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NOTES

KNOW YOUR WORTH: VALUING MARRIAGE AND THE RELINQUISHMENT OF MARITAL RIGHTS IN ESTATE & GIFT TAX LAW

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I. INTRODUCTION

Because the United States (U.S.) estate tax does not acknowledge marriage as adequate and full consideration and the Supreme Court oddly ruled the relinquishment of marital rights does not constitute adequate and full consideration for gift tax purposes, couples looking to fulfill the terms of their prenuptial agreement prior to their wedding are left with paradoxical tax consequences. However, if a couple waits to fulfill the prenuptial-agreement transfers of property until after they are married, the couple will not be subject to those consequences.[1] Even more peculiar, the

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1. STEPHANIE J. WILLBANKS, FEDERAL TAXATION OF WEALTH TRANSFERS: CASES AND PROBLEMS 112 (Erwin Chemerinsky et al. eds., 4th ed. 2016). Although the estate and gift tax exclusion amount is high, $11.4 million in 2019, which means few people will actually suffer any tax consequences, it is still important to consider what message is being sent by tax law not viewing marriage as adequate and full consideration. *What's New – Estate and Gift Tax*, IRS (Feb. 8, 2019), https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax [http://perma.cc/V2HF-NMMZ].

Supreme Court gives deference to Tax Court's rulings on tax issues,[2] yet the Court ignored prior Tax Court rulings stating the relinquishment of marital rights constitutes adequate and full consideration for gift-tax purposes.[3]

Prenuptial agreements serve many valuable purposes: 1) protect family businesses, 2) protect separate assets earned prior to marriage, and 3) among other things, ensure distribution of assets to children from a prior marriage.[4] But forcing couples to fulfill their prenuptial transfers after the marriage may lead to many problems. For example, the death of a spouse may result in lengthy litigation if the prenuptial agreement was not properly enforced after the marriage was effectuated.[5] Furthermore, social and economic disparities between men and women may leave women more economically vulnerable in prenuptial-agreement negotiations.[6] Allowing prenuptial transfers to take place prior to the marriage could give women leverage to overcome this vulnerability.

Currently, couples are forced to fulfill their prenuptial agreement after their marriage or deal with possible gift-tax consequences.[7] But what goal does that accomplish? What goal is being achieved by forcing couples to transfer property to each other after they are married, instead of prior to being married? Why should marriage and the relinquishment of marital rights not be adequate consideration for tax purposes? This Note begins by outlining the advantages and disadvantages of prenuptial agreements and how the tax law's current view of consideration exacerbates those disadvantages. Second, this Note addresses how tax law and other areas of law define *adequate and full consideration* and how those definitions differ. Finally, this Note addresses why the tax law's current definition of *consideration* is inappropriate.

2. Comm'r v. Wemyss, 324 U.S. 303, 305 (1945).

3. *See* Merrill v. Fahs, 324 U.S. 308, 310 (1945); Bristol v. Comm'r, 42 B.T.A. 263, 268–69 (B.T.A 1940), *vacated sub nom.* Comm'r v. Bristol, 121 F.2d 129 (1st Cir. 1941); Jones v. Comm'r, 1 T.C. 1207 (T.C. 1943).

4. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 890–92 (1997).

5. *See* Estate of Carli v. Comm'r, 84 T.C. 649, 649–52 (T.C. 1985); United States v. Paulson, No. 15cv2057-AJB-NLS, 2017 U.S. Dist. LEXIS 1021, at *2 (S.D. Cal. Jan. 4, 2017); Anonymous v. Anonymous, 123 A.D.3d 581, 581–83 (N.Y. App. Div. 2014).

6. *See* Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 187 (1996).

7. *See* Merrill v. Fahs, 324 U.S. 308 (1945); Comm'r v. Wemyss, 324 U.S. 303 (1945).

II. PRENUPTIAL AGREEMENTS

A. History

Modern prenuptial agreements date back to 16th century England.[8] At common law, a husband was provided curtesy from his wife's estate upon her death,[9] and a wife was provided dower from her husband's estate upon his death.[10] "Curtesy was developed . . . partly to help husbands support and educate children of their marriages and partly to enable husbands to fulfill the duties placed on them by feudal property laws."[11] Common-law curtesy entitled the husband to a life estate "in the real property of which his wife die[d] seised of an estate of inheritance provided that live [children were] born of the marriage."[12] Dower ensured a wife was "not . . . left disinherited and destitute" upon her husband's death.[13] Common-law dower "entitle[d] the wife to a life estate, in a certain portion of all the lands of which the husband was seized or possessed at any time during the marriage, unless she [was] lawfully barred."[14]

The 16th century English prenuptial agreements allowed the bride's family to transfer a lump sum of money to the groom's family in exchange for a guarantee of an annual income for the bride if she survived her husband.[15] "If the couple did not contract for the [annual income], upon the death of her husband the wife was [still] entitled to her dower portion . . . ."[16] As marriage became more about "personal fulfillment and love . . . , premarital agreements fell into disuse, except among the exceptionally wealthy or the unusually famous."[17] Nonetheless, the average American couple often used prenuptial agreements to address "the property rights of a surviving spouse at widowhood."[18] Conversely, prenuptial agreements involving divorce were not legally upheld until

8. 7 AM. JUR. PROOF OF FACTS 3D 581 *Enforceability of Premarital Agreement Based on Fairness of Terms and Circumstances of Execution* § 1 (1990).
9. 25 AM. JUR. 2D *Dower and Curtesy* § 3 (2018).
10. 28 C.J.S. *Dower and Curtesy* § 2 (2018).
11. 25 AM. JUR. 2D *Dower and Curtesy* § 3.
12. *Id.* § 2.
13. 28 C.J.S. *Dower and Curtesy* § 2.
14. *Id.* § 4.
15. Marston, *supra* note 4, at 905.
16. *Id.*
17. Guggenheimer, *supra* note 6, at 147.
18. Marston, *supra* note 4, at 897.

after the 1970s.[19]

B. Reasons for Premarital Agreements

There are many reasons to create a prenuptial agreement. For example, "[p]rospective spouses enter into prenuptial agreements because they wish, in the event of divorce [or death], to divide their property in a manner different from that prescribed by the state's standard property-apportionment rules."[20] Essentially, the prenuptial agreement will be used to protect the wealth of the "economically superior" spouse or keep individually-earned assets separate upon death or divorce.[21] Therefore, wealthy or famous couples may be the best candidates for a prenuptial agreement.[22] Prenuptial agreements allow wealthy or famous individuals to protect the fortunes they have when entering into a marriage.[23] Furthermore, prenuptial agreements protect wealthy and famous individuals from contentious divorces that could be revealing and bring out embarrassing discoveries.[24]

However, prenuptial agreements can be helpful to the average couple as well because they provide the average couple an opportunity to discuss finances prior to marriage.[25] Some experts even say opening the lines of communication about finances in this manner "allow[s] for better communication about finances" after the couple marries.[26] Additionally, prenuptial agreements are helpful for couples coming into a new marriage with children from a prior marriage.[27] People may want a prenuptial agreement to ensure their children from the prior marriage are guaranteed certain assets upon their death.[28] Specifically, people may want "to protect family wealth or businesses from potential disputes that arise upon death or divorce."[29] However, two-income families may just want to protect their

19. *See* Posner v. Posner, 233 So. 2d 381, 385–86 (Fla. 1970).
20. Jeffrey Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 366 (2006).
21. *Id.*
22. *See* Marston, *supra* note 4, at 892.
23. *Id.*
24. *Id.*
25. *Id.* at 895.
26. *Id.*
27. *Id.* at 892.
28. *See id.*
29. *Id.*

individual assets.[30] In any event, prenuptial agreements may help to combat the complex problems that arise out of the modern family structure.

