

Deconstructing “Economic Man’s” Application to Marriage Agreements: An Analysis of the Method of Contractual Enforcement in *Hartshorne v. Hartshorne*

Sarah Whitmore

In September 2010, the second winner of the John E. VanDuzer Scholarship Award for Family Law was chosen. The Award committee, consisting of Madam Justice Mary Lou Benotto, Professor Rollie Thompson of Dalhousie University and Hamilton lawyer Pat Mackesy, selected a paper by Sarah Whitmore, written while she was a JD student at Osgoode Hall Law School. Sarah’s paper, “Deconstructing ‘Economic Man’s’ Application to Marriage Agreements: An Analysis of Contractual Enforcement in *Hartshorne v. Hartshorne*,” critiques the Supreme Court of Canada’s approach to the interpretation and enforcement of domestic contracts. She argues that that the Court inappropriately treats domestic contracts as if they were commercial agreements. Sarah’s paper will be published soon in the Canadian Family Law Quarterly.

## TABLE OF CONTENTS

<b>Introduction</b> .....	<b>3</b>
Justifications for the Individual Choice Model: Economic Assumptions.....	6
<b>Part 1 – <i>Hartshorne v. Hartshorne</i></b> .....	<b>8</b>
Background Facts to the Parties’ Relationship .....	9
The Marriage Agreement.....	10
Trial Judgment .....	11
British Columbia Court of Appeal Judgment, Majority .....	12
British Columbia Court of Appeal, Dissent.....	13
Supreme Court of Canada, Majority (Bastarache J., Iacobucci J., Major J., McLachlin C.J., Arbour J., and Fish J.).....	14
Supreme Court of Canada, Dissent (Deschamps J., Binnie J., and LeBel J.).....	15
The Economic Assumptions Underlying the Supreme Court’s Majority Decision.....	17
<b>Part 2 – Weaknesses of the Economic Model in the Family Context</b> .....	<b>20</b>
Problems Relating to Capacity.....	20
Cognitive Dissonance .....	20
Defective Capability .....	23
Voluntariness .....	26
Rationality.....	28
Problems Relating to Inequality of Bargaining Power .....	30
Differences in Bargaining Strategies .....	31
Equality in Marriages and Unequal Bargaining Positions .....	34
<b>Part 3: What the Court should Aim For</b> .....	<b>35</b>
Absence of Judicial Reasoning in <i>Hartshorne</i> .....	35
An Appropriate Model of Contractual Enforcement for Marriage Agreements.....	37

## INTRODUCTION

“With this Ring I thee wed, with my Body I thee worship, and with all my worldly Goods I thee endow.”<sup>1</sup>

“This is a love that embraces life  
and surpasses death....  
We are about to enter into a unique covenant,  
a bond of body, mind, and spirit.”<sup>2</sup>

The traditional marriage vow from the solemnization of matrimony found in the *Anglican Book of Common Prayer* expresses the idea of unconditional giving and sharing that exists when two people choose to marry. Similarly, the Jewish wedding prayer expresses the idea that marriage creates a unique bond between the spouses.

Family law in Canada also recognizes some of these ideas and elevates them to legal status. It recognizes that marriage involves not only a loving, nurturing relationship where spouses grow together and build a family and life, but that it also involves an economic relationship where spouses share with each other and invest in their family. In recognition of the economic relationship that is created when spouses marry, provincial legislation has been enacted to create schemes under which the spouses will

---

<sup>1</sup> The Form of Solemnization of Matrimony found in the *Anglican Book of Common Prayer*.

<sup>2</sup> This is a prayer recited at a Jewish wedding ceremony. The source is Margaret F. Brinig, *From Contract to Covenant* (Cambridge, MA: Harvard University Press, 2000), at p. 4.

share the accumulated efforts of this economic relationship if it comes to an end.<sup>3</sup> In a 1977 study that examined the various provincial matrimonial property regimes, Gray wrote:

Husband and wife are seen as equal partners in co-operative labour, both making ... an essential contribution towards the economic viability of the family unit, and hence, towards the accumulation of matrimonial property. Whatever property is acquired by them during marriage is therefore acquired by reason of the partnership effort.<sup>4</sup>

The idea of marriage as a partnership is also highlighted in the provision of the Ontario *Family Law Act* that describes the purpose of equalization:

The purpose of this section is to recognize that childcare, household management and financial provision are “joint responsibilities”; and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of net family properties, subject only to the equitable considerations set out in (6)<sup>5</sup>

At the same time, family law recognizes that when two people marry they retain their own individualities and do not become one person in law. As well, the law recognizes the variety of forms that families may take and the differences that may exist from one family to the next. In response to this, the provincial matrimonial property regimes allow spouses to create their own legal arrangements for how they will manage their economic relationship, both while married and if the marriage ends, on divorce. However, this contractual freedom that is extended has statutory bounds and most provincial regimes have delineated rules for when a court may intervene to set aside or vary a private marriage agreement and reappportion the parties’ assets.

Interpreting these rules and marriage agreements generally involves an analysis of the underlying contractual obligation in the agreement. For a court to determine whether a spouse should be held to the

---

<sup>3</sup> For example, s. 56(4) of the Ontario’s *Family Law Act*, R.S.O. 1990, c. F.3, permits a court to set aside a domestic contract or a provision thereof if a party failed to disclose significant assets or liabilities, if a party did not understand the nature or consequences of the contract, or otherwise, in accordance with the law of contract. See also *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 66(4); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 55(4), for similar language. Any term that is “unconscionable, unduly harsh on one party or fraudulent” will be set aside in Nova Scotia, *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 29. By contrast, in British Columbia, as earlier noted, a court may reappportion assets upon finding that to divide the property as provided for in the agreement or the *FRA* would be “unfair”. Clearly, the statutory scheme in British Columbia sets a lower threshold for judicial intervention than do the schemes in other provinces.

<sup>4</sup> Kevin J. Gray, *Reallocation of Property on Divorce* (Oxford: Professional Books, 1977), at p. 1 and 24.

<sup>5</sup> *Family Law Act*, R.S.O., 1990, c. F. 3, at s. 5(7).

marriage agreement or whether one of the rules for judicial discretion applies, the court must consider whether that spouse *should* be legally obligated.

The law of contracts would say that if the spouse chose to be obligated then the spouse *should* be obligated, because the law of contracts creates legal obligations based on individuals' choices.<sup>6</sup> A basic principle of contract law is that contracts will be enforced according to their terms and the law will remain neutral with respect to those terms.<sup>7</sup> Therefore, where an individual has chosen to enter into a contractual arrangement, the court will hold the individual to that bargain without inquiring into the content of the agreement, with the limited exception for unconscionable content. The only defenses available for the individual will be based on their choice: that it was not made voluntarily, it was exacted out of duress, or that it was induced by fraud.

The Supreme Court of Canada adopted this contractual model of obligation in its decision in *Hartshorne v. Hartshorne*.<sup>8</sup> In *Hartshorne*, the parties were divorcing spouses who had signed a marriage agreement on the day of their wedding that would govern their respective property entitlements in the event of a divorce. Mrs. Hartshorne had sought a division of assets according to the British Columbia *Family Relations Act*<sup>9</sup> and the Court had to determine whether it could intervene to vary the division of assets set out in their agreement. Justice Bastarache, writing for the majority, emphasized individual responsibility, a person's freedom to structure their affairs, and the importance of upholding and enforcing the fruits of such autonomy. Essentially, the majority of the Supreme Court treated the marriage agreement as if it were a commercial contract and considered the individual choice model of obligation when it decided not to reappportion the Hartshornes' assets.

In this paper, I will suggest that the individual choice model of obligation used in contract law and adopted by the majority of the Supreme Court in *Hartshorne* is inappropriate in the context of marriage agreements. The justifications for the individual choice model rest on economic assumptions

---

<sup>6</sup> Gillian Hadfield "An Expressive Theory of Contract" (1997-1998) 146 U. Pa. L. Rev. 1235, at p. 1236.

<sup>7</sup> Melvin Aron Eisenberg, "The Limits of Cognition and the Limits of Contract" (1994-1995) 47 Stan. L. Rev. 211, at p. 211.

<sup>8</sup> *Hartshorne v. Hartshorne* 2004 SCC 22.

<sup>9</sup> *Family Relations Act*, R.S.B.C. 1996, c. 128.

about rational choice; however, I will argue that these assumptions do not hold true in the context of negotiating a marriage agreement and, therefore, without these assumptions, there is no justification for enforcing these agreements. In order to illuminate some of the weaknesses that exist in the economic assumptions in relation to marriage agreements, I will consider the specific facts of the *Hartshorne* decision.

