

FAMILY CONTRACTS IN OREGON

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*“It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation.”*¹

For a variety of reasons, prospective spouses might choose to modify the rights that will otherwise legally govern them as wife and husband.² One or both of the parties may desire some assurance that if they divorce, their separate assets will not pass to the other spouse.³ The parties might also be resentful from a prior divorce and wish to avoid being caught in that type of conflict again.⁴ Moreover, the parties may choose to shield their assets to benefit their children.⁵ Thus, individuals often arrange their rights through private agreements, whether before, during, or after their marriage.⁶ This article will explore the scope and enforceability of prenuptial, postnuptial, and marital settlement agreements, with an emphasis on the applicable Oregon statutes and case law.

I. PREMARITAL CONTRACTS

Prenuptial agreements are favored in Oregon⁷ and ORS 108.700 to ORS 108.740 (particularly ORS 108.725) provides the framework

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1. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 651 (1993) (quoting *Hendricks v. Hendricks*, 270 P.2d 80, 82 (Cal. 1954)).

2. Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4th 22, § 2(a) (2006) [hereinafter Roy, *Modern Status*].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *In the Matter of the Marriage of Coward*, 582 P.2d 834, 836 (Or. App. 1978).

for the enforcement of these contracts.⁸ This statute controls to the extent that it is inconsistent with ORS 107.105(1)(f), Oregon's statute regarding the equal distribution of property, since ORS 108.725 prevails as the more specific statute.⁹ Courts define premarital agreements as contracts that parties enter into to regulate portions of their marriage.¹⁰ These contracts, often referred to as an antenuptial or prenuptial agreements, consist of agreements made by the parties "in contemplation of marriage and . . . [they thus] become effective upon marriage."¹¹ Parties can address a myriad of obligations and property rights in these contracts.¹²

Parties to a premarital contract might choose to determine, prior to their marriage, each of their respective rights with regard to the right to "acquire, manage, and dispose of property; the disposition of property on separation, dissolution, or death; the modification or elimination of spousal support; wills and trusts; and death benefits from life insurance policies."¹³ Typically, premarital agreements address each parties' rights in the event that they divorce each other.¹⁴

In Oregon, the parties may also include a provision providing for attorney fees if one of the parties files a suit to enforce the contract.¹⁵ Moreover, Oregon courts do not necessarily construe the Oregon statute for attorney fees and an attorney fee provision in a premarital agreement is mutually exclusive.¹⁶ Thus, a trial court may award attorney fees for fees that one of the parties incurs while enforcing the contract and it may also award attorney fees contingent on the parties' needs.¹⁷ These awards might end up offsetting each other partially or entirely.¹⁸

"Premarital agreements are gaining popularity as more people become conscious of the extensive financial rights and obligations

8. In the Matter of the Marriage of Grossman, 106 P.3d 618, 623 (Or. 2005).

9. *Id.*

10. Karen Servidea, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 536 (2005).

11. C. Katherine Mann, *Enforceability of Premarital Agreement Based on Fairness of Terms and Circumstances of Execution*, 7 AM. JUR. PROOF OF FACTS 3d 581, § 1 (2005).

12. *Id.*

13. *Id.*

14. Servidea, *supra* note 10, at 537.

15. In the Matter of the Marriage of Bowers, 922 P.2d 722, 725 (Or. App. 1996).

16. *Id.*

17. *Id.*

18. *Id.*

arising out of a marriage, and the increasing statistical chance that any marriage will end in divorce.”¹⁹ These contracts, made by prospective spouses in contemplation of marriage, spell out *prior* to their marriage how the parties will address property and alimony issues if they eventually divorce.²⁰ Generally, the more intensively the parties negotiate the premarital agreement, the more likely the parties’ contract will withstand any allegations of duress, fraud or undue influence.²¹

The ultimate irony[, however,] is that the ideal premarital agreement[,] from a standpoint of enforceability[,] may require the parties to engage in such adversarial negotiations that they probably will decide not to marry. On the other hand, premarital agreements first mentioned an hour before the wedding, with the affluent spouse-to-be telling the other, to ‘just put your trust in me,’ and signed without further comment, usually are not worth the paper on which they are written, whether or not indelible ink is used.²²

II. ENFORCEABILITY OF PREMARITAL AGREEMENTS

Premarital agreements become effective upon marriage and are usually enforceable without any consideration.²³ Some states, however, do require consideration, but they often find the marriage itself sufficient as consideration.²⁴ Other courts only allow the marriage to qualify as consideration if they determine that the premarital agreement operates as a prerequisite to the marriage.²⁵ Even if a court later declares the marriage void, it may still enforce the premarital agreement to the degree necessary to circumvent any unjust results.²⁶

Judicial willingness to give credence to premarital agreements used to depend upon events that the parties included in their contracts

19. In the Matter of the Marriage of Leathers, 789 P.2d 263, 265, n.5 (Or. 1990) (quoting 12 ABA FAMILY ADVOCATE, No. 3, 54-55 (Winter 1990)).

20. *Id.* (emphasis added).

21. *Id.*

22. *Id.*

23. Mann, *supra* note 11, at § 1.

24. *Id.*

25. *Id.*

26. *Id.*

to prompt certain economic outcomes.²⁷ Whenever the contracts became effective during the parties' marriage or at death, courts generally favored premarital agreements as a class and thus voided only those executed defectively.²⁸ The courts determined that these agreements actually advanced the parties' well-being because they removed arguments regarding property distribution and support, which in turn eliminated a common source of contention in families.²⁹

With regard to agreements that anticipated divorce or separation, however, the courts did not extend such a favorable view.³⁰ These agreements were thought to encourage discord, separation, or divorce and, therefore, they violated legal principles surrounding the marriage.³¹ According to the courts, the public interest related to issues such as marriage until death and the husband's support of his wife required the courts' continuing control of the financial outcomes of dissolution.³² Thus, the parties were not permitted to sidestep the potential problems involved in dissolving a marriage by resolving these issues through private arrangements.³³

Nowadays, many courts discard the outdated view that considers premarital agreements void as a class.³⁴ Given the increasing number of divorces, these courts recognize that solidifying expectations by contract harmonizes with the public's interest in lasting marriages.³⁵ Moreover, some people might not marry without the reassurance of the premarital agreement protecting their interests, not only for themselves, but also for children of a prior marriage.³⁶

Thus, in light of the frequency of divorce, courts found it wise for parties to prepare for the possible demise of their marriage.³⁷ As the Oregon Supreme Court stated, "[t]he adoption of the 'no-fault'

27. Roy, *Modern Status*, *supra* note 2, at § 2(a).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at § 2(a).

33. *Id.*

34. *Id.*

35. Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution – Modern Status*, 53 A.L.R. 4th 85, § 2(a) (2006) [hereinafter Roy, *Enforceability*].