1. Problems That Could Arise When Prenuptial Agreements Are Fulfilled After the Marriage

Although there are many benefits to having a prenuptial agreement, there are also many problems that could arise from using them. One problem with prenuptial agreements stems from societal inequalities between men and women. Disparities in income between men and women have primarily left women more "economically dependent on their husbands than [men] are on [their] wives."[31] Allowing the terms of prenuptial agreements to be fulfilled prior to the marriage—without possible negative tax consequences—could give women more bargaining power to help combat the negative effects of financial dependency wives may suffer at death or divorce.

In 2016, the U.S. Bureau of Labor Statistics found women's weekly earnings were 82% of men's.[32] Even more strikingly, married women only earned 78.9% to that of married men.[33] This discrepancy leads to wives "being more economically dependent on their husbands."[34] Therefore, when a prenuptial agreement is enforced, the inconsistency between pay and prevalence of wives "being more economically dependent on their husbands" leads to a bigger wage gap for women at divorce "than when the spouses were single."[35]

Critically, "a woman . . . [may] be disadvantaged by a premarital agreement that shelters her spouse's income from state mandated income sharing" during a divorce.[36] This "[e]quitable distribution doctrine empowers [a] divorce court to assign property without regard to predivorce legal ownership."[37] In essence, equitable distribution works to

30. *Id.*
31. Guggenheimer, *supra* note 6, at 149.
32. U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2016*, BLS REP. 1 (Aug. 2017), https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf [https://perma.cc/79Z4-TZW7].
33. *Id.* at 10.
34. Guggenheimer, *supra* note 6, at 149.
35. *Id.*
36. *Id.* at 148.
37. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. &

counter economic hardships a person may suffer from the divorce.[38] However, when a couple enters into a prenuptial agreement and a spouse gives up all claims to property or takes a settlement in exchange for a waiver of marital rights, the exchange is likely to be less than what state law would provide.[39] Thus, "the economically weaker spouse (usually a woman)" gives up a possibly larger amount of property than would have been equitably distributed.[40] This leaves the "economically superior spouse (usually a man)" advantaged by allowing him to retain control over the property to do what he wants with it despite the fact the economically weaker spouse contributed value to the marriage.[41] Allowing couples to fulfill the terms of their prenuptial agreement prior to the marriage could give the economically weaker spouse leverage to negotiate for a more equitable distribution and allow a chance for the economically weaker spouse to reconsider the marriage if the economically superior spouse is combative about making the premarital transfers.

Aside from the social impact of prenuptial agreements, there is also a possibility the economically superior spouse will not transfer property to the economically weaker spouse per the prenuptial agreement, creating problems for the economically weaker spouse and any executor(s) after the economically superior spouse passes. For example, in *Estate of Carli v. Commissioner*, the decedent and his wife entered into a prenuptial agreement where decedent agreed to transfer a life estate to his wife after their marriage.[42] During the three-year marriage, the decedent never amended his will or trust to include his wife's life estate.[43] Three months after the decedent's death, his wife entered into a settlement agreement with the decedent's son, the executor of decedent's estate, for $10,000 cash in exchange for her giving up the $31,423 life estate.[44] Then decedent's son filed a tax return claiming the $31,423 life estate as a marital deduction.[45] The Commissioner of Internal Revenue

FEMINISM 229, 236 (1994) (quoting GRACE G. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 4 (2d ed. 1993)).

38. *Id.* at 236–37.
39. *Id.* at 238.
40. *Id.* at 239.
41. *Id.*
42. Estate of Carli v. Comm'r, 84 T.C. 649, 651–52 (T.C. 1985).
43. *Id.* at 652.
44. *Id.*
45. *Id.* at 653.

(Commissioner) rejected the full marital deduction.[46] Instead, the Commissioner allowed a $10,000 deduction as a debt claimed against the estate.[47] Thus, the decedent's failure to follow through with the prenuptial agreement not only left a widow without her life estate and a settlement amount lower than the value of the life estate, but it also left the estate with a lower tax deduction than expected. Litigation over the decedent's estate finally ended around eight years after the decedent's death.[48] *United States v. Paulson* presented an even more egregious family feud.[49] In *Paulson*, a husband and his wife entered into a standard prenuptial agreement.[50] The couple had a twelve-year marriage before the husband's death.[51] However, upon the husband's death, the wife spent three years battling with the executors of the husband's estate to collect on the prenuptial agreement.[52] The husband's son refused to transfer certain property to the wife per the prenuptial agreement, leading to contentious litigation.[53] After the wife settled with the executors of the estate, she believed her claim was resolved.[54] However, twelve years after the settlement, the wife was named in a suit against the estate for unpaid taxes.[55] In the court's last decision, seventeen years after the husband's death, the property-distribution and estate-tax claims were still being litigated.[56]

In another case, a wife attempted to invalidate a prenuptial agreement as being fraudulent during her divorce action.[57] After the couple's twelve years of marriage, the husband failed to transfer certain property to the wife as laid out in the prenuptial agreement.[58] The wife testified that her husband informed her he would "rip up the agreement after they were married for [ten] years."[59] Instead of finding the prenuptial agreement a sham, the court found that "[a]t best, [the wife had] a cause of action for

46. *Id.*
47. *Id.*
48. *See id.* at 649–52.
49. *See* United States v. Paulson, No. 15cv2057-AJB-NLS, 2017 U.S. Dist. LEXIS 1021, at *3–4 (S.D. Cal. Jan. 4, 2017).
50. *Id.* at *3.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *7–8.
55. *Id.* at *4, *7.
56. *Id.* at *7.
57. Anonymous v. Anonymous, 123 A.D.3d 581, 582–83 (N.Y. App. Div. 2014).
58. *Id.*
59. *Id.* at 582.

breach of contract" entitling her to receive an equitable distribution of the "value of the property . . . as indicated by the court."[60] The court focused on the fact that during the twelve years of marriage the wife never demanded the transfer to be completed, not on the dishonest actions of the husband.[61]

In each of these cases the economically weaker spouse could have been afforded better protection and less legal trouble had the prenuptial agreement and transfers of property been effectuated prior to the marriage. Allowing the transfers to take place without any possible estate or gift tax consequences would assure the economically weaker spouse that the transfers were appropriately performed prior to entering the marriage. However, because estate and gift tax law does not view marriage and the relinquishment of marital rights as adequate and full consideration, couples have no choice but to endure possible estate and gift tax consequences if they complete the transfers before the marriage takes place. This cruel reality leaves spouses in difficult legal situations that cost them time and money to resolve.

