

# 5810

## MARRIAGE CONTRACTS

Antony W. Dnes  
*Associate Dean (Research)*  
*University of Hertfordshire, England.*  
© Copyright 1999 Antony W. Dnes

### Abstract

This chapter is an examination of the incentive structure set up by the law of marriage and divorce. Two forms of opportunistic behaviour are of particular interest: the 'greener-grass' effect and the 'Black-Widow' effect.

There is a case for seriously considering expectation damages as a basis for post-divorce support obligations and asset division. The current focus of marital law on a mixture of needs-based and contractual elements in divorce settlements is vulnerable to the charge that behaviour is encouraged in both males and females that is predatory in nature. The contractual uncertainty that follows from this may well deter some good quality marriages that might otherwise occur.

*JEL classification:* K12

*Keywords:* Family, Remedies, Needs, Opportunism, Breach of Contract

### 1. Introduction

The growth of divorce, reduction in rates of marriage, growth of co-habitation, and similar trends in western society have all caused concern in recent years. Families are less stable and this has implications for the welfare of children.

From an economic perspective, a major issue is the incentive structure set up by the law of marriage and divorce. The dependency and vulnerability of one marriage partner to opportunistic behaviour by the other is foreseeable under current laws, opportunism being defined as self-seeking with guile (definition of Williamson, 1985, p. 47). This chapter is specifically concerned with the extent to which laws may have set up incentives encouraging divorces that would otherwise be avoided and discouraging marriages that might otherwise have occurred

Two adverse incentives are of particular interest. Financial obligations may create incentives for a high-earning partner to divorce a low-earning, or possibly simply ageing, spouse if the law does not require full compensation of lost benefits. Elsewhere, I have called this the 'greener-grass' effect (Dnes, 1978). Under current social conditions and present marital law, the

greener-grass effect will typically induce wealthy men to abandon poorer wives. There could also be an incentive for a dependent spouse to divorce if payments based on dependency allow the serial collection of marital benefits without regard to the costs imposed on the other party. I call the second adverse incentive the '*Black-Widow*' effect (Dnes, op cit.). Under current conditions, Black Widows are likely to be women with relatively poor husbands in marriages where the husband cannot transfer benefits to deter her exit.

## 2. Marriage as a Long-Term Contract

A useful starting point is to think of marriage as a contract between two parties and divorce as resulting from breach of contract, although it should be noted that marriage predated the development of contract. A purely contractual starting point would be modern, although contractual elements are present in the case law (Lloyd Cohen, 1987, p. 270). A contractual approach is also capable of considerable sophistication and it is unhelpful to dismiss it out of hand, particularly where inherently economic issues like asset division are at stake.

Becker was a pioneer among economic theorists of marriage and is often regarded as a *bête noir* by writers hostile to economics-based approaches to the family. Becker's work is admirable but was not focused on opportunism. It has led to more recent bargaining theories of the family. The interested reader may see Becker (1974a) and Becker (1991) to inspect the origins of economic analysis of the family.

Lloyd Cohen (1987) describes marriage as an unusual contract in which the parties exchange promises of spousal support, where the value of the support is crucially dependent on the attitude with which it is delivered. In a traditional marriage, many of the domestic services provided by the wife occur early in the marriage, whereas the support offered by the male will grow in value over the longer term. The opportunities of the parties may change so that one of them has an incentive to breach the contract. Divorce imposes costs on both parties, equal to at least the cost of finding a replacement spouse of equivalent value (in contract terms this cost is technically a measure of expectation damages, that is the replacement cost of the anticipated spousal support). Cohen argues that the risks and costs of being an unwilling party to divorce are asymmetrically distributed: the husband might be tempted to take the wife's early services and dump her to enjoy his later income without her (the 'greener-grass' effect), and she will tend to be worth less on the remarriage market than a male of similar age (Lloyd Cohen, 1987, p. 278). Why do people marry? There are both psychic and instrumental benefits to marriage.

The willingness of someone to commit themselves to oneself is evidence of worthiness of such love, and marriage gives a means of protecting long-term investments in marital assets. According to Cohen the spouses may be regarded as 'unique capital inputs in the production of a new capital asset, namely 'the family'. In particular, children are shared marital outputs. Another instrumental gain is the provision of insurance: parties give up their freedom to seek new partners, if their prospects improve, for a similar commitment from a spouse, which is rational if the gains from marriage exceed the cost of losing freedom to separate (see Posner, 1992). The gains from marriage reflect surpluses that can be seen as appropriable and may tempt a spouse to opportunistic behaviour, comparable to the incentives in more regular long-term contracts (see Klein, Crawford and Alchian, 1978). Cohen also draws attention to the role of marriage-specific investments like the effort expended on raising children, or the prospect of losing association with one's children, as 'hostages' that may suppress opportunistic exit from the marriage.

Cohen favours the preservation of restraints on opportunistic divorce, which he sees as requiring understanding that marriage is a long-term contractual relationship. The 'wrong' judicial approach to obligations like long-term support can lead to too much or too little divorce. This observation brings in the idea of an optimal level of divorce, which might be encapsulated in a rule like 'let them divorce when the breaching party (the one who wants to leave, or who has committed a "marital offence") can compensate the victim of breach'. (I pursue the idea of optimal breach further below.)

A contractual focus on marriage is of value but the underlying view of the marriage contract needs to be sophisticated. Marriage contracts revolve around direct and instrumental benefits, bargaining influences (Lundberg and Pollak, 1996), shared goods, long-term marriage-specific investments, incentives for due performance and incentives for opportunism. These factors are of considerable consequence. If the law covering the financial obligations attached to divorce fails to suppress opportunism, then people will be hurt: fewer marriages will occur than otherwise and there may be less investment in marriage-specific activities like child raising. People will not be certain of obtaining predictable returns on marital investments.

### **3. Efficient Marital Breach**

Breach of contract may be optimal, providing compensation is paid to the breached-against party for lost expectation. Awarding 'expectation damages' is indeed the standard remedy for breach among commercial parties, and has the characteristic of placing the parties in the position they would have been in

if the contract had been completed (see Dnes, 1996). The common law may be considered efficient (wealth maximizing for the parties) in awarding expectation damages for breach. One would not insist on specific performance of a commercial contract. However, so as not to over-insure the victim of breach there is an important requirement for the victim to take any steps possible to mitigate the loss.

