

1979

Divorce Planning in Antenuptial Agreements: Toward a New Objectivity

Peter N. Swisher

University of Richmond, pswisher@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Family Law Commons](#)

Recommended Citation

Peter Nash Swisher, *Divorce Planning in Antenuptial Agreements: Toward a New Objectivity*, 13 U. Rich. L. Rev. 175 (1979)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

UNIVERSITY OF RICHMOND

LAW REVIEW

VOLUME 13

WINTER 1979

NUMBER 2

DIVORCE PLANNING IN ANTENUPTIAL AGREEMENTS: TOWARD A NEW OBJECTIVITY

*Peter Nash Swisher**

I. INTRODUCTION

Within the past fifty years, there have been numerous articles written about the validity and enforceability of antenuptial agreements.¹ Such agreements are generally favored by the law when prospective spouses privately contract to vary, limit, or relinquish certain rights which they would otherwise acquire in each other's property or in each other's estate by reason of their impending mar-

* Associate Professor of Law, University of Richmond School of Law; Member, California and Virginia State Bars; B.A., Amherst College, 1966; M.A., Stanford University, 1967; J.D., University of California, Hastings College of the Law, 1973.

1. See I. BAXTER, MARITAL PROPERTY §§ 25:1-26:6 (1973); H. CLARK, LAW OF DOMESTIC RELATIONS 27-31 (1968) [hereinafter cited as CLARK]; A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90 (1977 ed.) [hereinafter cited as LINDEY]; Branca & Steinberg, *Antenuptial Agreements under California Law*, 11 U.S.F.L. REV. 317 (1977); Cathey, *Ante-Nuptial Agreements in Arkansas—A Drafter's Problem*, 24 ARK. L. REV. 275 (1970); Funk, *Antenuptial Contracts Concerning Property Settlements*, 33 KY. L. J. 197 (1945); Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972) [hereinafter cited as Gamble]; Klein, A "Check List" for the Drafting of Enforceable Antenuptial Agreements, 19 U. MIAMI L. REV. 615 (1965); Merritt, *Changing Marital Rights and Duties by Contract: Legal Obstacles in North Carolina*, 13 WAKE FOREST L. REV. 85 (1977); Wolsen, *Husband and Wife—Antenuptial Contracts*, 41 MICH. L. REV. 1133 (1943); Note, *The Validity of Antenuptial Agreements Which Limit the Property Rights of the Parties, Particularly as They Pertain to Divorce*, 31 B.U.L. REV. 92 (1951); Note, *Equity and the Antenuptial Agreement*, 6 CATH. U. L. REV. 169 (1957); Note, *Antenuptial Agreements in Pennsylvania*, 55 DICK. L. REV. 382 (1951); See also Annot., 46 A.L.R.3d 1403 (1972); Annot., 16 A.L.R.3d 370 (1967); Annot., 80 A.L.R.2d 941 (1961); Annot., 57 A.L.R.2d 942 (1958); Annot., 30 A.L.R.2d 1419 (1953); Annot., 1 A.L.R.2d 1178, 1259 (1948); Annot., 164 A.L.R. 1236 (1946); Annot., 98 A.L.R. 533 (1935); Annot., 70 A.L.R. 826 (1931).

riage.² Traditionally, this antenuptial agreement is typically made by older people who are about to be remarried, and who have acquired considerable property from a prior marriage that they wish to control.³

However, unless the antenuptial agreement provisions fall squarely within this rather limited parameter, there is a good chance that a court may declare the antenuptial agreement to be illegal and void as against public policy, especially if the agreement has included any antenuptial contingency planning in case of a later divorce or marital separation.

In fact, judicial attitudes toward many antenuptial agreements have become so unpredictable and indefinite, that widespread and consistent use of the antenuptial agreement has traditionally been precluded in any form other than to settle the disposition of property and estate rights on the death of one or both of the spouses.⁴

Within this general framework of what does and does not constitute a valid antenuptial agreement, any divorce-planning provisions in antenuptial agreements, until very recently, have almost always been held by American courts to be void as contrary to a rigid "public policy" rule, purportedly upholding the status of marriage by preventing the parties from contracting a private agreement which would facilitate a future divorce or legal separation.⁵

The legal rationale behind this "public policy" rule, though seldom clearly articulated in the cases, may be summarized under one of two major assumptions:

(1) Antenuptial agreements which include provisions related to the possibility of divorce tend to "promote" or "encourage" that divorce; or

(2) Certain duties incident to marriage, such as alimony or spousal support and maintenance, are of such public importance

2. Such provisions might include: release of the distributive shares in each other's estate; the mutual bar of dower and curtesy rights; the surrender of the right of election to take against the other's estate; and the transfer of money or property to the other, either before the marriage or after. See LINDEY, *supra* note 1, at § 90-26.

3. CLARK, *supra* note 1, at 27.

4. See LINDEY, *supra* note 1, at § 90; CLARK, *supra* note 1, at 28-30; and Gamble, *supra* note 1, at 693.

5. See LINDEY, *supra* note 1, at §§ 90-71 to 74; and CLARK, *supra* note 1, at 28-31.

that they cannot be left to the parties' private contractual control in an antenuptial agreement.

This article will analyze these two "public policy" rules by using examples of various judicial decisions to test each rule by its legal rationale and public policy justification; it will demonstrate through these examples that a traditional judicial subjectivity has often misinterpreted and misapplied these rules; and it will conclude that divorce-planning in antenuptial agreements is a realistic and objective legal concept whose time has come.