C. Estate and Gift Tax Law & Adequate and Full Consideration

The Revenue Bill of 1918 expressly included "dower, curtesy, or any estate created in lieu of dower or curtesy" in a decedent's gross estate.[62] Congress enacted this bill to clarify that estates created in lieu of dower or curtesy were included in the gross estate.[63] Congress extended this notion a step further in its Revenue Bill of 1932. In the Revenue Bill of 1932, Congress created the gift tax and amended section 804 of the estate tax to explicitly state "the value of a relinquished, or a promised relinquishment of, dower, curtesy, or other marital rights in [a] decedent's property" will not constitute adequate and full consideration in money and money's worth for estate-tax purposes.[64] Congress felt that allowing an estate-tax deduction for the relinquishment of dower, curtesy, and other marital rights "amount[ed] to a subversion of the legislative intent"[65] to exclude these relinquishments from being adequate and full consideration under

60. *Id.* at 583.
61. *Id.*
62. H.R. REP. NO. 65-767, at 21 (1918).
63. *Id.*
64. H.R. REP. NO. 72-708, at 47 (1932).
65. *Id.*

the pre-1932 amendment estate tax.[66] The amendment was only meant to clarify that intent.[67]

Commissioner v. Wemyss and *Merrill v. Fahs* furthered the Revenue Bill of 1932 amendment's logic to the gift tax as well. In *Wemyss*, a widower received income from a trust fund set up by her deceased husband.[68] However, the widow's income would be transferred to her child in the event she remarried.[69] Not wanting to lose her trust income but wanting to remarry, the widow entered into an agreement with her future husband in which he transferred a block of shares of stock to her in exchange for her promise to marry him and forfeit her trust fund from her deceased husband.[70] The Tax Court found marriage "was not a consideration reducible to money value"[71] and that "the transfer . . . was not made at arm's length in the ordinary course of business," subjecting the transaction to a gift tax.[72] The Supreme Court agreed.[73]

One dissenting Supreme Court justice argued, along with the circuit court of appeals, that the marriage agreement was "an arm's length bargain and [had] an absence of 'donative intent' which [he] deemed essential" to define a transfer as a gift.[74] However, the Supreme Court emphasized "common law considerations," such as donative intent or lack thereof, are "not embodied in the gift tax."[75] The Court went on to state that allowing something such as the "detriment to the donee to satisfy the requirement of 'adequate and full consideration' would violate the purpose of the [gift tax] and open wide the door for evasion of the gift tax."[76] In its decision, the Court made clear the only test for determining whether the gift tax is applicable is whether "property is transferred for less than an adequate and full consideration in money or money's worth."[77]

Instead of risking a detriment to herself, the fiancée in *Fahs* released her marital rights in exchange for her future husband, the taxpayer,

66. Merrill v. Fahs, 324 U.S. 308, 312–13 (1945).
67. *Id.* at 312.
68. Comm'r v. Wemyss, 324 U.S. 303, 303–04 (1945).
69. *Id.* at 304.
70. *Id.*
71. *Id.* at 305.
72. *Id.* at 307.
73. *Id.* at 306.
74. *Id.* at 305, 308.
75. *Id.* at 306.
76. *Id.* at 307–08.
77. *Id.* at 306 (quoting H.R. REP. NO. 72-708, at 29 (1932)).

creating an irrevocable trust for her.[78] The Commissioner viewed the transaction as a taxable event, but the taxpayer argued the relinquishment of the fiancée's marital rights "constituted *adequate and full consideration*."[79] The Supreme Court began its analysis by noting "[t]he gift tax [is] supplementary to the estate tax."[80] This led the Court to assert the estate and gift tax are "*pari materia* and must be construed together."[81] Therefore, the Court went on to eventually conclude the phrase "*adequate and full consideration in money or money's worth* . . . came into the gift tax by way of estate tax provisions."[82]

In 1916 the estate tax excepted "a bona fide sale for a fair consideration in money or money's worth" from the gross estate.[83] Then "[i]n 1924[,] Congress limited deductible claims against an estate to those supported by 'a fair consideration in money or money's worth.'"[84] The 1924 Act, where the gift tax was first enforced, also used similar language: "'Where property is sold or exchanged for less than a fair consideration in money or money's worth' the excess shall be deemed a gift."[85] And "[w]hen the gift tax was [reintroduced] in the 1932 Revenue Act, the . . . phrase *adequate and full consideration* . . . was taken over by the draftsman."[86] Because of these similarities in the enactment and language of the estate and gift tax, the Court in *Fahs* held that relinquishment of dower, curtesy, and other marital rights does not constitute adequate and full consideration in money and money's worth for purposes of the gift tax along with the estate tax.[87]

Although tax law does not acknowledge marriage or the relinquishment of marital rights as adequate and full consideration in money or money's worth, it does acknowledge a transfer in lieu of a husband's obligation to support his ex-wife as adequate and full consideration in money and money's worth. In *District of Columbia v. Lewis,* a husband and wife entered into a "Property Settlement and

78. Merrill v. Fahs, 324 U.S. 308, 309 (1945).
79. *Id.* at 310 (emphasis added) (internal quotations omitted).
80. *Id.* at 311 (quoting Estate of Sanford v. Comm'r, 308 U.S. 39, 44 (1939)).
81. *Id.* (quoting *Estate of Sanford*, 308 U.S. at 44) (emphasis in original).
82. *Id.* (emphasis added) (internal quotations omitted).
83. *Id.* at 311 (quoting Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 75B, 776–778).
84. *Id.* (quoting Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253, 305).
85. *Id.* at 312 (quoting Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253, 314).
86. *Id.* (emphasis added) (internal quotations omitted).
87. *Id.* at 312–13.

Separation Contract."[88] "On the same day the [contract] was signed, a decree of absolute divorce was . . . filed."[89] When the husband died, the wife filed a claim against the husband's estate for $25,000, "which she claimed to be ow[ed] to her under the provision of the separation agreement."[90] The estate paid an adjusted $23,500 claim.[91] The Commissioner assessed an inheritance tax against the estate for the payment.[92] The estate subsequently sued for reimbursement of the tax.[93] The court grappled with two competing lines of precedent on the issue.[94] In a Second Circuit case, the court "held that the wife's right of support was one of the 'other marital rights,'" making separation-agreement transfers subject to the gift tax.[95] Conversely, an Internal Revenue Service decision stated "that a transfer in lieu of support is a substitute for a transaction which of itself would not be subject to a transfer tax."[96] Distinguishing support obligation from relinquishment of marital rights, and agreeing with the Internal Revenue Service's logic, the court in *Lewis* held "a transfer in lieu of a husband's obligation to support his wife during their joint lives, or until her remarriage, is made for full and adequate consideration in money or money's worth."[97]

In reaching its decision, the court stated "the federal transfer tax should reach every transfer made in lieu of one which would be taxed, and *vice versa*."[98] However, after the *Wemyss* and *Fahs* decisions, couples avoid adverse gift tax consequences of premarital transfers by fulfilling the terms of their prenuptial agreement after the marriage occurs.[99] At that time, couples may take advantage of the marital deduction to avoid any tax consequences. These post-marital prenuptial-agreement transfers are allowed despite the fact they are transfers made in lieu of one which could be taxed—leading to perplexing results.

