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Antenuptial Contracts and Divorce in Kentucky: A Better Approach

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Antenuptial Contracts and Divorce in Kentucky: A Better Approach

The antenuptial contract was a wicked device to evade the laws applicable to marriage relations, property rights, and divorces, and is clearly against public policy and decency. It was nothing more, in effect, than an attempt on the part of the [husband] . . . to legalize prostitution, under the name of marriage. . . .[1]

INTRODUCTION

Although describing an antenuptial contract drawn decidedly in favor of the husband,[2] the above excerpt reflected the generally accepted view of antenuptial contracts contemplating divorce in the first half of this century.[3] While antenuptial contracts settling property rights in the event of either spouse's death were favored by the courts,[4] contracts settling property or support rights upon divorce led to their being held void *ab initio* because of the courts' concerns that such contracts would encourage and facilitate divorce.[5] With the

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[1] *In re* Duncan's Estate, 285 P. 757, 757 (Colo. 1930). An antenuptial (or prenuptial) agreement is an agreement between prospective spouses, "or between both or either of them and a third party, entered into before marriage, but in contemplation and in consideration thereof, whereby the property [or other] rights of one or both of the prospective spouses are determined." 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90, at 90-26 (1982).

[2] *See* 285 P. at 757 (contract provided for separation in the event of marital discord, with the wife accepting a payment of $100 for each year of marriage, and relinquishing all other claims for maintenance, dower or widow's rights).

[3] Any provision in an antenuptial agreement predetermining alimony or property settlement in the event of divorce is generally held to be unenforceable. *See* 2 A. LINDEY, *supra* note 1, § 90, at 90-33. *See also* Oliphant v. Oliphant, 7 S.W.2d 783, 788 (Ark. 1928); French v. McAnarney, 195 N.E. 714, 716 (Mass. 1935); Fricke v. Fricke, 42 N.W.2d 500, 502 (Wis. 1950). For a discussion of the validity of these contracts see generally 17 AM. JUR. *Divorce and Separation* § 16 (1930); Annot., 57 A.L.R.2D 942 (1958); Annot., 98 A.L.R. 533 (1935); Annot., 70 A.L.R. 826 (1931).

[4] *See, e.g.*, Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962); Kuhnen v. Kuhnen, 184 N.E. 874, 877-78 (Ill. 1933); Stratton v. Wilson, 185 S.W. 522, 525-28 (Ky. 1916); Stewart v. Stewart, 23 S.E.2d 306, 308-09 (N.C. 1942); Leonard v. Prentice, 43 P.2d 776, 778-80 (Okla. 1935).

[5] *See, e.g.*, Fricke v. Fricke, 42 N.W.2d at 502. *See generally* Annot., 57 A.L.R.2D

advent of no-fault divorce laws and the changes in society which such laws represent, this strict prohibition has gradually given way to an ad hoc analysis of these contracts by many courts.[6]

The Kentucky Court's resistance to this trend is apparent in a 1981 decision, *Jackson v. Jackson*.[7] In *Jackson*, the Court was called on to assess the validity of an antenuptial contract which provided, in part, that the husband would " 'furnish [his intended spouse] a decent support during his natural life.' "[8] The agreement served to release all property rights upon the death of either spouse, and the provision for "decent support" was not contingent on divorce or separation of the parties. The Court upheld a lower court's enforcement of the support provision during a divorce action, but in so doing the Court also reaffirmed *Stratton v. Wilson*,[9] a 1916 decision voiding antenuptial contracts in consideration of divorce.[10]

The *Stratton* decision dealt with an antenuptial contract in which the wife released all her estate rights in exchange for $25,000 payable upon her husband's death. The contract also provided that she would accept $10,000 in relinquishment of all alimony, maintenance, and attorney fees in the event of divorce.[11] Upon the husband's death, his niece sought to en-

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942, 943 (1958) (upholding such provisions could encourage a property owning spouse to provoke or openly seek a divorce).

[6] *See, e.g.*, Barnhill v. Barnhill, 386 So. 2d 749, 751-52 (Ala. Civ. App. 1980); Spector v. Spector, 531 P.2d 176, 181-85 (Ariz. Ct. App. 1975); Newman v. Newman, 653 P.2d 728, 731-36 (Colo. 1982) (en banc); McHugh v. McHugh, 436 A.2d 8, 11-13 (Conn. 1980); Parniawski v. Parniawski, 359 A.2d 719, 720-22 (Conn. Super. Ct. 1976); Burtoff v. Burtoff, 418 A.2d 1085, 1088-91 (D.C. 1980); Posner v. Posner, 233 So. 2d 381, 382-86 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); Scherer v. Scherer, 292 S.E.2d 662, 664-67 (Ga. 1982); Rossiter v. Rossiter, 666 P.2d 617, 620-22 (Hawaii Ct. App. 1983); Volid v. Volid, 286 N.E.2d 42, 46-48 (Ill. App. Ct. 1972); Tomlinson v. Tomlinson, 352 N.E.2d 785, 788-91 (Ind. Ct. App. 1976); Matlock v. Matlock, 576 P.2d 629, 632-34 (Kan. 1978); Osborne v. Osborne, 428 N.E.2d 810, 814-17 (Mass. 1981); Hafner v. Hafner, 295 N.W.2d 567, 571-72 (Minn. 1980); Buettner v. Buettner, 505 P.2d 600, 604-05 (Nev. 1973); Unander v. Unander, 506 P.2d 719, 721-22 (Or. 1973); Laird v. Laird, 597 P.2d 463, 467-68 (Wyo. 1979).

[7] 626 S.W.2d 630 (Ky. 1981).

[8] *Id.* at 631.

[9] 185 S.W. 522 (Ky. 1916).

[10] 626 S.W.2d at 632.

[11] 185 S.W. at 522.

force the estate settlement clause of the contract.[12] The court found the contract's alimony clause void, "as the law will not permit parties contemplating marriage to enter into a contract providing for, and looking to, future separation after marriage."[13] Nevertheless, by holding the contract clauses separable, the Court was able to uphold the estate settlement clause.[14]

The Kentucky Supreme Court upheld the *Jackson* agreement by focusing on the agreement's failure to mention divorce or separation[15] and, thus, able to reconcile its holding with *Stratton*, finessed the more difficult task of reexamining the *Stratton* doctrine. Although it implied a willingness to make such a reexamination of *Stratton*, the Kentucky Court in *Jackson* chose not to do so.[16] The prevalence of divorce in recent history,[17] the adoption of no-fault divorce in Kentucky,[18] and the changing status of women in today's society[19]

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[12] *Id.* at 524.

[13] *Id.* at 525.

[14] *Id.* at 525-26.

[15] 626 S.W.2d at 632.

[16] *Id.* As of this writing, the latest Kentucky case dealing with antenuptial contracts contemplating divorce was Carter v. Carter, 656 S.W.2d 257 (Ky. Ct. App. 1983). The Kentucky Court of Appeals did not address the validity issue since it held the contract to have been revoked. *Id.* at 258.

[17] Nationally, the divorce rate per 1,000 married women, 15 years old and over had risen from 9.2% in 1960 to 22.8% in 1979. *See* DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 82 (103d ed. 1982-83) (table no. 124). This raised the number of divorced persons per 1,000 married persons from 35 in 1960 to 109 in 1981. *See id.* at 40 (table no. 51).

In Kentucky, the number of divorces almost doubled between 1965 and 1979. There were 8,300 divorces in 1965 as compared with 16,000 in 1979. *See id.* at 84 (table no. 127) (1979 statistic is incomplete). In the same time frame, marriages only increased from 28,300 to 34,000, less than a 25% increase. *See id.* at 83 (table no. 126) (1960 statistic is based on the number of marriage licenses; 1979 statistic is incomplete).

