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COMMENTS

A "CHECK LIST" FOR THE DRAFTING OF ENFORCEABLE ANTENUPTIAL AGREEMENTS

DONALD M. KLEIN*

INTRODUCTION

As one writer has observed, recent years have witnessed the growing popularity of antenuptial agreements, and with this increasing popularity, a correspondingly greater number of attacks upon the validity of such contracts.[1] Since the Florida law in this area consists of a sketchy handful of decisions, it is the purpose of this comment to present a broad view of the law as it exists throughout the United States so as to lay a foundation upon which to make some concrete suggestions which, it is hoped, will be of assistance to the practitioner in drafting antenuptial agreements able to sustain the challenge of litigation.

Basically, an antenuptial agreement is a contract between a man and woman, or sometimes between both of them and a third person, entered into prior to marriage but in contemplation and consideration thereof, by which the property rights of one or both of the intended spouses are determined in advance of those events, such as death, which ordinarily give rise to an interest in the property of the other spouse.[2] An antenuptial settlement is the same as an antenuptial agreement, except that the former involves a transfer of property at the time the contract is executed, while the latter may be partly or wholly executory.[3]

An antenuptial agreement between the prospective spouses can take varied forms, such as settlement deeds whereby both spouses, or one of them, convey property before marriage to the other. It may also assume the form of an executory contract by which one or both of the parties agree to transfer property to the other after marriage or upon the happening of a designated event, such as death, and usually contains a provision

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1. Murray, *Family Law*, 18 U. MIAMI L. REV. 231, 251 (1963).

2. See generally LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90 (1964). See also *In re* Greenleaf, 169 Kan. 22, 217 P.2d 275 (1950); Troha v. Sneller, 169 Ohio St. 397, 159 N.E.2d 899 (1959).

An antenuptial agreement is to be distinguished from a release, which is effective *in praesenti* to relinquish rights which may arise *in futuro* upon the death of one of the spouses. An antenuptial agreement, on the other hand, is not effective until the date of death or other contingency provided in the agreement. See Barnhart v. Barnhart, 376 Pa. 44, 101 A.2d 904 (1954). A release will be held valid in the absence of fraud. *In re* McCready, 316 Pa. 246, 175 Atl. 554 (1934).

3. LINDEY, *op. cit. supra* note 2.

whereby each spouse agrees to waive all other rights in the property or estate of the other.[4]

GENERAL REQUISITES

At the common law, antenuptial agreements were a virtual impossibility. In view of the doctrine that marriage caused a merger of the wife's identity into that of her husband, spouses were unable to contract with each other during coverture. Under an extension of this principle, marriage operated to discharge or extinguish any obligations created by a contract executed by the spouses prior to their marriage.[5] However, even in early times the courts of equity were willing to enforce such agreements, and with the advent of the Married Women's Property Acts,[6] the common law rule that marriage extinguished contracts between husband and wife was abrogated.

Today, all courts recognize that antenuptial agreements are enforceable as long as the parties have complied with the law governing the execution of such contracts. Prenuptial agreements are now said to be favored by public policy,[7] since they are conducive to the welfare of the parties and prevent disputes as to marital rights in property, thus tending to settle in advance one of the most frequent causes of family strife.

To the extent that it is executory, an antenuptial agreement must be supported by consideration. However, it is everywhere agreed that the marriage itself is a sufficient consideration for such agreements.[8] Indeed, marriage has been said by Mr. Justice Story to be "of the highest value,"[9] and by Chancellor Kent to be "the highest consideration in law."[10] However, marriage is not the only consideration recognized as sufficient to support an antenuptial agreement, and many courts have held that a promise to marry, especially when the marriage later takes place, will

4. *Ibid.*

5. For a general historical background, see LINDEY, *op. cit. supra* note 2; 26 AM. JUR. *Husband & Wife* § 275 (1940).

6. See, *e.g.*, FLA. STAT. ch. 708 (1963).

7. McClain's Estate v. McClain, 183 N.E.2d 842, *rehearing dismissed*, 184 N.E.2d 281 (Ind. App. 1962); Baugher v. Barrett, 128 Ind. App. 233, 145 N.E.2d 297 (1957); Gartner v. Gartner, 246 Minn. 319, 74 N.W.2d 809 (1956); *In re* Appleby, 100 Minn. 408, 111 N.W. 305 (1907); Sanders v. Sanders, 288 S.W. 473 (Tenn. App. 1955).

8. North v. Ringling, 149 Fla. 739, 7 So.2d 476 (1942); Guhl v. Guhl, 376 Ill. 100, 33 N.E.2d 185 (1941); *In re* Onstot, 224 Iowa 520, 277 N.W. 563 (1938); Kalsem v. Froland, 207 Iowa 994, 222 N.W. 3 (1928); Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1 (1896); Kennett v. McKay, 336 Mich. 28, 57 N.W.2d 316 (1953); *In re* Appleby, 100 Minn. 408, 111 N.W. 305 (1907). See generally MADDEN, DOMESTIC RELATIONS § 72 (1931).

But see Fahs v. Merrill, 142 F.2d 651 (5th Cir. 1944), indicating that marriage is not consideration in the sense of "money or money's worth" so as to enable a conveyance pursuant to an antenuptial agreement to avoid the imposition of a gift tax.

9. Magniac v. Thompson, 32 U.S. (7 Pet.) 348 (1833).

10. Sterry v. Arden, 1 Johns. Ch. R. 261 (1814).

constitute valuable consideration for a prenuptial contract.[11] In some cases, a promise to marry will suffice even though the intended marriage never occurs, as where the marriage is prevented by the death of one of the parties.[12] Generally, however, a promise to marry which is not followed by the marriage itself will support an antenuptial agreement only when the agreement can be shown to have been made in consideration of the promise itself, and not made conditional upon the subsequent marriage taking place.[13]

In most cases, additional consideration is present in the form of mutual promises to relinquish all rights in the property of the other prospective spouse. If such is the case, the partial failure of other consideration will not serve to vitiate the agreement if it can be shown that marriage was the vital consideration for the contract and that the marriage took place.[14]

Unless otherwise governed by statute, the form and externals of an antenuptial agreement are immaterial,[15] and the court's prime concern will be the intention of the parties.[16] However, the attorney would be wise to explore his local statutes, since some jurisdictions require that antenuptial agreements be in writing,[17] witnessed or acknowledged,[18] or recorded.[19]

In construing prenuptial contracts, most courts have been governed by principles applicable to the construction of deeds and contracts

11. Masterson v. Masterson, 200 Ark. 193, 139 S.W.2d 30 (1940); *In re* Wamach, 137 Cal. App. 2d 112, 289 P.2d 871 (1955); Ayoob v. Ayoob, 74 Cal. App. 2d 236, 168 P.2d 462 (1946); Smith v. Farrington, 139 Me. 241, 29 A.2d 163 (1943); *In re* Saffer, 39 Misc. 2d 691, 241 N.Y.S.2d 681 (Surr. Ct. 1963); Dearbaugh v. Dearbaugh, 170 N.E.2d 262 (Ohio App. 1959).

12. Smith v. Allen, 87 Mass. (5 Allen) 454 (1862).

13. Essery v. Cowlard, 26 Ch. D. 191 (1884).

14. Wilson v. Wilson, 157 Me. 119, 170 A.2d 679 (1961); Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).

15. See generally 26 AM. JUR. *Husband & Wife* § 278 (1940); Baugher v. Barrett, 128 Ind. App. 233, 145 N.E.2d 297 (1957).

