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THE MODERN THEORY AND PRACTICE OF ANTENUPTIAL AGREEMENTS

INTRODUCTION

Antenuptial agreements are just one aspect of family law, but especially important due to the lack of a specifically stated theory of law underlying such agreements and due to their importance as an area in which the marriage partners may exercise at least a modicum of control over this most intimate contract which may well be the most important legal relationship either party shall ever enter.

The crux of many of the difficulties in family law is a lack of common understanding as to exactly what the marital relation is meant to be. What is needed is a comprehensive legal definition of marriage. As a functional definition for the purposes of this comment marriage is defined as follows: marriage is a legally created and sanctioned voluntary relationship between a man and a woman whereby each undertakes a complex of rights and duties in regard to the other, which rights and duties may only be diminished or abrogated with the consent of the state and in accordance with the law. An antenuptial agreement is an agreement entered into before marriage with the expressed or implied consent of the state and in accordance with law that diminishes or abrogates certain of the rights and duties of the marital relationship and may also create new rights and duties between the parties that would not have otherwise existed.

The marital relation itself may be said to be a contract, albeit a very special contract, which creates a status in which the state has a direct interest. The state, recognizing that the marital relation is essential to a stable family unit and that a stable family unit is necessary for the state itself to function, could immediately require the establishment of marriage contracts. It is not necessary for the state to require marriage contracts, since a stable marriage will be established anyway. The state, however, should be interested in the establishment of stable marriages, and should establish marriage contracts to prevent the establishment of unstable marriages. A marriage contract is an agreement entered into before marriage with the expressed or implied consent of the state and in accordance with law that diminishes or abrogates certain of the rights and duties of the marital relationship and may also create new rights and duties between the parties that would not have otherwise existed.

The difference between the marriage itself as a contract and other contracts made in regard to that marriage is pointed out in Comment, An Analysis of the Enforceability of Marital Contracts, 47 N. C. L. Rev. 815 (1968):

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3 This is because the validity of the marriage itself as well as the nature of the marital status is a matter of state law and not of private contract. See, Estate of Duncan, 87 Colo. 149, 265 P. 757 (1930); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 555 (1906); Nedd v. Nedd, 56 Kan. 507, 44 P. 1 (1896); Garlock v. Garlock, 278 N.Y. 337, 18 N.E.2d 521 (1939); Ryan v. Dockery, 134 Wis. 431, 114 N.W. 220 (1907).
takes upon itself the role of a third party to the marriage contract.\(^4\) This extends to include the state as a third party to any contract directly relating to the marital relationship, including antenuptial agreements, marriage settlements, widows' allowances, separation agreements, and property settlements.\(^5\) The state is a full party to such proceedings and as such demands that they include a fair consideration for the state's concerns, viz. the continued viability of the family unit system and the support and welfare of its citizens.\(^6\)

Even if it is now presumed that women can contract as the complete legal equals of men, even in regard to certain factors of their marital rights with those men,\(^7\) the state's interest in the marital relation still exists.\(^8\) A marriage is assumed to eventually result in children who will be dependent for an extended period of time on just those parties to the marriage relation, the children's mother and father. The state assumes it to be to the child's advantage that the parents live together amicably and that they be productive to the degree necessary to secure the child's wants without making demands upon the state.\(^9\) The parents have the primary responsibility


\(^5\) N. KOHUT, THERAPEUTIC FAMILY LAW — A COMPLETE GUIDE TO MARRITAL RECONCILIATIONS, 28-29 (1968), in which the feeling of the courts was shown generally to be that what is best for society is also what is best for the family, leading to the imposition on the parties to the marital relation of certain obligations by both natural and civil laws.

\(^6\) The courts show a great abhorrence for antenuptial or marital contracts that tend to encourage the separation of the parties or indicate that the parties do not intend to abide by the legal requirements of their status. This attitude is seen in such cases as the following: Williams v. Williams, 29 Ariz. 538, 243 P. 402 (1926); Estate of Duncan, 87 Colo. 149, 285 P. 757 (1930); Kalsem v. Froland, 207 Iowa 994, 222 N.W. 3 (1928); Cohn v. Cohn, 209 Md. 470, 121 A.2d 704 (1956); In re Appleby, 100 Minn. 408, 111 N.W. 305 (1907).

\(^7\) See LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS, §90 (1964), (hereinafter cited as LINDEY). At common law the marriage would have extinguished existing contracts between the husband and wife.

\(^8\) The state's special interest in the marital rights, or personal rights, of a party as opposed to property rights is made clear in Comment, A "Check List" for the Drafting of Enforceable Antenuptial Agreements, 19 U. MIAMI L. REV. 615 (1965): Thus, prospective spouses may release their respective [property] rights by way of dower, homestead, or distributive share in the estate of the other.

On the other hand, there are certain personal rights and duties which may not lawfully be contracted away by means of an antenuptial agreement. Thus, for example, an antenuptial promise to reside in a particular location, to raise the issue of the marriage according to the teachings of a particular religion, to refrain from cohabitation or to exclude the issue of a previous marriage from the new household will be considered void and unenforceable against the contracting spouse. Id. at 629-30.

\(^9\) Drinan, The Rights of Children in Modern American Family Law, in
for the support of the child, and indeed each member of the family unit is responsible for the support and welfare of the other members to some extent. This is especially seen in the husband's responsibility toward wife and child, though it is equally true that the wife bears responsibility to the husband and child, and that the child later may bear some responsibility for the support of his parents.

The state looks to the family unit as the means to secure the continued welfare of its citizens by making them legally responsible to each other within the family unit. The state thus could be said to allocate a portion of its responsibility for the welfare of its citizens to the individual members of the family by virtue of the marriage contract. The entire structure of the interresponsible relationships stems from the marriage contract, and the marriage contract itself represents the allocation of the state's responsibility.

With the rising frequency of second marriages, whether due to the death of a prior spouse, divorce or annulment, the need for some method of modifying the marital rights becomes pressing. As is the case throughout contract law, it becomes a question of balancing one value or goal against another — a weighing of prerogatives: the interests of the state as a party to the marriage contract and the right of the man and woman to freely contract with each other concerning their rights and obligations to one another.

In every state of the United States some manner of ante-
nuptial agreement is permitted\(^{15}\) and usually looked upon with much favor.\(^{16}\) But because of the vital balancing process mentioned above, the parties are very much limited in the rights they may surrender and in the manner in which they may waive those rights.\(^{17}\) The demands of the state concerning the welfare of family members still must be met, although the parties will be permitted to vary to some degree the manner in which those ends are reached.\(^{18}\)

This interest of the state is practically an absolute.\(^{19}\) No antenuptial agreement will be enforced if its effect would be to so pauperize one party as to make him or her dependent on the state for welfare.\(^{20}\) But that does not mean that a rich man must necessarily make his wife equally rich in her own right. The state only demands that she be provided for in a reasonable fashion, which if both prospective spouses agree, could mean that upon his death the wife would receive only a small portion of his net worth, or even none of his wealth at all, depending upon the circumstances.\(^{21}\)

**The Six General Types of Antenuptial Agreements**

Antenuptial agreements may be divided into two categories as to the subject matter with which they deal: those that treat

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\(^{17}\) The courts in general are very watchful inasmuch as by making the agreement the parties are in effect taking upon themselves some of the powers of the state and the court as they define the legal rights and duties that shall exist between them.


