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Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California

Rebecca Glass

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Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California

Rebecca Glass†

TABLE OF CONTENTS

Introduction.....	217
A. Marital Agreements: Definitions and Limitations	218
B. Deficiency in California Law	219
C. Roadmap	220
I. Legal Background	220
A. History of Prenuptial Agreements Generally	220
1. National Development of the Law	220
2. The Purpose of Prenups: Why and Who	223
B. California Legal Background.....	225
1. Adoption of the UPAA.....	226
2. The UPAA in Practice: <i>Bonds</i> and <i>Pendleton</i>	228
3. The Legislature’s Fix to the UPAA.....	231
4. Postnuptial Agreements and the UPAA: <i>Friedman</i>	233
II. Analysis and Solution.....	237
A. In the Legislature’s Lap	237
B. The Limitations of Contract in the Marital Context	238
1. General Limitations of the Bargain Principle of Contract	238
2. Problems with the Contract Approach as Applied to Marital Agreements.....	240

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a.	Unconscionability	240
b.	Differences in Cognitive Limitations	241
c.	Public Policy Distinction	243
C.	The Principles of the Law of Family Dissolution	244
1.	Background	244
2.	Relevant PFD Provisions and Their Differences from the UPAA	245
a.	Requirements for Enforceability	245
b.	Substantial Injustice	248
D.	The PFD Best Serves California's Interests	250
1.	Predictability	250
2.	Fairness	251
3.	Balancing Predictability and Fairness	252
Conclusion	255

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INTRODUCTION

The Uniform Premarital Agreement Act (UPAA) was one of California's true loves.¹ We saw it first, we took it in, and we did our best to change it for the better. But it has let us down once too often: the time has come to open our hearts to a new suitor, the American Law Institute's (ALI) Principles of Family Dissolution (PFD).

A California appellate court recently held that the California UPAA does not apply to postnuptial agreements.² This holding, which confirms the plain language of the California UPAA, nonetheless highlights a difference in the rights of parties to marital agreements based solely on the timing of the agreement. Given that similar fairness issues arise from both pre- and postnuptial agreements, this difference is inappropriate. However, an extension of the California UPAA to postnuptial agreements is an unacceptable solution; despite recent amendment, the California UPAA still relies on a contract theory that is overly harsh in the marital context. The ALI's PFD, in contrast, both treats pre- and postnuptial agreements similarly and utilizes a theory that, by balancing freedom of contract and fairness concerns, is more responsive to the nature of these agreements. The California legislature should therefore adopt the section of the PFD that deals with marital agreements.³

1. California enacted the UPAA with a few modifications. This Comment will refer to the original UPAA (drafted by the National Conference of Commissioners on Uniform State Laws) as the "UPAA" and to California's enactment of the UPAA as the "California UPAA."

2. *In re Marriage of Friedman*, 122 Cal. Rptr. 2d 412 (Cal. Ct. App. 2002), *review denied*, No. S109408 (Cal. 2002).

The subset of family law dealing with marital agreements is rife with excessive terminology. The terms "prenuptial," "premarital," and "antenuptial" are interchangeable; for simplicity, this Comment will primarily use the term "prenuptial" to discuss agreements made in contemplation of marriage. The terms "postnuptial," "postmarital," "interspousal," and simply "marital" are all commonly used to describe the same kind of agreement made after marriage. This Comment rejects "postmarital" as a misnomer and "interspousal" and "marital" as overly broad—and so uses "postnuptial" almost exclusively for such agreements. It will use the term "marital agreement" to refer to both pre- and postnuptial agreements.

3. The PFD addresses marital agreements in its chapter seven.

A. *Marital Agreements: Definitions and Limitations*

Pre- and postnuptial agreements are two of the main types of contractual agreements couples make in the context of marriage.⁴ Both types of agreements are increasingly popular means by which parties allocate assets during marriage and plan for property distribution at the time of death or divorce.⁵ Because these contracts often operate in lieu of the state's statutory protocol,⁶ both also have implications for state policy concerns. The primary distinction between them is their timing in relation to the marriage ceremony. If prospective spouses make such a contract, it is prenuptial; if existing spouses make the same contract, their agreement is postnuptial.

There is little demographic information on people who enter into prenuptial agreements, and even less on parties to postnuptial agreements. What demographic and anecdotal evidence does exist indicates that, at least in the case of prenuptial agreements, there is frequently a financial disparity between the parties.⁷ This is only logical, as one of the primary motivations for entering into such an agreement is to protect the assets of the financially stronger spouse from a future claim by the financially weaker spouse.⁸ In the case of prenuptial agreements, the financially stronger party may indeed use the agreement as a condition of marriage. The condition, explicit or implicit, is that the wedding will not go forward without a signature. In the case of postnuptial agreements, because the parties are married, the threat of calling off the wedding is no longer present. However, there may be a parallel condition: the financially stronger spouse may threaten to end the marriage if the financially weaker spouse does not sign.⁹ The risk in a postnuptial context may be more about exploiting preexisting power imbalances than engendering new ones.

4. Property settlement agreements, also referred to as "marital property agreements," are the third primary type of agreement. Property settlement agreements divide a couple's assets as part of a concurrent dissolution. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.09 cmt. b (2000) [hereinafter PRINCIPLES OF FAMILY DISSOLUTION]. The timing of property settlement agreements means that they are negotiated at arm's length. *Id.* Therefore, these agreements do not raise the same types of bargaining problems created by pre- and postnuptial agreements and are not addressed in this Comment.

5. Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997); Mark Hanscn, *Split-Up Insurance*, A.B.A. J., Nov. 1999, at 30; *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996 (2003).

6. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 238 (1994).

7. See Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 232 (2001).

8. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 reporter's notes cmt. b ("[P]renuptial agreements will almost always be entered into between people with property or an income potential to protect on one side and people who are impecunious on the other.").

9. The impetus for the financially weaker party to sign in this case is to demonstrate the purity of his or her intentions—"I love you; I don't care about the money." Or it could be the simple and understandable "Please don't leave me."

Calculated exploitation by the financially stronger party is only one of the dangers of marital agreements. Both pre- and postnuptial agreements are also subject to the parties' cognitive limitations to bargaining, such as excessive optimism and the discounting of future benefits.¹⁰ These limitations are exacerbated in the context of marital agreements because, among other things, the parties love and trust one another, neither party knows what changes will take place during the marriage, and a divorce may never transpire.¹¹ Problems such as these raise difficult issues about the circumstances under which a marital agreement should be enforced.

B. *Deficiency in California Law*

Unfortunately, California law does not adequately address the enforcement issues stemming from marital agreements. Despite the similarities of the parties who enter into such agreements and the problems associated with bargaining for them, pre- and postnuptial agreements receive very different treatment under California law. The California Family Code devotes considerable attention to prenuptial agreements via the California UPAA,¹² and the state legislature recently amended it to make it more fair and predictable. However, there is no independent body of law that details the enforceability requirements of postnuptial agreements. In addition, a California appellate court recently ruled that the new protections of the California UPAA do not apply to postnuptial agreements.¹³ While consistent with the California UPAA's express terms, the decision's rationale is flawed, and its holding underscores a serious problem in this area of law. California's refusal to extend the UPAA's protections to married couples reflects an inconsistent and less than meticulous legislative approach. Thus, contrary to logic, a couple whose members owe each other a fiduciary duty can enter into a contract that would be per se unenforceable if the couple were unmarried. As more couples enter into postnuptial agreements, it becomes increasingly important that this difference be corrected.

However, mere amendment of the California UPAA would not sufficiently address the problems in California marital agreement law. This insufficiency stems from the UPAA's overly harsh contract law philosophy. While the legislature's amendment to the California UPAA has generally improved the law, it has not gone nearly far enough to protect the financially weaker spouse at the end of the marriage.

10. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

11. *Id.* at 254.

12. See CAL. FAM. CODE § 1600 (West 1994).

13. *In re Marriage of Friedman*, 122 Cal. Rptr. 2d 412 (Cal. Ct. App. 2002), *review denied*, No. S109408 (Cal. 2002).

Because the ALI's PFD recognizes that marital contracts are inherently different from commercial contracts and so provides additional protections to the parties, it would be a wiser choice to govern both pre- and postnuptial agreements. The PFD does an impressive job of balancing the goals of predictability¹⁴ and fairness,¹⁵ and should be adopted by the California legislature in place of the UPAA.

C. Roadmap

Part I of this Comment discusses the background and legal history of marital agreements. It begins with a broad overview of prenuptial agreements in this country and introduces the UPAA. Then it discusses the people who generally enter into such agreements and their reasons for doing so. It concludes with a description of the recent developments in California that led to the current state of postnuptial law, focusing on enforceability provisions.¹⁶ Part II describes the unique limitations of contracts in the marital context, introduces the PFD, and compares the PFD's and the California UPAA's enforceability provisions. Finally, after examining the goals of predictability and fairness that marital agreement law should aim to achieve, this Comment concludes that the PFD ought to be California's preferred source of law.

I

LEGAL BACKGROUND

A. History of Prenuptial Agreements Generally

1. National Development of the Law

Prenuptial agreements had a tenuous existence as early as the 1500s,¹⁷ but most commentators concur that their modern form began with the adoption of the Married Women's Property Acts in the second half of the nineteenth century.¹⁸ The Married Women's Property Acts gave women

14. In the interest of brevity, this Comment will use the term "predictability" to refer to the concept that one should have the freedom to draft a contract according to one's own wishes and to be able to expect that that contract will be enforced.

15. Similarly, this Comment will use the term "fairness" as a shorthand for fairness to the financially weaker party. This usage should not suggest to the reader a disinterest in the rights of the financially stronger party, but simply that those concerns are addressed in the predictability prong.

16. This Comment does not address the line of cases holding that a marital agreement must not violate public policy. *See, e.g.,* *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494 (Cal. Ct. App. 2002); *In re Marriage of Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1985).

17. Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 697 (2001).

18. *See, e.g.,* Suzanne D. Albert, *The Perils of Premarital Provisions*, R.I. B.J., Mar. 2000, at 5, 5; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65, 71 (1998). Albert's work lays out the early development of the law in greater depth than does this Comment; it is worth reading. However, Albert's article (which focuses on Rhode Island law) incorrectly characterizes *In re Marriage of Bonds*, an appellate court decision, as the California Supreme Court's decision. *See* Albert, *supra*, at 41; *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 753 (Cal.

ownership and control over their pre- and postmarital property and also the power to contract with prospective spouses.¹⁹ The Earning Statutes, adopted around the same time, allowed women to earn a wage outside the home and to receive it independent of their husbands, thus giving wives a far greater ability to contract.²⁰

Until relatively recently, however, courts considered any prenuptial agreement that “contemplated divorce” (as opposed to simply dissolution upon death) unenforceable as against public policy.²¹ The courts justified this characterization by asserting, among other rationales, that such agreements would cause marriage to lose its “dignity and sacredness,” lead to endless, minor litigation, and encourage the property-owning spouse to desert the other spouse.²² The courts also generally rejected prenuptial agreements that sought to displace legislation aimed at protecting the woman’s economic well-being.²³ Thus, the courts’ traditional, common law approach was to treat prenuptial agreements “with skepticism and outright paternalism.”²⁴

In 1970, this approach changed dramatically. Driven by a recognition of women’s de jure equality, the increasing numbers of women in the workplace, and the expanding emphasis on contractual freedom,²⁵ the Florida Supreme Court held in *Posner v. Posner* that prenuptial agreements contemplating divorce were no longer immediately void as contrary to public policy.²⁶ Other courts quickly followed suit, acting to make prenuptial agreements more easily enforceable. As a lower Florida court explained: “No longer will the courts in viewing antenuptial contracts invariably begin ‘with the realization that between persons in the premarital state there is a mystical, confidential relationship which anesthetizes the senses of the female partner.’”²⁷

Ct. App. 1999), *rev’d in part*, 5 P.3d 815 (Cal. 2000). This error is infinitely misleading, as the discussion *infra* Part I.B.2 makes clear.

19. Albert, *supra* note 18, at 5.

20. Silbaugh, *supra* note 18, at 71.

21. Albert, *supra* note 18, at 5. The line that California courts draw today is not at consideration of divorce, but at encouragement of it, consistently holding unenforceable agreements that by their terms facilitate or promote divorce or are otherwise counter to public policy. See, e.g., *Diosdado*, 118 Cal. Rptr. 2d at 496; *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872-73 (Cal. Ct. App. 1988); *Noghrey*, 215 Cal. Rptr. at 157 (“[T]he prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouses.”).

