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The Marriage Contract. Spouses, Lovers and the Law, by Lenore J. Weitzman

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BOOK REVIEW

THE MARRIAGE CONTRACT. SPOUSES, LOVERS AND THE LAW. By Lenore J. Weitzman. New York: The Free Press. 1981. Pp. 536. $17.95.

*Reviewed by Linda S. Mullenix**

Within the first few weeks of law school almost every first-year law student encounters the famous contracts case of *Balfour v. Balfour*.[1] In *Balfour*, the husband, a British civil engineer with a position in Ceylon, promised to pay his ailing wife an allowance of £30 a month. When the husband failed to pay, the court denied the wife recovery, explaining "agreements such as these are outside the realm of contracts altogether . . . . In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."[2]

For contemporary, savvy students living in the post-*Marvin*[3] era, the *Balfour* case is something of a shock. Students are surprised to discover that agreements between spouses constitute "transactions outside the area of contract exchange"[4] and that marriage is a "relationship that [does] not call for contractual recognition."[5] For those who have read the *Marvin* decision, the *Balfour* case is an anomaly: The California Supreme Court based its *Marvin* decision on the principle "that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[6] Is it possible, students wonder, that unmarried cohabitants have the right to contract with each other, but legally married spouses do not? Something seems amiss in contract

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1. 2 K.B. 571 (1919). *See* J. CALAMARI & J. PERILLO, CONTRACTS: CASES AND PROBLEMS at 4-7 (1978); E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS at 178-79 (3d ed. 1980); and A. MUELLER & A. ROSETT, CONTRACT LAW AND ITS APPLICATION at 38-42 (2d ed. 1977).

2. 2 K.B. at 579, *quoted in* CALAMARI, *supra* note 1, at 6.

3. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

4. *See* MUELLER, *supra* note 1, at 33.

5. *Id.*

6. 18 Cal. 3d at 674, 557 P.2d at 116, 132 Cal. Rptr. at 825.

law, especially when contract concepts are applied to the realm of domestic relations.

Lenore J. Weitzman's book, *The Marriage Contract. Spouses, Lovers and the Law*,[7] is an excellent and exhaustive treatise on the interrelationship of family law and contract law. The result of ten years research on marriage and divorce,[8] Weitzman's book advertises itself as providing "expert advice on writing a living-together contract for equal partnerships, traditional marriages, remarried parents, homosexual couples, and roommates who want to avoid 'palimony.' "[9] The book provides an incisive, critical analysis of the traditional model of marriage and its regulation by current law.[10] The book's most significant contribution is its argument that late twentieth-century social realities have rendered anachronistic archaic legal assumptions concerning both married and unmarried couples.[11] In order to remedy the inequities that arise from judicial discretion in the realm of domestic problems, Weitzman suggests that the best method for governing relationships is "intimate marital and nonmarital contracts."[12]

Clearly, Professor Weitzman has seen the future of domestic relations law to be in contract law, but it is in the case of intimate contracts[13] that Professor Weitzman's book is most disturbing and frightening. It is unsettling to envision thousands of couples using *The Marriage Contract* as a kind of fix-it manual for their relationship (not unlike Dacey's *How To Avoid Probate*[14]), only to discover, at some later date, that their intimate contract is an unenforceable, worthless piece of wishful thinking.

Professor Weitzman, who is a sociologist although not an attorney,

7. L. WEITZMAN, THE MARRIAGE CONTRACT. SPOUSES, LOVERS AND THE LAW (1981).

8. *See generally* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181 (1981); Weitzman and Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L. Q. 141 (1980); L. Weitzman, *No-Fault Divorce in California*, (1979) (unpublished manuscript) (available from the Center for the Study of Law and Society Library, University of California at Berkeley); L. WEITZMAN, SEX ROLE SOCIALIZATION, (1979); Weitzman and Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473 (1979); L. Weitzman, *The Legal Regulation of Marriage: Tradition and Change—A Proposal for Contracts Within and in Lieu of Legal Marriage*, 62 CALIF. L. REV. 1169 (1974).

9. *See* WEITZMAN, *supra* note 7, at book-jacket.

10. *Id.* at Part I, "The Legal Tradition: Terms of the Traditional Marriage Contract," 1-135.

11. *Id.* at Part II, "Legal Assumptions Versus Social Reality," 135-225.

12. *Id.* at xxii-xxiii, 225-26.

13. *Id.* at Part III, "The Case for Intimate Contracts," 227-55.