\(^{19}\) No state court is ever likely to rule that it has no interest in the marital relation or that the parties may avoid the court's supervision over any particular aspect of the marital relation which may affect the stability of that marriage. The very basis of the law of domestic relations is the state's interest in the marital relationship between the parties which was recognized by the state's laws with the state then defining the general nature of the marital status itself.

\(^{20}\) In re Nelson, 224 Cal. App. 2d 138. 36 Cal. Rptr. 352 (1964); Watson v. Watson, 37 Ind. App. 848, 77 N.E. 355 (1906); Gartner v. Gartner, 246 Minn. 319, 74 N.W.2d 809 (1956); In re McCallan, 365 Pa. 401, 75 A.2d 595 (1950); In re Vallish, 431 Pa. 88, 244 A.2d 745 (1968).

\(^{21}\) If all the conditions required by the court are met, even a grossly disproportionate share may be enforced. Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925); Youngblood v. Youngblood, 457 S.W.2d 750 (Mo. Sup. Ct. 1970). See also Cantor v. Cantor, 15 Ohio Op. 2d 148, 174 N.E.2d 304 (1959); In re Knipple, 7 Wis. 2d 335, 96 N.W.2d 514 (1959).
property rights of the parties in the property of either spouse, and those that treat the right of a spouse to support during and after the termination of the marriage. These two categories may be further broken down into three subcategories as to the time at which the antenuptial agreement will come into noticeable effect: those to come into effect during the marriage, those to take effect upon the divorce or separation, and those to take effect at death.

The only types of antenuptial agreements that would be almost universally enforceable are those made in regard to property rights during the marriage and in regard to property interests of the survivor upon the death of a spouse. The other categories are open to much debate and make up a rather unsettled portion of family law. Movement in this area seems to be on an ad hoc basis with the courts paying primary attention to the equities of the case directly before them. The primary concern of the lawyer then is to be able to predict the limits to which the court may be willing to go when given a compelling set of equities. Policy declarations of the court as indicative of new trends provide the most reliable guide, as the issue is ultimately based on public policy.

29 Among the symptoms of this unsettled condition are the conflicting case law within a single jurisdiction, reliance by the court on the particular facts of the case before it rather than on a general principle of established law, and the failure to have a decisive utterance on some aspects of antenuptial agreements dealing with the divorce and/or death of the parties. Among the causes for this uncertainty may be the changing divorce laws and family law concepts in many areas coupled with a fear by the court that its decision may prove disruptive to the family unit ideal if made generally applicable.
The following is an analysis of the six types of antenuptial agreements:

1. Those agreements to take effect during the marriage affecting the property rights of the parties.\footnote{Lindey, §90.} This is a usually accepted method by which each party may retain exclusive control over property acquired by him or her before the marriage or other property acquired during the marriage but held in his or her own name,\footnote{Collins v. Phillips, 259 Ill. 405, 102 N.E. 796 (1913); Edwards v. Martin, 39 Ill. App. 145 (1890); Geiger v. Merle, 360 Ill. 497, 196 N.E. 497 (1935); In re Strickland, 181 Neb. 478, 149 N.W.2d 384 (1967); In re Davis, 20 N.Y.2d 70, 28 N.Y.S.2d 767, 228 N.E.2d 769 (1967).} as well as the rents or proceeds from such property. Such an agreement might include property given to one spouse by the other in consideration of the marriage.\footnote{Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934).} The parties may also agree to hold certain property jointly.\footnote{McMullen v. McMullen, 185 So. 2d 191 (Fla. Dist. Ct. App. 1966).}

2. Those agreements to take effect after the death of one spouse affecting property rights of the parties.\footnote{Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. Sup. Ct. 1962); Johnson v. Johnson, 140 So. 2d 358 (Fla. 2d Dist. 1962); In re Moore, 210 Ore. 23, 307 P.2d 483 (1957).} Upon the death of either party to the marital relation the marriage itself is of course over and the state no longer need concern itself with its continued viability. This is a method by which the parties may agree that upon the death of the other the surviving spouse shall take only the agreed interest in the deceased's estate and not make a claim upon the estate to the full limits of the statutory allowance.\footnote{Edwards v. Martin, 39 Ill. App. 145 (1891); Wetsel v. Firebaugh, 258 Ill. 404, 101 N.E. 602 (1913).} The adequacy of the agreement is determined as of the time it was executed.\footnote{Clark v. Clark, 201 Okla. 134, 202 P.2d (1949).}

3. Those agreements to take effect upon the divorce or separation of the spouses affecting their respective property rights.\footnote{Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934).} This type of agreement is viewed more critically by the courts inasmuch as it tends to improperly influence the continuance of the marital relation between the parties.\footnote{Williams v. Williams, 29 Ariz. 588, 243 P. 402 (1926); Reiling v. Reiling, 474 P.2d 327 (Ore. Sup. Ct. (1970)).} That is, if the agreement calls for a large property settlement to the wife upon divorce, she may be tempted to bring about the conditions of that divorce in order to avail herself of the settlement. Conversely, if the settlement is small, she may put up with practically intolerable abuse from her husband, reasoning that she would lose a substantial property interest if divorced and forced to rely on the paltry property allowance.
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... to which she had agreed. In the example above, the situation would be the reverse for the husband who in the case of a large property settlement agreement would tend to suffer abuse from his wife, while with a more modest settlement might be tempted to force her into a divorce. In considering the enforceability of such agreements the courts will look to which party was at fault in regard to the divorce, at least in those states where fault is still a factor in the granting of a divorce. It is apparent then that such an agreement may provide a mechanism by which one party to the marriage may gain an unfair advantage over the other throughout the course of their marriage. Waivers of dower in such situations are usually upheld, however.

4. Those agreements to take effect during the marriage of the parties affecting the support of a spouse. By such agreement the man usually tries to have his prospective spouse agree to a periodic stipend or allowance in lieu of any other support over the course of the marriage. The courts take a dim view of such agreements since the conditions of the parties may change drastically over the period of a marriage, which is designed to be a lifetime contract. Here, as in number 3 above, one party, usually the husband, may gain an unfair advantage over the other by threatening to stand by the agreement, forcing the wife to support herself with what has turned out to be a completely inadequate allotment. It is also conceivable that if the allowance is very large the husband could find himself at a disadvantage if unable to meet the payments. For the courts to enforce such agreements would tend to disrupt the marriage all the more. It seems that only in rare situations where the parties are financially independent of one an-

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43 No fault divorce law is in effect in California and attempts have been made to pass similar legislation in other states, notably Illinois, where up to now it has failed to be passed. Under such a law there is no "guilty" party in the divorce action, with the only cause for divorce being that the parties to the marriage had irreconcilable differences.