88. District of Columbia v. Lewis, 288 F.2d 137, 138 (1961).
89. *Id.* at 139.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 140.
94. *Id.*
95. *Id.* (quoting Meyer's Estate v. Comm'r, 110 F.2d 367, 368 (2d Cir. 1940)).
96. *Id.*
97. *Id.* at 141.
98. *Id.* at 140 (emphasis in original).
99. WILLBANKS, *supra* note 1, at 112.

D. Contract Law and Marriage as Consideration

1. Common Law

Despite the fact tax law refuses to view marriage as adequate and full consideration, marriage has long been considered adequate and full consideration under contract law. In fact, the highest consideration known to contract law is the promise of marriage.[100] In *Anderson v. Goins,* a man drafted a deed and gave it to a girl's mother for safe keeping prior to his marriage to the girl.[101] The mother was to record the deed after they married.[102] However, before the marriage occurred, the mother and the girl recorded the deed.[103] When the marriage did not occur, he sued the girl and her mother.[104] Subsequently, the mother and the girl moved to dismiss the case arguing the deed was void for public policy reasons and alternatively that the deed was nothing more than a gift.[105] However, the court found that "[m]arriage is always a good consideration for the execution of a deed."[106] And because there was no marriage, the court voided the deed for the girl and her mother's failure to provide consideration.[107]

Furthermore, a West Virginia court found that money exchanged in contemplation of marriage must be returned if the receiver of the money breaks off the engagement.[108] In *Bryan v. Lincoln*, the transferor gave his fiancée $5,000 to buy out her ex-husband's one-half interest in their property.[109] The fiancée was then supposed to place the property in the transferor's name.[110] The fiancée took the $5,000 and bought out her ex-husband's interest in the property, but unfortunately for the transferor, placed the property in her own name and remarried her ex-husband instead.[111] The circuit court dismissed the case, but the Supreme Court of Appeals reversed the case finding the transferor had a valid claim and

100. Prewit v. Wilson, 103 U.S. 22, 24 (1880).
101. Anderson v. Goins, 187 S.W.2d 415, 415 (Tex. Civ. App. 1945).
102. *Id.* at 415–16.
103. *Id.* at 416.
104. *Id.* at 415.
105. *Id.*
106. *Id.*
107. *Id.* at 417.
108. *See* Bryan v. Lincoln, 285 S.E.2d 152, 152–53 (W. Va. 1981).
109. *Id.* at 153.
110. *Id.*
111. *Id.*

deserved his day in court.[112]

A similar case, *Pryor v. Bond*, involved the forgiveness of a promissory note in consideration of marriage.[113] Prior to their engagement, a widower gave his fiancée a loan.[114] When they got engaged, the widower cancelled the promissory note and agreed to take on any future indebtedness of the fiancée.[115] However, the widower pushed the wedding date back for business purposes and then died before the marriage occurred.[116] Upon settling the estate, the executor sued the fiancée for her indebtedness to the widower.[117] The court held the fiancée's promise to marry the widower was "good and valuable consideration" for the discharge of any indebtedness.[118] Therefore, the court did not hold the fiancée liable for the debts.[119]

In another case, a suitor proposed to his fiancée by presenting her with a diamond ring and an amendment to a contract to purchase a property adding the fiancée as an additional purchaser.[120] "The deed to the property listed [the suitor and fiancée] as 'joint tenants with right of survivorship.'"[121] Shortly thereafter, the suitor broke off the engagement with the fiancée and sued to remove the fiancée from the deed and have the diamond ring returned.[122] However, the suitor died before the proceedings were completed, and the property passed to the fiancée upon the suitor's death per the right of survivorship in the deed.[123] Despite this, the court held it was appropriate for the fiancée to return the funds from the sale of the property to the suitor's estate because the property was "given solely in consideration of [a] marriage" that never occurred.[124]

Courts have even held that marriage is adequate consideration when the party was legally unable to marry the other party to the proposal. In *Ashley v. Dalton*, a sixty-year-old man followed a young woman to the store she owned and began courting the woman, boasting about the amount

112. *Id.* at 155.
113. Pryor v. Bond, 110 A.2d 539, 539–40 (D.C. 1955).
114. *Id.* at 539.
115. *Id.* at 539–40.
116. *Id.* at 540.
117. *Id.* at 539.
118. *Id.* at 540.
119. *Id.*
120. Northern Trust, NA v. Delley, 935 N.Y.S.2d 805, 806 (N.Y. App. Div. 2011).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 807.

of money he had.[125] The young woman informed the man she was in the middle of a divorce, but the man insisted that "after the divorce was granted . . . he was going to make . . . a good husband [to the woman], and that he was a good provider."[126] Although a friend informed the woman the man was married and "making a fool of her," the woman chose to take the man at his word.[127] Despite the fact the man was already married and incapable of marrying a second woman, when the man never married her, the court held the woman was entitled to sue for breach of promise to marry and recover damages.[128]

More frequently, courts generally find that the engagement ring must be returned to the proposer if an engagement ends because an engagement ring is a conditional promise predicated on a marriage actually occurring. In one lover's quarrel, a boyfriend decided to propose to his girlfriend in the hope that the engagement would ease the frequent arguing between the couple.[129] After the relationship remained troubled, the boyfriend attempted to break off the engagement several times.[130] However, the girlfriend had a hard time accepting the break-up and would threaten to harm herself when the boyfriend would bring up wanting to end the engagement.[131] Eventually the boyfriend resorted to separating from his girlfriend over e-mail.[132] The girlfriend moved out shortly after and refused to return the engagement ring.[133] Unable to recover the ring from the girlfriend, the boyfriend brought an action for replevin to retrieve the engagement ring.[134] The court upheld the trial court's determination that "[t]he engagement ring was a conditional gift presented in contemplation of a marriage that did not occur"; therefore, the boyfriend was entitled to the ring.[135]

In all of these cases marriage was valuable consideration. In fact, the courts easily decided these cases, rarely questioning marriage being adequate consideration. Aside from parties to a marriage providing love,