14. R. DACEY, HOW TO AVOID PROBATE (1965).

has written a legal "how-to" manual replete with sample agreements and contract provisions.[15] Her book is dangerous because many readers may skip the legal analysis and proceed straight to the model contracts. Her caveats, however, are grossly inadequate to warn the reader of the potential legal pitfalls in the sample agreements. As will be discussed below, these illustrative draft instruments are fraught with legal peril, particularly to the naive, the trusting, and the legally illiterate. Professor Weitzman's book is potentially harmful in that it offers dubious legal advice through official-sounding, jargon-laden, model intimate contracts.[16] As such, these "contracts" are the weakest and least valuable portion of the book.

The first half of the book is a sociological survey of the laws relating to traditional marriage[17] and is the best-argued portion of this massive examination of domestic relations law. Professor Weitzman cogently demonstrates the inadequacies of the traditional marriage model, where the husband is the head of the family with the responsibility for spousal and child support[18] and the wife is the household manager with responsibility for the children.[19] This traditional model of marriage has resulted in the legal sanctioning of sex-based roles, as well as the inequitable assignment of various rights and duties during marriage and at dissolution.[20] After a thorough analysis of the "terms of the traditional marriage contract,"[21] Weitzman argues that most people would be better off with a contract designed and executed by themselves, instead of getting married or living together without a contract.[22] For those already married, she urges that the partners draw up a contract within the marriage as an alternative to the marriage contract imposed by law.[23]

Weitzman argues that at marital dissolution the most equitable system of domestic relations law would recognize that virtually all as-

15. There are three sections of Weitzman's book which provide sample contract provisions. Chapter 11 contains a descriptive list of over twenty-five "Topics and Provisions for Intimate Contracts." Chapter 12 contains "Case Studies: Ten Contracts Within and in Lieu of Marriage," which are actual agreements drafted by couples in a variety of different relationships and living arrangements. The Appendix, "An Empirical Study of Intimate Contracts," is a summary of the various contract provisions drafted by fifty-nine sociology students at a University of California campus, as part of their course requirements.

16. *Id.*

17. *See supra* note 10.

18. WEITZMAN, *supra* note 7, at 5-60.

19. *Id.* at 60-134.

20. *Id.* at 134-89.

21. *Id.* at 1-135.

22. *Id.* at xxiii, 225-26.

23. *Id.*

sets acquired during a marriage, except for inherited assets, are property.[24] Thus, distributable property would include a variety of "career assets" that have monetary value, in addition to traditional property like income and real property. Among such career assets are professional education, business and professional goodwill, life insurance and pension benefits.[25] Moreover, the most equitable system of property distribution is based on community property principles, now embraced by only eight states.[26] "Community property principles are strongly recommended for all states," urges Weitzman, "because they would most effectively bring the law into line with the ideals of most couples entering marriage, and would most truly reflect the partnership ideals that family law seeks to encourage."[27]

Professor Weitzman's sociological analysis effectively demonstrates that late twentieth-century social realities are inconsistent with the legal assumptions underlying the traditional model of marriage. For example, many young couples no longer expect to live together "until death do us part" and mistakenly believe that their property will be divided evenly when they separate and dissolve their marriage. Weitzman argues, therefore, that because of the contemporary high rate of divorce, society should "at minimum, have legal provisions for marriage contracts, term marriages, and limited-purpose marriages for persons wishing alternatives."[28] In addition, two reforms are needed: (1) The law should recognize the partnership nature of marriage and the wife's contributions to assets acquired during the marriage, and (2) The law should provide better economic protection "for women and children who are casualties of the current laissez-faire system of divorce."[29]

The high rate of divorce is but one contemporary social reality that has caused crisis in domestic relations law. In addition, the traditional model of marriage fails to consider a variety of alternative life-styles. Thus, the poor, ethnic and racial minorities, homosexual couples, and family communes are often ill-served by the courts.[30] For example,

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24. *Id.* at 89 & 97.

25. *Id.*

26. The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Puerto Rico is also a community property jurisdiction. *See* Freed and Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L. Q. 229, 249 (1981).

27. WEITZMAN, *supra* note 7, at 97.

28. *Id.* at 151.

29. *Id. See also* Weitzman, *The Economics of Divorce: Social and Child Support Awards, supra* note 8, for a detailed empirical study of the impact of divorce awards in California.