More importantly for antenuptial contract purposes, widowed and divorced women comprised 20.3% of the female population above the age of 18 in 1981, and, the number of remarriages of women almost tripled from 1960 to 1979, increasing from 197,000 to 582,000. *See id.* at 38, 82 (table nos. 49 & 124) (remarriage statistics are skewed since 1960 figures include 33 states including New York but exclude New York City; 1979 statistics include 42 states and the District of Columbia).

[18] *See* KY. REV. STAT. ANN. §§ 403.150, .170 (Bobbs-Merrill Cum. Supp. 1982) [hereinafter cited as KRS].

[19] Inherent in the policy prohibiting antenuptial contracts contemplating divorce is a paternalistic attitude toward women. This attitude is no longer warranted. *See,*

dictate a reexamination of *Stratton*'s prohibition of antenuptial contracts contemplating divorce.

This Note traces the historical development of the public policy invalidation of antenuptial contracts contemplating divorce. It examines the rationale behind this public policy and questions the validity of this rationale in light of contemporary reality. In addition, it reviews the recent trend towards validation of these contracts and discusses the various approaches used by the courts, legislatures, and commentators. Concluding that the underlying rationale for per se invalidation of antenuptial contracts contemplating divorce is no longer sound, this Note proposes a treatment more consistent with present public policy as expressed by current legislation.

I. A HISTORICAL VIEW OF ANTENUPTIAL CONTRACTS AND PUBLIC POLICY

A. *The Common Law*

At common law, two policies weighed against the validity of antenuptial contracts contemplating divorce. First, a marriage valid in its inception was indissoluble, as divorce was a "matrimonial cause" cognizable only in the Ecclesiastical Courts and the Church refused to recognize an absolute divorce.[20] This "state" interest in the preservation of marriage has continued, albeit statutorily altered regarding dissolubility, into the present day and is the basis for the public policy underlying decisions invalidating antenuptial contracts.[21] Second, common law coverture merged the wife's identity with the husband's, not only depriving the spouses of the capacity of making contracts during marriage, but also extinguishing any preexisting agreement between them.[22] Statutory law has since abolished this common law rule.[23] However, the concept of marriage as the foundation of both the family and society

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e.g., Parniawski v. Parniawski, 359 A.2d at 720-21; Volid v. Volid, 286 N.E.2d at 46-47; Laird v. Laird, 597 P.2d at 468.

[20] Posner v. Posner, 233 So. 2d 381, 382 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

[21] *Id.*

[22] *See* 2 A. LINDEY, *supra* note 1, § 90, at 90-27 to -28.

[23] *Id.* at 90-28.

remains unchanged.[24]

B. *Early Decisions*

The state's asserted interest in the preservation of marriage was the basis for numerous early decisions invalidating antenuptial agreements contemplating divorce—whether relating to support or property rights.[25] In *Oliphant v. Oliphant*,[26] previously married and divorced parties executed an antenuptial agreement whereby the wife waived her rights of homestead, dower and alimony in the event of divorce. The court held that an antenuptial contract governing the disposition of property only in case of a divorce is contrary to public policy and is, therefore, void.[27]

In addition, courts felt that the majority of antenuptial contracts would not be equally favorable to both spouses, thereby promoting divorce by making it profitable for one of the spouses to cause a separation and reap the rewards of the agreement.[28] This concept was reflected in the Restatement of Contracts, which provided that "[a] bargain between . . . persons contemplating marriage, for separation or divorce is illegal."[29] This provision was followed by an illustration:

> A and B who are about to marry enter an antenuptial bargain providing that if they find it impossible to live together amicably, and therefore separate, their respective interests in what they own shall remain as they were before marriage. The bargain is illegal since its tendency is to lead to separation.[30]

Two early California cases echo this sentiment. *Pereira v. Pereira*[31] involved a reconciliation agreement providing for a $10,000 settlement in satisfaction of the wife's alimony, costs, fees, and property rights should the husband give the wife a

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[24] Posner v. Posner, 233 So. 2d at 382.
[25] *See, e.g.*, cases cited *supra* note 3.
[26] 7 S.W.2d 783 (Ark. 1928).
[27] *Id.* at 788.
[28] *See, e.g., id.* at 788-89.
[29] RESTATEMENT OF CONTRACTS § 584(1) (1932).
[30] *Id.* § 584 illustration 2.
[31] 103 P. 488 (Cal. 1909).

new cause of action for divorce.[32] The court viewed this agreement as being conducive to divorce, since at the time of the agreement the wife's share of the community property was worth at least $28,500.[33] Finding that if the husband "should, after its execution, be moved by evil impulses to commit anew the offenses against his wife which first gave her cause for divorce . . . the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury,"[34] the court held the contract void. In *Whiting v. Whiting*,[35] an antenuptial agreement, providing for a $5,000 payment to the wife in lieu of her claims to any fees, alimony, or property rights upon separation, divorce, or death, was held promotive of divorce and void.[36]

Kentucky's highest court has viewed such contracts in a similar vein. In *Stratton v. Wilson*,[37] the court considered its invalidation of contracts providing for future separation after marriage

> but a manifestation of a long-settled policy of the law to the effect that it is beneficial to society that the marital relation should not be disturbed or its happiness marred, but that it should be upheld and encouraged, and that the parties to it should not be led into the breaking of the vows by the allurments [sic] of any stipulations which they may enter into before marriage.[38]

The fear that antenuptial contract provisions would tempt husbands to either desert their wives, or compel their wives to leave them, in order to secure a profit, was a pervasive theme in these early cases.[39] This fear, coupled with the state's inter-

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[32] *Id.* at 489.

[33] *See id.* at 490.

[34] *Id.*

[35] 216 P. 92 (Cal. Dist. Ct. App. 1923).

[36] *Id.* at 96.

[37] 185 S.W. 522 (Ky. 1916). See text accompanying notes 9-14 *supra* for a discussion of the decision.

[38] 185 S.W. at 525.

[39] *See, e.g.*, Williams v. Williams, 243 P. 402, 404 (Ariz. 1926); *In re* Duncan's Estate, 285 P. 757, 758 (Colo. 1930); Watson v. Watson, 77 N.E. 355, 356-57 (Ind. App. 1906); Fincham v. Fincham, 165 P.2d 209, 213 (Kan.), *modified*, 173 P.2d 244 (Kan. 1946); Neddo v. Neddo, 44 P. 1 (Kan. 1896); Cohn v. Cohn, 121 A.2d 704, 707 (Md. 1956).

est in preserving marriages, continues to greatly influence the courts today.

