIENT LAW* 141 (Dorset Press 1986) (1861).

202. *See, e.g.*, *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) (rejecting contention that “spouses can be treated just like any other parties haggling at arm’s length”).

203. *See generally* Singer, *supra* note 1 (summarizing these developments); *see also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (describing the trend toward the contractualization of family law, and proposing default marriage law rules consistent with the view of marriage as a relational contract).

204. *See* Bix, *supra* note 56, at 261–73.

205. *See* Singer, *supra* note 1, at 1470.

206. *See id.* at 1446, 1474.

create private agreements that encourage divorce, and should not be able to create a private alternative to marriage through private contract.²⁰⁷

Today, every state offers no-fault divorce.²⁰⁸ At least half of the states will enforce the financial terms of prenuptial agreements without second-guessing the fairness of such bargains,²⁰⁹ while the remainder of states will enforce such agreements as long as the terms are both procedurally and substantively fair.²¹⁰ And the majority of states will enforce both express and implied agreements by which unmarried cohabitants determine their financial rights and obligations toward one another.²¹¹

There are still significant limits on the contractualization of marriage, even with respect to the financial rights and obligations of family members. The reluctance to allow contract law in its purest form to enter into the domain of family relations is exhibited, for instance, in the view of nearly half of the states that prenuptial agreements should be enforced only if a court ensures that a given agreement was fairly procured and makes reasonable provisions for the less well-off spouse.²¹² And even those jurisdictions that are most favorable toward the enforcement of premarital agreements typically do not permit the enforcement of terms that would cause one party to require public assistance²¹³ or that diminish a child's right to support.²¹⁴

Moreover, while the developments of the past fifty years have enabled individuals to govern the terms of exit from marriage or marriage-like relationships, courts continue to be reluctant to enforce agreements that govern the ongoing relationship.²¹⁵ And judicial views about the state-dictated duties of spouses within an intact marriage often render contracts for domestic services unenforceable, on the ground that spouses have a preexisting duty to provide such services.²¹⁶

Nonetheless, family members are now able as never before both to exit marriage at will and to use private agreements to dictate the financial terms that will apply when their marriage ends. These exit terms, in turn, often have a significant effect on the incentives, power dynamics, and

207. 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, 148–72 (1998) (describing initial resistance to private domestic agreements).

208. See Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 2 (2012).

209. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 43 (1983). The Uniform Premarital Agreement Act has been adopted in more than half of the states. See Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 14 & n.14 (2012).

210. See Bix, *supra* note 56, at 249, 264.

211. See *id.* at 272.

212. See *id.* at 264.

213. See UNIF. PREMARITAL AGREEMENT ACT § 6.

214. See UNIF. PREMARITAL AGREEMENT ACT § 3(b) (“The right of a child to support may not be adversely affected by a premarital agreement.”).

215. See *generally* Case, *supra* note 49 (advocating greater enforcement of such agreements).

216. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 840–41 (2004).

assumptions within an ongoing marriage.²¹⁷ Thus, the contractualization of marriage has the potential to reshape intact marriage as well.

A substantial contingent of family law scholars has embraced the contractualization of marriage.²¹⁸ As many have noted, allowing contract to dictate the terms of marital and marriage-like relationships promotes diversity and pluralism of family forms, by providing individuals with the autonomy to determine what their relationships should look like.²¹⁹ Such scholars argue that if both spouses want to remain financially independent during their marriage, and to individually retain whatever assets and earning power each spouse accumulates, a regime of enforceable premarital or marital contracts enables them to do so. If, by contrast, a couple would prefer their marriage to take a more traditional form, with one spouse acting as the breadwinner and the other as the stay-at-home spouse, a prenuptial agreement can ensure that neither spouse is disadvantaged by such an arrangement in a jurisdiction that prefers to promote egalitarian marriages in which both men and women enter the workplace and acquire earning power.²²⁰

The power of contract goes beyond allowing legally recognized spouses to design their own marital rights and obligations. It also enables adults who cannot or do not wish to marry, such as same-sex couples in certain jurisdictions, siblings, or friends, the power to form family ties without regard to the state's ideal of what a family should look like.²²¹ For this reason, the increased willingness of courts to enforce agreements between adults in an intimate relationship has been widely welcomed as facilitating individual freedom to craft family forms that the state might, if given the chance, reject.²²²

Much of the continued scholarly resistance to the enforcement of marital contracts—in particular, to the enforcement of prenuptial and postnuptial agreements—rests on the potential unfairness of such agreements to the more vulnerable spouse, with a particular emphasis on potential unfairness to women.²²³ Feminists have argued that women tend to have weaker bargaining power than men, both before and within the marital union. Amy

217. See generally Amy Wax, *Bargaining in the Shadow of Marriage: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

218. See, e.g., Case, *supra* note 49; Rasmusen & Stake, *supra* note 1, at 464–65; Shultz, *supra* note 12; Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992); Stark, *supra* note 1.

219. See, e.g., Stark, *supra* note 1, at 1491 (recommending a marriage law that “explicitly contemplates varied, changing, contextualized forms of marriage”).

220. See, e.g., Rasmusen & Stake, *supra* note 1, at 464, 502 (describing how contract can protect spouses in traditional marriages).

221. See, e.g., Shultz, *supra* note 12, at 220–40 (describing liberating possibilities of contractualizing family ties).

222. See, e.g., Bix, *supra* note 56, at 251 (“Just as we would not have government tell people whether to marry or whom, whether to have children or how many, it seems but a small step to say that individuals should have comparable freedom to select or modify some of the terms of their domestic ties.”).

223. See generally Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994) (arguing that enforcing such agreements exacerbates gender inequality).

Wax contends that women have less leverage than men within marriage in part because of their lower value on the remarriage market;²²⁴ other factors that potentially disadvantage women in marital bargaining include lower earning potential²²⁵ and less aggressive negotiation styles.²²⁶ As a result, marital agreements entered into before or during the marriage will often reflect women's weaker bargaining position by setting forth terms that disadvantage women and leave them vulnerable when the marriage dissolves.²²⁷ The status-based rules of marital property division and spousal support are intended in large part to protect the dependent spouse in the marriage, such as the wife who sacrifices her career to care for children while her husband continues to progress in his career and develop his earning potential. Pre- and postnuptial agreements often contract around rules meant to protect the dependent spouse in this situation, leaving her without protection when the marriage ends.²²⁸

Another common objection to enforcement of prenuptial agreements is that it can be difficult for couples entering into marriage to be rational about marital dissolution. One cognitive limit suffered by couples entering marriage is an optimism bias; a well-known study by Lynn Baker and Robert Emery found that even law students well-informed about the high rate of divorce tend to believe that their own marriage will endure.²²⁹ A second barrier to rational prenuptial contracting is the difficulty of foreseeing the contingencies that might occur during the course of the marital relationship. Given the potentially long-term nature of marriage, spouses-to-be may have difficulty predicting the various events that might occur during the course of their relationship, such as career changes, unemployment, or illness of a spouse or of another family member. Such contingencies may make agreements limiting spousal support or property division significantly more onerous for one of the spouses than initially anticipated.²³⁰

224. See Wax, *supra* note 217, at 544–50.

225. See *id.* at 612.

226. See *id.* at 589 (describing arguments to this effect). But see Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 5–6, 10–11 (1995) (finding little support for the claim that women are more risk-averse and altruistic than men such that they are inherently at a disadvantage in marital bargaining, while noting that differences in earning power and hence in power within the marital relationship can affect marital bargaining power).

227. See Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 518 (1998) (“[W]e should question how choice is produced within heterosexual unions, where power relationships are complicated and often unequal.”).

228. See Singer, *supra* note 1, at 1549 (“[L]egal rules that grant unfettered discretion to private individuals to structure the process of marital dissolution . . . may end up empowering economically stronger family members at the cost of economically weaker ones.”).

229. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 445 (1993).

230. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract Law*, 47 STAN. L. REV. 211, 254–58 (1995) (arguing that courts implicitly recognize this

Despite these objections, many scholars advocate enforcing marital agreements allocating rights to property and support.²³¹ A number of those who agree that unfairness to women and problems of rationality pose significant concerns have proposed mechanisms for addressing such concerns while enabling couples to craft enforceable premarital or postmarital agreements.²³² For instance, some recommend implementing procedural safeguards to ensure that the parties to premarital agreements are free from undue pressure and well-informed of the rights and duties that they are relinquishing and of the assets of their future spouse.²³³ This recommendation is often coupled with the proposal of some degree of substantive review to prevent the enforcement of agreements that will inflict injustice, particularly when this injustice is the result of events that were not foreseen by the parties at the time the agreement was executed.²³⁴ Such safeguards—which at once police marital bargains and provide mechanisms to ensure their enforceability—have been endorsed by the ALI²³⁵ and adopted, in some form, by nearly half of the states.²³⁶ Others have suggested strengthening the bargaining power of vulnerable spouses by changing the default rules of marriage, for instance by giving non-breadwinners greater rights to spousal support or marital property,²³⁷ or, as Amy Wax proposes, by returning to a strong presumption of maternal custody.²³⁸ These proposals would facilitate premarital and marital bargains by addressing the objection that women and men have unequal bargaining power within the marital relationship.

aspect of bounded rationality when they refuse to enforce prenuptial agreements where enforcement would be unduly burdensome as the result of unforeseen circumstances).

231. See, e.g., Shultz, *supra* note 12, at 329–30 (arguing that extension of the contractual ordering of marriage will best facilitate “private values and choices,” despite the risk that some of these choices will be the product of a disparity in bargaining power); Stake, *supra* note 218, at 415–29 (recommending that premarital agreements be both enforceable and mandatory); Wax, *supra* note 217, at 651–52 (addressing possibility that enforcement of antenuptial contracts might help to address the current inequality of bargaining power within marriage); Williams, *supra* note 1, at 827 (advocating enforcement of postnuptial agreements).

232. See, e.g., Brod, *supra* note 223, at 282 (arguing that “while premarital agreements generally harm women, such agreements also serve beneficial purposes” and proposing a combination of procedural and substantive mechanisms of review to mitigate against potential unfairness while permitting enforcement); see also Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. 1, 28–36 (2003) (proposing a declaratory judgment process by which courts could declare *ex ante* that premarital agreements are sufficiently fair both procedurally and substantively to merit enforcement).

233. See Brod, *supra* note 223, at 286–91 (proposing requirement that each party to such an agreement be represented by independent counsel, “unless the agreement clearly attains economic justice for the vulnerable spouse”).

234. See *id.* at 288 (arguing that “the more economically unjust the agreement, the more demanding the court should be in determining whether the agreement was procured fairly”).

235. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 7.04–.05 (2000).

236. See Bix, *supra* note 207, at 151–58.

237. See, e.g., Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 42–43 (2002).

238. See Wax, *supra* note 217, at 641–42.

2. Continued Resistance to Custody Contracts

Scholarly support is significantly weaker when it comes to the enforcement of marital agreements about child custody, particularly those entered into either prior to or during marriage. Family law scholarship on marital contracts largely either sidesteps the topic of custody agreements or recommends that these be treated differently from contracts allocating rights to property and support.²³⁹ The consensus is that custody agreements are exceptional, because these affect the rights of third parties—children—who are not parties to the marital bargain and in whose welfare the state has an interest.²⁴⁰ Some extend this analysis to all marital contracts that potentially affect children, including those regarding property division and spousal support, as well as the right to exit from marriage, arguing that here, too, the private right to contract should be limited by state concerns about children’s welfare.²⁴¹ But few question the prevailing view that, at a minimum, parents should not be permitted to employ custody agreements to circumvent the judicial power to ensure that custody arrangements coincide with children’s best interests.²⁴²

239. See, e.g., Rasmusen & Stake, *supra* note 1, at 475 (proposing widespread enforcement of marital agreements, but not with respect to custody provisions, on the basis that “[t]here are some consequences of divorce—such as child custody where the child’s interests must be protected—that do require judicial supervision”); Jeffrey Evans Stake, *Paternalism in the Law of Marriage*, 74 IND. L.J. 801, 807 (1999) (“[W]e agree that children cannot protect themselves, and therefore must be protected by the state. We do not propose to change current law regarding children”); Williams, *supra* note 1, at 830 (proposing enforcement of postnuptial contracts with the exception of provisions relating to child custody or child support).

240. See Scott & Scott, *supra* note 203, at 1323 (noting that “children are not parties to the contract and the state has an important interest in their welfare”); Singer, *supra* note 1, at 1552 (“Children’s interests may . . . be threatened by the shift from public to private ordering of the process for resolving family disputes. Children are, quite literally, unrepresented third parties”); Stark, *supra* note 1, at 1525 (proposing that in a regime where parents would be able to enforce premarital “Marriage Proposals” setting forth the rules and principles that would govern property division and custody at divorce, these would presumptively reflect their children’s best interests, but “[c]ustody . . . would still be subject to a judicial determination of the ‘best interest’ of the child at divorce”).

241. See Singer, *supra* note 1, at 1553–55 (proposing “two-tier family law regime” under which private ordering is more limited in families with children).

242. See *supra* note 240 and accompanying text. The only recent scholarship directly advocating enforcement of custody agreements rests primarily on parents’ constitutional right to make fundamental decisions about their children’s custody. See generally Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004) (arguing for greater deference to parents’ custody agreements, on the basis both that parents are best positioned to make such decisions and that they have a constitutional right to do so); see also Spitko, *supra* note 109 (arguing that greater deference to parents’ agreements to arbitrate custody would help to protect parents’ autonomy and their constitutional right to direct their children’s upbringing). Enforcement of custody agreements was also advocated by Robert Mnookin and Lewis Kornhauser in their seminal article about how default legal rules affect bargaining behavior in the context of divorce. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 957 (1979) (“We believe divorcing parents should be given considerable freedom to decide custody matters—subject only to the same minimum standards for protecting the child from neglect and abuse that the state imposes on all families.”). At the same time, however, Mnookin and Kornhauser observed that there are a

With respect to premarital custody agreements (there is little discussion of postnuptial agreements relating to custody),²⁴³ a further objection is that parents are unlikely to be able to predict their children's interests in one or another custody arrangement before the children are born. Unpredictability is a problem with all premarital agreements. But to some, it is especially problematic for someone who may not yet be a parent to purport to know what is best for a child who does not yet exist and does not yet have an established relationship with either parent.²⁴⁴

Perhaps the most powerful objection to premarital custody agreements is that the very existence of such an agreement could be detrimental to a child. One argument here is that a parent who has agreed to relinquish the right to primary custody before a child is born might be less invested in the child as a result.²⁴⁵ However, the incentive effect of a premarital custody agreement could also cut the other way—a parent who has agreed to forgo primary custody of a child in the event of divorce might have a greater incentive to make the marriage work, to the child's benefit.²⁴⁶ The more intractable problem is the possibility that a child's relationship with a parent could be harmed by the child's knowledge that that parent had agreed, *ex ante*, to forgo primary custody in the event of divorce.²⁴⁷ This is indeed a risk of premarital custody agreements. However, it is a risk that applies to any premarital agreement; the very existence of such an agreement, after all, indicates to a child that her parents have contemplated divorce—a reality that might undermine a child's sense of security and stability. Yet we enforce (and thereby encourage) premarital agreements nonetheless.

Another concern with premarital custody provisions is that unequal bargaining power might enable the stronger party to impose a one-sided custody agreement as part of a premarital package that overwhelmingly benefits one spouse to the detriment of the other. An example of such an agreement is provided by the *Littlefield* case, in which the much older and

number of potential problems with bargaining for custody under the current legal regime. *See generally id.*

243. *See Williams, supra note 1*, at 830 (excepting custody agreements from proposal for greater enforcement of postnuptial contracts).

