

FAIRNESS OF CONTRACT vs. FREEDOM OF CONTRACT: THE PROBLEMATIC NATURE OF CONTRACTUAL OBLIGATION IN PREMARITAL AGREEMENTS

I. INTRODUCTION

"The main purpose of contract law is the realization of reasonable expectations induced by promises. The underlying purpose of law and government is human happiness and contentment to be brought about by the satisfaction of human desires in the highest practicable degree."¹ Pragmatically, one must often view life as a series of contracts. It follows, then, that the law of contracts serves in part to teach individuals how to deal with transactions on a daily basis, thereby teaching people how to behave in society in general. When engaging in a contractual relationship, the parties must be aware of exactly what they are doing. Each party must demand information regarding the deal in question, along with all possible benefits and drawbacks, in order to avoid serious dissatisfaction in the end. This Note focuses on the concept of full and fair disclosure in premarital agreements,² as applied by the Wisconsin courts.³ The topic brings up an interesting tension between two useful and beneficial principles embedded in contract law: the duty of disclosure and the freedom to draft a contract as one wishes. This tension provides an interesting point at which to begin a discussion of the benefits and drawbacks of each policy, as they concern premarital agreements.⁴ Whether premarital agree-

¹ 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1.1, at 2 (West Publishing Co., 1962) [hereinafter CORBIN ON CONTRACTS].

² See BLACK'S LAW DICTIONARY 92 (6th ed. 1990). The term is defined as: An agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage . . . in attempt to resolve issues of support, distribution of wealth and division of property in the event of the death of either or the failure of the proposed marriage resulting in either separation or divorce.

Id. These are also called prenuptial agreements, antenuptial agreements, or marital property agreements. *Id.* In order to avoid confusion, this Note will refer only to the term "premarital agreements."

³ See discussion *infra* Parts III, IV.

⁴ See UNIF. PREMARITAL AGREEMENT ACT, Prefatory Note, (1983). The following provides an explanation for the increased significance of premarital agreements:

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage.

ments are a good idea for a couple contemplating marriage raises many emotional and rational points supported by both affirmative and negative arguments. The Supreme Court of Wisconsin states its position on such agreements as follows:

The legislature has recognized that prenuptial and postnuptial agreements dividing property serve a useful function. They allow parties to structure their financial affairs to suit their needs and values and to achieve certainty. This certainty may encourage marriage and may be conducive to marital tranquility by protecting the financial expectations of the parties. The right to enter into an agreement regulating financial affairs in a marriage is important to a large number of citizens.⁵

For better or worse, society takes an interest in protecting the welfare of marriage as an institution. Since premarital agreements solidify financial expectations and serve to resolve various other uncertainties between the parties, state legislatures and courts are concerned with regulations and guidelines for drafting and enforcing premarital agreements.⁶ Because such agreements are presumed to be equitable, and therefore enforceable,⁷ a discussion of the problematic issues arising from premarital agreements can provide helpful information to parties contemplating the execution of such agreements. Knowledge concerning the various aspects of the agreement one is about to make is the most important ingredient for a satisfying contract.⁸

Because of their intent to marry, a confidential relationship arises between parties to a premarital agreement.⁹ Therefore, the parties are no longer dealing with each other at arm's length, as are the parties in ordinary contractual agreements.¹⁰ Rather, parties executing and agreeing to a premarital agreement have a duty to disclose the "nature, extent, and value of the property" that he or she presently holds, "so that the other party may make an intelli-

Id.

⁵ *Button v. Button*, 388 N.W.2d 546, 550 (Wis. 1986).

⁶ See discussion *infra* Part IV.

⁷ See *Gardner v. Gardner*, 527 N.W.2d 701 (Wis. Ct. App. 1994).

⁸ JOHN D. CALAMARI AND JOSEPH M. PERILLO, *CONTRACTS*, §§ 1-3, at 6 (3d ed. . 1987) ("Most of contract law is premised upon a model consisting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining.")

⁹ See Linda D. Elrod and Timothy B. Walker, *Family Law in the Fifty States*, 27 *FAM. L. Q.* 515, 531 (1994) ("Fiancés share a confidential, fiduciary relationship, each having a responsibility to act with good faith and fairness to the other, which includes full disclosure prior to execution of premarital agreements.")

¹⁰ See *id.*

gent decision as to what will be gained or lost by entering into the agreement."¹¹

Imposing such a duty on the parties to an agreement necessitates a discussion of the inherent tension between the duty to disclose, on one hand, and freedom of contract, on the other. Both principles are supported by valid policy arguments; however, in the case of premarital agreements, a delicate situation arises. Parties ought to be able to contract freely, regardless of whether the bargain appears wise, unwise, profitable, or unprofitable to an outsider.¹² Furthermore, parties to an agreement should be free from the heavy-handed benevolent paternalism implicit in the imposition of limitations and requirements on private agreements. Such rules often suggest that one party is intellectually weaker and less capable of protecting his or her own interests. Placing a duty to disclose upon the parties to a premarital agreement, however, serves not only to protect the non-drafting party, but also implements an aspect of efficiency in the process of executing the agreement.¹³ The tension between the duty of disclosure and the freedom to draft a contract according to one's own wishes provides an instrumental focus for a discussion of the benefits and drawbacks of each policy as they concern premarital agreements.

This Note traces the case history and present standing of premarital agreements in Wisconsin, and ultimately takes issue with the goal sought by requiring full and fair disclosure: Is the purpose to provide for an equitable or agreeable [potential] parting of the ways, or is the requirement merely a tool of judicial efficiency used to insure contractual enforceability? The cases illustrate different outcomes based on unclear guidelines for drafting and enforcement.¹⁴ Such methodology results in ambiguous rules of law as well as arbitrary results. This Note suggests that the state asserts its right to enforce its moral judgment by intruding upon marital relations and personal transactions under the guise of contract law, using arbitrary rules based on subjective judicial preferences to enforce or invalidate a premarital agreement. Rather than strict adherence to the drafting and enforcement guidelines set forth by the Uniform Premarital Agreement Act, the Supreme Court of Wisconsin has devised a method for enforcing premarital agreements

¹¹ James G. Pearson, Jr., Annotation, *Failure to Disclose Extent or Value of Property Owned as Ground for Avoiding Premarital Contract*, 3 A.L.R. 5th 394, 413 (1993) (citing 41 AM JUR. 2D, *Husband and Wife* §297 (1995)).

¹² See generally Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

¹³ For an overview of freedom of contract's declining trend in the twentieth century, see generally, CALAMARI AND PERILO, *supra* note 8.