30. WEITZMAN, *supra* note 7, at 190-223.

onerous alimony or support awards make little sense in the typical poor, matriarchal black family, while child custody rules frequently run afoul of the shared parenting philosophy inherent in communal living experiments. Traditional family law often imposes inappropriate burdens and responsibilities and sometimes penalizes people "for not living up to middle class norms."[31] For Professor Weitzman, the best alternative is a contract model which would allow people of different classes, races, and ethnic diversity "to structure their relationships in accord with their own norms and values."[32]

Professor Weitzman's thesis is that contract law should replace the subjective, discretionary system of domestic relations law that now regulates marital and nonmarital status in all states. "Increased judicial recognition of contracts would . . . provide a route to reforming and updating our antiquated system of family law."[33] There are four major advantages to the substitution of the contract model in the realm of domestic relations. First, couples would be able to formulate agreements that conform to social reality. Second, intimate contracts would enable couples to escape from sex-based assumptions concerning rights and duties within their relationship and establish a more egalitarian partnership. Third, couples would be able freely to order their personal relationship as they wished, in privacy. And fourth, the use of the intimate contract would allow unmarried cohabitants to formalize their relationship.[34] Thus, contracts offer "the option of creating a personally-tailored structure to facilitate their [a couple's] goals and desires."[35]

Contracts are ideally suited to help resolve conflict in on-going relationships, as well as lessen conflict at the time of dissolution. A well written contract will contain some mechanism for resolving differences, hopefully before disputes grow to such serious proportions that they endanger the relationship. An example of one such mechanism is the Conciliation Court of Los Angeles County, which offers counseling sessions to resolve disagreements between marital partners before they begin dissolution proceedings.[36] The Conciliation Court uses a "Marriage Agreement" as a tool in its counseling, and the final document which the couple agrees to is signed and has the status of a court

31. *Id.* at 203.
32. *Id.*
33. *Id.* at 228.
34. *Id.* at 227-28.
35. *Id.* at 229.
36. *Id.* at 235-36.

order. Technically, the Agreement is enforceable through contempt citations, but this rarely occurs: The Agreement has more value as a tool of moral persuasion.[37] As an alternative to the possibility of judicial enforcement, couples might wish to adopt a concept of arbitration, similar to that in labor law, or to provide for mandatory marriage counseling.[38]

Weitzman's thesis that the traditional model of marriage is antiquated is well argued, and her suggestion that intimate contracts supplant the subjective judicial review of family law judges is thoughtful and provocative. If the book were limited to this analysis, it would constitute a valuable contribution to the literature of family law. Professor Weitzman goes further, however, and proposes that couples enter intimate contracts *now*, as though her suggested changes in the law have already been implemented. They have not. The major problem with Professor Weitzman's proposal is that many of these recommended intimate contracts probably are not enforceable. While her sociological analysis is intelligent and perceptive, her legal argument is shaky, at best.

Professor Weitzman recognizes that the contracts she advocates must be viewed in light of certain caveats, but in general, she is quite sanguine. "Some dramatic shifts in judicial rules in recent years suggest that these contracts are now increasingly likely to be recognized as valid and binding,"[39] citing to five cases from Florida, Illinois, Oregon, Nevada, and California.[40] In light of these five decisions, Professor Weitzman broadly concludes that "[A]lthough these courts thus far have dealt overwhelmingly with cases involving support and property on divorce, the new legal doctrines established by their decisions may easily be extended to agreements affecting ongoing marriages."[41]

Professor Weitzman asserts that these cases have opened the door for the enforceability of some intimate contracts and have established new principles for reviewing contracts between marital partners. Thus, such contracts will be viewed as valid legal agreements, provided that

37. *Id.*

38. *Id.* at 412. "Couples who want to be assured of settling disputes that arise during their relationship may wish to borrow the concept of arbitration used in labor law or to provide for marriage counseling in their contracts."

39. *Id.* at 337.

40. *Id.* at 347-52. The five cases Weitzman discusses in support of her thesis are: Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds on rehearing*, 257 So. 2d 530 (Fla. 1972); Volid v. Volid, 6 Ill. App. 3d 836, 286 N.E. 2d 42 (1972); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Unander v. Unander, 506 P.2d 719 (Or. 1973); and In re Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

41. WEITZMAN, *supra* note 7, at 347-48.

they meet the test of traditional contract standards. In addition, both property and support are valid subject matters for contracts between spouses, and marital partners now have the same freedom to contract as other parties.[42] Weitzman concedes that no court has yet upheld a husband's attempt to contract away his support obligation during marriage, nor has any court upheld a contract in which a husband agrees to pay his wife a salary for her domestic services.[43] Nonetheless, Weitzman believes that in light of the new trend in domestic relations cases, "it is almost certain that these courts would uphold an agreement to pay the wife for her domestic services with a property award (instead of a salary) provided the contract was negotiated in accord with traditional contract standards."[44] Finally, the *Marvin* decision clearly illuminates the way for intimate contracts between both married and unmarried partners: "*Marvin* extended the contractual rights of parties in both types of relationships. In fact, *Marvin* has meant that both married and unmarried partners now have a far better chance of having their agreements upheld in a court of law."[45]

Professor Weitzman's analysis of the trend of domestic relations law with regard to contract enforceability is frightening, particularly since this analysis impels her to urge existing and future couples to enter into contracts as the fairest and best method of ordering rights and duties within personal relationships.