Later in this chapter I shall show that a sophisticated view of the marriage contract, drawing on modern ideas of long-term relational contracting could give a useful direction to policy. For the moment, I examine a more limited, classical form of contract. Marriage vows would be taken quite literally and promises would be seen as binding. For example, a traditionalist view of the marriage contract is as an exchange of lifetime support for the wife, in which she shares the standard of living ('output') of the *marriage*, for domestic services such as housekeeping and child rearing. The classical-contract view could easily include less traditionalist frameworks. Breach of contract by one party would allow the other to reclaim lost expectation subject to an obligation to mitigate losses.

All the traditional marital offences, such as adultery, unreasonable behaviour and abandonment, would be relevant to a divorce system based on classical breach of contract, in determining who had breached. Equally, no-fault divorce would be consistent with the notion of efficient breach as it would simply represent either (i) a decision by one party to breach the marital contract and pay damages, or (ii) a mutual decision to end the contract with a negotiated settlement.

Consider a lengthy marriage that ends in divorce. The parties met when they left university. After working for some years the wife gave up work to have children and care for them. When the youngest child started school, she returned to work but at a lower wage than previously. After 20 years of marriage, the husband petitions for divorce on the grounds of separation. Their housing and other assets have always been held jointly.

The husband would be expected to share property and income to maintain the standard of living his ex-wife would have enjoyed for the remainder of the marriage. Expectation damages are identical to the minimum sum that he would have to pay to buy from her the right to divorce her, if divorce were only available by consent. (He might have to pay up to his net benefit from divorcing if this were higher and his ex-wife were able to hold out.)

The court would assess what that standard of living was and determine who had breached the contract. The breaching partner would not generally be difficult to detect if attention is focused, as is common across the law, on proximate causes. The fact that the divorced wife gave up work for a while or now earns less than might have been the case without child-care responsibilities is immaterial in finding expectation damages: broadly, if it can be judged that

she would have enjoyed the use of a large house and of other assets and available monetary sums, she would be awarded the assets and income to support that lifestyle. Her own income would contribute to that expectation, as would her own share of the house and other assets. The divorcing husband would be expected to contribute from his income and his share of the assets to provide that support for his ex-wife, regardless of the impact on his own lifestyle or on any subsequent marriage partner. Any common-law or statutory requirement to maintain the standard of living of the children of the marriage could be dealt with separately by the court, although the requirement would probably be met by maintaining expectation in the example.

Following the principle of loss mitigation, if separation from allows the former wife to increase her income or assets in some way, or there are opportunities to avoid losses (including opportunities for remarriage) those amounts should be deducted from the settlement. In addition, if she contrived an apparent breach, for example by pursuing oppressive forms of behaviour, the husband could excuse his breach under the doctrine of duress (other classical contract doctrines would also be needed, for example misrepresentation, but do not seem central to the issues at this point). Without such safeguards, couples might be careless in preserving the marriage. With these qualifications, expectation damages would ensure that only efficient breach occurred, that is when someone's gain from the divorce exceeded the compensation needed to put the other party, as far as money could, in the same position as before. From a traditionalist perspective, the approach would give security to a woman contemplating an investment in home-making rather than labour-market activities - although it is actually supportive of a wide range of possible marriage types.

Under a classical-contracting approach, the courts would recreate the expected living standard of the victim of breach of the marital contract by adjusting the property rights and incomes of the parties at divorce. Fault would matter to the extent that the court would need to establish who was the breaching party but this would not rule out no-fault divorce (actually, unilateral breach where one party wishes to leave the marriage without citing marital offences and can divorce the other party against his or her will). It would only be irrelevant in a system of mutual consent, where both parties negotiated a settlement stating that neither was at fault; where bargaining would safeguard expectations. The classical-contracting approach preserves incentives for the formation of traditional families, if that were considered important. Any costs incurred by the victim of breach in raising children would be more than compensated since expectation normally exceeds such costs. The parties would only enter the marriage and incur costs (possibly as opportunities forgone, which we discuss further below) if they expected their personal welfare to be higher - hence, expectation exceeds (reliance) costs.

Classical contracting is also consistent with the simultaneous existence of separate legal obligations for the maintenance of children. However, it would only be consistent with a literal interpretation of the clean-break principle favoured in much recent family law if sufficient property rights can be transferred to avoid the need for subsequent periodical payments. A classical-contract view would not be consistent with views emphasizing the sanctity of marriage, which insists upon specific performance.

No more difficulty should arise in family law than in commercial law in carrying out calculations of expectation damages. Typically, both parties will be at a mature stage of their lives where their lifestyles are reasonably foreseeable. It would be harder to calculate alternatives like reliance damages (see below). The courts might well discover they faced a great deal of argument over who had caused the breach. There might also be a tendency to apply rigid views of what constituted a party's reasonable expectation in a marriage, although, historically, there has been more of a problem of discretion and inconsistency in the case law on long-term support of ex-wives.

Other criticisms of an expectation-damages approach tend to be based on sectional views of social welfare. Thus, the arguments of feminists may be used to reject the idea of divorce rules that reinforce the dependency of women on men. Some liberals (for example, Kay, 1987) argue for measures to increase equality between males and females in their social roles. Others (for example, Gilligan, 1982) argue that men and women are different (women's art, women's ways of seeing, women's writing, and so on).

Recent moves in divorce law to compensate women for forgoing career opportunities, or to 'rehabilitate' them have been sympathetically received by these groups. Such moves focus on opportunity cost and amount to using restitutionary or possibly reliance standards of compensation.

#### **4. The Reliance Approach**

In *The Limits of Freedom of Contract*, Michael Trebilcock (1993) contrasts an analysis of the financial consequences of divorce based on classical-contract ideas with contemporary trends towards compensating opportunity costs. Trebilcock argues strongly for an expectation-damages approach to marital breakdown, particularly because this will suppress opportunistic abandonment of dependent spouses. According to Trebilcock, the feminist dilemma is that divorce laws that are protective of women legitimize the subordinate role of women in society, whereas treating the divorcing couple as equals ignores the

labour-market disadvantages that domestic specialization confers on many divorcing women.