47 Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906). In this case the wife had been crippled at the time of the marriage and the court held that the duty of supporting her fell entirely on the husband regardless of any contract between the parties.
other could such an agreement be fairly countenanced by the courts.

5. Those agreements to take effect after the death of a spouse affecting the support of the surviving spouse.\(^4\) This is much like number 2 above, since support in this context means a property distribution from the estate of the deceased spouse.\(^5\) Such agreements include the specific waiver of rights in the estate of the other spouse. Such waivers are usually upheld even though it is obvious at the time that the party can ill afford to lose such rights.\(^6\) The courts look to the time the agreement was made to be sure that all the requirements of validity were present, but without a showing of some inequity at that time, the agreement will stand.

It seems somehow paradoxical, inasmuch as the courts critically view agreements that waive support upon divorce or separation, that agreements such as these should meet with favor.\(^7\) In the case of either divorce or death the marriage itself becomes defunct, and the most important remaining consideration is the continued welfare of the parties. In the case of divorce the husband is still alive, and it is usually he who is obligated for the continued support of his ex-spouse. Perhaps it may be said that a divorce may end the domestic relation but will not be allowed to end the contractual aspects that the state has read into the marriage, one of these being mutual support of each spouse until this primary obligation is assumed by another, as through remarriage.

Upon the death of a spouse it is no longer possible to look to that spouse's personal earnings from labor for support, but his property still exists, and his estate may still have an income. The point is that to be consistent it seems that courts should realize that some obligation to support the surviving husband or wife exists even after death, and that obligation should be met by the deceased's estate. This is the primary purpose of dower and statutory allowances. Thus here there may be seen a rather subtle inconsistency in that waiver of dower and statutory allowances is in reality a waiver of support rights as well as property rights. Dower especially is commonly said to be a life

\(^{48}\) Lindsay v. Lindsay, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964) ; Posner v. Posner, 233 So. 2d 381 (Fla. Sup Ct. 1970). An analogy could be made to a divorce decree in which separate allotments are made for property settlement and for support. On the other hand, this in itself could be looked upon as a means of assuring a spouse the means of support whether by assuring the spouse property which could be used as a means of support in itself or through actual support payments.
\(^{50}\) Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906).
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interest in one-third of the dead spouse's real property, which would indicate it is meant to be in the nature of support.

6. Those agreements to take effect upon the divorce or separation of the spouses affecting their support rights and obligations to one another. With very few exceptions the courts uniformly reject such agreements as inimical to the family and to interspousal relationships. But why should this be so? It is easy to understand that the parties should be obligated to support their offspring until such children can support themselves and that even upon the breakup of the marriage the rights of dependent children subsist in the original marital contract and cannot be avoided. The question of custody is then primarily a question of where the child's interests will be best served. It is obvious that both parents are bound to support such children, though it is not so obvious as to why they should be bound for an indefinite time after the marriage to support one another.

A possible argument might be that the division of labor in the average household makes the wife unfit for any but domestic duties, that she has forfeited her opportunities of gaining advantages of self-support in reliance on her husband's acknowledged duties to provide for her indefinitely into the future. Upon the divorce itself the wife may forego provisions for alimony, as many women now do. But the possibility of alimony is still there. As the right to support cannot be waived, the husband usually is somewhat at a marital disadvantage since a divorce will involve the risk of splitting his income between his wife and himself in the maintenance of two households.

It seems that upon marriage the parties are presumed to agree to share a common standard of living and this agreement continues even after a divorce. Perhaps also it could be

52 Neddo v. Neddo, 56 Kan. 507, 44 P. 1 (1896); Cohn v. Cohn, 209 Md. 470, 121 A.2d 704 (1966); In re Appleby, 100 Minn. 408, 11 N.W. 306 (1907).
53 In general most of the courts see the woman as being in a less capable position to support herself after the termination of the marital relation than the man, sometimes pointing to the fact that the woman usually has only marginal job skills at best. However, it now seems that prior to the marriage an equality of bargaining position is presumed to exist between the parties, everything else being equal, either because of statute or court ruling. See Kuhnen v. Kuhnen, 351 Ill. 591, 184 N.E. 874 (1933); Martin v. Collison, 266 Ill. 172, 107 N.E. 257 (1914); Allison v. Stevens, 269 Ala. 268, 112 So. 2d 451 (1959); Baugh v. Barrett, 128 Ind. App. 233, 145 N.E.2d 297 (1957); In re Brown, 189 Kan. 193, 358 P.2d 27 (1962); In re Harris, 7 Wis. 2d 417, 96 N.W.2d 718 (1959).
54 J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS, 179-89 (1931), and cases cited therein.
looked upon as a veiled threat to the principal provider for the family that he must not let his position of financial domi-
nance lead him to overstepping the rights of the other spouse. In effect, then, the concept of alimony may be a means of as-
suring the rights of a dependent spouse to equate the status of the spouses during the marital relationship. To allow them to agree prior to marriage that no alimony award should ever be made or to limit it to a definite amount would destroy this function.

Though not usually articulated by the courts, the function of alimony is not solely to provide for the welfare of a spouse after their separation but to deter the possibility of the separa-
tion in the first place by guaranteeing them common living standards. Some courts point to the fact that a large alimony settlement agreed to in an antenuptial agreement would en-
courage divorce, while a very small agreed settlement would prevent an innocent party from prosecuting a divorce even when good grounds were present and he or she would otherwise do so, for fear of losing an adequate means of support. In the first instance, a viable marriage is jeopardized due to the lure of the big settlement; in the second case, an intolerable marital relation is suffered due to the fear of an inadequate post marital arrangement. In either case the agreement has an untoward influence on the marriage, giving one spouse or the other an advantage. By guaranteeing common living stan-
dards even after a divorce one of the possible motives for a spouse forcing a divorce on his or her partner is removed.

