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THE ANTENUPTIAL CONTRACT IN OHIO

A couple contemplating marriage can define their respective property rights and interests in an antenuptial contract. The Ohio courts, however, have read such contracts restrictively and have applied rules mechanically to reach unpredictable results. The author suggests that the Ohio courts adopt an approach that corresponds more closely to the modern understanding of the marriage relationship and that they draw on trends in other jurisdictions to make the antenuptial contract a useful and effective planning tool.

AN ANTENUPTIAL CONTRACT is a contract "between a man and a woman before marriage, but in contemplation and generally in consideration of marriage whereby the property rights and interests of either the prospective husband, or wife, or both of them, are determined, or where property is secured to either or both of them." Antenuptial contracts are most useful to, and are most often used by, a prospective spouse who has been married previously and has children from the prior marriage. Often, the purpose of the contract is to ensure that the contracting party's estate will pass to his heirs from the first marriage, undiminished by the share the surviving spouse of the second marriage is entitled to take at law.

The Ohio Supreme Court early declared antenuptial contracts to be beneficial and within public policy. At its first opportunity to pass on the validity of antenuptial contracts, the court stated that "such contracts are in favor of marriage and tend to promote domestic happiness by removing one of the frequent causes of family disputes—contentions about property, especially allowances to the wife." Antenuptial contracts have been well-received in most other jurisdictions as well; in fact, one is hard-pressed to find a decision involving antenuptial contracts that does not contain a similar statement of praise.

1. Also known as a prenuptial or marriage settlement contract.
4. Subrin, supra note 2, at 54. For a discussion of the rights of the surviving spouse in Ohio, see notes 50–54 infra and accompanying text.
5. See Stilley v. Folger, 14 Ohio 610 (1846).
6. Id. at 649.
7. Gamble, supra note 3, at 692 n.2.
In light of the fanfare with which the antenuptial contract was recognized in Ohio, one might expect considerable precedent on such contracts. However, little has materialized. Three reasons have been suggested to account for the paucity of cases. Perhaps prospective spouses do not know about the instrument or choose not to use it. Perhaps antenuptial contracts are widely used, but their validity is seldom litigated. But it is most likely that the instrument is not the subject of litigation because the practitioner chooses not to employ it. Why? The answer is that the courts in Ohio have viewed such contracts restrictively, have applied rules of construction mechanically, and have decided cases involving such contracts unpredictably. One writer has analogized the "perils" of drafting and validating an antenuptial contract in Ohio to traveling down a "legal highway" scattered with "pitfalls" and "dead-end street[s]."

The analysis employed by the courts of Ohio is not unique; the courts of other jurisdictions approach antenuptial contracts in the same manner. They balance sub silentio the parties' freedom to contract with the state's interest in preserving the marital relation. In Ohio this balancing has led courts to refuse to enforce

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8. Id. at 692–93.
9. This may be attributable, in part, to a lack of premarital counseling: "With the exception of some people who have been married previously, almost all couples marry without the help of any legal . . . counseling." King & Firestone, Antenuptial Contract: A Useful Alternative, 4 SAN FERN. V. L. REV. 249, 257 (1975).
10. This restrictive view manifests itself when the courts imply a constructive condition in antenuptial contracts (under the guise of construing the actual terms of the instrument) and make the validity of the contract dependent upon the continued existence of the marital relation. See notes 114–51 infra and accompanying text.
11. The courts' mechanistic approach is demonstrated by those opinions which rest ostensibly on the intent of the parties as articulated in the contract where the courts in fact "found" intent without supporting its conclusion with the terms of the antenuptial agreement. See notes 114–51 infra and accompanying text.
12. Ohio's law on antenuptial contracts is unpredictable because the courts utilize rules that are based on intent, but the decisions reveal no clue as to what language in the contracts triggers the holdings. See notes 114–51 infra and accompanying text.
13. Subrin, supra note 2, at 53.
14. See, e.g., Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).
15. Freedom to contract is protected under the Ohio Constitution: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and property, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. art. I, § 1. The right to contract is a derivative property right. City of Cleveland v. Clements Bros. Constr. Co., 67 Ohio St. 197, 219, 65 N.E. 885, 890 (1902). See also In re Staube, 91 Ohio St. 135, 139, 110 N.E. 250, 251 (1914).
16. The state recognizes marriage as a favored legal status. See Waymire v. Jetmore, 22 Ohio St. 271 (1872).
antenuptial contracts in favor of a spouse who fails to meet his marital obligations or to enforce antenuptial contracts which might undermine the stability of the marital relation. A reading of these decisions suggests that judges tip the balance prior to the hearing on any particular case in favor of the state's interest in stable marriage relationships.