36. Roy, *Modern Status*, *supra* note 2, at § 2(a).

37. *Id.*

concept of divorce is indicative of the state's policy, as exhibited by legislation, that marriage between spouses who 'can't get along' is not worth preserving."³⁸ The court justified allowing the elimination or modification of spousal support in these agreements by noting that "[a] marriage preserved only because good behavior by the husband is enforced by the threat of having to pay alimony is also not worth preserving"³⁹

Historically, courts found it necessary to protect women because they typically had few claims to the marital assets and did not work.⁴⁰ This concern fades as more women enter the workforce and generate income.⁴¹ In addition, many courts note that, even without a marital agreement, the risks of one spouse abusing the agreement to the detriment of the other spouse appears just as often.⁴² As a result, courts hold that the current relative equality among women and men justifies allowing women to attend to their own personal affairs.⁴³

In light of these advances, courts now allow prospective husbands and wives quite a bit of latitude to contractually determine their respective rights and obligations should their marriage dissolve.⁴⁴ The legislature in Oregon expressly approves premarital agreements made in contemplation of personal property, real property, and spousal support.⁴⁵ Courts, however, still subject these agreements to strict judicial scrutiny.⁴⁶ In Oregon for example, courts refuse to enforce provisions concerning alimony in premarital agreements if enforcement deprives the spouse of a reasonable means of support which the spouse could not otherwise secure.⁴⁷ The Oregon Supreme Court noted that this solution had the merit of according the contracting parties the freedom to contract, yet it reserved to the state the right to invalidate the agreement when necessary to ensure adequate support for an Oregonian.⁴⁸

38. *Unander v. Unander*, 506 P.2d 719, 721 (Or. 1973).

39. *Id.*

40. *See id.*

41. Roy, *Modern Status*, *supra* note 2, at § 2(a).

42. *Unander*, 506 P.2d at 721.

43. Roy, *Modern Status*, *supra* note 2, at § 2(a).

44. Roy, *Enforceability*, *supra* note 35, at § 2(a).

45. *Unander*, 506 P.2d at 721.

46. *See id.*

47. *Id.* at 107.

48. *Id.* at 108.

As noted, contracts between spouses have long played a role in the field of domestic relations, particularly with respect to premarital agreements made in contemplation of death.⁴⁹ Some courts utilize developed principles governing those agreements, along with general contract law, to determine the enforceability of premarital agreements contemplating dissolution.⁵⁰ Relevant circumstances in this analysis include “the close relationship of the contracting parties, the length of time between the execution of the contract and the dissolution of the marriage, and the repercussions on the lives of the people affected in light of their personal and financial ability to resume separate responsibilities and pursuits.”⁵¹

Over time, courts in each jurisdiction have set varying standards to carry out the terms of premarital agreements.⁵² Courts particularly seem to focus on the circumstances underlying the agreement’s execution and its substantive terms.⁵³ In July 1983, the National Conference of Commissioners on Uniform State Laws, in an effort to allow for uniformity in premarital agreements, approved and recommended the Uniform Premarital Agreement Act.⁵⁴ Oregon adopted the Act.⁵⁵

Moreover, according to some courts, the introduction of no-fault divorce decreased concerns that the well-off spouse would force the other spouse to start a divorce action to use the agreement to his or her advantage.⁵⁶ Other courts, however, remain wary of potential overreaching by one of the parties, particularly given the private nature of their relationship.⁵⁷ Prospective spouses often do not engage in arms length negotiations.⁵⁸ They share an intimate relationship which directly affects their judgment and the judgment that typically accompanies most contractual relationships.⁵⁹ This

49. Mann, *supra* note 11, at § 1.

50. *Id.*

51. *Id.*

52. *Id.*

53. Roy, *Enforceability*, *supra* note 35, at § 2(a).

54. Mann, *supra* note 11, at § 1.

55. *Id.*

56. Servidea, *supra* note 10, at 539-40 (citing 2 ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 110.70(2)(c) (2d ed. 2002)).

57. *Id.* at 540.

58. Roy, *Enforceability*, *supra* note 35, at § 2(a).

59. *Id.*

unquestionably “increases the potential for one party to take advantage of the other.”⁶⁰

Courts also view the prospective spouses as being in a fiduciary relationship with each other, which requires that they interact with each other honestly and in good faith.⁶¹ A fiduciary relationship exists when one party places special trust and confidence in another party who must act in good faith and in that party’s best interests.⁶² Oregon courts hold that this relationship requires a full and frank disclosure of all circumstances that will materially bear on the agreement.⁶³ Thus, parties must provide a full disclosure of assets.⁶⁴ “The exercise of good faith necessitates disclosure by the prospective husband [and wife] of all material facts relating to the amount, character and value of his [or her] property, so that the prospective . . . [spouses] may have sufficient knowledge on which to base [his or] her decision to enter into the agreement.”⁶⁵ People enter into premarital agreements to achieve some degree of self-protection.⁶⁶ Thus, each party to a premarital agreement is presumably primarily worried about his or her own self-interest.⁶⁷

As a result of these potential risks, courts actively oversee the substantive provisions of premarital agreements, which contrasts sharply with the swift search for unconscionability usually performed for commercial contracts.⁶⁸ Courts also review the fairness of the agreement as it stands at the time of the divorce, particularly with respect to contracts that modify alimony obligations.⁶⁹ Some courts indicate that they do not need to scrutinize the fairness of the execution of an agreement if the contract’s terms appear fair.⁷⁰ If the provisions seem unfair, however, then the proponent of the agreement must rebut the presumption that its execution was involuntary or

60. *Id.*

61. *Id.*

62. In the Matter of the Marriage of Knoll, 671 P.2d 718, 721 (Or. App. 1983) (Warren, J., dissenting).

63. Bauer v. Bauer, 464 P.2d 710, 712 (Or. App. 1970).

64. *Id.*

65. *Id.* (citing 2 ALEXANDER LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 90-43, § 90 (1967)).

66. In the Matter of the Marriage of Bowers, 922 P.2d 722, 724 (Or. App. 1996)..

67. *Id.*

68. Servidea, *supra* note 10, at 540.

69. *Id.* at 540-41.

70. Roy, *Enforceability*, *supra* note 35, at § 2(a).

fraudulent.⁷¹

To evaluate the fairness of the circumstances accompanying the execution of the premarital agreement, Courts take into account numerous factors.⁷² These include, among others, (1) each parties' age, education, sophistication, experience, employment and previous marriages; (2) the complexity of the provisions in the premarital agreement; (3) the disparity and nature of the assets the parties brought into the marriage; (4) the time each spouse had to consider the agreement after he or she first saw its terms.⁷³ In Oregon, a premarital agreement's validity "depends on the circumstances of each particular case and the degree of sophistication possessed by the party against whom the agreement is being enforced."⁷⁴

Courts consider the complaining party's access to independent counsel prior to signing the agreement the most pertinent factor, and it is thus given the greatest weight.⁷⁵ Some jurisdictions require that the party had an opportunity to obtain independent legal advice prior to consenting to the contract terms.⁷⁶ Most courts, however, indicate that access to counsel should be considered along with all of the other factors.⁷⁷ Moreover, while some courts look to whether the complaining party merely had an opportunity to seek independent advice, other courts place an affirmative duty on the party presenting the agreement to urge the other party to seek advice before signing the agreement.⁷⁸

Prospective spouses may specify in their premarital agreement the jurisdiction whose law should apply in adjudicating the validity and effect of the contract.⁷⁹ If the parties do not include a specific provision to this effect, courts look to the law of the jurisdiction where the parties executed the agreement and where it will be performed.⁸⁰ It also appears that an American court will apply the law of a foreign jurisdiction to enforce a premarital agreement in a

71. *Id.*

72. *Id.*

73. *Id.*

74. *In the Matter of the Marriage of Knoll*, 671 P.2d 718, 720 (Or. App. 1983).

75. *Roy, Enforceability*, *supra* note 35, at § 2(a).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at § 2(b).