Unless her legal analysis is correct, Professor Weitzman's advice is ill-conceived. And her legal analysis is suspect for many reasons. To begin, Professor Weitzman is incorrect in suggesting that *Marvin* has given both married and unmarried partners a better chance of having their agreements upheld in court. Although the *Marvin* decision has engendered a great deal of novel litigation, the success rate of *Marvin*-type claims has not been high because the litigants generally cannot demonstrate the adequacy of traditional contract requirements.[46]

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42. *Id.* at 351-52.

43. *Id.* at 352.

44. *Id.*

45. *Id.* at 411.

46. *See* Jones v. Daly, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981); Morone v. Morone, 407 N.E. 2d 438, 439 (N.Y. 1980), *aff'd*, 413 N.E. 2d 1154 (1980); McCall v. Frampton, 415 N.Y.S.2d 752 (1979); Hewitt v. Hewitt, 380 N.E. 2d 453 (Ill. 1978), *rev'd*, 394 N.E.2d 1204 (1979). Some recent analyses dealing with the contract implications of the *Marvin* decision are: Casad, *Unmarried Couples and Unjust Enrichment; From Status to Contract and Back Again*? 77 MICH. L. REV. 62 (1978); Branca and Steinberg, *Antenuptial Agreements Under California Law: An Examination of the Current Law and* In Re Marriage of Dawley, 11 U.S.F.L. REV. 317 (1976); Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039 (1978); Reppy, *Debt Collection*

Moreover, the significant post-*Marvin* trend has been for courts to limit the applicability of *Marvin*. For example, in California, courts have refused to extend the spousal immunity privilege in criminal trials to unmarried couples.[47] Similarly, one unmarried partner has no standing to sue for the wrongful death of the other.[48] In the area of taxation and decedents' estates, the courts have ruled that the surviving partner of a *Marvin* relationship is a "Class C" (unrelated stranger), rather than a "Class A" (surviving spouse legatee). Thus, the tax burden of the surviving partner was significantly increased.[49] An unmarried cohabitant was denied the right to recover for loss of consortium, even though the cohabitating couple was engaged to be married at the time of the tortious injury to one of the partners.[50] Similarly, the courts have refused to allow an unmarried cohabitant who witnessed the negligent killing of his partner to recover damages for emotional distress.[51]

Thus, the *Marvin* experience in California, as well as in other states, has been to take a very narrow view of the rights of nonmarital partners.[52] It seems difficult to conclude, from this bleak pattern, that "married and unmarried partners now have a far better chance of having their agreements upheld in a court of law."[53] Yet this is precisely what Professor Weitzman concludes, on very slim evidence and a highly selective reading of a few decisions from a small number of states.[54]

The case for the enforceability of contracts between marital part-

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From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 S.D.L. REV. 143 (1980); Shultz, *Contractual Ordering of Marriage: A New Model For State Policy*, 70 CALIF. L. REV. 207 (1982).

47. People v. Delph, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979). The court held that the marital privilege concerning communications between spouses, under CAL. EVID. CODE §§ 970, 971 (West 1967), did not apply to ummarried couples.

48. 4 CAL. FAM. L. REP. No. 3, at 1 (Feb. 18, 1980) (Los Angeles County trial ct.); Harrold v. PSA, 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981) (cohabitant not an heir in wrongful death action); Vogel v. Pan Am, 450 F. Supp. 224 (S.D.N.Y. 1978) (meretricious spouse cannot sue for wrongful death in airline crash); *but cf.* Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (cohabitant entitled to recover for loss of consortium).

49. Estate of Edgett, 111 Cal. App. 3d 230, 168 Cal. Rptr. 686 (1980); *see also* Aspinall v. McDonnell Douglas, 635 F.2d 327 (5th Cir. 1981) (definition of heir not expanded by *Marvin* decision).

50. Childers v. Shannon, 444 A.2d 1141 (N.J. 1982) (affianced status insufficient as basis for recovery of loss of consortium); Tong v. Jocson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1978) (denial of consortium damages after tortious injury). *See* Comment, *Loss of Consortium and Unmarried Cohabitors: An Examination of Tong v. Jocson*, 14 U.S.F.L. REV. 133 (1980).

51. Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

52. *See* REPPY, COMMUNITY PROPERTY IN CALIFORNIA 278-80 (1980).

53. WEITZMAN, *supra* note 7, at 411.

54. *See supra* note 40.

ners is even more attenuated than that for unmarried partners. As Weitzman herself concedes, marital partners still cannot contract away their support obligations nor agree to pay one another for household services.[55] Parents cannot contract away a child's right to receive support, nor can they contract concerning child custody in the event of divorce, since in most jurisdictions child custody is a matter in the court's discretion: The child will be placed in custody in accordance with the judge's determination of the child's best interest.[56] Other matters are clearly beyond contractual control: for example, various government benefits for spouses, designated as "spousal" benefits by law, such as social security.[57] Yet Weitzman disregards this legal reality and asserts: "While some of these benefits of marriage are accorded only to those who have the status of a spouse . . . in many cases the same results may be achieved through a private contract."[58]

In the final analysis, Weitzman can point to only two areas where courts have actually enforced agreements between spouses: property distribution and alimony.[59] But these court decisions are hardly novel, nor do they signal any significant new trend; courts have always been willing to uphold and enforce duly-executed antenuptial and postnuptial property agreements between spouses.[60] Indeed, under well-established community property principles in California, a husband and wife are not bound by the statutory definitions of separate and community assets. They are free to contract concerning management powers

55. WEITZMAN, *supra* note 7, at 352. Notwithstanding that no court has yet enforced such an agreement, Professor Weitzman optimistically concludes: "It is almost certain that these courts would uphold an agreement to pay the wife for her domestic services with a property award (instead of a salary) provided the contract was negotiated in accord with traditional contract standards." *Id.*

56. *Id.* at 414. As will be discussed below, a number of the sample contracts in the book do contain provisions concerning child custody at dissolution, and it is highly questionable whether a court would enforce these provisions where other factors compelled a different custody arrangement.

57. *Id.* at 232-33. Professor Weitzman believes parties ought to be able to contract concerning these statutorily mandated benefits as well: "While one might argue that an individual ought to be allowed to designate their beneficiaries, in much the same manner that they can designate the beneficiary of a private insurance policy, the public policy issues raised by this argument are beyond the scope of this book." *Id.* at 233.

58. *Id.* at 232-33.

59. *See supra* note 40.

60. *See generally* REPPY, *supra* note 52, at ch. 3; RITCHIE, ALFORD AND EFFLAND, DECEDENTS' ESTATES AND TRUSTS 175-78 (6th ed. 1982); KRAUSKOPF, MARITAL AND NONMARITAL CONTRACTS: PREVENTIVE LAW FOR THE FAMILY (1979); Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 142 (1979); Comment, *Husband and Wife—Antenuptial Contracts*, 41 MICH. L. REV. 1133 (1943).

and ownership rights.[61] Moreover, the couple can contract concerning the property status of some, but not all, of their assets; for example, they can contract to hold their residence in joint tenancy. "One of the most common forms of marital property agreement," notes a community property expert, "is the contract to live separate in property, *i.e.*, [the husband and wife] will own and control property under the law applicable to them as if they were not married."[62]

Professor Weitzman's trend, then, is reduced to four cases dealing with antenuptial agreements in which contracting spouses stipulated to a sum of alimony in a case of divorce.[63] What these cases suggest is that some courts have repudiated the premise that alimony agreements incite divorce. Quite simply, these courts have concluded that "public policy is not violated by permitting these persons prior to their marriage to anticipate the possibility of divorce and to establish their rights by contract . . . as long as the contract is entered with full knowledge and without fraud, duress or coercion."[64] Moreover, these four alimony decisions are hardly novel when viewed in the context of decedents' estates law, because courts have long upheld both antenuptial and postnuptial agreements between partners concerning property settlements at death.[65] Perhaps all that these four cases signify is that it is difficult to distinguish the enforceability of contracts in contemplation of death from the unenforceability of contracts made in contemplation of divorce. Finally, Professor Weitzman has cited no case that enforced an intimate contract during the course of the marriage, rather than at death or dissolution.