Though this approach may have reflected popular sentiment toward marriage in years past, such an approach is anachronistic today. Fundamental changes in the perception of marriage and marital roles indicate that it is time for Ohio to review its law regarding antenuptial contracts. The traditional view of the unequal status of men and women both in society and in the marriage relationship is giving way to egalitarian concept. The fabric of our society is changing as more people divorce each year and

Marriage is a civil contract, but it is sui generis and differs from all other contracts. It is an agreement that creates a social status. The legal incidents of that status and the rights and obligations flowing from it are imposed by society independently of the will of the parties. Although mutual consent creates the status, mutual consent cannot dissolve it. Only death or divorce will sever the tie.

The state is said to have a vital interest in marriage as the "foundation of our civilized structure." See J. Murray, Jr., Murray on Contracts § 341, at 722-24 (2d rev. ed. 1974); 2 A. Lindley, supra, § 90, at 90-27; Comment, Husband and Wife—Antenuptial Contracts, 41 Mich. L. Rev. 1133, 1135 (1943). This interest is so great that writers have observed the courts' view of marriage as a tripartite relationship between the state and the husband and wife. 2 A. Lindley, supra, § 8, at 8-4; Flieschmann, Marriage by Contract: Defining the Terms of Relationship, 8 Fam. L.Q. 27 (1974); Note, Marriage, Contracts, and Public Policy, 54 Harv. L. Rev. 473 (1941).

17. See, e.g., Kennedy v. Kennedy, 11 Ohio App. 399 (Cuy. County 1919) (wife awarded alimony in divorce proceeding despite provision in antenuptial contract depriving her of any interest in her husband's property if they separated because his neglect of her was so gross as to constitute a breach of contract on his part).

18. See, e.g., Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (Cuy. County 1946) (voiding an antenuptial contract provision permitting wife to maintain an action against her husband for injuries suffered in an automobile accident prior to their marriage).

19. This conception of the status of the male vis-à-vis the female is usually couched in terms of the male's physical and intellectual superiority over the weak, submissive, and intellectually inferior female.

20. Representative of this trend is the move to ratify the proposed twenty-seventh amendment to the United States Constitution. The amendment provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. proposed amend. XXVII, § 1. Ohio reacted to this trend in 1974 and repealed Ohio Rev. Code Ann. § 3103.02 (repealed) (Page 1974), which provided that the "husband is the head of the household."

21. The national divorce rate increased steadily from 2.2 per 1000 in 1960 to 4.6 per 1000 in 1974. In Ohio the rate jumped from 2.4 per 1000 in 1960 to 4.6 per 1000 in 1974.
fewer people choose to marry. Furthermore, more antenuptial contracts are being written and litigated each year and the parties are successfully enforcing agreements which reorder aspects of their relationship in ways not previously cognizable.

Today the antenuptial contract can be beneficial both to the contracting parties and to society not only by serving to promote marriage and marriage stability but also by curbing litigation of divorce decrees. Though antenuptial contracts may indeed be useful, they will not be used unless the Ohio courts clarify the law surrounding them. The objective of this Note is to explicate the Ohio law regarding the antenuptial contract, to suggest refinements in the courts' analysis, and to explore a variety of enforcement techniques.