16. *Ibid.* See also LINDEY, *op. cit. supra* note 2.

17. *In re* Saffer, 39 Misc. 2d 691, 241 N.Y.S.2d 681 (Surr. Ct. 1963) (Statute of Frauds complied with); Lieber v. Mercantile Nat'l Bank, 331 S.W.2d 463 (Tex. Civ. App. 1960). See generally LINDEY, *op. cit. supra* note 2, § 90, at 45-52.

In Gilbert v. Gilbert, 66 N.J. Super. 246, 168 A.2d 839 (1961), an oral antenuptial agreement was held unenforceable, the court noting that marriage alone was not such part performance as would withdraw the contract from the operation of the statute and render it enforceable in equity. See also Watkins v. Watkins, 82 N.J. Eq. 483, 89 Atl. 253 (1913). Nor can a subsequently executed will serve as a memorandum of an antenuptial agreement to make a bequest to the wife. Brought v. Howard, 30 Ariz. 522, 249 Pac. 80 (1926).

For a discussion of the writing requirement in Florida, see notes 112-13 *infra*, and accompanying text.

18. *In re* Nelson, 36 Cal. Rptr. 352 (Cal. App. 1964); *In re* Gillen, 191 Kan. 254, 380 P.2d 357 (1963); *In re* Dorshorst, 174 Neb. 886, 120 N.W.2d 32 (1963).

But if acknowledgement is not required by statute, its absence will not invalidate an otherwise valid antenuptial agreement. Finn v. Grant, 224 Iowa 527, 278 N.W. 225 (1938).

19. Burnes v. Burnes, 203 Ark. 334, 157 S.W.2d 24 (1942).

generally.[20] However, since antenuptial agreements are favored by public policy, they are given a liberal construction in order to ascertain and give effect to the intention of the parties.[21] In determining the intention of the parties, the courts will look to the instrument itself, the circumstances and condition of the parties, including the property owned by each, and to such other matters which ordinarily would constitute the inducement for the contract.[22] Although extrinsic evidence is admissible as an aid to construction, the words of the contract should not be disregarded and the court should avoid making a new agreement for the parties contrary to the normal meaning of the words contained therein.[23] On the other hand, it has been said that when the wording of the contract is ambiguous and equally susceptible to two contrary interpretations, the agreement should be afforded the construction which will prove most favorable to the wife.[24]

THE TESTS OF VALIDITY—ADEQUACY AND FULL DISCLOSURE

Stated broadly, it is the general rule that antenuptial agreements are valid and enforceable as long as they are freely and voluntarily entered into and if, in view of all the surrounding facts and circumstances, the agreement is fair, equitable and reasonable.[25] To a large extent, this rule is merely declaratory of a principle applicable to contracts generally, and indeed it has been suggested that antenuptial agreements are to be governed by the established principles of contract law.[26]

More realistically, it is obvious that the general rule is much too general, and a substantial body of case law has evolved which has noted the inherent points of divergence between antenuptial and ordinary con-

20. Northern Trust Co. v. King, 149 Fla. 611, 6 So.2d 539 (1942); Baugher v. Barrett, 128 Ind. App. 233, 145 N.E.2d 297 (1957); O'Dell v. O'Dell, 238 Iowa 434, 26 N.W.2d 401 (1947); *In re* Brown, 189 Kan. 193, 368 P.2d 27 (1962); Bunger v. Bunger, 187 Kan. 642, 359 P.2d 1113 (1961); *In re* Hepinstall, 323 Mich. 322, 35 N.W. 276 (1948); *In re* Harris, 7 Wis. 2d 417, 96 N.W.2d 718 (1959).

21. *E.g.*, Brawley v. Rogers, 188 Ark. 655, 67 S.W.2d 176 (1934); *In re* Parish, 236 Iowa 822, 20 N.W.2d 32 (1945); *In re* Hill, 162 Kan. 385, 176 P.2d 515 (1947); Pressman v. Pressman's Adm'r, 275 Ky. 45, 120 S.W.2d 739 (1938).

22. Barham v. Barham, 33 Cal. 2d 416, 202 P.2d 289 (1949); Northern Trust Co. v. King, 149 Fla. 611, 6 So.2d 539 (1942); McClain's Estate v. McClain, 133 Ind. App. 645, 183 N.E.2d 842 (1962); Roush v. Hullinger, 119 Ind. App. 342, 86 N.E.2d 714 (1949); Peet v. Monger, 244 Iowa 247, 56 N.W.2d 589 (1953); Key v. Collins, 145 Tenn. 106, 236 S.W. 3 (1921).

23. *In re* Parish, 236 Iowa 822, 20 N.W.2d 32 (1945); *In re* Hill, 162 Kan. 385, 176 P.2d 515 (1947); Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942).

24. Mallow v. Eastes, 179 Ind. 267, 100 N.E. 836 (1913); Turley v. Turley, 44 N.M. 382, 103 P.2d 113 (1940); Moore v. Moore, 344 Pa. 324, 25 A.2d 130 (1942); Oesau v. Estate of Oesau, 157 Wis. 255, 147 N.W. 62 (1914); Deller v. Deller, 141 Wis. 255, 124 N.W. 278 (1910).

25. *E.g.*, Allison v. Stevens, 269 Ala. 288, 112 So.2d 451 (1959); *In re* Ward, 178 Kan. 366, 285 P.2d 1081 (1955); Hawkins v. Hawkins, 185 N.E.2d 89 (Ohio Prob. 1962); *In re* Cobb, 305 P.2d 1028 (Okla. 1957); *In re* Borton, 393 P.2d 808 (Wyo. 1964); annot., 27 A.L.R.2d 883 (1953).

26. See note 20 *supra*.

tracts. Thus, although the general law of contracts is predicated on the justifiable assumption that the parties to the agreement have dealt with each other at arm's length, such an assumption is obviously unrealistic in the case of antenuptial agreements. Indeed, most prenuptial agreements are entered into at a time when the parties are formally engaged, or at least, contemplating marriage in the near future.

Most of the courts that have considered the question agree that it is the engagement of the parties that renders the antenuptial agreement different from the ordinary contract. If the parties are engaged, the agreement will be subjected to a more careful scrutiny than is given to contracts in general.[27] Engagement is said to give rise to a confidential relationship which, in turn, imposes upon the contracting parties a duty to make a full and complete disclosure concerning the nature, extent and value of their estates.[28] According to the majority of courts, in the absence of an engagement to marry, no confidential relationship arises and an antenuptial agreement may be sustained even though the requirement of full disclosure has not been satisfied.[29] However, a number of more modern decisions have recognized that the mere fact that the parties contemplate marriage when the agreement is executed is sufficient to impose a duty of disclosure,[30] while others have reached the same result by holding that a formal engagement is not necessary to give rise to a confidential relationship between the parties to an antenuptial agreement.[31]

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27. Allison v. Stevens, 269 Ala. 288, 112 So.2d 451 (1959); Norrell v. Thompson, 252 Ala. 603, 42 So.2d 461 (1949); Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940); Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1927); Rolfe v. Rolfe, 125 Me. 82, 130 Atl. 877 (1925); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); Mathis v. Crane, 360 Mo. 631, 230 S.W.2d 707 (1950); Kingsley v. Noble, 129 Neb. 808, 263 N.W. 222 (1935); *In re* Cobb, 305 P.2d 1028 (Okla. 1957); Giesler v. Remke, 117 W. Va. 430, 185 S.E. 847 (1936).