22. Marston, *supra* note 5, at 897.

23. Albert, *supra* note 18, at 5.

24. Marston, *supra* note 5, at 897.

25. Brod, *supra* note 6, at 253.

26. 233 So. 2d 381, 385 (Fla. 1970).

27. *Potter v. Collin*, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975) (citing Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 719 (1972)).

Legislators also joined in the shift from common law “paternalism” to a modern approach that increasingly treated prenuptial agreements like other contracts.²⁸ The promulgation of the Uniform Premarital Agreement Act in 1983 and its subsequent popularity with state legislatures²⁹ both reflected and facilitated the law’s transformation.³⁰ The UPAA was aimed at creating uniformity and increased enforceability.³¹ It standardized the concept of the prenuptial agreement as essentially an ordinary contract.³² In order for such an agreement to be unenforceable under the UPAA, the party challenging its validity must prove either that it was involuntary or both that it was unconscionable when executed and that the other party failed to disclose assets.³³ This test all but does away with courts’ discretion to assess the reasonableness of an agreement; the single exception is that if the agreement modifies or eliminates spousal support so as to cause one party to be eligible for public assistance, a court “may” modify the agreement to address this unfairness.³⁴ This exception notwithstanding, the UPAA’s strict, contractual-freedom approach means that contracting parties can be assured that courts will find enforceable most of the agreements under it.

The change in attitudes toward prenuptial agreements is further reflected by the 1990 case of *Simeone v. Simeone*.³⁵ In that case, an unemployed twenty-three-year-old nurse (wife) married a thirty-nine-year-old neurosurgeon (husband) and signed a prenuptial agreement on the eve of her wedding.³⁶ Upon divorce, the wife argued that the agreement was void

28. Brod, *supra* note 6, at 253. Albert and others suggest that this reflected an “overly optimistic picture of women’s status” in the years leading up to the UPAA’s enactment. Albert, *supra* note 18, at 7.

29. While the UPAA came out in 1983, it was adopted by different states at different times. California, for example, adopted it in 1985. As of 2002, the UPAA had been adopted in whole or in part in twenty-six states. UNIF. PREMARITAL AGREEMENT ACT references & annotations, 9C U.L.A. 35 (2001) (Table of Jurisdictions Wherein Act Has Been Adopted).

30. *But see* Elizabeth Barker Brandt, *The Uniform Premarital Agreement Act and the Reality of Premarital Agreements in Idaho*, 33 IDAHO L. REV. 539, 543 (1997) (“It was not at all clear at the time the UPAA was drafted that the freedom of contract view would emerge as the predominant view if states were left to sort out the enforcement issues without the help of a uniform act.”); *see also* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 147 (1993).

31. Marston, *supra* note 5, at 899.

32. *Id.*; *see also* Alex Shukhman, *Show Her the Money: The California Court of Appeal’s Mistake Concerning In re Marriage of Bonds*, 20 LOY. L.A. ENT. L. REV. 457, 466 (2000). *But see Developments in the Law—The Law of Marriage and Family*, *supra* note 5, at 2079, for the proposition that while the UPAA treats prenuptial agreements similarly to ordinary contracts, it does include some limitations on the parties’ ability to contract. For example, section 3 limits the subject matter of a contract to issues “not in violation of public policy.” *Id.* (quoting UNIF. PREMARITAL AGREEMENT ACT § 3(a)(7), 9C U.L.A. 36 (1983)).

33. UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48-49 (2001).

34. *Id.* § 6(b).

35. 581 A.2d 162 (Pa. 1990).

36. *Id.* at 163.

because it was unreasonable and formed under duress.³⁷ In support of this claim, she asserted that she had not understood the agreement and could not have sought the advice of counsel at the time she first viewed the agreement without the “trauma, expense, and embarrassment of postponing the wedding.”³⁸ The court was unconvinced, reasoning that “[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded,” and that “[p]renuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.”³⁹

By the early 1990s, then, the ideal of contractual freedom in prenuptial agreements had overtaken that of protecting the vulnerable spouse in courts and legislatures throughout the country.

2. *The Purpose of Prenups: Why and Who*

Before delving into California’s own development of prenuptial agreement doctrine, it makes sense to pause briefly and elaborate on the general nature of these agreements.

A useful way of understanding why a couple might enter into a marital agreement is to begin with the premise that every couple enters into a contract automatically upon marriage—a marriage contract whose terms are dictated in a cookie-cutter manner by the state, with no input from the couple.⁴⁰ A marital agreement is a way of tailoring that contract so that it reflects the individuals’ unique circumstances.

The circumstances that may motivate a couple to enter into a marital agreement are sundry and probably endless. Married couples may wish to enter into such an agreement if one spouse is likely to inherit property or start her own business.⁴¹ Spouses may wish to minimize the potential for a bitter divorce by attempting to ensure that there is nothing to fight over if and when the marriage ends.⁴² Couples may believe that the process of drafting the agreement is a beneficial exercise in and of itself, one that elicits frank discussion of sometimes difficult issues.⁴³ Another common motivation is a desire to keep assets as separate property during marriage and

37. *Id.* at 167.

38. *Id.*

39. *Id.* at 165. The decision in *Simeone* was not unanimous; indeed, Justice McDermott dissented strongly. *See id.* at 168-72 (McDermott, J., dissenting).

40. Marston, *supra* note 5, at 901.

41. *See* Tamar Lewin, *Among Nuptial Agreements, Post- Has Now Joined Pre-*, N.Y. TIMES, July 7, 2001, at A1.

42. Pamela E. George, *Can a Woman of the 90’s Have It All? Or, Is She Once Again Faced with That Age Old Question—“What’s A Girl To Do?”*, J. AM. ACAD. MATRIMONIAL L., Spring 1992, at 73, 75 (citing *Breaking the Divorce Cycle*, NEWSWEEK, Jan. 13, 1991, at 48).

43. Albert, *supra* note 18, at 6.

have greater control over their distribution when the marriage ends.⁴⁴ Finally, one author has suggested that the fact that “everyone has some property,” coupled with a high divorce rate, should be sufficient motivation to enter into a marital agreement.⁴⁵

Yet clearly, not everyone enters into a marital agreement. The ability and inclination to form a marital contract that reflects one’s unique life circumstances more accurately than a state template vary for individuals with different experiences and characteristics.⁴⁶ For example, an individual’s involvement with divorce can affect a decision to enter into a marital agreement. The emergence of a nationwide “divorce culture”⁴⁷ may help to explain the increasing use of these agreements. Adult children of divorced parents may be particularly prone to caution when contemplating marriage, using pre- or postnuptial agreements as a kind of safeguard.⁴⁸ Further, what little evidence there is on marital agreement demographics suggests that the group most likely to either request or face signing a prenuptial agreement consists of individuals who have themselves gone through a past divorce.⁴⁹ That as of 1997 over 40% of marriages were “second or higher-order” marriages for one or both of the parties, and that 60% of these marriages ended in divorce, makes this assertion all the more noteworthy.⁵⁰

Potentially related to, but distinct from, the factor of second or higher-order marriage is the wealth factor.⁵¹ The drafting of pre- or postnuptial agreements can be expensive, particularly where a separate counsel requirement means the hiring of two attorneys per couple. Admittedly, a strong argument can be made that these agreements are “no longer the exclusive domain of the rich or the famous.”⁵² However, the expense of

44. *Id.* at 5.

45. Robert J. Nachshin, *Prenuptial and Postnuptial Agreements*, GPSOLO, Oct./Nov. 2001, at 54, 55. Incidentally, Nachshin served as attorney for Barry Bonds in his famous prenuptial agreement case, discussed *infra* Part I.B.2.

46. This may involve interesting racial and cultural distinctions. However, the paucity of empirical research on who, exactly, enters into marital agreements extends to these factors as well.

47. See generally BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1998) (analyzing divorce as a now-entrenched component of American life).

48. George, *supra* note 42, at 75 (citing *Breaking the Divorce Cycle*, *supra* note 42).

49. *Id.* at 73 (citing Lisa J. Moore, *The Art of the (Marriage) Deal*, U.S. NEWS & WORLD REP., Mar. 5, 1990, at 68). The Prefatory Note of the UPAA lists prior marriage experience as a cause of the increasing rate of prenuptial agreements. See UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 36 (2001).

50. See Marston, *supra* note 5, at 891 (citations omitted).

51. See Brod, *supra* note 6, at 243-48 (inferring such a relationship based on the confluence of two ideas: that second or higher-order grooms tend to be older than their wives and that “age is a proxy for accumulated wealth and business experience”).

52. *Id.* at 231.

these contracts⁵³ likely precludes many couples from forming pre- or post-nuptial contracts.

The second and more telling way in which wealth influences the decision of whether to enter into such an agreement is that while "everyone has some property," not everyone views his or her property as valuable enough to warrant protection from the state's distributive scheme. It should be no surprise that prenuptial agreements may be less common among couples entering into a marriage with few or comparable assets. As one commentator found, "the purpose and effect of most prenuptial agreements is to protect the wealth and earnings of an economically superior spouse from being shared with an economically inferior spouse."⁵⁴ Presuming that most prenuptial agreements in California involve the waiver of community property rights, the necessary corollary to that statement is that the economically weaker spouse is adversely affected by the agreement's enforcement.⁵⁵

B. California Legal Background

California is a community property state, which means that all real or personal property acquired by either spouse during the marriage belongs to the couple together from the time it is earned.⁵⁶ Marital agreements in California generally function to replace the community property system with one of the couple's own design.

As is the case with the subject's national development, there is no discrete history of Californian postnuptial agreement law. There are, however, a few sections of the Family Code that clearly pertain to postnuptial agreements. These are, chiefly, section 721 and section 850. Section 721 allows either spouse to enter into any transaction respecting property with the other which they might enter into if they were unmarried; it also makes clear that spouses owe each other a fiduciary duty.⁵⁷ Section 850 and its related provisions allow married persons to transmute their property,⁵⁸ requiring only that the transmutation be in writing and include "an express

53. A 1997 article suggests that the cost of these agreements generally ranges between \$1,000 and \$5,000, and can be as high as \$25,000. Marston, *supra* note 5, at 892 (citations omitted). Since then, these numbers may have gone up.

54. Brod, *supra* note 6, at 234. See also PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 reporter's notes cmt. b.

55. In addition, folk wisdom, reported cases, and national statistics on the feminization of poverty suggest that one may usually substitute the words "richer man" for "economically superior spouse" and "poorer woman" for "economically inferior spouse." See Brod, *supra* note 6, at 248 (citing, among other sources, Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 121-22 & nn.2-4 (1987)); Bix, *supra* note 7, at 232.

56. CAL. FAM. CODE § 760 (West 1994).

57. *Id.* § 721(a)-(b).

58. Transmutation can be in any of three forms: (a) from community property to separate property of either spouse; (b) from separate property of either spouse to community property; or (c) from separate property of either spouse to separate property of the other spouse. *Id.* § 850.

declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.”⁵⁹ Transmutation is a common component of postnuptial agreements, but this latter provision does not cover the breadth of contractual possibilities.

The salient point is that these two sections do not include specific, functional requirements as to the enforceability of postnuptial agreements. In contrast to its tangential treatment of postnuptial agreements, the Family Code section on marital agreements is composed almost entirely of the California UPAA, which as its name suggests—and an appellate court has confirmed⁶⁰—governs prenuptial agreements exclusively.⁶¹

1. Adoption of the UPAA

In 1985, California became the first state to adopt the UPAA.⁶² While the state thus joined the national trend toward contractual autonomy, it refrained from adopting the Act and its freedom of contract philosophy unrereservedly. Instead, the legislature omitted UPAA sections 3(a)(4) and 6(b), which allowed for prenuptial modification or waiver of spousal support.⁶³ With these exceptions, California embraced the UPAA as a means of standardizing the law and enhancing the enforceability of prenuptial agreements.⁶⁴

Two sections of the California UPAA are fundamental. The first is section 1612, which sets out a seven-item list of subject matter that a prenuptial agreement may address.⁶⁵ For our purposes the most relevant is (3): “[t]he disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.”⁶⁶ The

59. *Id.* § 852(a).