II. THE TREND TOWARDS ACCEPTANCE

A. *Bucking the Trend: Decisions Refusing Validation*

Both the paternalistic attitude toward women and the state interest in marriage persevered into the second half of this century. In a 1950 decision, *Fricke v. Fricke*,[40] the Supreme Court of Wisconsin found an antenuptial contract entitling the wife to $2,000 if the marriage ended in divorce to be void as against public policy.[41] Citing the language of one of its previous decisions,[42] the court based its decision on the state's interest in the marital contract and its control over the husband's obligation to his wife:[43]

> The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order.[44]

The court concluded that, regardless of the circumstances motivating its adoption or attending its execution, an antenuptial contract is aimed at limiting the husband's liability in the event of divorce or separation and is, consequently, void as against public policy.[45]

Despite its patronizing attitude towards women, the *Fricke* rationale was recently applied by the Wisconsin court in *Kunde v. Kunde*.[46] Although the court allowed the provisions of an antenuptial agreement to be considered as a factor

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[40] 42 N.W.2d 500 (Wis. 1950).
[41] *Id.* at 502.
[42] Ryan v. Dockery, 114 N.W. 820, 821 (Wis. 1908).
[43] 42 N.W.2d at 501.
[44] *Id.* at 502.
[45] *Id.*
[46] 191 N.W.2d 41 (Wis. 1971).

in a divorce proceeding property settlement, the court held that the agreement was against public policy and could not govern the division of the parties' estate.[47]

Nebraska also retains a blanket prohibition against antenuptial agreements contemplating divorce. In the recent case of *Mulford v. Mulford*,[48] the Nebraska Supreme Court summarily dealt with this issue, noting that "[i]t is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce."[49] Citing a 1958 A.L.R. annotation, the court found this to be the majority rule.[50]

However, most of the recent case law nullifying antenuptial contracts contemplating divorce does so only with respect to *alimony* or *support* provisions, not *property* settlement provisions.[51] This distinction is based upon the longstanding acceptance of antenuptial contracts providing for property division upon the death of a spouse.[52] This acknowledged ability to contract away property rights upon death has been, in many jurisdictions, logically extended to contracts contemplating divorce.[53] In addition, divorce legislation enacted in many jurisdictions lists property agreements as a factor influencing the property settlement of the parties.[54] Tennessee is an example of a jurisdiction that prohibits antenuptial contracts concerning alimony, while holding contracts settling property valid. In *Crouch v. Crouch*,[55] antenuptial property settlements were found to be favored by public policy,[56] but

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[47] *Id.* at 42.

[48] 320 N.W.2d 470 (Neb. 1982).

[49] *Id.* at 471.

[50] *See id.* (citing Annot., *supra* note 5, at 942).

[51] *See, e.g.*, Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964).

[52] *See* the authorities cited in note 4 *supra* and accompanying text.

[53] *See, e.g.*, Spector v. Spector, 531 P.2d 176, 179-84 (Ariz. Ct. App. 1975); McHugh v. McHugh, 436 A.2d 8, 11-12 (Conn. 1980); Tomlinson v. Tomlinson, 352 N.E.2d 785, 790-91 (Ind. Ct. App. 1976); Matlock v. Matlock, 576 P.2d 629, 633 (Kan. 1978).

[54] *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 307 Alternative A, 9A U.L.A. 142 (1973).

[55] 385 S.W.2d 288 (Tenn. Ct. App. 1964).

[56] *See id.* at 293.

an antenuptial contract limiting the husband's liability for alimony was held to be promotive of divorce and void.[57] Tennessee's continuing adherence to this approach is shown in the recent case of *Duncan v. Duncan*[58] where the rule prohibiting alimony provisions was extended to void a provision controlling attorney fees.[59] At the same time, the Tennessee court noted the legislature's recent express approval of property settlement provisions in antenuptial contracts and put to rest any doubts as to the validity of such provisions.[60]

While neither expressly authorizing nor prohibiting an antenuptial agreement *property* division, both South Dakota and Louisiana recently reaffirmed their paternalistic attitude concerning *support* provisions in antenuptial contracts.[61] The South Dakota court, drawing upon the tenor of its statutes and past decisions to determine public policy, concluded that a provision in an antenuptial agreement purporting to limit the husband's obligation to support his wife was void.[62] Simi-

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[57] *See id.* With regard to an antenuptial contract that limits the husband's liability for alimony in case of divorce, the court opined:

> Such contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited. In other words, a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay.

Id.

[58] 652 S.W.2d 913 (Tenn. Ct. App. 1983).

[59] *See id.* at 915 (citing Crouch v. Crouch, 385 S.W.2d at 294).

[60] See *id.* where the court cites TENN. CODE ANN. § 36-606 (Supp. 1983) which provides in pertinent part:

> [A]ny antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined in the discretion of such court that it was entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse.

Id.

[61] *See* Holliday v. Holliday, 358 So. 2d 618 (La. 1978); Connolly v. Connolly, 270 N.W.2d 44 (S.D. 1978).

[62] 270 N.W.2d at 47-48. Expressing its paternalistic attitude toward women, the court declared: "We conclude that to insure that the public's interest in the enforcement of a husband's duty to support his wife is not thwarted by antenuptial agreements that may bear no reasonable relationship to the subsequent situation of the parties, we must hold that such agreements are void and unenforceable." *Id.* at 47.

larly, the Louisiana court voided an antenuptial contract which waived a wife's right to alimony *pendente lite* in the event of judicial separation.[63] The Louisiana court declared that it was the public policy of the state that a husband should support and assist his wife during the existence of the marriage.[64]

In *Norris v. Norris*,[65] the Iowa Supreme Court voided an antenuptial contract in which each party waived his or her right to the other's property in the event of divorce.[66] Conceding that, generally, antenuptial contracts are favored in law and should be construed liberally to carry out the intention of the parties, the court nevertheless concluded that this contract was contrary to public policy.[67] Construing a contract that waived property rights to also include a waiver of alimony rights, the Iowa court based its decision on three grounds. First, the state's interest in preserving the marriage relationship rendered contrary to public policy and void any provision that provided for, facilitated, or tended to induce divorce of the parties after marriage.[68] Second, it was against public policy to force a party to endure an unhappy marriage to avoid an unfavorable contract.[69] Finally, the public interest

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[63] 358 So. 2d at 620.

[64] *See id.* The court explained that the public policy involved was "that conditions which affect entitlement to alimony pendente lite cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in enforcement of the legal obligation to support overrides the premarital anticipatory waiver of alimony." *Id.*

The dissent strongly objected to this "demeaning" attitude of the majority as being inconsistent with today's reality: "It is simply not correct to assume that all, or most, women are incapable of financial independence but must, instead, be wholly dependent upon either their husbands or the state." *Id.* at 622. (Calogero, J., dissenting).

[65] 174 N.W.2d 368 (Iowa 1970).

[66] *Id.* at 370.

[67] *Id.*

[68] *Id.*

[69] *Id.* The court stated:

> It is also against public policy to place an innocent party in a position where he or she would be forced to endure conduct which would constitute grounds for divorce because of fear that the commencement of an action would deprive the person of contracted property rights and means of support.

Id.

prohibited enforcement of an agreement relieving the husband of his duty to support his wife.[70]

Whether invalidating only support provisions or invalidating both the support and property provisions, these cases are presently in the minority. The bulk of the recent case law has upheld antenuptial contracts contemplating divorce, as the courts have reasoned that past public policy does not comport with present reality.[71]

B. *The Trend: Decisions Validating Antenuptial Contracts*

In contrast to the small number of jurisdictions since 1970 that have found provisions in antenuptial contracts contemplating divorce to be void per se,[72] many states have reexamined the rationale employed to invalidate these contracts and found it wanting.[73] The jurisdictions validating antenuptial contracts can be divided into two groups: those states that permit property provisions but have not ruled upon the validity of alimony provisions, and those states that accept both property and alimony provisions (the larger group).

Illustrative of the former group is *Spector v. Spector*.[74] In this Arizona decision, the court agreed with the traditional rule that agreements between spouses which either provide for or tend to induce divorce or separation are contrary to public policy.[75] However, the court also concluded that the contractual freedom conveyed to spouses by its case law, together with the legislative recognition of the equality of marriage partners as evidenced by Arizona's no-fault divorce laws, reflected a public policy permitting the enforcement of an antenuptial contract concerning the property of the spouses.[76] The

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[70] *Id.*

[71] *See* cases cited *supra* note 6 and accompanying text.