125. Ashley v. Dalton, 81 So. 488, 488 (Miss. 1919).
126. *Id.*
127. *Id.*
128. *Id.*
129. Cooley v. Tucker, 15-CA-01308-COA (¶ 2) (Miss. Ct. App. 2016).
130. *Id.* (¶ 4).
131. *Id.*
132. *Id.*
133. *Id.* (¶ 5).
134. *Id.*
135. *Id.* (¶ 12).

support, and companionship to each other, parties to a marriage also provide value in the form of housekeeping services, contribution to the household income, and make it possible for the other to excel in his or her profession by alleviating the time pressures of the day-to-day chores of living. It seems perplexing that contract law recognizes this value and holds marriage as the highest consideration,[136] yet the Legislature and the Supreme Court have said marriage is not adequate consideration for estate and gift-tax purposes.[137]

2. Uniform Premarital Agreement Act

Aside from the common law, the Uniform Premarital Agreement Act (Act) itself holds marriage as adequate consideration for prenuptial agreements. The Act technically "dispenses with the need for consideration as a prerequisite for the enforcement of premarital agreements" but states that marriage is required for it to be effective.[138] Thus, the Act implies that marriage is adequate consideration for a prenuptial agreement.

In *Prell v. Silverstein*, a couple "entered into [a] marriage with nothing"—no money or real property.[139] Despite this, the husband insisted on the couple entering into a prenuptial agreement because "a friend of [the husband] had lost millions of dollar[s] to two of his wives and [the friend] insisted [the husband] have a prenuptial agreement."[140] The wife agreed, and before their marriage the couple signed a handwritten prenuptial agreement agreeing to keep all personal assets separate upon divorce.[141] During the marriage the husband received $165,000 in "stocks and monetary gifts" that he used to purchase property the couple and their five children lived on.[142] When the couple initiated their divorce, the wife moved to invalidate the prenuptial agreement.[143] The family court determined the prenuptial agreement was unenforceable for lack of

136. *See* Prewit v. Wilson, 103 U.S. 22, 24 (1880).
137. *See* H.R. REP. NO. 72-708, at 47 (1932); Comm'r v. Wemyss, 324 U.S. 303, 307 (1945); Merrill v. Fahs, 324 U.S. 308, 312–13 (1945).
138. 41 AM. JUR. 2D *Husband and Wife* § 91 (2018).
139. Prell v. Silverstein, 162 P.3d 2, 3 (Haw. Ct. App. 2007).
140. *Id.* at 4.
141. *Id.* at 3–4.
142. *Id.* at 3–5.
143. *See id.* at 3.

consideration among other things.[144] The appeals court reversed this decision, finding the marriage was adequate consideration for the prenuptial agreement.[145] The husband testified he "wasn't going to marry [his wife] unless she signed the prenuptial agreement."[146] This, the court stated, made it clear that marriage was part of the consideration for executing the prenuptial agreement.[147]

Even in more complex prenuptial agreements, a party to the agreement may try to argue there was not adequate consideration. In one case a couple entered into a prenuptial agreement a month before their wedding.[148] The prenuptial agreement spelled out "that the sole consideration for the paper writing was (1) the contemplated marriage between the parties; (2) the mutual promises and covenants contained in this paper writing; and (3) the sum of ten thousand dollars to be paid by [the husband] to [the wife] on the day of the marriage."[149] Unfortunately, the husband never paid the wife the $10,000.[150] Based on this fact, the trial court determined the payment of $10,000 from the husband to the wife was a condition precedent the husband never performed thus invalidating the prenuptial agreement.[151]

The appellate court began its analysis by stating the law is clear that marriage is adequate consideration for a prenuptial agreement, and the agreement will be enforced "so long as the marriage [takes] place."[152] However, because there were three separate types of consideration listed in the prenuptial agreement, the court needed to apply the principles of contract interpretation to determine the validity of the agreement.[153] In reviewing relevant precedent, the court stated: "Conditions precedent are not favored by the law."[154] It also noted that when provisions in the contract are unclear as to whether there is a condition precedent, the court will construe a term as a promise instead of a condition precedent.[155] Based on this, the court found the term of payment of $10,000 from the husband to the wife was not a condition precedent but one of three promises that

144. *Id.* at 6.
145. *Id.* at 11.
146. *Id.* at 12.
147. *Id.*
148. Harllee v. Harllee, 565 S.E.2d 678, 679 (N.C. Ct. App. 2002).
149. *Id.* at 681.
150. *Id.*
151. *Id.*
152. *Id.* at 682.
153. *Id.*
154. *Id.*
155. *Id.*

made up the consideration for the prenuptial agreement.[156] Furthermore, the court declared the prenuptial agreement expressly stated it was entered into "with the express intention on the part of both parties that this [a]greement be legally binding."[157] Finally, after noting that invalidating a contract for lack of consideration requires a showing of complete lack of consideration, the court found "the marriage of the parties was sufficient consideration to support the premarital agreement."[158] Therefore, the failure of the husband to pay the wife the $10,000 did not invalidate the prenuptial agreement.[159]

Similarly, in *Barnhill v. Barnhill*, an elderly couple entered into a prenuptial agreement after having an attorney explain the contents of the document to the husband and wife.[160] Knowing the effect of the prenuptial agreement, the wife was not happy about signing it.[161] However, the husband informed the wife he would not marry her if she did not sign it.[162] The wife ultimately signed the agreement.[163] Four years later the wife tried to invalidate the prenuptial agreement during the divorce from her husband.[164] The wife argued the only consideration she received from her husband when signing the document was his relinquishment of a claim to any of her property, and because the husband's estate was so much larger than her estate, the contract lacked adequate consideration.[165] The court held the wife's claim was without merit because marriage alone is sufficient consideration for a prenuptial agreement.[166] The fact that the husband insisted on the wife signing the prenuptial agreement prior to the marriage made it clear the marriage itself was sufficient consideration.[167]

A court has also found that contracting to stay married is adequate consideration. In *Allen v. Allen*, a wife filed to divorce her husband but "subsequently non-suited upon the parties entering an agreement entitled 'Memorandum of Understanding.'"[168] In this agreement the husband

156. *Id.* at 683.
157. *Id.*
158. *Id.*
159. *Id.*
160. Barnhill v. Barnhill, 386 So.2d 749, 751 (Ala. Civ. App. 1980).
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. Allen v. Allen, 789 S.E.2d 787, 789 (Va. Ct. App. 2016).

consented to staying married to the wife for twenty years and placing the wife on the husband's insurance.[169] If the husband took any action to disqualify the wife from being covered by the husband's insurance, the husband was to provide for the wife's healthcare expenses for the remainder of the twenty years.[170] Seven months after entering into said agreement, the husband filed for a divorce.[171] The wife responded by "fili[ng] a plea in bar arguing that pursuant to the parties' . . . agreement, [the] husband was precluded from seeking a divorce for a period of twenty years."[172] The court agreed with the wife that the husband's consent to stay married for twenty years was "valid consideration supporting the contract."[173] Therefore, when the husband filed for a divorce, he breached the contract, but the court dismissed the wife's claim finding "[t]he contract clearly spell[ed] out [the] wife's remedy; that [it was the] husband's personal liability for any and all medical expenses [the wife] incur[ed] over the next [twenty] years that would have been otherwise covered under [the] husband's . . . insurance plan."[174]

E. Why Marriage Should be Adequate and Full Consideration

1. Marriage as Consideration

A marriage involves two people joining into a partnership in which both parties bring valuable assets to help support each other. The assets may be property, money, the ability to work and provide for the partnership's well-being; homemaking skills, such as childcare or cleaning; or the assets may simply be love, support, and companionship. These assets should be valuable consideration the other party takes into account when deciding to enter into a marital union. And the parties should take care to make sure they are getting an equal trade of assets. Although it may be difficult to monetize the consideration of love, support, companionship, property, money, ability to work, and homemaking skills a party may bring to the partnership; it could be monetized for tax purposes. "The work that homemakers do for their families is not

169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 791.
174. *Id.* at 794.