In general, then, there is a strong prejudice against en-
forcing that portion of an antenuptial agreement dealing with the rights of a spouse upon the dissolution of the marriage through divorce. Some courts hold that since the divorce de-
stroys the marriage it also renders the antenuptial agreement ineffective. Other courts seem to hold that the inclusion in the agreement of stipulations concerning divorce renders that part of the agreement void as against public policy, or as showing the bad faith of the parties upon entering the agreement. Still other courts find that there has been a failure of the considera-
tion for the agreement upon the divorce, making the antenu-
ptial agreement unenforceable. The most commonly given rea-
son is that the duty to support the spouse is imposed by law, and the other spouse will not be permitted to shed this respon-
bility which is not an obligation to the husband or wife alone but also an obligation to the state.55

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55 See cases cited in note 27 supra.
INTERESTS OF THIRD PARTIES

In addition to the six general types of agreements, a prospective spouse may assent to the interest of a third person in the property of the other party and agree that such interest is to be maintained even after the marriage. This may be especially useful to protect the interests of a child by a prior marriage, siblings, parents or grandparents in the property of either party by giving such third persons a right enforceable at law or in equity. This may be done in such a way as to make the antenuptial agreement irrevocable as to that third party's interest without his consent.

Third parties themselves may directly enter into antenuptial agreements with one or both of the spouses. Of course, such agreements made in the contemplation of marriage must usually meet the requirements of the statute of frauds. Third persons, such as relatives of a pregnant bride, may assume certain obligations, such as support, toward one of the prospective spouses or toward the children of the marriage, though this will not relieve either spouse of his or her duties toward the other or toward a child if the third party should fail to perform. The marriage itself may serve as a valid consideration for any antenuptial agreement, indeed even a promise of marriage may be sufficient.

PROPERTY ACQUIRED THROUGH JOINT EFFORTS

Special arrangement may be made in a separate part of the antenuptial agreement for the disposition of property acquired during the marriage, that is, property which both parties worked to obtain. The parties may agree that such property should pass completely to the survivor of the two, or that upon the death of one, one-half should pass to his estate and the other half to the surviving spouse. The point to be made is that for such property both spouses will likely feel that they have earned an interest, regardless of whether they hold the title to it jointly, as opposed to property which each had earned.

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58 Specht v. Richter, 258 Ill. App. 22 (1930).
60 Specht v. Richter, 258 Ill. App. 22 (1930); Wright v. Wright, 114 Iowa 743, 87 N.W. 703 (1901); French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Kovler v. Vagenheim, 333 Mass. 252, 130 N.E.2d 557 (1955). These cases make it clear that the antenuptial agreement would probably be void to the extent that it actually tried to relieve the husband of his legal responsibility to support his wife.
61 Note 60 supra.
separately and brought independently to the marital relation.

THE ILLINOIS LAW

The Illinois courts express a general approbation for antenuptial agreements. The primary requirement is that the spouse know what rights he or she is surrendering and willingly surrenders those rights. The reasoning is that one may not be said to have given up a claim to such rights without knowing that such a claim existed, or the extent of that claim. Following from this reasoning is the Illinois courts' emphasis on full disclosure to each spouse of the extent of the other spouse's wealth. Of course, substitutes for actual personal disclosure by spouse to spouse may be found, as for instance where the wife has learned by independent though reliable means of the extent of her prospective husband's holdings and this information was accurate and was in fact relied upon. The important element is that the spouse knew of the value of the right she surrendered at the time she surrendered it and that she intended the result contained in the agreement. The wording of the agreement itself is examined for evidence of the actual intent of the parties.

In Illinois a confidential or fiduciary relationship is presumed to exist between couples engaged to be married. An antenuptial agreement between engaged persons then is not made at arm's length. When a dispute arises over the agreement the burden is on the challenged party to demonstrate that a full disclosure of wealth had been made. The contrary is true when the agreement is between persons not engaged to marry. For such a couple, an arm's length or business type relationship is presumed. This pragmatic approach to marriage results in placing the burden of proof that there was not

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64 Guhl v. Guhl, 376 Ill. 100, 38 N.E.2d 185 (1941); Meggison v. Meggison, 367 Ill. 168, 10 N.E.2d 815 (1937); Hessick v. Hessick, 169 Ill. 486, 48 N.E. 712 (1897); Davis v. Davis, 196 Ark. 261 Ky. 414, 87 S.W.2d 937 (1935); Rolfe v. Rolfe, 125 Me. 82, 130 A. 877 (1925); Levy v. Sherman, 185 Md. 65, 43 A.2d 25 (1945);
65 Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925); Slater v. Slater, 310 Ill. 454, 142 N.E. 177 (1923); Allison v. Stevens, 269 Ala. 288, 112 So. 2d 451 (1959); Wilson v. Wilson, 354 S.W.2d 532 (Mo. App. 1962); In re McCready, 316 Pa. 246, 175 A. 554 (1934).
67 Achilles v. Achilles, 137 Ill. 589, 28 N.E. 45 (1891); Kuhnen v. Kuhnen, 381 Ill. 591, 184 N.E. 874 (1933); Martin v. Collison, 265 Ill. 172, 107 N.E. 287 (1914); Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1955); Yockey v. Marion, 269 Ill. 342, 110 N.E. 94 (1915). Id.
full disclosure on the party challenging the agreement. With older couples seeking primarily companionship and financial security this approach is not so unrealistic as it might sound for a passionate and impetuous pair of young lovers. It is important here to note that the modern courts in general and the Illinois courts in particular view the marital relation in light of the situation of the parties and their private goals and needs rather than as a static and invariant arrangement. However, all courts demand that it be a marriage in fact and that the more basic rights and duties of the spouses cannot be abrogated. The major point to be ascertained is which rights and duties are so basic that the parties cannot reach them by mutual agreement, and which are not.

By means of an antenuptial agreement the rights of ownership in property acquired before the marriage may be retained exclusive of the other spouse. Though it seems this property could be reached if necessary for support, property rights as such would not vest in the other spouse either during the marriage or after the death of the other spouse. Agreement could also be made as to property acquired during the marriage itself, though in this area there would have to be an acknowledgment of the rights of the spouse in the original acquisition of such property. Property rights in general are not so basic to the marital relationship as to be beyond the reasonable control of the parties themselves.69

An area less clear relates to agreements as to the disposition of property upon the divorce of the parties. It would seem that an agreement that property acquired before or during the marriage by a single spouse may be held exclusive of the rights of the other spouse, would preclude that spouse upon divorce or separation from making direct demands on such property. However, if the agreement dealt specifically with the consequences of divorce or separation so as to affect the character of the marriage by giving one party the financial advantage over the other in case of divorce, the agreement would be looked at less favorably. If the prospect of divorce were to be either particularly beneficial or specially detrimental to one party as opposed to another, then such agreement would not be enforced.70 This is not because of its effect on property rights so much as because of its effect on the marital relation itself, causing that relationship to be other than it is contemplated by law by putting one party at a legal disadvan-

69 Long v. Barton, 236 Ill. 551, 86 N.E. 127 (1908), wherein it was held that taking the agreed amount in lieu of dower upon divorce waived the right to assert dower as a claim later on.
tage in regard to the other, forcing the one to risk more than the other in case of a divorce or separation. After the death of a spouse such a possibility would no longer appertain to the agreement, and it could then be fully enforceable.