¹⁴ See discussion *infra* Parts III, IV.

based on general rules of contract law, combined with the requirement of 'meaningful choice.'¹⁵ The regulations produced by the Wisconsin Supreme Court's decisions are pioneering in their ability to simultaneously accommodate fairness and practicality, however: these guidelines are often applied subjectively and ambiguously by the lower courts. Finally, this Note endorses a method of analyzing premarital agreements based on the concept of meaningful choice, as suggested by the Supreme Court of Wisconsin. Such a method of reasoning promotes the fundamental principles of fairness, upon which a duty to disclose is based, while not detracting from the sound policy of freedom of contract.

II. FREEDOM OF CONTRACT: PERSONAL LIBERTIES AT THE EXPENSE OF PROPERTY AND ECONOMIC RIGHTS? *"The freedom of contract dogma is the real hero or villain . . ."*¹⁶

Before discussing the actual enforceability of premarital agreements, it is first useful to grasp an understanding of the reasons behind judicial decisions upholding or striking down certain agreements. The reasoning behind judicial rulings regarding premarital agreements is based largely on two policies: the demand that parties to a contract deal fairly with each other, and the desire to ensure that parties may contract freely according to their own wishes.¹⁷ Most decisions fall into the category of 'fairness' (with the courts policing the terms of the agreement), or freedom of contract (with the courts taking an objective position and upholding a contract despite its apparent unfairness to one of the parties). This is not an ideal way of creating law, as some rulings inevitably seem subjective and in favor of fairness at the expense of freedom to create the agreement one desires, while other decisions appear unjust and uphold the right to contract freely at the expense of requiring fair dealing between the parties. Decisions concerning premarital agreements seem to beg the question: must freedom of contract be championed at the expense of eliminating, if not a fair outcome between the parties, at least a fair dealing when creating the agreement? The tension between the competing policies of freedom of contract and the rules implemented to insure fair dealing and procedural fairness in creating agreements is the most problematic issue surrounding the enforceability of premarital

¹⁵ See *Button v. Button*, 388 N.W 2d 546, 551 (Wis. 1986).

¹⁶ Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLL. L. REV.* 629, 639 (1943)

¹⁷ See discussion *infra* Part IV.

agreements.¹⁸ Therefore, a discussion of these competing policies is a necessary precursor to an examination of the topic.

Historically, American judges and legislators have staunchly supported freedom of contract.¹⁹ It is important to recall that the topic of this discussion concerns only the problematic contractual obligations arising from premarital agreements. Several historical arguments in favor of the freedom of contract deal with employment regulations, civil rights laws, and other topics unrelated to the subject at issue here.²⁰ This Author favors freedom of contract, and this opinion is woven throughout the Note's discourse.²¹

Freedom of contract serves to benefit the parties to premarital agreements in several ways. First, parties to premarital agreements are contemplating the execution of a contract. Parties to any contract have both the right and the responsibility to negotiate freely. This freedom reflects the existence of privacy rights and individual autonomy within society.²² Second, many of the mechanisms of premarital agreements, which will later be discussed in an examination of contractual fairness, are so vague, and applied on such an ad hoc basis that they encourage subjectivity while illustrating discretion in judicial decision-making abilities, rather than the promotion of fairness between the parties. The subjectivity and

¹⁸ See generally, Paul G. Haskell, *Teaching Moral Analysis In Law School*, 66 NOTRE DAME L. REV. 1025, 1048 (1991).

The autonomy of the individual, specifically freedom to contract, was restricted in the interest of a fundamental societal good. In the case of the premarital agreement, there was also a paternalistic element in the restriction of autonomy: the state was protecting a prospective spouse from making an imprudent decision affecting the remote future in circumstances where pressures were likely to exist.

Id.

¹⁹ See Caroline R. Fredrickson, *Freedom of Contract and the Remedy of Forced Hiring: A Comparative Assessment of German and American Anti-Discrimination Law*, 4 J.L. & POL'Y 1, 5 (1996). See also, Justice Rufus Peckham's discussion of freedom of contract in *Allgeyer v. Louisiana*, 165 U.S. 578, 583-93 (1897), stating that people ought to be free to choose which contractual relationships they wish to engage in.

²⁰ See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a statute regulating maximum work hours and stating: "There is no reasonable ground for interfering with the liberty of a person or the right of free contract."). But see *id.* at 65 (Harlan, J., dissenting) ("There is a liberty of contract which cannot be violated, [but] is subject to [reasonable police regulations]."). In latter years, the Court expanded on Justice Harlan's reasoning:

Under our form of government the use of property and the making of contracts are normal matters of private and not a public concern. The general rule is that both shall be free from governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.

Nebbia v. New York, 291 U.S. 500, 523 (1934) (citations omitted).

²¹ However, as the title of this Note suggests, such arguments are confined to the debate regarding premarital agreements.

²² For a brief discussion of sovereignty and the human will as related to contract law, see CALAMARI AND PERILO, *supra* note 8, at 7-11.

discretion inherent in judicial decisions purportedly favoring contractual fairness ultimately serve to render those decisions unfair simply because of the high level of judicial subjectivity. The fact that academic arguments favoring contractual 'fairness' are often defeated by unfair outcomes in the cases themselves provides one more reason to seriously consider and embrace the benefits of a freely negotiated agreement.

Contracts provide a form of private governance and a way of regulating activities and transactions among and between individuals without the formidable, interfering, and benevolent paternalism of government control.²³ The principle of freedom of contract reflects a society in which individuals are capable of and allowed to think and act for themselves:

Thus freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system. As a result, our legal lore of contracts reflects a proud spirit of individualism and of *laissez faire*. This is particularly true for the axioms and rules dealing with the formation and interpretation of contracts, the genuineness and reality of consent. Contract—the language of the cases tells us—is a private affair and not a social institution. The judicial system, therefore provides only for their interpretation, but the courts cannot make contracts for the parties. . . . A person is supposed to know the contract he makes.²⁴

Ideally, each party to an agreement has the right to negotiate and, ultimately to decide to walk away from the proposed agreement if its terms and provisions are unsatisfactory.²⁵ Ultimately, freedom of contract reflects the existence of individual freedom.²⁶ It fol-

²³ See Ugo Mattei, *The Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427, 443 (1995) (recognizing "contracts as means of private justice alternative to state justice"); Adam B. Seligman, *Individualism As Principle: Its Emergence, Institutionalization, and Contradictions*, 72 IND. L. J. 503, 508 (1997) (stating that the "[f]reedom of contract, for example, exists exactly to the extent to which such autonomy is recognized by the legal order.") (citing 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 698 (1978)).