80. *Id.*

dissolution proceeding.⁸¹ In apparent agreement, Oregon provides in ORS 108.700 to 108.740, that parties to a premarital agreement may contract with respect to the choice of law that governs a court's construction of the agreement.⁸²

States often assert two justifications for their substantive review of premarital contracts: that states have a legitimate interest in marriage and that premarital contracts implicate that interest.⁸³ A significant amount of controversy surrounds the desirability of having the state involved in the relationships between private individuals.⁸⁴ Questions also remain as to whether the states continue to adhere to this interest in the preservation of marriage as an institution.⁸⁵ Legal reforms, such as the adoption of no-fault divorce laws and the abandonment of the tender years presumption in custody battles, suggest that the states have become less involved.⁸⁶ On the other hand, continuing bans on same-sex marriages and polygamy indicate that states still recognize the public interest served by marriage.⁸⁷ As consideration for the state's imposition of regulations on marriage, states grant married couples certain social benefits.⁸⁸

Premarital agreements implicate the state's interest in marriage in a variety of ways. "Agreements that limit the support or property entitlements of one party might potentially force that individual to become a public charge after the divorce."⁸⁹ States typically exhibit a preference that the spousal duty of support continue after marriage, rather than having a party reliant on public assistance.⁹⁰ Premarital contracts also alter the parties' children's standard of living after the divorce, which implicates the state's interest in the marriage's child rearing function.⁹¹ Furthermore, these agreements implicate the state's interest in marriage by changing the incentives to seek a

81. *Id.*

82. In the Matter of the Marriage of Proctor, 125 P.3d 801, 803 (Or. App. 2005).

83. Servidea, *supra* note 10, at 554.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Some marital protections and privileges conferred on married partners include the symbolic recognition of the relationship, standing in wrongful death actions, the protection of communications between spouses and inheritance rights. *Id.* at 555.

89. *Id.* at 557.

90. *Id.*

91. *Id.*

dissolution, which affects the functions of marriage.⁹²

While these justifications provide a basis for the states' significant involvement in the enforceability of premarital agreements, numerous reasons exist that counter the desirability of the states' strong presence in this area of domestic relations. First, one could argue that a state's concern regarding a spouse becoming reliant on public assistance is unfounded. One must keep in mind that the parties might never have married if one of the spouses did not receive assurance that he or she would not be required to support the other spouse following dissolution. Moreover, if spouses cannot make it on their own after divorce, they might not have survived without public assistance regardless of the marriage. However, this contention raises questions as to what happens to a spouse that gives up his or her career opportunities by staying home to care for children or to support the other spouse.

In regards to the child rearing function of marriage, a large proportion of children are now raised in environments other than the nuclear family home. One might argue that numerous types of custody arrangements remain available to parents and, given the common nature of this situation, children seem to adjust quite well in the majority of circumstances. Child support guidelines, along with the inability of parents to contract away child support, ensure that children will be protected in the event of a divorce. However, given the costs associated with living on one's own, there remain significant concerns regarding the lower standard of living experienced following dissolution. On the other hand, children might suffer more by living in a home with parents that hate each other, but stay together for the "benefit" of the children.

Finally, with respect to the third argument that premarital agreements change the incentives to divorce, this should not be held as a sole basis to interfere with the rights of parties to create the terms of their marriage. It seems highly unlikely that parties only marry each other with the intention of divorcing and eventually enforcing the favorable agreement that they created together. Thus, the states' justifications for their strong presence in the area of domestic relations with regard to contracting between parties appears questionable.

Despite these concerns, the growing acceptance of premarital

92. *Id.* at 558.

agreements makes sense considering the nature of today's society. The outdated notion of the nuclear family as the norm no longer holds true. Quite frequently, prospective spouses are not marrying for the first time and they might have strong incentives for protecting assets they accumulated during their lives. Moreover, many people marry later in life, in which case they probably have significant assets that they might wish to protect. These realities support the notion that states should not force parties to risk losing much of their property in the event the marriage does not work. In light of the current divorce rates, it seems understandable that parties worry that their marriage might not last. Therefore, common sense dictates that states should encourage prospective spouses to come to an agreement prior to their marriage on how to divide their assets and liabilities in the event of a divorce.

III. POSTNUPTIAL CONTRACTS

Another question that arises in the field of domestic relations concerns the enforceability of contracts made between married parties in the course of their marriage. This type of agreement, referred to as a postnuptial agreement or a marital contract, consists of agreements entered into after a marriage has taken place, but before the parties seek to end their marriage.⁹³ Sometimes married couples enter into postnuptial agreements to help resolve issues in their marriage by removing a source of disagreement over finances, assets, children, chores and so on.⁹⁴ More frequently however, one spouse attempts to get the other spouse to sign an agreement waiving certain rights that person might otherwise have had.

Often the party advocating the creation of the agreement possesses most of the assets in the marriage, and thus, has a strong incentive to overreach. That spouse might want to create a postnuptial agreement after one of the spouses' financial status changes following the wedding. This may include events such as changes in career, receiving an inheritance, experiencing a change in investment income and selling a business. This situation can

93. See Paul Brewer, *Family Law – Bratton v. Bratton: The Tennessee Supreme Court Considers Postnuptial Agreements and Allows Married Partners to Agree That They May Eventually Disagree*, 35 U. MEM. L. REV. 579, 581 (2005).

94. W. F. Cameron, Robert S. Hoffman & Alan V. Ytterberg, *Marital and Premarital Agreements*, 39 BAYLOR L. REV. 1095, 1124 (1987).

obviously work to the disadvantage of the more subservient spouse or to a spouse that might have other incentives to remain married, such as for the benefit of the children.

Two different types of contracts seem to primarily concern the commentators and courts. The first type of marital contract deals with agreements made between parties with respect to the provision of services in exchange for property.⁹⁵ An additional type of marital contract, referred to as a reconciliation agreement, occurs after the parties experience troubles in their marriage.⁹⁶ In this situation, one party forgoes a pending dissolution action in exchange for some property from the other party.⁹⁷ The courts react differently to the enforceability of these two distinct contracts.

The distinction the courts make when discussing the enforceability of these contracts centers on the sufficiency of the consideration exchanged. It seems that, in general, the duties and obligations associated with the traditional concepts of marriage do not constitute sufficient consideration, whereas the agreement to forgo something that is not required of the marital relation could suffice.⁹⁸ An example of the latter occurs in those situations where a party brings suit to dissolve the marriage, but then withdraws the suit as consideration for something he or she desires from the other spouse.⁹⁹ The main question with respect to post-marital agreements revolves around whether courts should presume that certain domestic services, such as doing housework or caring for an ill spouse, constitute duties and obligations assumed by the spouses on marriage.¹⁰⁰ An examination of the relevant case law helps clarify the distinctions made by courts.

IV. RECONCILIATION AGREEMENTS

Reconciliation agreements are quite common and courts often apply the same rules to them as to premarital agreements.¹⁰¹ Courts

95. See Wendy L. Hillger, *Borelli v. Brusseau: Must a Spouse Also be a Registered Nurse? A Feminist Critique*, 25 PAC. L. J. 1387 (1994).

96. Brewer, *supra* note 93, at 581.

97. *Id.*

98. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 N.W.U. L. REV. 65, 80 (1998).