The two broad assumptions that underlie the economic justifications for the individual choice model of contractual obligation are that people enter into contracts with full capacity and equality of bargaining power. In part III of this paper, I will consider each of these assumptions separately and discuss various reasons that undermine their validity in this context. Capacity is related to the ability of a person to enter into a contract and influences the decision to execute. Considerations of bargaining power, by contrast, involve the circumstances surrounding the negotiation of the contract and may influence its content. By illustrating weaknesses in the economic model of contractual obligation, it becomes clear that a person's decision to sign a marriage agreement may not necessarily reflect the person's view on what would be best for themselves.

Once it is accepted that a person's choice to enter into a marriage agreement is not reflective of a calculated self-serving decision, the rationale for enforcing marriage agreements as if they were commercial contracts disintegrates. In the final part of this paper, I suggest some deviations from the economic model of enforcement that would aid courts to be more alive to the realities and constraints facing the parties to marriage agreements.

### **Justifications for the Individual Choice Model: Economic Assumptions**

Justifications for the individual choice model of obligation are found in the economic concept of human decision making. Economics is used to study political decisions, exchange rates, commodity pricing, and housing markets. Inherent in all of these broad areas of study is the concept of human action and behavior. At a micro level, people make decisions daily that when taken together affect many aspects of the functioning of society and the world at large. In order to study these areas effectively economists

have created a model for human decision making. For the purposes of this paper, I will describe this tool as “economic man.”<sup>10</sup>

“Economic man” is an individual with autonomous and stable preferences that relate only to his desire to maximize his own utility.<sup>11</sup> Utility relates to satisfaction, happiness, well-being, enjoyment, and welfare and is the measure of value that an individual places on a course of action or thing. According to economists, alternative preferences are all ranked by “economic man” according to how much utility they will provide to him.<sup>12</sup> As well, all of “economic man’s” decisions are rational: his choices between the various alternatives available to him are based on the alternative that will provide him with the greatest level of utility. Parties to a transaction are equipped with perfect information, and therefore, they conduct a cost-benefit analysis of all possible alternatives.

An economic view of human behavior is based on the precept of individualism, according to which every person acts for themselves in a manner that will maximize their own utility, regardless of what consequences may arise to others. The only caveat to this is where Person A’s utility is derived from the happiness of Person B; however, this choice is still individualistic, because Person A is still acting to benefit themselves. As well, this view of human behavior is gender neutral. “Economic man” represents all persons, and there is no room in this model for considerations of gender differences let alone gender inequalities.<sup>13</sup>

In general, economists prefer private agreements over collective decision-making by courts or legislatures for several reasons which relate to the characteristics of “economic man.” Utilitarian support for private agreements is found in the idea that people are the best judges of their own interests, and in order to increase overall social welfare, people should be able to structure their affairs in a way that

---

<sup>10</sup> This is not my concept, but rather has been used in feminist literature in critiques of law and economics: see Wanda A. Wiegiers, “Economic Analysis of Law and ‘Private Ordering: A Feminist Critique’” (1992) 42 *University of Toronto L. J.* 170.

<sup>11</sup> Wiegiers, at p. 170.

<sup>12</sup> Arie Kapteyn “Utility and Economics” (1985) 133 *De Economist* 1, at p. 1.

<sup>13</sup> Brenda Cossman “A Matter of Difference: Domestic Contracts and Gender Equality” (1990) 28 *Osgoode Hall L.J.* 305, at p. 313.

maximizes their own utility.<sup>14</sup> Support is also founded on the notion that private agreements increase individuals' autonomy by allowing them to choose for themselves. Specifically, some academics suggest benefits for women, because allowing private ordering affirms in women the ability to operate "as freely autonomous and self-determining agents, free to bargain and enjoy all the rights and freedoms previously only held by men."<sup>15</sup> It is clear that the support for private agreements and the justifications for encouraging people to order their affairs privately assumes that all of the characteristics of "economic man" hold true. If some of them proved to be untrue, for example, if people made choices out of fear, love, desire, or for any other reason other than to increase their own utility, would private agreements still increase social welfare? Possibly, but it becomes less certain. What if women were systemically at a disadvantage when it came to bargaining power, would encouraging private ordering increase their autonomy? Again possibly, but it seems less certain. And by tearing down additional assumptions behind "economic man's" actions, it becomes less and less likely that private ordering increases social welfare or increases personal autonomy, thereby rendering economists' justification for supporting private agreements problematic.

## **PART 1 – *HARTSHORNE V. HARTSHORNE***

The characteristics of "economic man" and the assumptions underlying economic theory are not new to the reasoning of the Supreme Court of Canada in family law. In the area of spousal support, concepts of individualism and personal responsibility have played centre stage at various points in the Court's history. In fact, in the late 1980s, in the *Pelech* trilogy of cases the Court emphasized promoting autonomy and, therefore, accorded great deference to separation agreements.<sup>16</sup> In that trilogy, the Court adopted a concept of formal equality that treats men and women as equally able to become self-sufficient

---

<sup>14</sup> Social welfare in this sense refers to an aggregate of individual's utilities.

<sup>15</sup> Michael Trebilcock & Rosemin Keshvani "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 47 University of Toronto L. J. 533, at p. 540.

<sup>16</sup> *Pelech v. Pelech* [1987] 1 S.C.R. 801.

on marriage breakdown.<sup>17</sup> However, the Court moved away from this gender-neutral focus in *Moge v. Moge*, a 1992 decision about whether to vary a court order for spousal support, and considered the phenomenon of the feminization of poverty and the economic realities that women face on marriage breakdown.<sup>18</sup> Sadly, in this writer's view, the shift to a more contextual approach was fleeting. The Court's 2003 decision in *Miglin v. Miglin* once again adopted an approach to separation agreements that was gender-neutral and focused on individualism and personal autonomy.<sup>19</sup> In *Miglin*, the Court ignored the possibility of any gender inequalities that might have affected the negotiation and subsequent execution of their separation agreement. Then again, in the *Hartshorne* decision, the Court extended the concepts of formal equality between spouses and the promotion of individual choice into the area of marriage agreements.

#### **BACKGROUND FACTS TO THE PARTIES' RELATIONSHIP**

Mr. Hartshorne and Mrs. Hartshorne met while she was articling at his firm in 1981. They became romantically involved in early 1982, began cohabitating in September 1985, and married in March 1989, and lived together continuously until they were separated in January of 1998 – a period of 12 and 1/2 years. Both parties had been previously married and divorced when they met. When Mr. Hartshorne and his first wife separated they divided their assets. When Mrs. Hartshorne separated from her first husband, they both had substantial debts and she owed Revenue Canada \$10,000. The parties had two children together. Their eldest child was born in July 1987 and their youngest, who had special needs, was born in November 1989. Mrs. Hartshorne never returned to the practice of law after the birth of the couple's first child. Consequently, she was completely financially dependent on Mr. Hartshorne throughout their marriage. Throughout their relationship, Mr. Hartshorne was able to focus on his law practice and allow the firm to grow without being hampered by child care or household responsibilities.

---

<sup>17</sup> Mossman, "Running Hard to Stand Still": The Paradox of Family Law Reform" (1994) 17 Dalhousie L.J. 5, at p. 24.

<sup>18</sup> *Moge v. Moge*, [1992] 3 S.C.R. 813.

<sup>19</sup> *Miglin v. Miglin*, [2003] S.C.J. No. 21, 2003 SCC 24.

At the time of the trial, Mrs. Hartshorne had been away from the practice of law for 12 years. However, in July 2001 she went back to work as an associate at a Richmond law firm with an annual of salary \$52,000. Mr. Hartshorne's income for the year 2000 was \$267,000.

### **The Marriage Agreement**

The trial judge found evidence that supported Mr. Hartshorne's position that he had made it known to Mrs. Hartshorne that he would not remarry without a marriage agreement: the parties never had a shared bank account, Mr. Hartshorne provided Mrs. Hartshorne with a monthly allowance and access to some credit cards for household purchases. The agreement was prepared by Mr. Hartshorne and his lawyer in February 1989. Mr. Hartshorne presented it to Mrs. Hartshorne in the middle of February 1989 and insisted that she have independent legal advice, which she obtained. Mrs. Hartshorne's lawyer thought that the agreement was "grossly unfair" and prepared a letter to that effect. After reading the letter Mr. Hartshorne testified at trial that he thought it was "interesting," but that he was not prepared to make any changes with respect to the provisions governing the property division. He also testified that he knew Mrs. Hartshorne had never wanted to enter into a marriage agreement. Mrs. Hartshorne testified that she felt as if she had no choice but to sign the agreement, because the wedding date was quickly approaching, she had a young 20 month old child, they were planning on having a second child, and she had committed to a life with the plaintiff. As well, she testified that Mr. Hartshorne was controlling and domineering and she feared if she didn't sign the agreement she would severely damage their relationship.