²⁴ Kessler, *supra* note 16, at 630.

²⁵ *Id.* (stating that "[e]ither party is supposed to look out for his own interests and his own protection Everyone has complete freedom of choice with regard to his partner in contract").

²⁶ See *id.* at 640 (noting that freedom of contract is the most significant symbol of individual rights in contract law and endorsing such freedom because, "society believed that individual and cooperative action left unrestrained in family, church and market would not lessen the freedom and dignity of man but would secure the highest possible social justice.").

lows, then, that suppression of freedom of contract ultimately results in the suppression of individual freedom.

Arguably, the interest in freedom of contract prevails over any compulsory requirements derived from a confidential relationship. If one's concern is the loss of protection granted by the duties inherent in confidential relationships, one can simply refuse to sign the agreement. It is not inappropriate for courts to call upon individuals to protect their own interests and take personal responsibility for their agreements.

There is an implied covenant of good faith and fair dealing in contractual relationships;²⁷ similarly, the duty of disclosure is required where the drafting and execution of premarital agreements is concerned.²⁸ As will later be discussed, a duty of disclosure arises from the unique personal relationship between parties to a premarital agreement.²⁹ However, the cases that follow indicate that this requirement, arising from a desire to promote substantive and procedural fairness, is vague and its applicability and definition are left to the discretion of the courts.³⁰ Such vagueness, leading to subsequent increases in judicial discretionary power, creates a subjectivity in determining the enforceability of premarital agreements.³¹ Limitations on contractual freedom in premarital agreements arise from public policy bases as the states purport to possess a special interest in marriages, families, and marriage agreements.³² Yet the abstract notion of promoting public policy is frightening simply because it is so abstract and vague. Before praising a rule which supposedly stands on public policy, one must first seriously question the reliability of this concept. As Professor Corbin commented:

What is "public policy" and who knows what it requires? Does a judge know this, merely by virtue of becoming a judge? Does an

²⁷ See CALAMARI AND PERILLO, *supra* note 8, §§ 11-38, at 509 ("[I]n every contract there exists an implied covenant of good faith and fair dealing.") (citing *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933); RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 205 (1981)). See also, Oliver Wendell Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure In Contract Formation*, 39 U. PITT. L.REV. 381, 384 (1978).

²⁸ See discussion *infra* Part IV.

²⁹ See *Button v. Button*, 388 N.W.2d 546, 550 (Wis. 1986). See also Judith T. Younger, *Perspectives On Antenuptial Waivers of Permanent Alimony*, 40 RUTGERS L. REV. 1059, 1073 (1987-88) (noting that prospective spouses are free to contract as long as public policy is not violated).

³⁰ See discussion *infra* Parts III, IV.

³¹ See Tina Boudreaux, *McAlpine v. McAlpine: The Louisiana Supreme Court Reverses Its Stance on Antenuptial Waivers of Permanent Alimony*, 71 TUL. L. REV. 1339, 1357 (1997) (noting that the dilemma of fairness in antenuptial agreements is not easily solved, particularly because "too many risks are associated with determining which situations cross the amorphous lines of fairness . . .").

³² See *Button*, 388 N.W.2d at 550. See also Younger, *supra* note 29, at 1073.

administrative officer or commission? Do the men constituting a legislature or a Congress? All of these persons have more or less power to make declarations of public policy and to make those declarations effective to the advantage or the detriment of their fellow men. . . . The loudest and most confident assertions as to what makes for the general welfare and happiness of mankind are made by the demagogue and the ignoramus. . . . When the validity of a contract is in issue before a court, the judge is obliged to make decision [sic] whatever the degree of his ignorance or wisdom.³³

Because the requirement of fairness is abstract and ambiguous in premarital agreements, the enforceability of such agreements is judged by subjective standards. By definition, a requirement that is ambiguously applied according to subjective standards cannot promote fairness. It follows then that such standards, because of their vagueness, fail to promote fairness while simultaneously detracting from the parties' freedom of contract.³⁴

Opponents to freedom of contract argue that parties to premarital agreements seldom occupy equal bargaining positions. According to such arguments, freedom of contract allows one person to use the agreement as a way of pushing the other party into a corner. The courts, however, do not apply a bright-line rule in determining the enforceability of premarital agreements. The rule followed by the Wisconsin courts states that "[t]he law presumes marital property agreements are presumed to be equitable,"³⁵ and a determination of whether or not the agreement is equitable rests with the discretion of the trial court.³⁶ Judicial discretion is detrimental in premarital agreements for two reasons: discretion allows subjectivity in determining the enforceability of certain agree-

³³ 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1375, at 10 (West Publishing Co., 1962).

³⁴ See generally, Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

Enforcement of premarital agreements would serve the ends of fairness as well as efficiency. One aim of the law of marriage and divorce is to distribute fairly the benefits and burdens of marriage. But what is fair? It is generally fair to hold people to freely made promises, and fair to refuse to impose duties and obligations beyond those promises. The more important question may be: To whom should it seem fair? It is vital that the couple thinks that obligations and entitlements are divided fairly. Because notions of fairness vary, we will probably come closest to that goal by honoring the parties' ex ante indication of what they consider to be fair. To determine fair property division and spousal support without knowing what the parties thought is to navigate without a destination.

Id. at 420-21.

³⁵ *Gardner v. Gardner*, 527 N.W.2d 701, 705 (Wis. Ct. App. 1994).

³⁶ See *id.*

ments,³⁷ and it detracts from the individual's power to create the most beneficial contract possible.

III. FAIRNESS OF CONTRACT: LIBERTY SUBJECT TO CERTAIN CONSTRAINTS WITHIN A CIVIL SOCIETY

Both common sense and the facts found in the cases show that, without certain protective measures in premarital agreements, such as the duty of disclosure, individuals in inferior positions are often exposed to inequitable contractual provisions.³⁸ As the following case study illustrates, the enforceability of premarital agreements depends on the fulfillment of certain fairness requirements.³⁹ Stating that marriage is not simply a contractual relationship, but is also "a legal status in which the state has a special interest,"⁴⁰ the Supreme Court of Wisconsin is apparently as willing to promote contractual fairness as it is willing to supporting contractual freedom.⁴¹ The Wisconsin courts, however, recognize the restraint placed on premarital agreements, which arise from the desire to encourage persons contemplating marriage to deal with each other fairly and honestly:

The public interest requires that a financial agreement between spouses or prospective spouses be executed under conditions of candor and fairness. Married persons and persons about to marry stand in a confidential relationship and must deal fairly

³⁷ See Mattei, *supra* note 23, at 432 ("Once a legal system has recognized freedom of contract, it should naturally follow that contracts regularly entered into by the parties will be strictly enforced. Changing the rules of the game . . . encourage[s] speculative litigation with increasing social costs, and before courts which are already overwhelmed with work.")