I. THE LAW OF ANTENUPTIAL CONTRACTS

A. Background

I. History

At early common law a woman's legal identity merged with her husband's upon marriage. A wife had no independent legal


22. The national marriage rate climbed from 8.5 per 1000 in 1960 to 11 per 1000 in 1972 and then fell steadily to 10 per 1000 in 1975. Id. table no. 97, at 68 (97th ed. 1976).

23. Gamble, supra note 3, at 694; King & Firestone, supra note 9, at 257.


25. See note 85 infra.

26. "One out of every three marriages results in divorce. Of those divorce decrees appealed, most are challenged on the basis of the alimony award, the property division, or the child custody determination. It is the economics of divorce which most often prove unacceptable." Note, The Economics of Divorce: Alimony and Property Awards, 43 U. CIN. L. REV. 133, 135 (1974) (footnotes omitted). See also Note, Public Policy, The Courts, and Antenuptial Agreements Specifying Alimony, 23 U. FLA. L. REV. 113 (1970):

[A] study has shown a direct positive correlation between an ex-husband's favorable attitude toward his alimony payments and the continuity of such payments. A man who thinks an alimony award is too high is more likely to default on his payments than one who feels that he is paying a just amount. Common sense suggests that a man who has contracted for an alimony award in an antenuptial agreement would usually feel the award justified.

Id. at 132 (footnotes omitted).

At present, antenuptial contracts "contemplating" a future divorce are struck down by most courts as contrary to public policy. See note 63 infra and accompanying text.

27. The lawyer, schooled to be careful and conservative in his judgment, is likely to hesitate recommending the use of so uncertain a tool as the antenuptial contract. See notes 114-51 infra and accompanying text.

28. The basis for this concept was twofold. Until the Industrial Revolution the medieval western family was the basic economic and social unit in a predominantly agrarian society. Males worked the land while females managed the inter-
right to own or dispose of property, or to enter into a contract. Accordingly, antenuptial contracts were unenforceable at common law. Because dower was regarded as an inchoate right which could not be barred before it accrued, settlements or conveyances executed prior to marriage aimed at divesting the wife's right to dower were voided by the courts.

To give effect to their desires the parties executed a jointure. A jointure was a trust device whereby the husband settled to a trustee a remainder interest in his lands to the use of his intended wife for life, in exchange for a relinquishment of his intended wife's dower interest. Such transfers were fully enforced by equity courts. Thus, the parties could accomplish through equity that which they could not at law.

As time passed, legal rights were gradually extended to the wife. Finally, through passage of the Married Women's Property Acts the unity fiction was dispelled, allowing women to own and dispose of property and to make contracts.

The first recognition of the validity of an antenuptial contract in Ohio was in the mid-nineteenth century decision of Stilley v.


29. Id. Not only was the wife unable to make contracts after the marriage, but also the contracts she had made with her husband before the marriage were vitiated by the marriage. Id. See also Comment, Family Law—Valid v. Void, Reconsideration of the Role of the Antenuptial Agreement In Illinois, 4 LOY. CHI. L.J. 497, 498-99 (1973).

30. Subrin, supra note 2, at 54.

31. Id.

32. The avowed purpose and need of the agreement usually resulted from the situation where the prospective husband, an elderly widower, owning realty and other property, and having children by his first marriage, wanted the companionship of a wife, usually a widow, in the twilight years of his life, but was reluctant to pay too dearly for the bliss which, according to the inexorable accuracy of the mortality tables, might prove of short duration.

[The jointure gave the wife] some security in the event of her husband's death, even though it was something less than the law would give her. Subrin, supra note 2, at 54. See Note, supra note 28, at 113.