28. Weeks v. Weeks, *supra* note 27; Warner v. Warner, 235 Ill. 448, 85 N.E. 630 (1908); Watson v. Watson, 5 Ill. App. 2d 526, 126 N.E.2d 220 (1955); Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 532 (1954); Lamb v. Lamb, 130 Ind. 273, 30 N.E. 36 (1892); Denison v. Dawes, 121 Me. 402, 117 Atl. 314 (1922); Mathis v. Crane, *supra* note 27; *In re* Mosier, 58 Ohio Op. 369, 133 N.E.2d 202 (1954); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957). *But see* Fernandez v. Fernandez, 15 Cal. Rptr. 374 (Cal. App. 1961), holding that California law does not presume a confidential relationship between prospective parties to marriage.

29. In the following cases, it was held that the burden was on the wife attacking the agreement on the ground of nondisclosure to allege and prove that the parties were engaged at the time the agreement was executed: Yockey v. Marion, 269 Ill. 342, 110 N.E. 345 (1915); Martin v. Collison, 266 Ill. 172, 107 N.E. 257 (1914); Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954); Denison v. Dawes, *supra* note 28; Williamson v. First Nat'l Bank, 111 W. Va. 720, 164 S.E. 777 (1931).

See also Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955), in which the court noted that a recital in the agreement that marriage was "shortly to be solemnized" and the husband's introduction of his "prospective wife" to his attorney gave rise to the logical inference that the parties were engaged.

30. Johnston v. Johnston, 134 Ind. App. 351, 184 N.E.2d 651 (1962); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); Speckman v. Speckman, 15 Ohio App. 283 (1921).

31. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955).

As a corollary to the general rule that engagement imposes a duty of full disclosure, it is generally accepted that when it appears from the surrounding facts and circumstances that the contemplated marriage was primarily one of convenience, a confidential relationship will not be found, and the validity of the contract will be measured by the more general principles governing arm's length transactions.[32] In such cases, the courts have assumed that the parties are capable of exercising a sounder kind of judgment than are those who are blinded by the mutual trust and ardor normally associated with impending matrimony.[33] Although a few courts have sought to attach some significance to the relative ages of the parties in determining whether a confidential relationship existed,[34] the decided weight of authority has rejected that approach and has been content to consider the ages of the parties as only one of a multitude of salient factors worthy of consideration.[35]

Given the existence of a confidential relation between the intended spouses—either because the parties were engaged or because of the very nature of an antenuptial agreement—and recognizing that such a relationship gives rise to a duty of full and frank disclosure, the vast majority of courts have held that an inequitable, unjust or unreasonably disproportionate provision in the agreement made in favor of the intended wife gives rise to a *presumption* of nondisclosure by the intended husband.[36] This presumption is grounded on the premise that few women would be content to relinquish the benefits accruing to them upon marriage in exchange for a relatively small sum, unless their choice was influenced by designed concealment or fraud on the part of the prospective husband.

Although most courts have agreed that an inadequate provision in favor of the intended wife is sufficient to raise a presumption of conceal-

32. *Ibid.*; *In re* Malchow, 143 Minn. 53, 172 N.W. 915 (1919); Pniewski v. Przybysz, 183 N.E.2d 437 (Ohio App. 1962).

33. See annot., 27 A.L.R.2d 883, 890 (1953).

34. *In re* Mackevich, 93 Ariz. 129, 379 P.2d 119 (1963); Slingerland v. Slingerland, 115 Minn. 270, 132 N.W. 326 (1911); *In re* Koeffler, 215 Wis. 115, 254 N.W. 363 (1934).

35. Peet v. Peet, 81 Iowa 172, 46 N.W. 1051 (1890); Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955); *In re* McClellan, 365 Pa. 401, 75 A.2d 595 (1950); *In re* Flannery, 315 Pa. 576, 173 Atl. 303 (1934); *In re* Koeffler, *supra* note 34. See also *In re* Mosier, 58 Ohio Op. 369, 133 N.E.2d 202 (1954), in which the agreement was sustained on the ground that the provision made for the wife was not "so disproportionate as to give rise to a presumption of fraud."

36. Davis v. Davis, 196 Ark. 57, 116 S.W.2d 607 (1938); Guhl v. Guhl, 376 Ill. 100, 33 N.E.2d 185 (1941); Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937); Hessick v. Hessick, 169 Ill. 486, 48 N.E. 712 (1897); Harlin v. Harlin, 261 Ky. 414, 87 S.W.2d 937 (1935); Rolfe v. Rolfe, 125 Me. 82, 130 Atl. 877 (1925); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); Juhasz v. Juhasz, 134 Ohio St. 257, 16 N.E.2d 328 (1938); Kline v. Kline, 57 Pa. 120 (1878); Bibelhausen v. Bibelhausen, 159 Wis. 365, 159 N.W. 516 (1915).

But see Johnston v. Johnston, 134 Ind. App. 351, 184 N.E.2d 651 (1962), in which the court refused to infer constructive fraud in the absence of other facts and circumstances from which such a presumption might fairly be inferred. However, the court suggested that a presumption might arise from a grossly disproportionate provision.

ment by the husband, the standard of "adequacy" imposed has not been uniform. Thus, some have refused to indulge in the presumption unless the provision for the wife was "manifestly inadequate,"[37] while others have required that the provision be "so small as to shock the conscience of the court."[38] Others have sustained provisions which were not "oppressive or grossly inadequate,"[39] or "not so inadequate as to be unconscionable."[40] Needless to say, such "tests" often do no more than beg the question. In the final analysis, the facts of the individual case must be examined to determine whether the provision in question is truly "inadequate." A few courts have undertaken the task of pinning down the question with more precision, demanding that the intended wife be provided with at least enough to enable her to live comfortably after her husband's death in substantially the same manner as prior to their marriage.[41] Another court has gone still farther, basing the measure of adequacy on a number of factors, including the relative wealth of the parties, their ages and number of children by a previous marriage, intelligence and the role played by the wife in the husband's accumulation of wealth.[42] All courts are agreed, however, that the question of adequacy is determined with reference to conditions as they existed at the time of the agreement's execution.[43]

In considering the effect to be given to a provision that has been characterized as "inadequate" under one of the standards already mentioned, all courts agree that the mere inadequacy of provision, without more, is not sufficient to invalidate the antenuptial agreement.[44] Rather, a determination that a provision is inadequate bears on the burden of proof necessary to establish the fairness of the agreement. Most courts have taken the position that an unreasonably disproportionate provision in favor of the prospective wife gives rise to a presumption of concealment by the husband, and shifts the burden to him to demonstrate in affirmative terms that he fully disclosed to her the extent, nature and value of his estate.[45] On the other hand, a few courts have treated the inadequacy

37. *In re* Koeffler, 215 Wis. 115, 254 N.W. 363 (1934); *In re* Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959).

38. *In re* Nelson, 36 Cal. Rptr. 352 (Cal. App. 1964).