99. *Id.*

100. *Id.*

101. Richard A. Lord, *Bargains Tending to Corruption or Immorality*, 7 WILLISTON ON

typically find that a promise to resume the relationship, coupled with the dismissal of justified divorce proceedings, constitutes adequate consideration if the provisions do not violate public policy.¹⁰² On the other hand, this type of agreement lacks adequate consideration if the parties have no plausible justification for divorce or separation.¹⁰³ Questions arise as to how this might be affected by no-fault divorce laws. It seems that there still needs to be a reasonable basis for the parties' attempt to seek a divorce in that the laws still require irreconcilable differences.

Oregon recognizes reconciliation agreements in ORS 107.590, which provides that "[a] circuit court . . . may make orders with respect to the conduct of the spouses and with respect to the subject of the controversy as it considers necessary to preserve the marriage or to implement the reconciliation of the spouses"¹⁰⁴ It further states that "[a]ny reconciliation agreement between the spouses may be reduced to writing, and, with the consent of the spouses, the court may make an order requiring the spouses to comply fully with the agreement."¹⁰⁵ Thus, Oregon law favors an agreement promoting reconciliation.¹⁰⁶

In the *Ellinwood* case, the Oregon Court of Appeals addressed the enforceability of reconciliation agreements.¹⁰⁷ In that case, the husband left the wife and a few months later she filed a dissolution proceeding.¹⁰⁸ The wife then agreed to reconcile, but only if the husband signed a reconciliation agreement.¹⁰⁹ This agreement provided that the wife would dismiss her suit for dissolution in a good faith attempt to continue the marriage relationship in consideration for the husband's agreement to make and maintain a will leaving all of his property to her.¹¹⁰ The parties completed the necessary formalities for the reconciliation contract and for the execution of the will.¹¹¹ A

CONTRACTS § 16:20 (4th ed. 2005).

102. *Id.*

103. *Id.*

104. OR. REV. STAT. ANN. §107.590(1) (West 2003).

105. OR. REV. STAT. ANN. §107.590(2) (West 2003).

106. *Id.*

107. In the Matter of the Marriage of Ellinwood, 651 P.2d 190, 191 (Or. App. 1982).

108. *Id.* at 192.

109. *Id.*

110. *Id.*

111. *Id.*

year later, the wife filed a second proceeding for dissolution of the marriage.¹¹²

The husband argued that the court should not enforce the contract because his wife only attempted to reconcile the marital relationship for one year.¹¹³ The court found his argument unpersuasive and stated that the agreement specifically provided that the wife only needed to make a good faith effort to reconcile the marriage, which she did.¹¹⁴ The husband further contended that the lower court erred by not considering the reconciliation agreement in its determination of the division of the parties' assets and spousal support.¹¹⁵ The court, however, disagreed and held that the uncertainty of whether the husband would die before the wife and the condition the agreement was contingent on, made it much too speculative to figure out the agreement's value.¹¹⁶ Therefore, the husband did not receive any credit towards his spousal support obligation, or in the property division, for the chance that his ex-wife would receive all of his property on his death.¹¹⁷

V. CONTRACTS FOR SERVICES

Many cases hold that giving attention to a spouse or child, providing medical services, homemaking services, or educational tutoring within the family home cannot be reimbursed by contract during the parties' marriage.¹¹⁸ On the other hand, unmarried parties that perform domestic services subject to a cohabitation agreement can recover for the value of those services.¹¹⁹ Courts find that the former type of agreement runs contrary to the notion of marriage as a partnership and therefore, against the public policy favoring the institution of marriage.¹²⁰

In a well known case, *Borelli v. Brusseau*, a California court examined the enforceability of a contract made by spouses

112. In the Matter of the Marriage of Ellinwood, 651 P.2d 190, 192 (Or. App. 1982).

113. *Id.*

114. *Id.*

115. *Id.* at 193.

116. *Id.*

117. In the Matter of the Marriage of Ellinwood, 651 P.2d 190, 193 (Or. App. 1982).

118. William Bassett, *California Community Property Law, Agreements Regarding Future Earnings – Domestic Services*, EXPERT SERIES § 4:23 (2006).

119. *Id.*

120. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 649 (1993).

exchanging care-giving services for property.¹²¹ In that case, the husband became quite ill and worried that he might die soon.¹²² The husband wanted to live at home even though it meant that he would need round-the-clock care.¹²³ In light of the husband's wishes, the parties entered into an oral agreement, whereby the husband promised to leave the wife a large share of property in exchange for her promise to care for him for the duration of his illness.¹²⁴ The wife performed her promise, but the husband did not, as his will only gave her a small percentage of the property that he had promised her.¹²⁵

In analyzing the enforceability of the parties' oral agreement, the court noted the mutual obligations that parties assumed upon marriage.¹²⁶ The court specifically stated that parties cannot condition these obligations on the existence of property or income.¹²⁷ "In entering the marital state, by which a contract is created, it must be assumed that the parties voluntarily entered therein with knowledge that they have the moral and legal obligation to support the other."¹²⁸ According to the court, a husband's obligations and duties include the duty to offer sympathy, fidelity and confidence to his wife.¹²⁹ Moreover, the court stated that spouses must "provide uncompensated protective supervision services for each other."¹³⁰

The wife in this case argued that courts in today's society should not uphold these views, as she claimed they are based on an outdated notion of women.¹³¹ The court, however, rejected this argument and adhered to the concept that contracts, where the wife receives compensation for providing care to a sick husband, are void as against public policy.¹³² The services constitute inadequate consideration to uphold the promise.¹³³ Thus, a marital contract that creates a personal duty of personal performance does not qualify as new consideration to

121. *Id.*

122. *Id.* at 650.

123. *Id.*

124. *Id.* at 650-51.

125. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 651 (1993).

126. *Id.* at 651-52.

127. *Id.* at 652.

128. *Id.*

129. *Id.*

130. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 652 (1993).

131. *Id.*

132. *Id.* at 653.

133. *Id.* at 654.

uphold the promise of compensation.¹³⁴

A. Sufficiency of the Consideration

As discussed above, some marital contracts lack consideration when the exchange relates to the duties and obligations owed between the spouses through their marriage. Numerous examples exist of the types of services that do not constitute sufficient consideration, including the giving of wages or consideration in a will for housework.¹³⁵ Courts consider home labor, sex, and cohabitation basic legal duties of marriage, and therefore a promise to perform them is a pre-existing legal duty.¹³⁶

Aside from the argument that rules encouraging sickbed bargaining do not foster marriages, the issue revolves around whether these types of exchanges run contrary to the institution of marriage.¹³⁷ According to the courts, negotiating services such as these is antithetical to the institution of marriage.¹³⁸ They justify this conclusion by stating that spouses should not provide marital services for gain, but rather they should perform them as an expression of affection.¹³⁹ Courts also note that “[o]ther contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed [sic], the law steps in and holds the parties to various obligations and liabilities.”¹⁴⁰ Thus, almost all modern cases view service obligations as a non-negotiable component of marriage.¹⁴¹

As the discussion in the above cases make clear, states retain a strong interest in preserving the institution of marriage. Courts become concerned when it appears that this ideal might deteriorate. Some commentators argue that courts employ a sexist notion of the woman’s place in the home and that it uses the concept of consideration to enforce that old fashioned view.¹⁴² It seems imperative, however, that the courts make a distinction at some point.

134. *Id.*

135. Silbaugh, *supra* note 98, at 79-80.

136. *Id.* at 80.

137. *Id.*

138. *Id.*

139. *Id.* at 83.

140. *Id.* at 83-84.

141. *Id.* at 86.