II. DO CONTINGENT DIVORCE-PLANNING PROVISIONS IN ANTENUPTIAL AGREEMENTS ACTUALLY "ENCOURAGE" OR "PROMOTE" DIVORCE *Per Se*?

A. *The Traditional Rule*

Until very recently, it was almost a universal "public policy" rule in every American jurisdiction, except possibly one,⁶ that antenuptial agreements which attempt to govern the rights and duties of the parties on divorce⁷ are invalid. This "public policy" rule, stated by numerous authorities, is that:

any antenuptial contract which provides for, facilitates, or tends to induce, a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void. It has often been held that an antenuptial agreement limiting the liability of the husband to the wife [or vice versa] for alimony, or fixing the property rights of the parties, in the event of a separation or divorce, is void.⁸

This has been the general rule in most jurisdictions.⁹

6. *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

7. Such contingent divorce-planning provisions might include the following examples: limiting or relinquishing the property rights of the respective spouses on separation or divorce; limiting or relinquishing the obligation for spousal support on separation or divorce; and limiting any spousal support or property rights on separation or divorce to a certain stipulated amount of money. See LINDEY, *supra* note 1, at §§ 90-73-4; Gamble, *supra* note 1, at 703-04 n. 46.

8. *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288, 293 (1964) (quoting 17 AM. JUR. *Divorce and Separation* § 16 (1957)). See also Annot., 70 A.L.R. 826 (1931); Annot., 57 A.L.R.2d 942 (1958).

9. *Williams v. Williams*, 29 Ariz. 538, 243 P. 402 (1926); *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928); *Ellis v. Comm'r. of Int. Rev.*, 437 F.2d 442 (9th Cir. 1971) (applying Ariz. law); *Daniel v. Daniel*, 222 Ga. 861, 152 S.E.2d 873 (1967); *Watson v. Watson*, 37 Ind.

Admittedly, such a "public policy" rule may have merit in protecting and promoting the status of marriage, which creates "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution."¹⁰

Yet, although the rule itself may have merit, the judicial *application* of this rule has often been ignored or misconstrued by most courts. In practice, this can mean that whenever property or support provisions related to divorce are mentioned in an antenuptial agreement, most courts will take one of two approaches: first, they may automatically invalidate *any* divorce contingency provision or invalidate the entire agreement without attempting to determine whether or not such provisions actually *do* "encourage" or "promote" divorce under a particular fact situation; or, second, those courts which do at least discuss the rationale behind this "public policy" rule, tend to interpret the rule by a rather subjective judicial standard—discussing what *might* happen to "encourage" or "promote" divorce—rather than basing their decision on the actual intent of the parties, or on the objective terms of the specific contract itself.¹¹

An example of the first approach is the case of *In re Marriage of Gudenkauf*,¹² where the Supreme Court of Iowa stated that it had "no choice" but to hold an antenuptial agreement limiting the amount of alimony on divorce to be invalid *per se*. "[S]uch a provision may tend to facilitate or induce dissolution of the marriage," the court noted, even though the husband argued that "it did not

App. 548, 77 N.E. 355 (1906); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa, 1973); *Fincham v. Fincham*, 160 Kan. 683, 165 P.2d 209, *modified on other grounds*, 161 Kan. 753, 173 P.2d 244 (1946); *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976); *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916); *Hilbert v. Hilbert*, 168 Md. 364, 177 A. 914 (1935); *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956); *In re Estate of Muxlow*, 367 Mich. 133, 116 N.W.2d 43 (1962); *Englund v. Englund*, 286 Minn. 157, 175 N.W.2d 461 (1970); *Stefonick v. Stefonick*, 118 Mont. 486, 167 P.2d 848 (1946); *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961); *Dearbaugh v. Dearbaugh*, 110 Ohio App. 540, 170 N.E.2d 262 (1959); *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327 (1970); *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); *Fricke v. Fricke*, 257 Wis. 124, 43 N.W.2d 500 (1950); *Werlein v. Werlein*, 27 Wis.2d 237, 133 N.W.2d 820 (1965); *Cumming v. Cumming*, 127 Va. 16, 102 S.E. 572 (1920). *But see* *Capps v. Capps*, 216 Va. 378, 219 S.E.2d 901 (1975); and *Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208 (1972).

10. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

11. *See generally* the authority cited in note 9, *supra*. *But see* the authority cited in note 14, *infra*.

12. 204 N.W.2d 586 (Iowa, 1973).

have that effect in this marriage." Nevertheless, declared the Iowa Supreme Court, "[t]he policy which invalidates antenuptial prohibitions of alimony does *not* depend upon the result in a *given* case. It operates *ab initio* to avoid such provisions in *every* case,"¹³ apparently without regard to any objective analysis, or without reference to the parties' objective intent under general contract law.¹⁴

In regard to the second approach—that of a subjective judicial standard to determine whether or not an antenuptial agreement "might" encourage or promote divorce—a leading Wisconsin decision, *Fricke v. Fricke*,¹⁵ aptly demonstrates how inadequate this subjective test really is.

In this particular case, Gustav, aged 62, contemplated marriage to Elizabeth, aged 56, who had been his housekeeper for 13 years. Prior to the marriage, the parties voluntarily entered into an antenuptial agreement which provided that if the marriage were terminated at any time "by divorce or legal proceedings," Elizabeth would then receive \$2,000 as "a full and final property settlement" and also "in lieu of any right to alimony." The parties were married for five years, at which time Elizabeth brought an action for divorce against Gustav. Elizabeth also asked the court to set aside the parties' antenuptial agreement as void.¹⁶ The lower court held the antenuptial agreement with its divorce contingency provisions was valid, but on appeal the Wisconsin Supreme Court reversed, holding such an agreement was invalid *per se*.