Predicated on this overly optimistic view of the direction of domestic relations law in the coming years, Professor Weitzman's book is principally devoted to ten case studies of actual contracts between married and unmarried couples and an empirical study of intimate contracts drafted by a group of fifty-nine sociology students at the University of California in 1977.[66] In addition, the book describes in

61. REPPY, *supra* note 52, at 29.

62. *Id.*

63. Posner v. Posner, 233 So. 2d 381 (Fla. 1970) (antenuptial agreement concerning alimony), *rev'd on other grounds on rehearing*, 257 So. 2d 530 (Fla. 1972); Volid v. Volid, 6 Ill. App. 3d 836, 286 N.E.2d 42 (1972) (antenuptial agreement stipulating lump sum settlement at divorce); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973) (antenuptial agreement specifying alimony and property rights at divorce); Unander v. Unander, 506 P.2d 719 (Or. 1973) (antenuptial agreement concerning alimony).

64. Volid v. Volid, 6 Ill. App. 3d at 392, 286 N.E. 2d at 47, *cited in* WEITZMAN, *supra* note 7, at 349.

65. *See supra* note 60.

66. *See supra* note 15.

lengthy detail twenty-five categories of topics and provisions for intimate contracts.[67] Weitzman notes that while some people may wish to write a contract solely as a statement of philosophy or intent, "more will want to construct a legally enforceable agreement."[68] Therefore, she cautions her readers to consider the legal caveats discussed in later chapters, which are precisely those chapters that contain the rosy prognosis of the enforceability of these intimate contracts.[69]

Professor Weitzman's warning is inadequate and a trap for the unwary; nowhere in her analysis does she indicate which contracts and specific provisions are legally unenforceable. While most first-year law students could probably quickly identify the various problems in her sample agreements, the layman has no way of knowing which provisions will withstand judicial scrutiny. In short, almost all the model contracts can be eviscerated on traditional contract principles, leaving the parties confused, if not embittered, by their attempts to substitute their notions of rights and duties for the law's. The sample contracts in this book may be desirable to couples as statements of their hopes, but they are of dubious value for the larger number who want a true contract.

The most fundamental problem with most of the sample contracts is that they are not really contracts in the technical sense, as a lawyer or a court would recognize. A contract is generally defined as a promise or set of promises "for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[70] As will be discussed below, there simply are no remedies available for many of the suggested contract provisions, nor in many of the cases

67. WEITZMAN, *supra* note 7, at 255-91. Among the contract provisions recommended are: general purpose of the contract; legalities; parties; aims and expectations; duration; work and careers; income and expenses; property currently owned and acquired during the marriage; debts; domicile and living arrangements; responsibility for household tasks; surname; sexual relations; personal behavior and ways of relating; relations with family, friends and others; decision to have children; plans for raising children; religion; health and medical care; inheritance and wills; liquidated damages; resolving disagreements; changing, amending and renewing the contract; and dissolution. *Id.*

68. *Id.* at 257.

69. *Id.* Weitzman refers her readers to Chapters 13, 14 and 15: "Parties who want their contract legally enforceable would be wise to consider the caveats discussed in those chapters." Weitzman also recommends that the contracting parties include a severability provision to ensure that the unenforceable provision does not render the entire contract void, yet few of the sample agreements include such a severability clause. *Id.; see also* sample contracts in Chapter 12.

70. WILLISTON, CONTRACTS § 1 (3d ed. 1957); RESTATEMENT OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS (1977); SIMPSON, CONTRACTS ch. 1 (2d ed. 1965).

would the law recognize as a duty some of the performances agreed to by the parties. The contracts are filled with precatory language and ambiguous provisions. Some suggested clauses violate current statutory or constitutional provisions. In short, a number of the agreements are either void, voidable, or unenforceable. Thus, some of the contracts are void because the law does not provide a remedy in case of breach nor recognize a duty of performance.[71] Other agreements are voidable because one or more of the parties can elect to avoid or ratify the legal relations in the contract.[72] Many of the provisions are unenforceable because they are incapable of being sued upon or proved by one or both of the parties.[73]

The major difficulty with many of the contract provisions suggested by the sample agreements is the lack of definiteness. A contract will fail for indefiniteness if it is impossible for the court to tell what has been promised; therefore, it is difficult to supply a remedy for failure to render a promised performance.[74]

The sample agreements in Weitzman's book abound with vague and indefinite terms. For example, in one contract, Nancy agrees to give up her career aspirations as a dancer and to support her husband David through medical school. In return, the agreement provides "she expects financial security, the assurance she will enjoy the usual benefits of being a doctor's wife . . . and a future interest in David's ca-