244. *See Silbaugh, supra note 2*, at 140 (arguing that intended parents cannot predict interests of an unborn child); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08(e) cmt. i (2000) (“Along with the customary lack of realism most couples share about the likelihood of a separation or divorce, adults on the brink of marriage can be expected to be limited in their ability to evaluate their child's needs, judge the other parent's ability to meet the child's needs, or gauge their own interests.”). The ALI Principles indicate that it is more appropriate for a court to take into account a custody agreement that was made after a child was born, or one that the parents agreed to *ex ante* but adhered to during their marriage. *See id.* But the ALI declines to render such agreements enforceable. *See id.*

245. *See Silbaugh, supra note 2*, at 127–28.

246. A potential problem here would be the possibility that a parent would be trapped in an abusive marriage by the fear of losing custody—a possibility that this Article addresses in its proposal in Part IV.

247. *See Silbaugh, supra note 2*, at 127–28; Stake, *supra note 218*, at 436 (noting that “learning of their parents' contingent allocation might cause emotional injury to the children by making them think that one parent does not care about them”).

wealthier husband-to-be presented his future wife with a premarital agreement that, in the course of providing the husband with every protection that an attorney could devise, mandated a joint custody arrangement, with equally shared residential custody, for any children of the marriage.²⁴⁸ Where, as here, a premarital agreement is the product of an extreme power imbalance, its custody provisions may not be the product of careful deliberation regarding a child's future interests, but might instead have been unilaterally imposed by the stronger party to create as much leverage as possible in the event of separation or divorce. And even where some negotiation of custody terms occurs, the power imbalance might hamper the ability of the parent more likely to be invested in the child's interests to make agreements that are beneficial for that child.

The problem of unequal bargaining power is also emphasized by scholars concerned with the enforcement of custody agreements made at separation or divorce. Here, a common focus of scholarly attention is the likelihood that the parent more invested in custody will trade access or custody for property or support.²⁴⁹ Scholars to make this objection have built on Robert Mnookin and Lewis Kornhauser's argument that the parent who is more invested in maintaining custody will often be so risk averse with respect to the custody outcome that, under the indeterminate and unpredictable best-interests standard, she will forgo rights to property or support in order to avoid even a small possibility of losing sole custody.²⁵⁰ While there is some debate in the scholarly literature about whether it is true as an empirical matter that parents will trade custody for money,²⁵¹ many contend that it is, and either oppose enforcement of custody agreements on this basis²⁵² or argue for changing the default rules of

248. See discussion *supra* Part I.A.1.

249. See Scott & Scott, *supra* note 203, at 1244 (describing criticism that "in bargaining over divorce, parents are free to decide their children's future in a negotiation in which custody and support are the currency of exchange. The withdrawal of the state from its historic role in setting the terms of marriage and supervising the decisions of parents for their children thus harms the welfare of children"); Singer, *supra* note 1, at 1552–53 (discussing frequency of "bald-faced trade-off[s] of access to the children for support payments").

250. See Mnookin & Kornhauser, *supra* note 242, at 978–79 (analyzing ways in which the uncertainty of the current default custody rule affects the bargaining power of the spouses); Scott, *supra* note 63, at 643–56 (arguing that the indeterminate best-interests standard encourages trade-offs between money and custody, which in turn increase the likelihood that divorce bargaining will facilitate strategic behavior, increase bargaining costs, and undermine the financial security of children).

251. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 154–61 (1992) (concluding from empirical study of divorce decrees that "most divorce decrees do not reflect a trade-off between custody and money"); Brinig, *supra* note 226, at 10 (noting that "[t]here has been little empirical testing of Mnookin and Kornhauser's 'trading' theory"); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 513 (1996) (finding no evidence of custody-money trade-offs in settlements tracked as part of empirical study of judicial decision making in New York).

252. See, e.g., Singer, *supra* note 1, at 1550–56.

custody law to make such trade-offs, and related strategic behavior, less likely.²⁵³

Where parents exchange custody for money, this disadvantages children materially, in that the children who live with a primary custodial parent will suffer from the loss of property along with the parent who gave up her right to that property in exchange for custody.²⁵⁴ This exchange also raises commodification concerns, as is most evident in those rare cases where divorcing fathers agree to forgo visitation altogether in exchange for a mother's agreement to relinquish all rights to child support. The scholarly sentiment against enforcing such agreements rests in part on the view that it is harmful to children's self-image to permit what looks like the sale of parental rights by the parent less interested in retaining custody.²⁵⁵

Arguably, however, both the problem of unequal bargaining power and the related problem of trade-offs between custody and property are more likely to apply at dissolution than in the premarital context. This is both because those entering into marriage tend to be less adversarial than those divorcing and because the spouse who invests more in the child—to the damage of her career prospects—is likely to have greater bargaining power at the outset of her marriage, when she has not yet sacrificed her earning power or agreed to have children or to care for them, than at dissolution. By the time of divorce, the damage to earning power inflicted by unequal roles in caretaking and other domestic chores—or by other sacrifices, such as the tendency of the spouse with weaker earning power to leave her own job in order to enable a higher-earning spouse to improve his or her career

253. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761 (1988) (advocating a return to the primary caretaker presumption, and noting that under the prevailing approach to child custody, “many women bargain away needed property and support benefits to avoid the risk of ‘losing’ their children”); Scott, *supra* note 63, at 652 (contending that replacing the best-interests-of-the-child standard with the more determinate approximation approach, which awards custody in proportion to the amount of time each parent spent caring for the child while the parents' relationship was intact, will help to “enhanc[e] the possibility that parties will reach a cooperative agreement about custody independent of their bargaining over property rights”); cf. Kay, *supra* note 237, at 42 (noting that the revised ALI approach to spousal support, which emphasizes compensation rather than need and attempts to make support awards less discretionary, provides an “important safeguard against the money-for-children tradeoff” by reducing the uncertainty of spousal support awards and thus “lessen[ing] the incentive to use children as a bargaining chip”).

254. See Singer, *supra* note 1, at 1550 (“Substantial evidence suggests that the common divorce bargaining practice of a parent trading off financial claims for custody assurances has contributed both to inadequate child support agreements and to the impoverishment of children and their custodial parents after divorce.”). There is some evidence that the increased uniformity and predictability of child support awards has reduced trade-offs between custody and child support. See Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 185 (2012) (“Before support guidelines, support amounts were just one of several critical issues negotiated between parties, and it was not uncommon for them to make tradeoffs between the child support amount and other aspects of the divorce settlement, including custody arrangements. The implementation of uniform guidelines that established the support amount in every case helped eliminate that dynamic and removed one potential complication in reaching a judgment on all divorce issues.”).

255. See Silbaugh, *supra* note 2, at 126–28.

prospects—has already taken place. Moreover, at the outset of marriage, a party can still walk away from the relationship and decide not to become a parent with her intended spouse. Once a child is born, the parent no longer has this option, and instead—precisely in proportion to her investment in the child—may well be so averse to losing custody that she feels she has no option but to agree to unfavorable terms.

Thus, to the extent that the objection to the enforcement of custody agreements hinges on concerns regarding bargaining power and potential trade-offs, it would seem that premarital and marital custody agreements should be given more deference than those reached at dissolution. Both scholarly opinion and judicial practice, however, take the opposite approach. While there is resistance to enforcing any type of custody provision, there is significantly greater support for enforcing separation agreements regarding custody than there is for enforcing premarital custody provisions. In fact, custody agreements made at separation or divorce are routinely approved with minimal oversight²⁵⁶ (but, significantly, are open to reevaluation, subject to prevailing modification standards, in the event that parents disagree down the road). This suggests that the unpredictability objection, in conjunction with the child welfare objection—the notion that parents or intended parents cannot make good decisions about the future welfare of their children—are the most powerful factors behind the reluctance to support enforcement of previously made custody agreements.

There has, in recent years, been some scholarly support for enforcing custody agreements, even those entered into prior to marriage. Linda Jellum, for instance, argues that parents have a fundamental constitutional right to make decisions about their children, which is infringed by judicial refusal to enforce custody agreements.²⁵⁷ And Jeffrey Stake, in his proposal for mandating prenuptial agreements between every couple entering marriage, briefly discusses the advantages and disadvantages of including custody in such agreements, and concludes that perhaps adherence to the *ex ante* custody choices of future parents would be preferable to the current best-interests standard.²⁵⁸ However, Stake retracts that view in his subsequent scholarship, arguing instead that custody should prove the exception to the contractualized family law regime that he advocates.²⁵⁹

The vast majority of the scholarly literature on marital contracts either gives the issue of custody agreements short shrift or endorses the prevailing view that agreements about how and by whom children are raised must pose the exception to spouses' rights to enforce private marital contracts. Perhaps the most telling rejection of custody contracting comes from Katharine Silbaugh, who argues that it is unfair to enforce the monetary

256. See Sharp, *supra* note 86, at 1264.

257. See generally Jellum, *supra* note 242. A more limited proposal is offered by Gary Spitko, who has advocated enforcing not custody agreements, but agreements to have custody disputes submitted to private arbitration, again as a matter of protecting parents' fundamental rights. See Spitko, *supra* note 242. The question of whether courts or arbiters are better positioned to assess best interests is beyond the scope of this Article.

258. See Stake, *supra* note 218, at 435.

259. See Stake, *supra* note 239, at 807.

terms of prenuptial agreements without enforcing the nonmonetary terms—and thus that such contracts should be unenforceable altogether. Silbaugh powerfully demonstrates that parents have a strong stake in their children’s custody, such that “if [custody] cannot be the proper subject of a contract . . . , a parent is left without the ability to protect her most profound interest in the family.”²⁶⁰ Her argument in part is that under the current approach, where premarital property agreements are largely enforced but premarital custody agreements are not, we may be strengthening the bargaining power of the more monied spouse, given that premarital agreements tend to be more favorable toward such a spouse than the background law of support and property division. The result is that a primary caretaker, for instance, will have even less leverage to negotiate custody terms than she would otherwise have.

Silbaugh acknowledges that the problem she identifies could be addressed by rendering custody provisions—and other nonmonetary terms of premarital agreements—enforceable.²⁶¹ Thus, she notes that permitting contractual entitlement to custody could help prevent the situation described by Mnookin and Kornhauser, where the parent most invested in custody will trade custody for property or support in order to avoid the uncertainty of litigation.²⁶² But she nonetheless rejects enforcement of custody contracts, in part for the reasons discussed above—the commodification concern; the possibility that parents will agree to custody arrangements that are worse for a child than what a court would devise; and that “there is little reason to privilege the parties’ understanding of what is best for not-yet-living children” over the ex-post determination of “even a fallible court.”²⁶³

If Silbaugh’s argument illustrates the prevailing objections to enforcing custody agreements, it also demonstrates the damage inflicted on children and parents alike by the current approach. Silbaugh proposes that we refuse to enforce marital contracts altogether, given the unfairness, and potential harm to children, of enforcing monetary provisions alone.²⁶⁴ But courts largely continue to enforce the monetary provisions of premarital contracts while refusing to enforce terms related to custody. The result is that what prevails today is the very regime that Silbaugh recommends against, one in which marital contracts—and the privatization of family relations—are increasingly accepted and enforced, with exceptions carved out for contracts related to custody. As Silbaugh demonstrates, this lopsided system is blind to the “family economy,” and ignores the extent to which childrearing, children’s interests, and parental investment—as well as the power of the parent most invested in a child’s interests to bargain in ways that benefit that child—are profoundly implicated by the monetary aspect of marital arrangements.²⁶⁵

260. See Silbaugh, *supra* note 2, at 90.

261. See *id.* at 128.

262. See *id.*

263. *Id.* at 140.

264. See *id.* at 128–29, 133–35.

265. See generally *id.*

B. The Parentage Literature: Scholarly Support of Parentage Contracts

The scholarly literature on parentage is more favorable than the marital contracts literature toward enforcing agreements concerning parental rights and obligations. Parentage scholars are not unanimous on the advisability of permitting parental status to be created by contract, and often stop short of recommending a wholly contractualized approach to parenthood. But scholars in this field have noted the advantages of parentage contracts and the extent to which these can help to address the central concern of twenty-first century parentage law: providing stability and certainty at a time when the law of parentage is in flux as never before.

Much of the focus of current parentage scholarship is on determining the parentage of children born through assisted reproductive technology. An overlapping field of concern is establishing the parentage of children who are raised by same-sex partners, single parents, or multiple (i.e., more than two) parents. In both of these areas, there is considerable concern about the uncertainty and potential instability faced by intended parents and their children at a time when the default rules governing parentage may fail to provide clear guidance about parental status, or may set forth rules that are at odds with the lived experience of functional families.

Many parentage scholars are currently engaged in devising mechanisms to assure intended parents who hope to create a family through assisted reproductive technology that their parental status will be recognized and enforced. Some have argued for a contract-based approach to the parentage of children born through assisted reproductive technology, such that the parental status of such children, in contested situations, would be determined with reference to bargained-for parental intent.²⁶⁶ As Marjorie Shultz has argued, a default rule making bargained-for intent determinative of parental status has a number of advantages. It reduces uncertainty for prospective parents;²⁶⁷ gives parental status to those who have carefully planned to raise children (and thus will presumptively be good parents);²⁶⁸ and provides a gender-neutral basis for determining parenthood, instead of dictating parental status based on stereotypical assumptions about gender roles.²⁶⁹

A contractual approach to parentage is only one of many proposed approaches to determining the parental status of children born through assisted reproductive technology. Other suggestions in the recent parentage literature include defining parentage with reference to parental intent;²⁷⁰

266. See generally Ertman, *supra* note 5; Shultz, *supra* note 5; Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913 (2007). See also Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1 (2004) (advocating extending contractual approach to parenthood beyond the context of assisted reproductive technology).

267. See Shultz, *supra* note 5, at 323–24.

268. See *id.* at 343.

269. See *id.* at 379–95.

270. See, e.g., John Lawrence Hill, *What Does It Mean To Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Richard F. Storrow,

looking at parental consent;²⁷¹ protecting functional parentage in addition to formal parentage;²⁷² unbundling parental rights and responsibilities;²⁷³ or some combination of these possibilities.²⁷⁴ As Courtney Joslin has observed, not all intended parents will have the resources to draft a formal contract allocating parental rights.²⁷⁵ Joslin for this reason recommends looking to consent to parent, broadly defined, instead of requiring a contract; she argues that a consent-based approach to parentage would enable parents to allocate rights and obligations prior to birth, whereas a functional approach would not.²⁷⁶ But, along with many scholars who recommend non-contractual approaches to determining parental status for children born of assisted reproductive technology, she has no objection to looking to a written agreement as evidence of parental intent and determining parentage accordingly²⁷⁷ (with the caveat that she would not permit an intended parent to contractually limit her rights and obligations toward the child).²⁷⁸

Despite the relatively favorable attitude of the parentage literature toward recognizing parental intent in determining parental status, there are a number of scholars who oppose the enforcement of parentage contracts. The primary reasons for this opposition are threefold: that parentage contracts may be at odds with children's welfare; that the contractualization of parentage commodifies children, to their detriment; and that certain forms of assisted reproductive technology exploit women.

The child welfare argument has been made prominently by Marsha Garrison, who argues for applying the same parentage rules to children born of assisted reproductive technology that we do to children born through traditional means.²⁷⁹ Significantly, Garrison makes this argument by drawing on the opposition to custody contracts in the marital contracts literature and case law. She observes that we do not permit the enforcement

Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage, 53 HASTINGS L.J. 597 (2002).

271. See, e.g., Joslin, *supra* note 6, at 1222 (advocating extending “the consent = legal parent rule to all children born through assisted reproduction”); Polikoff, *supra* note 6, at 234.

272. See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013) (recommending that functional parenthood be recognized as a distinct category of parental status, and proposing a registration system as one basis for establishing status as a functional parent).

273. See, e.g., Laufer-Ukeles & Blecher-Prigat, *supra* note 272, at 475–77 (proposing that parental rights and obligations be disaggregated for functional, but not for formal, parents).