³⁸ See Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 *ST. LOUIS U. L.J.* 117, 126 (1992) (recognizing that judicial attachment to freedom of contract supports objectivity, but the policy of freedom of contract can be hostile for parties who lack bargaining power and are therefore forced into transactions they neither negotiated nor had the capacity to understand).

³⁹ See Younger, *supra* note 29, at 1073.

⁴⁰ *Button v. Button*, 388 N.W.2d 546, 550 (Wis. 1986).

⁴¹ See *id.* (stating that "[t]he parties are free to contract, but they contract in the shadow of the court's obligation to review the agreement on divorce to protect the spouses' financial interests on divorce.")

The courts continue to uphold the validity and enforceability of prenuptial agreements if certain standards of fairness are met. Litigation in this area persists, however, as the courts define and interpret these standards. The Wisconsin Supreme Court, in its opinion in *In re Button*, 131 W.2d 84, 388 N.W.2d 546 (1986), held that a court should examine whether there was a fair disclosure of each spouse's financial status, whether the agreement was entered into voluntarily, and whether the substantive provisions were fair.

Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 21 *FAM. L. Q.* 417, 430 (1988).

with each other. Fair and reasonable disclosure of financial status is a significant aspect of the duty of fair dealing.⁴²

It has been argued that limits on freedom of contract need not place limits on the efficiency of contractual execution or enforceability.⁴³ The duty of disclosure, arising from the confidential relationship of the parties, is one limit placed on contractual freedom in premarital agreements.⁴⁴ Perhaps such a requirement need not be unnecessarily oppressive, and its implementation does not automatically detract from the individual liberty inherent in the freedom of contract.⁴⁵

As mentioned above, parties to premarital agreements do not deal at arm's length.⁴⁶ Certain fairness standards exist as a logical extension of the confidential relationship between prospective partners.⁴⁷ The factors included in the assessment of fairness include not only issues of disclosure,⁴⁸ but also other considerations such as the parties' respective experience in business affairs, and whether the agreement would have affected the parties' feelings toward each other.⁴⁹

However, the criteria used to determine the contract's inherent fairness often obscure the goal of ensuring contractual fairness. The case of *Gardner v. Gardner*⁵⁰ provides a clear example of the way courts can misuse or misconstrue the requirements implemented to provide fair contractual dealings. In upholding the premarital agreement, the Court of Appeals of Wisconsin stated that,

⁴² *Button*, 388 N.W.2d at 550.

⁴³ See generally, MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993).

⁴⁴ See Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 472 (1997) ("The laws dealing with one of the ultimate fiduciary relationships, marriage, and particularly antenuptial and settlement agreements, are generally governed by some form of a fairness test . . .").

⁴⁵ See Mattei, *supra* note 23, at 430 ("In general, contract law endeavours to forbid behaviours that create externalities either between the parties or to third parties. Contract law seeks to create an efficient legal structure . . . which does not necessarily grant complete freedom.").

⁴⁶ See Younger, *supra* note 29, at 1074 (explaining that parties to premarital agreements "are in confidential relationships that call for good faith, candor, and sincerity in all matters connected with the agreement.").

⁴⁷ "The inquiry into voluntariness begins as a common law review for fraud, overreaching, or sharp dealing but probes deeper than the similar inquiry made in cases of ordinary contracts." *Id.* at 1075.

⁴⁸ See Stephen W. Schlissel, *Negotiation and Drafting Considerations*, 184 PRAC. LAW INST. 51, 53 (1989) ("The single most important practical consideration in drafting a premarital agreement is full and complete disclosure. Such disclosure has been accepted as the practical equivalent of substantive fairness.").

⁴⁹ See *Gardner v. Gardner*, 527 N.W.2d 701, 706 (Wis. Ct. App. 1994) (premarital agreement held enforceable because "Dianne's conduct demonstrates that specific knowledge of William's assets and finances was not an important component of her decision to marry William.").

⁵⁰ *Id.*

despite the obvious lack of full disclosure, "Dianne's conduct demonstrates that specific knowledge of William's assets and finances was not an important component of her decision to marry William."⁵¹ Arguably, just because the value of William's assets was not important to Dianne personally (i.e. she would have married him regardless of his net worth) does not mean that full financial disclosure was not important in determining the enforceability of the agreement. Each party will be held to the terms of the agreement, whether or not those terms are an 'important' factor in their decision to marry, and therefore each party should have information regarding the specific provisions of the contract. Another criticism of the 'fairness of contract' approach taken by the Wisconsin courts for examining contracts can be found in *In re Estate of Knipfel*,⁵² where the Supreme Court of Wisconsin held that an agreement's enforceability can hinge either upon disclosure, or upon a fair provision for the contesting party.⁵³ However, allowing the court to decide whether the agreement is enforceable based on the 'fair provision for the contesting party' exploits the policy of fairness of contract as a way of allowing the court to make a value judgment based on subjective and amorphous concepts of 'fairness' along with a great deal of judicial discretion.

'Fairness of contract' sounds like a fabulous theory to follow when drafting and enforcing contracts. However, a determination of what is fair often arises from a variety of subjectively derived criteria, depending on the provisions of each agreement and the circumstances surrounding the parties to that agreement. Subjectivity can only serve to confuse the points at issue in determining whether or not an agreement ought to be enforced.

IV. ANTENUPTIAL CONTRACTS IN WISCONSIN: A CASE HISTORY OF THE DUTY OF DISCLOSURE

This section will trace Wisconsin's case history of premarital agreement litigation, focusing in particular on the problematic requirement of disclosure. Most courts hold parties to antenuptial agreements to be in confidential relationships and require a disclosure of assets prior to execution of the agreement,⁵⁴ and most juris-

⁵¹ *Id.* at 706.

⁵² 96 N.W.2d 514 (Wis. 1959).