60. *In re Marriage of Friedman*, 122 Cal. Rptr. 2d 412 (Cal. Ct. App. 2002), *review denied*, No. S109408 (Cal. 2002).

61. The Act defines prenuptial agreements as “between prospective spouses made in contemplation of marriage and to be effective upon marriage.” CAL. FAM. CODE § 1610(a) (West 1994). Comments to the model UPAA reinforce the exclusion of postnuptial agreements. UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 48-49 (2001) (stating “nor does the Act provide for postnuptial or separation agreements”).

62. UNIF. PREMARITAL AGREEMENT ACT references & annotations, 9C U.L.A. 35 (2001) (Table of Jurisdictions Wherein Act Has Been Adopted).

63. Charlotte K. Goldberg, “*If It Ain’t Broke, Don’t Fix It*”: *Prenuptial Agreements and Spousal Support Waivers in California*, 33 LOY. L.A. L. REV. 1245, 1245-46 (2000). The court in *In re Marriage of Pendleton*, 5 P.2d 839 (Cal. 2000), analyzed this issue at length. This Comment discusses *Pendleton* *infra* Part II.B.2.

64. See *In re Marriage of Bonds*, 5 P.3d 815, 832 (Cal. 2000).

65. CAL. FAM. CODE § 1612 (West 1994).

66. *Id.* § 1612(a)(3). While the issues surrounding the regulation of nonfinancial matters during marriage (such as who does what chores on what nights of the week) are infinitely variable and occasionally humorous, they are also beyond the scope of this Comment. Recommended reading includes LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981), particularly chapter ten, *The Case for Intimate Contracts*.

second main California UPAA provision is section 1615. This “key operative section”⁶⁷ details the enforcement of prenuptial agreements.

Section 1615 contains three critical components. First, the burden of proving that an agreement is unenforceable belongs to the party “against whom enforcement is sought.”⁶⁸ Presumably this is the financially weaker party.

Second, one of the two ways a court may rule an agreement unenforceable is for the challenger to prove that it was involuntary.⁶⁹ The original UPAA, section 6, does not specify what “voluntarily” means, either in the prefatory note or the comments to this section.⁷⁰ The comments do say (without specific reference to the voluntary prong) that the absence of independent counsel is not determinative, but “may well be a factor in determining whether the conditions stated in section 6 may have existed.”⁷¹

Absent a more specific definition, general contractual principles govern. As Judith Younger writes, “[t]he inquiry into voluntariness begins as a common law review for fraud, overreaching, or sharp dealing.”⁷² The bar for proving these is quite high, and so the Act makes establishment of involuntariness next to impossible. This is particularly so if the parties retained separate counsel for execution, but even a simple clause in the contract indicating that it was entered into voluntarily will make a showing of involuntariness difficult.⁷³ Whether or not the agreement was truly voluntary, it would be hard to contest a clause attesting to its voluntary nature.

Finally, the other way for a challenger to prove an agreement unenforceable under the California UPAA is to prove that the agreement was both unconscionable at the time it was executed and that there was a lack of disclosure by the other party of property or financial obligations prior to execution.⁷⁴ Courts evaluate the unconscionability prong retrospectively, evaluating the contract’s fairness at the time it was executed.⁷⁵ The comments to section 6 of the UPAA again make clear that contract principles reign: the drafters explain that the standard for unconscionability is not novel, but is the same as is used in contract law, entailing protection from one-sidedness, oppression, and unfair surprise.⁷⁶

67. UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 48-49 (2001).

68. CAL. FAM. CODE § 1615(a) (West 1994).

69. *Id.* § 1615(a)(1).

70. The comments reference case law in certain states but do not endorse any particular definition provided by the case law. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9C U.L.A. 48-49 (2001).

71. *Id.*

72. Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, J. AM. ACAD. MATRIMONIAL L., Spring 1992, at 1, 19-20.

73. See George, *supra* note 42, at 84.

74. CAL. FAM. CODE § 1615(a)(2) (West 1994). The drafters even cite to section 2-302 of the Uniform Commercial Code, the epitome of contract law. *Id.*

75. *Id.* § 1615(a)(1)-(2).

76. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9C U.L.A. 48-49 (2001).

Each contracting party may satisfy the disclosure prong through actual disclosure, waiver of disclosure, or actual or constructive knowledge of the other party's property and financial obligations. In practice, this means that an astute attorney may need only include "waiver of disclosure" language in every agreement she drafts in order to preempt a challenger's claim under 1615(a)(2).⁷⁷ It also means that under the UPAA, a court may enforce an irrefutably unconscionable agreement provided it meets the disclosure requirement.⁷⁸ Bion M. Gregory, the chairman of the group that drafted the UPAA, asserted pointedly, "If you have a fair and reasonable disclosure, we feel you ought to have a contract which is enforceable, even though it's a contract that a hundred other people would not have entered into."⁷⁹ This statement and the law that it comments upon reflect a goal of increasing the enforceability of prenuptial agreements, so long as they steer clear of obvious contractual pitfalls like coercion, duress, and fraud.⁸⁰

2. *The UPAA in Practice: Bonds and Pendleton*

The strict enforcement provisions of the UPAA ultimately proved too harsh for California. Two California Supreme Court cases, issued on the same day in 2000, served as the catalyst for a legislative softening of the law. The first was *In re Marriage of Bonds*.⁸¹ In *Bonds*, professional baseball player Barry Bonds sought to enforce a prenuptial agreement against his former wife, Sun, upon divorce.⁸² Although many of the facts were disputed in that case, the general circumstances were as follows: Sun had emigrated from Sweden in 1985; she and Barry met in 1987; and in January 1988 the two decided to marry.⁸³ Whether or not Sun knew about or consented to the agreement beforehand, or understood it at the time of execution, she signed it the night before her wedding.⁸⁴ She did not have separate counsel.⁸⁵

Basing its decision largely on the credibility of the witnesses (and, in doing so, favoring Barry), the trial court held that Sun had entered into the agreement "free from the taint of fraud, coercion and undue influence."⁸⁶

77. George, *supra* note 42, at 85.

78. See Albert, *supra* note 18, at 36 ("The practical effect of these provisions will be to validate almost every (unconscionable) agreement.").

79. *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783, 818 (Cal. Ct. App. 1999) (Ruvolo, J., concurring and dissenting) (citing *Committee Proceedings Re Uniform Antenuptial Agreements Act*, 1983 NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 54), *rev'd in part*, 5 P.3d. 815 (Cal. 2000).

80. See *id.*

81. 5 P.3d 815 (Cal. 2000).

82. *Id.* at 816.

83. *Id.* at 817.

84. *Id.* at 818.

85. *Id.* at 819.

86. *Id.*

The appellate court reversed, holding that the trial court did not attribute enough significance to Sun's lack of counsel in the face of Barry's two attorneys and his agent.⁸⁷ In reaching this holding, the appellate court considered Sun's lack of income, dependence on Barry, and probable lack of awareness and understanding of her right to, and need of, separate counsel.⁸⁸ A law review article written in response to the *Bonds* appellate court decision criticized the court for creating a heightened standard in contradiction of the UPAA, arguing that there is no independent counsel requirement under the Act.⁸⁹

Indeed, when the California Supreme Court reversed the appellate court's holding, it did so in large part because it found that lack of independent counsel is "only one of several factors that must be considered" in assessing voluntariness.⁹⁰ It held that the appellate court had erred in applying strict scrutiny to the agreement merely because Sun had not been represented by independent counsel.⁹¹ Moreover, the court concluded that the trial court was justified in finding that Sun had entered into the agreement voluntarily.⁹² Finally, the California Supreme Court held that while prospective spouses "morally owe" one another a duty of fair dealing, the legislature did not intend that voluntariness in prenuptial agreements be assessed in light of the strict fiduciary duties imposed on persons like lawyers, or (pursuant to Family Code section 721) married couples.⁹³ The agreement, denying Sun a share of Barry's considerable earnings during their marriage, was enforced.⁹⁴

The other case that prompted California's rethinking of prenuptial agreements was *In re Marriage of Pendleton*.⁹⁵ In *Pendleton*, Candace Pendleton sought spousal support upon divorce in spite of a prenuptial agreement in which she and husband Barry Fireman forever waived any right either had to such support.⁹⁶ Both had been represented by independent counsel, and the agreement indicated that both had read and understood the contract's legal consequences.⁹⁷ The court's analysis centered on the California legislature's decision (made prior to this agreement's execution) not to adopt the provision of the UPAA that expressly permitted parties to

87. *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783, 809 (Cal. Ct. App. 1999), *rev'd in part*, 5 P.3d 815 (Cal. 2000).

88. *Id.* at 807.

89. *See* Shukhman, *supra* note 32, at 486.

90. *Bonds*, 5 P.3d at 817.

91. *Id.* at 816-17.

92. *Id.* at 817.

93. *Id.* at 832.

94. *Id.* at 838.

95. 5 P.3d 839 (Cal. 2000).

96. *Id.* at 840.

97. *Id.*

a prenuptial agreement to modify or eliminate spousal support contractually.

The trial court ruled that waiver of spousal support was against public policy, and therefore unenforceable.⁹⁸ The appellate court reversed, reading the legislature's rejection of the UPAA spousal support provisions as an acknowledgment that the assessment of spousal support waivers fell within the province of the judiciary.⁹⁹ The appellate court then had to determine whether, under section 1612(a)(7), spousal support waivers fell under the heading of a "violation of public policy."¹⁰⁰ It found that the current state of family law had shifted such that the courts should no longer per se prohibit spousal support waivers or limitations.¹⁰¹

The California Supreme Court affirmed the appellate court's ruling, agreeing that "[t]he most reasonable understanding of the legislature's [omission was] that it was satisfied with the evolution of the common law . . . and intended to permit that evolution to continue."¹⁰² The court then found that the common law practice of barring prenuptial spousal support waivers was "anachronistic,"¹⁰³ and that the adoption of the UPAA and the improved condition of married women in contemporary California pointed to a need to update public policy.¹⁰⁴ Finally, it held that "no public policy is violated" by enforcing a prenuptial spousal support waiver made by intelligent, well-educated, financially secure people who are represented by counsel, and declared the agreement valid.¹⁰⁵ In dissent, Justice Kennard noted that "the inequities that may result from premarital spousal support waivers are much graver than those that may result from a premarital waiver of community property rights."¹⁰⁶ That is to say, if community property rights are modified or eliminated by contract, a judge can still protect the financially weaker spouse if that judge has discretion over spousal support.

Bonds and *Pendleton* increased enforceability of prenuptial agreements at the expense of financially more vulnerable spouses. Barry Fireman's attorney declared that the California Supreme Court "has strongly indicated that a more favorable judicial climate lies ahead regarding the allowable scope of premarital agreements as well as the factual circumstances under which they will be enforced."¹⁰⁷ Applauding the increased enforceability in California, Barry Bonds's attorney

98. *Id.* at 840-41.

99. *Id.* at 841.

100. *Id.* at 848.

101. *Id.* at 847-48.

102. *Id.* at 845.

103. *Id.*

104. *Id.* at 847-48.

105. *Id.* at 848.

106. *Id.* at 851 n.3 (Kennard, J., dissenting).

107. Dennis Wasser, *Prenuptial Disagreements*, L.A. LAW., Dec. 2000, at 26, 26.

announced, “the Supreme Court is trying to make it easier for people to enter into prenuptial agreements as consenting adults.”¹⁰⁸

3. *The Legislature’s Fix to the UPAA*

The California legislature did not share these attorneys’ glee. Less than five months after the supreme court’s decisions in *Pendleton* and *Bonds*, Senator Sheila Kuehl proposed Senate Bill 78 (SB 78), which responded directly to the decisions by addressing the enforceability of spousal support provisions and the requirements for voluntariness under the California UPAA.¹⁰⁹ Of *Pendleton*, Senator Kuehl asserted that the state’s highest Court had “fundamentally misinterpreted” the legislature’s intent in regards to spousal support; the bill was to make this intent explicit.¹¹⁰ The bill answered *Bonds* “head on” by explaining the circumstances that must exist for a court to determine that an agreement was made voluntarily.¹¹¹ The bill passed quickly and with much support: the votes were 61-6 in the Assembly; 39-0 in the Senate.¹¹² Some practitioners complained that the bill moved through the legislature with “so little fanfare” that lobbyists for and against it did not have time to prepare a thorough lobby to Governor Gray Davis.¹¹³ Their complaints notwithstanding, the governor signed the bill into law within two weeks of its arrival on his desk.¹¹⁴

SB 78 amended California’s version of the UPAA in the area of spousal support by adding subsection (c) to section 1612. Although Senator Kuehl initially sought to ban spousal support waivers entirely,¹¹⁵ the compromise that ultimately passed limited such waivers in two ways. It first declared unenforceable a spousal support waiver for which the challenging party was not represented by independent counsel at execution.¹¹⁶ It next made unenforceable spousal support waivers that are unconscionable at the time of enforcement.¹¹⁷

108. Peter Blumberg, *Supreme Court Rules in Favor of Barry Bonds*, L.A. DAILY J., Aug. 22, 2000, at 1.

109. S.B. 78, 2001 Leg., Reg. Sess. (Cal. 2001); see John G. Gherini, *The California Supreme Court Swings and Misses in Defining the Scope and Enforceability of Premarital Agreements*, 36 U.S.F. L. REV. 151, 170 (2001).