274. See, e.g., Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 448 (2005).

275. See Joslin, *supra* note 6, at 1221–22.

276. See *id.*

277. See *id.* at 1225–26 (stating that although “the parties should be encouraged to enter into written consents,” her “proposal does not mandate written consent”).

278. See *id.* at 1221–22.

279. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000).

of custody agreements for traditional families, on the basis that children's interests are thought to be paramount to such agreements, and argues that parentage contracts should be granted no more deference than custody contracts, because they are no more likely to be aligned with children's interests.²⁸⁰ In Garrison's view, placing children first requires refusing to recognize parentage contracts and instead determining parentage as we would if the child had been born without assisted reproductive technology, applying the usual rules of maternity and paternity where possible and extending the principles underlying those rules where necessary.²⁸¹ Her argument is that these rules are designed to benefit children, in part by assuring that they will be raised by two parents with care and support obligations.²⁸²

The more widely voiced objection to parentage contracts hinges on two concerns that overlap both with one another and with the concern about child welfare: commodification and the exploitation of women. While both of these concerns have implications for many forms of assisted reproductive technology (including, for instance, ova donation, which may entail both some health risks to the donor and the exchange of money for gametes),²⁸³ they are voiced most commonly with respect to the practice of surrogacy. During the early years of surrogacy, Margaret Radin argued that the practice of paying women to bear children for others harms personhood—and thus human flourishing—by treating both children and women's gestational labor as mere commodities.²⁸⁴ Others have echoed the notion that surrogacy commodifies children by treating them as the objects of monetary exchange, likening surrogacy to a baby market.²⁸⁵ There have been a number of responses to the commodification concern. Some argue that the exchange of money for a surrogate's services should be permitted, because monetary exchange is not necessarily at odds with intimacy and human dignity.²⁸⁶ Others advocate limiting compensation for surrogacy in order to distance the practice from baby-selling, such that surrogates are compensated for their labor, but not for parting with their genetic offspring.²⁸⁷

280. *See id.* at 892–94.

281. *See id.* at 896.

282. *See id.* at 882–89. Garrison would thus, for instance, apply traditional paternity law to accord sperm donors to unmarried women all the rights and obligations of fatherhood, regardless of a contract terminating the donor's parental status, in order to provide such children with two parents rather than one. *See id.* at 896–97, 903–912.

283. *See* Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1654 (2008) (advocating limits on compensation to ova donors on non-commodification grounds, but recommending that some compensation be permitted, because the procedures involved take time to complete and entail “a certain amount of medical risk”).

284. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1909–11 (1987).

285. *See* MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES* 102–23 (2001).

286. *See* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 526–27 (2005); Ertman, *supra* note 5.

287. *See* Hasday, *supra* note 286, at 514–15 (describing this approach).

With respect to surrogate mothers, scholars have objected both that surrogacy exploits such mothers by coercing them to sell their children—or their reproductive labor—under conditions of scarcity,²⁸⁸ and that a woman cannot rationally consent to terminate her maternal rights prior to giving birth, because she cannot know *ex ante* how she will feel about terminating her rights once the child is born.²⁸⁹ One oft-voiced response to these objections is that restricting women from agreeing to surrogacy contracts on the basis that they cannot freely consent to such contracts reinforces the stereotypical notion that women are less able than men to make rational and autonomous decisions and more prone to be governed by emotions and other irrational factors.²⁹⁰

Despite these concerns, there is increasing scholarly support for enforcing surrogacy agreements, especially where there are limits in place to protect surrogates who have a genetic tie to the child.²⁹¹ While some scholars would enforce even traditional surrogacy agreements,²⁹² others continue to have reservations about permitting a mother to terminate her parental rights to her genetic child prior to birth.²⁹³ And there are some scholars who argue that a gestational surrogate forms a parental bond with her child by virtue of carrying the child through pregnancy, and that she should be deemed a parent accordingly.²⁹⁴

But apart from the fraught area of surrogacy—and in particular, the question of whether a genetically related surrogate should be permitted to terminate her parental rights prior to birth—parentage scholars are largely favorable toward permitting intended parents to establish their parental status by agreement.²⁹⁵ There is only minimal objection to permitting the

288. See Radin, *supra* note 284, at 1909–11, 1917; see also SHANLEY, *supra* note 285, at 107–10.

289. See, e.g., Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2388 (1995).

290. See Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD 173 (Larry Gostin ed., 1990) (“It would seem to be a step backward for women to argue that they are incapable of making decisions.”); Shultz, *supra* note 5, at 355 (arguing that refusal to enforce surrogacy contracts treats women as “non-autonomous persons”).

291. See, e.g., Hasday, *supra* note 286, at 527 (describing mechanisms to facilitate the enforcement of surrogacy agreements); Yehezkel Margalit, *In Defence of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014); Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2367–72 (1995); MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 48–57 (1993).

292. See, e.g., Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2337 (1995); Shultz, *supra* note 5, at 367–69.

293. See, e.g., TREBILCOCK, *supra* note 291, at 48–57; Brinig, *supra* note 289, at 2381.

294. See, e.g., Susan Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 282–84 (2006) (arguing for a presumption of maternity for gestational surrogates, on the ground that gestation is a form of functional parenting).

295. See, e.g., Joslin, *supra* note 6, at 1222 (advocating determining parentage of children born through assisted reproductive technology by looking to parental consent); Polikoff, *supra* note 6, at 234, 243–46 (advocating both recognition of intent to parent in determining

sale of gametes, for instance, and terminating the parental status of those who sell their eggs or sperm;²⁹⁶ though some scholars call for greater regulation of gamete donation, their emphasis is largely on whether to permit anonymous donation or to impose other limits on the mode and frequency of donation.²⁹⁷ Relatively few advocate prohibiting the sale of gametes altogether.²⁹⁸ Scholarly support for enforcing the intentions of known gamete donors (that is, those who do not sell their sperm, but donate it to an acquaintance or relative) is similarly strong. Despite some disagreement on this point, many argue for respecting the intentions of known donors and intended parents, both where the parties agree to terminate the donor's parental status entirely and where they agree to preserve a limited role for the donor in the child's life.²⁹⁹ The consensus is that we should respect the intended parents' plans for the children they have arranged to bring into the world, both to provide those children with emotional and financial certainty and stability and to ensure respect for a diversity of family forms.

C. *Bringing Together the Custody Literature and the Parentage Literature*

Why is it that the marital contracts literature continues to resist the contractualization of custody, while the parentage literature increasingly embraces the move toward contract? This section argues that, while there are differences between the two types of agreements, the divergence in scholarly attitudes is largely unfounded. This section begins by demonstrating the overlap and interaction between custody agreements and parentage agreements. It then addresses the objections to each type of agreement, showing that these are largely similar, and have no greater force in the custody context than in the parentage context.

1. Collapsing the Distance Between Custody and Parentage Agreements: The Role of Custody Agreements in Parentage Disputes

There are some significant differences between custody contracts and parentage contracts that help to explain the radical distance between

the parentage of children born through assisted reproductive technology and enforcement of agreements to provide a limited parental role to a donor of gametes).

296. *But see* Garrison, *supra* note 279, at 903–12 (advocating imposition of parental status on known or anonymous sperm donors where a child is conceived by a single woman).

297. *See, e.g.,* CAHN, *supra* note 156, at 114–29 (advocating that parental status of children born through gamete donation be determined with reference to parental intent, but that the market in gametes be regulated to prohibit anonymity); Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189 (2010) (recommending against limits on anonymous gamete donation).

298. *But see* Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 271–73 (2002) (objecting to the sale of gametes); Garrison, *supra* note 283, at 1654 (recommending limiting the amount of compensation permissible for gamete donation).

299. *See, e.g.,* Polikoff, *supra* note 6, at 245–46; Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 393 (1996); Shultz, *supra* note 5, at 340–41.

scholarly attitudes toward each type of contract. The stakes are arguably higher in the parentage context, in that a parentage dispute is more likely to raise the possibility that a would-be parent will lose her parental rights and obligations entirely, as occurs when a court refuses to enforce a co-parenting agreement. Parentage scholars are currently engaged in devising mechanisms to protect children from the worst-case scenario in which they lose all contact with, or right to support from, a functional parent. A classic custody dispute, by contrast, tends to involve the amount of time that children spend with each parent, rather than whether a parent will be permitted any contact with the child at all. The children of parents involved in custody disputes typically retain contact with and a right to support from both parents, regardless of whether a court enforces any custody agreements into which their parents might have entered. Thus, the need for parentage contracts may be greater than that for custody contracts.

However, custody contracts can have important implications as well, for parents and children alike. A custody agreement may determine which parent maintains primary contact with a child, raising the child for most of the year, and which parent is instead relegated to visitation on holidays and summers—thus largely limiting the child’s contact with one or the other parent. It may limit the right of a parent to relocate while retaining custody of the child, or may provide for parental freedom to relocate—possibilities that may have a major influence on the child’s future and her contact with the noncustodial parent, and may alternately permit or prevent a parent from remarrying, moving closer to family and friends, obtaining an education, or advancing her career.

Moreover, custody agreements play an increasingly significant role in parentage disputes. Intended and existing co-parents will often draft agreements that spell out their rights and obligations in the event that their relationship dissolves, such as which parent will maintain primary custody, which parent will have visitation, and the contours of both visitation and support. In a number of parentage disputes, the continuation or termination of one parent’s relationship with the child has hinged on the presence or absence of such an agreement, as well as on the court’s decision regarding whether to enforce the agreement.³⁰⁰

Scholars of both parentage and custody would thus do well to keep in mind the potential interplay between the two categories of agreements. Scholars of marital contracts should consider the role of custody contracts in parentage disputes, which may differ significantly from their role in the

300. *See, e.g.*, *A.C. v. C.B.*, 829 P.2d 660, 663–65 (N.M. Ct. App. 1992) (permitting co-parent to assert custody rights based on settlement reached when co-parents’ relationship dissolved); *Mason v. Dwinell*, 660 S.E.2d 58, 67–68 (N.C. Ct. App. 2008) (citing co-parenting agreement providing for shared custody in the event of dissolution of co-parents’ relationship as evidence that the legally recognized parent intended for her co-parent to continue her relationship with their child should the co-parents separate); *Rubano v. DiCenzo*, 759 A.2d 959, 966 (R.I. 2000) (permitting co-parent to enforce post-dissolution visitation agreement, and looking to such agreement as one among several factors in finding that the co-parent had the de facto parental status that was a predicate to the court’s jurisdiction to enforce the visitation agreement).

typical marital economy that many such scholars address. Custody contracts at the same time provide a potentially useful tool for parentage scholars engaged in developing mechanisms for protecting the expectations of families that diverge from the traditional form of two married parents and their biologically related children.

2. Collapsing the Distance Between Custody and Parentage Agreements: Objections to Enforcement

As we have seen, scholars largely support the enforcement of parentage agreements and resist the enforcement of custody agreements. However, objections to enforcing the two types of agreements are sufficiently similar to render the divergence in approach incoherent. This section discusses the three primary objections to the enforcement of custody agreements and shows that these apply with equal force in the parentage context: the unpredictability objection, the duress objection, and the child welfare objection. It addresses the extent to which these concerns play out differently in the custody context than in the parentage context, but concludes that these differences do not justify the current divergence in attitude toward the two types of agreement.

a. *The Unpredictability Objection*

One of the strongest objections to the enforcement of custody agreements is that parents cannot predict the custody arrangement that will be in their child's interests at a future point. The unpredictability objection is raised most forcefully with respect to custody agreements that are entered into before the children are born, such as custody provisions of premarital agreements. To use the language of contract law, the argument is that premarital custody agreements are not the product of rational consent—and therefore should not be enforced—because the contracting parties cannot ex ante have sufficient information to make a rational decision about children who do not yet exist.³⁰¹ The unpredictability objection is also levied at custody agreements made at separation or divorce; courts and scholars alike have argued that the difficulty of predicting how a child will develop weighs against permitting separating parents to craft a custody arrangement that will bind themselves, and courts, down the road.³⁰²

The unpredictability objection is also raised in connection with the enforcement of premarital agreements generally. Some argue that it is difficult for intended spouses to make rational decisions about any aspect of

301. See, e.g., *In re Marriage of Littlefield*, 940 P.2d 1362, 1371 n.9 (Wash. 1997) (questioning whether premarital custody agreement respecting a child not yet born can ever be voluntary and knowing); Silbaugh, *supra* note 2, at 140 (“[T]here is little reason to privilege the parties’ understanding of what is best for not-yet-living children.”).

302. See, e.g., *Guss v. Guss*, 472 A.2d 790, 793 (Conn. App. Ct. 1984) (“A child’s best interests . . . cannot be prospectively determined.”); *Knutson v. Cegalis*, 989 A.2d 1010, 1014 (Vt. 2009) (“[C]hanges in custody must be based on real-time determinations of a child’s best interests . . .”).

the dissolution of their marriage, and therefore that even premarital agreements regarding property should not be enforced.³⁰³ But the unpredictability objection is given most credence in the context of custody agreements. A majority of jurisdictions will enforce premarital agreements as to property.³⁰⁴ But none will enforce premarital or marital custody agreements or post-dissolution agreements that attempt to dictate custody arrangements into the future.³⁰⁵

In the parentage context, by contrast, the child-oriented unpredictability objection is largely absent from discussions of parentage agreements. Few scholars object to parentage agreements on the basis that it will be difficult for intended parents to know *ex ante* the types of relationships that they will have with their unborn children, and thus which of multiple possible parentage arrangements will be in those children's interests. The scholarly consensus here is that children and parents alike will be better off if parents are permitted to clarify parental status *ex ante*, instead of waiting until the child is born and seeing what sort of relationship develops. In other words, the consensus is that children's interests are better served by enforcing parental *ex ante* intent than by making parental status hinge on an *ex post* assessment of parental suitability.³⁰⁶ Scholars largely agree that children benefit from stability and certainty in their relationships with their parents, and that mechanisms such as parentage agreements will therefore protect children's interests by reducing the likelihood that a child's parentage will be contested and brought into question after the child has been conceived or born, or after a child has developed a relationship with, or financial dependency on, an intended parent.³⁰⁷

There is little discussion in the parentage scholarship of the dangers of enforcing a parental intent that is formed before it can be determined whether it will be in a particular child's best interests to be raised by one or another parent. The literature on assisted reproductive technology favors looking to *ex ante* parental consent or intent to determine parental status, and does not, for the most part, contend that parental status should instead hinge on an *ex post* assessment of the parents' fitness to raise a child.³⁰⁸ As many have observed, parents are generally permitted to procreate without

303. See *supra* notes 229–30 and accompanying text.

304. See *supra* notes 231–38 and accompanying text.

305. See *supra* Part I.A.

306. See, e.g., Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 330–31 (2010) (contending that *ex post* determination of parental status is adverse to children's interests).

307. See, e.g., Joslin, *supra* note 6, at 1182 (arguing that recognizing *ex ante* intent to parent is necessary to protect children's financial interests); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 353–54 (2002) (arguing that recognition of maternity on the basis of petition filed prior to or after birth will best protect children's relationships with lesbian co-parents).

308. See, e.g., Joslin, *supra* note 6, at 1225 (“[T]he law should provide that an individual who consents to alternative insemination by a woman with the intent to be a parent of the resulting child and with the consent of the woman is a parent of the resulting child.”).

any state assessment of their children's interests.³⁰⁹ The scholarly consensus is that children's interests are best protected by rules that look to ex ante intent in determining the parentage of children born through assisted reproductive technology.³¹⁰

To the extent that the parentage literature raises the unpredictability objection to the enforcement of parentage agreements, this objection is typically framed in parent-oriented rather than child-oriented terms, and is made primarily with reference to surrogacy contracts. A number of scholars argue that a woman cannot rationally consent ex ante to give up a child after birth, because she cannot predict the emotions that she will experience during pregnancy and birth. This argument is raised both with respect to traditional surrogacy and with respect to gestational surrogacy, and seems to hinge on the relationship that develops between surrogate and child during the pregnancy.³¹¹ The objection is parent-focused in that there is relatively little discussion of the possibility that the child will be better off remaining with the surrogate who developed an emotional tie to the child; the argument is couched largely in terms of fairness to the mother who consented to terminate her maternal rights without accurately predicting how she would feel about doing so once the child was born.