71. CALAMARI AND PERILLO, CONTRACTS § 1-11 (2d ed. 1977); SIMPSON, *supra* note 70, at Ch. 1 § 7.

72. *Id.*

73. *Id.*

74. *Id.* at § 2-13; SIMPSON, *supra* note 70, at ch. 3 §§ 43-51. Examples of fatal indefiniteness include such promises as to pay an employee "an appropriate share of the profits," or, in addition to a salary, "a reasonable amount." Von Reitzenstein v. Tomlinson, 249 N.Y. 60, 162 N.E. 584 (1928) and Gaines & Sea v. R.J. Reynolds Tobacco Co., 163 Ky. 716, 174 S.W. 482 (1915), cited at SIMPSON, *supra* note 70, at 67. Other examples of indefinite promises that are unenforceable include agreements "to build a number of houses"; to divide profits "on a very liberal basis"; to pay "good wages" to a teacher; or to pay "a liberal and substantial bonus." Fly v. Cline, 49 Cal. App. 414, 183 P. 615 (1920); Greater Service Homebuilders' Investment Ass'n v. Albright, 88 Colo. 146, 293 P. 345 (1930); Fairplay School Tp. v. O'Neal, 127 Ind. 95, 26 N.E. 686 (1891); Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822 (1916), cited at SIMPSON, *supra* note 70 at nn.5, 18 & 20. The problem with this language is that it is so vague that the meaning cannot be determined with reference to any objective criteria. Similarly, it is well recognized that a contract will fail for indefiniteness where the parties attempt to define the time in which performance is to be rendered, but express this in such a fashion that their intentions cannot be determined. SIMPSON, *supra* note 70, at ch. 3 §§ 46 & 48. Moreover, where a contract suggests continuing performances by the parties, "in the great majority of cases [these] agreements . . . without termination date are construed as terminable at the will of either party, and so not contracts in the sense that they create any executory duties." *Id.* at § 48.

reer."[75] What exactly has David promised in this provision? Can a court possibly determine what is the required performance on David's part? What is "financial security," or "the usual benefits of being a doctor's wife?" More importantly, if David fails to keep his part of the agreement, what possible remedy can the court order? If money damages are incalculable or inappropriate for breach of this promise, can the court order specific performance by David? Does such a remedy run afoul of the thirteenth amendment?

The contract between Nancy and David is filled with aspirational (and inspirational) language that would leave a court bewildered and helpless. Other examples:

> Nancy realizes that she will have to work hard and make due with very little money while she supports David. Further, she understands that David's studies will be time-consuming, and that he will be a less than ideal companion. *However, she is willing to sacrifice these short-run benefits for David's guarantee of a better tomorrow*.[76]

David, in this agreement, has apparently guaranteed a "better tomorrow"—surely, one of the vaguest contract terms imaginable. Although he perhaps has made a foolhardy promise, he is not without recourse, however, because Nancy has agreed (according to the sample contract):

> [T]o devote her talents to nurturing him and their children and *to create the type of elegant and beautiful home that only Nancy's presence could create*.[77]

How is a court to determine if Nancy has performed or failed to perform on this contract term? If David decides that Nancy is not living up to her portion of the agreement, what possible remedy can they order? Since Nancy presumably has neither income nor assets to compensate David for her inadequate domestic skills, can the court order the specific performance of an elegant and beautiful home?

In addition to vague and indefinite contract terms, the sample contracts are filled with precatory language; that is, language that is advisory or in the form of a recommendation or request, rather than a positive command.[78] But what is a court to make of all this aspirational language? The most egregious examples of precatory language are con-

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75. WEITZMAN, *supra* note 7, at 296.

76. *Id.* (emphasis added).

77. *Id.* (emphasis added).

78. BLACK'S LAW DICTIONARY 1339-40 (4th ed. 1951).

tained in the sample contract between Barbara and Robert, an already married couple:

> Barbara and Robert *desire to continue* their marriage and to make it a full and equal partnership.
>
> . . . .
>
> The parties *share a commitment* to the process of negotiations and compromise that will continue to strengthen their equality in the partnership.
>
> . . . .
>
> The parties *hope to maintain* such mutual decision-making . . . .
>
> . . . .
>
> The parties *acknowledge their desire* to maintain a monogamous sexual relationship. They, therefore, agree to be sexually faithful to each other.[79]

Having agreed to remain sexually faithful to each other (can the court enforce this?), Barbara and Robert also acknowledge that each would be jealous or upset if the other became involved with another person. To deal with this possible eventuality, Barbara and Robert agree, in part, that:

> [If] Robert's activities cause Barbara undue anxiety (even if they are innocent and or helpful to his work), he will change his plans.
>
> . . . .
>
> At the same time, Barbara will try to become a more trusting person.[80]

It should be quite evident that no court will get into the business of assessing Barbara's "undue anxiety" or compelling Barbara to become "a more trusting person." Barbara and Robert do not have a contract; they have paper that states their hopes and fears, and their agreement to seek marriage counseling if things do not work out.[81]

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79. WEITZMAN, *supra* note 7, at 308-09 (emphasis added). There are numerous other examples of precatory language in the sample contracts: "We hope that we can teach our child to know the joys of caring deeply for others as well as taking seriously the quality of his or her own life. We hope that our child will come to understand the world and act in a useful and just manner. We hope that our child will have a terrific sense of humor about it all."