In its decision holding the divorce-planning provisions to be void

13. *Id.* at 587 (emphasis added). See also *Hilbert v. Hilbert*, 168 Md. 364, 177 A. 914 (1935) (in this case although a mutual waiver of alimony in an antenuptial agreement was not contested, the court still declared that "such contracts are held to be void as against public policy." *Id.* at 919); *In re Estate of Muxlow*, 367 Mich. 133, 116 N.W.2d 43 (1962) ("Had one of the parties to the [antenuptial] agreement sought divorce, the chancellor would not have been bound by anything in the agreement." *Id.* at 46).

14. See, e.g., 1 A. CORBIN, CONTRACTS § 106 (1963) ("In the process of making a contract, the *actual* and *proved* intent of either of the parties should *not* be disregarded, unless he knowingly or negligently has misled another person to his injury." *Id.*) (emphasis added); SIMPSON, CONTRACTS § 102 (1965) ("The cardinal or fundamental rule of interpretation of contracts, to which all others are subordinate, is that a contract could receive that interpretation which will best effectuate the intention of the parties." *Id.*); *Williston on Contracts* §§ 601, 610A (3rd ed. W. Jaeger 1961); and authority cited therein.

15. *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950).

16. *Id.* at 500.

as against public policy, the court stated its traditional "public policy" argument in this manner:

The court should not look with favor upon an agreement which *may* tend to permit a reservation in the mind of the husband when he assumes the responsibility of maintaining his spouse in such comfort as he is able to provide and until his death or the law relieves him of it.¹⁷

Arguing that a husband "cannot shirk," "even by contract," from the requirement of supporting his wife or ex-wife, the *Fricke* court stated in summary:

We conclude that an antenuptial contract which purports to limit the husband's liability in the event of separation or divorce, regardless of the circumstances motivating its adoption or those attending its execution is void as against public policy.¹⁸

So the *Fricke* court, in its concern for upholding certain public policy principles *per se*, had turned a deaf ear to the question of whether or not these principles applied to the particular facts of a given agreement based upon the objective intent of the parties. Instead, the court subjectively stated that these principles "may" be affected, but "regardless of the circumstances"¹⁹ such an agreement would be void *ab initio*.

A persuasive dissent by Justice Brown in the *Fricke* case questioned the rationale behind this majority opinion—that divorce contingency provisions in an antenuptial agreement "may" promote or encourage divorce:

[I]t seems to be taken as a fact that if the parties know what the husband must give and the wife will get as a result of divorce [through an antenuptial agreement, then] one of them will be stimulated to misconduct or to an effort to be rid of the spouse. How this is known I cannot tell, and I doubt if it is so, but if it be true *then it seems self-evident that a contract which so encourages one necessarily deters the other.*²⁰

17. *Id.* at 501 (emphasis added).

18. *Id.* at 502.

19. *Id.* at 503 (dissenting opinion).

20. *Id.* (emphasis added).

Here then was an equally valid counter-argument—that a divorce contingency provision in an antenuptial agreement might “promote and encourage” the *marriage* just as strongly as it might subjectively “promote divorce.”

For example, Justice Brown hypothesized about a marriage where the wife was “at fault,” but the husband desired to preserve the marriage because of an overly-extravagant antenuptial agreement in the wife’s favor; or the additional example of a wife with substantial property of her own, and adequate support.²¹ Shouldn’t the validity or non-validity of any divorce contingency provisions be based on an objective case-by-case analysis?

Yet the facts of this case were that both parties had voluntarily signed the agreement, that there was no evidence of fraud or duress in the contract, and that Gustav and Elizabeth would never have been married had not an antenuptial agreement been signed by the parties in the first place.²² Nevertheless, Justice Brown’s reasoned dissent could not sway the Wisconsin court in two later decisions.²³

Another example of judicial disfavor toward divorce-planning contingencies in antenuptial agreements appears in a California case, *In re Marriage of Higgason*,²⁴ which was a reverse situation of the *Fricke* case, and which dealt with a wife who owned substantial property of her own.

In *Higgason*, at the time of the marriage, Lolita was 73 years old and William was 48. The wife was a woman with substantial assets, and the husband at the time of the marriage was a waiter, earning \$2 an hour plus tips, and had little or no means.

21. *Id.*

22. “The [Fricke] marriage had a chance to succeed and the contract is not shown to have been responsible for its failure. Without the contract there would have been no marriage at all. Public policy does not require that an elderly woman desiring marriage must remain single if she cannot find a man who is willing to leave everything to chance and put his property at the disposal of the court, if someday a court thinks it proper to grant a divorce” *Id.* at 504 (dissenting opinion).

23. See *Stranberg v. Stranberg*, 33 Wis.2d 204, 147 N.W.2d 349 (1967). *But see* *Caldwell v. Caldwell*, 5 Wis.2d 146, 92 N.W.2d 356, 361 (1958) (“While some members of the court as now constituted would prefer the views expressed in [Justice Brown’s] dissent [in *Fricke v. Fricke*] if the inatter were an original proposition, we do not consider ourselves at liberty to reject the considered decision of our predecessors”) Query: Why not? Must questionable legal precedent be preserved at all costs?