110. Gherini, *supra* note 109, at 170.

111. *Id.*

112. *Id.* at 170 n.162.

113. Hudson Sangree, *Bill Restricting Prenups Passes State Assembly*, L.A. DAILY J., Aug. 28, 2001, at 1, 9.

114. Gherini, *supra* note 109, at 170.

115. Sangree, *supra* note 113, at 9.

116. CAL. FAM. CODE § 1612(e) (West 1994).

117. *Id.*

SB 78 also clarified and expanded the definition of “voluntary” in response to the *Bonds* holding.¹¹⁸ The new subsection 1615(c) states that a court will presume that a prenuptial agreement was executed *involuntarily* unless the court finds all of the following:

- (1) the party against whom enforcement is sought was represented by independent legal counsel or expressly waived separate counsel in writing after being advised otherwise;
- (2) not less than seven days passed between the time that party was presented with the agreement and the time the agreement was signed;
- (3) the party against whom enforcement is sought, if unrepresented, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up;
- (4) the prenuptial agreement was not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement;
- (5) any other factors the court deems relevant.¹¹⁹

By introducing these elements into a court’s voluntariness inquiry, the legislature weighed in heavily in favor of fairness to the weaker spouse. The fifth clause in particular, “any other factors the court deems relevant,” provides the courts broad discretion to assess fairness. The amendment may also have a dramatic effect on the burden of proof. Section 1615(a) still provides that the “party against whom enforcement is sought” must prove that he or she did not execute the agreement voluntarily.¹²⁰ Yet by adding subsection 1615(c), which introduces the presumption that an agreement is involuntary unless certain requirements are met, the legislature seems to have discretely shifted the burden of proving voluntariness to the party seeking enforcement.¹²¹

Such developments, which make it more difficult to enforce prenuptial agreements, did not please everyone. “I’d like the law to make people behave as grown-ups and not (treat) them like little children,” declared attorney Robert Nachshin, “I don’t think women need extra protection—they’re smart and savvy.”¹²² In another forum, Nachshin complained of SB 78’s burden-shifting, and, foremost, of the catchall fifth protection, about

118. See Jim Sanders, *Law Aims to End Bonds-Like Prenups*, SACRAMENTO BEE, Oct. 28, 2001, at A3.

119. CAL. FAM. CODE § 1615(c)(1)-(5) (West Supp. 2003) (paraphrased).

120. *Id.* § 1615(a).

121. *But see* Philip G. Seastrom & Brian G. Seastrom, *Drafting and Litigating Premarital Agreements*, ORANGE COUNTY LAW., July 2003, at 44, 49 (arguing that the amendment leaves the burden of proof question unanswered).

122. Sanders, *supra* note 118, at A3.

which he posed the question, “What does that mean?”¹²³ Other commentators raised additional concerns. The requirement that a party be “fully informed” does not require that the party actually understand the agreement; it is therefore unclear what a practitioner must do to fulfill his or her duty of disclosure to the unrepresented party.¹²⁴ Furthermore, the requirement that an attorney for one spouse “fully inform[]” the unrepresented spouse presents potential problems with regard to dual representation, as well as the ethical obligations of attorneys to be loyal to their clients.¹²⁵ Observers also questioned when the seven-day waiting period commences, finding the term “first presented with the agreement” troublingly malleable.¹²⁶

As discussed in the next section, recent litigation revealed an additional shortcoming of SB 78 and the current Family Code that warrants immediate legislative action.

4. *Postnuptial Agreements and the UPAA: Friedman*

By its terms, the California UPAA only applies to prenuptial agreements.¹²⁷ SB 78 did not expressly change these terms. *In re Marriage of Friedman*,¹²⁸ decided in 2002, was the first California appellate case to address whether the amended Family Code section 1615 nevertheless implicitly applied to postnuptial agreements.

The background facts of *Friedman* began developing in December 1990, when Jill, an attorney, met and fell in love with Keith, who had just sailed around the world and wanted to start a forensic consulting firm.¹²⁹ Weeks later, doctors diagnosed Keith, who had no health insurance, with leukemia.¹³⁰ Although Keith’s initial thought was to “go off sailing again and just die,” the couple decided instead to marry so that Keith’s cancer treatment could be covered by Jill’s insurance.¹³¹ The couple married in January 1991.¹³² Within days, Keith contacted his attorney about drafting a postnuptial agreement; Keith’s goal was to protect Jill from creditors if he did not survive the medical treatment.¹³³ The attorney drafted the agreement—which declared that the parties’ individual income, business

123. Robert J. Nachshin, *New Law Makes Prenuptial Agreements Too Vulnerable*, L.A. DAILY J., Nov. 26, 2001, at 6.

124. See Gherini, *supra* note 109, at 172-73.

125. *Id.* at 173; see also Seastrom & Seastrom, *supra* note 121, at 50.

126. Seastrom & Seastrom, *supra* note 121, at 49-50.

127. CAL. FAM. CODE § 1610(a) (West 1994).

128. 122 Cal. Rptr. 2d 412 (Cal. Ct. App. 2002), *review denied*, No. S109408 (Cal. 2002).

129. *Id.* at 414. Jill is an insurance defense lawyer. Appellant’s Opening Brief at 27, *Friedman* (No. B151847).

130. *Friedman*, 122 Cal. Rptr. 2d at 414.

131. *Id.*

132. *Id.*

133. *Id.*

property, and debts would be separate property¹³⁴—and the couple signed it.¹³⁵ Keith recovered from the leukemia, and in time his forensic consulting firm “flourished beyond [the couple’s] dreams.”¹³⁶ In May 2000, the parties divorced, and Jill claimed that the postnuptial agreement was invalid.¹³⁷ The dispute was centered upon the circumstances of the agreement’s drafting and execution.

Keith’s law firm did some estate-planning work for Keith and Jill contemporaneously with its work on the postnuptial agreement.¹³⁸ Jill asserted that this work led her to believe that she was a client of the firm and that no one at the law firm ever indicated otherwise.¹³⁹ When the firm billed the couple for its work at the beginning of 2001, the invoices bore only Keith’s name, but the billing entries showed both Keith and Jill as receiving services.¹⁴⁰ Jill claimed that the firm failed to: (1) get a waiver for its conflict of interest, (2) advise the couple of its fiduciary duties to one another, (3) ascertain that the parties disclosed their assets, (4) explain to Jill the rights at stake in the postnuptial agreement, and (5) advise Jill to seek independent counsel.¹⁴¹

Keith and the law firm asserted that the postnuptial agreement was valid because Jill quite obviously represented herself when she reviewed and signed it.¹⁴² In support of this contention, they produced a letter dated February 7, 1991, which accompanied the mailing of a draft agreement. In the letter, Keith’s attorney wrote, “I, and my firm, can only represent Keith Since Jill is an attorney, I presume that she will review the documents herself, or to the extent she chooses, have them reviewed by an attorney of her choice.”¹⁴³ In addition, Keith pointed to the agreement itself, which included the language, “Jill is acting as her own legal counsel.”¹⁴⁴

Despite Jill’s claims that she never saw the February 7 letter and that the recitals in the postnuptial agreement were false, the trial court found that the law firm represented both parties “on the estate plan but not the postnuptial agreement.”¹⁴⁵ The court ruled that the language in the postnuptial agreement regarding Jill’s self-representation constituted a “clear waiver” of the firm’s representation, despite Jill’s assertions that such a

134. *Id.*

135. *Id.* at 415.

136. *Id.*

137. *Id.*

138. Appellant’s Opening Brief at 6, *Friedman* (No. B151847).

139. *Id.*

140. *Id.* at 9.

141. *Id.* at 8.

142. Respondent’s Brief at 1, *Friedman* (No. B151847).

143. *Friedman*, 122 Cal. Rptr. 2d at 415.

144. *Id.*

145. *Id.* at 416.

waiver did not satisfy California Rule of Professional Conduct 3-310(c).¹⁴⁶ Moreover, the court stated that Jill was “a bright woman,”—“a trained attorney”—who had signed the agreement “freely, voluntarily, intelligently with superior knowledge of the law and the rights that she was relinquishing.”¹⁴⁷ Jill appealed the trial court’s enforcement of the agreement.

Remarking that “[j]udicial erasure of a competent adult’s signature on an agreement does not serve the purpose of the law of contracts,” the appellate court affirmed the trial court’s holding.¹⁴⁸ Although Jill did not raise the argument at trial, she argued on appeal that the agreement was not enforceable, under or by analogy to Family Code section 1615.¹⁴⁹ On that point, after describing *Bonds* and the effect of SB 78, the court declared:

Wife’s reliance on Family Code 1615 is misplaced. *This section does not govern postnuptial agreements.* Premarital agreements are not interpreted and enforced under the same standards as interspousal agreements. *See In re Marriage of Bonds*, [5 P.3d 815, 831 (Cal. 2000)]. It is well settled that property settlement agreements occupy a favored position in California. *See, e.g., [In re Marriage of Egedi*, 105 Cal. Rptr. 2d 518, 522 (Ct. App. 2001)].¹⁵⁰

This holding, while potentially *not* fundamental to the ultimate outcome in *Friedman*, nonetheless is quite troubling both as legal argument and as precedent. The court’s statement that Family Code section 1615 does not govern postnuptial agreements was certainly supported by language in the UPAA Prefatory Note and elsewhere,¹⁵¹ and it conclusively slammed the door on postnuptial application of the amended section 1615. Yet, rather than rest upon the textual basis for its holding, the court supported it with two somewhat illogical statements.

First, the court cited *Bonds* for the proposition that prenuptial agreements and postnuptial agreements are interpreted and enforced under different standards, but failed to note the court’s rationale for the different treatment. The California Supreme Court in *Bonds* did distinguish between pre- and postnuptial agreements,¹⁵² but it did so on the basis that postnuptial agreements are in fact entitled to *more* protections than prenuptial agreements, due to married couples’ fiduciary relationships.¹⁵³ The

146. Respondent’s Brief at 15, *Friedman* (No. B151847). California Rule of Professional Conduct 3-310 is entitled *Avoiding the Representation of Adverse Interests*; it was relevant to Jill’s claim that she was a client at the firm and that the firm knew that she and Keith had adverse interests. Appellant’s Opening Brief at 21, *Friedman* (No. B151847).

147. *Friedman*, 122 Cal. Rptr. 2d at 415.

148. *Id.* at 414.

149. Appellant’s Opening Brief at 31-33, *Friedman* (No. B151847).

150. *Friedman*, 122 Cal. Rptr. 2d at 417-18 (emphasis added).

151. *See* UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 48-49 (2001).

152. *In re Marriage of Bonds*, 5 P.3d 815, 831 (2000).

153. *Id.*

Friedman court thus turns *Bonds*'s pre- and postnuptial distinction on its head.

The second misleading statement in the *Friedman* court's section 1615 rationale is that "property settlement agreements occupy a favored position in California," a proposition for which the court cites *In re Marriage of Egedi*.¹⁵⁴ It is unclear what the court meant by including this statement, but a likely interpretation is that the statement reflects a fundamental misunderstanding about the different types of marital agreements. At issue in *Egedi* was a property settlement agreement in which an attorney acted as scrivener for a couple dividing their assets at the time of divorce.¹⁵⁵ This is a far different set of circumstances than a newlywed couple drafting a postnuptial agreement. Postnuptial agreements have much more in common with prenuptial agreements (both involve the planning for distribution of assets in the case of dissolution) than with property settlement agreements (which involve actual arm's-length division at the time of dissolution).¹⁵⁶ The comment that courts favor property settlement agreements, while accurate, is irrelevant when the case at issue does not include a property settlement agreement. Thus, the *Friedman* court's reference to and reliance on *Egedi* is a muddying of the doctrinal waters.