[72] See text accompanying notes 40-70 *supra* for a discussion of the leading cases in these jurisdictions.

[73] *See* cases cited *supra* note 6.

[74] 531 P.2d 176 (Ariz. Ct. App. 1975).

[75] *See id.* at 181.

[76] *Id.* at 180-81. The court noted:

> The institution of marriage is of vital interest to the state and nation since our family and social organization is built upon it. If agreements between spouses provided for or tended to induce divorce or separation, that would

court found no reason why an antenuptial contract should be accorded different legal treatment than a postnuptial contract.[77]

Indiana similarly upholds antenuptial contracts concerning property rights while reserving the issue of alimony rights. In *Tomlinson v. Tomlinson*,[78] the Indiana court held that an antenuptial agreement which spoke to a proposed property division was "to be presumed valid unless surrounding circumstances show it to have been entered without full knowledge or entered as the result of fraud, duress, or coercion."[79] The *Tomlinson* court justified its decision by describing the changes in society that had led to a new public policy.[80] Since the antenuptial contract in *Tomlinson* did not fix any support or alimony rights, the Indiana court did not directly address that issue.[81]

Despite its acceptance of antenuptial contracts fixing property rights upon divorce, the Indiana court held that such an agreement was not binding upon the court.[82] The court reasoned that "[s]ince circumstances existent at the time of divorce may be substantially different than those which existed at the time of the agreement, a valid agreement is but one factor to be considered among the several factors upon which the court customarily relies to make an equitable distribution of property."[83]

Minnesota and Wyoming are also within the jurisdictions that have validated agreements fixing property rights but

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be contrary to public policy. But where the prospective marriage partners wish to consider and adjust by legal agreement their respective rights in advance of marriage, we believe that the institution of marriage is thereby strengthened, not weakened. Under such circumstances such agreements are consistent with public policy, not contrary to it.

Id. at 181.

[77] *Id.* at 183.

[78] 352 N.E.2d 785 (Ind. Ct. App. 1976).

[79] *Id.* at 791.

[80] *Id.* at 789-91.

[81] *See id.* at 790. However, the *Tomlinson* court, in dictum, declared: "[W]hether a particular antenuptial agreement concerns property distribution or alimony . . . we deem the changed and changing status of the male vis-a-vis the female" to be significant. *Id.*

[82] *See id.* at 791.

[83] *Id.*

have not ruled upon those fixing support or alimony. In *Hafner v. Hafner*,[84] the Minnesota Supreme Court held valid an antenuptial agreement that provided each party would retain their respective property as if no marriage had taken place, despite the fact that the wife was not told of her rights absent the agreement.[85] The court found little difference between this contract and a marriage settlement, noting that it had "repeatedly acknowledged that such agreements promote important social functions."[86] Likewise, in *Laird v. Laird*,[87] the Supreme Court of Wyoming validated an antenuptial contract by applying the same rules of construction as are applied to other contracts.[88] The assertion that an antenuptial contract must be more closely scrutinized was rejected, since such an assertion "springs from the archaic presumption of inequality of husband and wife."[89] The court concluded that the contract was valid and enforceable because it was "understandingly made and freely executed."[90]

The second and larger group of jurisdictions that validates antenuptial contracts contemplating divorce accepts both property and alimony provisions in the contracts. With the landmark decision of the Florida Supreme Court in *Posner v. Posner*[91] setting the stage, thirteen jurisdictions[92] have

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[84] 295 N.W.2d 567 (Minn. 1980).

[85] *See id.* at 569-70.

[86] *Id.* at 570. The court noted:

> "Marriage settlements . . . are matters of history, and have been upheld and sustained by the courts from the earliest times. They are not against public policy, but, on the contrary, are regarded with favor, as being conducive to the welfare of the parties and subservient to the best purposes of the marriage relation, and are uniformly sustained when free from fraud or not expressly prohibited by some statute."

Id. at 571 (quoting Appleby v. Appleby, 111 N.W. 305, 307 (Minn. 1907)).

[87] 597 P.2d 463 (Wyo. 1979).

[88] *See id.* at 468.

[89] *Id.*

[90] *See id.*

[91] 233 So. 2d 381 (Fla. 1970).

[92] *See, e.g.*, Barnhill v. Barnhill, 386 So. 2d 749 (Ala. Civ. App. 1980); Newman v. Newman, 653 P.2d 728 (Colo. 1982); McHugh v. McHugh, 436 A.2d 8 (Conn. 1980); Parniawski v. Parniawski, 359 A.2d 719 (Conn. Super. Ct. 1976); Burtoff v. Burtoff, 418 A.2d 1085 (D.C. 1980); Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982); Rossiter v. Rossiter, 666 P.2d 617 (Hawaii Ct. App. 1983); Volid v. Volid, 286

ruled favorably on these contracts since 1970.

In *Posner*, the court explored the reasoning behind the traditional rule that antenuptial agreements will not be upheld because "contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy."[93] It examined the rationale set forth in *Crouch v. Crouch*,[94] wherein the Tennessee court expressed concern that an antenuptial contract contemplating divorce would allow a husband to inflict any amount of abuse on his wife, fully confident that he would not suffer monetarily in a divorce settlement.[95]

The *Posner* court responded to this fear by noting that an equally unfair result could occur, if antenuptial contracts providing for property division upon the death of either spouse were recognized, while those effective upon divorce were not:[96]

> [I]t is not inconceivable that a dissatisfied wife—secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her, but that she would be bound by the provisions limiting or waiving her property rights in the estate of her husband—might provoke her husband into divorcing her in order to collect a large alimony check every month, or a lump-sum award . . . rather than take her chances on being remembered generously in her husband's will. In this situation, a valid antenuptial agreement limiting property rights upon death would have the same meretricious effect, insofar as the public policy in question is concerned, as would an antenuptial divorce provision in the circumstance hypothesized in *Crouch v. Crouch*. . . .[97]

N.E.2d 42 (Ill. App. Ct. 1972); Matlock v. Matlock, 576 P.2d 629 (Kan. 1978); Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981); Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979); Buettner v. Buettner, 505 P.2d 600 (Nev. 1973); Unander v. Unander, 506 P.2d 719 (Or. 1973).

In 1960, the Supreme Court of Oklahoma held that a just and reasonable antenuptial contract providing for alimony and/or property division upon divorce would be upheld by the courts. Hudson v. Hudson, 350 P.2d 596, 597 (Okla. 1960).

[93] *See* 233 So. 2d at 382.

[94] 385 S.W.2d at 288. See notes 55-57 *supra* and accompanying text for a discussion of the *Crouch* case.

[95] *Id.* at 293. See note 57 *supra* for the *Crouch* hypothetical.

[96] 233 So. 2d at 383-84.

[97] *Id.*

While noting that the institution of marriage was still of great importance to the state, the court also recognized that the permanence of the institution has greatly diminished as of late and that, consequently, many prospective marriage partners might want to consider the disposition of their property and maintenance rights in the event their marriage should fail.[98] While observing that agreements "withdrawing opposition to the divorce or not to contest it or to conceal the true cause thereof by alleging another"[99] were illegal as contrary to public policy, the Florida court could find "no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to . . . divorce still exists."[100] The court concluded that "antenuptial agreements settling alimony and property rights of the parties upon divorce . . . should no longer be held to be void *ab initio* as contrary to public policy."[101]

In the thirteen years since *Posner*, twelve other jurisdic-

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[98] *See id.* at 384. The Florida court declared "we cannot blind ourselves to the fact that the concept of the 'sanctity' of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades." *Id.*

[99] *See id.* (quoting from Allen v. Allen, 150 So. 237, 238 (Fla. 1933)).