24. 10 Cal.3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

A few days prior to the marriage the parties entered into an antenuptial agreement which provided in part: "Each party hereto waives and releases and renounces any and all interest present or future in or to any and all the properties real and personal of the other party . . . and all right for contribution to the support, maintenance and expenses of the other party."²⁵ Again, as in the *Fricke* case, there was more than a mere suggestion that this marriage would *not* have been entered into but for the antenuptial agreement.

Two weeks after the marriage, Lolita was adjudged an incompetent, and a conservator was appointed. After two separate suits for annulment and dissolution of the marriage were filed and dismissed, Lolita instituted a final suit for the dissolution of her marriage.

In his response to Lolita's petition to dissolve the marriage, William requested spousal support of \$2,425 a month, attorneys fees, and property rights "as provided by law."²⁶ Lolita's attorney, however, argued that William was precluded from these requests by reason of the parties' antenuptial agreement.

The California Supreme Court in this case held that William was entitled to spousal support²⁷ from Lolita despite the parties' objective intent in their antenuptial agreement which stated otherwise. Said the court:

Antenuptial agreements . . . must be made in contemplation that the marriage relation will continue until the parties are separated by death. Contracts which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.²⁸

Here, then, was the farthest-reaching application of the tradi-

25. *Id.* at 898.

26. *Id.* at 900.

27. Alimony or spousal support and maintenance may be awarded to *either* husband or wife, as the needs and abilities of the parties dictate, in the following states; Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. T. BAXTER, MARITAL PROPERTY, Appendix "Alimony, Maintenance, and Property Division" (Supp. 1977).

28. 110 Cal. Rptr. at 903.

tional "public policy" rule. The California court in *Higgason* held that such an agreement regarding spousal support was void not only because it "might" subjectively promote divorce, but because antenuptial agreements must contemplate that the marriage will continue "until the parties are separated by death."²⁹ Hence, this is an almost insurmountable obstacle for a woman of substantial means who might desire to protect her assets from an impoverished, though upwardly-mobile, spouse. The holding of this case was disapproved, however, in a subsequent decision.³⁰

The courts following this traditional "public policy" rule regarding divorce planning in antenuptial agreements have therefore declared such agreements to be void *ab initio*, making no attempt to ascertain the particular fact situation in question. In so doing, they have demonstrated a highly subjective analysis of what *might* happen to the parties, rather than making a judicial determination of the parties' *actual* intent in drafting such an agreement.

B. *The Modern Approach*

Beginning in 1970 with the landmark Florida decision of *Posner v. Posner*,³¹ a growing number of jurisdictions³² have now abandoned the traditional "public policy" rule, and have adopted the modern approach that divorce-planning in antenuptial agreements is *not* invalid *per se*; and, thus, parties contemplating marriage might legally draft provisions in an antenuptial agreement covering the possibility of an unwanted, but statistically probable, marriage breakdown which could conceivably end in divorce.³³

29. *Id.*

30. *In re Marriage of Dawley*, 17 Cal.3d 342, 551 P.2d 323, 133 Cal. Rptr. 3 (1976), *disapproving*, *In re Marriage of Higgason*, 10 Cal.2d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

31. 233 So.2d 381 (Fla. 1970), *quashed on other grounds*, 257 So.2d 530 (Fla. 1972).

32. *In re Marriage of Dawley*, 17 Cal.3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976), *disapproving*, *In re Marriage of Higgason*, 10 Cal.3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); *Parniawski v. Parniawski*, 33 Conn. Sup. 44, 359 A.2d 719 (1976); *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972) and 307 So.2d 918 (Fla. 1975); *Volid v. Volid*, 6 Ill. App.3d 386, 286 N.E.2d 42 (1972); *Krejci v. Krejci*, 191 Neb. 698, 217 N.W.2d 470 (1974) (*semble*); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973), *over-ruling in part*, *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327 (1970).

33. The year number of divorces in the United States has increased from 428,000 in 1963 to over 900,000 in 1973. (By 1977 there were over 1 million divorces a year in the United

The validity of such an antenuptial provision would be based on the parties' objective intent and, so long as the agreement itself did not "promote" divorce or separation, the parties could contractually determine their various property and support contingencies upon divorce.³⁴

The *Posner* court expressed the social policy behind the modern approach in this way:

There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the "sanctity" of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no "guilty" party—is being advocated by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for dissolution of a marriage upon pleading and proof of "irreconcilable differences" between the parties, without assessing the fault for the failure of the marriage against either party.

With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.³⁵

Cognizant of the traditional "public policy" rule against divorce-

States.) The divorce rate per 1,000 population increased from 2.5 in 1965 to 4.4 in 1973. U.S. Dept. of Commerce, *Statistical Abstract of the United States* 51 (1974).

34. See note 7 *supra*.

35. 233 So.2d at 384. Parenthetically, it is interesting to note that the high rate of divorce in America today is *not* directly related to these "easier" divorce laws. See RHEINSTEIN, *MARRIAGE, STABILITY, AND THE LAW* 306 (1972); Lee, *Divorce Reform in Michigan*, 5 J. LAW REF. 409 (1972), *quoted in* H. CLARK, *CASES AND PROBLEMS IN DOMESTIC RELATIONS* (1974), where Clark concludes on p. 683 ". . . it is important to remember that no evidence has ever been found that liberal grounds for divorce produce unstable marriages or that a strict divorce law prevents or reduces the breakdown of marriages." This is important to remember as it affects antenuptial agreements with divorce-planning contingencies.

planning contingencies in antenuptial agreements,³⁶ the *Posner* court argued that this subjective test could also apply to defeat the marriage, as well as uphold it, and thus “have the same meretricious effect insofar as the public policy in question is concerned.”³⁷ The court continued:

[I]t is not inconceivable [under the traditional rule] that a dissatisfied wife—secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her . . . might provoke her husband into divorcing her in order to collect a large alimony check every month, or a lump-sum award³⁸

So contingent divorce-planning provisions in an antenuptial agreement, the *Posner* court concluded, must now be tested by the objective intent of the parties themselves.