39. Thomas v. Dancer, 264 P.2d 714 (Okla. 1953).

40. Gartner v. Gartner, 246 Minn. 319, 74 N.W.2d 809 (1956).

41. *In re* McClellan, 365 Pa. 401, 75 A.2d 595 (1950); *In re* Emery, 362 Pa. 142, 66 A.2d 262 (1949).

42. *In re* Kaufman, 404 Pa. 131, 171 A.2d 48 (1961).

43. *In re* Mosier, 58 Ohio Op. 369, 133 N.E.2d 202 (1954); Clark v. Clark, 201 Okla. 134, 202 P.2d 990 (1949).

44. *E.g.*, Brown v. Brown, 265 S.W.2d 484 (Ky. 1954); Cantor v. Cantor, 15 Ohio Op. 2d 148, 174 N.E.2d 304 (P. Ct. 1959); *In re* Koeffler, 215 Wis. 115, 254 N.W. 363 (1934); *In re* Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959).

45. Davis v. Davis, 196 Ark. 57, 116 S.W.2d 607 (1938); Murdock v. Murdock, 219 Ill. 213, 76 N.E. 57 (1905); Watson v. Watson, 5 Ill. App. 2d 526, 126 N.E.2d 220 (1955); Pattison v. Pattison, 129 Kan. 558, 283 Pac. 483 (1930); Simpson v. Simpson's Ex'rs, 94 Ky. 586, 23 S.W. 361 (1893); Mathis v. Crane, 360 Mo. 631, 230 S.W.2d 707 (1950); Pierce v. Pierce, 71 N.Y. 154 (1877); Juhasz v. Juhasz, 134 Ohio St. 257, 16 N.E.2d 328

of a provision simply as evidence to be considered along with other evidence to determine the existence of fraud by the husband.[46]

If the court determines that the provision made for the wife is reasonable in view of all the circumstances, the validity of the agreement will be sustained, notwithstanding the husband's failure to disclose the extent of his estate.[47] Thus, the requirements of an adequate provision and full disclosure are imposed in the alternative, and the presence of either one of them will be sufficient to sustain the validity of the agreement.[48]

As one might expect, it is virtually impossible to generalize with respect to the degree or kind of disclosure required in any given case. Obviously, the facts and circumstances surrounding the making of the individual agreement will be determinative. At the same time, however, it may be helpful to examine a few of the many factors which have influenced the courts in determining whether the requirements of full disclosure have been met.

Since the foundation of a valid antenuptial agreement is the existence of an atmosphere of voluntariness and fair dealing between the parties, it is essential that the prospective wife be made aware of the nature and legal effect of the agreement. This essential, in turn, requires knowledge by her not only of the rights she is relinquishing but also that she is relinquishing those rights by the agreement. Thus, most courts have emphasized the desirability, if not the necessity, of independent legal counsel for the wife.[49] Generally, it is not imperative that she actually be represented by an attorney, so long as she is afforded the opportunity to obtain competent legal advice when it is desired,[50] or is advised to retain an

(1938); *In re* Cobb, 305 P.2d 1028 (Okla. 1957) (complete absence of provision for the wife constituted a legal fraud on the wife, whether intentional or otherwise).

On the other hand, it has been said that the presumption of nondisclosure is not evidence as such, and as soon as contrary evidence of disclosure is presented, the presumption disappears. Geiger v. Merle, 360 Ill. 497, 196 N.E. 497 (1935). See also Brown v. Brown, 265 S.W.2d 484 (Ky. 1954).

46. *E.g.*, Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925). See also Cantor v. Palmer, 166 So.2d 466 (Fla. 3d Dist. 1964), where the court held that a disproportionate provision in favor of the wife should not, in itself, void the agreement if the wife was aware or should have been aware of the disproportion. Although the court required an affirmative showing of fraud or concealment by the husband, it conceded that if the provision was unreasonable *on its face* the burden would shift to establish the validity of the agreement.

47. Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954); *In re* Mosier, 58 Ohio Op. 369, 133 N.E.2d 202 (1954); *In re* Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959).

48. Cantor v. Cantor, 15 Ohio Op. 2d 148, 174 N.E.2d 304 (P. Ct. 1959); *In re* Kaufman, 404 Pa. 131, 171 A.2d 48 (1961); *In re* Snyder, 375 Pa. 185, 100 A.2d 67 (1953); Belsky v. Belsky, 196 Pa. Super. 374, 175 A.2d 348 (1962).

49. See, *e.g.*, Allison v. Stevens, 269 Ala. 288, 112 So.2d 451 (1959); Wilson v. Wilson, 354 S.W.2d 532 (Mo. App. 1962).

50. Johnston v. Johnston, 134 Ind. App. 351, 184 N.E.2d 651 (1962). In Hawkins v. Hawkins, Ex'r, 89 Ohio L. Abs. 161, 185 N.E.2d 89 (P. Ct. 1962), an antenuptial agreement was sustained when the facts disclosed that the prospective wife had requested that an attorney draw the agreement and in fact had legal assistance at the time the

seek out information concerning the financial condition of her intended husband. At the same time, the validity of the agreement depends, technically, not on *disclosure* by the husband but, rather, on *knowledge* by the wife of the extent of his estate. Thus, it should be immaterial whether the information necessary for the wife to possess reaches her ears by way of her husband or the communications of others. Placing the emphasis where it properly belongs—on the wife's knowledge of her prospective husband's worth—it becomes possible to sustain the validity of an agreement even though the husband has made no disclosure whatsoever of the nature, extent and value of his property.

Because the burden properly rests, in the first instance, on the shoulders of the husband to disclose his financial condition, the courts have been hesitant to lift that burden in the absence of clear evidence that his intended wife was possessed of sufficient knowledge from outside sources to enable her to intelligently assess the wisdom of entering into the agreement. Consequently, most courts have held that information based on "common knowledge" or mere reputation of the husband's wealth is not sufficient to charge the wife with that degree of knowledge necessary to render the agreement enforceable.[62] The parties' residence in the same community, or even in the same neighborhood, prior to their marriage affords no assurance that at the time of the agreement the wife was aware of the property owned by her prospective husband or of its value.[63] Even less substantial is "knowledge" founded on rumors to the effect that the prospective husband was a man of means or the owner of a great amount of property.[64]

On the other hand, certain facts may be known to the prospective wife which obviate the necessity of strict disclosure by the husband. In a number of cases, the wife boarded for varying lengths of time in the same house as her intended husband, or served as his housekeeper. In such cases, the courts have not found it difficult to conclude that the wife was acquainted with her intended husband's holdings in more than a general way.[65] Other courts have found that although the prospective

62. Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928); Watson v. Watson, 5 Ill. App. 2d 526, 126 N.E.2d 220 (1955); Denison v. Dawes, 121 Me. 402, 117 Atl. 314 (1922); Welsh v. Welsh, 150 Minn. 23, 184 N.W. 38 (1921); Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940).

But see In re Schippel, 169 Kan. 151, 218 P.2d 192 (1950); Forwood v. Forwood, 86 Ky. 114, 5 S.W. 361 (1887); *In re* Clark, 303 Pa. 538, 154 Atl. 919 (1931).

63. Mines v. Phee, 254 Ill. 60, 98 N.E. 260 (1912); Murdock v. Murdock, 219 Ill. 723, 76 N.E. 57 (1905); Hessick v. Hessick, 169 Ill. 486, 48 N.E. 712 (1897); Tilton v. Tilton, 130 Ky. 281, 113 S.W. 134 (1908); *In re* Flannery, 315 Pa. 576, 173 Atl. 303 (1934).