142. *See, e.g.,* Hillger, *supra* note 95, at 1389.

When parties enter into a marriage, they often hold different ideas of the duties and obligations that this new relationship encompasses. Moreover, spouses in marriages of different socioeconomic statuses or ethnicities mostly likely retain very different ideas as to their respective roles in their marriage. Whereas one set of spouses might assume that the wife, for example, will do the housework, a wife in a different marriage might believe that a housekeeper will take care of that duty.

As a solution, courts could potentially distinguish between different types of marriages. However, if courts began to make these fine distinctions, divorce and probate proceedings would inevitably become convoluted. Each party would need to present evidence of what spouses in similar marriages expect upon entering the marriage, what they personally believed when they entered the marriage and perhaps what types of duties they led the other spouse to believe that they would perform during the marriage. This process could easily lead to confusion, inconsistent results and to a deterioration of marriages as a whole.

As an example, consider a wife who heard that her friend's husband gave her a significant piece of property in exchange for her taking more of an interest in the children's care. After hearing this, the wife might decide that she too would like some extra compensation for her efforts. This could begin the process that courts fear, which involves bargaining all aspects of a marriage. If this happens, parties might no longer have any assurance of the duties their marriage automatically entails.

The prime scenario given by commentators involves the sick husband whose wife provides for his end-of-life care. The main criticism of the courts is that they go too far in defining the roles of spouses. Many parties do not expect their spouse to provide round-the-clock care for them should they become seriously ill. However, other parties might hold such an expectation. Furthermore, many children do not provide in home care for their parents, which demonstrates the belief of many children that nursing homes are better equipped to give their parents the necessary care. In the case of spouses, in order to provide round-the-clock care, a spouse would need to quit his or her job and, if the children were still young, sacrifice time spent with them. This hardly comports with the state's interest in preserving the institution of marriage. Rather, it might actually deteriorate the quality of the marriage and create animosity

between the spouses.

For all of these reasons, it remains questionable as to how far courts should go in defining what constitutes sufficient consideration when it comes to the exchange of marital services. At a minimum, spouses should provide some nursing services for each other in times of illness, care for the party's children and give love and affection to each other. On the other end of the spectrum, courts should not necessarily require spouses to perform housework or full time nursing services as an obligation contained in the marital contract. Outside these situations though, it becomes more complicated. While courts understandably need to draw a line, as of yet they have failed to take contemporary societal standards into account when making these distinctions.

VI. MARITAL SETTLEMENT AGREEMENTS

A third area of concern for family practitioners arises after the parties decide to terminate their marriage. Sometimes parties determine the terms of their dissolution together by entering into a contract separate from the dissolution judgment, referred to as a marital settlement agreement.¹⁴³ The trial court may then agree to incorporate all or part of the parties' agreement into the judgment. Those incorporated parts ultimately merge into the final judgment.¹⁴⁴

This practice raises an important question as to whether marital settlement agreements retain their status as independent contracts after the entry of a judgment.¹⁴⁵ This question affects not only the availability of the divorce terms, but also the methods of modification and the remedies available to the parties.¹⁴⁶ Thus, the manner in which the final judgment treats the parties' agreement typically determines: (1) the provisions of the agreement subject to modification; (2) the applicable res judicata standards; (3) retention of contract rights, and; (4) the enforceability of provisions by contempt.¹⁴⁷

143. Webber v. Olsen, 998 P.2d 666, 669 (Or. 2000).

144. *Id.*

145. Kelvin H. Dickinson, *Divorce and Life Insurance: Post Mortem Remedies for Breach of a Duty to Maintain a Policy for a Designated Beneficiary*, 61 MO. L. REV. 533, 554 (1996).

146. *Id.*

147. Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C.L. REV. 319,

A. History

Over the years, divorce attorneys and courts have struggled with the complicated rules for marital settlement agreements and the results have often been inconsistent.¹⁴⁸ As an author contemplating the issue once stated, “[i]n virtually every state, marital settlement agreements have given rise to a confusing, and sometimes impenetrable, body of case law.”¹⁴⁹ The complex series of public policy restrictions that governed the execution, and limited the substance of marital settlement agreements, began to erode in correlation with increased divorce statistics and the liberalization of divorce laws.¹⁵⁰

As no-fault divorce developed, so did the liberty of parties to negotiate the terms of their dissolution.¹⁵¹ Almost all states now allow parties, with judicial approval, to contract with regard to most of the issues incident to their divorce.¹⁵² These agreements, however, must appear just and reasonable and be free from duress, fraud and undue influence.¹⁵³ Thus, quite a bit of tension still exists between the modern movement of contract freedom and the traditional public policy of regulating many aspects of divorce.¹⁵⁴ This tension accounts for much of the confusion in this area.¹⁵⁵

The general rule in favor of the enforceability of marital settlement agreements is subject to two exceptions.¹⁵⁶ Courts will not enforce marital settlement agreements if (1) doing so will contravene the law, or (2) if doing so would transgress public policy, even if enforcement would not directly violate the law.¹⁵⁷ The first exception includes situations where a court cannot reconcile a provision in the marital settlement agreement with a state’s statute.¹⁵⁸ This situation occurred in *In re Marriage of Hutchinson*, where the parties agreed

323 (1991) [hereinafter Sharp, *Semantics*].

148. *Id.* at 319.

149. *Id.*

150. *Id.* at 321.

151. *In the Matter of the Marriage of McDonnal*, 652 P.2d 1247, 1250 (Or. 1982).

152. Sharp, *Semantics*, *supra* note 147, at 321-22.

153. *Id.* at 322

154. *See id.* at 321.

155. *See id.* at 322-23.

156. *In re Marriage of McInnis*, 110 P.3d 639, 643 (Or. App. 2005).

157. *Id.* at 643-44.

158. *See id.* at 643.

that a modification of spousal support would be retroactive to a particular date.¹⁵⁹ The court refused to uphold the provision after pointing to an Oregon statute that stated that courts do not possess the power to modify dissolution judgments for obligations prior to the date of the motion to modify.¹⁶⁰

The second exception involves situations where, for example, the marital settlement agreement deprives the court of its statutory authority.¹⁶¹ In *In re Marriage of Heinonen*, the parties delegated the authority to determine parenting time to a third party.¹⁶² The court found this provision unenforceable because it conflicted with the policy, found implicitly in other relevant statutes, that only courts should resolve the dispute of parenting time.¹⁶³

Oregon, unlike many of the other equitable distribution states, currently does not have a statute that expressly authorizes parties to opt out of equitable distribution by the terms of their marital settlement agreement.¹⁶⁴ Case law in Oregon makes it clear that the courts, not the parties, possess the ultimate authority to determine whether any or all of the settlement agreement merges into the judgment.¹⁶⁵ Courts, however, rarely exercise this authority.¹⁶⁶ Commentators argue that this cursory judicial inquiry into formation fails to recognize that these agreements do not qualify as arms length transactions.¹⁶⁷ Moreover, the potential for abuse in these types of transactions remains high.¹⁶⁸

As a result of these concerns, the modern trend appears to favor treating marital settlement agreements as contracts.¹⁶⁹ Proponents of the contract model argue that the parties are in the best position to decide the terms of their marital settlements, and that this method is

159. 69 P.3d 815, 821 (Or. App. 2003).

160. *Id.* at 823.

161. *McInnis*, 110 P.3d at 644.

162. 14 P.3d 96 (Or. App. 2000).