This solicitude for the parent's ex-post regrets is primarily reserved for gestational mothers, and rests largely on the characterization of pregnancy and giving birth as emotional in a way that other experiences are not. Thus, the unpredictability objection is not typically raised with respect to gamete donation. While a donor of ova or sperm might perhaps regret her decision to terminate parental rights to a genetic child, the scholarly literature is largely in favor of enforcing gamete donation agreements, and there is little objection to enforcement of such agreements on the ground that a donor could not accurately predict how he might feel after the child has been born.³¹²

Scholarly objection to enforcement of parentage contracts on the basis of unpredictability is thus largely limited to the special case of gestational mothers. The majority of parentage scholars, moreover, do not see child-centered unpredictability as a barrier to enforcing parentage agreements. While the marital contracts literature takes for granted that parents cannot rationally consent to decisions about future custodial arrangements for their children (whether unborn or already in existence), the parentage literature makes the opposite assumption—namely, that parents and would-be parents

309. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993) (rejecting determination of parentage of child born through gestational surrogacy on the basis of a best-interests analysis); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (“Parents are not screened for the procreation of their own children . . .”) (emphasis omitted); Shultz, *supra* note 5, at 341–42 (“Even under conventional legal rules, children do not get a say in who their parents will be, or for that matter, in whether they will be conceived or born.”).

310. See, e.g., Joslin, *supra* note 6, at 1225 (explaining why the consent equals legal parentage rule protects children's interests).

311. See *supra* notes 288–89 and accompanying text.

312. See *supra* notes 298–99 and accompanying text.

have sufficient rational capacity to make decisions about the parentage of their children, including children who do not yet exist.

b. The Duress Objection

Another objection against enforcing custody agreements is that parents may enter into such agreements in situations that exert sufficient pressure on one of the parties to vitiate her ability to freely consent to the arrangement. For example, in the scenario often cited to oppose the enforceability of prenuptial agreements, a bride may be presented with a premarital contract on the eve of her wedding, and may sign the contract despite aversion to its terms because she lacks the fortitude to cancel the wedding at that late date.³¹³ The pressure on the party presented with a premarital agreement is often exacerbated by the power dynamic between the parties; the party presenting the prenuptial agreement will often be older and significantly wealthier than the party asked to sign it. This was what happened, for instance, in *Littlefield*, where the bride signed a prenuptial agreement drafted by the attorney of her much wealthier groom.³¹⁴ The agreement in that case favored the groom in various ways, including in its provision for fully shared custody between the spouses in the event of divorce.³¹⁵

One response to the duress objection is that, under contract law, a parent who is coerced into agreeing to a custody provision can argue for voiding the contract on the basis of duress. Nonetheless, there is concern among family law scholars that parents (or future parents) may agree to such contracts under pressure that is insufficient to vitiate enforcement under the duress standard, but suffices to undermine the parent's ability to reject the proffered agreement or to have a say in crafting its terms. Moreover, as Howard Fink and June Carbone have pointed out in their proposal to provide for ex ante judicial approval of premarital agreements, any mechanisms that are proposed to make premarital agreements more likely to be enforced—even those designed to ensure that such agreements meet a minimal standard of procedural and substantive fairness—strengthen the bargaining position of the more powerful party by providing a blueprint for creating an enforceable bargain.³¹⁶

While the duress objection and the concern about unequal bargaining power are valid, in the context of custody agreements, this objection is most applicable to precisely those agreements that courts are most likely to enforce—custody agreements entered into at separation or divorce. Courts routinely enforce such agreements, even though the pressure on parents is often greater at dissolution than before a child has been born. Before birth, the parent-to-be has the leverage of refusing to have a child in the first instance if custody terms are not acceptable. Once the child has been born

313. See *supra* notes 223–28 and accompanying text.

314. *In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997).

315. See *supra* notes 40–50 and accompanying text.

316. See Fink & Carbone, *supra* note 232, at 33–35.

and the parents' relationship has dissolved, a parent's desire to retain custody of a child can exert tremendous pressure on that parent. As some have contended, this pressure weighs most heavily on the parent who is more invested in the child—it is precisely this parent who will be most averse to even the slightest risk of losing a bid for custody. The result is that the parent who has a stronger desire for custody, and thus typically a closer bond with the child, will often trade off rights to property division and spousal support in order to obtain custody, to the detriment of custodial parent and child alike.³¹⁷

Moreover, to the extent that duress is a particular concern in the context of custody agreements, we can address that concern by better policing for duress than we currently do, rather than refusing to enforce custody agreements altogether. While no such mechanism can entirely remove the possibility that custody agreements will be the product of unequal bargaining power, this Article, in its proposal in Part IV, presents protective mechanisms that can help to prevent the enforcement of bargains that are the product of duress and undue pressure while enabling parents to craft non-coerced custody agreements that will govern in the event that the parents' relationship dissolves. There are a number of situations in which parents may enter into custody agreements that are the product, not of duress, but of reasoned decisions about what will be best for their children if their relationship does not last. Parents are more likely to think reasonably about their children's interests at a time when they are still cooperating with one another, whether this is prior to marriage, prior to the children's birth, or at some later point during the children's lives when the parents' relationship is still intact.³¹⁸ Where they indeed do enter into such a custody agreement, and there is no evidence of coercion or undue pressure, then the duress objection should not prevent enforcement of the agreement. In fact, given the trend of judicial deference to separation agreements, enforcing premarital custody agreements is the best way to protect custody outcomes from being driven by the pressures that apply when a parental relationship dissolves.

The incoherence of the duress objection to custody contracts comes into focus when we compare discussions of duress in the parentage literature. The duress objection to parentage contracts, much like the unpredictability objection, is focused largely on surrogacy. Parentage scholars who oppose enforcement of surrogacy agreements often express concern that surrogates will enter into such agreements under financial pressure. While all contracts are entered into under conditions of scarcity—an employee typically agrees to an employment contract, for instance, because she needs the wages—the concern with surrogacy contracts is that these are exploitative, in that they may induce a woman to agree to take actions she

317. See *supra* notes 249–50 and accompanying text.

318. See Scott & Scott, *supra* note 203, at 1323 (“[F]rom the ex ante perspective of the hypothetical bargain, parents’ interests can generally be assumed to be aligned with those of their future children, an assumption that probably cannot be made ex post in the context of the divorce itself.”).

might greatly regret—put herself at risk of bodily harm, and relinquish rights to a child—on the basis of financial need.³¹⁹

In response to concerns about surrogacy agreements entered into under duress, a number of scholars who support surrogacy have proposed special mechanisms to insure that only surrogacy contracts entered into with full volition are enforced. These include limiting the compensation that surrogates can receive for their services; eliminating compensation for surrogacy altogether; and providing each surrogate with independent legal counsel to ensure that her decision to enter into a surrogacy agreement is voluntary and well-informed.³²⁰ Scholars make such proposals on the theory that it is possible, and desirable, to facilitate surrogacy agreements that are voluntary and rational, instead of proscribing all such agreements on the basis that some of them might be entered into under duress. There is no reason not to take a similar approach to custody agreements, particularly those that currently meet the greatest resistance—agreements entered into before the children are born. While indeed it is possible that some future parents might enter into custody agreements out of fear of a cancelled wedding or of losing their mate, it is also possible that future parents might enter into a prospective custody agreement on a level playing field, particularly when there are no trade-offs involved between custody and money.

The duress objection is raised with significantly less frequency against other forms of parentage contracts, such as gamete donation agreements. Despite the fact that donors of sperm and ova often sell their gametes for financial gain, the majority of parentage scholars do not express concern that these donors faced undue pressure in deciding to relinquish their parental status. The scholarly consensus is that gamete donation agreements should be enforceable, despite the fact that they involve decisions by genetic parents to relinquish rights to their unborn children in exchange for payment.³²¹

To the extent that the parentage scholarship criticizes the exchange of parental rights for payment in gamete donor agreements, the concern is less with the potential for duress than with commodification, an objection that is levied against surrogacy agreements as well. The concern here is that permitting parental status to be exchanged for money harms children in both a practical sense and an expressive one by treating them as objects to be bought and sold, and creating a market in which the desirable genetic traits of future children are sold to the highest bidder.³²²

The commodification objection is levied against custody agreements as well.³²³ Custody agreements rarely explicitly involve the exchange of

319. See, e.g., Radin, *supra* note 284, at 1909–11.

320. See, e.g., Hasday, *supra* note 286, at 526–27 (making proposals to this effect).

321. See *supra* notes 298–99 and accompanying text.

322. See Shanley, *supra* note 298, at 271–73.

323. Courts often employ a rhetoric of commodification to justify their refusal to enforce custody agreements. See, e.g., McClain v. McClain, 716 P.2d 381, 385 (Alaska 1986) (“A child is not a chattel to be bargained away for consideration.”).

custodial rights for money. In some limited situations, a parent will agree to sever his parental rights in exchange for a waiver of his support obligations. However, an agreement to terminate parental rights goes beyond the scope of a custody agreement, and is better characterized as a parentage agreement. When a custody agreement properly understood (that is, an agreement that allocates parental rights) is entered into prospectively between adults who contemplate having children, there is unlikely to be even an implicit trade-off between custody and property, except insofar as the prospective parents may wish to make arrangements ensuring support of their future children. Custody agreements entered into at divorce may, as we have seen, involve implicit trade-offs of custody for property and spousal and child support. But these trade-offs are not a necessary part of any custody arrangement, and thus the custody provisions can—and this Article argues should—be severed from the rest of the parents' agreement.³²⁴ We can further protect against such trade-offs by refusing to enforce custody arrangements that seem to be the product of an exchange of custody for money.³²⁵ This would prevent the enforcement of any custody agreement that would amount, in either an expressive sense or a practical one, to the sale of a child.

The limited discussion of the duress objection in the parentage literature suggests that the possibility of duress should not pose an insurmountable objection to enforcement of custody contracts. Strikingly, the duress objection is rarely raised with respect to the category of parentage agreement that most resembles a custody agreement: co-parenting agreements. Where intended parents agree to raise a child together and to share parental rights and obligations, scholars largely agree that such an agreement should be enforced.³²⁶ Typically, the parties to a co-parenting agreement include at least one parent who has legally recognized parental status and another who does not.³²⁷ Thus, one parent agrees to extend parental rights to the other, who in turn agrees to take on parental obligations. In some cases, the co-parenting agreement includes provisions governing the custodial arrangement in the event that the parental relationship dissolves.

There is little discussion in the parentage literature of the likelihood that a co-parenting agreement will be made under duress. The assumption, to the contrary, is that parties who agree to a co-parenting arrangement do so in order to protect their expectations and those of the children they intend to raise together. While co-parents may then contest such an arrangement when their relationship dissolves—thus giving rise to the question of whether the co-parenting agreement is enforceable—it was entered into at a time when the parents were in accord, such that even parents who contest

324. *See infra* Part IV.

325. *See infra* Part IV.

326. *See supra* notes 266–78 and accompanying text.

327. *See supra* Part I.B.1 (discussing relevant cases).

the enforceability of a co-parenting agreement rarely argue that it was the product of duress.³²⁸

The significant difference between a co-parenting agreement and a custody agreement between two parents who already have legal rights to a child is that the co-parents have a need that the others do not to ensure that both parents are legally recognized. But co-parenting agreements are often driven in part by the intended co-parents' desire to ensure that they will each retain rights to their children should their relationship dissolve. In this respect, the power dynamic between two prospective co-parents does not significantly differ from that between prospective parents who will be legally recognized even in the absence of any agreement, but have decided to set forth the custodial arrangement that will govern if their relationship dissolves. Just as a number of intended co-parents decide to spell out their custodial plans in the event that they separate,³²⁹ intended parents who have no reason to doubt their legal rights to their future children may decide to do the same. There is no reason to think that either of these types of custody agreements is especially likely to be the product of duress. And there is good reason to believe that parents who enter into a custody agreement at a time when they are in harmony are especially likely to do so freely, driven not by pressure or fear but by a desire to protect both their own plans as parents and what they imagine to be the best interests of their future children.³³⁰

c. *The Child Welfare Objection*

The most commonly voiced, and most powerful, objection to enforcing child custody agreements is that these may be contrary to the interests of the child. "Parties cannot by agreement relieve the court of its obligation to safeguard the best interests of the child. . . . In issues of custody and visitation the question is always what is in the best interests of the children, no matter what the parties have agreed to."³³¹ This is the repeated mantra of courts that consistently refuse to enforce such agreements,³³² and it is widely accepted by a number of marital contracts scholars.³³³ Since children cannot be parties to custody agreements, yet are deeply affected by them, it is argued that courts should retain the discretion to override such agreements in the name of the children's interests.³³⁴

Much of the concern about unpredictability and duress is driven by concern about child welfare. Scholars and courts alike object to enforcing custody agreements made *ex ante* in large part because they are concerned that parents cannot accurately determine their children's interests in

328. *See supra* Part I.B.1.

329. *See supra* note 300 and accompanying text.

330. *See* Scott & Scott, *supra* note 203, at 1323.

331. *P.T. v. M.S.*, 738 A.2d 385, 396–97 (N.J. Super. App. Div. 1999) (quoting *Giangeruso v. Giangeruso*, 708 A.2d 1232, 1233 (N.J. Super. Ct. Ch. Div. 1997)).

332. *See supra* Part I.A.

333. *See supra* notes 239–42 and accompanying text.

334. *See supra* Part I.A.; *supra* notes 239–42 and accompanying text.

advance.³³⁵ Similarly, reluctance to enforce a custody agreement made under undue pressure stems in part from the concern that such an agreement is not the product of a cooperative and reasoned decision about the children's interests.

The best-interests-of-the-child objection is raised in the parentage context as well.³³⁶ But it is given significantly less credence here than in the custody context. Some courts and commentators that have rejected the intent-based approach to parental status have suggested that the parentage of children born through assisted reproductive technology should be determined instead with reference to a judicial assessment of those children's interests.³³⁷ And even some scholars in favor of defining parentage with reference to intent have expressed support for screening parents prior to engaging in assisted reproductive technology in order to protect children's interests.³³⁸ The majority of parentage scholars to have considered the matter, however, reject the best-interests approach to determining the parental status of an existing child in situations other than adoption.³³⁹ With respect to both assisted reproductive technology and co-parenting agreements, parentage scholars largely agree that parental status should be determined with reference to parental intent, perhaps in combination with parental function, rather than by applying the best-interests standard, particularly where the intended parents decided *ex ante* to bring a child into the world and to raise the child together.

The reluctance of parentage scholars to recommend including a best-interests assessment as an element of parentage determinations helps to illustrate the problems of doing so in the context of custody agreements. Parentage scholars largely reject a system in which the government would have the power to determine who is fit to raise children.³⁴⁰ As the parentage literature is well aware, such state supervision of parentage under

335. See *supra* Part I.A; *supra* notes 244–45 and accompanying text.

336. See, e.g., JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 254–62 (2006) (arguing that children's interests should factor into determinations of legal parenthood, such that the state should refuse to assign parental status to the biological parents of newborns who seem especially likely to be unfit parents).

337. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 798 (Cal. 1993) (Kennard, J., dissenting) (arguing that “the best interests of the child, rather than the intent of the genetic mother, is the proper standard to apply in the absence of legislation” to determine the parentage of a child born through gestational surrogacy).

338. Schultz, *supra* note 5, at 370 (conceding that “screening of prospective surrogates and parents might be required to protect the interests of children”).