But see Landes v. Landes, 268 Ill. 11, 108 N.E. 691 (1915); Yarde v. Yarde, 187 Ill. 636, 58 N.E. 600 (1900); Peet v. Peet, 81 Iowa 172, 46 N.W. 1051 (1890); *In re* Neis, 170 Kan. 254, 225 P.2d 110 (1950).

64. Warner v. Warner, 235 Ill. 448, 85 N.E. 630 (1908); Simpson v. Simpson's Ex'r, 94 Ky. 586, 23 S.W. 361 (1893); Denison v. Dawes, 121 Me. 402, 117 Atl. 314 (1922).

65. Pollack v. Jameson, 63 App. D.C. 152, 70 F.2d 756 (1934); Yockey v. Marion, 269 Ill. 342, 110 N.E. 34 (1915); *In re* Devoe, 113 Iowa 4, 84 N.W. 923 (1901); *In re*

wife did not possess actual knowledge of her intended husband's financial condition, the surrounding circumstances were such that a reasonable woman should have shown the extent of his wealth.[66] A few decisions have suggested that although the intended wife was not bound by what she had heard, she should have made further inquiries to substantiate the information she had received.[67] One court has held that in view of the large provision made for her in the antenuptial agreement, the wife should have known that her intended husband was a man of great wealth, even though no disclosure of his true financial position had been made.[68]

Though the circumstances surrounding the making of each agreement necessarily differ, it may be advanced as a general proposition that the wife's knowledge, when based on outside information, must at least be sufficiently precise to enable her to evaluate what she stands to relinquish by entering into the contract.[69] It is submitted that if the courts are content to recognize actual knowledge as an acceptable substitute for affirmative disclosure by the husband, then the degree of knowledge on the part of the wife required to sustain the agreement should be commensurate with the degree and kind of information she would have acquired had her prospective husband acted consistent with his duty in the first instance.

One factor which seems to have influenced courts to declare an antenuptial agreement invalid is the existence of a relatively brief interval between the execution of the agreement and the subsequent marriage of the parties.[70] Although few courts have assigned it as a reason for their decisions, it seems clear that when an antenuptial agreement is executed a day or two before the wedding, there is a greater opportunity for the exertion of undue pressure by the husband than when the contract is executed under more relaxed conditions. Perhaps the courts are disposed, unconsciously, to look with suspicion on the hus-

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Moore, 41 N.Y.S.2d 697 (Surr. Ct. 1943); *In re* Koeffler, 215 Wis. 115, 254 N.W. 363 (1934).

66. Pollack v. Jameson, *supra* note 65; Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928); Yarde v. Yarde, 187 Ill. 636, 58 N.E. 600 (1900); *In re* Parish, 236 Iowa 822, 20 N.W.2d 32 (1945); Rankin v. Schiereck, 166 Iowa 10, 147 N.W. 180 (1914); Watson v. Watson, 104 Kan. 578, 180 Pac. 242 (1919).

67. Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937); Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954); Gordon v. Munn, 87 Kan. 624, 125 Pac. 1 (1912); Settles v. Settles, 130 Ky. 797, 114 S.W. 303 (1908); Wulf v. Wulf, 129 Neb. 158, 261 N.W. 159 (1935).

68. Petru v. Petru, *supra* note 67.

69. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955)(wife's indefinite knowledge that husband owned a business falls short of actual knowledge of his worth).

70. See, *e.g.*, Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1928); Brown v. Brown, 265 S.W.2d 484 (Ky. 1954); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957); *In re* Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959); Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N.W.2d 356 (1958). See also Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954) for a discussion of this factor and the effect it has had on a number of decisions.

band who greets his bride on the eve of their wedding with a request to relinquish those property rights which normally accompany marriage.

A few courts have recognized that although an antenuptial agreement may have lacked the requisites for validity at the time of its execution, subsequent events nevertheless may render it enforceable against those who seek to assert its invalidity. Such decisions have been sustained on the theories of laches and ratification. Under the doctrine of laches, a wife who learns, after marriage, the true state of her husband's financial affairs and who takes no steps to renounce the antenuptial agreement will be barred from later contesting the validity of the contract.[71] These decisions suggest that the wife should attack the agreement during her husband's lifetime or forever be precluded from doing so. This position seems unsound, since it fosters "disagreements . . . in the family fatal to domestic peace."[72]

According to the doctrine of ratification, an antenuptial agreement, invalid when executed on the ground of nondisclosure, nevertheless may be rendered enforceable by a complete disclosure by the husband or the acquisition of knowledge by the wife prior to the marriage of the parties.[73] The subsequent marriage without renunciation of the agreement is said to constitute ratification of its terms. However, the kind and degree of disclosure or knowledge required in such cases is commensurate with that necessary to sustain the validity of the agreement in the first instance.[74] On the other hand, the mere acceptance of benefits under the contract should not amount to ratification in the absence of a showing that at the time the benefits were accepted the wife was fully apprised of the extent of her husband's property.[75]

Florida appears to have accepted the general principles governing the validity of antenuptial agreements. In *Del Vecchio v. Del Vecchio*,[76] the Florida Supreme Court sustained the findings of the chancellor below in setting aside an antenuptial agreement at the suit of the widow. The agreement had provided that the plaintiff relinquished all rights in the decedent's estate in return for his promise to convey his home to

71. Barnes v. Starr, 64 Conn. 136, 28 Atl. 980 (1894); Fargo v. Fargo, 11 N.Y. Supp. 646 (Sup. Ct. 1890).

Contra, Denison v. Dawes, 121 Me. 402, 117 Atl. 314 (1922); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); Stokes v. Stokes, 119 Misc. 168, 196 N.Y. Supp. 184 (1922); Morrish v. Morrish, 262 Pa. 192, 105 Atl. 83 (1918); Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940); *In re* Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959). See also annot., 74 A.L.R. 559 (1931).

72. *In re* Flannery, 315 Pa. 576, 173 Atl. 303 (1934).

73. Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916); Brown v. Brown's Adm'r, 25 Ky. L. Rep. 2264, 80 S.W. 470 (1904).

74. Mathis v. Crane, 360 Mo. 631, 230 S.W.2d 707 (1950); *In re* Warner, 207 Pa. 580, 57 Atl. 35 (1904).

75. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955). *But see* Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928); Speckman v. Speckman, 15 Ohio App. 283 (1921).