What would happen if we compensated the abandoned spouse (usually the woman) or the woman choosing to leave the marriage, for the opportunity cost of marrying? Opportunity cost comprises the value of alternative prospects she gave up. In contract terms, this amounts to awarding reliance damages: the opportunity cost has become akin to wasted expenditure and the suggested rule seeks to put her in the position she would have been in had the marriage never taken place (the *status quo ante*). Reliance draws attention to the loss of career opportunities for many women either on entering marriage or in stopping work to have children. An economically strong woman leaving a marriage might receive nothing under this approach, if she could be shown to have lost nothing through marriage.

This form of compensation should strictly provide the *difference* between what has been obtained up to the point of divorce and what the lost opportunity might reasonably be expected to have provided over some targeted period of time. The court would be required to examine and adjust the property rights of the divorcing spouses to put the divorcing woman in the financial position she could claim marriage prevented her from attaining. The suggested *operation* of this standard is not strictly equivalent to the use of reliance damages, either in contract (when this occurs) or in tort, because there is no suggestion that the payment of reliance damages should be linked to breach of contract: the adjustment is usually simply to be made for the benefit of an economically weakened divorcing woman (or comparable male cases if they emerged, for example where he had given up work to carry out child care). Equally, there is no reason in principle why reliance damages could not be linked to breach of contract, either in the sense of marital offences (substantial breach) or simply as a decision by one party to leave the marriage.

Trebilcock points out that the reliance approach is harsh in its treatment of divorcing women with poor pre-marriage career prospects, for example, the waitress who marries a millionaire. Such cases would receive very little compensation for marital breakdown. Reliance damages were rejected in 1980 by the English Law Commission as requiring too much speculation about what might have been. In comparison, expectation damages require less speculation: comparisons are not in the distant past and it is usually reasonably clear by the time of divorce how the standard of living would have developed.

Nonetheless, reliance does have its supporters among some economics of law practitioners, notably in the valuation of the loss of a housewife's services in fatal-accident cases and in establishing a bare incentive for investment in

household production. (On accident valuation, see Knetsch, 1984.) In the case of a fatal accident, the wife is lost and in some jurisdictions the husband claims her opportunity cost of participating in the marriage as an alternative to claiming her replacement cost (that is, hiring a housekeeper). The reasoning is that the benefits to them both of her forgoing that opportunity must have been at least equal to the opportunity cost (for example wage in paid employment) or she would not have given up the opportunity. The advantage to the professional-class bereaved husband is that compensation will typically be higher.

Although reliance damages would tend to be lower than expectation damages, assuming the marriage increased each party's expected welfare, incentives for investments in domestic services would be preserved. A woman contemplating marriage-specific investments in child care by giving up labour-market opportunities (the reliance) for example, is better off in the marriage with those investments and is at least as well off if it all goes wrong. Therefore, the incentive remains for traditional marriages in which the woman exchanges domestic services for long-term support. The reliance approach could therefore easily support a public-policy objective of preserving traditional family lifestyles, which may not be appreciated by some of its supporters. Equally, one could support investments by males in child care by establishing their right to reliance damages upon divorce.

Reliance damages will not be associated with efficient breach. Taking a contractual view first, if reliance damages are owed for breach of contract, a party may breach when the net benefit to them before damages is exceeded by the loss to the other party (opportunistic breach). This is because they only have to pay for reliance, which is normally less than expectation, so the socially suboptimal breach confers a private net advantage to the breaching party.

In a system awarding reliance damages for breach of contract, we would expect additional, opportunistic divorces compared with an expectation standard. Women's marriage-specific investments tend to be made early in marriage, and their remarriage opportunities are poorer than men's owing to the different operation of ageing processes, demographic factors and the fact that the children of an earlier marriage will be a financial burden on a new husband. Men therefore would be more likely to divorce their wives (the 'greener-grass effect') and the increase in opportunistic divorces would tend to harm the interests of women on balance.

Under a system awarding reliance damages for breach, we could expect a great deal of judicial effort to go into establishing fault (in the sense of who breached the marriage contract) just as under an expectation standard. If less

were at stake because reliance is normally less than expectation, there would be a lower incentive to pursue disputes and there might be fewer resources devoted to such conflict. However, the main driving force is that a finding of fault will result in a large bill under both standards so the difference is unlikely to be great.

In a system awarding reliance damages of right to a divorcing party regardless of the cause of breach (typically an award to a wife - but possibly a husband - who has specialized in child care) there may also be an incentive for opportunism of a different kind. The problem is not peculiar to the reliance standard but affects all non-fault standards, for example, consider an award *from* a spouse divorced against his or her will under the Matrimonial and Family Proceedings Act 1984. The apparently vulnerable wife (or husband) might decide to divorce when the net gain from divorce including the reliance award exceeds her (or his) expected net benefit from the marriage continuing, which is a form of inefficient breach. This problem could not happen under a more contractual approach, because a decision to end the marriage would be breach of contract and would attract a damages penalty rather than an award. The practical problem here is that the woman in the example will either not care (on financial grounds) whether the marriage survives, or may feel she will be better off without it. The law will have effectively written an insurance contract that perversely influences behaviour: a case of moral hazard. This type of opportunism (the 'Black-Widow' effect) would lead to the prediction that divorces initiated by women would increase whenever such specified damages were introduced.

The reliance approach could encourage opportunistic behaviour and would encounter problems of definition and calculation of the *status quo ante*. It is not kind to divorced women who start out with poor career prospects. Like the expectation standard, reliance implies no special status for any particular family asset: houses, pensions, and anything else, are all candidates for trading off with the aim of achieving the targeted level of support for a party. Reliance could be criticized for introducing a tort focus into the financial obligations of divorce, treating decisions to invest in domestic services as like sustaining injury, and carrying the implication that home building and child raising are activities with no benefits for the domesticated provider. As with expectation damages, a reliance approach could be operated around a separate system of child-support obligations.

## 5. Restitutionary Damages

Carbone and Brinig (1991) identify a modern development in divorce law that they describe as a restitution approach. In a US context, they argue that academic analysis has been led by developments in the courts, which have increasingly emphasized settlements that repay lost career opportunities, particularly in the context of a wife's domestic support of her husband and children during periods that allowed for the development of business capital, and other contributions to a spouse's career (see, for example, *Jamison v. Churchill Truck Lines*, 632 S.W. 2d. 34, 3536 (Missouri Ct. App. 1982), awarding part of business for domestic contributions; see also Carbone, 1990; Krauskopf, 1980, 1989, and O'Connell, 1988).