Perhaps most basic of all elements to marriage in a legal sense are the mutual obligations of support between the spouses. It is understandable then that the Illinois courts, as well as most other courts, do not look with favor on agreements waiving or impairing these obligations. To do so would allow the parties to alter the basic nature of the legal status of being married and make of marriage something other than that which is countenanced by law.

There are few Illinois cases specifically dealing with the waiver of rights to support during or after the termination of the marriage. There could be a number of reasons for this. The parties themselves may not seek to enforce such agreements through the court process. Both spouses may have been adequately provided for in other ways, reaching an amicable agreement as to support duties without the need for adjudication of their agreement. It also may be that each party realizes the doubtful enforceability of such agreements and relies primarily on the other spouse's not challenging it, and when it is challenged, not undertaking the extra expense of an appeal. If the wife, for instance, were well provided for under the agreement, it might be senseless for her to appeal an order affirming it. It is just such an equitable agreement that would most likely be approved by the courts. It is primarily the unfair or grossly disproportionate allowance that is appealed and such agreement is then often found unenforceable for more than one reason. Thus it would seem improper to state that absolutely all agreements dealing with alimony and support will be found unenforceable in Illinois, especially in light of the declared court policy to hold paramount the intent of the parties to the agreement at the time of its making. But it can be said that the courts will not favor such agreements as they touch on a basic element of marriage, and that probably such an agreement would not be enforced unless it provided for the wife at least as well as she would be provided for without the agreement.

The difficulty in attempting to ferret out the general law applied by the courts is due to the emphasis placed on the situation of the parties and to persons in like situations. The management of the marriage relationship within certain bounds
is popularly thought to be none of the state's business. Hence the unwillingness of courts in general to be involved in the enforcement of agreements as to the religious and educational training of children. Certain matters are best left to the parties themselves. Private agreements between parties to avoid litigation are favored by the law and are also predominantly favored in regard to the marital relation. It is only when the agreement, in the light of the situation of the parties, has so changed the marriage from that defined by law as to put one party or the other in a relationship that cannot be recognized as legally binding on him or her, that the court will interfere with the enforcement of such an agreement. This may explain why the court moves seemingly on an ad hoc basis in regard to such cases, deciding them on the basis of the equities of a particular factual situation. The major goal is that the marital relation place the parties on as equal a footing as possible.

There is positive authority in Illinois for the following propositions. A couple contemplating marriage may enter into an antenuptial agreement altering the rights that either would have in the property of the other by law because of the marriage. Each spouse may agree to hold his or her property as if single. Under such an arrangement, either spouse should be able to sell or give away his own property without the consent of the other, and to hold any rents or other income from such individually owned land as his own property and to retain the right to dispose of this property by will.

Either prospective spouse may agree with the other to waive his or her rights to dower and statutory allowances that he or she would otherwise receive upon the death of the other by operation of law. This would prevent a wife, for example, from claiming dower on a piece of land concerning which she had not specifically waived her right of dower during her husband's life. This blanket antenuptial exclusion or waiver would preclude her from claiming dower in any of the land her husband may have owned during the marriage.

An antenuptial agreement that is void in part may still be given partial effect. It may be used as evidence of the intent of the parties at the time they entered the agreement. It may also be used as one of the considerations of the court in determining a matter before it, such as divorce or alimony. Also it

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73 Note 49 supra.
74 Luttrell v. Boggs, 168 Ill. 361, 48 N.E. 171 (1897).
76 Moats v. Moats, 168 Colo. 120, 450 F.2d 64 (1969); Strandberg v. Strandberg, 36 Wis. 2d. 204, 147 N.W.2d 349 (1967).
appears Illinois follows the general principle that full effect may still be given to the valid portion; for example, if a provision to take effect upon the divorce of the parties were to be held void, nevertheless upon the death of a spouse a provision to take effect then might still be wholly valid.\textsuperscript{7}

\textbf{ILLINOIS THEORY OF ANTENUPTIAL AGREEMENTS}

The same factors which are causing other jurisdictions to reconsider their policies in regard to antenuptial agreements are also at work in Illinois. The most challenging area, that of antenuptial agreements in relation to divorce, has yet to be fully met by the courts in this state. Usually once a decisive case in this field is decided many similar cases arise. The importance of the factual setting in the situation presented for adjudication leads to delicate differences between seemingly similar cases. Due to the inherent complexities in weighing these factual variables the courts often go to the law of other states to find similar settings for a solution to the particular problem before them. It seems likely, therefore, that when Illinois begins to enter this area the force of the decisions of other states will be quite influential, especially due to the dearth of Illinois cases on this particular subject.

A number of considerations indicate that the Illinois courts may follow the more progressive states in regard to antenuptial agreements in relation to divorce. These are: a highly favorable attitude toward antenuptial agreements in general; a presumption of validity for such agreements; the especially high divorce rate in the state; concern shown for the equities of the situation rather than formal correctness; priority of the court to give effect to the intent of the parties to the agreement whenever possible.

The Illinois law at present seems similar in some respects to that of the progressive states in this field, such as Kansas and Florida,\textsuperscript{8} before premarital contracts in regard to divorce were countenanced by the courts in those states. Such a decision in Illinois would not in itself be a radical departure from current views, but rather a logical extension. Courts discussing the modern antenuptial cases seem to have little difficulty in reconciling even the more advanced thinking with the traditional views. If the basic purposes behind the public policy are kept in mind rather than the traditional requisites of antenupt-

\textsuperscript{7} Note 71 supra.

tial agreements, a liberalization of antenuptial contracts should in no way upset current proprieties.

THE NATURE OF THE AGREEMENT

Attempts have been made to use an antenuptial agreement to define certain conditions of the marital relationship, such as specifying that children of a prior marriage shall not live with the couple,\(^7\) where the couple shall live,\(^8\) the amount of support from the husband which the wife shall receive while they are married,\(^9\) and the religious and educational training of the children that might result from the marriage.\(^9\) It may now be said with some certainty that the courts will not usually enforce such agreements. Logically it may be seen that such agreements would be very difficult, if not impossible, to enforce, causing the courts to invade the privacy of the familial unit and to keep a constant watch on the domestic life of the parties. Also, as to religious covenants, to grant enforcement would bring the courts very close to crossing the line between church and state, albeit that the covenant had been voluntarily made by the parties in relation to the upbringing of their children.\(^8\)

An antenuptial agreement may be effectively used to contract with the prospective spouse to make him or her the beneficiary of a will or an insurance policy.\(^8\) Under certain circumstances even an oral agreement of this sort may be enforceable.\(^8\) The antenuptial agreement, then, may be used to effect changes in other contracts that preexisted the marriage. By this method a spouse can be assured before the marriage that certain provisions will be made by the other in regard to that spouse's safety and security, and that a change of mind by the other spouse during the marriage will not jeopardize that sense of security, which may well have been one of the motives for the marriage in the first place.