76. 143 So.2d 17 (Fla. 1962), *reversing*, 132 So.2d 771 (Fla. 3d Dist. 1961).

them as tenants by the entirety. At the time the agreement was executed, the plaintiff was without independent legal advice and no disclosure was made by the decedent with respect to the extent of his property, although the plaintiff knew in a general way that the decedent owned a hardware business and other property. The Supreme Court held that a valid antenuptial agreement contemplated a fair and reasonable provision for the wife, or in the alternative, full and complete disclosure of the husband's worth or at least a general and approximate knowledge by her of her intended husband's worth. Although the court found the existence of independent counsel to be "preferable," it refused to impose the presence of counsel as a "required pre-requisite."[77]

The question of whether the wife knew the legal effect of the agreement and the extent of her future husband's property was said to be a matter for the determination of the chancellor, whose findings were not to be taken lightly.[78] However, the court declared that although the provision made for the wife was inadequate, this would not, in itself, be sufficient to invalidate the agreement. Rather, the entire agreement must manifest an "element of fairness between the parties," which is determined by the more definite standard which evaluates:

> the facts touching the husband's property and the question of whether the provisions made for the wife will enable her to live after the dissolution of the marriage ties in a manner reasonably consonant with her way of life before such dissolution and certainly no less confortably [sic] than before the marriage. The element of fairness should, of course, be measured as of the time of the execution of the agreement.[79]

The court took a progressive view concerning the presumption of concealment which most courts have said arises when the provision for the wife is unreasonable or inadequate. Although the court was willing to recognize the utility of that presumption when the prospective husband is a man of the world and his intended bride is relatively inexperienced, "if, on the other hand, the prospective husband is a commonplace and elderly drab and the prospective bride a worldly-wise and winsome young woman the rule should be applied, if at all, with caution."[80]

It is also worth noting that the court apparently rejected the rigid traditional view that the confidential relationship which imposes a duty of full disclosure arises only out of the betrothal of the parties. Instead,

77. 143 So.2d 17, 20 (Fla. 1962).
78. *Ibid.*
79. *Ibid.*
80. *Id.* at 21.

it was intimated that it is the nature of the agreement rather than the strict status of the parties which gives rise to the duty of disclosure.[81]

Interestingly, the court pointed out that the fairness of the agreement was to be measured, not by the degree of disclosure by the husband but, rather, by the extent of information and knowledge available to the wife. Thus, an antenuptial agreement will be sustained as long as the wife has not been prejudiced by her lack of information. Lamentably, though, the court did not indicate that it would require a degree of knowledge commensurate with the information she might have derived solely from disclosure by her husband.

THE SCOPE OF ANTENUPTIAL AGREEMENTS— PROPERTY RIGHTS V. PERSONAL RIGHTS

In defining the permissible scope of an antenuptial agreement, it is essential to distinguish at the outset between those which purport to relinquish rights in property and those which attempt to relinquish a personal right incident to the marital relation. On the one hand, it is everywhere agreed that parties to an antenuptial contract may lawfully vary or release rights and interests in *property* which they would otherwise acquire by reason of the marriage. Thus, prospective spouses may release their respective rights by way of dower,[82] homestead[83] or distributive share in the estate of the other.[84]

On the other hand, there are certain *personal* rights and duties which may not lawfully be contracted away by means of an antenuptial

81. The relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing on the contract. *Ibid.*

82. See, *e.g.*, Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962); Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940); Cantor v. Palmer, 166 So.2d 466 (Fla. 3d Dist. 1964).

The Florida courts have grappled with the question of whether an antenuptial agreement is effective to bar a widow's allowance, although they have failed to arrive at a satisfactory answer. Thus, the majority of the court in *In re* Stein, 106 So.2d 2 (Fla. 3d Dist. 1958), held that an antenuptial agreement would not bar a widow's allowance prior to a determination of the validity of the agreement. Judge Carroll, concurring, reasoned that a family allowance was a "claim against the estate" under FLA. STAT. § 733.20 (1963) and therefore would not be affected by an antenuptial agreement. In a later case, the Second District seemed prepared to accept Judge Carroll's characterization, but then receded and refused to go beyond the majority opinion in the *Stein* case. The court suggested, however, that "a reasonable allowance based on a clear showing of need may be justified in instances where the agreement is subjected to prompt litigation and that fact is brought promptly to the attention of the probate court." *In re* Anderson, 149 So.2d 65, 68 (Fla. 2d Dist. 1963).

83. Johnson v. Johnson, 140 So.2d 358 (Fla. 2d Dist. 1962); *In re* Moore, 210 Ore. 23, 307 P.2d 483 (1957). See also *In re* Rothman, 104 So.2d 607 (Fla. 3d Dist. 1958), holding that jurisdiction to determine questions relating to title to homestead allegedly relinquished by an antenuptial agreement resides in the circuit court, while the county judge's court is restricted to determining the existence *vel non* of the homestead.

84. See, *e.g.*, Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916); Price v. Price, 341 Mass. 390, 170 N.E.2d 346 (1960); *In re* Appleby, 100 Minn. 408, 111 N.W. 305 (1907).

agreement. Thus, for example, an antenuptial promise to reside in a particular location,[85] to raise the issue of the marriage according to the teachings of a particular religion,[86] to refrain from cohabitation[87] or to exclude the issue of a previous marriage from the new household[88] will be considered void and unenforceable against the contracting spouse.

In this connection, an agreement by which a husband undertakes to relieve himself of his obligation to support his family is considered void as against public policy.[89] Although such agreements may assume many shapes, most of them fall into one of two broad categories: those which purport to relieve the husband of his duty of support throughout coverture or which require the wife to pay for her own maintenance, and those which seek to relieve the support obligation, in whole or in part, only upon the happening of a contingency or designated event. Within the latter category, the most common provision is one by which the wife agrees to waive her right to alimony and support in the event the parties are thereafter separated or divorced, regardless of who is at fault. The remainder of this section will examine the enforceability of this type of agreement.

The cases have almost uniformly held that such a provision in an antenuptial agreement, since it contemplates the dissolution of the marital tie, is against public policy and is therefore absolutely void.[90] The reasons behind that rule are well-founded. A contract which incites, by the hope of financial profit, the separation of married people should not be lent judicial sanction. Because the termination of the marital relation may prove financially profitable to one of the parties, the natural tendency of such an agreement is to encourage and facilitate separation, contrary to public decency and morality.[91] This position has been accepted by the *Restatement of Contracts*.[92]

85. Marshak v. Marshak, 115 Ark. 51, 170 S.W. 567 (1914); Isaacs v. Isaacs, 71 Neb. 537, 99 N.W. 268 (1904).

86. Hackett v. Hackett, 146 N.E.2d 477 (Ohio C.P. 1957).

87. Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926).

88. Mengal v. Mengal, 201 Misc. 104, 103 N.Y.S.2d 992 (1951).

89. Smith v. Smith, 154 Ga. 702, 115 S.E. 73 (1922); Kershner v. Kershner, 244 App. Div. 34, 278 N.Y. Supp. 501 (1935). See generally LINDEY, SEPARATION AGREEMENTS & ANTE-NUPTUAL CONTRACTS § 90 (1964).

90. *E.g.*, Kalsem v. Froland, 207 Iowa 994, 222 N.W. 3 (1928); Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1 (1896); Cohn v. Cohn, 209 Md. 470, 121 A.2d 704 (1956); *In re* Appleby, 100 Minn. 408, 111 N.W. 305 (1907); Cartwright v. Cartwright, 43 Eng. Rep. 385 (1853); Cocksedge v. Cocksedge, 60 Eng. Rep. 351 (1844).

91. Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 783 (1928); Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488 (1909); Whiting v. Whiting, 62 Cal. App. 157, 216 Pac. 92 (1923); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906); Fincham v. Fincham, 160 Kan. 683, 165 P.2d 209 (1946); Sanger v. Sanger, 132 Kan. 596, 296 Pac. 355 (1931); Stephonick v. Stephonick, 118 Mont. 486, 167 P.2d 848 (1946); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939); Ryan v. Dockery, 134 Wis. 431, 114 N.W. 820 (1908). See also cases cited in note 90 *supra*.