Restitution might be considered appropriate when a wife supports her husband through college: if they later divorce, the question is whether it is right that he should keep all the returns on this human-capital investment. The canonical example would be where the wife undertakes the child care so that her husband can develop his professional or business life. Restitution is often cited as an appropriate remedy in contract law when not returning money paid out by the victim of breach would lead to unjust enrichment of the breaching party. Restitution is ideologically acceptable to cultural feminists who wish to emphasize the *repayment* of sacrifices.

A restitution approach is distinct from a reliance approach, although both often emphasize the same life choices, for example the opportunity forgone for a separate career. Under a restitution approach, compensation is in the form of a share in the market gain supported by the (typically) wife's supportive career choice, for example a share in the returns to a medical degree, or a share of the business. Restitution is therefore only possible where *measurable market gains* have resulted from the 'sacrifice'. The reliance approach, in contrast, is based on measuring the value of the opportunity forgone, for example estimating the value of continuing with a career instead of leaving work to raise children - an input rather than output measure. Reliance puts the *victim* of breach in the same position as if the contract had not been made, whereas restitution puts the *breaching* party in the same position as if the contract not been made (Farnsworth, 1990, p. 947).

Restitution damages may be difficult to calculate. Who can really say how much a wife's contribution was to a husband's obtaining a medical training? Under a tort-style 'but-for' test, perhaps a case could be made that all of his earnings (and assets bought with income) belong to her. Yet, the ex-wife must have got something from the marriage, that is, was not supporting him purely

for the later return on his income. How much should we offset? Another problem might be negative restitution, where a party can show that the other spouse held them back and was a drain rather than an asset (the 'Mayor of Casterbridge effect'). In practice, interest in restitution awards arises in US states with no-fault divorce and community-property rules, as a basis for obtaining alimony for an abandoned wife. Restitution will probably be kinder to divorcing women who had poor career prospects before entering the marriage.

From an efficiency angle, restitution damages suffer from all of the problems already cited for reliance: the difficulties are logically identical. In a contractual setting (using restitution as a remedy for breach) restitution damages will lead to inefficient breach as liability for damages will again be too low. There will be too much breach (divorce) compared with expectation damages as restitution will normally be less than expectation damages (as long as the victim of breach expected more from the marriage than the returns reflected in the victim's investment in the breaching party's career). The higher level of opportunistic divorce will be to the disadvantage of women, if earlier comments about the differential effects of age on remarriage prospects for males and females hold true. Outside of a contractual setting, if support payments are set by statute for ex-spouses regardless of fault, there will be an incentive for opportunistic breach by the party for whom the restitution payment plus other expected benefits from divorce exceed the expectation within the marriage (the Black-Widow effect exactly as above, with restitution substituted for reliance).

Compared with reliance damages, the level of divorce could be higher or lower under a restitution standard. This is because there is no necessary connection between the value of investment in the other spouse's career and a person's own alternative career prospects. Therefore, reliance can be greater or less than restitution (measured as the market return on the investment in the other spouse's career).

The restitution standard will give the incentive necessary to bring forth investments in domestic activities, particularly child raising. This would operate a little differently from the reliance standard. A person contemplating marriage-specific investments in child care by giving up labour-market opportunities would be entitled to compensation for each such investment decision. Therefore, the incentive remains for traditional marriages. As with expectation damages, a restitution approach could be operated around a separate system of child-support obligations.

## 6. Partnership, Property Rights and Rehabilitation

There is a trend towards the use of a partnership model in some jurisdictions, notably where community-property is the norm in marriage. Singer (1989) argues that post-divorce income disparity between ex-spouses is the result of joint decisions and that the higher income is strictly joint income (which could carry over to property bought from income). Singer also points out that the equal division of property and income would meet demands for compensation for lost career opportunities, and could further the aims of 'rehabilitating' an abandoned spouse. According to Carbone and Brinig (1991), Singer's analysis uses conventional justifications for post-divorce support without identifying the links between them, fails to determine initial property rights and does not achieve a precise calculation. Singer actually has a spuriously precise system of sharing the joint income for a number of years (she suggests one year of post marriage support for each year of marriage).

A partnership model is possibly consistent with an updated contractual model of marriage. There is some evidence that divorcing couples do see themselves as jointly owning at least their assets, that is, their expectations are built around partnership. Weitzman (1981a) found that 68 percent of women and 54 percent of men in her sample of divorcees in Los Angeles County, California believed 'a woman deserved alimony if she helped her husband get ahead because they are really *partners* in his work'. This was similar to the proportion supporting alimony on the grounds of the need to maintain small children. Davis, Cretney and Collins (1994) note the prevalence of the presumption of an equal split in their discussion of 'folk myths' associated with divorce.

Without repeating the detailed analysis of earlier sections, I note that, unless rehabilitation, or equal shares, are the parties' expectations from marriage, the model could lead to inefficient breach. In turn this can give rise to incentives for opportunistic behaviour, including the greener-grass and the Black-Widow effects, which reflect the adverse incentive effects from using less-than-expectation damages. If the true expectation of the dependent party went beyond equal shares or temporary support plus rehabilitation then a move from expectation damages to rehabilitation would encourage breach of contract by the non-dependent party.

## 7. Need

A focus on meeting post-divorce housing and other needs, particularly of the spouse with childcare responsibilities, is the dominant element operating in several jurisdictions (for example, England and some US states). In such law, need is the starting point, and the majority of cases do not reveal sufficient family resources to go much beyond the allocation of housing to the spouse with responsibility for care of the children, particularly as the clean-break principle favours transferring assets in lieu of periodical payments.

There is no necessary inconsistency between a contractual view and needs-based awards, as meeting the needs of the children of the marriage and a breached-against spouse could be the remedy for breach of the marriage contract. However, the welfare consequences of the standard are not encouraging. If we assume that meeting need is a minimal expectation in marriage, need awards for breach would be less than or equal to expectation damages and excessive breach would occur: the by now familiar greener-grass effect as (most likely) husbands find they are not expected fully to compensate abandoned wives for removing the husband's high, late career earnings. Also, if, as is the case, need awards are not linked to substantial breach, the Black-Widow effect can follow, if the value of a need award plus the expectation from the changed situation (possibly, re-marriage, cohabitation, or single status) exceeds the expectation from the current marriage. There is a direct analogy with the fourth condition above.