We have given careful consideration to the question of whether the change in public policy towards divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void *ab initio* as “contrary to public policy.” If . . . it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that, under the rules applicable to postnuptial alimony and property settlement agreements . . . it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to conditions existing at the time the agreement was made.³⁹

Another example of the modern approach regarding divorce-planning in antenuptial agreements is *In re Marriage of Dawley*.⁴⁰ Here, the California Supreme Court held that an antenuptial agree-

36. The *Posner* court cited 57 A.L.R.2d 942 *et seq* where such divorce contingency provisions were said to “facilitate or promote the procurement of a divorce” and quoted from *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964): “Such [a] contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge [that] his pecuniary liability would be limited.” 233 So.2d at 383.

37. *Id.* at 383-84.

38. *Id.* at 383.

39. *Id.* at 385.

40. 17 Cal.3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976), *disapproving*, *In re Marriage of Higgason*, 10 Cal.3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

ment is valid, even though the uncontested facts were that both parties had anticipated an early dissolution of their marriage.⁴¹

In this case, Betty and James had "maintained an intimate relationship"⁴² for three years, at which time Betty discovered that she was pregnant. Betty, a tenured elementary school teacher, told James that she feared a non-marital pregnancy would result in the loss of her teaching job. James refused to marry Betty, and she then threatened a paternity suit with publicity against James to imperil *his* employment. Finally, both parties agreed to a *temporary* marriage as a solution to their mutual dilemma, and agreed to protect their respective property and support interests through an antenuptial agreement.⁴³

In the antenuptial agreement, both parties disclaimed all rights in the property of the other, including community property rights that would ordinarily devolve upon marriage. James further agreed to support Betty and her child by a former relationship "for the minimum period of fourteen calendar months following said marriage in order that [Betty] may take a leave of absence from the teaching profession."⁴⁴ James also agreed to support any child born to Betty and James until that child reached the age of majority.

In fact, this "temporary" marriage lasted much longer than the contemplated fourteen months—seven years to be exact—before James and Betty filed for the dissolution of their marriage. The trial court granted dissolution of the marriage based upon "irreconcilable differences" and granted Betty spousal support of \$1 per year, custody of Lisa (the parties' child), child support of \$300 a month, and attorneys' fees. Relying on the antenuptial agreement, the court found no community property to divide in the dissolution proceedings, and Betty appealed, arguing that their antenuptial agreement was void *ab initio* since it contemplated divorce.⁴⁵

Although the California Supreme Court could not enforce alimony provisions in the antenuptial agreement, as the *Posner* court had done, since this was barred in California by statute,⁴⁶ the court,

41. 131 Cal. Rptr. at 6.

42. *Id.* at 5.

43. *Id.* at 5-7.

44. *Id.* at 6.

45. *Id.* at 6-7.

46. CAL. CIV. CODE § 4802 (West, 1970). One might argue that since § 4802 refers to

nevertheless, over-ruled earlier precedent,⁴⁷ and held that divorce-planning in antenuptial agreements concerning the parties' property rights was indeed valid.

In upholding the divorce-planning provisions of the Dawley's antenuptial agreement, the court re-emphasized the modern approach that the analysis of antenuptial agreements should be confined to the objective terms of the agreement itself when it stated that, "California courts have uniformly held that contracts offend the state policy favoring marriage *only* insofar as the *terms of the contract* 'facilitate' 'encourage,' or 'promote' divorce or dissolution."⁴⁸

Another example of the modern approach that divorce-planning in antenuptial agreements is valid, but with an interesting twist, is the Nevada decision of *Buettner v. Buettner*.⁴⁹

In this case, prior to their marriage, John and Stella signed an antenuptial agreement providing that in the event of divorce, in release of all rights and claims against John's real or personal property, including spousal support, Stella would receive the parties' marital dwelling and household furnishings, and the sum of \$500 per month for a period of five years, for a total amount of \$30,000. The antenuptial agreement also provided that upon divorce, these provi-

"husband and wife," the section is confined to postnuptial agreements instead of antenuptial agreements, but this statute needs further judicial clarification or legislative modification. See *Branca v. Steinberg*, *Antenuptial Agreements Under California Law* 11 U.S.F.L. REV. 317, 328-40 (1977).

47. *In re Marriage of Higgason*, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973). The court stated that the dictum in *Higgason*, that antenuptial agreements must be made in contemplation that the marriage will continue "until the parties are separated by death," was an inaccurate statement of California law. *In re Marriage of Dawley*, 17 Cal.3d 342, 551 P.2d 323, 131 Cal. Rptr. 3, 8 (1976). See also LINDEY § 90-18 for other supporting authority.

48. *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3, 8 (1976) (emphasis added). The court in a footnote narrowed this objective test even further:

Although the cited cases assert that an agreement which "facilitates" dissolution violates public policy, this terminology is misleading. In a literal sense, any contract which delimits the property rights of the spouses might "facilitate" dissolution by making possible a shorter and less expensive dissolution hearing. But public policy does not render property agreements unenforceable merely because such agreements simplify the division of marital property; it is only when the agreement encourages or promotes dissolution that it offends the public policy to foster and protect marriage. *Id.* at 8, n. 5.