⁵³ *Id.*

⁵⁴ See *Button v. Button*, 388 N.W.2d 546, 550 (Wis. 1986) ("Fairness in procurement depends on two factors: whether each spouse makes fair and reasonable disclosure to the other spouse of his or her financial status, and whether each spouse enters into the agreement voluntarily and freely."). See also *Younger*, *supra* note 29, at 1074.

ditions require full disclosure of assets in order for a premarital agreement to be considered valid.⁵⁵ In order to establish that there has been proper disclosure, the agreement usually either contains a clause signed by the parties stating that full disclosure has been made, or includes an actual listing of each party's assets.⁵⁶ Some jurisdictions, including Wisconsin, have held that disclosures need not be exact,⁵⁷ and several courts have also established approaches allowing actual or constructive knowledge of the other party's assets as a substitute for full disclosure.⁵⁸ Furthermore, a party to a premarital agreement is not required to seek information regarding the other party's assets.⁵⁹ Often, the enforceability of premarital agreements depends upon the procedural fairness of the contract's execution, with disclosure of assets being the most problematic issue.⁶⁰

Wisconsin's first response to the disclosure issue in deciding the validity of premarital agreements occurred in 1959 in *In re Estate of Knippel*.⁶¹ The case involved a suit brought by the second Mrs. Knippel against the estate of her deceased husband to set aside their antenuptial agreement because Mr. Knippel had failed to fully disclose his net worth.⁶² According to Mrs. Knippel:

⁵⁵ See *Ortel v. Gettig*, 116 A.2d 145 (Md. 1955) (finding that confidential relationship arises between parties engaged to be married, requiring full and truthful disclosure of wealth); *In re Estate of Benker*, 331 N.W.2d 193, 196 (Mich. 1982) (duty of full disclosure required); *Simeone v. Simeone*, 581 A.2d 162, 167 (Pa. 1990) (requiring "full and fair" disclosure of the parties' financial positions). See also UNIF. PREMARITAL AGREEMENT ACT (UPAA) (1983) (declaring "(a) premarital agreement is not enforceable if the party against whom enforcement is sought proves . . . (he or she) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party."). See generally, James O. Pearson, Jr., Annotation, *Failure to Disclose Extent or Value of Property Owned as Ground for Avoiding Premarital Contract*, 3 A.L.R.5th 394 (1993).

⁵⁶ See Pearson, *supra* note 55.

⁵⁷ See *Matuga v. Matuga*, 600 N.E.2d 138 (Ind. Ct. App. 1992) (*transfer den.* Dec. 15, 1992); *In re Estate of Broadie*, 493 P.2d 289 (Kan. 1972); *In re Estate of Peterson*, 381 N.W.2d 109 (Neb. 1986); *Hengel v. Hengel*, 365 N.W.2d 16 (Wis. Ct. App. 1985).

⁵⁸ See *Hughes v. Hughes*, 471 S.W.2d 355 (Ark. 1971); *In re Marriage of Ross*, 670 P.2d 26 (Colo. Ct. App. 1983); *In re Marriage of Sokolowski*, 597 N.E.2d 675 (Ill. App. Ct. 1992) (holding that information from friend that husband "probably was worth more than \$100,000" was adequate substitute for disclosure); *In re Marriage of Sell*, 451 N.W.2d 28 (Iowa Ct. App. 1989); *In re Marriage of Knoll*, 671 P.2d 718 (Or. Ct. App. 1983).

⁵⁹ This does not, however, mean that a party may ignore information regarding the other party's assets simply because it came from an indirect source. See *Ryken v. Ryken*, 461 N.W.2d 122 (S.D. 1990); *In re Marriage of Cohn*, 569 P.2d 79 (Wash. Ct. App. 1977); *Hengel v. Hengel*, 365 N.W.2d 16 (Wis. Ct. App. 1985); *Button*, 388 N.W.2d at 546 (recognizing rule); *Schumacher v. Schumacher*, 388 N.W.2d 912 (Wis. 1986) (finding that independent knowledge of each other's financial assets satisfies disclosure requirement as long as independent knowledge is not merely a general knowledge).

⁶⁰ See *Schlissel*, *supra* note 48, at 53 ("The single most important practical consideration in drafting a premarital agreement is full and complete disclosure. Such disclosure has been accepted as the practical equivalent of substantive fairness.").

⁶¹ 96 N.W.2d 514. (Wis. 1959).

⁶² *Id.* at 519.

the matter of a pre-nuptial agreement had never been discussed before the day it was signed; she saw the agreement only for about twenty minutes before she signed it; she was not given a copy at that time; she did not think she needed legal counsel; he told her the purpose of signing the agreement was 'so you will be well taken care of; so you'll get your one-third' and 'so his own children wouldn't cheat me out of it.'⁶³

Relying on precedent, the Supreme Court of Wisconsin found that a lack of disclosure is not dispositive in determining the enforceability of premarital agreements, but rather the party contesting the agreement must prove the existence of fraud unless the agreement's terms "are so manifestly inadequate as to give rise to a presumption of fraud."⁶⁴ The Wisconsin Supreme Court further concluded by supporting a rule requiring either full disclosure or, alternatively, a reasonable provision for the party contesting the agreement.⁶⁵

At first glance, the rule established by *In re Estate of Knippel* (either disclosure, or fair provision for the contesting party) is equitable and based on sound policy. The court seems to state that insuring fairness in premarital agreements is the ultimate goal, but two problems arise from such an assertion. First, the term "fairness" describes a subjective concept. Should the courts engage in the business of examining the relationship of a married couple and subsequently rule on the terms included in a private agreement? Such a question relates to the previous discussion of contractual fairness in premarital agreements.⁶⁶ Is it sound policy for a court to make a substantive ruling, not on the fairness of the contract's terms, but on the fairness of the actual provisions of the agreement? The court does not discuss (either by attacking or supporting) the circumstances surrounding the agreement's execution, such as the fact that the wife was not forewarned she would be presented with a premarital agreement, that she saw it for only twenty minutes before signing it, or that she did not have the benefit of counsel's advice.⁶⁷

Such problems lead into the second basis for this decision's unsound policy, violation of the parties' rights to contract freely.

⁶³ *Id.* at 516.

⁶⁴ *Id.* (citing *In re Estate of Koeffler*, 254 N.W. 363 (Wis. 1934)).

⁶⁵ *See id.* at 519 (recognizing *In re McClellan's Estate*, 75 A.2d 595, 597 (Pa. 1950), which held the validity of antenuptial agreements depends on one of two factors: "[a] reasonable provision for the wife, or in the absence of such provision, a full and fair disclosure to the wife of the husband's worth . . .").

⁶⁶ *See supra* notes 31-53 and accompanying text.

⁶⁷ *See Knippel*, 96 N.W.2d at 516.

Ruling on the fairness of a contract's provisions detracts from one of the most basic principles of contract law: that parties are free to deal in any way they choose, whether or not the bargain appears unwise or unprofitable to an outside party. Such a discussion of freedom of contract — or freedom to engage in an unwise agreement — leads us back to the problem of disclosure arising from the confidential relationship of the parties, which places a limit on the freedom of contract.