Equitable considerations and requirements are vital in

\(^{86}\) Marshak v. Marshak, 115 Ark. 51, 170 S.W. 567 (1914); Isaacs v. Isaacs, 71 Neb. 537, 99 N.W. 268 (1904).
\(^{81}\) Notes 45 and 46 supra.
premarital contract cases, as usually the antenuptial agreement is considered in equity.\textsuperscript{86} If the spouse who has been treated unfairly in the agreement waits too long before coming to court to have the agreement declared void after the inequity has been discovered, he or she may be denied relief due to laches or because of an implied ratification by him or her of the agreement.\textsuperscript{87} However, for certain types of undue influence or fraud in the procurement of the agreement, some courts have held that the agreement was wholly void, that the wronged spouse did not ratify by failing to come forth, and that the spouse's reluctance to challenge the agreement may have been justified by an interest in preserving marital tranquility.\textsuperscript{88}

By taking or receiving certain benefits under the agreement the spouse may also be held to have waived his or her right to challenge the agreement as invalid at a later time, if when the benefits were taken, the spouse had or should have had knowledge of the wrong committed on him or her by the other spouse in regard to the agreement.\textsuperscript{89}

Equitable considerations are often involved in regard to the enforcement of antenuptial agreements since the agreements are usually brought into play during the probate of an estate where a spouse challenges the validity of the agreement as an unconscionable contract, in order that he or she may take a statutory share in the estate contrary to the agreement.\textsuperscript{90} Even when the action is brought while both spouses are still alive, due to the nature of the domestic relation the courts will apply equitable standards to the agreement, especially due to the fiduciary relationship that usually precedes the making of the premarital contract between the parties because of their engagement to marry.\textsuperscript{91} Some states, though not Illinois, see every contract entered into in contemplation of marriage as one which takes on this highly fiduciary character, whether the couples were engaged at the time or not.\textsuperscript{92}

If during the marriage the parties decide they no longer need or desire the antenuptial agreement and its provisions,
they may by mutual consent rescind all or part of it. They may also modify or alter it, again by mutual consent but, if a third party is involved, that is, if he has been granted certain rights under the agreement, or if certain rights have already been vested in him, then they will need his consent as well in order to rescind that part of the agreement that related to his interest.

The divorce and subsequent remarriage of the parties to an antenuptial agreement to each other will be held to negate the original antenuptial agreement, the one made in regard to the first marriage, insofar as the second marriage is concerned, except for the rights already vested in the spouse by virtue of the first marriage.

There are situations recognized by the courts as having a special need for antenuptial agreements concerning the rights of the parties, as with older couples, couples entering second and third marriages, cases where there are other dependents, a great disparity in wealth between the prospective spouses, a disparity in age or in health, or where the marriage would be impracticable without some sort of premarital understanding.

**DRAFTING CONSIDERATIONS**

When drafting an antenuptial agreement there are certain factors which must be taken into consideration due to the special nature of the agreement, the attitudes of the courts towards its enforceability, and the circumstances of the parties involved.

First and foremost, the agreement itself must be fair on its face at the time that it is entered. The agreement must also be fair or at least not unreasonably one-sided at the time it will take effect. The agreement must not go so far as to overreach or to be indicative of unfair advantage or unreasonableness, or of a lack of full and fair disclosure. If fraud or misrepresentation is used to secure the agreement, it may be held voidable

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93 Campbell v. McBurney, 201 Kan. 26, 439 P.2d 133 (1968); In re Reed, 414 S.W.2d 283 (Mo. Sup. Ct. 1967).
94 Note 93 supra.
95 Seuss v. Schukat, 368 Ill. 27, 192 N.E. 666 (1934).
99 E.g., Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906); In re Vallish, 431 Pa. 88, 244 A.2d 745 (1968).
100 Mann v. Mann, 270 Ill. 83, 110 N.E. 345 (1915); Slater v. Slater, 310 Ill. 454, 142 N.E. 177 (1924).
by the innocent party.\textsuperscript{101} At all times the reasons and goals for
the agreement must be kept in mind and be known to both
parties, to prevent either one from being misled.\textsuperscript{102}

It is of great importance to ascertain which state's laws
will govern when the agreement is sought to be enforced. In
the drafting of the agreement and its execution, all the laws
of the state in which it is to be executed must be met.\textsuperscript{103} The
following items are of prime concern to the drafting attorney:
the conflict of laws implications;\textsuperscript{104} income tax advantages;\textsuperscript{105}
the possibility of the imposition of a gift tax;\textsuperscript{106} estate and in-
heritance tax matters.\textsuperscript{107}

It is necessary that a full disclosure of wealth be made to
be certain that the parties knew what rights they had and vol-
untarily gave up those rights in the light of that knowledge.\textsuperscript{108}
To surrender a right without knowing its value or possible
worth would be unconscionable and unenforceable.\textsuperscript{109}

There must be no undue influence by one spouse on the
other.\textsuperscript{110} This may be a difficult requirement to meet inasmuch
as a person about to be married would usually tend to be
greatly influenced by the prospective spouse. It is prudent to
engage independent attorneys for each party to represent his or
her interest and to assure that both parties understand the full

\textsuperscript{101} This is because of the general contract principle that the defrauded
party may rectify the fraudulent transaction and enforce the contract which
would otherwise have been void due to the misrepresentation.

\textsuperscript{102} Genung v. Havemann, 103 Ill. App. 2d 409, 242 N.E.2d 790 (1968);
Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925); Mead v. Mead, 193 So.

\textsuperscript{103} Hill v. Hill, 262 A.2d 661 (Del. Ch. 1970), aff'd, 269 A.2d 212

\textsuperscript{104} For a general discussion on this point see Cathey, Ante-Nuptial
Agreements in Arkansas — A Drafter's Problem, 24 Ark. L. Rev. 275
(1970). This problem is magnified due to the greater mobility of families
in modern time and by the conflicting public policies concerning such agree-
ments in the various states.

\textsuperscript{105} An example of a possible income tax advantage might be an agree-
ment between the prospective spouses that if they should ever be divorced
payments to the wife should be characterized as alimony rather than as
support, allowing the husband the tax advantage of the deduction. As
support, he would only have been allowed the uniform tax deduction for
dependents.

\textsuperscript{106} Ellis v. Comm'r, 437 F.2d 442 (9th Cir. 1971), wherein an
antenuptial agreement involving a trust had been ruled void under Arizona
law, the amount of the trust corpus was considered a gift to the wife for
tax purposes.

\textsuperscript{107} An antenuptial agreement to take effect upon the death of a party
should be considered as part of the entire estate plan, since it must be
complied with if valid in any disposition of the estate's assets.

\textsuperscript{108} Deholt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1928); Landes v.
Landes, 268 Ill. 11, 108 N.E. 691 (1915). Cf. In re Perelman, 468 Pa. 112,

\textsuperscript{109} Id.