Under the heading of "Final Observations," the *Friedman* court stated that its mission had been to evaluate the legality of postnuptial agreements at the time of execution, and that "subsequent events" are irrelevant.¹⁵⁷ This remark may have been a response to Jill's argument that, although SB 78 was codified after the *Friedmans* executed their agreement, the law should be applied retroactively.¹⁵⁸ It is unclear. What is clear, leaving aside the unfortunate case of Jill and Keith *Friedman*, is that the protections that the legislature endeavored to add with SB 78 for parties entering into prenuptial agreements are not available to those who enter postnuptial agreements, and that the *Friedman* court's rationale for so finding is neither compelling nor cogent.¹⁵⁹ Further, the *Friedman* court's unwillingness to apply section 1615's protections to postnuptial agreements contravenes the *Bonds* court's reiteration of the principle that parties to postnuptial agreements, as fiduciaries, owe each other a higher duty of care than

154. *Friedman*, 122 Cal. Rptr. 2d at 417-18 (citing *In re Marriage of Egedi*, 105 Cal. Rptr. 2d 518, 522 (Cal. Ct. App. 2001)).

155. *Egedi*, 105 Cal. Rptr. 2d at 520.

156. See Mitchell A. Jacobs & David L. Marcus, *Prenuptial Agreement Statutes Don't Cover Postnuptial Pacts*, L.A. DAILY J., Aug. 13, 2002, at 7 (reasoning that "the [*Friedman*] postmarital agreement was not an agreement settling a pending divorce action, the enforcement of which the law may favor in order to reduce litigation").

157. *Friedman*, 122 Cal. Rptr. 2d at 418.

158. Appellant's Opening Brief at 33, *Friedman* (No. B151847).

159. See Jacobs & Marcus, *supra* note 156, at 7 ("It would seem that the protections that the Legislature found were needed to protect potential spouses before marriage would apply with greater force after the marriage.").

unmarried couples. The California Supreme Court denied review of *Friedman* on October 16, 2002, and in so doing missed an important opportunity to clarify and improve upon the protections available to parties in postnuptial agreement law.

II

ANALYSIS AND SOLUTION

A. *In the Legislature's Lap*

The ever-increasing number of couples contemplating postnuptial agreements¹⁶⁰ and the family law attorneys who draft them need to know the parameters of California's postnuptial agreement law, and particularly its standards of enforceability. However, according to its own terms¹⁶¹ and judicial interpretation,¹⁶² the California UPAA does not apply to postnuptial agreements. In the absence of an independent body of law pertaining only to postnuptial agreements, it is unclear what the law on postnuptial agreements is.

It is clear only that in California, parties to postnuptial agreements are less protected from unfairness than are parties to prenuptial agreements. Yet, there are compelling reasons for enforcing pre- and postnuptial agreements similarly. First, the parties to a postnuptial agreement are married and thus owe each other the highest duty of good faith and fair dealing.¹⁶³ Next, what little evidence exists suggests that the people who enter into both types of agreements share relevant motivations and/or demographic characteristics.¹⁶⁴ Finally, both types of agreements are subject to the same kinds of drafting limitations, discussed in detail in the following section. Just as the California legislature acted promptly to clarify the law and to prevent overly harsh enforcement of marital agreements in the wake of *Bonds*, it must now act again.

If the legislature does act to fill the gaping hole that *Friedman* helped to illuminate, it will likely choose between one of two models. Its first option is to extend the California UPAA to cover postnuptial agreements, and thereby overrule the appellate court's judgment in *Friedman*. This would certainly be the easiest action to take, as it would require minimal revision to the Family Code. The legislature's second option is to adopt the ALI's PFD. This option is an approach to marital agreements that goes beyond contract law principles and avoids many of the enforcement pitfalls present

160. Hansen, *supra* note 5, at 30 (“[W]hile postnups are not nearly as common as prenups, they nevertheless are growing in popularity.”).

161. See UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9C U.L.A. 48-49 (2001).

162. See *Friedman*, 122 Cal. Rptr. 2d at 417-18.

163. CAL. FAM. CODE § 721(b) (West 1994).

164. See *supra* Part I.A.2.

in even California's version of the UPAA. Accordingly, it deserves the serious consideration of California lawmakers.

B. The Limitations of Contract in the Marital Context

To determine whether the extension of the California UPAA to post-nuptial agreements or the replacement of the marital agreement framework with the PFD is a better choice for California, it is necessary to understand the particular context of marital agreements.

1. General Limitations of the Bargain Principle of Contract

In contract law, the bargain principle assumes that parties are the best judges of their own self-interest and thus of whether the bargain's terms advantage them.¹⁶⁵ Courts have always recognized some limits to the bargain principle; one already discussed in this piece is unconscionability.¹⁶⁶ Unconscionability is a contract law doctrine under which a contract can be voided because of unfairness. When analyzing unconscionability issues in a consumer context (for example, in which an individual contracts with a powerful corporation), courts generally distinguish between procedural unconscionability (in which the contract negotiation is unjust) and substantive unconscionability (in which the terms of the contract are so one-sided that they would be onerous and oppressive to the weaker party).¹⁶⁷ Unconscionability is thus a prime example of a public policy limit to the bargain principle.¹⁶⁸

However, there is another type of limit, which is not attributable to unfair exploitation by one's bargaining partner: the cognitive limit.¹⁶⁹ Professor Melvin Eisenberg begins his eminent analysis of cognitive limitations with the premise that limited information and limited information processing bound human rationality.¹⁷⁰ The limited information prong means simply that contracts concern the future, so uncertainty exists.¹⁷¹ Professor Eisenberg's more substantive contribution concerns the processing limitations. He asserts, on the basis of cognitive science research, that even competent people systematically make significant cognitive errors.¹⁷² Three such "cognitive flaws" bear heavily on marital agreements:

165. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. a.

166. *See id.*

167. *See* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 77-78 (7th ed. 2001).

168. For example, a contract that includes an exculpatory clause relieving a party from liability for her own intentional wrongdoing is unconscionable because it is contrary to public policy. *See* CAL. CIV. CODE § 1668 (West 1985).

169. *See* Eisenberg, *supra* note 10, at 212. This exceptional article is highly recommended reading.

170. *Id.* at 214.

171. *Id.* at 213.

172. *Id.* at 216.

(1) excessive optimism about future developments; (2) treating low-probability events as if they had zero probability; and (3) discounting future benefits.¹⁷³

Excessive optimism manifests itself in interesting ways. In one study, almost 90% of drivers believed their driving skills were better than average.¹⁷⁴ In another study, the number of students who believed they were less likely to develop drinking problems was seven times greater than the number who thought they were more likely.¹⁷⁵ In the most famous study on the subject, and one of particular relevance in the context of marital agreements, *When Every Relationship Is Above Average*, researchers polled couples about to get married. While the couples correctly estimated that 50% of American couples would divorce, they estimated that their own chance of divorce was 0%.¹⁷⁶ The respondents similarly estimated that 40% of spouses pay alimony when ordered to do so by a court, but 100% predicted that their own spouse would do so.¹⁷⁷ Similarly, Richard Birke and Craig Fox have asserted that in negotiations, “most people tend to make unrealistically optimistic forecasts regarding their own future outcomes.”¹⁷⁸

Studies have also found that people not only underestimate but ignore low-probability risks.¹⁷⁹ The primary studies on these cognitive limitations are insurance-related. Even when offered subsidized premiums, for example, people prefer to insure only against high-probability, low-loss risks and tend to reject insurance against low-probability, high-loss risks.¹⁸⁰ Eisenberg asserts that this failure to appreciate future risks is linked to the problem of unrealistic optimism: “If actors are unrealistically optimistic, they will systematically underestimate risks.”¹⁸¹

Additionally, Eisenberg finds that people systematically discount future benefits—a flaw he also refers to as “faulty telescopic faculty.”¹⁸² Eisenberg gives the example of tax-favored pension plans; the rationale is that without an external push, many people would lack the foresight to save for the future,¹⁸³ believing, as the cliché goes, that a bird in the hand is

173. Comments to the PFD also highlight these three limitations. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. b.

174. See Eisenberg, *supra* note 10, at 216.

175. *Id.*

176. *Id.* at 217 (citing 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, 443 (1993)).

177. *Id.* at 217-18 (citing Baker & Emery, *supra* note 176).

178. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 18 (1999).

179. See Eisenberg, *supra* note 10, at 222-23.

180. *Id.* at 223 (citing Howard Kunreuther & Paul Slovic, *Economics, Psychology, and Protective Behavior*, AM. ECON. REV., May 1978, at 64, 66-67).

181. *Id.* at 225.

182. *Id.* at 222 (paraphrasing A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920)).

183. *Id.*

worth two in the bush. By undervaluing future benefits, a negotiating party is likely to find that an agreement that made some sense in the present shortchanges her in the long run.

That these broad cognitive limitations would affect parties to marital contracts is self-evident. However, it is worth discussing the ways in which “agreements about marriage are more likely than commercial agreements to involve special facts that test the limits of the bargain principle.”¹⁸⁴ This concept above all else justifies greater protections for parties to marital agreements than are provided for in the California UPAA.

2. *Problems with the Contract Approach as Applied to Marital Agreements*

a. *Unconscionability*

Marital agreements are different from commercial contracts in several important ways. First, there are differences in the knowledge and disposition of potential or actual spouses as compared to potential business partners. It is fairly common in a commercial setting for both sides’ negotiators to be experts in the relevant market and to devote significant resources to analyzing risk.¹⁸⁵ In contrast, while one or both parties entering into marital agreements may have been married previously (and as such may have a slightly better idea of the potential risks of marriage), this does not put them on a par with a “team of [expert analysts] with [formal] task-specific training.”¹⁸⁶ If a substantial number of these cases involve older and previously married men marrying younger, not previously married women, there is no reason to assume that the women, who are usually financially weaker, benefit from their prospective husbands’ “training.”

The potential for a disparity in the parties’ topic-specific sophistication and knowledge is relevant in terms of cognitive limits, as the next section discusses, but it also makes unconscionable agreements more likely. This is especially so in light of the wealth and age disparities that are often present among the parties to marital agreements. All of these factors bring with them the threat of power differentials in the relationship, which can taint negotiations. Absent statutory protections, it is simply too easy for a wealthier, older husband with access to superior legal counsel to use his power in the relationship to leverage an unfair, one-sided (and thus substantively unconscionable) agreement.¹⁸⁷ Procedural unconscionability results from unjust contract negotiations; arguably an example of such unfair negotiations is *In re Marriage of Bonds*.¹⁸⁸ While Barry may not have been

184. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. a.

185. *See id.* § 7.05 cmt. b.

186. *Id.*

187. *See* Bix, *supra* note 7, at 232.

188. 5 P.3d 815 (Cal. 2000).

himself an expert in the relevant market, his counsel certainly was. That Sun signed the agreement the night before the wedding, without her own legal counsel and with questionable understanding of the contract's terms,¹⁸⁹ contributes to the agreement's procedural unconscionability. Future or current spouses are not expert or seasoned negotiators squaring off against one another in a business forum, but individuals with differing knowledge, means, and power.

b. Differences in Cognitive Limitations

There are numerous ways in which the marital context increases cognitive limitations. In addition to increasing the risk of unconscionable agreements, the relative lack of knowledge and resources of many parties to marital agreements may also increase cognitive errors, while commercial parties' comparatively great knowledge and analytical resources may decrease them.