163. *Id.* at 99.

164. Heather Newton, Hagler v. Hagler: *The North Carolina Supreme Court Construes a Separation Agreement*, in SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 66 N.C. L. REV. 1254, 1262 (1988).

165. *Rigdon v. Rigdon*, 347 P.2d 43, 45 (Or. 1959).

166. Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1409 (1984).

167. *Id.*

168. *Id.*

169. Newton, *supra* note 164, at 1260.

far less costly than litigation.¹⁷⁰ Commentators also argue that marital settlement agreements minimize economic and psychological costs of divorce, lessen the impact of divorce upon children, increase post-divorce cooperation and promote the judicial economy.¹⁷¹

B. Merger

When parties negotiate a marital settlement agreement, the court granting the divorce may incorporate all or a portion of the agreement into the dissolution judgment.¹⁷² Merger operates to extinguish all contract rights and obligations, whereas incorporation occurs when the agreement retains its validity as a contract.¹⁷³ Difficulties might arise for parties if the language used by the court in the judgment creates ambiguity as to whether or not the terms in the marital settlement agreement have merged into the judgment.¹⁷⁴ In Oregon, prior to 2001, if the provisions of the agreement merged into the judgment, those terms became a part of the judgment and were enforced as orders of the court.¹⁷⁵ If the terms did not merge, then the parties enforced the provisions pursuant to contract remedies.¹⁷⁶

C. Exception to Merger

An exception to the rule of merger occurs in situations where the terms of the settlement agreement require the performance of a future act rather than the typical present obligation to pay money.¹⁷⁷ Oregon courts have said in several cases that a provision in the judgment which requires performance of a future act cannot merge into the judgment.¹⁷⁸ In *Carothers v. Carothers*, the Oregon Supreme Court held that as a general rule, the doctrine of merger does not apply to judgments in any actions aside from those to recover money.¹⁷⁹ The court looked at an incorporated marital settlement agreement, where the father agreed to carry and maintain a \$20,000 life insurance policy

170. *Id.* at 1261.

171. Sharp, *Semantics*, *supra* note 147, at 320.

172. *Id.* at 323-24.

173. *Id.*

174. *See id.*

175. *Webber v. Olsen*, 998 P.2d 666, 670 (Or. 2000).

176. *Id.*

177. *Carothers v. Carothers*, 488 P.2d 1185, 1187 (Or. 1971).

178. *Id.*

179. *Id.*

to benefit his child.¹⁸⁰ Once the father passed away, the mother brought an action on behalf of the minor child as the trustee.¹⁸¹ The court stated that the mother could proceed for breach of contract because the provision required the performance of a future act, which made merger inapplicable.¹⁸²

Moreover, in *Waterman v. Armstrong*, the court considered a provision in a dissolution judgment in which the father agreed to pay additional medical expenses for the parties' child.¹⁸³ The judgment incorporated the marital settlement agreement.¹⁸⁴ The court held that the requirements that the father pay for the son's health and medical care were acts other than the payment of money.¹⁸⁵ Thus, the provision did not merge into the dissolution judgment and the court ordered the father to pay for his son's health insurance.¹⁸⁶

At times, it may be difficult to ascertain what constitutes a future act. In *Sheil v. Breuer*, the terms of the parties' property settlement agreement provided that the wife would pay the husband \$25,000 from the sale of the wife's house contingent on certain events occurring.¹⁸⁷ The agreement merged into the judgment and the court awarded the husband a judgment lien to that effect.¹⁸⁸ The husband then brought an action to enforce the terms of the property settlement agreement.¹⁸⁹ The court held that merger applied to bar any contract action on the agreement because the wife's obligation under the settlement agreement did not qualify as a future act exempted from merger.¹⁹⁰ In light of this decision, confusion arises as to what could possibly satisfy the future act exception to merger.

It seems that courts make this subject matter much more complex than necessary. If courts merely abandoned the distinction between future acts and those acts not fitting within the exception, they would still achieve the same results. The question then would

180. *Id.*

181. *Id.*

182. *Carothers v. Carothers*, 488 P.2d 1185, 1187 (Or. 1971).

183. 633 P.2d 774, 775 (Or. 1981).

184. *Id.*

185. *Id.* at 778.

186. *Id.*

187. 880 P.2d 500, 500-01 (Or. App. 1995).

188. *Id.* at 501.

189. *Id.*

190. *Id.* at 501-02.

shift to whether the marital settlement agreement, if the parties created one, is outside of the court's statutory authority or void as against public policy. The courts could then determine, based on this analysis, whether the agreement merged into the judgment. This approach would eliminate much of the confusion in this area and would help to clarify the necessary distinctions.

Moreover, the recent case of *Webber v. Olsen* raises a question about the continuing validity of the future acts exception.¹⁹¹ A footnote in the *Webber* case brings up this point, although the court never reached the merits of this issue as it disposed of the case on different grounds.¹⁹² A couple of recent cases also call into question the continued validity of the future acts exception, in light of their express approval of Section 18 of the Restatement Second of Judgments.¹⁹³ This version of the Restatement does not distinguish between whether or not judgments are actions for the recovery of money.¹⁹⁴

D. Court's Authority

Courts must enforce these agreements without exceeding their statutory authority.¹⁹⁵ Thus, parties may not use agreements to confer authority that the courts themselves do not possess.¹⁹⁶ On the other hand, parties may sometimes include terms that exceed the court's authority when they specify which provisions of the marital settlement agreement merge into the dissolution judgment. The Oregon statute that addresses this situation states that courts must enforce the terms of marital settlement agreements to the fullest extent possible, unless enforcement of the agreement violates the law.¹⁹⁷

However, when parties negotiate a marital settlement agreement,

191. 998 P.2d 666, 669 n.3 (Or. 2000); Kathy T. Graham, *Merger, Contract Rights and Divorce: A Conundrum of Possibilities*, MARITAL SETTLEMENT JUDGMENT MERGER CLE, 5 (October 2000) (unpublished, on file with author).

192. Graham, *supra* note 191, at 5.

193. *Id.* See *Drews v. EBE Co.*, 795 P.2d 531, 535-36 (Or. 1990); N. Clackamas Sch. District v. White, 750 P.2d 485, 487 (Or. 1998).

194. RESTATEMENT (SECOND) OF JUDGMENTS § 18.360 (1980); Graham, *supra* note 191.

195. See Graham, *supra* note 191, at 5-6.

196. *In re Marriage of Hutchinson*, 69 P.3d 815, 822 (Or. App. 2003).