[100] *Id.*

[101] *Id.* at 385. The court added:

> If such an agreement is valid when tested by the stringent rules prescribed in Del Vecchio v. Del Vecchio . . . for ante- and post-nuptial agreements settling the property rights of the spouses in the estate of the other upon death, and if, in addition, it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that, under the rules applicable to postnuptial alimony and property settlement agreement referred to above, it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to conditions existing at the time the agreement was made.

Id. The basic criteria in *Del Vecchio* is fairness between the parties, in addition to the spouse's free and voluntary signature, preferably upon independent advice. *See* Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962).

The *Posner* court held that modification of such antenuptial agreements should be decided under the laws governing the modification of "postnuptial contracts settling the alimony and/or property rights of the parties." *See* 233 So. 2d at 385.

The concurring opinion in *Posner* stressed that such modification "should be exercised only in the face of the strongest and most compelling reasons." *See id.* at 387 (Spector, J., concurring specially).

The Florida Supreme Court reaffirmed the reasoning of *Posner* in Weintraub v. Weintraub, 417 So. 2d 629 (Fla. 1982).

tions have followed Florida's lead.[102] Two decisions among the twelve, both decided within the last three years, stand out for their logic and depth. In *Osborne v. Osborne*,[103] Massachusetts' Supreme Judicial Court held that "an antenuptial contract settling the alimony or property rights of the parties upon divorce is not per se against public policy and may be specifically enforced."[104] The court observed that in recent years the legislature, by recognizing irretrievable breakdown as a ground for divorce, had made divorce easier to obtain.[105] In addition, the Massachusetts court responded to arguments that had been made in favor of holding antenuptial contracts void.[106] Countering the contention that such contracts denigrated the status of marriage, the court noted that these contracts were in aid of, rather than in derogation of, marriage.[107] In reply to the argument that such contracts tended to facilitate divorce, the court cited *Posner* to observe that such contracts are no more likely to encourage divorce than antenuptial contracts in contemplation of death.[108] Finally, the court noted that such a contract could be modified by the courts in special circumstances, such as "where it is determined that the spouse is or will become a public charge," thus countering the argument that a contract waiving or minimizing alimony may turn a spouse into a ward of the state.[109]

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[102] See note 92 *supra* for a list of the leading cases in each jurisdiction.

[103] 428 N.E.2d 810 (Mass. 1981).

[104] *See id.* at 816.

[105] *See id.* at 815.

[106] *Id.* at 814-16. The court articulated three "[traditional] reasons most frequently given for invalidating such contracts . . . :(1) they . . . denigrate the status of marriage, (2) they tend to facilitiate divorce by providing inducements to end the marriage, and (3) a contract waiving or minimizing alimony may turn a spouse into a ward of the State." *Id.* at 814.

[107] *Id.* at 815.

[108] *See id.* (citing Posner v. Posner, 233 So. 2d at 383-84).

[109] *Id.* at 816. The court adopted the guidelines of a previous Massachusetts case to be used in determining the extent to which such agreements should be enforced. In addition to "fair disclosure" mandated by the parties' confidential relationship, other relevant factors are whether

> (1) it contains a fair and reasonable provision as measured at the time of the execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth.

Almost a year after the Massachusetts court decided *Osborne*, the Supreme Court of Colorado faced the same issue in *Newman v. Newman*.[110] In a well-reasoned opinion, the court held that an antenuptial agreement contemplating divorce, "freely executed by the parties and providing for terms of separation should the marriage fail," is not void as against public policy in Colorado as long as the same standards set for similar contracts contemplating death are satisfied.[111] The terms of the agreement in question had been suggested by the wife, and provided that

> upon dissolution [she] would receive the car, . . . any gifts given to her by her husband, all of her separately owned property at the time of the marriage, $2,000 in cash, and one-half of the balance, if any, of a joint savings account into which all of her earnings during the marriage were to be deposited.[112]

Unless she was disabled at the time of the divorce, the wife was to receive no maintenance or other property.[113] The trial court upheld the entire agreement, but the court of appeals struck the provision denying maintenance, as being against public policy.[114]

The Colorado Supreme Court first distinguished the 1930 case of *In re Duncan's Estate*,[115] which voided a similar antenuptial contract.[116] Noting that the state of Colorado has an interest in favoring the marriage relationship, the *Newman* court reasoned that some couples would not marry if antenuptial agreements were not enforceable.[117] It then looked to

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Rosenberg v. Lipnick, 389 N.E.2d 385, 388 (Mass. 1979). The reasonableness of any monetary provision in the contract would also be judged by such factors as the worth, age, intelligence, literacy, and business acumen of each of the parties. *Id.* at 389.

[110] 653 P.2d 728 (Colo. 1982).

[111] *See id.* at 731.

[112] *Id.* at 730.

[113] *Id.* If disabled, the wife would receive payments of $500 per month from the husband. *Id.*

[114] *See id.*

[115] 285 P. 757 (Colo. 1930).

[116] 653 P.2d at 731 (distinction based on the fact that laws of marriage and grounds for divorce in Colorado had been altered since the *Duncan* decision).

[117] *Id.* The court attributed this both to the frequency of divorces and to the fact that many people marry more than once. *Id.*

other factors that favored validation of these contracts. The court observed that the legislative statement of policy in the Uniform Dissolution of Marriage Act (UDMA), providing for dissolution on grounds of irretrievable breakdown,[118] was not "eroded by agreements which anticipate and provide for . . . economic arrangements upon dissolution of a marriage."[119] As to the argument that such contracts encouraged divorce, the court declared:

> On the contrary, it is reasonable to believe that such planning brings a greater stability to the marriage relation by protecting the financial expectations of the parties, and does not necessarily encourage or contribute to dissolution. In our view, it is unlikely that an otherwise viable marriage would be destroyed because of the potential for economic gain through enforcement of the terms of the antenuptial agreement.[120]

The Colorado Supreme Court then considered separately the standards for reviewing the validity of an antenuptial agreement and reasoned that the standard for review of a maintenance provision should be stricter than that for a property division provision.[121]

Of the remaining jurisdictions which have, in the wake of *Posner*, fully accepted antenuptial contracts contemplating divorce,[122] Hawaii is the most recent to do so. In a case of first

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[118] *See* COLO. REV. STAT. § 14-10-106(1)(a)(II) (Cum. Supp. 1983).

[119] *See* 653 P.2d at 731-32.

[120] *Id.* at 732.

[121] *See id.* at 732-35 (reasoning that maintenance provisions may lose their legal vitality by reason of changing circumstances which render them unconscionable at the time of divorce).

[122] In 1972, an Illinois court in Volid v. Volid, 286 N.E.2d 42 (Ill. App. Ct. 1972), held that public policy was not violated by permitting persons with "families and established wealth" to "anticipate the possibility of divorce and to establish their rights by contract . . . prior to marriage as long as the contract is entered with full knowledge and without fraud, duress or coercion." *Id.* at 47. In reply to the oft-cited reasons for holding support provisions in such contracts void, the court observed that the argument that such agreements encourage divorce was based upon little empirical evidence:

> It is true that a person may be reluctant to obtain a divorce if he knows that a great financial sacrifice may be entailed, but it does not follow from this that a person who finds his marriage otherwise satisfactory will terminate the marital relationship simply because it will not involve a financial

> sacrifice. It may be equally cogently argued that a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability.