33. See Note, supra note 28, at 114. See also Subrin, supra note 2, at 54.

34. See Note, supra note 28, at 114.

35. See generally 41 AM. JUR. 2d Husband & Wife § 17 (1968). Statutes or constitutional provisions removing the common law restrictions can be found in most American jurisdictions. Id. In Ohio, see OHIO REV. CODE ANN. §§ 3103.04, .07 (Page 1972) (property ownership); OHIO REV. CODE ANN. § 3103.05 (Page 1972) (ability to make contracts and incur obligations); OHIO REV. CODE ANN. § 2307.09 (Page 1954) (ability to sue and be sued in her own name).
An antenuptial contract between the decedent and his wife was held to bar the wife's claim for dower. The court recognized the validity of such contracts, relying upon English and American authority approving them. These agreements were approved because courts believed that the contracts promoted harmony within the marriage by removing disputes about property. Antenuptial contracts were upheld if they were entered in good faith, with full disclosure of their consequences, and if they included reasonable provision for the wife. The Stilley court stated the permissible scope of antenuptial contracts in broad terms:

Almost any bona fide and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution.... Though, for many purposes, by the marriage, the legal existence of the wife is merged in that of her husband, the law [in this context] recognizes her legal and separate identity and her separate rights; and she may preserve the one and enforce the other, in contracts of this character.

The reasoning of the court reveals a desire to do equity. The antenuptial contract at issue in Stilley did not conform to the technical terms of a jointure, which was the only means of defeating dower under the Ohio statute in force in 1846. Yet the court held that the contract was a bar to dower. It reasoned that the technical failure of the antenuptial contract to constitute a legally cognizable jointure was not fatal; the antenuptial contract could be given force as an equitable jointure, or alternatively, the agreement could operate as a complete equitable estoppel to a claim for dower.

Today the Ohio statute governing the bar to dower does not speak of jointure. The present statute is a legislative adoption of the Stilley holding, recognizing the validity of antenuptial con-

36. 14 Ohio 610 (1846).
37. For reference to the specific cases cited by counsel, see Brief for Respondents, id. at 624-46.
38. Id. at 649.
39. Id. at 647.
40. Id. at 649.
41. The statute provided: "If any estate shall be conveyed to a woman as jointure, to take effect immediately after the death of her husband, and to continue during her life, such conveyance shall bar her right to dower." SWANS STATUTES, 296, § 2 (1824).
42. 14 Ohio at 650.
43. OHIO REV. CODE ANN. § 2103.03 (Page 1976) provides in pertinent part: "The conveyance of an estate or interest in real property in lieu of dower to take effect on the
tracts as an absolute bar to dower. The modern judicial approach to antenuptial contracts also follows the Stilley rationale.\footnote{Compare text accompanying notes 36–42 with Osborn v. Osborn, 10 Ohio Misc. 171, 226 N.E.2d 814 (C.P.Cuy. County 1966), aff'd, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969).}

2. Classification of Antenuptial Contracts

Antenuptial contracts lend themselves to several systems of classification. They can be classified according to the consideration received, the rights to which the instrument speaks, or the contingencies contemplated by the parties.

\paragraph{a. Consideration.} A valid antenuptial contract is based on \textit{quid pro quo} consideration.\footnote{See notes 77–79 infra and accompanying text.} The consideration supporting the relinquishment of rights by one spouse in favor of the other can be settled at the time the contract is entered,\footnote{13 OHIO PRACTICE § 1767 (1975). Such contracts are usually referred to as marriage settlements. For reference to a typical contract form providing for the payment of consideration to the relinquishing spouse at the time of the execution of the contract, see 1 OHIO FAMILY LAW Form 80, at 667–68 (Anderson 1975).} or it can be executory, to be settled upon the happening of a future event, usually death.\footnote{13 OHIO PRACTICE § 1767 (1975). This type of agreement is the one most often employed. See Subrin, supra note 2, at 54; Comment, supra note 29, at 498. For reference to a typical contract form providing for the payment of consideration to the relinquishing spouse at the death of his spouse, see 1 OHIO FAMILY LAW Form 81, at 668–70 (Anderson 1975). For a discussion of agreements contingent upon events other than death, see notes 60–63 infra and accompanying text.}