197. *Id.*

they typically plan to reorder their rights and responsibilities according to their preferences, rather than based on those required by law.¹⁹⁸ The public policy of enforcing marital settlement agreements reflects the notion that parties voluntarily enter into these agreements with the understanding that courts will enforce them.¹⁹⁹ As a result of these negotiations, the parties essentially waive their opportunity to litigate the issues in dispute.²⁰⁰ For this reason, courts should presume that the parties relied on the agreement and that inequity would result if they did not fully enforce these agreements.²⁰¹ Therefore, under some circumstances, if the parties include a contract term in the judgment, courts may enforce it despite its deviations from the applicable substantive law. Although the contract term might merge into the judgment, courts will interpret the term to give effect to the parties' intent.²⁰²

For example, a court may enter a judgment that incorporates a marital settlement agreement for future review, even though it departs from the change of circumstances rule.²⁰³ Nonetheless, a court may never provide for this type of review on its own initiative.²⁰⁴ If the parties attempt to preclude any modification of spousal or child support, the court's power to modify support awards outweighs the parties' agreement.²⁰⁵ Otherwise, in the absence of conflicts regarding the statutory powers of the court, courts remain responsible for giving effect to the intent of the parties.²⁰⁶ A court can determine the parties' intent by considering the circumstances under which the parties reached the agreement, the parties' testimony and the agreement as a whole.²⁰⁷ Courts interpret provisions of property settlement agreements as they would with any other contract.²⁰⁸

In the *McDonnal* case, the Oregon Supreme Court examined the applicable effect of a property settlement agreement between the

198. In re Marriage of St. Sauver, 100 P.3d 1076, 1083 (Or. App. 2004).

199. In re Marriage of McInnis, 110 P.3d 639, 643 (Or. App. 2005).

200. *Id.* (citing In the Matter of the Marriage of McDonnal, 652 P.2d 1247, 1251 (Or. 1982)).

201. *Id.*

202. *McInnis*, 110 P.3d at 643.

203. *McDonnal*, 652 P.2d at 1254.

204. *Id.*

205. *Id.* at 1252.

206. *Id.* at 1251.

207. *Id.*

208. In the Matter of the Marriage of McDonnal, 652 P.2d 1247, 1251 (Or. 1982).

parties, incorporated into the dissolution judgment, which contained a provision for the future review of spousal support by the court.²⁰⁹ The judgment provided for a spousal support award of \$500 per month for one year and \$400 per month for the following two years.²¹⁰ It then stated that the court would review the spousal support award after three years, so long as one of the parties filed a motion prior to this time.²¹¹ Since there was not a change of circumstances, the court needed to consider whether the court could review the judgment in the absence of such a change.²¹² The court noted that the reviewability provision originated with the parties and not with the court.²¹³ Historically, courts treat provisions that are imposed by the court differently than those created by the parties.²¹⁴

In the *Edwards* case, the court addressed a similar issue where the provision provided for the automatic termination of spousal support upon cohabitation or remarriage by the supported spouse.²¹⁵ The court stated that this type of provision, if imposed by the court, could not be enforced.²¹⁶ However, where parties voluntarily enter into an approved and incorporated marital settlement agreement, countervailing principles of public policy prevail and the courts should give effect to the parties' agreement.²¹⁷ In this case, the court determined that public policy did not preclude the enforcement of the parties' agreement to condition spousal support on the wife's choice of living companion.²¹⁸

As a general rule, courts do not possess the authority to modify property divisions in a dissolution judgment.²¹⁹ ORS 107.135 however, gives courts the authority to modify property awards entered into before October 23, 1999.²²⁰ Currently, although ORS 107.135 authorizes courts to modify child and spousal support provisions, it

209. *Id.* at 1248.

210. *Id.*

211. *Id.*

212. *Id.* at 1249.

213. *In the Matter of the Marriage of McDonnal*, 652 P.2d 1247, 1251 (Or. 1982).

214. *Id.*

215. *In the Matter of the Marriage of Edwards*, 698 P.2d 542, 543 (Or. App. 1985).

216. *Id.* at 545.

217. *See id.*

218. *Id.*

219. *In re Marriage of St. Sauver*, 100 P.3d 1076, 1079 (Or. App. 2004).

220. *Id.* *See also* OR. REV. STAT. ANN. § 107.135 (West 2005).

does not allow modifications of property divisions once merged into dissolution judgments.²²¹ Accordingly, while parties can agree to modify property divisions between themselves, courts may not.²²²

VII. CONTRACT REMEDIES

As mentioned, many equitable distribution states currently have statutes that expressly allow parties to determine all of their rights contractually through a separation agreement.²²³ Some jurisdictions even allow persons other than the parties to the dissolution to enforce these agreements on a third party beneficiary theory.²²⁴ In Oregon, however, prior to 2001, parties could not bring an action directly on the contract once the court merged the terms of the settlement agreement into the judgment.²²⁵ Before 2001, Oregon only allowed parties to enforce the terms of the judgment after merger occurred, as the agreement essentially ceased to exist for legal purposes.²²⁶ Contractual remedies were not available to enforce marital settlement agreements that had merged into the dissolution judgment.²²⁷

Therefore, once the court entered a judgment, the parties were entitled to certain remedies available under that judgment.²²⁸ Judgment remedies included relief or modification of the terms of the judgment, a declaration of the parties' rights and duties under the judgment, and enforcement of the judgment through contempt proceedings.²²⁹ Conduct punishable as contempt, if done willfully, includes disobedience of, obstruction of, or resistance to the court's authority, judgments, process or orders.²³⁰ However, a court could not, and still may not, enforce money judgments through contempt proceedings, unless such judgments are for spousal support or child support.²³¹

221. *See Sauver*, 100 P.3d at 1080.

222. *Id.*

223. *See Newton*, *supra* note 164, at 1260-61.

224. *Id.*

225. *Webber v. Olsen*, 998 P.2d 666, 670 (Or. 2000).

226. *Id.*

227. *In re Marriage of McInnis*, 110 P.3d 639, 643 (Or. App. 2005).

228. *Webber*, 998 P.2d at 670.

229. *Id.*

230. *In re Marriage of St. Sauver*, 100 P.3d 1076, 1083 (citing OR. REV. STAT. ANN. § 33.015(2)(b) (West 2005)).

231. *See Carothers v. Carothers*, 488 P.2d 1185 (Or. 1971).

At one time, many practitioners in Oregon did not draft separate marital settlement agreements to accompany the dissolution judgment. Instead, these attorneys included all terms of a parties' dissolution in the stipulated judgment. The following case exemplifies the danger of this approach, particularly prior to the enactment of ORS 107.104 in 2001.

A. Webber Case

The issue in *Webber*, decided in 2000, revolved around whether a stipulated judgment of dissolution qualified as a contract, which would allow the plaintiff to recover in an action for breach of contract rather than only through judgment remedies.²³² The Oregon Supreme Court explored whether the trial court erred in granting the defendant's motion for summary judgment on the plaintiff's claim for breach of an implied promise to notify, contained in the parties' stipulated judgment of dissolution.²³³

In this case, the parties entered into a stipulated judgment at the dissolution of their marriage.²³⁴ The judgment required the husband to maintain the wife as the primary beneficiary of his insurance policy and for the wife to leave the house to the husband in her will.²³⁵ The judgment further stated that, if the wife sold the house, the husband need not keep the wife as the primary beneficiary of his insurance policy.²³⁶ A couple of years later, the ex-wife sold the residence, but did not inform her ex-husband.²³⁷ He found out a few days before his death, three years later, and thus the ex-wife remained designated as the primary beneficiary under the ex-husband's will.²³⁸

The ex-wife argued that courts should treat a stipulated judgment the same as judgments entered into following trial.²³⁹ The plaintiff, acting as personal representative of the decedent's estate, believed that courts should allow the parties here the same basic remedies that parties have under contracts.²⁴⁰ The court refused to hold that a

232. *Webber v. Olsen*, 998 P.2d 666, 670 (Or. 2000).

233. *Id.* at 669.

234. *Id.* at 668.

235. *Id.*

236. *Id.*

237. *Webber v. Olsen*, 998 P.2d 666, 668 (Or. 2000).

238. *Id.*

239. *Id.* at 669.