Needs-based awards of spousal support do meet a concern that people should not be trapped into unhappy marriages. 'Fault served to restrain men from leaving or flouting their marital obligations too egregiously, but it also left women with little bargaining power within the relationship. Women ... could not leave ... without facing financial ruin' (Carbone and Brinig, 1991, p. 997).

However, from the perspective of maximizing the sum of benefits from a marriage, it is impossible to justify the removal of costs for one person when this will impose similar or greater costs upon another: that would amount to 'taking sides'. Furthermore, the possibility of inducing the Black-Widow effect might encourage some men to avoid marriage altogether, which is generally a problem when contracts cannot be secured against opportunism: a form of long-term, dynamic inefficiency (see Dnes, 1995). The argument that public policy requires men rather than women to bear the financial costs of divorce is vulnerable to the observation that it is difficult to distinguish between the unhappy divorcing wife and the opportunistically divorcing wife. The weight of the criticism in this paragraph could be undermined by finding that there is

typically a heavy spillover effect (externality) from the unhappiness of one marriage partner to the welfare of other parties, for example onto children.

### 8. Revising the Contract Approach to Marriage

The problems following from avoiding the use of expectation damages, or of separating awards from the issue of breach of contract are that (i) generally, breach will be inefficient, and (ii) breach may be opportunistic (exploitative). However, the problems with expectation damages in marriage contracts are that (i) implications of lifetime support appear to militate against a modern emphasis on independence in life, and (ii) protracted arguments over the identification of breach would be costly, which is particularly relevant when the court system is run largely from public funds. The problems of identifying breach are at least as severe if non-expectation standards (for example reliance) are used. Would a more sophisticated view of the marriage contract resolve any of these issues?

The movement away from highly restrictive divorce laws coupled with lifetime support obligations towards wives was followed by the evolution of liberal laws characterized often by needs-based, discretionary systems of property adjustment and spousal support. The social norms surrounding marriage have clearly changed over time, in particular towards favouring serial marriages and cohabitation. A number of points stand out. One is that marriage rates are falling, cohabitation rates are rising, and divorce rates are rising in many countries, which suggests that the current legal view of marriage does not correspond with the wishes of the population at large. A second important point is that liberalization in a sense allows people to change their minds as circumstances change and to revise the marriage contract. Consequently we need to ask whether a more flexible view of marriage is useful and what the limits to it would be. The history of marital law, showing an evolving view of the nature of the marriage contract that has been heavily shaped by surrounding social norms, is consistent with modern views of 'relational' contracts shaped by a surrounding mini-society of norms (relational contracting is explored in Macneil, 1978; Williamson, 1985 and Macaulay, 1991).

One possibility might be to encourage the use of clearer marriage contracts with the possibility of enforceable modifications that might be a substitute for divorce. The literature on contract modifications is extremely pessimistic over the prospect of welfare gain from enforcing *mutually agreed and compensated* modifications (see Jolls, 1997, and Dnes, 1998). This is because of the difficulty of distinguishing between genuinely beneficial revisions and those resulting

from opportunistic behaviour, which can amount to duress. Consider the difficulty in marriage contracts in distinguishing between a genuine modification (because a party now has improved prospects) and the case where a party threatens to make their spouse's life hell unless certain terms are agreed.

Contract modifications will not set up incentives for opportunism if, in the context of unforeseen events, (i) it is not clear who is the lowest-cost bearer of the risk, (ii) the events were judged of too low a value to be worth considering in the contract, or (iii) it was infeasible for either party to bear the risk (as explained fully in Dnes, 1995, p. 232). Generally, the view that supporting all modifications is desirable because there appears to be a short-term gain is unsound: there may be undesirable long-term instability as a result, as already noted in the previous subsection, since fewer people will make contracts if it is difficult to protect them from opportunism.

The idea that modifications can be legally supported when events unfold for which it would not have been clear early on who should have benefitted or borne a fresh cost does give a clue to a rôle for the court. It can determine whether some change was foreseeable and whether the attendant risk would have been clearly allocated, for example, one's wife's aging is not a reason for scooting off without compensating her, on the other hand mutually tiring of each other would have been hard to allocate to *one* party.

Generally, the main focus of the law can be expected to remain the division of benefits and obligations on divorce, that is, the ending of a contract and move to new circumstances for the parties. A more appropriate fundamental model of the marriage contract would be as a relational contract. Macneil (1978) has suggested that complex long-term contracts are best regarded 'in terms of the entire relation, as it has developed [over] time'. Special emphasis is placed on the surrounding social norms rather than on the ability of even well-informed courts to govern the relationship (Macneil calls governance that emphasizes third-party interpretation 'neoclassical' contracting). An original contract document (for example marriage vows) is not necessarily of more importance in the resolution of disputes than later events or altered norms. Courts are likely to lag behind the parties' practices in trying to interpret relational contracts.

A relational contract is an excellent vehicle for thinking of the fundamental nature of marriage but it may be of limited help in designing practical solutions to divorce issues unless it is possible to fashion legal support for the relational contracting process. Crucially though, the idea emphasizes flexibility. It is a fascinating mental experiment to put the idea of flexibility together with the persistent caution of this article over the dangers of creating incentives for opportunistic behaviour. Many of the problems associated with the division of

marital assets arise because social norms change (for example the wife has no entitlement to life-time support) but the individual marriage partners fail to match the emerging marital norm (for example a homely wife married in 1966 is much more likely to have specialized in domestic services). Therefore, a possible approach to divorce law is to use expectation damages to guard against opportunism but to allow the interpretation of expectation to be governed by differing 'vintages' of social norms. As an example, the courts could take a retrospective view of the expectations associated with each decade. Consideration could also be given to making pre-nuptial, and post-nuptial, agreements between spouses legally binding. Modern marriages might be allowed to choose between *several* alternative forms of marital contract (for example traditional, partnership, or implying restitutionary damages on divorce). Providing expectations are clarified, inefficient and opportunistic breach could be broadly suppressed. Such a system could operate around a statutory obligation to meet the needs of children, which providing it does not overcompensate the parent with care should be neutral towards incentives.