The parties made a few of the changes Mrs. Hartshorne's lawyer had recommended - a clause that stated Mrs. Hartshorne was not signing voluntarily and a clause that preserved her right to spousal support - but essentially the agreement remained unchanged. Mrs. Hartshorne signed it after the wedding ceremony, but before the celebratory dinner, on their wedding day. Mr. Hartshorne acknowledged at trial that Mrs. Hartshorne was emotional and crying when she signed the agreement. He testified that had she refused to sign it at that point he would not have gone through with the wedding. She signed the agreement in front of a friend, to whom she said, "You're my witness, I am signing this under duress."

## TRIAL JUDGMENT

Mr. Hartshorne sought a division of their assets in accordance with the terms of their agreement, while Mrs. Hartshorne argued that the division under the agreement was unfair having regard to the factors enumerated in section 65(1) of the British Columbia *Family Relations Act* and therefore pursuant to that section the court should exercise its discretion to reapportion the parties' assets.<sup>20</sup>

At the outset of her decision, the trial judge stated that it was important to "bear in mind that the law in this province does not treat domestic contracts in the same way commercial arrangements are treated."<sup>21</sup> In support of that principle she quoted the British Columbia Court of Appeal's decision in *Clarke v. Clarke* (1991)<sup>22</sup>, which rejected applying commercial contract law principles in the area of family law.

Justice Beames found that the factors concerning the length of the marriage, the date when the property was acquired, and Mrs. Hartshorne's need to become financially independent were the most relevant in determining that the division of assets under the agreement was unfair.<sup>23</sup> While the parties' relationship was not short, most of the parties' property was acquired by Mr. Hartshorne before the parties even began their relationship.<sup>24</sup> Mrs. Hartshorne's need to become financially independent was pressing: she had given up her own career to care for the couple's children and home, yet the agreement made no provisions for her for retirement or pension savings.<sup>25</sup> After a nine year marriage that involved significant sacrifices on the part of Mrs. Hartshorne, the agreement provided her with a 27% interest in the family home and a joint interest in the household contents and family cars. As well, she noted that Mr. Hartshorne had been alerted to the possibility of such a finding by Mrs. Hartshorne's lawyer, and he had still insisted that his original substantive proposal be signed.

---

<sup>20</sup> *Family Relations Act*, *supra* note 9 at s. 65(1).

<sup>21</sup> *Hartshorne v. Hartshorne* (1999) CanLII 5113 (B.C.S.C.), at para. 56.

<sup>22</sup> *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

<sup>23</sup> *Family Relations Act*, *supra* note 9 at s. 65(1)(a)(c)(e)(f).

<sup>24</sup> *Clarke*, *supra* note 22 at para. 57.

<sup>25</sup> *Ibid*, at para. 58.

On the question of reapportionment, the trial judge relied on the decision of McEachern C.J.B.C., in *Gold v. Gold* (1993)<sup>26</sup>, which stressed the importance of not using commercial values in deciding family law cases.<sup>27</sup> The Court in *Gold* stated that “unlike commercial matters, the Court is entitled to consider the circumstances and the ambience in which the agreement was reached. Little weight can be given to a manifestly unfair agreement where one of the parties only signed it for the purposes of enhancing the chances of a successful reconciliation.”<sup>28</sup> She reapportioned the assets in a manner that gave Mrs. Hartshorne an interest in family assets with a value of \$654,000 or about 46% of the total family assets, as compared to the 20% or \$280,000 which she would have received under the agreement.<sup>29</sup>

#### **BRITISH COLUMBIA COURT OF APPEAL JUDGMENT, MAJORITY**

The majority of the Court of Appeal, Justice Rowles and Justice Huddart, decided that the trial judge made no error in principle in determining whether the division of property under the parties’ agreement was unfair and upheld the trial judge’s reapportionment.<sup>30</sup> The majority agreed with the trial judge that when considering the fairness of an agreement under section 65(1) it was important to consider the context and circumstances under which the agreement was signed.<sup>31</sup> Madam Justice Rowles, for the majority, described the context as uncertain:

The parties signed the agreement when they were embarking on marriage following three years of cohabitation. Whether or for what period their marriage would continue, what assets and liabilities, earning capacity, and obligations for child care and support they would have at some undetermined point in the future was not known at the time the agreement was signed.<sup>32</sup>

---

<sup>26</sup> *Gold v. Gold* (1993), 106 D.L.R. (4th) 452.

<sup>27</sup> *Ibid*, at para. 60.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Hartshorne v. Hartshorne* (2002), 31 R.F.L. (5th) 312 (BC CA), at para. 25.

<sup>30</sup> *Hartshorne* (C.A.), *supra* note 29 at paras. 27, 68.

<sup>31</sup> *Ibid* at para. 34.

<sup>32</sup> *Ibid* at para. 37.

As well, the majority agreed with the trial judge that Mrs. Hartshorne's need to become and remain self-sufficient was highly relevant in this case and that the agreement's most serious deficiency was its failure to provide anything for the sacrifices that Mrs. Hartshorne had made during the relationship.<sup>33</sup>

On the issue of reapportionment, the majority noted that, although courts should generally respect separation agreements that parties negotiate, particularly where they have had independent legal advice, marriage agreements are different since circumstances are likely to change between the time of signing and as the relationship evolves.<sup>34</sup> If an agreement was fair at the time it was made but unforeseen circumstances made it unfair at the time of the triggering event, then reapportionment may be limited to the amount required to address the change.<sup>35</sup> Finally, in agreeing with the trial judge's reapportionment, the majority agreed that commercial values should not be applied to family law cases and they quoted the same passage from *Gold*.<sup>36</sup>

### **British Columbia Court of Appeal, Dissent**

Mr. Justice Thackray dissented on the question of reapportionment. He thought that the trial judge erred in giving insufficient deference to the agreement by essentially setting it aside once she determined that it was unfair.<sup>37</sup> Justice Thackray thought this was an error of law as the legislation does not intend to override parties' intentions which are evidenced through their agreement.<sup>38</sup> The legislative goal of upholding the parties' demonstrated intentions could be accomplished by seeking to reapportion the assets to achieve fairness within the confines of the agreement. Upholding the legislative goal would require altering the agreement with respect to the matrimonial home and contents, the RRSPs, motor vehicle and

---

<sup>33</sup> *Ibid* at para. 44.

<sup>34</sup> *Ibid* at para. 61.

<sup>35</sup> *Ibid* at para. 64.

<sup>36</sup> *Ibid* at para. 67.

<sup>37</sup> *Hartshorne (C.A.)*, *supra* note 29, at paras. 72 & 76.

<sup>38</sup> *Ibid* at para. 81.

bank account, but otherwise Justice Thackray would have left the agreement intact – a result that would have left Mrs. Hartshorne with \$525,000, about 37% of the family assets.<sup>39</sup>

**SUPREME COURT OF CANADA, MAJORITY (BASTARACHE J., IACOBUCCI J., MAJOR J., MCLACHLIN C.J., ARBOUR J., AND FISH J.)**

The majority wrote that in order to give effect to the legislative intention of fairness, courts should encourage parties to enter into agreements that are fair and to respond to changes throughout their marriage by reviewing and revising their agreements.<sup>40</sup> Agreements that have attempted to do so should generally be respected, especially where the parties have had independent legal advice. The majority highlighted the importance of individual choice and judicial respect for that choice and wrote that “in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so.”<sup>41</sup>

A court should consider whether the parties’ agreement operates unfairly in light of the section 65(1) factors and in light of the parties’ personal and financial circumstances and how these circumstances evolved over time.<sup>42</sup> When considering the parties’ circumstances, the Court held:

The essence of this inquiry is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at that time the parties made adequate arrangements in response to those anticipated circumstances.<sup>43</sup>

Therefore, for the majority, the question of fairness depended on the parties’ perspectives and how accurately they were able to predict the unfolding of their lives. If their lives unfolded precisely as they had anticipated at the time of contract formation, then a great level of deference

---

<sup>39</sup> *Ibid* at para. 98.

<sup>40</sup> *Hartshorne* (SCC), *supra* note 8 at paras. 8 & 36.

<sup>41</sup> *Ibid* at para. 36.

<sup>42</sup> *Hartshorne* (SCC), *supra* note 8, at para. 47.

<sup>43</sup> *Ibid*, at para. 43.

should be accorded to their agreement.<sup>44</sup> A failure to accord such deference in these cases would, in the majority's opinion, involve the court substituting its concept of fairness for the notion of fairness the parties had agreed to.