\textsuperscript{110} Deholt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1928); Petru v.
Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954); Brown v. Brown, 265 S.W.2d
484 (Ky. 1954); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); In re
Knippel, 7 Wis. 2d 385, 96 N.W.2d 514.
effect of the agreement and any and all circumstances that may reasonably be expected to result from it.\textsuperscript{111}

In proving the validity of the antenuptial agreement, the agreement is presumed initially to be fair and fully enforceable, and it is further presumed that full disclosure had been made, with the burden on the challenging party to show otherwise. However, if the provision for the challenging spouse was significantly disproportionate to the other spouse's wealth at the time of the agreement, the burden shifts to the party seeking to uphold the agreement to show it met all the requirements of validity and that it had been agreed to after the required full and fair disclosures of the extent of the respective spouse's wealth had been made.\textsuperscript{112}

Marriage itself provides a sufficient consideration for the agreement, with the exchange of waivers or the giving of a sum of money by one prospective spouse for the waiver of the other also providing valid consideration.\textsuperscript{113}

There is a variety of interrelated factors that the courts generally consider in ruling on the validity of the antenuptial agreement in addition to the circumstances of the parties at the time it is sought to be enforced or when its validity is ruled upon. The ages of the parties relative to one another are considered,\textsuperscript{114} as well as age as indicative of a spouse no longer possessing the ability to support and care for him or herself.\textsuperscript{115} The business acumen, literacy, astuteness, intelligence, and like factors of the parties at the time of the agreement are taken into account to help determine whether one party took advantage of the other in securing consent to the agreement or in overreaching the other.\textsuperscript{116} The conditions under which the agreement was made are considered to determine whether full and fair disclosure was made to the other party, if there was any undue influence, if there was time to consider the agreement in full and, in general, if the surrounding circumstances were indicative of fraud or coercion either directly or indirectly by one party on the other.\textsuperscript{117} The relative wealth of the parties is examined to see if the spouse's allotment is grossly disprop-

\textsuperscript{111} Note 65 supra.
\textsuperscript{112} Note 64 supra.
\textsuperscript{113} Edwards v. Martin, 32 Ill. App. 145 (1890); York v. Ferner, 59 Iowa 457, 13 N.W. 630 (1882).
\textsuperscript{115} See In re Kaufman, 404 Pa. 131, 171 A.2d 48 (1961). Here the Pennsylvania court considered many factors as relevant to the adequacy of the settlement as well as the age and present ability of the surviving wife.
\textsuperscript{117} Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967).
portionate to what would otherwise have been received.\textsuperscript{118} Some courts use the measure of the adequacy of the settlement as the prime criterion.\textsuperscript{119}

The nature of the premarital agreement is such that when it is sought to be enforced or is challenged in the courts it is usually some time after its execution, thus making it difficult for the court to determine exactly what the conditions were when it was entered into and to decide whether these conditions were fair to both parties. The intent of the parties is especially scrutinized, this becoming a major factor in the more recent Illinois decisions.\textsuperscript{120} A party will not be held to have waived or surrendered any of his or her marital rights unless the intent to do so is clearly made out in the agreement itself.\textsuperscript{121}

Often the prior obligations of the parties may be held to indicate the need for a rather severe antenuptial agreement that might otherwise be rejected as unreasonable. This could arise, for instance, if the husband had minor children from a prior marriage for whom he wanted to assure proper provision was made.\textsuperscript{122}

The antenuptial agreement must meet all the requirements of contract law in addition to all the special requirements due to the nature of the marital relationship.\textsuperscript{123}

\section*{Limitations upon Antenuptial Agreements in Regard to Divorce}

There are five major reasons given by the courts for a general refusal to enforce the types of antenuptial agreements that deal with the consequences of the divorce or separation of the parties:

1) The inclusion of a clause in the agreement to take effect upon the divorce of the parties shows bad faith on the part of the parties in regard to the marriage.\textsuperscript{124}

In other words, by the agreement they belie the

\textsuperscript{118}Achilles v. Achilles, 151 Ill. 136, 37 N.E. 693 (1894); Taylor v. Taylor, 144 Ill. 436, 33 N.E. 532 (1893).

\textsuperscript{119}In re Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964); Thomas v. Dancer, 264 P.2d 714 (Okla. Sup. Ct. 1953); In re Knippe, 7 Wis. 2d 385, 96 N.W.2d 514 (1959).


\textsuperscript{121}Id.

\textsuperscript{122}Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. Sup. Ct. 1962).

\textsuperscript{123}Guhl v. Guhl, 376 Ill. 100, 33 N.E.2d 185 (1941); Van Cura v. Drangelis, 45 Ill. App. 2d 205, 193 N.E.2d 201 (1963); Barham v. Barham, 33 Cal. 2d 416, 202 P.2d 289 (1949); Northern Trust Co. v. King, 149 Fla. 611, 6 So. 2d 839 (1942); McClain's Estate v. McClain, 133 Ind. App. 645, 188 N.E.2d 842 (1962); Key v. Collins, 145 Tenn. 106, 236 S.W. 3 (1921); Deller v. Deller, 141 Wis. 255, 124 N.W. 278 (1910).

\textsuperscript{124}See Ehlers v. Ehlers, 259 Ill. App. 142 (1930).
necessary intent that the marriage be a permanent contract which neither would try to jeopardize or terminate.

2) To make an agreement contemplating divorce, reducing certain of the duties and obligations of either spouse to the other, makes the marriage relation other than what it is defined by law to be.\textsuperscript{125} No such pseudo-marriage will be tolerated by the courts; each marriage must include certain rights and duties between the spouses which are deemed essential to the relationship itself. Hence, the parties will not be allowed to waive these essential obligations, or alter the basic nature of marriage as a lifetime contract.

3) An agreement made before marriage dealing with a possible future divorce situation may increase the chances of the parties seeking a divorce or even show an intent by the parties that the marriage should later terminate by divorce. Such agreements may be held void as a matter of public policy.\textsuperscript{126}

4) It is sometimes held that upon the dissolution of the marriage there has been a failure of the consideration given for the antenuptial agreement, namely the marriage itself, rendering such an agreement no longer enforceable.\textsuperscript{127}

5) Some courts have held that the end of the marriage also ends the effectiveness of the premarital agreement.\textsuperscript{128} The reasoning seems to be that the only valid subject matter for the antenuptial agreement was the marriage itself, and that when the court acted to end the marriage all the agreements which were dependent upon that marriage were canceled. The point is that there can no longer be an antenuptial agreement when there is no longer a marriage. Such a view would certainly render moot the question of antenuptial agreements in regard to divorce if adopted by the courts as a whole.