49. 89 Nev. 39, 505 P.2d 600 (1973).

sions were binding upon John, whether or not Stella later remarried.⁵⁰

The facts further indicated that both parties had been previously married and had children by prior marriages, and that John's separate property at the time of the antenuptial agreement was estimated by him to be worth approximately \$400,000.⁵¹

One year later the parties sued for divorce, and Stella petitioned the trial court judge that should a divorce be granted, the related property settlement and support provisions should conform with the parties' antenuptial agreement. The trial court disagreed and, following the traditional "public policy" rule, held that their "Pre-Marital Agreement . . . was made in derogation of marriage, is contrary to public policy and is therefore void."⁵² Stella appealed to the Nevada Supreme Court, which reversed the lower court decision.

In its decision, adopting the modern approach toward divorce-planning provisions in antenuptial agreements, the *Buettner* court demonstrated an objective analysis toward the facts of this particular case:

While in the normal case the wife urges the invalidity of the contract, here, the husband, using a strange twist on the above rationale, argues that the contractual provision relating to the property settlement and support was so generous in favor of the wife that she was induced by the hope of financial gain to so abuse and mistreat her husband as to force him to bring an action for divorce.

We are unconvinced. We do not find, nor did the trial court find, that the prospective wife entered into the contract with the intent to obtain a divorce from Mr. Buettner and thereby profit financially. There was no finding that the wife caused the divorce This case, then, does not stand on the same footing as those wherein certain types of antenuptial contracts are said to be violative of public policy because they induce, encourage or promote divorce.⁵³

Quoting the public policy rationale of the *Posner* case with ap-

50. *Id.* at 601.

51. *Id.* at 602.

52. *Id.* at 602.

53. *Id.* at 603.

proval,⁵⁴ the *Buettner* court supported this objective test regarding divorce-planning contingencies in antenuptial agreements, and further stressed an inherent judicial review to guard against any possible contractual abuses:

We have given careful consideration to whether antenuptial contracts settling alimony and property rights upon divorce are to be viewed in this state as void because contrary to public policy, and hold that they are not. Nevertheless, as with all contracts, courts of this state shall retain power to refuse to enforce a particular antenuptial contract if it is found that it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure, or duress.⁵⁵

It had thus taken judicial precedent over half a century to recognize the fact that divorce-planning contingencies in antenuptial agreements should be analyzed by, and confined to, the objective terms of the contract itself, rather than being analyzed by some highly subjective and often misapplied "public policy" argument.

III. IS ALIMONY—OR SPOUSAL SUPPORT AND MAINTENANCE—OF SUCH PUBLIC IMPORTANCE THAT IT CANNOT BE LEFT TO THE PARTIES' PRIVATE CONTRACTUAL CONTROL IN AN ANTENUPTIAL AGREEMENT?

In addition to the traditional "public policy" rule that divorce-planning contingencies in antenuptial agreements might "promote" or "facilitate" divorce,⁵⁶ a second "public policy" argument has been espoused by some courts to invalidate such divorce-planning provisions. Briefly stated, this second rule is that the essential marital obligation of adequate spousal support is of such public importance that it should not be left to the parties' private contractual control in an antenuptial agreement.

As one court has stated this principle:

There are three parties to a marriage contract—the husband, the wife, and the state. The husband and wife are presumed to have, and

54. *Id.* at 603-04. See also the discussion related to note 34 *supra*; *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42, 47 (1972) ("The reasons given to justify the invalidation of all antenuptial agreements which limit the obligation of support upon divorce do not warrant the condemnation of all such agreements in the name of public policy."); *Parniawski v. Parniawski*, 33 Conn. Sup. 44, 359 A.2d 719 (1976).

55. *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600, 604 (1973).

56. See notes 6-55 *supra*, and accompanying text.

the state unquestionably has an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization. That unusual conditions have caused a marked increase in the divorce rate does not require us to change our attitude toward the marital relation and its obligations, nor should it encourage the growth of a tendency to treat it as a bargain made with as little concern and dignity as is given to the ordinary contract . . . [So] 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.⁵⁷

Here then is the second subjective "public policy" rule that would reject any divorce-planning contingencies in antenuptial agreements as void *per se*, and another "public policy" rule that is not entirely accurate.⁵⁸ Nevertheless, this rule is still followed by various courts, and must be tested against an objective alternative, if any.

Accordingly, two interdependent arguments may be raised to question this second "public policy" approach: (1) The general rule is that parties may privately contract to vary, limit, or extinguish their respective property rights *and alimony obligations* in a separation agreement, prior to divorce, without state interference. Why then shouldn't the parties be able to contract in a similar manner with antenuptial agreements; and (2) Antenuptial agreements regarding the various property rights of the parties are usually upheld, even when divorce is contemplated, if the agreement is fair to the parties, or there is full disclosure of the parties' worth. Why shouldn't this objective test apply equally well as to *alimony provisions* in an antenuptial agreement?

57. *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500, 501-02 (1950) (quoting in part from *Ryan v. Dockery* 134 Wis. 431, 434, 114 N.W. 820, 821). See also *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa, 1973) ("The other basis for the [public policy] rule is the principle that the interspousal support obligation is imposed by law and cannot be contracted away." *Id.* at 587); *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327, 328 (1970) ("[T]he state has a paramount interest in the adequate support of its citizens, and, therefore, the husband's duty of support, either before or after divorce, should not be left to private control." *Id.* at 328.).

58. "This [rule] is not so widely or strongly applied as it used to be, as shown by the modern courts' hospitality toward separation agreements. It does still have application to many kinds of agreements, however." CLARK, *supra* note 1, at 29 n. 18.