Although the Court of Appeal found that there had been a great deal of unforeseen change in the Hartshornes' lives, the majority of the Supreme Court found that the Hartshornes' lives had unfolded precisely as they had envisioned and consequently their agreement should be accorded great deference.<sup>45</sup> The Court acknowledged that a fair distribution of assets should of course take into account sacrifices made throughout the marriage and the effects of these sacrifices, but that this exercise had to be conducted in light of the personal choices the parties made. In this case, as evidenced by their agreement, the parties intended to leave each other with that which they had brought into the marriage and to remain economically independent throughout their relationship. By signing this agreement, the parties were acknowledging their intentions and entered their marriage with certain expectations on which they could reasonably rely.<sup>46</sup> After considering the provisions of the *Family Relations Act*, the majority concluded that the agreement operated "fairly" at the time of division and refused to reapportion the Hartshorne's assets.<sup>47</sup>

### **Supreme Court of Canada, Dissent (Deschamps J., Binnie J., and LeBel J.)**

Although the dissent agreed with the majority that the legislative intent was fairness, they disagreed fundamentally with the way the majority defined "fairness".<sup>48</sup> The majority focused on the parties' original intentions in assessing fairness, while the minority actually thought that this focus could prove problematic because what parties' view as fair at the time they enter into the agreement may very well become unfair as time passes and circumstances change.<sup>49</sup> Deschamps J., wrote that "most people

---

<sup>44</sup> *Ibid*, at para. 44.

<sup>45</sup> *Ibid*, at para. 46.

<sup>46</sup> *Ibid*, at para. 65.

<sup>47</sup> *Hartshorne*, *supra* note 8 at para. 9.

<sup>48</sup> *Ibid*, at para. 77.

<sup>49</sup> *Ibid*.

enter into a marriage hoping that it will succeed, and their cost-benefit analysis before execution may be based on the assumption that the risk of the provisions ever coming into effect is low.”<sup>50</sup>

For the dissent, the parties’ original intentions were relevant only to show how the parties chose to address the requirement of fairness and that their intentions were not determinative of fairness.<sup>51</sup> Instead they considered fairness to be a judicial prerogative based “on a contemporaneous evaluation of the factors set out in the FRA.”<sup>52</sup> The minority’s approach stands in contrast to the majority who warned of substituting a judicial concept of fairness for the parties’ vision of fairness, and who considered the parties’ original intentions and their ability to predict how their relationship would evolve to be primary considerations. Although the majority considered the parties’ original intentions in assessing fairness, the minority

Justice Deschamps also held that the circumstances surrounding the negotiation and signing of a marriage agreement could be important to alert a court to the possibility of unfairness.<sup>53</sup> In this particular case, the circumstances of negotiation and signing “supported turning a keen eye to the Hartshorne’s prenuptial agreement.”<sup>54</sup> At the time of its execution, for example, the dissent noted that Mrs. Hartshorne was in a position of vulnerability and Mr. Hartshorne in a position of power: Mrs. Hartshorne had already been out of the work force (and she had only ever worked for Mr. Hartshorne), she was financially dependent on Mr. Hartshorne, the agreement was signed on the day of their wedding, and he refused to make any changes despite her requests and despite her lawyer’s opinion.<sup>55</sup> The dissent opined that although these circumstances did not amount to unconscionability, they did justify subjecting the agreement to increased scrutiny.<sup>56</sup>

Finally, the dissent’s last point of disagreement with the majority was the emphasis placed on the fact Mrs. Hartshorne had signed the agreement. The majority held that Mrs. Hartshorne’s decision to sign

---

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, at para. 78.

<sup>52</sup> *Ibid.*, at paras. 82, 88.

<sup>53</sup> *Ibid.*, at para. 89.

<sup>54</sup> *Hartshorne* (SCC), *supra* note 89.

<sup>55</sup> *Ibid.*, at para. 90.

<sup>56</sup> *Ibid.*

the agreement signaled that she was not concerned about its potential defects, despite having been alerted to them, and that since she signed it she must have reasonably understood its consequences. However, the dissent says this reasoning confuses fairness with unconscionability, and although Mrs. Hartshorne could have foreseen some of the agreement's shortcomings at the time of execution, "foreseeability does not cure its substantive unfairness."<sup>57</sup>

The dissent found that the trial judge did not err in principle in concluding that the division of property under the Hartshornes' agreement was unfair and would have upheld her reapportionment with the exception of Mr. Hartshorne's law firm.<sup>58</sup> The dissent would not have given her an interest in the firm, because they found that since Mrs. Hartshorne had been awarded spousal support, granting her an interest in Mr. Hartshorne's sole source of income would amount to double recovery.<sup>59</sup>

The minority agreed with the trial judge and majority of the Court of Appeal: marriage agreements were not the same as commercial contracts.

### **The Economic Assumptions Underlying the Supreme Court's Majority Decision**

Justice Bastarache, writing for the majority of the Supreme Court, adopted an individual choice model of contractual obligation when he considered whether the Hartshornes' marriage agreement was "unfair" and whether their assets should be re-apportioned.

The majority highlighted the importance of individual choice and judicial respect for this choice when they wrote that,

in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution or marriage, courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so.<sup>60</sup>

---

<sup>57</sup> *Ibid*, at para. 89.

<sup>58</sup> *Ibid*, at para. 84.

<sup>59</sup> *Ibid*, at paras. 94, 99 & 101.

<sup>60</sup> *Hartshorne* (SCC), *supra* note 8, at para. 36.

This statement reflects an assumption that individuals will choose to structure their affairs rationally, which will justify judicial deference to their choice. It also reflects the idea that individuals are the best assessors of their own affairs and that they will make arrangements in a way that maximizes their utility. Bastarache J. wrote that, although he was aware of the systemic economic problems facing women on divorce that were discussed in *Moge*, the ultimate issue is “fairness between the parties.”<sup>61</sup> This conclusion implies that gender inequality is not a significant part of the discussion of fairness of marriage agreements.

Fairness, as defined by the majority of the Supreme Court, involves a subjective inquiry into the parties’ own perspectives. A marriage agreement will be fair if the circumstances of the parties at the time of the division of assets under the agreement were within the parties’ contemplation at the time they signed the agreement.<sup>62</sup> If parties could have predicted their lives unfolding in the manner they actually did, then if they signed the agreement with those circumstances in mind, the court will be very unwilling to interfere with the agreement.<sup>63</sup> Finally, the majority held that a failure to accord the parties’ such deference would involve the court substituting its notions of fairness for that of the parties. For the majority, the only exception to this would be if “the parties did not really consider the impact of their decision in a rational and comprehensive way.”<sup>64</sup> In this case, the majority found that the Hartshornes’ lives had unfolded in precisely the manner they had anticipated, and therefore, the agreement should be accorded great deference.<sup>65</sup>

Inherent in this description of fairness are several economic assumptions. Bastarache J., supports the notion that the Hartshornes conducted a rational cost-benefit analysis to maximize their own utilities. Since the parties’ future circumstances were within their “reasonable contemplation,” he assumes that the parties weighed these consequences with objective probabilities in mind and chose to enter into the agreement because they believed that these future consequences would maximize their utility. The

---

<sup>61</sup> *Ibid*, at para. 47.

<sup>62</sup> *Ibid*, at para. 43.

<sup>63</sup> *Ibid*, at para. 44.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Hartshorne* (SCC), *supra* note 45, at para. 46.

majority assumes they were rational, because they hold that judicial intervention should occur only if the parties did not act rationally. Therefore, the majority assumes that they did not choose to sign the agreement for any other reasons, such as trying to keep each other happy, preserve the relationship, or minimize conflict. As well, if the parties were able to correctly predict their future circumstances they were bargaining with full information. The majority does not consider other reasons for signing the agreement, and therefore, supports the notion that the parties considered the alternatives and rationally selected what they believed to be fair.

Another important emphasis of the majority's decision is that they view the court's role as neutral. If the agreement is fair, as determined by the above analysis, then there is no reason for the courts to interfere, or "substitute the parties' notion of fairness with the court's," or inquire into the sufficiency of the agreement.<sup>66</sup> The only exceptions that may exist are where one of the assumptions about "economic man" has not held true.

Not included in the majority's description of fairness is an inquiry into possible gender inequalities, bargaining inequalities, or flaws in the parties' capacity to contract. There is no contextual analysis into the circumstances of negotiation or the actual substantive context of the agreement at the fairness stage. These views are all consistent with an economic approach to contracts, according to which "economic man" is gender neutral and only contracts with others where there is equality of bargaining power and equality of capacity to contract, so there is no need to examine whether any of these existed – they are assumed to exist.

It is clear that Justice Bastarache and the majority support private ordering for marriage agreements. Although the economic model of contractual enforcement may lend support to private ordering in the commercial context where the parties to the contract operate at arm's length from each other and transact with each other in an effort to create benefits for themselves through a highly informed cost-benefit analysis, the model seems to have several weaknesses when applied to marriage agreements.

---

<sup>66</sup> *Ibid*, at para. 44.

