

Agreements in American Family Law

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Abstract:

In the United States, individuals now have significant power through agreement or other choices to alter domestic rights and obligations. This article explores which family-related agreements are (or should be) enforceable by the state, focusing on a small subset of private ordering topics in American family law, while emphasizing their sharply different treatment: premarital and marital agreements, co-parenting agreements, and open adoption agreements.

The article speculates on the differing responses both courts and commentators bring to private ordering in these areas. Perhaps thinking about private ordering in family law, or private ordering generally, turns on one's view regarding the doctrines of law being altered by the agreement. If one views them as default rules, meant merely to save transaction costs, one is likely to be permissive about agreements that alter them. If one views them as reflecting strong public policies, much will depend on what one thinks about the policies. Additional bases for different views on agreements in family law are different ideas about the third-party effects (externalities) of such agreements. One might also, in some cases, focus on the process of agreement formation rather than the finished product. For example, some have argued that the process of negotiating premarital and marital agreements encourages a sort of adversarial or zero-sum approach to marriage that could undermine the marriages to which they relate.

Overall, one might reasonably describe family law's treatment of private ordering as inconsistent, incoherent, and frequently counterproductive. On the other hand, similar complaints could likely be brought against any area of law that has dealt with as much legal and social change as family law has in recent decades.