A. *The Analogy Between Separation Agreements and Antenuptial Agreements*

Although an extensive discussion of the legal aspects of separation agreements related to divorce is beyond the scope of this article,⁵⁹ there are still some striking similarities regarding the contractual rights of the parties in drafting divorce-planning provisions in separation agreements that might also have the same applicability in antenuptial agreements.

First, a separation agreement, if fairly made, "is binding in virtually all jurisdictions that permit parties to contract with each other."⁶⁰ Like antenuptial agreements, a separation agreement is valid and favored by law if the contract itself does not "encourage" or "promote" divorce or separation.⁶¹ However, the parties in a separation agreement in contemplation of divorce, but not conducive to it, may also settle, by private contract, not only their property rights, but also *spousal support provisions*.⁶² Antenuptial agreements are also valid and favored by law regarding the disposition of certain property rights,⁶³ but under the traditional view the parties in an antenuptial agreement *cannot* determine any spousal support provisions.⁶⁴ Why this difference between separation agreements and antenuptial agreements?

The answer, in large part, appears to be one of timing. In a separation agreement, the separation has already occurred, or occurs immediately after the making of the agreement.⁶⁵ The parties contemplating divorce in a separation agreement may therefore realistically

59. *But see*, regarding separation agreements, LINDEY, *supra* note 1, at § 31; CLARK, *supra* note 1, at 521-66; Wilson, *Property Settlement Agreements* 14 S. CAL. L. REV. 373 (1941); Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree* 20 U. CHI. L. REV. 138 (1952); Clark, *Separation Agreements* 28 ROCKY MTN. L. REV. 149 (1956).

60. *See* LINDEY, *supra* note 1, at § 31-56; CLARK, *supra* note 1, at 521-523.

61. *See, e.g.*, Beverly v. Beverly, 290 Ga. 468, 74 S.E.2d 89 (1953); Nogle v. Nogle, 53 Ill. App. 2d 457, 202 N.E.2d 683 (1964).

62. *See* LINDEY, *supra* note 1, at § 31-18 to -24; CLARK, *supra* note 1, at 548-53. *See, e.g.*, Wife B.T.L. v. Husband H.A.L., 287 A.2d 413 (Del. 1972); Catron v. Catron, 492 S.W.2d 172 (Mo. 1973); Marson v. Marson, 6 N.Y.2d 925, 161 N.E.2d 212 (1959); Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975).

63. *See* LINDEY *supra* note 1, at § 90-25; CLARK, *supra* note 1, at 27. *See, e.g.*, Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962); In re Kaufmann's Estate, 404 Pa. 131, 171 A.2d 48 (1961); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957).

64. *See* notes 1-5 *supra*, and accompanying text.

65. *See* CLARK, *supra* note 1, at 521.

ascertain, and provide for, their immediate and future needs and obligations. But in an antenuptial agreement, it has been argued, spousal support requirements at a later date may be unknown or inadequate.

The real reason for invalidating such antenuptial contracts seems to be that although the [spousal support] provisions may be fair at the time they are made, they may not be later when the separation or divorce occurs. The wife *may* thus be left with entirely inadequate support, or the husband with an excessively heavy liability to his wife [or vice versa], Thus, the difficulty of forecasting the parties' circumstances so far in the future has led the courts to disallow antenuptial contracts which attempt to do this with respect to support⁶⁶

Yet, although spousal support "as an essential obligation of the marital relation"⁶⁷ may have "greater significance than property rights,"⁶⁸ this traditional subjective concern of what "may" happen has again led many courts to declare antenuptial spousal support provisions are void *per se* when, in fact, there already exists an objective legal safeguard to determine the validity or invalidity of these provisions using a case-by-case analysis.

What is this legal safeguard? With analogous separation agreements, where spousal support provisions may be validly fixed, limited, or relinquished by the parties themselves, the courts *still* retain the right to review these contracts and objectively determine whether or not the support provisions are fair to the parties; and if such provisions are determined to be unfair, the court is *not* required to recognize the agreement.⁶⁹ So, also, the court can retain

66. *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327, 328 (1970), *quoting*, CLARK, *supra* note 1, at 28-9 (1968) (emphasis added). An argument can be made that judicial concern behind this "public policy" rule of adequate support for the wife may not be as important today as it might have been in the past, due to the greater influx of married women into the national labor force. In 1940, married women were only 36.4% of the female labor force, but by 1973 they constituted over 63% of that labor market. In 1950, only 23.8% of all married women were in the national labor force, but by 1973 40% of all married women were in the labor force. (Current estimates today are that approximately 50% of all married women are currently employed.) U.S. Dep't of Commerce, *Statistical Abstract of the United States* 340-41 (1974) citing U.S. Bureau of Labor Statistics.

67. 474 P.2d at 328, *quoting*, CLARK, *supra* note 1, at §§ 28, 29.

68. *Id.*; *But see* note 73.

69. The power of the divorce court and the extent of judicial review over separation agree-

judicial control over antenuptial support provisions, based on an objective case-by-case analysis of each agreement, rather than voiding all such agreements *per se*.