In *In re* Duncan, 87 Colo. 149, 285 Pac. 757 (1930), the court characterized such an agreement as "a wicked device to evade the laws applicable to marriage relations, property

There have been many variations on the main theme. Although it is not necessary to demonstrate that at the time the agreement was entered into one of the parties contemplated or intended a later separation, one court has suggested that since such contracts are adapted to produce separation and divorce, the court should presume that this was one of the inducements causing the husband to desire its execution.[93] Another court characterized a schedule of payments, graduated according to the number of years of cohabitation, as a sort of "severance pay" contrary to public standards of decency,[94] while another found a provision giving the wife 100 dollars for each year the parties remained married was an attempt on the part of the husband "to legalize prostitution, under the name of marriage, at the price of $100 per year."[95] On the other hand, agreements providing for a fixed sum upon separation or divorce without regard to the length of time the parties were married have been found to be no less objectionable, on the ground that even when the husband is entirely at fault he is relieved under any and all circumstances from the burden of providing support to his wife in an amount which the court may deem proper.[96]

Such agreements are objectionable on the further ground that they constitute an attempt by the husband to relieve himself of his legal duty to support his wife. The marriage relation imposes on the husband an obligation to maintain and to support his wife in conformity with his condition and station in life.[97] At the same time, marriage is recognized to be more than a contract; it is a relationship established according to law with duties and responsibilities arising out of it which the law, and not the marriage contract, imposes.[98] Consequently, the duty of the

rights, and divorces, and is clearly against public policy and decency." In Pereira v. Pereira, *supra* at 490, the court concluded that "the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations and inflict the injury." And in Whiting v. Whiting, *supra* at 96, the court called such a contract "a menace to the marriage relation, and should not be tolerated . . . ."

92. RESTATEMENT, CONTRACTS § 584, Illustration 2 (1932):

A and B who are about to marry enter into 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.

93. Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488 (1909).

94. Cohn v. Cohn, 209 Md. 470, 121 A.2d 704, 707 (1956).

95. *In re* Duncan, 87 Colo. 149, 285 Pac. 757 (1930).

96. Williams v. Williams, 29 Ariz. 538, 243 Pac. 402 (1926).

97. Williams v. Williams, *supra* note 96; Watson v. Watson, 37 Ind. App. 548, 77 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 134 (1947), *aff'd*, 273 App. Div. 960, 79 N.Y.S.2d 325 (1948); Mottley v. Mottley, 255 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. 431, 114 N.W. 820 (1908).

98. *In re* Duncan, 87 Colo. 149, 285 Pac. 757 (1930); Watson v. Watson, *supra* note 97; Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1 (1896); Garlock v. Garlock, *supra* note 97; Ryan v. Dockery, *supra* note 97.

The rationale was best expressed by Garlock v. Garlock, *supra* note 97, at 522:

Marriage is frequently referred to as a contract entered into by the parties, but it is more than a contract; it is a relationship established according to law, with

husband—both as a matter of policy and as an obligation imposed by law—cannot be relieved by contract.

In many instances, an antenuptial agreement contains provisions effective on the death of the husband and others which take effect only in the event the parties are later divorced or separated. In dealing with such agreements, most courts have expressly noted the distinction between provisions in antenuptial agreements which purport to relinquish property rights and those which seek to effect a waiver of purely personal rights.[99] In view of that distinction, when an antenuptial contract contains a provision which attempts to settle the personal rights of the parties in advance and also one which determines only the rights each spouse is to have in the property of the other, the two provisions may be severed without rendering the entire agreement invalid. Although an antenuptial agreement may contain a provision for the wife in lieu of any right she may have to alimony and support in the event of a separation or divorce, if the parties in fact continue to cohabit until one of them dies, the provision settling the property of the spouses upon death will be given effect notwithstanding the partial invalidity of the contract.[100] One court reached the same result by characterizing the agreement as fully executed on the death of the husband; consequently, any issue as to the validity of the provision in the event of divorce was immaterial.[101] Another court justified its action in severing the two provisions on the ground that when two promises are supported by the same consideration and the consideration is not itself illegal, the two promises may be separated without destroying the contract itself.[102]

Although the courts do not appear to have confronted the issue directly, there is reason to believe that the general rule voiding provisions

certain duties and responsibilities arising out of it which the law itself imposes. The marriage establishes a status which it is the policy of the State to maintain. Out of this relationship, and not by reason of any terms of the marriage contract, the duty rests upon the husband to support his wife and family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life . . . . The duty of the husband, however, as a matter of policy and as an obligation imposed by law, cannot be contracted away.

99. As the court stated in Ryan v. Dockery, 134 Wis. 431, 434, 114 N.W. 820, 821 (1908):

Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself.

100. McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458 (1920); McClain's Estate v. McClain, 183 N.E.2d 842 (Ind. App. 1962); Kalsem v. Froland, 207 Iowa 994, 222 N.W. 3 (1928); Dunsworth v. Dunsworth, 148 Kan. 347, 81 P.2d 9 (1938); Sanger v. Sanger, 132 Kan. 596, 296 Pac. 355 (1931); Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916); Stephonick v. Stephonick, 118 Mont. 486, 167 P.2d 848 (1946); Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N.W. 516 (1915).

But see Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1916), holding that the antenuptial agreement was void from its inception and every provision contained therein was invalid.

101. Dunsworth v. Dunsworth, *supra* note 100.

102. Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916).

in lieu of alimony and support may be limited by a test of adequacy similar to that noted previously with respect to the requirements for the execution of a valid antenuptial agreement. A close examination reveals that most of the decisions have emerged from situations in which the wife, in exchange for her release of alimony and other claims, was to receive either nothing at all[103] or at best, an amount so small as to tend to induce a termination of the marriage.[104] If these provisions are objectionable because they serve to promote separation by means of a financial inducement, to the extent that the "margin of profit" is narrowed the agreement would seem to become less objectionable. Thus, a court might be expected to uphold a provision which bears some approximate relation to the amount of alimony to which the wife might reasonably be entitled upon divorce. Stated another way, such provisions would seem to be contrary to public policy only to the extent that the wife is prejudiced thereby.

Indirectly, this principle has been applied in a few cases, although those decisions sustained the agreements by emphasizing that the husband had nothing to gain, rather than pointing to the fact that the wife had nothing to lose by a divorce or separation. Thus, when an antenuptial agreement provides that a certain provision is to take effect upon the death of one of the parties only in the event the parties are still living together at that time, it is clear that the decedent does not stand to profit by such an arrangement.[105] The loss of benefits will inure to the residuary estate, or in any event will benefit persons other than the decedent, thereby negating any inducement to separate or divorce. Thus, it has been said that although the parties may not contract to relieve the husband of his obligation to support his wife during his lifetime, there is no public policy which compels the protection of the wife's interest in his estate after death.[106]

At this juncture Florida appears to have adhered to the basic principles governing antenuptial provisions in lieu of alimony and support. In *Lindsay v. Lindsay*, [107] the parties entered into an antenuptial agreement by which it was agreed that in the event of a divorce or separation, neither would make any claim upon the property of the other. The wife further agreed to waive the right to receive any legal obligation which

103. Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 783 (1928); Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1 (1896); Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1955).

104. Williams v. Williams, 29 Ariz. 538, 243 Pac. 402 (1926) ($500); McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458 (1920) ($100 as full payment of costs and attorney's fees in the event of divorce); *In re* Duncan, 87 Colo. 149, 285 Pac. 757 (1930) ($100 for each year of marriage); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906) ($200); Fincham v. Fincham, 160 Kan. 683, 165 P.2d 209 (1946) ($2,000).