Id. at 46. In response to the argument that the state has an interest in seeing that a divorced woman has adequate support, the Illinois court discussed the changed status of women in the economy and concluded that "[w]here a woman is trained, healthy, and employable, and where a woman's efforts have not yet contributed to her husband's wealth or earning potential, the necessity for an alimony award upon breakup of the marriage is not great." *Id.* at 47.

In 1973, the high courts of Nevada and Oregon held that antenuptial agreements settling property and maintenance rights upon divorce were not invalid. In Buettner v. Buettner, 505 P.2d 600 (Nev. 1973), the Supreme Court of Nevada quoted with approval the language of *Posner* and concluded that such contracts were not void as contrary to public policy. *See id.* at 603-04 (quoting Posner v. Posner, 233 So. 2d at 384). However, the court "[retained] the power to refuse to enforce a particular antenuptial contract [should it be] found unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress." *Id.* Only 21 days later the Supreme Court of Oregon announced a similar decision. In Unander v. Unander, 506 P.2d 719 (Or. 1973), the Oregon court overruled a decision only three years old, Reiling v. Reiling, 474 P.2d 327 (Or. 1970). On reexamination of its previous rationale, the court concluded that: (1) the argument that such contracts encourage divorce "is of extremely doubtful validity," (2) "the adoption of the 'no fault' concept of divorce is indicative of the state's policy . . . that marriage between spouses who can't get along is not worth preserving," and (3) the state's interest in the support of its citizens "does not necessarily lead to the conclusion that all antenuptial agreements concerning alimony are invalid." *See* 506 P.2d at 721.

In 1976, the Connecticut Superior Court held that, in view of the relatively equal status of women and men under the law, an antenuptial agreement controlling attorneys' fees, alimony, and premarital property was not void as against public policy. *See* Parniawski v. Parniawski, 359 A.2d 719, 721-22 (Conn. Super. Ct. 1976). Four years later the Supreme Court of Connecticut reiterated this doctrine in McHugh v. McHugh, 436 A.2d 8 (Conn. 1980). Faced with an antenuptial contract providing for property rights upon dissolution of marriage, the court held such a contract

> generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time [of divorce] are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice.

Id. at 11.

Subsequent years saw more states follow suit. In 1978, the Supreme Court of Kansas concluded that "the trial court did not err in upholding the antenuptial contract of the parties and in denying alimony or a share of the husband's separate property to the wife." *See* Matlock v. Matlock, 576 P.2d 629, 634 (Kan. 1978). In 1979, the Missouri Court of Appeals held that a court will be bound by an antenuptial agreement settling issues of property and maintenance upon divorce "if the provisions are conscionable and if the agreement was fairly made." *See* Ferry v. Ferry, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979).

Both Alabama and the District of Columbia climbed on the bandwagon in 1980. The Alabama Court of Civil Appeals declared that antenuptial agreements would be

impression, *Rossiter v. Rossiter*,[123] Hawaii's Intermediate Court of Appeals noted the trend toward upholding such agreements, but held that such an agreement, although valid, is not binding upon the court.[124]

If recent history is an accurate indication, judicial validation of antenuptial contracts governing maintenance or property rights upon divorce will likely occur in yet other jurisdictions.

C. *The Restatement of Contracts: Following the Trend*

An evolution in the Restatement of Contracts [Restatement] supports this trend in the courts. In its initial version, the Restatement provided that "[a] bargain between . . . persons contemplating marriage, for separation or divorce is illegal."[125] An illustration in the comment following this rule concluded that such an agreement is illegal, because any property provision in an antenuptial agreement would encourage separation.[126]

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held valid if the proponent is able to meet either of two tests: (1) "the consideration was adequate and that the entire transaction was fair, just and equitable from the [other spouse's] point of view," or (2) "the agreement was freely and voluntarily entered into by the [other spouse] with competent independent advice and full knowledge of [his or] her interest in the estate and its approximate value." *See* Barnhill v. Barnhill, 386 So. 2d 749, 751 (Ala. Civ. App. 1980). Noting that public policy considerations change along with societal conditions, the District of Columbia Court of Appeals looked first to the antenuptial contract's fairness in Burtoff v. Burtoff, 418 A.2d 1085, 1089 (D.C. 1980). If the contract is fair to both parties, the party challenging the contract must prove it was involuntarily entered into after less than full disclosure. If the contract is one-sided, the proponent of the contract must show "that the disadvantaged spouse signed freely and voluntarily, with full knowledge of the other's assets." *Id.* at 1089.

Two years later Georgia joined the growing number of states accepting antenuptial contracts contemplating divorce with its decision in Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982). Approving the language of *Posner* and *Volid*, the Georgia Supreme Court overruled its 1961 decision, Reynolds v. Reynolds, 123 S.E.2d 115 (Ga. 1961), and held that "antenuptial agreements in contemplation of divorce are not absolutely void as against public policy." *See* 292 S.E.2d at 666. For an in-depth discussion of this case, see Comment, *Antenuptial Agreements and Divorce in Georgia:* Scherer v. Scherer, 17 GA. L. REV. 321 (1982).

[123] 666 P.2d 617 (Hawaii Ct. App. 1983).

[124] *See id.* at 621.

[125] RESTATEMENT OF CONTRACTS § 584(1) (1932).

[126] *See id.* § 584 illustration 2. This illustration may be found in the text accompanying note 30 *supra*.

The Restatement (Second) of Contracts [Restatement (Second)] eliminated this blanket prohibition. Instead of finding such contracts to be void per se, Restatement (Second) section 190(1) declares "[a] promise by a person contemplating marriage . . . is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship."[127] The comment to this section explains that the rule "does not prevent persons contemplating marriage . . . from making contracts between themselves for the disposition of property, since this is not ordinarily regarded as an essential incident of the marital relationship."[128] Nor does the rule prevent contracts for services that are not essential to the marriage; but it does preclude contracts from changing, in a way detrimental to the public interest, the spouses' duty of mutual support.[129] Whether a change in the duty of support will necessarily be detrimental to the public interest will depend upon the circumstances of each case. An example of detrimental change, based on *In re Duncan's Estate*,[130] is included in the comments:

> A and B, who are about to marry, make an antenuptial agreement in which A promises to leave their home at any time on notice by B and to make no further claims against B, and B promises thereupon to pay A $100,000. The promises of A and B alter an essential incident of the marital relationship in a way detrimental to the public interest in that relationship and are unenforceable on grounds of public policy.[131]

Restatement (Second) section 190(2) provides: "A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy." The comment observes that "[w]hether a promise tends unreasonably to encourage divorce or separation in a particular case is a question

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[127] *See* RESTATEMENT (SECOND) OF CONTRACTS § 190(1) (1981).

[128] *Id.* § 190 comment a.

[129] *Id.*

[130] 285 P. 757 (Colo. 1930).

[131] RESTATEMENT (SECOND) OF CONTRACTS § 190 comment a, illustration 1 (1981).

of fact that depends upon all the circumstances"[132] and provides an example of a court's freedom to evaluate the facts:

> A and B, who are about to be married, make an antenuptial agreement in which A promises that in case of divorce, he will settle $1,000,000 on B. A court may decide that, in view of the large sum promised, A's promise tends unreasonably to encourage divorce and is unenforceable on grounds of public policy.[133]

The reporter's note for the section goes on to find that, because of changing social attitudes, what is "unreasonable" is a variable concept.[134] Thus, the Restatement of Contracts has moved from a position totally opposed to antenuptial contracts providing for divorce to a position of flexibility, tacitly approving provisions for property division and looking at all the factors when faced with a support provision.