240. *Id.* at 668-69.

stipulated judgment qualified as both a judgment and a contract under which judgment remedies and contractual remedies would be available to dissatisfied parties.²⁴¹ It stated that if parties to a dissolution wished to retain contractual remedies, in addition to judgment remedies, they needed to enter into a separate agreement.²⁴² In this agreement, the parties had to identify which of the terms of their agreement they desired the court to incorporate into the judgment, along with those terms that they wished to retain in a separate agreement.²⁴³

B. ORS 107.104

The Oregon legislature promptly responded to the holding in *Webber* and enacted ORS 107.104 in 2001 to overturn the Oregon Supreme Court's decision.²⁴⁴ This statute deals with the court's enforcement of settlement agreements and the available remedies.²⁴⁵ In relevant part, ORS 107.104(2) provides:

In a suit for marital annulment, dissolution, or separation, the court may enforce the terms set forth in a stipulated judgment signed by the parties, a judgment resulting from a settlement on the record or a judgment incorporating a marital settlement agreement: (a) As contract terms using contract remedies; (b) By imposing any remedy available to enforce a judgment, including, but not limited to contempt; or (c) By any combination of the provisions of paragraphs (a) and (b) of this subsection.²⁴⁶

Thus, at first glance, it appears that the Oregon legislature addressed the main concern raised in *Webber*, which involved a party's ability to maintain an action for contractual remedies under these circumstances.²⁴⁷ The statute not only strongly supports the enforceability of marital settlement agreements, but it also provides contractual remedies to parties, regardless of whether the terms of their marital settlement agreement merged into the dissolution judgment.²⁴⁸

241. *Id.* at 670.

242. *Webber v. Olsen*, 998 P.2d 666, 670 (Or. 2000).

243. *Id.*

244. *In re Marriage of Grossman*, 106 P.3d 618, 622 n.4 (Or. 2005).

245. *See* OR. REV. STAT. ANN. § 107.104 (West 2005).

246. *Id.* at § 107.104(2).

247. *See Webber v. Olsen*, 998 P.2d 666, 670 (Or. 2000).

248. *In re Marriage of McInnis*, 110 P.3d 639, 643 (Or. App. 2005).

VIII. INTRINSIC AND EXTRINSIC FRAUD

Pertinent to this issue is the distinction between intrinsic and extrinsic fraud, which helps to determine the applicable res judicata standards and whether the parties may bring an action when one party breaches the judgment or marital settlement agreement.²⁴⁹ Courts must differentiate between the two types of fraud, as not every type of fraud vitiates a judgment.²⁵⁰ Although courts consider perjured testimony fraudulent, they will not interfere for that sole reason because the losing party already possessed the ability to refute the false testimony in court.²⁵¹ Public policy favors this rule as it provides closure to cases, whereas litigation might otherwise continue indefinitely.²⁵²

Only extrinsic fraud, rather than fraud intrinsic to the trial itself, may authorize the reopening of a judgment.²⁵³ Thus, courts will only enjoin enforcement of a judgment for fraud extrinsic or collateral to the matter actually tried.²⁵⁴ The distinction relies on the idea that the fraud or deception engaged in by the winning party prevented the losing party from fully exhibiting or presenting his case. This occurred because a real contest between the parties on the suit's subject matter never truly existed.²⁵⁵ If the losing party can show fraud extrinsic or collateral to the case, and that the outcome of the trial might have been different if it were not for the perjured testimony, then the court might order a new trial.²⁵⁶

Dishonesty related to the merits of the case, on the other hand, constitutes intrinsic fraud.²⁵⁷ Intrinsic fraud includes perjured testimony; courts define it as fraud that pertains to the initial action or to a matter that the parties could have litigated at that time.²⁵⁸ When the fraud prevents an adversarial trial, however, it

249. *Johnson v. Johnson*, 730 P.2d 1221, 1227 (Or. 1986).

250. *Id.* at 1225.

251. *Id.*

252. *See id.*

253. *Hresko v. Hresko*, 574 A.2d 24, 26 (Md. App. 1990).

254. *Johnson*, 730 P.2d at 1225 (citing *O.-W.R. & N. Co. v. Reid*, 65 P.2d 664 (Or. 1937)).

255. *Id.*

256. *Id.*

257. *In re Marriage of Conrad*, 81 P.3d 749, 751 (Or. App. 2003) (citing *Johnson v. Johnson*, 730 P.2d 1221, 1222-23 (Or. 1986)).

258. *Id.*

constitutes extrinsic fraud.²⁵⁹ To determine which type of fraud exists, one must look at whether the fraud prevented the actual dispute from being submitted to the fact finder or whether the fraud merely caused the court to reach an unjust conclusion.²⁶⁰ In other words, extrinsic fraud relates to the manner in which the judgment was obtained, rather than the judgment itself.²⁶¹

Relevant to the issue of the distinction between intrinsic and extrinsic fraud is the idea of stipulated judgments and judgments. It appears that courts may reopen cases and modify property distributions in stipulated judgments when fraud, for example, is an issue. The parties did not take an oath for the stipulated judgment, and so nothing prevents the parties from re-litigating the issue. In contrast, if one party commits perjury on the stand and the parties obtain a judgment from the court that incorporates their marital settlement agreement, and they have not specified which provisions do not merge, then the two merge. As a result, the party hurt by the perjured testimony cannot bring any actions against the perjuring party because, due to the merger, the party no longer has the remedies that were otherwise available. The new legislation does not appear to help with this problem because fraud is a tort claim and the new legislation addresses only contractual claims, such as breach of contract. Res judicata principles apply to prevent the party from re-litigating the fraud issue.

For these reasons, divorce practitioners should become familiar with the intricacies of merger and the effects that it may have in the future. Although the Oregon legislature addressed part of the problem, practitioners should remain wary of relying solely on ORS 107.104 to circumvent the effects of merger. Divorce practitioners are instead well-advised to separately draft Marital Settlement Agreements, particularly in complex cases. Some practitioners view the process of drafting separate documents cumbersome and unnecessary. However, these concerns do not outweigh the possible hardships a client might face if left without recourse in situations that the statute does not cover.

259. *See id.*

260. *See Johnson v. Johnson*, 730 P.2d 1221, 1222 (Or. 1986).

261. *Id.* at 1225 (citing *Or.-Wash. Ry. & Nav. Co. v. Reid*, 65 P.2d 664, 667 (Or. 1937)).

IX. CONCLUSION

Family contracts, whether made before, during, or after the marriage, should adhere to the above principles not only in their content, but in their execution as well. For all of these contracts, practitioners should make sure that the parties do not contract regarding issues proscribed by statute. While the parties may contract to most subject matters pertaining to their marriage or divorce, courts still refuse to enforce certain areas.

Attorneys should also closely scrutinize these agreements to determine whether they violate public policy, such as leaving a spouse without any reasonable means to support herself. Moreover, all of these contracts require sufficient consideration in order for the courts to enforce them. Therefore, practitioners must pay attention to issues such as whether the parties are attempting to contract for services within the marriage or if the parties live in a state where the marriage itself is sufficient consideration for a premarital contract.

In addition, attorneys should ensure that the parties carefully follow all of the procedural steps required by their jurisdiction. This includes determining whether the opposing party should seek independent counsel prior to the execution of a premarital contract or whether the state legislature has adopted a statute addressing contract remedies for marital settlement agreements. Most importantly, attorneys should familiarize themselves with the intricacies of the law regarding family contracts specific to their jurisdiction, particularly considering the variation between jurisdictions.