These differences were recognized by several judges throughout all three levels of the Hartshorne's litigation; however, the majority of the Supreme Court did not consider them.<sup>67</sup>

In the following Part of this paper, I will examine some of the flaws in the assumptions underlying the economic model of contractual obligation when it is applied to marriage agreements. I will consider issues relating to capacity, including cognitive dissonance, limits of cognition, voluntariness, and rationality. As well, I will consider issues relating to potential inequalities of bargaining power. Some of these issues involve a discussion of the role gender plays in relationships in general and specifically in marriage, while some of the issues are truly gender neutral in that the deficiencies in the economic model are more a function of human frailty.

## **PART 2 – WEAKNESSES OF THE ECONOMIC MODEL IN THE FAMILY CONTEXT**

### **PROBLEMS RELATING TO CAPACITY**

These problems relate generally to questions of whether the parties to the marriage agreement were able to make “deliberate and informed judgments necessary to decide whether a particular agreement was in their interests.”<sup>68</sup> The individual choice model assumes that “economic man” and therefore all parties to contracts are able to do so; however, by examining problems relating to cognitive dissonance, defects in capability, voluntariness, and rationality it is clear that spouses entering into marriage agreements are often unable to do so.

#### **Cognitive Dissonance**

Cognitive dissonance is a psychological theory that explains the phenomenon in which a person knows that a given course of action has a high chance of occurrence in general but hopes that it will not happen to them. Then, in order to reduce the dissonance that results the person creates justifications or rationalizations for why the course of action will not happen to them. The problem presents itself because

---

<sup>67</sup> Trial Judgment, *Supra*, note 22, at para. 56; Court of Appeal Judgment, *Supra*, note 29, at para. 55; Supreme Court Judgment, *Supra*, note 40, at para. 71.

<sup>68</sup> Robert H. Mnookin, “Divorce Bargaining: The Limits on Private Ordering” (1984-1985) 18 U. Mich. J.L. Reform 1015.

of these justifications and rationalizations, which can lead to a tendency to ignore disconfirming evidence and can make people feel overconfident. A person who is presented with the opportunity to enter into a contract, and who feels overconfident about a given alternative, will not be evaluating the consequences of the agreement in the way economic theory suggests. Research suggests that this overconfidence is particularly true when people evaluate their chances for personal and professional success.<sup>69</sup>

Justice Deschamps, in *Hartshorne*, recognized this as a problem for parties entering into marriage agreements. She wrote that, “most people enter into a marriage hoping that it will succeed, and their cost-benefit analysis before execution may be based on the assumption that the risk of the provisions ever coming into effect is low.”<sup>70</sup> This was certainly the case for Mrs. Hartshorne, who not only was likely considering her chance of divorce to be exceptionally low, but who also had advice from her lawyer that the chances a court would implement the contract was extremely low. Empirical support for Justice Deschamps’ concern is found in a study by Lynn Baker and Robert Emery entitled; “When Every Relationship is Above Average.”<sup>71</sup> The major question of interest in the study was “whether the sense of surprise and unfairness that may attend divorce is due to (a) ignorance about divorce law and its consequences, or (b) accurate information about the laws and consequences of divorce but a belief that this information is not personally relevant.”<sup>72</sup> The authors surveyed two groups: recent marriage license applicants and law students on their knowledge of divorce statutes and statistics and their expectations for their own marriages. The marriage license applicants averaged 60% for correct answers on divorce laws, yet their knowledge on actual rates of divorce were more accurate with the median response being 50%.<sup>73</sup> Their predictions for the success of their own marriages were highly optimistic with a median response of 0% when estimating the likelihood of their own marriages ending in

---

<sup>69</sup> Neil D. Weinstein, “Unrealistic Optimism About Future Life Events” (1980) 39 J. Personality & Soc. Psychol. 806, at p. 809-814.

<sup>70</sup> *Hartshorne* (SCC), *supra* at note 45, at para. 82.

<sup>71</sup> Lynn A. Baker and Robert Emery “When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage” (1993) 17 L. & Hum. Beh. 439.

<sup>72</sup> *Ibid*, at p. 440.

<sup>73</sup> *Ibid*, at p. 441 & 442.

divorce.<sup>74</sup> The authors considered that the discrepancy between their knowledge of actual divorce statistics and their predictions for their own marriages may have been due to the fact they had just been married or their lack of knowledge on divorce statutes.

In order to compensate for these factors, the authors surveyed law students once on the first day of a family law course and secondly at its conclusion. The students' knowledge on divorce statutes increased from a median correct response rate of 64% to 70% at the conclusion of the course.<sup>75</sup> The family law course seemed to produce no real difference in the students' knowledge on the frequency of divorce generally; however, more importantly the course produced no statistically significant change in the students' expectations for their own marriages.<sup>76</sup>

Therefore, it would appear that increasing a person's knowledge about family law does not statistically affect the way they view the success of their own marriage. The authors describe this as an example of "representativeness bias," meaning that the respondents of the survey considered themselves to be unrepresentative of the population of people who marry and therefore immune to the statistics on divorce in the population at large.<sup>77</sup>

Applying economic theory to the negotiation of a marriage agreement, it is assumed that both parties understand the risk of divorce and consequent enforcement of the agreement, and weigh them while considering whether the terms of the agreement will maximize their utility. However, if the parties had overly optimistic expectations about the success of their own marriages, as suggested by the Baker and Emery study, then their cost-benefit analysis would be flawed. They would be evaluating the consequences of signing the agreement with an assumption that the chance of it ever being enforced as very low.<sup>78</sup> This analysis could potentially lead to people signing agreements that they wouldn't sign if they viewed the chance of them coming into effect at 50%.

---

<sup>74</sup> *Ibid*, at p. 442.

<sup>75</sup> *Ibid*, at p. 444.

<sup>76</sup> *Ibid*.

<sup>77</sup> Baker and Emery, at p. 446.

<sup>78</sup> Given that the median response was 0% when survey respondents were asked to estimate their personal likelihood of divorce.

### **Defective Capability**

Just as cognitive dissonance or representativeness bias may cause a person to become overly optimistic, defects in capability systematically distort the way people search for, process, and weigh information in a decision making process.<sup>79</sup> In his article, “The Limits of Cognition and the Limits of Contract,” Eisenberg points out that the economic assumptions about human behavior are based on games of chance and not on psychological analyses of human behavior.<sup>80</sup> Eisenberg discusses several deviations from the normative model of economic decision making that have been revealed by psychological study, including problems with invariance, availability, faulty telescopic faculties, and faulty risk-estimation faculties.

These limits on the economic assumptions that underlie the individual choice model of contractual obligation present particular difficulties in the context of signing a marriage agreement, partly because of the amount of uncertainty and risk involved in the decision, and partly because of the often positive relationship the spouses have at the time these types of agreements are signed. The discrepancy that exists between economic risk assessment and decision making in marriage was articulated well by Neave who wrote, “I am skeptical of reasoning which assumes that couples deciding to marry or to separate calculate the costs and benefits with the degree of precision attributed to owners of widget factories who enter into fire insurance policies.”<sup>81</sup>

### Invariance

A basic economic assumption about a rational decision maker is invariance: the decision maker’s preferences remain unchanged despite the manner in which the choice is characterized or presented.

However, in reality it has been shown that a person’s choice between two preferences often depends on

---

<sup>79</sup> Eisenberg, at p. 218.

<sup>80</sup> *Ibid.* Games of chance or game theory in general is used by economists to model how two (or more) persons will come to a decision in the face of uncertainty and risk. The problem that Eisenberg identifies is that the resulting economic assumptions and models about human decision making are based on “a normative model of an idealized decision maker, not as a description of the behaviour of real people.”

<sup>81</sup> Marcia Neave, “Resolving the Dilemma of Difference: A Critique of ‘The Role of Private Ordering in Family Law’” (1994) 44 U. Toronto L.J. 97, at p. 107.

the way the choice is “framed.”<sup>82</sup> An example is when substantively identical options are framed as gains or losses. This framing effect results because people tend to be risk-averse when considering gains and risk-preferring when considering losses.<sup>83</sup> Given a choice between a sure gain of \$700 and a 75% chance to win \$1000, most people will choose the sure gain even though the expected value of the sure gain (\$700) is less than the expected value of the chance ( $0.75 \times \$1000 = \$750$ ).<sup>84</sup> However, when the same alternatives are framed as a loss, with a sure loss of \$750 versus a 75% chance of losing \$1000, most people will choose the chance over the sure loss.<sup>85</sup> Eisenberg notes that the framing effect is so strong in most people that even when people are informed of their inconsistent choices they will nevertheless maintain them.