339. See, e.g., Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 54 (1997) (“The child’s best interest should not be relevant at the stage of identifying the parents; rather, it should be relevant only at the stage of determining custody”); David Meyer, *The Constitutionality of “Best Interests” Parentage*, 14 WM. & MARY BILL RTS. J. 857, 875–79 (2006) (enumerating concerns about best-interests approach to parentage); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 277 (1975) (arguing against permitting the state to terminate parental rights under the “indeterminate and discretionary” best-interests standard).

340. Cf. *Johnson*, 851 P.2d at 782 n.10 (majority opinion) (determining parentage on the basis of children’s best interests “raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy”).

the indeterminate best-interests standard could prevent family formation by intended parents who do not fit the state's view of what a parent, and a family, should look like.³⁴¹ Imposing a state-directed best-interests assessment as a predicate of parentage for any intended parent engaging in co-parenting or assisted reproductive technology could very well limit the diversity of family forms, or withhold legal recognition from parents of whom the state does not approve.³⁴² Where a relationship with a child has already developed, the possibility that the state will refuse to recognize parental status on the basis of an assessment of the child's interests undermines the security and stability of the parent-child bond.

Similar objections can be raised against the state use of the best-interests standard to supervise parents' custodial arrangements. Some scholars, such as Naomi Cahn, have argued that it is more problematic to make parental status hinge on a best-interests assessment than to do so with respect to custody.³⁴³ She proposes that courts determine parentage without any reference to children's interests, taking as inclusive an approach to parentage as possible, and then allocate custody by assessing the children's best interests.³⁴⁴ While this Article agrees about the dangers of determining parentage with reference to a child's best interests, it argues that the application of the best-interests analysis to custodial arrangements is problematic as well. A court empowered to award, alter, or terminate custody with reference to the best-interests standard has significant power to shape, and limit, how and by whom children are raised, and how their caretakers live their lives. The result, in the custody context as in the parentage context, is a level of insecurity that is detrimental to children's welfare.

Why is it widely accepted that custody agreements must give way to a judicial assessment of children's interests, while support for imposing the same requirement when determining parentage is significantly more limited? As Marjorie Shultz observes in her discussion of parentage contracts, "under conventional legal rules, children do not get a say in who their parents will be."³⁴⁵ Thus, she argues, it is not clear why children's inability to consent to parentage agreements should prove problematic.³⁴⁶ The same is true with respect to custody. Children do not have a say in who raises them, and the state generally cannot supervise how and by whom children are raised unless parents put their children at risk of harm. Why, then, should a custody agreement be subjected to judicial supervision in the name of children's interests?

The reason that we currently permit courts to award custody in accordance with children's interests is that there is no other basis for doing so when two parents with equal legal rights to a child fight for custody. In

341. See Shultz, *supra* note 5, at 347–52.

342. See *id.*

343. See Cahn, *supra* note 339, at 48–59.

344. See *id.*

345. See Shultz, *supra* note 5, at 341.

346. See *id.* at 341–42.

the absence of any preference for one parent over another, courts have long looked to children's interests to award custody in the event of parental dispute.

But when parents have contracted for a child's custody, there is no need for a court to engage in the best-interests assessment—the parents have provided a contractual alternative. There may well be arguments for considering children's interests despite the existence of any such contractual arrangement. These arguments must address, however, why children's interests should be permitted to override a custody agreement but not other barriers to judicial intervention, such as a parentage contract or the protection provided to parents through the intact family status that derives from some combination of marital status and biological relatedness. If the child welfare concern suffices to override parental intent in the form of a custody agreement, why should it not override parental decisions about children in other contexts as well?

This Article argues that the discrepancy between the parentage literature and the marital contracts literature on this point underscores the incoherence of insisting that custody contracts alone must give way to judicial determinations of children's interests. The Article does not argue—as some other scholars have³⁴⁷—that we should enforce custody agreements in the name of protecting parents' constitutional rights to raise their children as they see fit. It does not frame the issue as pitting parents' rights against children's interests. It argues, rather, that it is in the interests of children themselves for custody contracts to be enforced. As this Article now discusses, custody contracts—much like parentage contracts—would enable parents to provide their families with a level of stability, security, and freedom from the threat of government intervention that would serve the welfare of children and parents alike.

III. WHY CUSTODY CONTRACTS SHOULD BE ENFORCED

This part will use the perspective of parentage contracts to demonstrate that the benefits of enforcing custody contracts outweigh the concerns discussed in Part II. It argues that the primary benefit of custody contracts is their potential—in conjunction with parentage contracts more broadly—to provide all families with intact status, and thus put an end to our current two-tier system of family law.

Part III.A demonstrates that we currently have two different systems of custody and parentage law: one for traditional families that are deemed “intact,” and another for families that are deemed non-intact. While intact families are given considerable autonomy and protection from state intervention, non-intact families are subject to a level of intervention and insecurity that is harmful for parents and children alike. In an age when marriage can no longer suffice to keep families “intact,” custody contracts

347. See Jellum, *supra* note 242, at 644–54 (making a constitutional argument for enforcing parental custody agreements); Spitko, *supra* note 109, at 1189–97 (making a constitutional argument for enforcing parental agreements to arbitrate custody).

offer a mechanism for ensuring families the stability and certainty that marriage no longer guarantees.

Part III.B then discusses other advantages to enforcing custody agreements. Part III.B draws on the parentage literature to demonstrate that enforcement of custody contracts can help to promote gender neutrality and diversity of family forms. Enforcement of custody contracts will also promote respect for parental autonomy, although such autonomy should be seen as secondary to children's welfare.

A. *The Best-Interests Standard
and Our Two-Tier Approach to Family Law*

1. The Best-Interests Standard and the Bias Against Non-Intact Families

When a relationship between two legal parents disintegrates, in the absence of any enforceable contract that will govern care and upbringing of the children, a court will determine custody with reference to the children's best interests.³⁴⁸ The family law literature, in the areas of both custody and parentage, has widely rehearsed the problems with the best-interests-of-the-child standard. The best-interests standard is at once deeply subjective and open-ended, with the result that it affords judges an enormous amount of discretion.³⁴⁹ Compounding the problem is the difficulty of determining, in many instances, which of myriad possible custodial arrangements between equally fit parents will best serve a child's interests. This inquiry tends to be future-oriented, in that courts will try to assess which custodial allocation will produce the best adult outcome for a developing child.³⁵⁰ Courts are often uncomfortable engaging in such an analysis, which some have compared to gazing into a crystal ball.³⁵¹ But when the best-interests standard applies, courts are obliged to engage in this analysis, and, in so doing, will often weigh every possible detail of the parents' and children's lives in an effort to accurately respond to a question that does not admit of any clear answer.

The difficulty of determining children's best interests, along with the judicial discretion that the standard affords, render judicial decisions about child custody wildly unpredictable. Scholars have long critiqued the

348. See, e.g., Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 815-16 (1999).

349. See, e.g., Cahn, *supra* note 339, at 59 ("[T]he best interest standard . . . is indeterminate and biased in administration."); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) ("[T]he [best interest] principle is indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations."); Mnookin, *supra* note 339, at 203 ("Because what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes.").

350. See Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 312 (2012) ("The best-interests analysis of child custody law is focused . . . on the connection between childhood experience and the adult self.").

351. See, e.g., *In re C.B.*, 618 N.E.2d 598, 603 (Ill. App. Ct. 1993) ("[D]eciding what is in a child's best interest is difficult, if not impossible to predict without a crystal ball or the gift of foresight.").

unpredictability that the best-interests standard creates;³⁵² the result of this unpredictability, as Robert Mnookin and Lewis Kornhauser have argued, is that a parent strongly invested in maintaining custody of a child may be so adverse to even a small risk of losing custody that, rather than permit a court to determine a child's best interests, she will trade off rights to property and support in exchange for custody.³⁵³ Mnookin considers the possibility that the best-interests standard is so flawed, and its effect on bargaining incentives so problematic, that we might be better off if judges flipped coins to determine custody arrangements.³⁵⁴

Moreover, as June Carbone has noted, child custody decisions at divorce have now become "ground zero in the gender wars."³⁵⁵ In the era of no-fault divorce, custody decisions are often the only opportunity courts have to pass judgment on parents' behavior and morality.³⁵⁶ As a result, wronged spouses may channel their anger into contesting a child's custody and use that opportunity to obtain vindication and revenge. And courts may use custody decisions as an opportunity to scrutinize and condemn culturally contested behavior that is often out of the judiciary's reach, such as non-marital cohabitation or same-sex intimacy.³⁵⁷

Families that are subject to the unpredictable and open-ended best-interests-of-the-child standard thus face a perpetual threat of litigation that carries the possibility of extensive state intervention in their intimate lives. Courts applying the best-interests standard will often infringe upon parents' autonomy, and their constitutional rights, to an extent unimaginable in any other area of law. Judges can, and do, award custody, or change an existing custody arrangement, on the basis of parents' religious practices, speech acts, lifestyle, and musical preferences.³⁵⁸ They can also order parents to engage in or refrain from engaging in certain activities as a condition of custody.³⁵⁹ Courts awarding custody have prohibited parents from having

352. See generally Mnookin, *supra* note 339 (contending that the difficulty of predicting how one or another custodial arrangement will affect children, the lack of consensus on the values that should govern custody decision-making, and the paucity of binding precedent that might constrain judicial decision-making regarding custody combine to create an indeterminate standard that makes the outcome of litigation difficult to predict).

353. Mnookin & Kornhauser, *supra* note 242, at 979.

354. See Mnookin, *supra* note 339, at 290–91 (considering coin toss approach to determining custodial rights, on the ground that the best-interests standard "may yield something close to a random pattern of outcomes," and that the coin toss approach is less costly and helps to avoid the pain associated with litigating custody, but noting that the coin toss approach seems unacceptable because it undermines the symbolic and participatory values of adjudication); see also Elster, *supra* note 349, at 42–43 (considering coin toss as a possible method for determining custodial rights and noting that while such an approach would weaken the bargaining power of the more invested parent, it would benefit children by reducing protracted litigation).

355. See JUNE CARBONE, FROM PARTNERS TO PARENTS 193 (2000).

356. See *id.*

357. See June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267, 288–98 (2008) (discussing judicial consideration of non-marital cohabitation in custody decision-making and noting potential for polarization on this issue along partisan lines).

358. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633–43 (2006).

359. See *id.*

romantic partners stay overnight,³⁶⁰ banned parents from discussing their religious views with their children,³⁶¹ and required parents to take children to church,³⁶² among other prohibitions and requirements.

For such families, the threat of intervention posed by the best-interests standard is ongoing, and lasts until a child reaches the age of majority. A number of jurisdictions have formulated rules that limit judicial authority to modify custody without good cause. Nonetheless, under a typical modification standard, as long as one parent can show a significant change of circumstances affecting a child's interests, the court is empowered to conduct a full-fledged best-interests-of-the-child analysis and to change custody accordingly.³⁶³ As a number of courts have noted, circumstances often change as children develop and as parents move on with their lives, making changes to their careers, education, and personal relationships.³⁶⁴ A parent subject to a custody order thus can never rest assured that her parenting decisions will not be held to the microscope, and brought into question, at some future point. The best-interests-of-the-child standard thus destabilizes families subject to its rule and undermines both parents' and children's sense of security.

While many scholars have criticized the best-interests standard, few have observed the extent to which it creates a two-tier system of family law.³⁶⁵ (As a number of scholars have noted, we also have a two-tier system of family law based on economic privilege;³⁶⁶ this Article agrees with that assessment, while seeking to illustrate another, often overlapping dimension in which we treat certain families differently from others.) Families that are deemed intact—such as traditional families headed by married parents and their biological children—are given significant freedom from state intervention. The parents within such families are permitted to raise their children as they see fit, and do not face state-imposed penalties for their parenting decisions unless they put their children at risk of serious harm. The children, for their part, are provided the security that comes from being

360. See, e.g., *Muller v. Muller*, No. 259271, 2005 WL 2810399 (Mich. Ct. App. Oct. 27, 2005).

361. See Volokh, *supra* note 358, at 636–37 n.20 (collecting cases).

362. See, e.g., *Johns v. Johns*, 918 S.W.2d 728, 731 (Ark. Ct. App. 1996).

363. See discussion *supra* Part I.A.2.b.

364. See, e.g., *Knutsen v. Cegalis*, 989 A.2d 1010, 1014 (Vt. 2009) (“Mother and father could choose to relocate, change careers, enter into romantic relationships, or even have more children. All of these changes would properly contribute to a best interests calculus . . .”).

365. *But see* Volokh, *supra* note 358, at 673–711 (demonstrating that families subject to custody orders are subjected to greater levels of state intrusion into freedom of speech and of religion than are intact families).

366. See, e.g., Jill Elaine Hasday, *Parenthood Divided: A History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002) (demonstrating that parents who receive aid from programs that are associated with dependency, such as AFDC and TANF, are subjected to a much greater level of state intervention than are families who receive other forms of state aid, such as Social Security benefits); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 257–58 (1964).

raised by parents who are not at perpetual risk of losing their right to custody of their children. Subjecting intact families to the level of state intervention to which we routinely subject non-intact families would be unthinkable.

Many family law scholars who address child custody—even those who criticize the best-interests standard—tacitly approve of this two-tier system. For example, Katharine Bartlett, in one of the early pieces advocating rights for third parties who form relationships with children, limits her proposal to families that have been “interrupted” in some way.³⁶⁷ (A similar distinction is currently built into a number of current third-party visitation statutes that accord more deference to parents in an “intact” family than to single or divorced parents.³⁶⁸) Bartlett writes that

The decline of the nuclear family may mean that the fabric of social relationships is torn, but the patch must fit the tear. Statutes allowing . . . visitation over the objections of parents of intact families are too great an intrusion on parents who have managed to raise their children in traditional nuclear families.³⁶⁹

The language here indicates an approval of traditional nuclear families that have “managed” to remain intact—and an assessment of other families as “torn” or “broken”—that justifies greater incursions into parental autonomy where families are not intact. The implication is that if parents can simply work harder at staying married, they can protect themselves from the intrusions to which less successful families are subject.

Framing parents as deserving of punishment—or of lesser protection—because they have failed to keep their families intact suggests that these “torn” and “broken” families are less deserving of dignity and protection than “intact” families. This, in turn, harms the welfare of the children in such families, for reasons both practical and expressive. Children raised within these “torn” families are subjected to a level of insecurity and parental anxiety that is unlikely to be beneficial. In cases where the absence of an enforceable agreement results in protracted and repeated litigation, increased hostility and conflict between a child’s parents may impede the child’s course of development. On an expressive level, children within such families are denied the dignity in their relationships with their parents that is afforded to children within intact families.

The number of families that are intact, in the form of two married parents and their biological or adopted offspring, is rapidly dwindling. This is in

367. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 946 (1984).

368. See, e.g., OKLA. ST. ANN. tit. 43, § 109.4(A)(1)(c) (West 2001 & Supp. 2014) (limiting orders for grandparent visitation against the wishes of one or both parents to situations in which “the intact nuclear family has been disrupted” by the divorce, separation, death, or incarceration of the child’s parent or parents); *id.* § 109.4(B) (“Under no circumstances shall any judge grant the right of visitation to any grandparent if the child is a member of an intact nuclear family and both parents of the child object to the granting of visitation.”).

369. Bartlett, *supra* note 367, at 958 (footnote omitted).

part the result of the decline in marriage, the rise of single or unmarried parenthood, and the prevalence of divorce.³⁷⁰ But strengthening marriage and making it available to all can no longer suffice to render families intact—marriage no longer provides an adequate remedy to the problem of non-intact family status. For today it is increasingly the case that even if two parents “manage,” as Bartlett puts it, to marry and to remain married, their family may never enjoy the intact status that will grant them protection from court interference. Whenever a family engages in assisted reproductive technology, or decides to share some aspect of childrearing among more than two parents—and whenever one or more adults decide to raise children outside of marriage—the family will face a risk of being deemed non-intact, and subjected to court intervention accordingly.