## 9. Conclusions and Summary

There is a case for seriously considering expectation damages as a basis for post-divorce support obligations and asset division. The foundation for this conclusion is the incentive for opportunistic behaviour set up by the use of reliance, restitution, partnership, rehabilitation and need approaches to post-divorce liabilities. The current focus of marital law is vulnerable to the charge that behaviour is encouraged in both males and females that is predatory in nature. The contractual uncertainty that follows from this may well deter some good quality marriages that might otherwise occur.

Problems arise because a marriage partner can leave without meeting obligations incurred early on in the marriage, that is, will not be forced to pay expectation damages. Under the greener-grass incentive, a husband (usually) will leave the marriage if the gains in a new marriage or from single status exceed his gains in the first marriage, when he knows he will not have to compensate his first wife for the full loss of her married lifestyle. The Black Widow effect is similar but refers to cases where (typically) a female would find that a divorce award means she is better off leaving a first husband and possibly moving to a new relationship even when this would have lower net benefits for her in the absence of the award.

The contractual view of marriage ultimately explored in this article is different from classical commercial contract law. Different vintages and varieties of marriage need to be recognized. In particular, partners in traditional and non-traditional marriages could be contractually protected against exploitation by recognizing the variety of promises they received. The approach is also consistent with a separate system of liability for support for children and with avoiding having the state pick up the bill for failed marriages.

### Acknowledgements

I wish to thank the Lord Chancellor's Department in England for supporting parts of the research associated with this paper, and to thank participants at the June 1997 Lord Chancellor's Department Economists' Forum for helpful comments on an earlier draft. I also wish to thank everyone at the Private Enterprise Research Center, Texas A&M University, where I wrote part of this paper, for their kind hospitality and helpful discussions. The paper is developed from an earlier report (Dnes, *The Division of Marital Assets Following Divorce with Particular Reference to Pensions*, Research Report 7/97, Lord Chancellor's Dept, 1997) and a journal article (Dnes, 1998).

### Bibliography on Marriage Contracts (5810)

- Allen, Douglas W. (1990), 'An Inquiry Into the State's Role in Marriage', **13** *Journal of Economic Behavior and Organization*, 171-191.
- Bayles, Michael D. (1989), 'Marriage as a Bad Business Deal: Distribution of Property on Divorce', **17** *Florida State University Law Review*, 95-106.
- Becker, Gary S. (1973), 'A Theory of Marriage: Part 1', **81** *Journal of Political Economy*, 813-846.
- Becker, Gary S. (1974a), 'On the Relevance of the New Economics of the Family', **64** *American Economic Review. Papers and Proceedings*, 317-319.
- Becker, Gary S. (1974b), 'A Theory of Social Interactions', **82** *Journal of Political Economy*, 1063-1093.
- Becker, Gary S. (1976), *The Economic Approach to Human Behavior*, Chicago, University of Chicago Press, 314 p.
- Becker, Gary S. (1985), 'Human Capital, Effort, and the Sexual Division of Labor', **3(S)** *Journal of Labor Economics*, 33 ff.
- Becker, Gary S. (1988), 'Family Economics and Macro Behavior', **78** *American Economic Review*, 1-13.

- Becker, Gary S. (1991), *A Treatise on the Family*, Cambridge, MA, Harvard University Press, 288 p.
- Becker, Gary S. and Murphy, Kevin M. (1988), 'The Family and the State', **31** *Journal of Law and Economics*, 1-18.
- Becker, Gary S., Landes, Elisabeth M. and Michael, Robert T. (1977), 'An Economic Analysis of Marital Instability', **85** *Journal of Political Economy*, 1141-1187.
- Ben-Porath, Y. (1980), 'The F-Connection: Families, Friends and Firms and the Organization of Exchange', **6** *Population Development Review*, 1-30.
- Bennett, Belinda (1991), 'The Economics of Wifing Services: Law and Economics on the Family', **18** *Journal of Law and Society*, 206-218.
- Bishop, William, 'Is He Married? Marriage as a Market Signal', in Knetsch, Jack L. (ed.), *Economic Aspects of Family Law*, Toronto, Butterworths.
- Bolin, Kristian (1994), 'The Marriage Contract and Efficient Rules for Spousal Support', **14** *International Review of Law and Economics*, 493-502.
- Bonus, Holger (1991), 'Schöne Müllerin. Heiratsmarkt, Vor- und Nachteile der Ehe aus ökonomischer Sicht (Advantages and Disadvantages of Marriage from the Economist's Viewpoint)', **12** *Wirtschaftswoche*, 44-49.
- Borenstein, Severin and Courant, Paul N. (1989), 'How To Carve a Medical Degree: Human Capital Assets in Divorce Settlements', **79** *American Economic Review*, 992-1009.
- Bradshaw, J. and Millar, J. (1991), *Lone Parent Families in the UK*, Department of Social Security Research Report, No.6.
- Brinig, Margaret F. (1990), 'Rings and Promises', **6** *Journal of Law, Economics, and Organization*, 203-215.
- Brinig, Margaret F. (1993), 'The Law and Economics of No-Fault Divorce', **27** *Family Law Quarterly*, 453-470.
- Brinig, Margaret F. (1994a), 'Comment on Jana Singer's Alimony and Efficiency', **83** *Georgetown Law Journal*, 2461-2479.
- Brinig, Margaret F. (1994b), 'Status, Contract and Covenant', **79** *Cornell Law Review*, 1573-1602.
- Brinig, Margaret F. and Alexeev, Michael V. (1991), 'Legal Rules, Bargaining and Transactions Costs: The Case of Divorce', in Nagel, Stuart and Mills, Miriam K. (eds), *Systematic Analysis in Dispute Resolution*, New York, Quorum Books, 91-105.
- Brinig, Margaret F. and Alexeev, Michael V. (1993), 'Trading at Divorce: Preferences, Legal Rules and Transaction Costs', **8** *Ohio State Journal on Dispute Resolution*, 279-297.
- Brinig, Margaret F. and Alexeev, Michael V. (1995), 'Fraud in Courtship: Annulment and Divorce', **2** *European Journal of Law and Economics*, 45-63.
- Brinig, Margaret F. and Carbone, June R. (1988), 'The Reliance Interest in Marriage and Divorce', **62** *Tulane Law Review*, 855-905.
- Brinig, Margaret F. and Crafton, Steven M. (1994), 'Marriage and Opportunism', **23** *Journal of Legal Studies*, 869-894.
- Broude, Donna L. (1986), 'The Effect of the Tax Reform Act of 1984 on Divorce Financial Planning', **21** *Journal of Family Law*, 283-300.
- Cabrillo, Francisco (1996), *Matrimonio, Familia y Economía* (Marriage, Family and Economics), Madrid, Minerva Ediciones.
- Cabrillo, Francisco (1996b), *Matrimonio, Familia y Economía*, Madrid, Minerva Ediciones.