This effect may have come into play in Mrs. Hartshorne’s decision to sign the agreement. Her decision involved choosing whether to sign the agreement and be exposed to a chance of loss, or not sign the agreement and be subject to a sure loss. If she signed the agreement she would be exposed to the risk that her marriage would end and she would experience a loss, the amount she would be entitled to under the *FRA* less the amount she received under the agreement. However, if she did not sign, she would be exposed to a sure loss of not becoming married to Mr. Hartshorne. Therefore, considering her choice was framed as a loss, for her it was a lose-lose situation, and she may have been more likely to accept the risky scenario the agreement presented than what the rational choice model would otherwise predict.

#### Availability

When people are faced with a decision that requires a judgment about probability, people judge the probability on the basis of comparable scenarios that are readily available by memory or imagination rather than basing their judgment on objective frequency as the economic model assumes.<sup>86</sup> In assessing whether or not to sign the agreement, Mrs. Hartshorne would have been faced with a consideration of the possibility of divorce. The availability theory suggests that when faced with this consideration, she would

---

<sup>82</sup> Eisenberg, at p. 219.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Eisenberg, at p. 221.

have considered her present relationship with Mr. Hartshorne and her feelings for him at that moment, instead of relying on objective rates of divorce. The result would be an inaccurate assessment of how likely it was that the agreement would become operative, which would result in Mrs. Hartshorne being more willing to sign the agreement than if she had relied on objective considerations of risk.

#### Faulty Telescopic Faculties

Another type of defect in cognitive decision making is the ability of people to make rational comparisons between the present and the future. This defect is described by Eisenberg as the situation where people “systematically give too little weight to future benefits and costs as compared to present benefits and costs.”<sup>87</sup>

This limit in cognition is highly relevant to Justice Bastarache’s description of fairness in interpreting the *FRA*. He assumes that if people were able to predict the future circumstances of their relationship at the time they signed a marriage agreement, their consent to be bound by the agreement is evidence that they considered those future circumstances, conducted a rational cost-benefit analysis, and found them to be fair.<sup>88</sup> However, if parties entering into marriage agreements are giving too little weight to possible costs in the future, then they may not be rationally selecting those future consequences. Justice Deschamps warned of this when she noted that what parties may view as fair at the time they enter into the agreement may become unfair as time passes, because they may not have accurately predicted the future, or where they have accurately predicted the future, they may not have anticipated its costs accurately.<sup>89</sup>

#### Faulty Risk-Estimation Faculties

Related to people’s inability to correctly weigh future consequences is the systematic underestimation of risk. Arrow observes that “it is a plausible hypothesis that individuals are unable to

---

<sup>87</sup> Eisenberg, at p. 222.

<sup>88</sup> *Hartshorne* (SCC), *supra* note 8 at para.. 47.

<sup>89</sup> *Supra* note 66.

recognize that there will be many surprises in the future; in short, as much other evidence tends to confirm, there is a tendency to underestimate uncertainties.”<sup>90</sup>

Marriage agreements are signed during periods of great uncertainty. There are many risks that lie ahead and if parties to these agreements are systematically underestimating future risks, they may be entering into agreements that do not provide enough for life’s contingencies. Therefore, although the parties may view it as fair at the time of signing, this perspective could be based on underestimates of future risks. Both the trial judge and the majority of the Court of Appeal discussed the great uncertainty that exists when parties enter into a marriage agreement, and therefore, they accorded marriage agreements less deference than separation agreements.<sup>91</sup> The majority of the Supreme Court did not agree with this approach, assuming, instead, that parties conduct accurate cost-benefit analyses.<sup>92</sup>

### **Voluntariness**

Economics assumes that individual choice is voluntary: the individual chooses free of constraints from exogenous factors.<sup>93</sup> However, in the context of marriage agreements there are many reasons to be suspicious about voluntariness. Central to the individual choice model of obligation adopted by the majority of the Supreme Court is the assumption that Mrs. Hartshorne’s choice to sign the agreement was voluntary. Justice Bastarache places great emphasis on respecting individual’s autonomous choices, so inherent in that approach is the assumption that the individual actually made the choice voluntarily. Otherwise, the court would be respecting a non-autonomous choice, which would defeat the idea of respecting individual responsibility.

Economics also assumes that people bargain at arm’s length; hence, when they decide to contract with someone, they do so voluntarily because there is nothing requiring them to do so. However, as Mnookin points out, spouses do not contract at arm’s length and do not have the same freedom of choice

---

<sup>90</sup> Eisenberg at p. 219.

<sup>91</sup> *Hartshorne* (SCC), *supra* note 88 at para. 30.

<sup>92</sup> *Ibid*, at para. 39.

<sup>93</sup> Exogenous factors relate to anything outside of the individual’s own sphere.

as that which exists in a free market.<sup>94</sup> Rather, Mnookin describes the negotiation between spouses as similar to negotiations with a monopolist. He writes that “the two spouses are locked in a dyadic relationship that cannot be easily avoided.”<sup>95</sup> The problem that arises in these relationships is the possibility for opportunistic behavior. Since spouses are forced to negotiate with each other, one spouse ‘may take advantage’ of the other spouse’s weaknesses or vulnerabilities, because they know that the weak or vulnerable spouse has no alternative choice, other than leaving the relationship. This was evident in the Hartshorne negotiation. Mrs. Hartshorne clearly expressed that she did not want to enter into a marriage agreement, but Mr. Hartshorne drafted a particularly one-sided agreement and told her he would not marry without it. Mr. Hartshorne exploited her vulnerabilities by waiting until two weeks before their wedding date to present her with the agreement. He was also aware of her economic dependence on him and her plans to build a family together. Mrs. Hartshorne was faced with accepting the agreement or ending the relationship: not a real choice.

Not only does the presence of a monopolistic type relationship raise questions about the voluntariness of marriage agreements, but other gender-based constraints may often be present. Boyd and Young point out that the constraints on Mrs. Hartshorne’s choices were largely based on her gender and not taken seriously by the majority.<sup>96</sup> The couple already had a one year old child and Mrs. Hartshorne had already assumed primary responsibility for child care and household management. Having given up her career, she was economically dependent on Mr. Hartshorne.

The majority’s unwillingness to recognize these constraints is consistent with neoclassical economic theory, which considers parties as gender neutral individuals and fails to take into account women’s inferior social and economic positions which often constrain their choices.<sup>97</sup> Generally speaking, women and men continue to play different economic roles in the family. The reality of women’s reproductive capabilities means that women are more likely to be the primary caregiver of a

---

<sup>94</sup> Neave, at p. 114.

<sup>95</sup> Neave, at p. 114

<sup>96</sup> Susan B. Boyd and Claire F.L. Young, “Feminism, Law, and Public Policy: Family Feuds and Taxing Times.” 42 *Osgoode Hall Law Journal*, 545 (2004) at 566.

<sup>97</sup> Neave, at p. 122.

couple's children, especially when the children are young. Women continue, on average, to be more likely to work in the home and, even where women are working in the paid labor force, they continue to receive lower wages than their male counter-parts.<sup>98</sup> Wiegiers points out that by ignoring these disparities and the different degrees of freedom of choice that exists between men and women the inequalities are reinforced.<sup>99</sup> By describing Mrs. Hartshorne's choice as voluntary and ignoring the possible constraints on her choice, the majority was cementing the gender inequalities that existed between the couple. These inequalities are just seen as a normative reality for women and are not considered to have any impact on her ability to choose.

### **Rationality**

"Economic man" is a rational individual who knows what will maximize his utility and makes decisions and enters into contracts that will serve this end.<sup>100</sup> Since individuals enter into contracts only if they will increase or maximize their utility when contract law enforces these bargains the law views this as respect for individual autonomy.

However, the concept of rational choice fails to recognize the many important realities of the marriage relationship, including the viability and range of options within that relationship. Neave writes that "treating couples as entirely self-interested individuals ignores the affection, commitment, and concern for the other spouse's well-being which exists in marriage."<sup>101</sup> As well, treating a spouse's choice as an expression of the alternative that will leave them in the best position leaves no room for "understanding or evaluating the profoundly different meaning and importance of a person's choices in the context of his or her life."<sup>102</sup> Ignoring non-autonomous economic reasons for choice also perpetuates the idea that these reasons for choosing are inferior to economic reasons. The majority's decision in *Hartshorne* suggests that the law will only take into account a person's choice to maximize their own self-interest and will ignore any other reasons for which a person may be choosing to enter into marriage

---

<sup>98</sup> Wiegiers, at p. 190.

<sup>99</sup> Wiegiers, at p. 191.

<sup>100</sup> Wiegiers, at p. 170.

<sup>101</sup> Neave, at p. 107.