105. French v. French, 70 Cal. App. 2d 755, 161 P.2d 687 (1945) (agreement to make a will if the parties remained married); *In re* Appleby, 100 Minn. 408, 111 N.W. 305 (1907); Benjamin v. Benjamin, 197 Misc. 618, 95 N.Y.S.2d 167 (1950).

106. *Ibid.*

107. 163 So.2d 336 (Fla. 3d Dist. 1964).

might be owed to her at the time of any separation or divorce, including "alimony, temporary or permanent, attorney's fees, costs or separate maintenance money . . . . "[108] When the wife sued for divorce and sought temporary alimony and attorney's fees, the husband interposed their agreement as a bar.

The defendant-husband cited *Del Vecchio v. Del Vecchio*,[109] in support of his contention that the validity of the agreement should be sustained. In distinguishing the two cases, the court pointed out that *Del Vecchio* had decided only the validity of relinquishing the right to dower by antenuptial agreement, leaving unanswered the question of the validity of an agreement by which a future wife waived her right to alimony, support and attorney's fees and received nothing in return.

In striking down the challenged provision, the third district subjected the provision to the same standard of adequacy applied in *Del Vecchio*. Emphasizing that the agreement imposed no requirements on the husband, the court stated that the provisions for the wife must enable her to live in a manner reasonably consonant with her way of life before the dissolution of the marriage and certainly no less comfortably than before the marriage. In this connection, it is interesting to note that more than once the court pointed to the terms of the agreement by which the husband had *completely* relieved himself of all obligation to support his wife in the event the parties should thereafter become divorced or separated.[110] It is true that the court was confronted with a set of facts in which no provision whatsoever had been made for the wife, and to that extent the court perhaps was merely tailoring its holding to the precise facts before it. At the same time it would seem unrealistic to suppose that the Florida courts would be content to sustain a similar agreement as long as some provision were made in favor of the wife, for the *Del Vecchio* case and its standard of "adequacy" were cited favorably in *Lindsay*.[111] At the same time, however, *Lindsay* seems to indicate that a provision in lieu of alimony and support is not void per se, but will be sustained as long as the provision is sufficient to enable the wife to live in a manner reasonably consonant with her way of life prior to the divorce.

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108. *Id.* at 337.

109. 143 So.2d 17 (Fla. 1962).

110. "[*Del Vecchio*] does not decide the question of the validity of an ante-nuptial agreement wherein the future wife waives her right to alimony, support, or attorney's fees, *and receives nothing in return.*" Lindsay v. Lindsay, 163 So.2d 336, 337 (Fla. 3d Dist. 1964).

"The present agreement *imposed no requirements* upon the husband." *Ibid.*

"The husband may not *completely relieve himself* of his obligation to support his wife." *Id.* at 337-38.

"Since, by this contract, appellant had *no obligation* to his wife and never would, we must withhold judicial approval." *Id.* at 339. (All emphasis is supplied.)

111. *Id.* at 337.

A "CHECK LIST" FOR THE DRAFTSMAN

In undertaking to formulate a "check list" as an aid to the drafting of an enforceable antenuptial agreement, the author recognizes that a number of important points are bound to be omitted. And since no single factor will prove fatal to the validity of such agreements in the ordinary case, it has been necessary to take a more or less conservative approach in order to maximize the probability that the agreement will be able to sustain the challenges of litigation. With this in mind, the following suggestions are posed for the practitioner's consideration:

(1) It goes without saying that any antenuptial agreement worth recommending should be committed to writing. By statute, Florida requires that all antenuptial agreements must be in writing and signed by the party to be charged.[112] In this connection, a recent decision has suggested, collaterally, that an antenuptial agreement purporting to release the widow's right to dower must be executed in writing and in conformity with the Florida statute governing the relinquishment of dower.[113]

(2) In view of the statutory requirement that contracts to make a will must be executed in writing and signed in the presence of two subscribing witnesses,[114] and since enforcement of the agreement may be sought in a jurisdiction which requires that all antenuptial agreements be witnessed, it is advisable that all antenuptial agreements be signed in the presence of at least two, and preferably three, subscribing witnesses.

(3) Before any agreement is reduced to writing, the wife should be advised that her interests would best be served if she were represented by an attorney of her own choosing, and if she is willing to execute the agreement without the benefit of independent counsel the agreement should contain a recital to that effect.

(4) Whenever possible, the agreement should be executed as far in advance of the contemplated wedding as time will permit, to avoid the taint so many courts have noted in holding a particular antenuptial agreement invalid.

(5) The agreement should recite that it is entered into in consideration of marriage, so that if the other consideration should fail the agreement will still be upheld. Similarly, it should contain a recital that the effectiveness of the contract is conditional upon the marriage actually taking place and that if the parties should not thereafter consummate the marriage for any reason, including the death of one of the parties, the agreement will be of no force and effect.

112. FLA. STAT. § 725.01 (1963), the general statute of frauds, requires that all contracts made in consideration of marriage be in writing.

113. Kyle v. Kyle, 128 So.2d 427 (Fla. 2d Dist. 1961). FLA. STAT. § 689.01 (1963).

114. FLA. STAT. § 731.051 (1963).

(6) The agreement should contain a recital of the husband's approximate worth, and if possible should contain an itemization of his property and its approximate value. Reliance upon extrinsic information known to the wife involves the assumption of a risk that should be avoided.

(7) The agreement should contain a general recital that both parties have made a full disclosure to the other concerning the nature, extent and value of his or her estate, to shift the burden of proving nondisclosure on those who would seek to invalidate the agreement.

(8) The agreement should state clearly and in simple language the rights each is relinquishing in the property and estate of the other so as to insure that each party, and the wife in particular, fully comprehends the legal effect of the instrument about to be executed.

(9) The provision made in favor of the wife should be substantial enough to satisfy the test of adequacy imposed by the *Del Vecchio* and *Lindsay* cases. It would be well to remember that in cases of doubt, it is best to be overly generous and thereby avoid the risk of losing all that the agreement seeks to preserve.

(10) "No alimony" provisions are dangerous and should be avoided. Even when they may be severed without affecting the validity of a provision to take effect upon death, such provisions suggest an atmosphere of overreaching which may cause a curious judge to delve further into the circumstances surrounding the making of the agreement. On the other hand, a clause which divests the wife of any benefits under the agreement in case the parties are divorced at the husband's death is advisable in order to prevent her from taking more than she would be entitled to had no antenuptial agreement been executed in the first instance.

(11) The agreement should state with clarity the intention of the parties, to avoid the risk of a judicial construction inconsistent with the designed aim of the particular agreement.

(12) The attorney should make certain that the wife reads the agreement, and that she reads it in the presence of the witnesses. If she protests that it is unnecessary to do so, insist upon it. At worst, her failure to read the agreement may render it entirely void, while at the very best it may nullify the effect of the various recitals, which may go a long way toward insuring that the agreement will be sustained.

(13) Finally, as soon after the parties are married as is practicable, each should execute a new will incorporating by reference the antenuptial agreement, to avoid the possibility of any claim at death under the Florida pretermitted spouse statute.[115]

115. FLA. STAT. § 731.10 (1963).