In choosing to permit the undefined "fairness" standard as an alternative to full disclosure of assets between two parties engaging in a premarital contract, the Supreme Court of Wisconsin is actually controlling an area which should belong to the privately contracting parties. In deciding what is and is not fair for privately contracting parties, the Court endorses both subjectivity and paternalism in the area of premarital agreements. If the court wishes to provide for fairness when dealing with premarital agreements, the best way to do so is to provide solid guidelines for the execution of such contracts. The terms ought to be easily understood, parties should be represented by separate counsel⁶⁸ — or at least be given the time to seek counsel's advice if they desire, and full disclosure of assets owned and assets to be divided or withheld ought to be required. Such rules obviously conflict with the parties' abilities to bargain freely, but not so much as in the case where the parties draft an agreement which the court later subjectively decides is fair or unfair. If the parties' abilities to bargain freely must be limited, as such limitations appear to be a necessary evil in order to support some concept of fairness,⁶⁹ that concept of fairness should not be abstract and subjective, but should rather be determined by guidelines the parties can follow when drafting the agreement.

In 1977, Wisconsin enacted a statute addressing the enforcement of premarital agreements.⁷⁰ The statute states that no pre-

⁶⁸ See Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997).

⁶⁹ Citing the Wisconsin statute which allows partners to reach their own agreements concerning financial matters, and requires the court to presume validity of such agreements, provided the agreement is equitable, the Wisconsin Supreme Court stated:

Sec. 767.255 (11), however, sets forth a competing public policy. While Sec. 767.255(11) embodies the public policy of freedom of contract, it also empowers a divorce court to override the parties' agreement if the agreement is inequitable. This latter policy reflects the unique role of the marriage contract in society. Marriage is not simply a contract between two parties. Marriage is a legal status in which the state has a special interest.

Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986) (citing Wis. STAT. ANN., § 767.255 (11) (1983-84)).

⁷⁰ See Wis. STAT. ANN., MARRIAGE AND FAMILY, § 767.255 (11) (West 1997). The full text of the statute states:

marital agreement shall be valid where the terms are inequitable as to either of the parties; however, the court will presume premarital agreements to be equitable to both parties.⁷¹ Seven years after the statute's enactment, the Court of Appeals of Wisconsin addressed the scope of the disclosure requirement in *Hengel v. Hengel*.⁷²

Barbara Hengel contested the validity of her premarital agreement, on the basis that it was inequitable.⁷³ The parties married when Barbara was twenty-five and Joseph, her husband, was forty-one.⁷⁴ The court found the following facts significant: both parties had children from previous marriages, they had lived together for one and one-half years, the marriage had occurred at Joseph's request, Barbara had been employed by Joseph's business, Barbara comes from a wealthy family, she is "moderately sophisticated in financial matters," and she was aware before her marriage that Joseph would demand a premarital agreement.⁷⁵ The Court examined the circumstances surrounding the agreement in order to determine the substantive and procedural fairness, and ultimately upheld the agreement.⁷⁶ As to the substantive fairness of the provisions, the court determined that Barbara left the marriage with more assets than she possessed before the marriage, and presumably also took into account the fact that she came from a wealthy family.⁷⁷ As for the procedural fairness, the court concluded Barbara was aware she would be asked to sign a premarital agreement,⁷⁸ she signed the agreement voluntarily, was somewhat

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

Id. See also, *Bibelhausen v. Bibelhausen*, 150 N.W. 516, 520 (Wis. 1915) (establishing that, prior to enactment of the statute, husband and wife were free to execute contracts concerning their rights with regard to the other's assets); *Oseau v. Oseau's Estate*, 147 N.W. 62, 64 (Wis. 1914) (same).

⁷¹ See § 767.255(11).

⁷² 365 N.W.2d 16 (Wis. Ct. App. 1985) (holding premarital agreement valid where contesting spouse possessed only approximate knowledge of other spouse's property).

⁷³ See *id.* at 17 (Barbara was allotted "all household furniture and furnishings, dishes, silverware, jewelry and any and all other of Joe's personal effects and possessions," as well as one car not more than three years old, but not including cash, bonds or stocks.).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 17-18.

⁷⁷ See *id.* at 17.

⁷⁸ See *id.* at 20. Joseph, however, admitted that on the day they were leaving to be married in Las Vegas, and while Barbara's mother and father were waiting to go to the airport, Joseph demanded he would not leave "until or unless the contract was signed." *Id.* Other facts show that Barbara was presented with a premarital agreement several weeks before the wedding, that she was advised by counsel not to sign, and that she successfully negotiated several changes in the provisions of the agreement. See *id.* at 17.

knowledgeable in financial matters, and apparently knew, although not from any disclosure made by her husband, of Joseph's assets before agreeing to the contract.⁷⁹ The Wisconsin Court of Appeals determined that evidence of disclosure need not be included in the actual agreement, and that the parties to the agreement need not actually disclose their assets to each other, as long as the parties have independent knowledge of each other's assets.⁸⁰

There are two very problematic issues regarding the *Hengel* decision. First, the Court of Appeals of Wisconsin, in its first case determining validity of premarital agreements under the statutory requirements, decides that the contesting spouse need only have a general and approximate knowledge of the other spouse's assets.⁸¹ The applicable statute presumes the validity of premarital agreements, as long as they are equitable.⁸² In emphasizing the significance of equitability, but offering no definition of the term, the Wisconsin legislature ultimately leaves the determination of what constitutes equitability to the courts. However, the *Hengel* Court seems equally unwilling to define the terms of equitability. The Court in *Hengel* requires a fair provision for the non-drafting spouse, or disclosure of assets, or some general knowledge of the other spouse's property.⁸³ The Court appears to limit somewhat the parties' ability to contract freely, yet the Court does not specifically favor contractual fairness. The party drafting the agreement can opt to execute the agreement fairly, either by providing a reasonable portion of the estate for the non-drafting party, or by negotiating in good faith and disclosing his or her assets to the non-drafting party.⁸⁴ However, the drafting party has one further option: he or she can base the validity of the agreement on some outside information that the non-drafting party supposedly possesses regarding the assets to be divided.⁸⁵ Requiring that a reason-

⁷⁹ See *id.* at 17.

⁸⁰ See *id.* at 20 (stating that Barbara was somewhat knowledgeable in financial matters, and "had independent knowledge of the substantial size of Joseph's estate before the marriage"). The court finds it important that Barbara knew of her husband's assets before the marriage. *Id.* This statement is somewhat problematic in terms of procedural fairness because one would expect Barbara's independent knowledge of any assets must occur prior to signing the agreement, rather than prior to the marriage itself. See, e.g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20 (Fla. 1962) (The Florida rule, applied by Wisconsin, is that a valid premarital agreement "contemplates a fair and reasonable disclosure to the wife, before the signing of the agreement, of the husband's worth, or, absent such disclosure, a general and approximate knowledge by her of the prospective husband's property.").