<sup>102</sup> Wiegiers, at p. 189.

agreements. Inherent in the majority's decision is an assumption that the single reason Mrs. Hartshorne signed the agreement was because she considered it to be fair in the circumstances. The danger with this approach is that agreements may be enforced that were entered into for reasons that do not justify the individual choice model of contractual obligation. As well, ignoring people's true reasons for choosing may reinforce gender inequality and disadvantage facing women.

Empirical evidence from Australia suggests that couples sign marriage agreements for many reasons. The Australian Institute of Family Studies surveyed men and women who had entered into marriage agreements and asked whether they thought the division of property under the agreement was fair at the time of signing; which if thought to be fair, would suggest they thought the agreement would make them better off. 54 % of women and 66 % of men who signed these agreements considered that the division was unfair at the time of signing.<sup>103</sup> This suggests that in the context of marriage agreements, the desire to increase one's utility is not the only consideration with which a person wrestles.

The non-economic reasons for which people may consent to be bound by a contract often display gender differences and inequalities. In fact, West has argued that the economic presumption of a correlation between choice and well-being is empirically less true for women than it is for men.<sup>104</sup> She argues that women often make choices out of a desire to please others or satisfy others' desires.<sup>105</sup> As well, historically women have been expected to make choices based on self-sacrifice, both for their children and spouses. Therefore, women are under a social expectation to choose based on others' preferences.<sup>106</sup> While men have never been expected to adhere to a morality of self-sacrifice based solely on their gender. Similarly, because of social expectations, women may tend to be more submissive or undervalue their contribution to the marriage and thus fail to insist upon a fair share.<sup>107</sup> This is partly explained because women who work in the home are not paid for their contribution and therefore see it as

---

<sup>103</sup> Neave, at p. 114.

<sup>104</sup> Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 Wisconsin Women's Law Journal 81.

<sup>105</sup> *Ibid.*, at p. 91.

<sup>106</sup> Wiegers, at p. 193.

<sup>107</sup> Wiegers, at p. 195.

“less valuable” than their male partner’s work which has a quantifiable wage. Finally, Anderson notes that circumstances of social inequality can undermine an individual’s ability to choose for themselves and may result in a tendency to defer to the judgment of others.<sup>108</sup> If there are inequalities in the relationship to begin with, a woman may defer to the judgment of her spouse when negotiating the terms of a marriage agreement. For example, if the woman has less education, fewer assets, or what she perceives as a less desirable or respectable position in the labour force, she may, according to Anderson, simply consent to what her male partner proposes. It is possible to conceive of many other non-self-serving reasons women may choose to be bound by a marriage agreement, and women may choose to agree with their spouse’s requests in order to avoid conflict or violence. Women may agree to less than favorable economic terms in exchange for custody of children, or may agree to waive spousal support hoping that this will increase the likelihood of her husband complying with a child support order.

Mrs. Hartshorne testified that one of the reasons she signed the agreement was because Mr. Hartshorne could be domineering and controlling, and she did not want to risk doing anything to damage their relationship. As well, Mrs. Hartshorne had to consider the well-being of her child and likely felt compelled to consider the well-being of Mr. Hartshorne’s children from his first marriage. At this stage in their relationship, Mrs. Hartshorne was already economically dependent on Mr. Hartshorne, and likely did not want to do anything that would make her seem ungrateful for his support. Mrs. Hartshorne had entered their relationship heavily in debt; while Mr. Hartshorne had over \$1.5 million in assets. For these reasons it is likely that Mrs. Hartshorne’s decision to sign the agreement was not simply a reflection of what she thought would best maximize her own utility.

### **PROBLEMS RELATING TO INEQUALITY OF BARGAINING POWER**

Bargaining power generally relates to the way the parties conducted the negotiations and the resulting substantive content of the agreement. Inequalities in bargaining power are often evident in the circumstances surrounding the negotiations. Inherent in the individual choice model is the assumption

---

<sup>108</sup> Elizabeth Anderson, “Values, Risks, and Market Norms” (1988) 17 *Philosophy and Public Affairs* 54, at p. 62.

that the parties to the contract had relatively equal bargaining positions. However, in the context of marriage agreements, one sided bargains potentially result and there are several reasons to suggest that these one-sided agreements are the product of inequalities of bargaining power.<sup>109</sup> There are three issues that relate to possible inequalities of bargaining power: differences in bargaining strategies, inequality in the couple's relationship or marriage, and underlying unequal bargaining positions.

There was some debate in the judicial record of the *Hartshorne* decision as to whether a court should inquire into the circumstances of negotiation of the agreement it is being asked to enforce. The trial judge, the majority of the Court of Appeal, and the dissenting judgment of the Supreme Court thought that both the context in which the agreement was signed and the circumstances surrounding its negotiation were important factors to consider.<sup>110</sup> However, Justice Bastarache, for the majority of the Supreme Court, did not consider these factors and emphasized that a court should remain neutral and should avoid substituting its concept of fairness for that of the parties. This was markedly different from Justice Deschamps' view, which held that the "marriage agreement is only a presumptive entitlement" and that the assessment of fairness and extent of reapportionment are judicial prerogatives.

Ignoring these differences by refusing to consider the circumstances under which the contract was negotiated serve to reinforce the inequalities and often leads to the enforcement of one-sided opportunistic agreements.

### **Differences in Bargaining Strategies**

Economists view marriage as a positive-sum game where gains in utility are created for both spouses.<sup>111</sup> An example of this occurs where a woman stays at home with the couple's children and cares for their home, while the man works in the paid workforce. Their marriage has created gains for both of them, because the wife will be able to share in an increased standard of living and the husband will be

---

<sup>109</sup> Mnookin, at p. 1017.

<sup>110</sup> See para.60 of the trial judgment; para. 33 of the Court of Appeal judgment; para. 89 of the Supreme Court judgment.

<sup>111</sup> Amy L. Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?* (1998) 84 Virginia Law Review 509, at 526.

free to work outside of the home, content in knowing his children are cared for. However, any time there is a surplus in a positive-sum game, the result is not always an equal split of the surplus pie for each party.<sup>112</sup>

The negotiation of marriage agreements involve spouses (or soon to be spouses) bargaining over the future surplus of their marriage and assigning each spouse a slice of that future pie. Three differences that exist in the way women and men tend to bargain suggest that women systematically accept a smaller share of this pie. These differences involve differences in cooperation and underlying moralities. Other possible differences between men and women's bargaining strategies include "toughness, patience, perceptiveness, risk averseness, tolerance for conflict, aggressiveness, the differential concerns raised by the presence of "hostages" (such as children) ... the sense of entitlement and notion of fairness, and the time-dependent costs of disagreement."<sup>113</sup> Generally speaking, the characteristics attributable to women - patience, risk averseness, and concern for children - lead to a less equitable share of the pie. The characteristics attributable to men - toughness, perceptiveness, tolerance for conflict, aggressiveness, and sense of entitlement - lead to a greater share of the pie.

#### Different "Tastes" for Cooperation

According to Rose's hypothesis on women's "taste for cooperation," this gender-differentiated bargaining strategy results in men coming out with more assets in division of property in a marriage agreement than women.<sup>114</sup> She not only argues that women, on average, are more willing to cooperate in a bargaining situation than men, but also that women are more likely to be perceived as cooperative in a bargaining scenario.<sup>115</sup> For Rose, what proves to be most important is the fact that women are perceived as cooperative.<sup>116</sup> The results for women are systematic losses in bargaining scenarios.

---

<sup>112</sup> Carol M. Rose, *Bargaining and Gender*, (1994-1995) 18 Harvard Journal of Law and Public Policy, 547 at p. 547.

<sup>113</sup> Wax at p. 580.

<sup>114</sup> Rose at p. 549.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, at p. 555.

Rose's hypothesis is illustrated by the Hartshorne's bargain. Mrs. Hartshorne decided to stay at home and care for the children, while Mr. Hartshorne continued to grow and build his law firm. This arrangement is a positive-sum game, because there is a joint surplus created through the specializations. The parties decide to create a contract for how this joint surplus will be split if their relationship ever comes to an end. If Mr. Hartshorne thinks that Mrs. Hartshorne has a tendency to be cooperative, even if she does not, then he will begin the negotiations by offering her a smaller share of the surplus than he would if he thought she was not cooperative. If Mrs. Hartshorne actually does have a "taste for cooperation," which on these facts it would appear she does, then she will accept less than what she actually thinks is "fair" in order to minimize conflict and be cooperative. Therefore, although Mrs. Hartshorne is better off in this scenario, she gets to marry Mr. Hartshorne and share in an increased standard of living as a result of his income, she is not as much better off as Mr. Hartshorne, and she is less better off than she would have been under the statutory regime for division of property on divorce.