III. A SUMMARY OF THE ARGUMENTS FOR AND AGAINST ENFORCING ANTENUPTIAL CONTRACTS CONTINGENT UPON DIVORCE

A. *Arguments against Enforcement*

The courts have enumerated four arguments in support of the traditional view that antenuptial contracts contemplating divorce are void per se.

1. *Such Antenuptial Contracts Tend to Encourage or Facilitate Divorce*

By far the most common objection to these agreements is that they tend to encourage or facilitate divorce.[135] This argu-

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[132] *See id.* comment c.

[133] *See id.* comment c, illustration 5 (1981).

[134] *Id.* reporter's note (citing Posner v. Posner, 233 So. 2d at 381, and Volid v. Volid, 286 N.E.2d at 42).

[135] *See, e.g.*, Newman v. Newman, 653 P.2d 728, 732 (Colo. 1982); Posner v. Posner, 233 So. 2d 381, 382 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); Volid v. Volid, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972); Tomlinson v. Tomlinson, 352 N.E.2d 785, 789 (Ind. Ct. App. 1976); Norris v. Norris, 174 N.W.2d 368, 370 (Iowa 1970); Osborne v. Osborne, 428 N.E.2d 810, 814 (Mass. 1981); Ferry v. Ferry, 586 S.W.2d 782, 785 (Mo. Ct. App. 1979); Unander v. Unander, 506 P.2d 719, 720 (Or. 1973); Connolly v. Connolly, 270 N.W.2d 44, 46 (S.D. 1978).

ment must be divided into two separate parts. First, the objection that these contracts tend to *encourage* divorce has no empirical basis.[136] Secondly, the argument that these contracts tend to *facilitate* divorce must be conceded. However, this argument is based upon public policy, and current public policy, as evidenced by the vast majority of legislatures, approves of a trouble-free divorce through no-fault divorce laws.[137] Thus, facilitation of divorce can only promote public policy.

2. *Unfavored Spouses Will Become Wards of the State*

Historically, courts feared that such contracts would be unfavorable to the wife and that enforcement of the contract would result in the wife's becoming a public charge.[138] There are three responses to this objection. First, women's roles have changed, so that "[i]t will no longer do for courts to look on women who are about to be married as if they were insensible ninnies, pathetically vulnerable to overreaching by their fiances and in need of special judicial protection."[139] Second, allowing one-sided contracts to be modified, or providing for invalidation of unconscionable contracts, would remedy this objection.[140] Finally, the same objection could be raised about antenuptial contracts contemplating death, but these are generally enforced.[141]

3. *Such Contracts Are Inconsistent with the Husband's Duty to Support the Wife*

This argument is similar to the one above, but places

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[136] *See, e.g.*, Scherer v. Scherer, 292 S.E.2d 662, 665 (Ga. 1982); Volid v. Volid, 286 N.E.2d at 46; Unander v. Unander, 506 P.2d at 720.

[137] *See, e.g.*, Newman v. Newman, 653 P.2d at 731; Posner v. Posner, 233 So. 2d at 384-85; Osborne v. Osborne, 428 N.E.2d at 815; Unander v. Unander, 506 P.2d at 720.

[138] *See, e.g.*, Volid v. Volid, 286 N.E.2d at 46; Tomlinson v. Tomlinson, 352 N.E.2d at 789; Osborne v. Osborne, 428 N.E.2d at 814; Ferry v. Ferry, 586 S.W.2d at 783.

[139] *In re* Estate of Burgess, 646 P.2d 623, 625 (Okla. Ct. App. 1982). *See also* Volid v. Volid, 286 N.E.2d at 46-47.

[140] *See* Unander v. Unander, 506 P.2d at 721.

[141] *See, e.g.*, Stratton v. Wilson, 185 S.W. 522, 525-28 (Ky. 1916).

more emphasis on the traditional duty of the husband to support his wife.[142] Again, the changing role of women has weakened this objection.[143]

4. *Such Contracts Denigrate the Status of Marriage*

A less common reason given for invalidating such contracts is that they denigrate the status of marriage.[144] However, the inviolability of marriage has been weakened by the many no-fault divorce laws in effect throughout the states,[145] and such antenuptial contracts would do little to further this erosion.

B. *Arguments for Enforcement*

In addition to the arguments that can be made in answer to the objections to antenuptial contracts, several more points weigh in favor of accepting such contracts. First, the freedom to contract should not be curtailed without very strong reasons.[146] Second, rather than encouraging divorce, these contracts will in many instances foster marriage. Some couples, especially older ones who typically already have families and property of their own, might choose to forego marriage unless they are assured that they will be free to order their affairs as they wish. An enforceable antenuptial contract can accomplish this goal and thus facilitate the marriage.[147] Third, the law governing such contracts should be consistent with the law governing antenuptial agreements made in anticipation of

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[142] *See, e.g.*, Norris v. Norris, 174 N.W.2d at 370; Holliday v. Holliday, 358 So. 2d 618, 620 (La. 1978); Unander v. Unander, 506 P.2d at 720; Connolly v. Connolly, 270 N.W.2d 44, 46; Fricke v. Fricke, 42 N.W.2d 500, 502 (Wis. 1950).

[143] *See, e.g.*, Volid v. Volid, 286 N.E.2d at 46-47; Tomlinson v. Tomlinson, 352 N.E.2d at 789; Holliday v. Holliday, 358 So. 2d at 622 (Cologero, J., dissenting); *In re* Estate of Burgess, 646 P.2d at 625.

[144] *See, e.g.*, Osborne v. Osborne, 428 N.E.2d at 814; Ferry v. Ferry, 586 S.W.2d at 785.

[145] *See* note 137 *supra*.

[146] *See* Parniawski v. Parniawski, 359 A.2d 719, 721 (Conn. Super. Ct. 1976); Holliday v. Holliday, 358 So. 2d at 622 (Cologero, J., dissenting). *See also* Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1204-09 (1974).

[147] *See In re* Estate of Burgess, 646 P.2d at 625. *See also* Newman v. Newman, 653 P.2d at 731; Fricke v. Fricke, 42 N.W.2d at 503 (Brown, J., dissenting).

death.[148] Finally, recognition of antenuptial contracts contemplating divorce would reduce litigation by avoiding property and maintenance disputes where such contracts exist.[149]

IV. KENTUCKY LAW: PRESENT AND PROPOSED

A. *Current Law*

The present state of Kentucky's law regarding antenuptial contracts contingent upon divorce is less than clear.[150] Although *Jackson v. Jackson*[151] upheld an antenuptial contract in which the husband promised to furnish his wife "a decent support during his natural life,"[152] the Kentucky Court placed heavy emphasis on the absence of language related to divorce:

> It is to be noted that nowhere in this agreement is any reference made to a divorce or separation of the parties. The only reference in the agreement to support is the last sentence, and there is nothing in the agreement that would lead one to conclude that it was limited to a divorce or dissolution of the marriage of these parties.[153]

The *Jackson* decision, reiterating the 1916 doctrine espoused in *Stratton v. Wilson*[154] and avoiding a reexamination of the public policy rationale, leaves the practitioner confused. It is impossible to advise his or her client as to how an antenuptial agreement, providing for a property and/or maintenance settlement in the event of divorce, will be treated in the courts.

Despite *Jackson*'s ambiguity concerning the future treatment of these contracts, the decision made one thing clear. Public policy remains the basis for generally holding such con-

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[148] *See* Buettner v. Buettner, 505 P.2d 600, 603 (Nev. 1973); Fricke v. Fricke, 42 N.W.2d at 503-04 (Brown, J., dissenting).