[currently] commodified."[175] But because this work and other non-commodified assets are valuable and capable of being commodified, there is no reason that estate and gift tax law should exclude marriage from being adequate and full consideration in money and money's worth.

Typically, people work "nine to twelve hours a day."[176] This means the "ideal worker" would have little time for housework.[177] And if he or she had children, he or she could never take "time off for childbearing and [would have] no daytime child care responsibilities."[178] Entering into a marital partnership allows for each party to split these life responsibilities in order to empower the marital unit to prosper more than each partner would individually. However, one person in the marriage may be the primary wage earner and the other party the primary homemaker. In the event there is a primary homemaker, that person "make[s] it possible for [the] primary wage earner[] to achieve [the] 'ideal-worker' status through full-time, year-round participation in wage labor—largely unhindered by child care or other domestic responsibilities."[179] However, by taking on the role of the primary homemaker, the homemaker is prevented "from maximizing [his or] her own earning potential."[180] This leads to the "the typical marriage involv[ing] the primary homemaker's provision of household services in exchange for a share of the primary wage earner's wages."[181] Therefore, even in marriages with a primary homemaker and primary wage earner, the consideration is equally valuable.

2. Valuing Home Production

Although commodifying homemaking services is more difficult than commodifying earned wages, courts, economists, and policy makers still manage it. As one commentator described it:

> Valuation methods use a two-step process when estimating the value of lost household services. The first step is to estimate the

175. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 18 (1998).
176. Joan Williams, *Is Coveture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2236 (1994).
177. *Id.*
178. *Id.*
179. Ertman, *supra* note 175, at 21–22.
180. *Id.* at 41.
181. *Id.* at 42.

> time spent in household production activities, often derived from the American Time Use Survey (ATUS) or, in court cases, personal testimony. The second step of valuing household production is to connect time spent with market value.[182]

"Experts in wrongful death, personal injury, or divorce litigation cases commodify homemaking contributions through at least three different calculations: replacement cost, lost opportunity cost, and econometric models."[183] The opportunity cost valuation begins by assuming a homemaker is doing his or her best work.[184] Thus, "the value of [the] home production must at least equal the value of the next-best alternative in the market."[185] Under this approach, a person's production is valued against the labor-market employment that matches the person's "productivity-related characteristics—[taking] job experience, training/education, aptitude, etc." into account.[186] Although critics argue this method undervalues certain homemaking skills "if there is no market equivalent."[187]

The replacement–cost method of valuing a person's production is much more straightforward. This approach simply looks at what it would cost to replace the household production provided by the person.[188] Essentially, one would identify an equivalent job in the labor market and determine what an appropriate salary or wage is for that job.[189] The difficulty with this method is determining the level of expertise the homemaker had—were they closer to a gourmet chef or a restaurant cook?[190]

The econometric method of determining home-production value is the most complex valuation method—"combin[ing] economic theory with statistical analysis."[191] This methodology looks at the "efficient use of scarce factors of production, economies of scale[;] and joint

182. Aaron Lowen & Paul Sicilian, *An Alternative Valuation Method for Household Production Using American Time Use Survey Data*, 22 J. LEGAL ECON. 1, 3 (2015).
183. Ertman, *supra* note 175, at 43.
184. Charles C. Fischer, *The Valuation of Household Production: Divorce, Wrongful Injury and Death Litigation*, 53 AM. J. ECON. & SOC. 187, 188 (1994).
185. *Id.*
186. *Id.*
187. Ertman, *supra* note 175, at 43.
188. Fischer, *supra* note 184, at 189.
189. *Id.* at 190.
190. Ertman, *supra* note 175, at 43.
191. Fischer, *supra* note 184, at 190.

consumption."[192] Because this methodology takes these microeconomic theories into account in determining the value of household production, it is widely used in academic research and unpopular with lawyers and judges.[193]

Although these valuations occur after death or divorce, they prove an important point—marital contribution is capable of being valued. Thus, *Wemyss*'s assumption that marriage "was not a consideration reducible to money value" seems debatable.[194] Marriage is a partnership where both parties provide services, whether it is homemaking or wage earning, that helps the marital unit prosper more than each party would have individually. Clearly marriage provides monetary benefits that tax law seems to ignore.

For example, in *Potts v. Potts*, a husband and wife entered into a prenuptial agreement giving the wife limited distributions calculated by a formula that did not take any spousal maintenance into account.[195] The husband and wife were married for twenty years before they divorced.[196] During the twenty years of marriage the wife "devoted her efforts to raising the children and running the household and thereby supporting [her husband's] business."[197] The court found that all of the surrounding circumstances and the unfairness of the prenuptial agreement supported a "determination that the prenuptial agreement was invalid and not enforceable."[198] Thus, the court essentially gave a value to the wife's contribution to the marriage and found the prenuptial agreement did not live up to it.[199]

In *Gross v. Gross*, a couple worked together at the Pepsi-Cola bottling company before falling in love and getting married.[200] Both were previously married with children.[201] The husband "was a principal in a successful family business" and wanted to ensure his two children would someday inherit that business.[202] Therefore, both the husband and wife

192. *Id.* at 191.
193. Ertman, *supra* note 175, at 43.
194. Comm'r v. Wemyss, 324 U.S. 303, 305 (1945).
195. Potts v. Potts, 303 S.W.3d 177, 190 (Mo. Ct. App. 2010) (per curiam).
196. *Id.*
197. *Id.*
198. *Id.*
199. *See id.*
200. Gross v. Gross, 464 N.E.2d 500, 502 (Ohio 1984).
201. *Id.*
202. *Id.*

agreed a prenuptial agreement was the best option for them, and they hired attorneys and entered into negotiations about the agreement.[203] There were numerous changes made throughout the drafting of the document.[204] The wife's attorney advised her not to sign the prenuptial agreement while reviewing the final draft, but the wife signed anyways.[205] Per the prenuptial agreement, the wife was only to receive a car and $200 per month in support and maintenance in the event of a divorce.[206] After fourteen years of marriage the husband and wife decided to get a divorce.[207] By the time of the divorce, the husband had increased his total assets from $550,000 to "$8,000,000 with a net equity of $6,000,000."[208] Despite this enormous increase in the husband's income since the couple was married, the trial court found that because there was no evidence the prenuptial agreement was entered into under "fraud, duress, or misrepresentation, and there had been a full disclosure of the assets," the prenuptial agreement was valid and enforceable.[209] The appeals court reversed, finding the prenuptial agreement was invalid because of the husband's fault in the divorce.[210] The husband appealed to the state supreme court.[211]