⁸¹ *Hengel*, 365 N.W.2d at 20.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

able portion of the estate goes to the non-drafting party reflects contractual fairness.⁸⁶ Requiring a fair disclosure reflects freedom of contract, subject to the limitations placed on the parties by the confidential nature of their relationship. Requiring only a general and approximate knowledge of each other's assets reflects nothing but the Court's unwillingness to reach a definite decision regarding the equitability and enforceability of premarital agreements.

There is also a second problem with the Court's decision: the implicit benevolent paternalism directed at women. The agreement's validity hinges upon "a fair and reasonable provision therein for the wife."⁸⁷ This requirement implies first that the wife will not be the party drafting the agreement, and second that either the husband or the court must insure a fair provision for the wife, presumably due to the Court's lack of faith in the wife's own ability to insure a fair outcome for herself. This decision illustrates one of the most problematic issues regarding the subjective principle of contractual fairness: implicit in its application is the notion that one of the parties to a premarital contract—specifically, the female party—will not possess the intelligence or capability to protect her own interests. Even more problematic is the Court's illogical extension of this notion: that due to the woman's inability to provide for herself, the court must provide for her according to the court's indefinite, subjective interpretation of "fairness."⁸⁸

One year later, the Supreme Court of Wisconsin more directly addressed the disclosure issue based on a policy of contractual fairness in *Button v. Button*.⁸⁹ For the first time, the Supreme Court addressed the question of what constitutes an "equitable agreement" under the relevant statute.⁹⁰ The Court established the following requirements concerning the equitability, and hence enforceability, of premarital agreements:

an agreement is inequitable under sec. 767.255 (11) if it fails to satisfy any one of the following requirements: each spouse has made fair and reasonable disclosure to the other of his or her financial status; each spouse has entered into the agreement voluntarily and freely; and the substantive provisions of the agree-

⁸⁶ Of course, such a requirement is reminiscent of the previous discussion of contractual fairness. See *supra* Part III. A "reasonable" property division is an abstract term, which can only be determined according to subjective factors. See *id.*

⁸⁷ *Hengel*, 365 N.W.2d at 20.

⁸⁸ See *Button v. Button*, 388 N.W.2d 546, 551 (Wis. 1986) ("Substantive fairness is an amorphous concept. We can set forth general principles, but the courts must determine substantive fairness on a case by case basis.")

⁸⁹ See *id.*

⁹⁰ See *id.* at 548.

ment dividing the property upon divorce are fair to each spouse.⁹¹

This decision sets out definitive guidelines for the fairness and validity of premarital agreements, and requires "fair and reasonable disclosure," indirectly disposing of the paternalistic *Hengel* rule,⁹² which allows a fair provision for the wife to substitute for disclosure.⁹³ However, the *Button* court states that, "[w]here it can be shown that a spouse had independent knowledge of the opposing spouse's financial status, this independent knowledge serves as a substitute for disclosure."⁹⁴

Further, the Court states "[i]n determining whether the agreement was entered into voluntarily and freely, the relevant inquiry is whether each spouse had a meaningful choice."⁹⁵ It is interesting that the Court decided to apply the test of meaningful choice only to the determination of whether the agreement was entered into voluntarily. Arguably, disclosure of assets bears on whether or not a meaningful choice could occur. If disclosure of assets has not occurred, one cannot be fully informed of what they are gaining or relinquishing by signing the agreement.

In *Schumacher v. Schumacher*,⁹⁶ a case decided the same day as *Button*, the Supreme Court of Wisconsin affirmed the substitution of independent knowledge for a full and fair disclosure, but stated, "independent knowledge is not a general or imputed knowledge of the other's assets and their value."⁹⁷ The Court, however, did note that, "the requirement for fair and reasonable disclosure or independent knowledge is not so technical that *de minimus* failures to disclose will invalidate an agreement."⁹⁸

Four years later, the Court of Appeals of Wisconsin decided that the *Schumacher* rule, accepting independent knowledge, ex-

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See Hengel*, 365 N.W.2d at 20. Note that the *Hengel* rule, wherein disclosure can be substituted for a fair provision for the wife, implies that the wife is not intelligent enough to make a decision arising from the disclosure. *Id.*

⁹⁴ *Button*, 388 N.W.2d at 550 (the court did not decide whether a spouse may waive disclosure).

⁹⁵ *Id.* at 550-51. The court then outlined factors for consideration when determining meaningful choice, including the presence of independent counsel, adequate time for reviewing the agreement, and whether the parties understood the terms of the agreement and what they were giving up or gaining by signing the agreement. *Id.* at 551.

⁹⁶ 388 N.W.2d 912 (Wis. 1986).

⁹⁷ *Id.* at 914-15.

⁹⁸ *Id.* at 915.

tends to situations where the contesting party has assisted the drafting party in keeping his financial records.⁹⁹

Prior to and during the marriage, Josephine assisted Darwin in keeping his financial records. She made entries in Darwin's income and ledger books When Josephine signed the agreement on March 8, 1983, Attorney Kingston told her that she was entitled to a list of Darwin's assets. Josephine responded that the list was not necessary because she already knew about Darwin's property from her work on his books.¹⁰⁰

The Court of Appeals concluded that, "[t]he evidence supports the trial court's determination that Josephine was fairly and reasonably apprised of Darwin's assets."¹⁰¹ It is unclear whether this knowledge, gained from assisting with the financial records, constitutes actual disclosure or independent knowledge substituting for the requirement of full disclosure. In any case, this decision might aid in determining what actions constitute disclosure had the Court of Appeals not gone on to consider the wife's subjective feelings.