[149] *See In re* Estate of Burgess, 646 P.2d at 626. *See generally* Moore, *The Enforceability of Premarital Agreements Contingent Upon Divorce*, 10 OHIO N.U.L. REV. 11, 12-20 (1983).

[150] *See* text accompanying notes 7-19 *supra*.

[151] 626 S.W.2d 630 (Ky. 1981).

[152] *Id.* at 631.

[153] *Id.*

[154] 185 S.W. 522 (Ky. 1916). See text accompanying note 13 *supra* for a statement of this doctrine.

tracts void.[155] The Restatement (Second) recently shed some light on the use of public policy as a grounds for ruling that contracts or their terms are unenforceable. It provides that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[156] In weighing the interest *in the enforcement* of a contract or term, the Restatement (Second) provides that several factors be taken into account: "(a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular [contract]."[157] Among the factors to be considered in weighing a public policy *against enforcement* of a contract are "(a) the strength of that policy as manifested by legislation or judicial decisions [and] (b) the likelihood that a refusal to enforce the [contract] will further that policy."[158] "Enforcement will be denied only if the factors that argue *against* enforcement *clearly outweigh* the law's traditional interest in protecting the expectations of the parties. . . ."[159]

These guidelines permit a critical examination of Kentucky's public policy. As evidenced by its adoption of no-fault divorce,[160] the legislature chose to allow for the dissolution of marriage with relative ease. In its statutory language dictating the disposition of property upon divorce, the legislature defined marital property to include "all property acquired by either spouse subsequent to the marriage"[161] except "[p]roperty excluded by valid agreement of the parties."[162] Although providing no explanation of its provisions, the legislature did de-

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[155] *See* 626 S.W.2d at 632.

[156] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

[157] *Id.* § 178(2).

[158] Id. § 178(3).

[159] *Id.* § 178 comment b (emphasis added).

[160] *See* KRS §§ 403.150, .170.

[161] *See* KRS § 403.190(2) (Cum. Supp. 1982).

[162] KRS § 403.190(2)(d). This language tracks that contained in the Uniform Marriage and Divorce Act. *See* UNIF. MARRIAGE AND DIVORCE ACT § 506(2), 9A U.L.A. 221 (1973) [hereinafter cited as UMDA].

clare that "[the no-fault divorce] act does not repeal any laws relating to . . . the validity of premarital agreements between spouses concerning their marital property rights."[163]

Considering that "[t]he declaration of public policy has now become largely the province of legislators rather than judges,"[164] it is obvious that the *Stratton* Court's declaration of the state's interest in protecting marriage does not *clearly outweigh*[165] either the law's interest in protecting the parties' expectations or our Legislature's current declaration of public policy. As the Restatement (Second) cautions, "courts should not implement obsolete policies that have lost their vigor over the course of years."[166]

B. A *Proposal*

Having arrived at the inevitable conclusion that Kentucky's law must be changed to reflect current public policy, the question remains as to what this law should be. The following are offered as standards the courts should adopt for the review of an antenuptial agreement contemplating divorce:

1. *The agreement must be in writing.*

Kentucky law requires that any antenuptial contract settling property rights be in writing,[167] and there is no reason to change this rule merely because the agreement contemplates divorce.

2. *The terms of the agreement cannot violate statute or public policy.*

Even if these agreements do not violate public policy per se, their terms could. For example, provisions denying a duty to support any children of the marriage or relieving one

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[163] *See* KRS § 403.010 (Cum. Supp. 1982). *See also* UMDA § 506(2), 9A U.L.A. 221 (1973).

[164] RESTATEMENT (SECOND) OF CONTRACTS § 179 comment b (1981).

[165] This test is provided in RESTATEMENT (SECOND) OF CONTRACTS § 178 comment b (1981).

[166] *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 comment a (1981).

[167] *See generally* Terry v. Terry, 95 S.W.2d 282 (Ky. 1936); Glazebrook v. Glazebrook's Ex'r., 13 S.W.2d 776 (Ky. 1929).

spouse of the duty to support the other *during* marriage would violate public policy and be invalid.[168]

3. *All provisions relating to property division are subject to a fairness review as of the time of execution of the agreement.*

This fairness review would encompass the common concerns of fraud, duress, mistake, misrepresentation, overreaching, sharp dealing, or the absence of full disclosure. The parties' fiduciary relationship mandates full disclosure of assets, although this need be neither minutely detailed nor exact.[169] Absent full disclosure, the proponent of the agreement must prove the opponent had, or should have had, independent knowledge of the other party's worth.[170] In addition, the party opposing the agreement "must have signed freely and voluntarily."[171] The fairness review should weigh the respective parties' ages, health, experience, intelligence, literacy, and business acumen, and should determine if each party had independent and competent counsel (although this is not required) in deciding whether any overreaching occurred.[172] Fairness should be determined as of the time of the execution of the agreement, so that even though the agreement might later be considered imprudent, the court would not undo what the parties had freely agreed to.[173] This standard for property division provisions is reflected by legislative policy.[174]

4. *All provisions relating to maintenance are subject to an unconscionability review as of the time of the dissolution of the marriage.*

The current public policy as declared by the legislature makes no mention of antenuptial agreements concerning

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[168] *See, e.g.*, McHugh v. McHugh, 436 A.2d 8, 12 (Conn. 1980).

[169] *See* Del Vecchio v. Del Vecchio, 143 So. 2d 17, 21 (Fla. 1962).

[170] *See id.* at 21.

[171] *Id.* at 20.

[172] *See generally id.* at 20; Rosenberg v. Lipnick, 389 N.E.2d 385, 389 (Mass. 1979).

[173] *Cf.* Peterson v. Peterson, 583 S.W.2d 707, 711-12 (Ky. Ct. App. 1979).

[174] *See* text accompanying notes 160-66 *supra*.

maintenance.[175] Although it does not proscribe such agreements, the statute does allow for modification of separation agreements respecting maintenance or support upon a showing "of changed circumstances so substantial and continuing as to make the terms unconscionable."[176] By analogy, a maintenance provision in an antenuptial agreement that is unconscionable at the time of divorce should not be enforced. This approach is consistent with the state's interest in preventing a spouse from becoming a public charge. Unconscionability may be defined as "manifestly unfair and inequitable" and, thus, is not solely the result of bad bargain.[177] In addition, all maintenance provisions must meet the standards of fairness established for property provisions and must do so as of the time of execution of the agreement.[178]

CONCLUSION

Kentucky's refusal to enforce antenuptial contracts contemplating divorce ignores a real need and, instead, clings to an outdated public policy. The many authorities cited herein attest to the conclusion that it is no longer valid merely to cite outdated public policy rationales as a basis for rejecting these agreements. Adoption of the proposed standards would advance the public policy evidenced in Kentucky's legislative enactments. It would also foster the marriages of more mature couples with families and property; such couples desire assurance that they are free to order their affairs as they wish. These proposed standards employ concepts from both contract and family law and would be familiar to the trial courts. Finally, they give the practitioner concrete guidelines by which to advise the client. The Kentucky Supreme Court im-

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[175] *See* KRS § 403.200 (Cum. Supp. 1982).

[176] *See* KRS § 403.250(1) (Cum. Supp. 1982).

[177] Peterson v. Peterson, 583 S.W.2d at 711-12.

[178] The standards' distinction between property and maintenance provisions is modeled after Colorado's law, which includes statutes on property division and maintenance nearly identical to Kentucky's. *See* Newman v. Newman, 653 P.2d 728, 732-36 (Colo. 1982).

lied a willingness to reexamine its law in *Jackson*.[179] It should act upon this inclination at its next opportunity.

J. Clarke Keller

[179] *See* note 16 *supra*.