\paragraph{b. Rights.} Antenuptial contracts are commonly divided into classes according to what rights the agreement addresses: conjugal rights or marital property rights.\footnote{See 2 A. LINDEY, supra note 16, at § 90 (1964); Note, supra note 28, at 115; Note, Unander v. Unander: Recognition of the Alimony Provision in Antenuptial Contracts, 10 WILLAMETTE L.J. 117, 118 (1973).} Conjugal rights are the fundamental rights or duties incident to the marital relation, including support, services, love, affection, and sexual relations.\footnote{See 2 A. LINDEY, supra note 16, § 90, at 90–57 (1964). In Ohio such rights are statutorily defined. See OHIO REV. CODE ANN. § 3103.01 (Page 1972), providing that "husband and wife contract towards each other obligations of mutual respect, fidelity, and support."} Marital property rights are personal rights in property which arise by virtue of the marriage, including dower,\footnote{OHIO REV. CODE ANN. § 2103.02 (Page 1976).} the statutory share of the death of the grantor, will bar such grantee's right to dower in the real property of the grantor."
spouse's estate,\(^{51}\) the widow's allowance,\(^{52}\) homestead rights,\(^{53}\) and other intestacy rights.\(^{54}\) As a general rule, courts favor antenuptial contracts involving marital property rights\(^{55}\) and disfavor antenuptial contracts that concern conjugal rights.\(^{56}\)

There are two kinds of conjugal rights: rights which arise during a continuing relationship (\textit{e.g.}, rights to sexual relations) and rights which arise upon termination of the marital relationship (\textit{e.g.}, alimony or property settlement rights). Contracts speaking to rights arising during a continuing marital relationship have been uniformly disdained by the courts as contrary to public policy.\(^{57}\) There is a conflict of authority regarding the validity of contracts addressing alimony or property settlement rights. Traditionally, they were held invalid as contrary to public policy on the theory that they tended to encourage divorce.\(^{58}\) A growing number of courts have questioned the validity of the premise that antenuptial contracts concerning certain conjugal rights encourage divorce and have applied the contrary-to-public-policy

\(^{51}\) Id. § 2107.39.


\(^{53}\) These include the right to reside in the mansion house, \textit{Ohio Rev. Code Ann.} § 2117.24 (Page 1976), and the right to purchase the mansion house and its contents, \textit{id.} § 2113.32.


\(^{55}\) \textit{See} Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Stilley v. Folger, 14 Ohio 610 (1846); Comment, \textit{supra} note 29, at 1135–36; Note, \textit{supra} note 28, at 115; Note, \textit{supra} note 48, at 118.

\(^{56}\) 41 \textit{Am. Jur.} 2d \textit{Husband and Wife} § 322 (1968).

\(^{57}\) \textit{See note} 63 \textit{infra}.

\(^{58}\) Englund v. Englund, 286 Minn. 227, 175 N.W.2d 461 (1970); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950); Annot., 57 A.L.R.2d 942 (1958); Annot., 70 A.L.R. 826 (1931); 2 A. \textit{Lindey}, \textit{ supra} note 16, § 90, at 90–27 (1964); J. Murray, Jr., \textit{ supra} note 16, § 341, 722–24 (2d rev. ed. 1974); \textit{Restatement of Contracts} §§ 584, 586, 587 (1932). Under this traditional view, a couple entering marriage ("until death do we part") could not effectuate an antenuptial agreement which contemplated a future divorce. The public policy in favor of marriage as the cornerstone of a stable society, \textit{see note} 16 \textit{supra}, as well as the state's interest in avoiding the burden of supporting the divorced spouse, \textit{see 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, 92 (1951), dictate this result. In Ohio the duty of support is statutory, thus emphasizing the state's interest in protecting itself against the burden of supporting wards. \textit{Ohio Rev. Code Ann.} § 3103.03 (Page Supp. 1976) (the husband has a duty to support his family, and if he cannot, the wife has a duty to contribute to assist him).
rule less vigorously.  

   c. Contingencies. It has been suggested that if prior to marriage two individuals reflected on the incidents of the marital relation and decided to govern their relationship by contract, "undoubtedly their concern will focus primarily upon two contingencies—divorce and death." A few courts will recognize the validity of an antenuptial contract that contemplates either of these two contingencies. Most courts, however, will not recognize the validity of an antenuptial contract containing provisions which contemplate divorce. Thus, under the majority rule, if an antenuptial contract is found to contemplate a future divorce or if it otherwise undermines the stability of the marital relation, it will invariably be voided under the contrary-to-public-policy rule.  