The trial court determined, and the appellate court affirmed, the finding that "Josephine wanted a marriage to Darwin regardless of any agreement or its terms,"¹⁰² and decided "[i]f a party's conduct demonstrates that specific knowledge of the other's property and finances is not important to the marital decision, and if the agreement is otherwise freely and voluntarily made, we see no sound reason why the law should later intervene and undo the parties' contract."¹⁰³

Such a decision is doubly faulted. First, the Court of Appeals seems to favor freedom of contract by stating they will not interfere with the parties' private agreement, absent a showing of fraud or undue influence.¹⁰⁴ However, in determining that one of the parties would have married the other party regardless of the agreement's terms, the Court is invading the privacy of the parties' capacity to contract freely. It is neither the responsibility, nor the duty, of the Court to determine how strongly a person feels about marrying another. Such a determination certainly has no bearing

⁹⁹ See *Greenwald v. Greenwald*, 454 N.W.2d 34, 39 (Wis. Ct. App. 1990) (finding evidence supports showing of fair and reasonable disclosure of financial status, despite absence of formal exchange of financial records and even though wife claims ignorance of husband's financial value, if wife previously assisted husband in keeping his financial records prior to and during the marriage).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

on the validity of the premarital agreement, as it has never been voiced as a factor to consider when determining the agreement's validity. Further, the Court of Appeals in *Greenwald* ultimately discredits the concept of meaningful choice established by the Supreme Court in *Bullton*. If meaningful choice is to be a serious consideration in determining the enforceability and equitability of premarital agreements, as the *Bullton* Court establishes, then a decision holding disclosure to be irrelevant due to the court's finding that one of the parties was strongly determined to marry the other thwarts the goal to be achieved by meaningful choice. The *Greenwald* court ultimately holds meaningful choice to be an expendable requirement, if the wife is already determined to marry the husband. The *Greenwald* court is, in effect, stating that meaningful choice is unnecessary. Perhaps the court has decided meaningful choice is not needed because a woman's feelings will overcome any factual knowledge she possesses about her partner's assets or the provisions of the premarital agreement. That is, of course, not a declaration the court makes in its opinion.

The *Greenwald* decision illustrates the problems with both contractual freedom and contractual fairness in premarital agreements. The court states its unwillingness to interfere in private contracts.¹⁰⁵ However, the court determines that Josephine had made up her mind to marry Darwin, and the court further determines that no amount of information would have changed Josephine's mind.¹⁰⁶ Why is it necessary for the court to make such a finding? The court's decision clouds the requirement of meaningful choice, and in so doing shows a problem with the limitations placed on premarital agreements by requirements arising from a desire to promote contractual fairness: limits on freedom of contract, imposed to further the purpose of fairness, are applied ambiguously and in an ad hoc fashion according to which externalities strike the court as important. Such subjectivity and vagueness act as a double-edged sword as they cannot possibly promote fairness, and yet they detract from the parties' ability to contract freely.

In *Gardner v. Gardner*,¹⁰⁷ the Court of Appeals of Wisconsin made one more decision on the validity of premarital agreements. Again, the Court of Appeals considers the subjective extent of the

¹⁰⁵ See *id.* at 41. "To hold that [unequal bargaining positions alone] renders a marital agreement unenforceable would unreasonably impede the abilities and right of parties to both contract and marry." *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ 527 N.W.2d 701 (Wis. Ct. App. 1994).

wife's intentions in marrying, and relates this consideration to a determination of meaningful choice. Dianne was aware of the book value of William's assets,¹⁰⁸ and such awareness was sufficient to constitute disclosure, despite the significant differences between book value and actual fair market value. However, the Court of Appeals determined "that the dollar value placed on the stock was of no significance to Dianne. Dianne was determined to marry William. This determination to marry overcame her attorney's advice that the MPA (marital property agreement) was not in her best interest and his advice not to sign the agreement."¹⁰⁹ In effect, the Court of Appeals is once again taking the aspect of meaningful choice out of the hands of the wife. The Court decided that actual disclosure of the actual value of the husband's assets was unnecessary, because the wife was determined to marry, regardless of such knowledge.¹¹⁰

Arguably, it is impossible for the Court to know whether disclosure would have affected the wife's decision— because the Court never allowed the wife the option of meaningful choice as it was intended by the Supreme Court. The Court of Appeals states, "Dianne herself testified that the value of William's assets was not important to her."¹¹¹ Perhaps the value of the assets was not important to Dianne, meaning it wasn't the reason she married him. Just because the value of his assets wasn't important to her decision to marry doesn't mean such knowledge wasn't important for contractual purposes. She is going to be held to the terms of the contract, whether or not those terms are important to her. She should at least have knowledge, or the legal standing to attain knowledge, of what the specific contractual provisions are— including what she will gain or relinquish by signing the agreement, which necessitates a disclosure or independent knowledge of the value of her partner's assets. This is what the Supreme Court established as the requirement of meaningful choice in *Button*, but in *Gardner* as in *Greenwald*, the Court of Appeals has distorted and discredited meaningful choice by deciding disclosure would not have affected the wife's decision anyway.

¹⁰⁸ See *id.* at 705.

¹⁰⁹ *Id.* at 706.

¹¹⁰ See *id.*

¹¹¹ *Id.*

V. CONCLUSION: THERE'S SOMETHIN HAPPENING HERE, AND
WHAT IT IS AIN'T EXACTLY CLEAR¹¹²

The division between freedom and fairness in drafting premarital agreements is somewhat of a contractual valley of death for the parties involved. If one sides with the freedom of contract, one risks losing the benefit of disclosure—a policing method required to insure some level of fairness in drafting an agreement between parties sharing a confidential relationship. However, if one favors contractual fairness, one risks losing not only the ability to contract according to one's wishes, but one also risks facing the ambiguous judicial measurements implemented by the courts, supposedly intended to promote fairness.

While the Supreme Court of Wisconsin has offered the favorable solution of "meaningful choice,"¹¹³ it has not set stringent enough guidelines either for the definition or application of the solution. The effects, as illustrated by various Court of Appeals decisions, are an ambiguous, vague application of meaningful choice, nearly invalidating the duty of disclosure and allowing the courts to focus on unimportant facts in an ad hoc fashion.

By reviewing the facts and pointing out the inherent problems with disclosure in premarital agreements, this Note has shown the difficulties that lie in drafting and enforcing such agreements. The innate struggle between the competing philosophies of freedom of contract and the duty of disclosure, which exists to promote contractual fairness, often complicates matters concerning premarital agreements. Along with illustrating the essential difficulties with both theories, this Note has aimed to reveal two principles: first, to the extent that individuals entering premarital agreements rely on others to take care of them, they often fail to take care of themselves. Knowledge of one's rights, and the problems often experienced when drafting premarital agreements, can help those considering entering such agreements themselves. The second point is that the concept of meaningful choice, as advocated by the Supreme Court of Wisconsin, provides a solution for drafting and enforcing agreements that can leave both parties satisfied.

Faun M. Phillipson

¹¹² Buffalo Springfield, *For What It's Worth*, on BUFFALO SPRINGFIELD (Atlantic 1989).

¹¹³ *Button v. Button*, 388 N.W.2d 546, 551 (Wis. 1986).