- Carbone, June R. (1990), 'Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman', **43** *Vanderbilt Law Review*, 1463-1501.
- Carbone, June R. and Brinig, Margaret F. (1991), 'Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform', **65** *Tulane Law Review*, 954-1010.
- Cass, Ronald A. (1987), 'Coping With Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate', **67** *Boston University Law Review*, 73-97.
- Chami, Ralph and Fischer, Jeffrey (1996), 'Altruism, Matching and Nonmarket Insurance', **34** *Economic Inquiry*, 630-647.
- Cheung, Steven N.S. (1972), 'The Enforcement of Property Rights in Children, and the Marriage Contract', **82** *Economic Journal*, 641-657.
- Cohen, Jane Maslow (1987), 'Posnerism, Pluralism, Pessimism', **67** *Boston University Law Review*, 105-175.
- Cohen, Lloyd R. (1987), 'Marriage, Divorce, and Quasi-Rents; or, 'I Gave Him the Best Years of My Life'', **16** *Journal of Legal Studies*, 267-303.
- Dnes, Antony W. (1998) The Division of Marital Assets, **25** *Journal of Law and Society*, 336-64.
- Fair, R.C. (1978), 'A Theory of Extramarital Affairs', **86** *Journal of Political Economy*, 45-61.
- Freiden, A. (1974), 'The United States Marriage Market', **82(S)** *Journal of Political Economy*, 34-53.
- Friedman, Lawrence M. and Percival, Robert V. (1976), 'Who Sues for Divorce? From Fault through Fiction to Freedom', **5** *Journal of Legal Studies*, 61-82.
- Fuchs, Maximilian (1979), 'Die Behandlung von Ehe und Scheidung in der 'Ökonomischen Analyse des Rechts' (The Treatment of Marriage and Divorce in the 'Economic Analysis of Law')', **7** *Zeitschrift für das gesamte Familienrecht*, 553-557.
- Grossbard, Amyra (1978), 'Towards a Marriage between Economics and Anthropology and a General Theory of Marriage', **68** *American Economic Review. Papers and Proceedings*, 33-37.
- Grossbard-Shechtman, Amyra (1984), 'A Theory of Allocation of Time in Markets for Labour and Marriage', **94** *Economic Journal*, 863-882.
- Horton, Paul and Alexander, Lawrence (1986), 'Freedom of Contract and the Family: A Skeptical Appraisal', in Peden, Joseph R. and Glahe, Fred R. (eds), *The American Family and the State*, San Francisco, Pacific Research Institute for Public Policy, 229-255.
- Hudson, P. and Lee, W. (1990), *Women's Work and the Family Economy in Historical Perspective*.
- Hutchens, Robert M. (1979), 'Welfare, Remarriage and Market Search', **69** *American Economic Review*, 369-379.
- Keeley, Michael C. (1977), 'The Economics of Family Formation', **15** *Economic Inquiry*, 238-250.
- King, Allan G. (1982), 'Human Capital and the Risk of Divorce: An Asset in Search of a Property Right', **49** *Southern Journal of Economics*, 536-541.

- Knetsch, J. (1984), 'Some Economic Implications of Marital Property Rules', **34** *University of Toronto Law Journal*, 263 ff.
- Kornhauser, Lewis A. and Mnookin, Robert H. (1979), 'Bargaining in the Shadow of the Law: the Case of Divorce', **88** *Yale Law Journal*, 950 ff.
- Krauskopf, J. (1980), 'Recompense for Financing Spouse's Education' **28** *Kansas Law Review*, 379 ff.
- Krauskopf, J. (1989), 'Theories of Property Division/spousal Support: Searching for Solutions to the Mystery', **23** *Family Law Quarterly*, 253 ff.
- Landes, Elisabeth M. (1978), 'The Economics of Alimony', **7** *Journal of Legal Studies*, 35-63.
- Lemennicier, Bertrand (1980), 'La Spécialisation des Rôles Conjugaux, les Gains du Mariage et la Perspective du Divorce (Specialization of Conjugal Role, Marital Gains, and Perspective of Divorce)', *Consommation*.
- Lemennicier, Bertrand (1982), 'Les Déterminants de la Mobilité Matrimoniale (The Determinants of Matrimonial Mobility)', *Consommation*.
- Lemennicier, Bertrand (1988), *Le Marché du Mariage et de la Famille (The Marriage Market and the Family)*, Paris, Presses Universitaires de France (PUF), Collection Libre Echange.
- Lemennicier, Bertrand (1990), 'Bioéthique et liberté (Bio-Ethics and Liberty)', **13** *Droits: Revue Française de Théorie Juridique*, 111-122.
- Lemennicier, Bertrand and Garboua, Levy (1981), 'L'Arbitrage Autarcie-Marché: une Explication du Travail Féminin (Arbitration Autarchy-Market: An Explanation of Female Work)', *Consommation*.
- Lichtenstein, Norman B. (1985), 'Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault', **51** *UMRC Law Review*, 1-18.
- Lundberg, S. and Pollak, R. (1996), 'Bargaining and Distribution in Marriage' **10** *Journal of Economic Perspectives*, 139 ff.
- Lundberg, S., Pollak, R. and Wales, T. (1995), *Do Husbands and Wives Pool Their Resources? Evidence from the UK Child Benefit*, Manuscript, Economics Dept., Washington University, Seattle.
- Manser, Marilyn and Brown, Murray (1980), 'Marriage and Household Decision-Making: A Bargaining Analysis', **21** *International Economic Review*, 31-44.
- McGee, Robert W. (1998), 'Polygamy', in X. (ed.), *Magill's Legal Guide*, Pasadena, CA, Salem Press.
- Michael, R. (1979), 'Determinants of Divorce', in Garboua, Levy (ed.), *Sociological Economics*, London, Sage.
- O'Connell, M. (1988), 'Alimony after No-fault: A Practice in Search of a Theory', **23** *New England Law Review*, 437 ff.
- Olsen, Frances E. (1983), 'The Family and the Market: A Study of Ideology and Legal Reform', **96** *Harvard Law Review*, 1497-1578.
- Pahl, J. (1989), *Money and Marriage*.