2. A Historical Example of the Dangers of Judicial Discretion

In order for custody agreements to adequately address the problem of non-intact status, it is necessary that they be given significantly greater deference than they currently are. To illustrate the need for greater deference to custody agreements, this section examines the historical example of the custody dispute between activist Annie Besant and her separated husband, which arose from one of the first Anglo-American statutes that purported to permit separating parents to bind themselves through custody agreements. *In re Besant*³⁷¹ demonstrates that as long as courts can override parents’ custody contracts in the name of children’s interests, such contracts will do little to provide non-intact families with the stability, certainty, and freedom from state intervention that intact families enjoy.

In 1873, the British Parliament enacted legislation that for the first time explicitly permitted courts to enforce custody provisions in deeds of separation.³⁷² Until then, the prevailing Anglo-American rule had been that courts would not enforce a contract transferring or otherwise limiting parental rights, on the ground that parents did not have the power to transfer rights that they held only for their children’s benefit.³⁷³ Courts were especially adamant about refusing to enforce agreements where a father agreed to give custodial rights to the mother.³⁷⁴ Despite the rule that

370. See Lynn D. Wardle, *The Disintegration of Families and Children’s Right to Their Parents*, 10 AVE MARIA L. REV. 1, 10–16 (2011) (discussing decline in marriage rate, increase in divorce rate, and rise in single and unmarried parenthood).

371. (1879) 11 Ch. 508 (Eng.).

372. See Custody of Infants Act, 1873, 36 & 37 Vict., c. 12 (Eng.).

373. See, e.g., *Cook v. Cook*, 1 Barb. Ch. 639, 642 (N.Y. Ch. 1846) (refusing to enforce custody provision of separation deed); *People ex rel. Barry v. Mercein*, 3 Hill 399, 411 (N.Y. Sup. Ct. 1842) (same); *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259, 263–65 (Ch.) (same); see also *Andrews v. Salt*, (1873) 8 Ch.App. 622, 636 (Eng.) (“We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own.”).

374. See, e.g., *Cook*, 1 Barb. Ch. at 641 (refusing to enforce separation agreement giving mother custodial rights); *Mercein*, 3 Hill at 419 (discussing social perils that would follow from permitting father to allocate custodial rights to mother, including increased acceptance

custody contracts were not enforceable, parents employed them nonetheless throughout the nineteenth century, both in England and in the United States.³⁷⁵ When custody arrangements broke down, parents repeatedly went to court to enforce the custody agreements that had sanctioned these arrangements, only to be told that such agreements could not be enforced.³⁷⁶

It was against this backdrop of the turn toward private ordering on the part of parents, and the judicial refusal to enforce such agreements, that Parliament enacted the 1873 Custody of Infants Act,³⁷⁷ which permitted courts to enforce custody provisions in separation deeds. The statute explicitly instructed courts that transfers from fathers to mothers should be enforceable: “No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother.”³⁷⁸

The statute included the caveat, however, that “no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.”³⁷⁹ In this regard, the 1873 Custody Act is similar to many current American statutes regarding the enforceability of custody agreements.³⁸⁰ As in most jurisdictions today, this best-interests exception renders custody agreements largely superfluous, in that courts are free to ignore them and to instead impose a custody arrangement in accordance with their own assessment of a child’s best interests.

The *Besant* case, the first major case to apply the 1873 Custody of Infants Act, was decided in 1879 and involved a custody dispute between Annie Besant and the husband from whom she had separated five years earlier, the Reverend Frank Besant.³⁸¹ Annie separated from her husband when she first began to realize the extent of her atheist beliefs and decided that she could no longer accept the sacraments of the Church of England. Annie’s husband, who was a vicar in the Church of England, told her that he would not accept her into his home unless she would attend communion

of separation between married spouses); *Talbot*, 41 Eng. Rep. at 259 (refusing to enforce separation deed giving mother custody of daughter until age ten).

375. See *supra* notes 373–74.

376. See *supra* notes 373–74; see also Abramowicz, *supra* note 28, at 58–62 (describing the refusal by nineteenth-century English courts to enforce contractual transfers of parental rights).

377. Custody of Infants Act, 1873, 36 & 37 Vict., c. 12 (Eng.).

378. *Id.* § 2.

379. *Id.*

380. See discussion *supra* Part I.A.

381. See *In re Besant*, (1879) 11 Ch. 508 (Eng.). For a reading of the *Besant* case as indicative of a return to greater deference to paternal rights in England of the 1870s and 1880s, as well as of a tendency to limit custody awards to mothers deemed deserving, see Danaya C. Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175, 257 (2002) (“If fathers were going to lose their paternal rights in favor of mothers, the courts were going to ensure that only those ‘deserving’ mothers . . . those who fully adopted traditional norms and values, would be allowed to keep custody.”).

at his church. She refused, and they separated.³⁸² Taking advantage of the newly enacted 1873 law rendering custody agreements enforceable, the lawyers for Annie and her husband drew up a legal separation deed providing that Annie would have custody of their three-year-old daughter, Mabel, for eleven months of the year, and that her husband would have equivalent custody of their young son, with each parent given one month's visitation per year with the noncustodial child.³⁸³

The custody arrangement set out in the separation deed lasted five years. Frank expressed unhappiness with Annie's activities during this time, trying to stop her from publishing atheist and feminist tracts using his last name. But he abided by their custody agreement, until, in 1877, Annie published a pamphlet on birth control, for which she was arrested and indicted on charges of obscenity. In response, Frank went to court to regain custody of their daughter, who had been raised by her mother from the age of three and was at the time almost eight years old.³⁸⁴

As the father's counsel correctly pointed out in the ensuing litigation, under the 1873 Custody Act newly permitting the enforcement of custody provisions in separation deeds, the court was free to ignore the deed entirely in the name of the child's interests. In arguing that it was in his daughter's best interests to be transferred to his custody, the father argued that

there cannot be a doubt that the future welfare of this child will be prejudiced by her being brought up in association with persons who hold the opinions which her mother professes and advocates—opinions which are looked upon by most people as wrong, and by her own sex as perfectly shocking.³⁸⁵

The court agreed with this assessment, and ordered the girl removed from her mother's custody and transferred to that of her father.³⁸⁶

What is striking about the *Besant* court's justification for rejecting the parents' custody agreement is that the opinion carefully disavows ideological bias even while basing its custody determination on just such a bias, a double-move often seen in custody decisions today. The court repeatedly insists that it has no position on Annie's atheism, yet clearly condemns her and removes her daughter from her care for this very reason:

Not only does Mrs. Besant entertain those opinions which are reprobated by the great mass of mankind (whether rightly or wrongly, I have no business to say, though of course I think rightly), but she carries those speculative opinions into practice as regards the education of the child.³⁸⁷

Here the court insists that it is neutral as to Annie's religious views despite, in the same breath, condemning her for teaching those views to her child.

382. See ANNIE BESANT, AN AUTOBIOGRAPHY 101–29 (1893).

383. See *id.* at 205–44.

384. See *id.*

385. *Besant*, 11 Ch. at 517.

386. See *id.* at 508.

387. *Id.* at 513.

The court makes a similar double-move when it casts Annie's atheism as a violation of gender norms that will cause her to be socially stigmatized:

She has endeavored to convince others, by her lectures and by her pamphlets, that the denial of all religion is a right and proper thing to recommend to mankind at large. It is not necessary for me to express any opinion as to the religious convictions of others, or even as to their non-religious convictions; but I must, as a man of the world, consider what effect on a woman's position this course of conduct must lead to[; it must] cut her off, practically, not merely from the sympathy of, but from social intercourse with, the great majority of her sex.³⁸⁸

The court here once again condemns Annie for her atheism, and removes her child from her custody because of it, even while insisting that it is neutral as to her "non-religious convictions."³⁸⁹

The kind of disavowal we see here—where a court insists on its neutrality about religious and political views, even while basing its custody decision on those very views, on the ground that they will alienate a child from her community—persists today in myriad custody decisions that take religion, education, ideology, and morality into account in awarding child custody. Indeed, the application of the best-interests standard today is just as prone to judicial bias in favor of majority views—along with disavowal of that bias—as it was in England of 1879.

The tendency of courts to disavow their reasons for awarding custody makes it difficult for parents to confront, or to protect against, the role of ideological bias in determining custody. A recent custody decision from Michigan, *Ulvund v. Ulvund*,³⁹⁰ provides an instructive modern example of such disavowal, and of its potential to disrupt parent-child ties despite a parent's efforts to conform to judicial norms.³⁹¹ After the couple in *Ulvund* divorced, sharing joint physical custody of their youngest child, the mother entered into a lesbian relationship. At issue was the trial court's decision to modify custody by awarding primary physical custody to the father after five years during which the child had spent the majority of time living with his mother. In making its determination that such a modification of custody was in the child's best interests, the trial court took the mother's sexual orientation into account even while claiming that it was doing nothing of the sort. The appellate court affirmed the trial court decision, finding that the trial court did not hold the mother's sexual orientation against her. It reached this conclusion even though, in assessing the list of statutory best-interests factors, the trial court repeatedly found the mother's sexual orientation relevant to its evaluation. When the court assessed each parent's ability to continue the child's religious upbringing, for instance, it acknowledged that both father and mother were religious, and that both attended church and would take the child to church.³⁹² But it found in

388. *Id.*

389. *Id.*

390. No. 224566, 2000 WL 33407372 (Mich. Ct. App. Aug. 22, 2000).

391. *See generally id.*

392. *See id.* at *3.

favor of the father on the religion factor, because “although plaintiff attends church, she will eventually have to deal with the conflict between church doctrine and her choice of a homosexual lifestyle.”³⁹³ Then again, when considering the “catch-all” factor that is included in most custody statutes, the trial court found against the mother not, it insisted, because of her sexual orientation, but because she and her partner had decided not to express physical affection for each other in the child’s presence, while the father testified that he and his new wife did “express affection for each other in their home.”³⁹⁴ The court decided that it was better for the children to witness physical affection, and thus that this factor also weighed in favor of the father.³⁹⁵

The court’s disavowal of evident ideological bias in *Ulvund*—one of many similar decisions that go largely unnoticed—is similar to that of the court in the *Besant* case. Just as Annie Besant lost custody of her daughter on the basis of her atheism despite the court’s insistence that it could not express an opinion on a parent’s religious preference, the Michigan mother lost custody on the basis, in large part, of her sexual orientation, even as the court insisted that it was neutral on the matter. The *Ulvund* case illustrates the chilling effect that this type of unacknowledged judicial bias can have on parenting. Reading between the lines, it seems that the mother in *Ulvund* might have attempted to shape her conduct in a manner that would meet the court’s approval. Some courts have found physical affection between two women or two men to count against them in a custody determination.³⁹⁶ Perhaps, then, the mother in *Ulvund* refrained from being affectionate with her partner in front of the child because she feared losing custody. The court then turned this protective behavior against the mother and made it a basis for awarding custody to the father.

Where courts assess best interests for purposes of awarding custody, they take into account not only each parent’s ties to the child, but a host of other factors, many of which judge each parent from the perspective of a culturally contingent understanding of what is best for children.³⁹⁷ Courts awarding custody thus routinely intervene in parents’ behavior to an extent that would never be tolerated in an intact family. As the *Besant* and *Ulvund*

393. *Id.*

394. *Id.* at *4.

395. *See id.*

396. *See, e.g.,* Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (citing evidence that mother and female partner exhibited physical affection in front of child in support of decision to transfer custody from mother to father); Collins v. Collins, No. 87-238-11, 1988 WL 30173, at *1 (Tenn. Ct. App. Mar. 30, 1988) (same); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (citing evidence that mother and female partner exhibited physical affection in front of child in support of decision to transfer custody from mother to grandmother).

397. For example, a number of jurisdictions instruct courts to consider each parent’s ability to further a child’s religious upbringing when determining the child’s interests. And many jurisdictions also provide that courts assessing children’s interests should take into account each parent’s “moral fitness,” a category that explicitly invites award of custody to the parent who better conforms to prevailing norms. *See, e.g.,* FLA. STAT. ANN. § 61.13(d)(3)(f) (West 2006); MICH. COMP. LAWS ANN. § 722.23(f) (West 2011).

cases illustrate, the result is not only to deny custody to parents who fail to conform to community norms, but also to create a chilling effect on the behavior of any parent—even one in an intact family—who has any fear of one day coming before a custody court.

Custody contracts have the potential to protect families such as the mother and child in *Ulvund*, or Annie Besant and her daughter in nineteenth-century England, from the destabilizing effect of living in an arrangement that the state no longer deems intact. As the *Besant* case illustrates, contract can only provide this protective effect if it is given adequate deference. As long as courts awarding custody can override parents' agreements in the name of children's interests, parents on the wrong side of a state's normative views may find it impossible to provide their children with the stability, certainty, and freedom from state oversight that are granted to traditional marital families as long as they remain intact.

B. Advantages of Enforcing Custody Agreements

Enforcing custody agreements would provide a number of advantages. Most significantly, enforcement of custody agreements would help to protect non-intact families. Enforcement of custody agreements would also provide related benefits, including promoting gender neutrality, fostering a diversity of family forms, and conveying respect for parental autonomy.

1. Enforcing Custody Agreements Would Protect Against the Two-Tier System That Disadvantages Non-Intact Families

This Article advocates enabling all parents to employ contract to afford their families the protections afforded to intact families. Where a family has availed itself of contract to create an approximation of intact status even when the parents' relationship dissolves, we should treat such families in the same way that we do traditional, intact families. Doing so would dismantle the two-tier system of family law and provide the children of nontraditional families with the same protections afforded to the children of traditional families.

Enforcing custody contracts would enable intended or existing parents to create an alternative to the perpetual threat of state intervention in the name of children's interests should their relationship dissolve. The need for enforceable custody contracts extends beyond traditional families contemplating divorce. It extends, for instance, to the single woman who raises her child with the help of a known sperm donor who has agreed to limit his parental status to visitation; to the male couple that employs both a gestational surrogate and an egg donor who has agreed to play a role in the child's life; and to any couple that agrees to jointly raise the legal child of one partner.

Marriage cannot suffice to provide the intact status that families need. The solution is to permit contract law to work alongside marriage to render families intact. In some instances, custody contracts would serve as a gap-filling mechanism at a moment when the law is in transition, as is currently

the case with the law of same-sex marriage and assisted reproductive technology. But it is likely that there will always be a need for custody contracts to help render families intact. Intended parents may wish to use such contracts to maintain contact between a child and a biological donor; others may wish to protect ties between a child and a stepparent. And custody contracts will always be useful to those intended parents who decide not to marry, or who marry but—like all couples—face the possibility of one day ending their marriage with divorce. In all of these situations, custody contracts could provide a powerful mechanism for keeping the state out of the business of determining how and by whom children are raised, or—if we believe that the state should play such a role—for enabling all parents to avail their families of the same level of protection and security that we afford to traditional intact families.

Some scholars oppose the enforcement of parental agreements on the basis that such an approach privileges parental rights over children's interests.³⁹⁸ The aversion to parenting contracts is linked to an aversion to treating children like "chattel,"³⁹⁹ mere property to be transferred at the will of parent-owners. Enforcement of custody contracts, however, like that of parentage contracts, does not necessarily prioritize parents' rights over children's needs.⁴⁰⁰ With proper protections in place, such enforcement can instead be seen as promoting child welfare, by providing the children of non-intact families with the same dignity, relationship stability, and freedom from uncertainty that is enjoyed by the children of intact families. From the perspective of children's interests in a stable and predictable environment, enforcement of custody agreements no more privileges parents over children than does recognition of marital status in determining parental status.

2. Other Advantages of Enforcement

Enforcing custody contracts would also provide additional benefits, many of which resemble those that parentage scholars have argued would accompany the enforcement of parentage contracts.

398. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1820 (1993) (arguing that the intent-based approach to parentage "suggests that power over children ought to be defined by adults' bargained for exchanges," and advocating an approach to parentage grounded instead in caregiving and stewardship as considered from the perspective of the child's experience and needs).

399. See, e.g., *Rubano v. Diconzo*, 759 A.2d 959, 988 (R.I. 2000) (Bourcier, J., concurring in part and dissenting in part) (asserting that "a child is more than a mere chattel whose fate may be decided by a contract between two consenting adults" to explain disagreement with majority decision permitting award of parental rights on the basis of a visitation agreement between same-sex co-parents).

400. For a critique of the scholarly and judicial tendency to either balance parents' interests against those of children in the arena of child custody decision making or to privilege the interests of parents, and an argument that child welfare should be the only consideration here, see James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79 (2012).

Marjorie Shultz has argued that a contract-based approach to parentage would promote gender neutrality in family law by enabling intended parents to create families that diverge from the traditional two-parent model in which the mother has the primary nurturing role. As she notes, determinations of parentage often hinge on social norms about the relative nurturing potential of women and men, and on the notion that women are best equipped to raise children. A contract-based approach to parentage, she contends, would permit parental status to be determined free from potential bias about gender and parentage.⁴⁰¹

A contract-based approach to custody would similarly promote gender neutrality in family law. Critics have long accused custody law of promoting gender stereotypes and basing custody decisions on such stereotypes. Some argue that custody law favors women as caretakers, to the detriment of children's bonds with their fathers, on the basis of the stereotypical assumption that children should be raised by their mothers.⁴⁰² Others contend that gender stereotypes work to deny custody to women who fail to conform to those stereotypes.⁴⁰³ The arguments that Shultz makes in favor of enforcing parentage contracts apply to custody contracts as well. Determining custody with reference to parents' own ex ante agreements would help to promote a gender-neutral approach to determining parental rights and obligations. While parents may well make traditionally gendered decisions about who should have custody of a child, they would also be free to make decisions that do not conform to current gender norms.

Proponents of parentage contracts also claim that these would promote a diversity of family forms, while at the same time ensuring that children's relationships with their parents are protected regardless of whether their parents conform to traditional norms.⁴⁰⁴ The same is true of custody contracts, which would free parents to create family forms that diverge from the norm without risking a loss in custody. A custody contract could protect against the possibility that custody would be determined, or subsequently modified, on the basis of judicial preferences about family forms, such as a preference for a married couple over a single parent, for a married couple over an unmarried couple, or for opposite-sex rather than same-sex parents.

Finally, just as enforcing parentage contracts expresses respect for the autonomy of the contracting parties, the same is true of enforcing custody contracts. Although it may be argued, as it has been in the context of surrogacy agreements,⁴⁰⁵ that vulnerable women may be pressured into custody agreements that they will later regret, such an argument can be

401. See Shultz, *supra* note 5, at 397–98.

402. See, e.g., Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 191 (1990) (describing “widespread bias against fathers on the part of some judges who do not perceive men as being capable or appropriate primary caretakers”).

403. See, e.g., Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 565–87 (2012).

404. See *supra* notes 267–78 and accompanying text.

405. See *supra* notes 288–89 and accompanying text.

refuted on similar grounds. As a number of scholars have observed, it is paternalistic to assume that surrogacy agreements are necessarily either coerced or insufficiently rational.⁴⁰⁶ It is similarly paternalistic to assume that actual or intended mothers cannot make rational decisions about their parental rights in the context of custody agreements.

The charge of paternalism should not cause us to refrain from protecting vulnerable contracting parties, particularly where children's interests are at stake. The problems of duress and irrationality in custody contracting, however, can be handled in much the same way as in premarital agreements about property. Currently, such agreements are largely enforceable, and roughly half of the states provide protections against both procedural and substantive unfairness.⁴⁰⁷ Concerns about custody contracts that are obtained under coercive circumstances can be alleviated by developing mechanisms to protect against duress or excessive pressure in custody contracting. Several proposed mechanisms are discussed in Part IV. Such an approach would help to ensure that custody agreements truly reflect the parents' assessment of their children's interests, while facilitating enforcement of such agreements where this requirement is met.

IV. CONTRACTING FOR CUSTODY: A PROPOSAL

Custody contracts have the potential to render our system of family law more egalitarian. Currently, we have a two-tier system under which intact families are given greater privileges and protections than non-intact families. Intact families are granted significant deference in how children are raised, which in turn provides the parent-child relationship with stability and certainty. Non-intact families, by contrast, are subject to a perpetual threat of state intervention in the name of children's interests. The result is to further destabilize precisely those child-parent relationships that are most in need of protection.

Contracting for custody would enable parents to ensure that, even if their relationship with one another dissolves, they will enjoy the same stability and freedom from state intervention granted to traditional intact families. All parents would benefit, ranging from those who contemplate marrying and raising the couple's own biological or adopted children to those who intend to raise children in a family that does not fit this traditional model. At a time when many marriages end in divorce, and many parents employ assisted reproductive technology in order to create their families, marriage is no longer a viable solution to rendering a family permanently intact. Contract can fill the gap, providing structure and certainty where marriage cannot.

This part concludes by presenting a model for facilitating the enforcement of custody agreements while addressing concerns that have been raised about enforcement, including the concern that custody agreements may not be fully informed or voluntary and concerns about the

406. *See supra* note 290 and accompanying text.

407. *See supra* notes 209–10 and accompanying text.

need to protect children's welfare, particularly where parents have failed accurately to predict developments that have made an agreed-upon arrangement adverse to a child's welfare.

Part IV.A takes up the preliminary question of whether enforceability should hinge on the time at which a custody agreement was formed. It concludes that custody contracts should be given deference not only when agreed to by separating parents, but also when parents are no longer in agreement about custody. Part IV.B then discusses the ALI approach to premarital agreements as a model for enforcing custody agreements. Part IV.C builds on this model to present a proposal for enforcing custody agreements subject to both procedural and substantive review.

A. *Relevance of Time of Contract Formation*

One issue that arises in the marital context is whether custody agreements should be given more deference when they are agreed to at the point when the parents' relationship comes to an end. The current trend in custody jurisprudence is to give greater deference to custody provisions in separation agreements than to custody agreements made prior to or during marriage. While, in most jurisdictions, all custody agreements can be rejected by a court in the name of children's interests, agreements arrived at post-dissolution are much more likely to be enforced. This is so either because post-dissolution custody agreements are given greater deference as a formal matter, or because, in practice, courts are most likely to approve of custody arrangements made at divorce or separation and to reject out of hand any agreement made before a child was born or before the parents' relationship dissolved.⁴⁰⁸

While this Article suggests enforcing all custody contracts, it questions the prevailing view that those arrived at post-dissolution should be given the greatest deference. The rationale for such deference is that parents who are divorcing are better able than intended parents to determine an arrangement that is in their children's interests. How, ask courts and scholars, could an intended parent possibly know what is best for a child who has yet to be born?⁴⁰⁹ One response is that, if an agreed-to custody arrangement is not in a child's interests, the parents can, at the point when it comes into play, renegotiate the original agreement. Another is that we can develop sufficient protective mechanisms to protect children from being harmed by enforcement of ex ante custody agreements without rendering such agreements altogether unenforceable.

The potential utility of custody contracts would be greatest when they are employed by parents or intended parents in anticipation of changes that might occur in the future. Parents can employ custody agreements to ensure that their own ex ante decisions will govern their children's custody should their initial arrangement fall apart. They may prefer that, in the event that conflict arises, their parental rights will be determined by the decisions

408. *See supra* Part I.A.

409. *See supra* Part I.A.1.

they made at a time when they were working together to plan their children's future, rather than by a court faced with competing claims by potentially hostile parties.

Another reason for hesitating to favor separation agreements over custody agreements made *ex ante* is that it is precisely at the point of separation or divorce that the more vulnerable parent may have the least leverage. Before a child is born, a potential parent can insist on a fair and child-protective custody arrangement as a precondition to raising a child with another intended parent. A parent can also insist on a custody contract as a precondition for forgoing work or education in order to stay home with a child or devote more time to a child. Such an arrangement might be especially useful, for instance, in the event that a child has special needs and requires more parental care than anticipated. At the point of divorce, however, the parent who has devoted more time to raising the child may have less leverage in arriving at a custody agreement. As discussed in Part III, the indeterminacy of the best-interests standard makes it impossible to predict with certainty how a court will decide a contested custody dispute. Particularly in those jurisdictions that favor joint custody, the parent who devoted less time to staying home with the child has little to lose by pushing for the maximum custody award available. The result is that parents may trade off rights to property and support in exchange for custody, to the detriment of both the child and the primary custodial parent.

A related issue is whether custody agreements should continue to be granted deference going forward, as a child develops during the years that follow the initial dissolution of the parents' relationship. Currently, the fact of a prior custody agreement is given little weight in a proceeding to modify an existing custodial arrangement.⁴¹⁰ While the modification standard itself might be designed to favor the status quo, the same standard typically applies regardless of whether parents arrived at the custody arrangement themselves.⁴¹¹ Here, however, as with custody agreements made prior to a child's birth, the value in such agreements is largely in their power to provide certainty and predictability into the future. To protect families from the destabilization and loss of autonomy that come with non-intact status, it is essential that custody agreements retain their force over time.

Thus, we should facilitate enforcement of all custody contracts, regardless of when they were formed. However, we should, at the same time, attend to the concerns that have been expressed about the risks of enforcing custody agreements. To do this, we must craft an enforcement regime that will be sensitive to the pressures and informational weakness that might apply to a custody contract depending on when, and in what circumstances, it was entered into. Given the profound effect of such contracts on children who did not consent to them, an appropriate enforcement regime would also feature mechanisms to protect against potential adverse effects on children's welfare.

410. *See supra* Part I.A.2.c.

411. *See supra* Part I.A.2.c.

*B. The ALI Approach to Prenuptial Agreements
As a Model for Enforcing Custody Agreements*

Many of the problems that arise with respect to the enforcement of premarital custody contracts also arise in the enforcement of premarital agreements regarding monetary terms. These include the possibility that the contracting parties will experience, *inter alia*, uneven bargaining power; cognitive limits (such as the optimism bias that accompanies the inception of intimate relationships); and difficulty foreseeing how their own needs, as well as their children's needs, might develop over time. The primary difference between prenuptial monetary agreements—which courts often enforce—and prenuptial custody agreements—which they typically do not—is that in the latter category, children's lives are directly at stake. Custody contracts thus raise the additional concern of how enforcement will affect the child in question.

This Article proposes an approach to custody contracts that builds upon the ALI recommendations on enforcing prenuptial agreements, with changes and additions to reflect the special problems raised by custody agreements. The ALI provisions on premarital agreements indicate that these should not apply to agreements regarding custody.⁴¹² Nonetheless, the ALI approach to premarital agreements can be adapted to apply to custody agreements as well. The ALI provisions on premarital agreements were designed to facilitate *ex ante* contracting between intended or actual family members while addressing the ways in which family relationships, because of their intimacy, length, and frequent dependency, create problems for contract law, such as unequal bargaining power, cognitive bias, and unforeseeability.⁴¹³ The proposed adaptation of the ALI recommendations for premarital agreements would build upon the ALI's approach to these issues while attending to the additional problems posed by contract terms that directly affect the interests of children.

The proposed approach also builds upon the ALI provisions on parenting plans made by separating or divorcing parents, which recommend enforcement of such plans as long as they are knowing and voluntary and are not harmful to the child.⁴¹⁴ This Article's proposal differs significantly from the ALI provisions on parenting plans, however, in advocating enforcement not only of post-dissolution custody agreements that parents jointly present to a court for approval, but also of prior (including premarital or marital) custody agreements that at least one of the parents no

412. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.07 (2000) (providing that terms "allocating custodial responsibility and decisionmaking responsibility for a couple's children" are governed by the ALI provisions on custody and parenting, rather than by the provisions on prenuptial agreements). As Part I.A.2 discusses, the ALI recommendation on custody allocation is to grant deference to custody agreements made at separation or divorce, but not to those made during or before marriage. *See id.* §§ 2.06, 2.08, 2.09.

413. *See id.* § 7.05 cmt. b.

414. *See id.* § 2.06.

longer wants to enforce.⁴¹⁵ This, in turn, requires adjustments to reflect the special problems raised by enforcing custody agreements made *ex ante* rather than at the time of separation or divorce. It is in this respect that the ALI provisions on premarital agreements provide a useful model.

The cornerstone of the ALI approach to premarital agreements—which reflects the approach adopted by nearly half of the states⁴¹⁶—is to permit enforcement, while also policing such agreements more stringently than other contracts, both procedurally and substantively. The ALI recommends that the party arguing for enforcement of a premarital agreement must establish that the agreement was both voluntary and well-informed.⁴¹⁷ Once the procedural fairness of the agreement is thus established, the party opposing enforcement must establish a substantive reason for doing so. This requires showing both that one of various enumerated events has occurred since the agreement was executed—a fixed number of years has passed; a child has been born to or adopted by the parties; or there has been an unanticipated change in circumstances with a substantial impact on the parties and their children—and that, in light of such event, enforcing the agreement would inflict a substantial injustice.⁴¹⁸

Given the intrusion into parental autonomy and family stability that results when courts are permitted to override parents' custodial decisions, an enforcement regime for custody contracts should focus judicial review more heavily on the procedural rather than the substantive aspect of such agreements. This would help keep the state out of decisions about how children are raised, and would also let parents know *ex ante* what steps they need to follow in order to create an agreement that will be enforced. Nonetheless, given the importance of protecting children, we should include some element of substantive review as well.

C. The Proposed Procedural and Substantive Review of Custody Agreements

1. Procedural Review

Commentators have expressed concern that both premarital agreements and divorce settlements are often the product of unequal bargaining power that substantially disadvantages the more vulnerable and financially

415. Compare *id.* (“The court should order provisions of a parenting plan agreed to by the parents, unless the agreement (a) is not knowing or voluntary, or (b) would be harmful to the child.”), with *id.* § 2.08(e) (providing that courts determining whether to deviate from the ALI approximation approach to custody in cases where parents cannot agree on a parenting plan should “take into account any prior agreement . . . that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child”).

416. See Bix, *supra* note 56, at 264.

417. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.04.

418. See *id.* § 7.05.

dependent spouse.⁴¹⁹ They have argued, further, that courts often fail to recognize the factors that might have vitiated a spouse's ability to freely and knowingly consent to such an agreement, and routinely enforce agreements that were the product of undue pressure or duress.⁴²⁰ If we are to enforce custody agreements on the theory that the parents at the time of the agreement worked together to determine an arrangement that they jointly felt to be in their child's interests, courts must be rigorous in ensuring that the agreements were truly the product of free and informed consent. The concerns about paternalism and freedom of contract that are often voiced in opposition to rigorous policing of financial agreements between spouses do not have the same weight in the context of custody agreements, because children are not parties to such agreements, but are profoundly affected by their parents' custodial arrangements.

Procedurally, then, we should rigorously review custody agreements to ensure that they are the product of informed consent, and that they were not made under undue pressure or duress. The ALI approach to procedural review of premarital agreements could be adapted to this end, with modifications that address some of the special considerations that arise with respect to custody agreements. As under the ALI premarital agreement regime, the party requesting enforcement of a custody agreement should have the burden of establishing that the agreement was obtained with the fully informed and voluntary consent of the other party. The enforcing party could create a rebuttable presumption to this effect by showing that: (1) both parties were advised, and given the opportunity, to obtain independent counsel; (2) in situations where such representation was not obtained, the agreement clearly set forth both the full ramifications of the agreement and each party's rights in the absence of any agreement; (3) the agreement, if premarital, was not presented within thirty days of the parties' marriage; and (4) each party was given a period during which he or she could subsequently opt out of the agreement. These procedural requirements largely track those of the ALI with respect to premarital agreements.⁴²¹

If we want to make procedural review of custody agreements more rigorous, we could make it more difficult for the party wishing to enforce such an agreement to create a rebuttable presumption that the agreement was fully informed and voluntary. For instance, we could provide for application of the presumption only where each party to the agreement was represented by independent counsel. This would help to ensure that custody agreements are enforced only when they are the product of informed and voluntary consent, but could put such agreements out of reach of those who cannot afford this level of legal representation.