The Supreme Court of Ohio began its analysis by assessing the three public-policy concerns of prenuptial agreements: (1) the agreement is entered into absent fraud, duress, or misrepresentation, (2) "there was full disclosure," and (3) the terms of the agreement must "not promote or encourage divorce or profiteering by divorce."[212] Although the court wanted to uphold parties to a prenuptial agreement's freedom to contract, it found that a court must review the conscionability of the provisions involving support or maintenance at the time of the divorce.[213] Support and maintenance provisions will generally be upheld, but the court was particularly concerned with the validity of these provisions when circumstances of the couple changed over the course of the marriage.[214] In reviewing the execution and terms of the prenuptial agreement, the court

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 503.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 504.
212. *See id.* at 506.
213. *Id.* at 508.
214. *Id.* at 509.

found the agreement was fair and reasonable.[215] However, the court invalidated the prenuptial agreement because the husband's income increased dramatically during the marriage.[216] In the majority's reasoning, it noted that "[t]o require the wife to return from [an] opulent standard of living to that which would be required within the limitations of the property and sustenance provisions of [the] agreement, could well occasion a hardship or be significantly difficult for the former wife."[217] Thus, the majority's main focus was on the wife maintaining a similar lifestyle after her divorce.[218]

Whereas the majority focused on the wife's standard of living, the partial concurrence and partial dissent was more concerned with what the wife contributed to the husband's dramatic increase in income.[219] The justice stated: "The archaic notion that the only contributions of any value to a marriage are those of a wage-earning husband, and not those of a homemaker, has long ago been discarded."[220] The justice further noted that the terms of the prenuptial agreement did not make it clear whether the agreement was also to apply to any property obtained throughout the marriage.[221] The justice believed this silence should be construed to give recognition to "the substantial economic value of a homemaker's services."[222] Thus, the concurring and dissenting justice advocated for the court to focus on a spouse's contribution to the marriage in determining the unfairness of terms and to acknowledge those contributions as valuable and calculable. In his final note, the justice also brought light to the problematic outcomes that may occur from the majority's "lifestyle" standard, in which it would promote spousal support for a spendthrift over one who valued saving and lived a modest lifestyle.[223]

In *Ranney v. Ranney*, the couple was married for eleven years and had two children before they divorced.[224] In the divorce, the court granted the wife the "home and furnishings, an automobile, the sum of $25,000 as

215. *Id.* at 510.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 512 (Celebrezze, J., concurring in part and dissenting in part).
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. Ranney v. Ranney, 548 P.2d 734, 735 (Kan. 1976).

alimony, and child support."[225] A few years after their divorce, the couple contemplated remarriage.[226] Before the husband would marry the wife a second time, he set out to prepare a prenuptial agreement for the couple to sign prior to the second wedding.[227] Although the wife denied reading the prenuptial agreement, she conceded that she had signed it before the marriage took place.[228] The second marriage lasted another eleven years before the husband filed for a divorce.[229] Per the prenuptial agreement, the husband and wife were to keep their separate assets, and the husband's alimony and support payments were to cease in the case of divorce.[230] The court invalidated the prenuptial agreement as being unfair, inequitable, and against public policy.[231] Specifically, the court noted the prenuptial agreement did not take into account that the property the parties owned was joint property they acquired through joint efforts throughout the couple's marriage.[232] In each of these cases, a court was faced with assigning some form of value to contributions a spouse made to a marriage. And in every case, the court found a way to assess a value for those contributions.

F. Why Relinquishment of Dower, Curtesy, and Other Marital Rights Should Be Adequate and Full Consideration

At a minimum, the relinquishment of dower, curtesy, and other marital rights should establish adequate and full consideration for gift tax law purposes. Although "[t]he rights to dower and curtesy have been abolished in many jurisdictions," these rights have primarily been "supplanted by laws that entitle a surviving spouse to choose between accepting whatever is provided for the spouse in the decedent's will or taking a statutorily fixed percentage of the estate."[233] Relinquishing any of these rights could lead to the loss of a person's home, other real or personal property one has grown attached to throughout a marriage, alimony payments, etc. This relinquishment of rights is easily deducible to a monetary value.

225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 736.
229. *Id.*
230. *Id.*
231. *Id.* at 738.
232. *Id.* at 737.
233. 25 AM. JUR. 2D *Dower and Curtesy* § 4 (2014).

Furthermore, courts have already held that the relinquishment of marital rights is sufficient consideration for the enforcement of prenuptial agreements.[234] Courts have even gone so far as to hold that "consideration moving to the spouse or prospective spouse surrendering marital rights must be fair and equitable in the particular circumstances"—thus requiring an evaluation of those relinquishments.[235]

In order for a prenuptial agreement to be valid, there must be "full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property."[236] Although fair disclosure does not require detailed disclosure, information about the "general and approximate nature concerning the net worth of the other" should be given to each party of the prenuptial agreement.[237] However, knowledge of the other party's financial situation may substitute for fair disclosure, as those in an intimate relationship are likely to know each other's financial position in life.[238] This disclosure of assets allows parties to a prenuptial agreement to deduce the monetary value of their relinquishment of marital rights—seemingly to determine whether they are exchanging adequate and full consideration in money and money's worth.

In *Fahs*, marriage was not the only consideration exchanged; the taxpayer gained a monetary value for the marital rights his wife released in the prenuptial agreement.[239] The value of said marital rights could easily be deduced to a monetary value using mortality tables, allowing for a calculation of the consideration exchanged.[240] At the time of entering into the prenuptial agreement, the taxpayer had "cash and securities worth more than $5,000,000, and . . . real estate valued at $135,000."[241] The wife relinquished any claims to these assets in exchange for three trusts in the amount of $300,000 each.[242] Knowing the taxpayer's financial position, the wife could deduce whether she was entering into a fair contract. Furthermore, it appears the wife gave adequate and full consideration for the three trusts created for her on the face of the transaction, and mortality

234. 41 AM. JUR. 2D *Husband and Wife* § 91 (2015).
235. Potts v. Potts, 303 S.W.3d 177, 188 (Mo. Ct. App. 2010) (per curiam).
236. 41 AM. JUR. 2D *Husband and Wife* § 92 (2015).
237. 7 AM. JUR. PROOF OF FACTS 3D *Premarital Agreement* 581 § 4 (1990).
238. *Id.*
239. Merrill v. Fahs, 324 U.S. 308, 314–15 (1945) (Reed, J., dissenting).
240. *Id.* at 314.
241. *Id.* at 309 (majority opinion).
242. *Id.*

tables could have been used to confirm that notion.[243]