- Papps, Ivy (1980), *For Love or Money? A Preliminary Economic Analysis*, London, Institute of Economic Affairs, 63 p. (Hobart Paperback No.86).
- Parisi, Francesco (1998), 'Family Law and Successions', in Mattei, Ugo (ed.), *Introduction to Italian Law*, Boston, Kluwer Academic Publishers.
- Parisi, Francesco and Posner Richard A. (1997), *International Library of Critical Writings in Europe, Volume III: Other Areas of Private and Public Law*, London, Edward Elgar.
- Pask, E. Diane, McCall, M.L., Brown C.L., Bruce, Christopher J., Hass, C.A. and Vallance, D.P. (1989), *How Much and Why?*, Calgary, Canadian Research Unit for Law and the Family, 202 p.
- Pennington, Joan (1989), 'The Economic Implications of Divorce for Older Women', **23** *Clearinghouse Review*, 488-493.
- Peters, H. Elizabeth (1986), 'Marriage and Divorce: Informational Constraints and Private Contracting', **76** *American Economic Review*, 437-454.
- Pollak, Robert A. (1985), 'A Transaction Cost Approach to Families and Households', **23** *Journal of Economic Literature*.
- Polsby, Daniel D. and Zelder, Martin (1994), 'Risk-Adjusted Valuation of Professional Degrees in Divorce', **23** *Journal of Legal Studies*, 273-285.
- Posner, Richard A. (1989), 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood', **6** *Journal of Contemporary Health Law and Policy*, 21-31.
- Posner, Richard A. (1992), *Sex and Reason*, Cambridge, MA, Harvard University Press.
- Ramseyer, J. Mark (1996), *Odd Markets In Japanese History: Law and Economic Growth*, New York, Cambridge University Press.
- Riboud, M. (1988), 'Altruisme au Sein de la Famille, Croissance Economique et Démographie (Altruism in the Family, Economic Growth and Demography)', **39** *Revue Economique*.
- Schultz, Theodore W. (ed.) (1974), *Economics of the Family: Marriage, Children and Human Capital*, Chicago, University of Chicago Press, 584 p.
- Singer, J. (1989), 'Divorce Reform and Gender Justice', **67** *North Carolina Law Review*, 1103 ff.
- Smith, I. (1997), 'Explaining the Growth of Divorce in Great Britain', **44** *Scottish Journal of Political Economy*, 519 ff.
- Smith, Vernon L. (1974), 'Economic Theory and Its Discontents', **64** *American Economic Review. Papers and Proceedings*, 320 ff.
- Sofer, C. (1985), *La Division du Travail entre Hommes et Femmes* (The Division of Labour Between Men and Women), Paris, Economica.
- Stake, Jeffrey E. (1992), 'Mandatory Planning for Divorce', **45** *Vanderbilt Law Review*, 397-454.
- Stout, Lynn A. (1981), 'Note: The Case for Mandatory Separate Filing By Married Persons', **91** *Yale Law Journal*, 363-382.
- Tsaoussis-Hatzis, Aspasia (1999), 'Changes in Greek Marriage and Divorce Law: The Impact of the Family Law Reform of 1983', in Miller, Robin R. and Browning, Sandra Lee, *Till Death Do Us Part: A Multicultural Anthology on Marriage*, Greenwich, JAI Press.

- Tsaoussis-Hatzis, Aspasia (1999b), *The Social and Economic Consequences of the Greek Divorce Law Reform of 1983*, Ph.D. Thesis, University of Chicago Law School.
- Weiss, Yoram and Willis, Robert J. (1985), 'Children as Collective Goods and Divorce Settlements', **3** *Journal of Labor Economics*, 268-292.
- Weitzman, Lenore J. (1981a), *The Marriage Contract: Spouses, Lovers and the Law*, New York, Free Press, 536 p.
- Weitzman, Lenore J. (1981b), 'The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards', **28** *UCLA Law Review*, 1181-1268.
- Weitzman, Lenore J. (1985), *The Divorce Revolution: the Unexpected Consequences for Women and Children in America*, New York, NY, Free Press.
- Wishik, Heather Ruth (1986), 'Economics of Divorce: An Explanatory Study', **20** *Family Law Quarterly*, 79-107.
- Zelder, Martin (1993), 'Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce', **22** *Journal of Legal Studies*, 503-520.

### Other References

- Davis, G., Cretney, S. and Collins, J. (1994), *Simple Quarrels*, Oxford, Oxford Clarendon Press.
- Dnes, Antony W. (1995), 'The Law and Economics of Contract Modifications: the Case of Williams v. Roffey', **15** *International Review of Law and Economics*, 225-240.
- Dnes, Antony W. (1996), *Economics of Law*, London, Sweet & Maxwell.
- Farnsworth, E.A. (1990), *Contracts* (2nd edn), Boston, Little Brown.
- Gilligan, C. (1982), *In a Different Voice: Psychological Theory and Women's Development*, Boston, MA, Harvard Univ Press.
- Jolls, Christine (1997), 'Contracts as Bilateral Commitments: A New Perspective on Contract Modification', **26** *Journal of Legal Studies*, 203-237.
- Kay, H. (1987), 'Equality and Difference: A Perspective on No-fault Divorce and its Aftermath', **56** *University of Cincinnati Law Review*, 1 ff.
- Klein, Benjamin, Crawford, Robert G. and Alchian, Armand A. (1978), 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process', **21** *Journal of Law and Economics*, 297-326.
- Macaulay, Stewart (1991), 'Long-term Continuing Relations: The American Experience Regulating Dealerships and Franchises', in Joerges, Ch. (ed.), *Franchising and the Law*, 179 ff.
- MacNeil, Ian R. (1978), 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law', **72** *Northwestern University Law Review*, 854-905.

- Trebilcock, Michael (1993), *The Limits of Freedom of Contract*, Cambridge, Cambridge University Press.
- Williamson, Oliver E. (1985), *The Economic Institutions of Capitalism*, New York, NY, Free Press.