Beyond their background, parties to commercial contracts have an altogether different mindset from parties to marital agreements. In a business setting, parties understand that each side is unapologetically out to maximize its own best interest. On the other hand, prospective or actual spouses generally assume that they share "a mutual and deep concern for one another's welfare."¹⁹⁰ Even the *Bonds* court recognized this, conceding that "persons contemplating marriage morally owe each other a duty of fair dealing and obviously are not embarking upon a purely commercial contract."¹⁹¹ In contrast to impassive, hardened negotiators focused on financial gain, parties to marital agreements may be better described as "unsuspecting innocents acting in an emotional fog."¹⁹²

These differences in mindset in turn have two potential consequences for the likelihood and severity of cognitive errors. First, an emotional state of love and trust is likely to increase errors like unrealistic optimism, whereas one of financial self-interest is more likely to reduce them. Further, it is unlikely that the parties to a marital agreement would expend significant resources to avert cognitive errors. In contrast, when a business has sufficient economic interests in a deal, it may devote significant resources to analyzing risk.¹⁹³ This will tend to decrease the likelihood and severity of cognitive errors.

Second, differences in context also lead to differences in negotiating style. Commercial actors have little reason to be pressured into unfavorable

189. *Id.* at 818-19.

190. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. c.

191. *In re Marriage of Bonds*, 5 P.3d 815, 832 (Cal. 2000).

192. 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, 195 (1998) (citing HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 89 (3d ed. 1995)).

193. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. b.

contract terms.¹⁹⁴ In contrast, Stephen Sugarman has argued that “because entering into marriage [is] more often . . . the result of romantic love than hard-headed business bargaining, there is reason to fear that many individuals would not insist upon terms that would sufficiently protect themselves.”¹⁹⁵ The differences in negotiating styles can in part be ascribed to exacerbated discounting of future benefits as a result of the romantic mindset. The comments to the PFD point out that haggling over terms applicable only at divorce can undermine the good feeling or “expressive function” engendered by an earlier agreement to marry, and that this can lead to the suppression of genuine misgivings about terms.¹⁹⁶

Much of the scholarship in this area concerns prenuptial agreements, but the same concerns of trust and love “disarm[ing the parties’] capacity for self-protective judgment”¹⁹⁷ apply to postnuptial agreements. While mid-marriage may not always be the “time when the parties are *most* likely to be optimistic” that the marriage will endure,¹⁹⁸ that the parties are entering into a postnuptial agreement (rather than a property settlement agreement) indicates that they view their marriage as ongoing. In addition to the influence of love, such negotiations also raise the possibility of the exploitation of power imbalances in the relationship,¹⁹⁹ which may be more deep-seated in an existing marriage.

Another significant difference between marital agreements and ordinary commercial agreements is the timing of enforcement. In the business context, the terms of the contracts negotiated usually go into effect immediately, have continued relevance, and apply “every day, until the parties’ relationship ends.”²⁰⁰ Pre- and postnuptial agreements, on the other hand, become effective only if the relationship ends,²⁰¹ an event that may never take place. This fact bears heavily on the negotiating stance parties take in marital agreements, in light of their cognitive limitations. As the *When Every Relationship Is Above Average* study demonstrates, couples are likely to “heavily discount the possibility of divorce, because they will overemphasize the concrete evidence of their currently thriving

194. Bix, *supra* note 192, at 194.

195. Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 142 (Stephen D. Sugarman & Herman Hill Kay eds., 1990). Barbara Ann Atwood also used this quote from Sugarman in her discussion of the “unique emotional atmosphere” of drafting prenuptial agreements. See Atwood, *supra* note 30, at 134, 135 n.34.

196. See *PRINCIPLES OF FAMILY DISSOLUTION*, *supra* note 4, § 7.05 cmt. b.

197. See *id.* § 7.02 cmt. c.

198. Bix, *supra* note 192, at 193 (emphasis added) (describing prenuptial agreements). Bix also states that parties are “unlikely to be able to think clearly for themselves regarding the consequences of divorce at any time.” *Id.*

199. Younger, *supra* note 17, at 698 (“[P]arties are in a confidential relationship, likely to be of unequal bargaining power and in less than rational states.”).

200. See *PRINCIPLES OF FAMILY DISSOLUTION*, *supra* note 4, § 7.05 cmt. b (emphasis omitted).

201. *Id.*

relationship.”²⁰² If one is overly optimistic about her marriage, loves and trusts her spouse or prospective spouse, and perceives the 50% chance of divorce as a zero-probability event, she is unlikely to negotiate the terms of a marital agreement with much tenacity. It therefore makes sense to design enforcement provisions that encourage and require her truly informed consent.

The unique timing aspect of marital agreements also affects the parties’ priorities when drafting. This goes to Professor Eisenberg’s “limited information” prong.²⁰³ Couples simply cannot anticipate all of the changes that will take place in the marriage between execution and enforcement, nor the implications of such changes. As a result, parties frequently discount future benefits.²⁰⁴ One of the better examples the PFD gives of this tendency is that parties may give less weight to the interests of hypothetical future children than they would give to existing children.²⁰⁵ More fundamentally, “even childless parties who anticipate having children are often unable to anticipate the impact that children will have on their values and life plans.”²⁰⁶ Because the problems with the original agreement may only become apparent at the time of dissolution,²⁰⁷ it makes sense for the law to assess at the time of enforcement whether the agreement would work a substantial injustice. This is consistent with the “second look” approach that Professor Eisenberg advocates.²⁰⁸ In light of the aforementioned cognitive limitations, he concludes that in the case of a significantly changed marriage, a court must determine whether the parties likely had a mature understanding that the marital agreement would apply even in the kind of circumstances that actually occurred.²⁰⁹

c. Public Policy Distinction

Finally, marital agreements differ from ordinary commercial contracts because of their sensitive subject matter. It is generally understood that the law’s willingness to enforce a contract presupposes that the contract is not contrary to important public policy,²¹⁰ such as the protection of minor

202. See Eisenberg, *supra* note 10, at 254.

203. See *id.* at 214.

204. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. b.

205. *Id.* § 7.05 cmt. c.

206. *Id.* § 7.05 cmt. b.

207. See George, *supra* note 42, at 85.

208. See Eisenberg, *supra* note 10, at 232.

209. *Id.* at 258; see also George, *supra* note 42, at 105 (submitting in 1992 the idea that “such agreements be reviewed for unconscionability at the time of dissolution”). See generally Brod, *supra* note 6 (advocating a “substantive fairness” approach).

210. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. a.

children.²¹¹ Marital agreements frequently set aside otherwise-applicable, protective public policies, while commercial agreements generally do not.²¹² And states have long maintained a special interest in marriages and families.²¹³ Therefore, it makes sense that marital agreement law, as compared with commercial contract law, emphasizes that the agreements be executed fairly and not cause substantial injustice upon enforcement.

With these limitations in mind, Part II.C examines the sections of the PFD relevant to this Comment's inquiry and compares them to the California UPAA framework. Based on the implications of the limits of the bargain principle in the marital context, Part II.D then evaluates which of the two frameworks is superior.

C. *The Principles of the Law of Family Dissolution*

1. *Background*

In 2002, the American Law Institute²¹⁴ wrapped up over a decade of work and released its Principles of Family Dissolution on the subjects of child custody, child support, distribution of marital property, and compensatory payments to former spouses.²¹⁵ The ALI, writing to provide guidance to legislatures and courts alike,²¹⁶ had lofty goals. The PFD aims to "treat wives, husbands, and children fairly when the family dissolves, recognizing that . . . the achievement of fairness differs depending on the individuals, their choices, and their expectations."²¹⁷ This required a careful balancing of two well-established American traditions: privacy and regulatory impulse—or, mapped to our quandary, freedom of contract and fairness.²¹⁸

The PFD discusses marital agreements in its chapter seven. Significantly, the chapter declares that the same doctrine applies to pre- and post-nuptial agreements, a position the drafters assert is already the law of many states.²¹⁹ Consistent with the PFD's balancing goal, the chapter's objective is more than simply to allow parties "to accommodate their particular

211. *Id.* § 7.05 cmt. c; see also Atwood, *supra* note 30, at 131 (identifying the state's authority over agreements that do not affect children as derived from the state's interest in the institution of marriage).

212. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.02 cmt. c.

213. Faun M. Phillipson, Note, *Fairness of Contract vs. Freedom of Contract: The Problematic Nature of Contractual Obligation in Premarital Agreements*, 5 CARDOZO WOMEN'S L.J. 79, 85 (1998).

214. The ALI is an academic organization with the stated goals of achieving legal "clarification," "better adaptation [of law] to social needs," and the "better administration of justice." PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, chief reporter's foreword.

215. *Id.*, director's foreword.

216. *Id.*

217. *Id.*

218. *Id.*, chief reporter's foreword.

219. See *id.* § 7.01 reporter's notes cmt. e. This treatment further supports the concept that the difference between pre- and postnuptial agreements is largely one of timing.

needs and circumstances by contractually altering” their legal rights.²²⁰ Under the PFD, that freedom to contract is “subject to constraints that recognize both competing policy concerns and limitations in the capacity of parties to appreciate adequately, at the time of the agreement, the impact of its terms under different life circumstances.”²²¹ This concern for fairness is observable in the chapter’s two main enforcement sections: section 7.04 (“Procedural Requirements”) and section 7.05 (“When Enforcement Would Work a Substantial Injustice”), examined below.

2. *Relevant PFD Provisions and Their Differences from the UPAA*

a. *Requirements for Enforceability*

Under the PFD section 7.04, an agreement is enforceable if it is in writing, it is signed by both parties, and the party seeking enforcement can show that the other party’s consent was informed and not a product of duress.²²² With regard to the latter requirement, the PFD provides the specific conditions under which a court may rebuttably presume a pre- or postnuptial agreement to be voluntary.²²³ First, both parties must have been advised to obtain separate counsel and have had a reasonable opportunity to do so.²²⁴ Second, if the parties did not have separate counsel, the agreement must have stated in “easily understandable” language both the nature of the rights to be altered and the possibility that the spouses’ interests are adverse.²²⁵ Prenuptial agreements have the added requirement of execution at least thirty days prior to the wedding.²²⁶

To enforce terms limiting one party’s claims to compensatory payments or, more commonly, a share in marital property, the PFD also requires that the party challenging enforcement either knew (“at least approximately”) the enforcing party’s assets and income or received from the enforcer a written statement of such information.²²⁷ The enforcing party can satisfy this requirement by providing a disclosure statement containing certain specified information.²²⁸

These enforceability requirements are significantly different from the original UPAA, but have more in common with the amended California version. First, the PFD’s informed consent without duress provision is

220. *Id.* § 7.02.

221. *Id.*

222. *Id.* § 7.04(1)-(2).

223. *Id.* § 7.04(2)-(3), (4)(a).

224. *Id.* § 7.04(3)(b).

225. *Id.* § 7.04(3)(c). This is an objective standard based upon “an adult of ordinary intelligence with no legal training.” *Id.*

226. *Id.* § 7.04(3)(a).

227. *Id.* § 7.04(5).

228. *Id.*

essentially the equivalent of the original UPAA's voluntariness condition.²²⁹ In contrast to the original UPAA's vague approach, however, and closer to California's amended version, the PFD details the specific factors that comprise a demonstration of voluntariness.

Second, while the original UPAA places the burden of proof on the challenging party,²³⁰ both the California version²³¹ and the PFD²³² shift that burden to the party seeking to enforce the agreement. This is quite a dramatic change, particularly in regard to marginal cases.²³³ Moreover, it likely reflects a shared goal of "[cautioning the stronger party] against overreaching tactics that would make this burden of proof more difficult to meet."²³⁴ The PFD's drafters even acknowledged SB 78's amendment to Family Code section 1615, with its "several provisions similar to those advanced here."²³⁵

Despite this overlap, it would be a mistake to overlook the differences between the PFD and California law. First, under California's current system, and the model UPAA, one can meet the disclosure requirement either through actual disclosure, waiver of disclosure, or knowledge.²³⁶ The PFD has no waiver provision, which should eliminate the potential for nullifying the disclosure prong via clever drafting. Still, the PFD's approach should not be too arduous to comply with. A party need only provide the other with a written statement containing the specified information to meet the requirement. There is no separate requirement that the party receiving the disclosure understand it.

The PFD's disclosure provision is weightier than that of either the original or the California UPAA for another reason. Lack of disclosure under the UPAA would not in and of itself void an agreement; recall, the UPAA requires both lack of disclosure and unconscionability.²³⁷ The PFD makes clear that lack of disclosure would alone be sufficient to find an agreement unenforceable.²³⁸

229. See Younger, *supra* note 17, at 717.

230. UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48-49 (2001).

231. This is arguable, but the inference seems to be there. Under the California UPAA, an agreement is not voluntary unless several factors are proven. Presumably, the party seeking enforcement would have to prove them. See CAL. FAM. CODE § 1615(c) (West Supp. 2003). However, because any shift in the burden of proof in California was not made explicit, it does not execute this protection for the weaker party as cleanly as does the PFD. See *supra* text accompanying note 121.

232. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(2)-(3).

233. See *id.* § 7.04 cmt. b. Younger states that the PFD's drafters intended the difference in wording to reflect their emphasis on the enforcer's tactics and not the challenger's state of mind. She dismisses the change as "elegant variation." Younger, *supra* note 17, at 717.

234. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04 cmt. b.

235. *Id.* § 7.04 reporter's notes cmt. d.

236. CAL. FAM. CODE § 1615(a)(2)(A)-(C) (West 1994).

237. *Id.* § 1615(a). See *supra* Part I.B.1.

238. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(5).

In regard to voluntariness, the PFD is similar to but distinguishable from the California UPAA. Thanks to SB 78, both have requirements of independent counsel or, alternatively, of the provision of information about the rights at stake in the agreement.²³⁹ Both require that parties executing prenuptial agreements do so within a given period of time before the wedding in order to minimize the involuntariness and duress that can arise as a result of last-minute demands.²⁴⁰ The PFD is slightly more protective on that point, requiring a thirty-day waiting period²⁴¹ compared to California's seven days.²⁴²

The California UPAA's voluntariness provisions are arguably more protective than the PFD's in two respects. First, the former examines and bars not simply duress, but fraud, undue influence, and lack of capacity as well.²⁴³ Again, the significance of this difference is unclear. The California UPAA's concern with lack of capacity would seem important, particularly in the face of the PFD's objective test for "easily understandable" language.²⁴⁴ However, even if both parties had a reasonable opportunity to obtain counsel or if the agreement is in easily understandable language, the PFD still provides an opportunity for the challenging party to rebut the presumption of voluntariness. This provision seems to provide the flexibility needed to address the "wide variety of fact situations presented in real practice."²⁴⁵

Second, the California UPAA is potentially more protective than the PFD because of its ability to consider "any other factors the court deems relevant" in determining involuntariness.²⁴⁶ However, Robert Nachshin makes a reasonable point when he asks whether that provision allows a judge "to interpret every clause and stipulation through a subjective filter."²⁴⁷ Such leeway will inevitably result in disparate outcomes upon similar circumstances. By affording judges so much discretion, the law disrupts the balance between contractual freedom and fairness, and adds an element of unpredictability to parties' assessment of whether a court will void or enforce their agreement. An abstract requirement of fairness, ambiguously applied using subjective standards, "fail[s] to promote

239. See *id.* § 7.04(3)(b)-(c); CAL. FAM. CODE § 1615(c)(1), (3) (West Supp. 2003).

240. See CAL. FAM. CODE § 1615(c)(2) (West Supp. 2003); PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(3)(a). As the PFD explains, "Premarital agreements are rarely proposed on impulse . . . There is usually no reason why this process cannot begin early enough to be completed a month before the wedding." *Id.* § 7.04 cmt. d.

241. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(3)(a).

242. CAL. FAM. CODE § 1615(c)(2) (West Supp. 2003). The PFD waiting period is also more clear than that of the California UPAA, which has an ambiguous "presented with the agreement" start date. See *Seastrom & Seastrom*, *supra* note 121, at 49-50.

243. CAL. FAM. CODE § 1615(c)(4) (West Supp. 2003).

244. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(3)(c).

245. Bix, *supra* note 7, at 236.

246. CAL. FAM. CODE § 1615(c)(5) (West Supp. 2003).

247. Nachshin, *supra* note 123.

fairness.”²⁴⁸ That the PFD does not include a comparable provision is just as well. Moreover, the PFD takes a substantial leap ahead in the fairness competition by virtue of its section 7.05.

b. Substantial Injustice

The main way in which the PFD departs from the California UPAA is on the issue of unconscionability: unlike the UPAA, the PFD does not examine an agreement’s substantive unconscionability at the time of execution.²⁴⁹ Any agreement signed, in writing, and entered into with disclosure and informed consent, and without duress satisfies the requirement at the time of execution, no matter how unfair it is.²⁵⁰ However, the PFD inserts into the enforceability analysis an evaluation of the contract’s fairness at the time of *enforcement*, something the UPAA does not include.²⁵¹ The analysis has two main components.

First, the court must assess whether one or more “threshold triggering event[s]” have taken place.²⁵² Just three events qualify: (a) more than a fixed number of years have passed²⁵³; (b) the parties were childless at the time of execution and subsequently had or adopted a child; or (c) there was an unanticipated change in circumstances that had a substantial impact on the parties or their children.²⁵⁴ Lest this last item smack of the same generality as the California UPAA’s voluntariness catchall provision, the PFD drafters took pains to clarify their intent. The party challenging the agreement “need not show the nature of the parties’ deliberations and their cognitive capacities at the time of execution, which may have been many years earlier.”²⁵⁵ Rather, the drafters propose an objective test under which the challenging party can merely demonstrate that “normal, competent individuals” would not have anticipated the parties’ circumstances at divorce, or the impact the agreement’s terms would have on such circumstances.²⁵⁶ The party seeking to enforce the agreement may rebut the showing with subjective evidence that the parties in fact were likely to have anticipated such matters.²⁵⁷

248. See Phillipson, *supra* note 213, at 86 (making the argument with regard to Wisconsin law).

249. See Younger, *supra* note 17, at 718.

250. *Id.*

251. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05.

252. Bix, *supra* note 7, at 238.

253. The comments to this section suggest that a state choose a period of “about 10 years.” This would leave most divorces unaffected, as most occur after fewer years of marriage. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. b.

254. *Id.* § 7.05(2)(a)-(c).

255. *Id.* § 7.05 cmt. b.

256. *Id.*

257. *Id.* An illustration: where one party in the couple was aware of a heightened genetic risk of illness, and the agreement was drafted after consideration of that risk, this would likely rebut an objective showing. *Id.*

Second, if the court determines that a threshold event occurred, it must then determine whether enforcement would work a substantial injustice.²⁵⁸ Again, the party asserting the probability of a substantial injustice carries the burden of proof.²⁵⁹ He or she must bring to the court's attention, and the court must weigh, the following factors: (a) the magnitude of the disparity between the outcome under the agreement and the outcome otherwise; (b) for short marriages, the difference between the challenger's circumstances if the agreement is enforced and if the marriage had not occurred; (c) whether the purpose of the agreement was to benefit third parties, and whether that purpose is still relevant; and (d) the impact of enforcement on the parties' children.²⁶⁰

The comments to section 7.05 repeatedly stress that its thrust is not to bail out an unhappy party when an agreement simply "turned out less favorably" than he or she expected.²⁶¹ Such was the concern of the majority in *Simeone*, which reasoned that "[v]irtually nonexistent is the marriage in which there has been absolutely no change in the circumstances of either spouse during the course of the marriage."²⁶² Under the PFD, a contract that "makes reasonable provision" for the party challenging the agreement does not qualify as a substantial injustice, even if its outcome is "much less generous" than the result under governing law.²⁶³ The idea is to prevent the worst kinds of injustices under the most considerably changed circumstances. This breathes life and vision into Justice McDermott's dissent in *Simeone*, which argued that "[i]t borders on cruelty to accept that after years of living together . . . two individuals emerge the same as the day they began their marriage,"²⁶⁴ and yet narrows that potentially endless inquiry considerably.

The concept of evaluating fairness at the time of enforcement is not foreign to California lawmakers. Recall that the legislature's amendment of section 1612 in response to *Pendleton* instructed courts to determine whether an agreement modifying or eliminating spousal support is unconscionable at the time of enforcement.²⁶⁵ The same principle is at work in the PFD, but applicable only under certain circumstances and with more

The point is not, as Judith Younger's otherwise cogent article suggests, that parties should simply anticipate all possible circumstances, but that some changes cannot reasonably be anticipated. See Younger, *supra* note 17, at 721 ("Obviously, the parties did not expect one of them to become disabled They should have foreseen that possibility and planned for it.").

258. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05(2).

259. *Id.* § 7.05(3).

260. *Id.* § 7.05(3)(a)-(d).

261. See *id.* § 7.05 cmt. a.

262. *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990).

263. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. e.

264. *Simeone*, 581 A.2d at 170-71 (McDermott, J., dissenting).

265. CAL. FAM. CODE § 1612(c) (West Supp. 2003). The PFD drafters noted the similarity between the Principles and the amended California UPAA. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 reporter's notes cmt. a.

guidance than a general and inevitably subjective conception of “fairness.” The clear disadvantage of the PFD’s “substantial injustice” inquiry is that it means parties cannot be certain at the time of execution that their agreement will be enforceable at the time of divorce.²⁶⁶ There is no wholly satisfactory answer to this complaint, but these parties may be comforted by the knowledge that if circumstances change dramatically and their marriage ends, the court has the authority to protect them from an agreement that is no longer just.²⁶⁷ Certainly, section 7.05 reflects a compromise between the competing concerns of freedom of contract and fairness. Whether this compromise is superior to that achieved by the California UPAA is examined next.

D. *The PFD Best Serves California’s Interests*

Foremost, in evaluating marital agreement law, the legislature must consider two interrelated but sometimes conflicting interests: fairness and predictability. This Comment will tackle them in reverse, saving until last the contentious issue of fairness.

1. *Predictability*

Predictability in this context means the degree to which the parties entering into agreements and their attorneys can accurately assess whether and how the agreements will be enforced. Predictability is an obvious goal, closely tied to, but not synonymous with, the concept of contractual autonomy.²⁶⁸ Allowing couples to make marital contracts encourages them to think realistically about the marriage, to anticipate and plan for contingencies, and to form relationships on their own terms²⁶⁹—all of which are recognizable public policy aims. Undermining predictability may discourage parties from entering into marital agreements, which would in turn detract from these valuable benefits.

The California legislature likely had predictability in mind (as well as fairness) when it amended Family Code section 1615 to clarify the meaning of the word “voluntary.” Under the California UPAA, parties can now be confident that if they follow subsection (c)’s specific requirements, a court should find their agreement voluntary. Or at least that was the idea.

266. Bix, *supra* note 7, at 243.

267. The problem with this answer, of course, is that the parties complaining are not likely to be the ones who need protection. See discussion *infra* Part II.D.

268. Contractual autonomy or freedom is a broader concept, and includes a moral component relating to an individual’s right to bind himself or herself according to his or her own wishes without state interference. This Comment recognizes the power of such an ideal but (1) contends that freedom of contract is never pure but subject to the constraints of public policy, especially in the context of marriage, and so (2) focuses on predictability as the most relevant and practical part of that concept. Subject to necessary external restraints regarding the content of his or her contract, the enforcing party is most concerned with being able to expect that the contract he or she executed is indeed enforceable.

269. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.02 cmt. b.

Although clearly well-intentioned, the statute's catchall provision undoes much of the good work the preceding requirements (of separate counsel, a seven-day waiting period, etc.) did in terms of predictability. The inclusion of "any other factors the court deems relevant"²⁷⁰ as a requirement adds an unpredictable, subjective element to the process. Despite this one easily corrected flaw, the California UPAA's assessment of fairness only at the time of execution encourages both enforceability and predictability.

Some have argued that the PFD moves "at least a little" in the direction of greater certainty with regard to enforceability.²⁷¹ Compared to the original UPAA, this is a valid point, though it is less so when applied to the California UPAA, with its more detailed definition of voluntariness. Although the PFD does not contain the California UPAA's voluntariness catchall provision, it clearly makes enforcement less predictable than does either the original or the California UPAA by virtue of the "substantial injustice" test of section 7.05. That even a well-counseled and fair marital agreement may become unenforceable due to unanticipated events and the application of PFD section 7.05²⁷² means that contracting parties cannot be certain that a court will find their agreement valid at the time of dissolution. The drafters of the PFD restricted fairness evaluations at the time of enforcement to the three scenarios²⁷³ that may cast the most serious doubt on the parties' capacity to have properly evaluated the significance of the agreement's terms.²⁷⁴ The burden is then on the challenging party to bring to the court's attention specifically delineated factors that demonstrate substantial injustice.²⁷⁵ This inquiry is narrow enough that the drafters expect it to be "inapplicable" to most marital agreements.²⁷⁶ Still, in order to determine whether the PFD renders some marital agreements intolerably unpredictable, one must weigh predictability against the goal of fairness.