419. See, e.g., Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 *BUFF. L. REV.* 1153 (1999).

420. See *id.*; see also Orit Gan, *Contractual Duress and Relations of Power*, 36 *HARV. J.L. & GENDER* 171, 199–201 (2013).

421. See *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 7.04.

Another potential mechanism to help ensure that custody agreements are enforced only when formed under procedurally sound conditions would be to require the court to assess whether the terms of the agreement indicate that it was obtained under undue pressure. A number of commentators have recognized that unfair terms can often indicate that undue pressure was applied when a contract was formed.⁴²² Thus, for example, where a future spouse agrees to relinquish both her custodial rights and her rights to property or support in the event of divorce, this could, depending on the surrounding facts, constitute evidence that the agreement was the product of sufficiently unequal bargaining power that its custody terms should not be considered fully voluntary, and should not be enforced.

These requirements should apply to all custody agreements, premarital and otherwise. The proposal in this respect diverges from the prevailing approach to both parental custody agreements and spousal agreements about property division and spousal support, which is to give the greatest deference to those agreements made at separation or divorce. The rationale for imposing heightened procedural scrutiny to premarital financial agreements, but not to separation agreements on financial matters, is that spouses are presumed to know that they are in an adversarial position at the time their relationship dissolves, and thus are on notice that they need to look out for their own interests.⁴²³ However, parents working together to reach a mutually satisfactory arrangement regarding their children's custody may be under the impression that they are not in an adversarial position, even if their relationship has already dissolved. Or, in cases that are clearly adversarial, parents fearful of losing their children's custody may feel pressured to agree to a suboptimal arrangement rather than risk losing custody altogether. A party contemplating parenthood can back out of a relationship with a co-parent, and avoid the threat to deprive her of custody, to an extent that an existing parent cannot. Thus, courts should be required to scrutinize the procedural fairness of all custody agreements, including those agreed to when parents separate.

Some additional potential protective mechanisms would apply with particular force to the dissolution context. For instance, we could impose the further requirement that the party seeking enforcement of a custody agreement demonstrate that the custody agreement was not made in exchange for financial compensation. Under this requirement, an agreement would fail on procedural grounds if one party could establish that she agreed to waive her rights to alimony or support in exchange for a right to custody, or that she agreed to waive some portion of her right to

422. The comments to the ALI provisions on parenting agreements make a similar recommendation, noting that "a significant disparity between the provisions of the parents' agreement and what the court would have ordered without the agreement will often be probative of whether the agreement was truly understood and agreed to by both parties." *Id.* § 2.06 cmt. b.

423. See Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1414-24 (1984) (describing, and contesting, the view that separation agreements require minimal procedural review because spouses contemplating divorce are on notice that their positions are adversarial).

custody in exchange for compensation. Significantly, any such showing should also render the monetary aspect of the agreement unenforceable. These rules, together, would help prevent intended or actual parents from trading custody rights for money, whether as part of a transaction that commodifies a child's custody in the sense of "selling" custodial rights or in a situation in which a parent takes advantage of the other parent's aversion to losing custody to extract an advantageous financial settlement.⁴²⁴

Another important mechanism to ensure that custody agreements are enforced only when they are the product of free and informed consent would be to require courts to recognize the extent to which domestic abuse may impede a parent's ability to freely consent to an agreement. Some contend that courts do not adequately recognize the extent to which battered spouses may feel pressure to agree to unfavorable divorce settlements.⁴²⁵ Courts reviewing custody agreements for procedural fairness should be required to take such factors into consideration, perhaps by imposing a presumption that a custody agreement reached by a spouse subjected to emotional or physical abuse was not entered into with sufficient volition.

2. Substantive Review

The question of what sort of substantive review to apply to custody agreements is a more difficult one. This Article proposes one possibility, while hoping to start a conversation about other possible approaches. The goal is to create a regime in which custody agreements are more enforceable than they currently are, while still providing some protection for children. The ideal level of substantive review would afford non-intact families a level of freedom from judicial intervention that approaches as much as possible the autonomy accorded to intact families, while recognizing and addressing the special problems that might arise, and risks that children might face, when parenting arrangements fall apart.

At the substantive level, we should, at a minimum, refrain from enforcing a custody agreement where a court finds that to do so would likely be detrimental to a child's emotional, intellectual, or physical development.⁴²⁶ This approach would meet many of the current objections to the

424. Arguably, where a parent trades financial support for custody, the best outcome for the child would be to sever the custody provision from the financial provision, and to enforce the custody terms but not the financial ones. A parent who agrees to waive financial rights in exchange for custody is likely the parent who is most committed to the child. For a proposed mechanism to facilitate the severing of the custody terms of divorce settlements from terms related to property and support, see Sarah Abramowicz & Michael Abramowicz, *Severable Settlements* (unpublished manuscript) (on file with author).

425. See Bryan, *supra* note 419, at 1219–34.

426. This would resemble the ALI's approach to the substantive review of parenting plans made at separation or divorce, while extending that approach to custody agreements as to which the parents no longer agree. The ALI rejects the prevailing view that parenting plans should not be enforced unless a court finds them consistent with a children's best interests, and provides instead that such agreements should be enforced unless a court finds that enforcement would be harmful to the child. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06.

enforcement of custody agreements, while greatly reducing the likelihood of judicial intervention on the basis of unpredictable and subjective views about childrearing. There would be a strong presumption that custody agreements should be enforced, but a court would have the power to override an agreement likely to inflict harm on the child.

An example of a custody provision likely to be detrimental to a child would be a joint custody agreement that would be disruptive and impractical, such as an agreement to rotate custody of an infant every two months.⁴²⁷ An agreement to equally share custody of a school-age child could also be deemed harmful where, for example, the parents live in different locations and the child would be required to change schools repeatedly. Even where the parents live in close proximity to one another, an agreement to share physical custody could be harmful if the level of conflict and hostility between the parents is sufficiently high.

In certain predefined situations, we should presume that enforcement of a custody agreement would be harmful. For instance, we could presume that a child would be harmed by an award of custody to a parent who has engaged in domestic violence, whether physical or psychological, and regardless of whether it occurred in the child's presence. Such a presumption would in part serve to protect a parent against feeling forced to stay in an abusive relationship out of fear of losing custody.⁴²⁸ This presumption would also protect the child. As scholars have long contended,⁴²⁹ and custody law increasingly recognizes,⁴³⁰ a child can be harmed by living in an environment where domestic violence occurs, even if the violence is not directed at, or conducted in the presence of, the child.

We could also create presumptions that certain types of agreements should not be enforced, even without a finding of likely harm to the child. The effect would be to revert to the best-interests standard in certain circumstances that are especially likely to be adverse to children's interests. For instance, some might be concerned that a custody agreement could harm a child by denying primary physical custody to a parent who has had the bulk of contact with the child, such that the agreement, in the words of

427. Such an arrangement has, in fact, been imposed by trial courts in certain cases against the parents' wishes, only to be reversed on appeal on the basis that such an arrangement could be detrimental to a child's development. *See* *Friendshuh v. Headlough*, 504 N.W.2d 104, 106 (S.D. 1993) (reversing trial court's order, against parents' wishes, that they rotate custody of their infant son every two months); *see also In re Lukens*, 587 N.W.2d 141, 145-46 (N.D. 1998) (vacating trial court's order that parents alternate custody of infant on a biweekly basis).

428. The procedural review proposed in this Article would also protect such parents by preventing the enforcement of an agreement where physical or emotional abuse vitiated a parent's ability to consent. *See* discussion *supra* Part IV.C.1.

429. *See generally* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991) (critiquing child custody law for inadequately considering domestic violence in assessing children's interests, and noting that the exclusion of domestic violence as a factor in custody decision making originated in the 1970s as part of the deemphasis of fault in divorce and custody law).

430. *See generally, e.g.*, Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197 (1995).

the ALI provisions on parenting plans, “would drastically alter the child’s caretaking patterns.”⁴³¹ To address this concern, we could create the presumption that, where there is one parent who clearly played the role of primary caretaker, a custody agreement should not be enforced where it awards less than a certain percentage of custody to that parent. Although our concern here is with potential harm to the child, we should not create a presumption of harm. It may well be in a child’s interests to reside primarily with a parent who had engaged in a minority of caretaking activity during the parents’ relationship, particularly where the parents have agreed to such an arrangement. Thus, where an agreement is rendered unenforceable because it is drastically at odds with previous caretaking patterns in certain predefined ways, the court should not automatically reject the custody arrangement set forth in the contract, but instead should examine the child’s interests and determine custody accordingly, while taking the agreement into account as a factor bearing upon the child’s interests.

Another concern might be that a child could be harmed by a custody agreement that curtails the child’s relationship with a parent. We could address this concern by presuming that, when the child has already developed a relationship with a parent, we should not enforce any agreement that awards that parent less than a predetermined amount of physical custody. Thus, for instance, when a father agrees to forgo all rights to visitation in exchange for a waiver of his obligation to pay child support, if the father already has a relationship with the child, the agreement to forgo visitation altogether would be unenforceable.⁴³²

A more complicated problem arises when custody agreements are not necessarily harmful, but are unworkable in some way. For instance, parents might agree in advance to a detailed custody arrangement that turns out not to be feasible, such as where a specified schedule of visits may be impossible to reconcile with the child’s school schedule. Here, we should keep in mind that the parents can always renegotiate such an arrangement, and that we want to encourage them to do so instead of enabling a parent to strategically use a claim of unworkability to vitiate an agreement altogether. However, we need to address how courts should respond when the arrangement cannot be enforced as written and the parents fail to reach a new agreement. One mechanism to address this problem would be to permit enforcement of the general contours of a custody arrangement—such as the percentage of custodial time that a child would spend with each parent and the allocation of decision-making authority over various areas of the child’s life—while precluding enforcement of more detailed terms, such as when the child would visit each parent or which school the child would attend. This would enable parents to protect their custodial ties to their

431. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08 ill. 29.

432. Under the procedural branch of this Article’s proposal, such an agreement would also be unenforceable on the ground that it exchanges custody for a waiver of financial rights. See discussion *supra* Part IV.C.1.

children, and thus minimize the disruptive and destabilizing potential of a constant threat of custody litigation, while empowering courts to resolve any conflicts that arise in implementing an agreed-upon arrangement.

A similar problem occurs when parents incorporate unworkable standards into a custody agreement, thus requiring a court to in effect adjudicate custody on the parents' own terms. A hypothetical example cited by Katharine Silbaugh as evidence of the adjudication difficulties posed by premarital custody agreements is a provision that custody should be awarded to the mother as long as she is a "loving and devoted parent," an inquiry that would involve the court in a difficult fact-finding enterprise.⁴³³ To address this concern, we could provide that custody agreements can only allocate either custody or decision-making responsibility (including by deeming one or the other parent the decision maker about how to allocate custody), but cannot create the standards by which custody is adjudicated. Another possibility would be to permit parents to specify which of several preexisting custody standards should apply in the event of disagreement (parents could thereby, for instance, elect the approximation standard currently applicable only in West Virginia), while prohibiting the creation of novel custodial standards for courts to apply.

Another difficult problem is determining whether to permit modification of a custody agreement once the agreement has been implemented. While some states impose significant burdens on modification of custody arrangements, and many take the middle ground of requiring a substantial change in circumstances such that modification is in the child's interests, others permit modification of custody upon a showing that a change of custody is in the child's best interests.⁴³⁴ To permit modification under the open-ended best-interests standard would undermine any security that custody agreements might provide to parents and children. Of course, once a custody arrangement is implemented, it might become clear that the arrangement is detrimental to a child. A parent who functioned well in a co-parenting arrangement may be unable to handle the burdens of parenting alone, for example, or a parent may enter a relationship with a new partner who engages in domestic violence. But we should be wary of making it too easy to modify existing custody arrangements. Whenever an existing custody arrangement is disturbed, children's attachments and expectations are unsettled. Moreover, as Joan Wexler observed in her landmark article recommending that custody modification be permitted only under very limited circumstances, courts purporting to address children's interests will often modify custody to children's detriment in order to police the behavior of custodial parents.⁴³⁵ The case law contains numerous examples of courts that have removed custody from primary caretakers—in ways that often seem harmful to the children involved—because of behavior at odds with prevailing social norms, such as "promiscuous" behavior by a mother, entry

433. See Silbaugh, *supra* note 2, at 131–32.

434. See *supra* notes 82–83.

435. See Joan Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 *YALE L.J.* 757, 797 (1985).

into a same-sex relationship, or, as in Annie Besant's case, adoption of unorthodox religious views.

Thus, for custody agreements to achieve the goal of providing intact status to families in which parents' relationships have dissolved, it is important to adopt a modification standard that gives significant deference to such agreements, while permitting modification where a child seems at risk of harm. Here, as in our original enforcement of the agreement, we could presume that certain situations are harmful to a child, such as equally shared residential custody between parents who have demonstrated a high level of conflict in implementing the agreement, or the child's residence in a home where domestic violence occurs. To protect children's affective ties and their interests in stability, we should also require courts that are considering modifying an agreed-upon custody arrangement to balance the harm of continuing the arrangement against the harm that would follow from disrupting children's emotional bonds and their established pattern of care.

A number of substantive concerns can also be addressed by carefully defining which agreements constitute custody agreements subject to enforcement under the proposal, and distinguishing these from agreements concerning parental status.⁴³⁶ We can define custody agreements with reference to the limits that courts currently place on custody awards. Under prevailing custody jurisprudence, parents rarely lose the right to visitation with their child. Thus, custody agreements should be defined as those that allocate existing rights, without terminating or transferring them altogether. Under this definition, an agreement that terminates a parent's status entirely, rather than defining the scope of that parent's involvement, is not a custody agreement, but, rather, a parentage agreement.

A number of other limits could be imposed on the enforcement of custody agreements. For instance, to protect against unpredictability, we might provide for nonenforcement of a custody agreement where an unforeseeable event has occurred to make enforcement contrary to a child's interests. Examples might include the illness of a parent or child, or a job loss that alters expectations about who will serve as a child's primary caretaker. The unforeseeability exception would limit judicial intervention in custody, while enabling such intervention when the agreement that the parents made on the basis of their own *ex ante* best-interests assessment has little bearing on what they predicted to be the child's reality at the time of enforcement.

The more limits we impose on the enforcement of custody agreements, however, the closer we come to the current regime, in which such agreements are largely superfluous, especially when time has passed between execution and enforcement. Thus, any such limits should be carefully considered, and imposed only when necessary.

436. While the author endorses enforcing parentage agreements as well as custody agreements, different rules should apply to each, and the two types of agreements should be able to work in tandem. It is outside the scope of this Article to address the separate set of problems raised by enforcement of parentage agreements.

CONCLUSION

This Article does not seek to have the final word on how the enforcement of custody agreements should proceed. Rather, the Article's goal is the more modest one of setting forth the framework under which enforcement of custody agreements should be considered: a two-level judicial review of custody agreements, with enforcement predicated on a finding that the agreement in question is procedurally fair and substantively unlikely to harm a child's development. This framework is built on the premise that children and parents will benefit from greater deference to parental custody agreements. Such deference would enable all families to carve out the protections of intact status, and thus to be granted the autonomy, stability, and freedom from state intervention that today only a dwindling number of traditional nuclear families enjoy. The assumption of the marital contracts literature that children's interests are best protected by requiring judicial assessment of those interests even when a custody agreement exists does not survive close scrutiny. The arguments for contractual enforcement developed in the literature, and to some extent the case law, on parentage agreements are more persuasive, and should be extended to the custody context.