Aside from the relinquishment of marital rights being deducible to a monetary value, the Tax Court had already decided the estate and gift tax should be read separately prior to *Fahs*.[244] In *Wemyss* the Supreme Court partially relied on the Tax Court's prior ruling because of the "major role . . . [it] plays in federal tax litigation."[245] Yet the same Court refused to acknowledge the Tax Court's prior rulings on interpreting the estate and gift tax together in *Fahs* when it stated "[U]nlike the *Wemyss* case" the *Fahs* case did not come to the Court "by way of the Tax Court. No aid can therefore be drawn from a prior determination by the tribunal specially entrusted with tax adjudications."[246]

The Tax Court has found that the amendment to the estate tax provision excluding dower, curtesy, and other marital rights from being adequate and full consideration in money and money's worth is inapplicable to the gift tax.[247] In *Bristol v. Commissioner*, the U.S. Board of Tax Appeals confronted a case where a taxpayer entered into a prenuptial agreement with his wife where she released all of her marital rights in the taxpayer's property.[248] In exchange for this relinquishment of rights, the taxpayer purchased two annuities for his wife and gave her an interest in two parcels of real estate.[249] The U.S. Board of Tax Appeals noted "[b]oth the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports," yet Congress only made an amendment to the estate tax provision.[250] Therefore, the U.S. Board of Tax Appeals held that the relinquishment of dower, curtesy, or other marital rights is adequate and full consideration for gift tax purposes.[251]

In another case involving a divorce settlement, the Tax Court was again faced with interpreting the gift tax's definition of *adequate and full consideration in money and money's worth*.[252] In *Jones v. Commissioner*,

243. *Id.* at 314 (Reed, J., dissenting).
244. *Id.* at 315.
245. Comm'r v. Wemyss, 324 U.S. 303, 305 (1945).
246. *Fahs*, 324 U.S. at 310.
247. *See* Bristol v. Comm'r, 42 B.T.A. 263, 268 (B.T.A. 1940), *vacated sub nom.* Comm'r v. Bristol, 121 F.2d 129 (1st Cir. 1941); Jones v. Comm'r, 1 T.C. 1207, 1209 (T.C. 1943); Comm'r v. Beck's Estate, 129 F.2d 243 (2d Cir. 1942).
248. *Bristol*, 42 B.T.A. at 269.
249. *Id.*
250. *Id.*
251. *Id.*
252. *See* Jones v. Comm'r, 1 T.C. 1207, 1208–09 (T.C. 1943).

a husband and wife negotiated a property settlement outside of their divorce proceeding.[253] In the divorce complaint, the husband stated "there [were] no children . . . of the marriage, and all property rights of [the wife] and [husband] [had] been settled and adjusted."[254] After the divorce was finalized, the husband and wife executed their property agreement, and the husband paid the wife $190,000 and transferred her two properties.[255] The Commissioner subsequently imposed a gift tax, asserting for the first time that the gift tax should not only apply to payments made under a prenuptial agreement in exchange for relinquishment of marital rights but also to payments made incidental to divorce proceedings and the settlements of rights to maintenance and support.[256] Although the Tax Court distinguished the "satisfaction of the wife's right to support by her husband as an incident of their divorce" in this case from the relinquishment of marital rights, the Tax Court took the opportunity to reaffirm its view that Congress did not intend to exclude dower, curtesy, and other marital rights from being adequate and full consideration in money and money's worth, despite the First Circuit vacating *Bristol*.[257]

The Tax Court went on to reference *Commissioner v. Beck's Estate*, a Second Circuit case affirming the Tax Court's view that the estate and gift tax provisions should be read separate.[258] In *Beck's Estate*, the Second Circuit explicitly stated Congress's silence in the gift tax provision on dower, curtesy, and other marital rights was "strident."[259] Therefore, the court believed Congress could not have intended the estate and gift tax provisions to be read together.[260]

Despite the Supreme Court's alleged reliance on the Tax Court's expertise because of its "major role" in federal tax litigation, the Supreme Court did not take any of these Tax Court cases into account when determining whether Congress's interpretation of *adequate and full consideration in money or money's worth* should be binding on the gift tax as well as the estate tax.[261] It seems rather peculiar the Court was so

253. *Id.* at 1208.
254. *Id.*
255. *Id.*
256. *Id.* at 1209.
257. *Id.* at 1209–10.
258. *Id.*
259. Comm'r v. Beck's Estate, 129 F.2d 243, 245 (2d Cir. 1942).
260. *See id.*
261. Merrill v. Fahs, 324 U.S. 308, 310. *Compare Fahs*, 324 U.S. at 310–13, *with* Comm'r v. Wemyss, 324 U.S. 303, 305.

disinterested in the Tax Court's view on a tax issue.

III. CONCLUSION

It is absurd that tax law refuses to recognize marriage and the relinquishment of marital rights as adequate and full consideration when contract law views marriage as the highest consideration.[262] Even the Uniform Prenuptial Agreement Act acknowledges marriage alone is adequate consideration for a prenuptial agreement.[263] Critically, the Supreme Court alleges it gives high deference to the Tax Court's opinion on tax matters,[264] yet it refused to acknowledge the Tax Court's opinion on whether dower, curtesy, and other marital rights should be excluded from being adequate and full consideration in money and money's worth for gift tax purposes.[265]

The Supreme Court's rulings in *Wemyss* and *Fahs* appear to be a hindrance to prenuptial agreements on their face; however, parties to a prenuptial agreement may avoid any possible adverse tax consequences by making any contracted transfers after the marriage is completed to take advantage of the marital deduction.[266] Promoting a system such as this prevents parties to prenuptial agreements from ensuring these agreements will be properly effected and allows for couples to *work the system* to possibly avoid negative tax consequences. Aside from this, allowing prenuptial agreement transfers to be completed prior to the marriage could allow an economically weaker spouse to the agreement to use the impending wedding as leverage to ensure the contract is fair and fully performed. Furthermore, problems of lengthy litigation due to botched transfers or family feuds could be resolved by ensuring the transfers are made prior to the marriage. Because of this, the idea of consideration within tax law should be revisited and reconsidered.

262. Prewit v. Wilson, 103 U.S. 22, 24 (1880).
263. 41 AM. JUR. 2D *Husband and Wife* § 91 (2015).
264. *Wemyss*, 324 U.S. at 305.
265. *See Fahs*, 324 US at 312–13; Bristol v. Comm'r, 42 B.T.A. 263, 268–69 (B.T.A. 1940), *vacated sub nom*. Comm'r v. Bristol, 121 F.2d 129 (1st Cir. 1941); Jones v. Comm'r, 1 T.C. 1207, 1209 (T.C. 1943).
266. WILLBANKS, *supra* note 1, at 112.