2. *Fairness*

In the context of this Comment, fairness means protection for the financially weaker spouse from enforcement of an overly harsh marital agreement.²⁷⁷ This Comment has already examined the ways in which cognitive limitations can produce unfair results in the marital context. The differences between the California UPAA and the PFD are largely attributable to their respective techniques for and emphases on addressing these

270. CAL. FAM. CODE § 1615(c)(5) (West Supp. 2003).

271. Bix, *supra* note 7, at 240.

272. *Id.* at 244 n.52.

273. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05(2)(a)-(c).

274. See *id.* § 7.05 cmt. c.

275. See *id.*

276. See *id.* § 7.05 cmt. a.

277. This Comment is not insensitive to fairness to the financially stronger spouse, but deals with that kind of fairness as tied to the issues of predictability and contractual autonomy. See *supra* notes 14 and 15.

potential inequities. Both models retrospectively evaluate agreements for fairness at execution. The two have comparable requirements for proving voluntariness; the largest exception is the California UPAA's catchall provision. The California UPAA and PFD differ in another respect in their assessment at execution. While the California UPAA requires both nondisclosure and unconscionability in order to find an agreement unenforceable,²⁷⁸ PFD section 7.04 more protectively treats nondisclosure as sufficient to void an agreement.²⁷⁹ The California UPAA stops there, but the PFD provides in section 7.05 for an additional fairness evaluation at the time of enforcement in the marriages that have changed the most since execution.²⁸⁰ The PFD's acknowledgment that circumstances change during marriage and that people drafting an agreement cannot take into account every possible contingency weighs heavily in favor of fairness. The combined safeguards of section 7.04 and section 7.05 will likely protect the financially weaker partners—usually women—from “the worst possible consequences of unwise choices.”²⁸¹

3. *Balancing Predictability and Fairness*

The PFD is thus more protective than the California UPAA, but does it go too far?²⁸² The kind of fairness inquiry envisioned by section 7.05 can butt up against the goal of predictability, but it is defensible, and indeed imperative, for two reasons. First, courts have always recognized limits to the bargain principle based on equity.²⁸³ Pre- and postnuptial agreements exacerbate the contracting couples' cognitive limitations and take place “against a backdrop of statutes and case law that express important public policies.”²⁸⁴ One such policy, as Gail Frommer Brod argues, is a state's concern with mitigating spouses' economic harm at divorce.²⁸⁵ California honored such a policy when it amended its law on spousal support waivers to include a similar fairness assessment at the time of enforcement.²⁸⁶ Indeed, that inquiry is far less defined and constrained than the test described at length in PFD section 7.05.

Second, PFD section 7.05 finds support from the theory of philosopher John Rawls. Rawls postulated an “original position” in which people

278. CAL. FAM. CODE § 1615(a)(2) (West 1994).

279. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.04(5).

280. *See id.* § 7.05.

281. Bix, *supra* note 7, at 241 (emphasis omitted).

282. *But see Developments in the Law—The Law of Marriage and Family*, *supra* note 5, at 2097-98 (asserting that the PFD does not go far enough and advocating a presumption of unenforceability for prenuptial agreements that deviate from a 50-50 property split).

283. *See* PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05 cmt. a.

284. *See id.* § 7.05 cmt. c.

285. *See* Brod, *supra* note 6, at 285 n.304 (citing Barbara Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. U.L. REFORM 397, 404-05 (1977)).

286. *See* CAL. FAM. CODE § 1612(c) (West Supp. 2003).

did not know their place in society, class position or social status, their fortune in the distribution of natural assets and abilities, their intelligence, strength, and other, similar attributes.²⁸⁷ Thus positioned behind a “veil of ignorance,” the people would be best able to design a just society.²⁸⁸ Because they would start out as equals, individuals would not be at odds with one another, nor tempted to exploit their social and natural circumstances to their own advantage.²⁸⁹ As Rawls deduced, “it hardly seems likely that persons who view themselves as equals, entitled to press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others.”²⁹⁰ An admittedly simplified characterization of this theory is that someone who does not know which piece of cake he or she will get will be sure to cut the pieces fairly.²⁹¹

While it takes some extrapolation to apply the veil of ignorance to marital agreements, the task is possible.²⁹² Putting ourselves in the original position, we can agree that, like the state, we would wish to mitigate spouses’ economic harm at divorce—or, if that concept is too broad, that we would at least want to mitigate the worst kinds of harm. In the original position, we would not know, if we were to marry and divorce, whether we would be the spouses with the big wedges of cake or with the meager last slivers, and so we would advocate a fairly applied slicing system. The analogy can be taken too far (if it has not already): pushing marital agreements to provide for a fifty-fifty split²⁹³ would discourage parties from entering into such agreements—after all, what would be the point?—and overlooks some of the important benefits of doing so.²⁹⁴

Agreements that benefit the financially stronger party more than the financially weaker party should not be per se objectionable. Fairness may be the principal goal, but it must coexist with values such as predictability

287. JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed., The Belknap Press of Harvard Univ. Press 1999) (1971).

288. *Id.*

289. *Id.* at 118, 121.

290. *Id.* at 13.

291. See STEPHEN MULHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS 3 (2d ed. 1996).

292. One might argue that Rawls’s philosophy does not map as well to a voluntary institution like marriage as it does to an inevitable one like birth—that we need be less concerned with protecting marriage’s willful participants. However, one can respond that marriage is almost inevitable, as “nearly everyone marries at some point,” *Developments in the Law—The Law of Marriage and Family*, *supra* note 5, at 2075, and that as reflected by both our public policy recognizing a special interest in the well-being of marriage and family, Phillipson, *supra* note 213, at 85, and the unique cognitive errors arising in the context of marriage, see *supra* Part II.B.2.b, this application of Rawls’s equality theory is useful to our analysis.

293. See *Developments in the Law—The Law of Marriage and Family*, *supra* note 5, at 2098.

294. See *supra* Part II.D.1.

and contractual autonomy.²⁹⁵ The task is to find a reasonable balance between the parties' interests in forming an enforceable agreement according to their own terms, and making certain that the agreement was both negotiated fairly and will not have catastrophic effects on one of the parties when it is enforced.

The PFD achieves this balance masterfully and serves both the interests of fairness and predictability better than the California UPAA. A comparison of their voluntariness provisions illustrates this superiority. The most significant difference between the two sets of voluntariness requirements is that the California UPAA includes a catchall provision allowing a judge to invalidate an agreement based on "any other factors the court deems relevant"²⁹⁶ while the PFD includes no such provision. This catchall phrase drastically reduces predictability and confounds drafting—anything can be relevant. Nor does it demonstrably add much in the way of fairness, since there is no guarantee that relevant factors will support the position of the weaker party and since the statute already requires the judge to take into account those factors that most obviously relate to fairness. The PFD, by contrast, provides essentially the same voluntariness standard without this unfortunate provision.

The PFD is also superior to the California UPAA in regard to disclosure requirements. Under the California UPAA, one can meet the law's disclosure requirement by actual disclosure, waiver, or knowledge.²⁹⁷ The PFD has no waiver provision, and so makes less likely unfair agreements in which one party does not really disclose assets to the other. In addition, lack of disclosure under the California UPAA is not sufficient to void an agreement but must be accompanied by unconscionability.²⁹⁸ By making lack of disclosure alone sufficient to void an agreement, the PFD again best serves fairness concerns. Predictability is not materially different under either system.

The greatest difference between the two models, and the area in which the balancing is most pivotal, is unconscionability. The California UPAA evaluates an agreement's unconscionability at the time of execution.²⁹⁹ The PFD, in contrast, evaluates what might be described as unconscionability at

295. A counterargument is that individuals behind Rawls's veil of ignorance might just as soon define fairness as assurance that their agreements be enforced (predictability) or the ability to make their own agreements (autonomy) as opposed to this Comment's conception of fairness. In response, while fairness can certainly include the concepts of predictability or autonomy, in its essence it most centrally connotes even-handedness. Autonomy can lead to an inhumane twisting in the wind. Cruel and unusual punishment can be predictable under a brutal regime. But even-handedness is necessary, if not always sufficient, to the concept of fairness.

296. CAL. FAM. CODE § 1615(c)(5) (West Supp. 2003).

297. CAL. FAM. CODE § 1615(a)(2)(A)-(C) (West 1994).

298. *Id.* § 1615(a).

299. *See id.*

the time an agreement is to be enforced.³⁰⁰ Provided that a threshold triggering event has occurred, such as the addition of children to the marriage, the PFD allows judges to determine whether enforcement of the agreement would work a “substantial injustice” on either party.³⁰¹ In that case the judge can void the agreement.³⁰² The “substantial injustice” provisions of the PFD of course make marital agreements less predictable. A judge may still refuse to enforce a marital agreement even if the agreement met the disclosure requirements and the voluntariness requirements—even if it was indisputably *fair* when drafted. The California UPAA, without an equivalent fairness assessment at the time of enforcement, is clearly more predictable in this regard. And, as discussed earlier, the PFD is clearly more fair. The PFD stands for the principle that contractual autonomy and the interest in predictability must occasionally bend to the fundamental goal of fairness. If one truly believes that fairness is the highest good, then a preference for the PFD is warranted.

CONCLUSION

This Comment addresses two problems with California’s current marital agreement law. The first problem is that this body of law is inconsistent. No case illustrates this point better than the recent California Court of Appeal decision in *Friedman*.³⁰³ The *Friedman* court held that Family Code section 1615 does not govern postnuptial agreements.³⁰⁴ Not only was this finding poorly justified, it also points to a disturbing and illogical state of affairs: parties to postnuptial agreements receive less protection under California law than do parties to prenuptial agreements. In light of the fiduciary duty married couples owe one another, “[i]t would seem that the protections that the legislature found were needed to protect potential spouses before marriage would apply with greater force after the marriage.”³⁰⁵ It makes no sense that by marrying one another and entering into a confidential relationship, it becomes *easier* for a couple to enter into and enforce against one another an unfair contract.

The second problem discussed in this Comment is that the enforceability provisions of the California UPAA are insufficient for both pre- and postnuptial agreements. Marital agreements are different from commercial contracts in important ways. The nature of parties who enter into marital agreements, their intimate relationship, their disposition and degree of expertise in the negotiating process, and the timing between execution and

300. See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.05.

301. See *id.*

302. See *id.*

303. *In re Marriage of Friedman*, 122 Cal. Rptr. 2d 412 (Cal. Ct. App. 2002), *review denied*, No. S109408 (Cal. 2002).

304. *Id.* at 417.

305. Jacobs & Marcus, *supra* note 156, at 7.

enforcement all contribute to an exacerbation of cognitive limitations and an associated increase in the likelihood of unfairness. Accordingly, the law must provide more protections for parties to marital agreements than parties to commercial contracts.

*Bonds*³⁰⁶ illustrates the unfairness that can result from a lack of basic protections like independent counsel. That case led Senator Kuehl and the California legislature to try admirably to make the California UPAA fairer and more predictable. SB 78 made some progress but did not ultimately succeed at either goal. The amendment's catchall provision makes predictability difficult; agreements that were unconscionable at the time of execution but involved either disclosure or waiver of disclosure are still valid; and there is still no fairness evaluation at the time of enforcement. In contrast, the PFD unabashedly makes enforcement "subject to constraints that recognize both competing policy concerns and limitations in the capacity of parties to appreciate adequately [at execution] the impact of its terms under different life circumstances."³⁰⁷ The PFD's "substantial injustice" test appropriately assesses fairness at the time of enforcement, and its threshold requirements appropriately limit that assessment to marriages with the most changed circumstances.³⁰⁸ While the possibility of a fairness evaluation at enforcement, no matter how proscribed, necessarily undermines the goal of predictability, this compromise is necessary.

The Principles of Family Dissolution strikes a just balance between the goals of fairness and predictability. It treats marital agreements differently from commercial contracts, and prenuptial agreements the same as postnuptial agreements. For these reasons and, fundamentally, because it solves both of the problems this Comment identified with the current body of law, the California legislature would be wise to consider the PFD's immediate adoption with regard to marital agreements.

306. *In re Marriage of Bonds*, 5 P.3d 815, 832 (Cal. 2000).

307. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 4, § 7.02.

308. *See id.* § 7.05.