The majority of the courts still cling to one or more of these limiting doctrines, making it an uphill argument for counsel to argue the enforceability of such agreements. Even some of these courts, however, while not granting enforcement

\textsuperscript{125} Note 27 supra.
\textsuperscript{126} Ehlers v. Ehlers, 259 Ill. App. 142 (1930); Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 753 (1928); In re Duncan, 87 Colo. 149, 285 P. 757 (1930); Kalsem v. Froland, 207 Iowa 993, 222 N.W. 3 (1928); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).
\textsuperscript{127} York v. Ferner, 59 Iowa 487, 13 N.W. 630 (1882).
\textsuperscript{128} Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934).
of such agreements, will allow them to be used as evidence or be considered as part of the surrounding circumstances in the determination of the amount of alimony to be awarded after a divorce.\textsuperscript{129}

**CHANGING TEMPER OF THE TIMES — A PROGNOSTICATION**

The primary goal of domestic law in general is to make the family and the marital relation in particular a more viable and practicable situation. The high frequency of divorce would seem to indicate that something is lacking in the current perspective of the law. The modern antenuptial agreement, to gain stronger support from the courts and the legal community, must be demonstrated to increase the viability and practicability of marriage, or else any real use and value for such agreements will be marginal at best.

The first question in this regard is whether an antenuptial agreement can be used to increase the chances of a marriage lasting, that is, actually reduce the chances of divorce. By agreeing in advance as to certain matters, even if done informally, the parties can examine before marriage those issues that may be most disruptive later. Indeed it would seem advisable that couples visit a lawyer prior to marriage as they would visit a doctor. The legal ramifications of their bond may be at best vague to them. One advantage of the antenuptial conference is that these legal aspects are brought into focus with expert advice to both parties. Provisions can then be made before time for the possible contingencies that may befall the couple and their relationship.

The following factors would seem to indicate a compelling need for a wider application of antenuptial agreements, even those concerning divorce, to meet the exigencies of the times: a general concern for the equity of a particular situation rather than the application of purely formal rules; a broadened view toward an individual's private life; the realization of the equality of women with men both legally and economically;\textsuperscript{130} an increasing tolerance for a variety of life styles; the reality of a soaring divorce rate with an accompanying rise in the rate of second and third marriages; a trend to marriage at a somewhat older age.


\textsuperscript{130} The older cases unanimously hold that regardless of what independent means of support the wife may have, the husband still bears the primary obligation to support the wife due to the nature of the marital relation. This common law liability is still recognized by most courts in the allowance of alimony, though the extent of the wife's independent means is also a matter for consideration. See generally, In re Muxlow, 367 Mich. 133, 116 N.W.2d 43 (1962); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964).
age after a degree of economical security has already been reached.

**CONCLUSION**

In family law in general equities weigh at least as heavily as the law in any given situation. With antenuptial agreements this is the case as well. But at present, especially with the traditional notion of the family being tried and tested beyond precedent, the theories behind the restrictive policies toward some antenuptial agreements are also being tried and tested. The position that the state will not countenance an agreement made in anticipation of a possible separation or divorce begins to be considerably less tenable when the divorce rate reaches the level it has in present times. In some states directly and in others more indirectly a shift in emphasis can be observed.\(^{131}\) What is of primary importance is no longer the prevention of the parties from seeking divorce, but rather that neither party be at a disadvantage in the marital situation because of the agreement.\(^{132}\)

The responsibility of the spouses for any children they might have remains, as it should, beyond the reach of an antenuptial agreement. These are rights which accrue to the child by virtue of his birth and in no direct way arise from the agreement or lack of agreement between the spouses. Any such agreement could at best be auxiliary to the duty owed the child.\(^{133}\)

It is time that this more reasonable approach be made a matter of policy and not merely a guideline to be inferred from the court’s judgment of the equities. In frank terms, the marital relation is no longer what it had been in the past. The chances of a given marriage ending in divorce have increased greatly and, it seems, probably will increase still more. To proscribe the parties to a marriage from making any agreement as to this very real possibility is to needlessly handicap their planning for future contingencies.

The majority of the courts adhere to the more traditional approach.\(^{134}\) This may partly be due to the lawyers before them arguing traditional law and attempting to fit their factual situa-

\(^{131}\) An analysis of this shift may be found in: Lindsay v. Lindsay, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964).


\(^{134}\) Williams v. Williams, 29 Ariz. 538, 243 P. 402 (1926); Watson v. Watson, 27 N.E. 355 (1906); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939); Hillman v. Hillman, 69 N.Y.S.2d 194 (1947); Mottley v. Mottley, 206 N.C. 190, 120 S.E.2d 422 (1961); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950); Ryan v. Dockery, 134 Wis. 481, 114 N.W. 820 (1908).
tions into these established patterns. Also, the antenuptial agreement is often merged into the divorce settlement by mutual consent of the parties and never adjudicated by the court.

The more progressive courts treat the antenuptial agreement in relation to divorce not unlike a separation agreement.\(^{135}\) When dealing with property, the conditions at the time agreement was made are of utmost importance. When dealing with support, the conditions of the parties at the time the divorce is sought are also canvassed, that fairness may be preserved.\(^{136}\) But the agreement is not rejected out of hand merely because it was made in regard to divorce before the marriage.\(^{137}\) The agreement became fully enforceable or matured upon the filing for divorce. It should then be as valid as if the parties had entered the agreement at the time of filing for divorce, given that the other considerations for a valid antenuptial agreement had all been met.\(^{138}\)

In this field especially the court's attitude depends on the point of view taken as to the nature of the family, of marriage, and of the state's role in the private lives of its citizens. As marriage is a definite and legally defined relationship; a relationship even if called a marriage by the parties that is substantially different from that defined in law would not partake of the legal characteristics and would thus be void. If it is a valid marriage, the parties will not be allowed to alter it into something else by private agreement between themselves. What is at issue is how far the parties will be allowed to enter into private agreements to alter these legal characteristics and still remain substantially engaged in that relation defined by law.\(^{139}\) Of course, this involves the balancing of public policy and individual interests.\(^{140}\) In the past this balance has been tipped in favor of traditional public policy at the expense of individual interests.

It has been the basic argument of this comment that a truer balancing or equating of interests should take place, and that the major interest of the state should only be that neither spouse gain an unfair advantage over the other during the marriage.

Frank Rac

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\(^{136}\) Like a divorce decree it is subject to review by the court to determine if it is still just under changed circumstances of the parties, such as an increase in the need for support by the wife since the agreement had been entered.

\(^{135}\) This more progressive attitude is well brought out in Posner v. Posner, 233 So. 2d 381 (Fla. Sup. Ct. 1970), at 386, where it was held that an antenuptial agreement entered into under conditions as outlined in this article would be “a valid and binding agreement between the parties at the time and under the conditions it was made but subject to be increased or decreased under changed conditions . . . . (as provided by law).”

\(^{137}\) Note 78 supra.


\(^{139}\) Note 78 supra.

\(^{140}\) Note 60 supra.