80. *Id.* at 309.

81. *Id.* at 311. Their agreement provides that in the event of any unresolved conflicts over any provision of the contract, they will seek assistance from a licensed social worker or marriage counselor. *Id.*

As concerns the regulation of sexual relations, it seems highly dubious that any court could enforce many of the provisions suggested because of public policy or statutory prohibitions. Indeed, some of the suggested terms seem to violate ninth amendment protections concerning privacy rights:

> Children will be postponed until David's education is completed.
>
> . . . .
>
> If Nancy should become pregnant prior to that time, she will have an abortion.[82]
>
> . . . .
>
> Responsibility for birth control will be shared equally. Susan will have this responsibility for the first six months of the year, Peter for the second six.
>
> . . . .
>
> If Susan decides to have an abortion, the party who had responsibility for birth control the month that conception occurred will bear the cost of the abortion.[83]

Even more surprising is the contract drafted by two lawyers in lieu of marriage. This agreement, which they specify "is entered into with the firmest intention that we be mutually and legally bound" and "in our professional judgment . . . [is] . . . a judicially enforceable contractual relationship"[84] contains the following provision with regard to sexual relations, children, and child raising:

> We recognize the central importance of sex in human relationships and commit ourselves to putting time and creative energy into realizing our sexual potential.
>
> . . . .
>
> We agree to attempt to have a child.
>
> . . . .
>
> In deciding to bring a child into our lives, we commit ourselves to making the space to know and enjoy that person.[85]

The legal questions surrounding these "contract" provisions are obvious: What does the language mean? Are there promises here that a court could enforce? Are there any legally recognizable duties for

82. *Id.* at 298.
83. *Id.* at 304.
84. *Id.* at 324.
85. *Id.* at 321.

which the court could provide a remedy for non-performance? What possible remedies could the court order? The conclusion is clear: there are no legally enforceable contract terms expressed by these aspirations.

In addition to problems concerning indefiniteness, precatory language, and statutory and constitutional prohibitions, the sample agreements contain numerous problems of contract interpretation. For example, some provisions are ambiguous:

> Since Peter expects to become a psychologist, he will become the primary parent for the first child.[86]
>
> . . . .
>
> In the event that Robin becomes financially successful as a painter and earns enough to support them both throughout the year at the equivalent of double their current annual income of $6,000 a year, then Robin agrees to assume the responsibility for all living expenses.[87]

Do these contract provisions contain conditions? Are they conditions precedent or subsequent? Were conditions intended by the parties? If Peter does not become a psychologist, for example, but a mailman, is he relieved of his obligation to become the primary parent for the first child? If Robin earns $10,000 a year as a painter, does he have any responsibility for living expenses?

Without belaboring language problems further, the sample contracts are also perilous because they contain various provisions which clearly are contrary to statutory or common law rules. Thus, notwithstanding the best intentions of the parties, no court would enforce the following agreement: "If we cannot agree on custody, we will determine by random lot which parent gets custody at what time."[88] Similarly unenforceable is the provision that "no financial or other responsibilities will continue between the parties after separation and division of their community property."[89] It seems clear that until the law is changed, either by legislation or judicial decision, parties cannot simply contract away certain legal rights and duties. Yet this is precisely what many of Weitzman's couples attempt to do.

Professor Weitzman has envisioned a brave new world of contracts and all the wonderful people in it. Her vision, however, is frightening

86. *Id.* at 305.
87. *Id.* at 316.
88. *Id.* at 322.
89. *Id.* at 319.

to anyone conversant with basic contract principles, and most importantly, is anathema to the courts who would be asked to enforce her model contract provisions. Professor Weitzman has clearly identified the inadequacies of current domestic relations law to deal with contemporary family realities. Yet the solution she proposes, the substitution of intimate contracts, will not help the people she desires to aid. In short, many of the suggested contracts are not contracts at all, but merely aspirational statements of goals and expectations, drafted by couples who wish to order their own lives. Rather than helping these people to arrange a more stable and equal partnership, these agreements may inadvertently lead to hard feelings and bitterness when the contracting couples disagree or ultimately separate. At that point many may discover, to their surprise, that their so-called contract is no contract at all.