B. The Law of Antenuptial Agreements Already Provides an Objective Safeguard in Determining the Validity or Non-Validity of Spousal Support Provisions Upon Divorce

In addition to the argument that judicial review of separation agreements should apply equally well to antenuptial agreements regarding provisions for alimony or spousal support, another argument can also be made: that the law of antenuptial agreements *already* provides an objective safeguard in determining the validity or non-validity of spousal support provisions in an antenuptial agreement without having to void all such provisions *ab initio*. The second objective safeguard is this:

To render an antenuptial agreement valid, there must be a fair and reasonable provision therein for the wife [or husband], or—in the absence of such provision—there must be full and frank disclosure to her of the husband's worth before she signs the agreement, and she must sign freely and voluntarily, on competent independent advice, and with full knowledge of her rights.⁷⁰

If, traditionally, this antenuptial rule has applied to certain property rights,⁷¹ most courts following the modern approach have also

ments—specifically concerning spousal support provisions—differs widely from state to state. Some courts, probably a majority, hold that the divorce court is not necessarily bound by the parties' separation agreement with regard to spousal support, and the court may recognize the agreement's support provisions, or award support as it sees fit, on a case-by-case approach. Other courts hold that the terms of a separation agreement must be approved by the divorce court in the absence of fraud, duress, or a breach of some confidential relationship between the spouses. Professor Clark feels this is the more desirable approach in order to allow the parties to make their own financial arrangements.

See LINDEY, *supra* note 1, at § 31-55 *et seq*; CLARK, *supra* note 1, at 548-53; and authority cited therein.

70. *Batleman v. Rubin*, 199 Va. 156, 98 S.E.2d 519, 521 (1957), quoting LINDEY, *supra* note 1, at § 90. See also *Norrell v. Thompson*, 252 Ala. 603, 42 So.2d 461 (1949); *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962); *Plant v. Plant*, 320 So.2d 455 (Fla. App. 1975); *In re Estate of West*, 194 Kan. 736, 402 P.2d 117 (1965); *In re Estate of Spieth*, 181 Neb. 11, 146 N.W.2d 746 (1966); *In re Estate of Kaufman's*, 404 Pa. 131, 171 A.2d 48 (1961); *Schutterle v. Schutterle*, 260 N.W.2d 341 (S.D. 1977); *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954); *Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208 (1972); LINDEY, *supra* note 1, at § 90-36; CLARK, *supra* note 1, at 30.

71. See LINDEY, *supra* note 1, at § 90-36 and authorities cited in note 70. See also the

applied a similar rule to alimony or spousal support provisions in antenuptial agreements⁷²—especially since division of property often performs essentially the same function as alimony, and may also be given in lieu of alimony.⁷³

Using this rule, an objective case-by-case evaluation can be made, and alimony or spousal support provisions in antenuptial agreements will be upheld by the court if “fair” or was made with “full disclosure”; otherwise, like separation agreements, the provisions can be modified under the court’s power of judicial review. As the Oregon Supreme Court has stated this principle:

We have now come to the conclusion that antenuptial agreements concerning alimony should be enforced unless enforcement deprives a spouse of support that he or she cannot otherwise secure. A provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support.

If the circumstances of the parties change, the court can modify the decree just as it can modify a decree based upon an agreement made in contemplation of divorce which has a provision regarding payment of support.⁷¹

In this manner, an objective test involving fairness, full disclosure, and judicial modification if necessary, will permit, and pro-

following traditional examples of antenuptial agreements where the court upheld the parties’ *property division* upon divorce as valid: *Dingledine v. Dingledine*, 523 S.W.2d 189 (Ark. 1975); *In re Marriage of Higgason*, 10 Cal.3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); *Rosenstiel v. Rosenstiel*, 368 F.Supp. 51 (S.D.N.Y. 1973), *aff’d*, 503 F.2d 1397 (2d Cir. 1973); *Dearbaugh v. Dearbaugh*, 110 Ohio App. 540, 170 N.E.2d 262 (1959); *Freeman v. Freeman*, 565 P.2d 365 (Okla. 1977); *Englund v. Englund*, 175 N.W.2d 461 (Minn. 1970); *Capps v. Capps*, 216 Va. 378, 219 S.E.2d 901 (1975) (semble).

72. See, e.g., *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972); *Belcher v. Belcher*, 307 So.2d 918 (Fla. 1975); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973).

73. “It is argued . . . that very often the property division decreed by the divorce court performs essentially the same function as alimony. If so, any antenuptial agreement concerning the disposition of the parties’ property on divorce should share the same fate as the agreement concerning support.” CLARK, *supra* note 1, at 29. (footnotes omitted). See also *Id.* at 449-52, and authority cited therein.

74. *Unander v. Unander*, 265 Or. 102, 506 P.2d 719, 721 (1973). In a related footnote, the court added: “The antenuptial agreement, of course, must be valid in other respects, particularly it must have been fairly entered into by spouses who have a fiduciary duty to each other which includes a duty of full disclosure of assets.” *Id.* at 721 n. 2.

tect, realistic divorce-planning contingencies in antenuptial agreements from a subjective possibility of judicial overkill.

IV. CONCLUSION

The traditional "public policy" rule that divorce-planning in antenuptial agreements is void because this tends to "promote" and "encourage" divorce, or because alimony or spousal support has "greater significance" than property rights, has often been subjectively misinterpreted and misapplied by the courts.

A realistic antenuptial agreement *should* be able to incorporate certain divorce-planning contingencies, and courts following this modern approach will uphold such provisions under an objective test, ascertaining the parties' actual intent and the agreement's fairness through established judicial review.

Legal practitioners should be encouraged to draft suitable divorce-planning contingency provisions in their clients' antenuptial agreement, but with the *caveat* that until more jurisdictions recognize the modern approach to divorce-planning in antenuptial contracts, the practitioner would also be wise to incorporate a severability clause into this agreement.