#### Different Underlying Moralities

In her book, *In a Different Voice: Psychological Theory and Women's Development*, Gilligan identifies two different voices in morality with gender tendencies: one tends to be male and is based on individual rights, autonomy and an abstract concept of fairness; while the other tends to be female and is based on care, responsibility and relationships.<sup>117</sup> As well, she suggests that women have a moral voice that is more contextually sensitive and less rule-like. If Gilligan's work is true then in bargaining scenarios, women are not motivated by advancing their own individual rights but instead are focusing on the gains to the relationship that can be made and the responsibility they may feel for others. In discussing Gilligan's work, Cossman points out that "this problem is highlighted by domestic contracts which are made in the context of intimate relationships, that is, contracts made between and involving the

---

<sup>117</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

individuals to whom women feel the strongest sense of responsibility – their families – and thus for whom the sacrificing of self interest is the most likely.”<sup>118</sup>

The contract theory supported by the majority in *Hartshorne* is based on the idea of two autonomous individuals who voluntarily and rationally agreed to sign a contract, because they thought the agreement would maximize their own utilities and be fair. It is clear that this model is predicated on the male voice of morality. This raises the question then of how well this contract theory applies to women who may have been influenced in the bargaining stage by factors not related to individual self-serving goals. If the law assumes a male voice of morality, then contracts will be enforced even though they may not represent a women’s choice to maximize her own self-interest.

### **Equality in Marriages and Unequal Bargaining Positions**

The eventual split of a surplus in a bargain and the parties’ bargaining positions depend in part on their respective best alternatives to the bargain. A party’s next best alternative is defined by the situation the party would face in the absence of a negotiated agreement.<sup>119</sup> In the context of a marriage, the parties alternative is getting a divorce (or not marrying at all), and in either case both parties stand to lose; however, there are reasons to believe that the fallback positions are worse for wives than they are for husbands.<sup>120</sup> The party with the weaker best alternative will be more willing to negotiate and accept less than what may be fair. If the other party knows of the weaker best alternative, then this provides an incentive for opportunistic behavior. Research suggests that, on average, women tend to have weaker best alternatives than do their male counter-parts.

Wax suggests that single women’s baseline of well-being is lower than that of single men, partly because women’s marriageability declines more rapidly than men’s with increasing age and partly

---

<sup>118</sup> Cossman, at p. 345.

<sup>119</sup> Wax, at p. 542.

<sup>120</sup> Wax, at p. 544.

because the benefits that men receive from marriage are more available outside of marriage than are the benefits women seek.<sup>121</sup> Wax writes that benefits men seek from marriage range “from sex to food preparation to old-age insurance as well as, in some cases, the production of ‘own’ offspring and are readily available outside of marriage.”<sup>122</sup> By contrast, the benefits that women seek, namely “economic security, financial support, prestige, power, and a father’s authoritative help and financial ‘sponsorship’ for their children are hard for women to obtain outside of marriage.”<sup>123</sup> As well, women often do worse on divorce than men, because they are more likely to make “idiosyncratic marriage-specific investments” than men and those investments are made at the expense of investing in their human capital and marketability in the paid labour force.<sup>124</sup> These investments made by women are lost on divorce; whereas, the investments men have made in their careers are retained if the couple divorces.<sup>125</sup> Therefore, when faced with signing a marriage agreement or remaining single, women may have incentives to accept less than what they may otherwise have perceived as fair or maximizing their utility.

Mr. Hartshorne was aware of Mrs. Hartshorne’s vulnerabilities and weaker bargaining position at the time of the negotiation surrounding the marriage agreement. She was already financially dependent on him, she was the primary caregiver for their first child, she had already been divorced, and the wedding date was fast approaching. There were no findings of fact on this particular point, but it is quite possible that Mr. Hartshorne acted opportunistically to take advantage of Mrs. Hartshorne’s weaker bargaining position.

### **PART 3: WHAT THE COURT SHOULD AIM FOR**

#### **Absence of Judicial Reasoning in *Hartshorne***

What is perhaps most troubling about Justice Bastarache’s judgment is the lack of a reasoned discussion as to why marriage agreements should be treated as if they were commercial contracts. The

---

<sup>121</sup> Wax, at p. 545.

<sup>122</sup> Wax, at p. 546.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> Wax, at p. 547.

majority's failure to engage in a discussion about why marriage agreements ought to be interpreted as if they were commercial contracts could be a result of either willful blindness to the frailties and risks of applying the economic model in the area of marriage agreements, or a result of the majority's subconscious or unexamined normative views on marital relationships, including faulty ideas of equality between the spouses in terms of power and opportunity and similar goals and bargaining strategies.

The trial judge, the majority of the Court of Appeal, and the dissent in the Supreme Court all recognized the inherent differences between a commercial agreement entered into at arm's length and a marriage agreement signed by the parties in relation to one of life's most intimate relationships. In recognition of these differences, they suggested a contextual approach that would be cognizant of the circumstances surrounding the negotiations. Without considering any of the surrounding circumstances, the majority of the Supreme Court blindly applied the individual choice model of contractual obligation to marriage agreements. There was no analysis probing whether the justifications for this model, although present in the commercial area, were also present in the familial context. Instead, the majority assumed that marriage agreements were made of the same cloth as commercial contracts, thereby closing their eyes to any substantive relational or functional differences or inequalities that may exist between the spouses who execute these types of agreements.

Failing to consider and articulate why a particular doctrine should be applied in a given area of law is problematic. The danger with continuously applying the *status quo* without considering the reasons one is doing so can result in a failure to see and address the realities of all of the people encompassed by the area of law. In the context of marriage agreements, simply applying commercial contract law to the personal and relational sphere of agreements between spouses fails to consider the very different dynamics at play, dynamics which might include inequities and vulnerabilities that are substantially unique, and probably unknown in the commercial setting. This approach is particularly striking because family law attempts to protect vulnerable parties in familial relationships; however, the majority's decision in *Hartshorne* may actually serve to reinforce vulnerabilities and inequalities facing married women.

The majority of the Supreme Court has, like Alice, fallen down the rabbit hole into an unreal fantasy land.<sup>126</sup>

### **An Appropriate Model of Contractual Enforcement for Marriage Agreements**

Deconstructing “economic man” and all the assumed characteristics that justify the individual choice model leads to the obvious conclusion that marriage agreements should never be treated as if they were commercial contracts. Differences exist in the way people evaluate and negotiate domestic agreements compared to commercial contracts and these differences should not be ignored or glossed over. I am mindful of the work of feminist scholars who warn of creating special legal rules or presumptions for women which may simply entrench the majority’s view of women as lesser or weaker.<sup>127</sup>

The two main areas of concern that I have outlined in the individual choice model of contractual obligation relate to parties’ capacity to contract and their equality of bargaining power. Therefore, in order to discuss a more appropriate model of enforcement for marriage agreements, consideration of both areas must occur. In relation to the issues surrounding capacity, courts should take a subjective approach to considering whether the parties to the agreement were acting rationally. It is not appropriate to simply assume rationality. Nor is it appropriate to take an objective approach to rationality, for who defines rationality and can it, at present, be defined in a gender-neutral way? Looking at it from another angle, is it even appropriate to apply such a construct as rationality when that may not be a factor that is operating in the actual, subjective reality of one of the parties? Courts should be alive to evidence that one party may have been signing the agreement to preserve the relationship or to avoid conflict (factors that many men would not consider rational), or to any other frailties that may have existed at the time the parties

---

<sup>126</sup> Professor John Swan has addressed incoming students at the University of Toronto Faculty of Law by cautioning them against “falling down the rabbit hole.” In other words, he has cautioned against the reflexive, unreflective enforcement of contracts without an analysis of the values being upheld and those being ignored.

<sup>127</sup> This problem is commonly referred to as the “dilemma of difference.” For a discussion on this issue see: Cossman, “A Matter of Difference: Domestic Contracts and Gender Equality”; Martha Minow, *Making all the Difference: Inclusion, Exclusion, and American Law* (Ithaca, NY: Cornell University Press, 1990); and Neave, *Resolving the Dilemma of Difference: A Critique of ‘The Role of Private Ordering in Family Law.’*”

negotiated their agreement. In order to be mindful of the problems relating to bargaining power, courts should take a contextual approach to marriage agreements. They should consider the circumstances of the negotiation and be keen to any opportunistic behavior or inequalities that may have existed. Similarly, courts should not take a neutral approach to the content of marriage agreements and blindly accept whatever terms the parties have agreed to.

Throughout this paper I have explained the many and complex reasons why the content of marriage agreements may not actually reflect the parties' attempts to achieve fairness, but instead may reveal a power struggle waged by one to achieve a windfall and a capitulation by the other to achieve a fragile peace. The complexities of context such as these outlined in my paper can be assessed and weighed only when Justice is not blind but is alive to their existence and operation. And because these complexities are much broader and variegated than "economic man" has ever known or comprehended, it is time for family law to bid "him" a final and lasting farewell.