B. Formation

The Ohio rule governing the validity of antenuptial contracts is deceptively simple: an antenuptial contract fair and reasonable in its terms and fully executed by both parties will be given effect unless it is invalidated by fraud or is otherwise against public policy. Although this rule appears to be straightforward, the courts


63. See Gamble, supra note 60, at 704:

This rule, applied more vigorously by earlier decisions, is as follows, 'any antenuptial bargain that looks toward, provides for, facilitates, or tends to induce a separation or divorce after marriage, is contrary to public policy and void.' Apparently this rule began as a rebuttable presumption. Now, however, the rule seems to have become an absolute one which is applied to any antenuptial agreement contingent upon divorce. This public policy rule is used regularly as a basis for voiding an antenuptial contract contingent upon divorce, with total disregard for whether or not the agreement actually encourages divorce. (Footnotes omitted).

have encountered difficulties defining what is fair and reasonable, what is fully executed, and what contractual provisions are against public policy. The thesis of this Note is that the interpretive problems encountered in the law of antenuptial contracts are rooted in the approach the courts have taken toward these agreements. The courts have employed both rigid legal rules and elastic equitable doctrines. Because the courts use such an approach, it is necessary to examine both the legal requisites and the equitable considerations governing the formation of a valid antenuptial contract.

1. Legal Requisites

Since an antenuptial contract is made in consideration of marriage, it comes squarely within the Statute of Frauds and must therefore be in writing. Nevertheless, an oral contract reduced to writing after the marriage ceremony has been held a sufficient memorandum of the antenuptial bargain to remove it from the strict requirements of the statute.

Certain terms within antenuptial contracts will not be enforced by the courts. "[I]f the contract contains provisions repugnant to public policy the law will withhold its blessing." Thus a court will not enforce a provision in an antenuptial contract providing that the children born of the marriage must attend a certain religious school and be reared according to a certain faith; such disputes are more properly settled within the family, without state

65. See text accompanying notes 94-97 infra.
66. See notes 114-51 infra and accompanying text.
67. See text accompanying notes 72-76 infra.
68. See notes 15 & 16 supra.
69. See text accompanying note 2 supra.
70. OHIO REV. CODE ANN. § 1335.05 (Page 1976). One court has intimated that partial performance may take the contract outside the statute. Henry v. Henry, 27 Ohio St. 121 (1875).
71. See In re Estate of Weber, 170 Ohio St. 567, 167 N.E.2d 98 (1960). Such a memorandum must refer to the antenuptial contract, recite its terms, and otherwise affirmatively show that it is a memorandum of the oral contract. Id. at 574, 167 N.E.2d at 102-03. Weber also held that a memorandum of an antenuptial contract executed between married individuals did not constitute a contract between a husband and wife aimed at altering their legal relations; such contracts are prohibited by Ohio law. OHIO REV. CODE ANN. § 1335.06 (Page 1976).
intervention. Nor will a court enforce an antenuptial contract purporting to preserve the right of the wife to bring a negligence action against her husband after marriage. In addition, contracts made for the sole purpose of legitimating a child or those which provide that the married couple shall live apart upon their separate assets have been declared void as against public policy.

An antenuptial contract, like any other contract, must be supported by adequate consideration. Ohio courts have held that the consideration necessary to support an antenuptial contract is of a dual nature. Consideration consists of (1) each party's promise to perform his marital obligations and (2) the mutual promises that one party will convey a satisfaction in return for the other party's promise to relinquish some or all of his rights in the other's estate. In this regard, antenuptial contracts typically recite that they are made "in consideration of the marriage" the parties are about to enter, thereby emphasizing the reciprocal nature of the parties' obligations. If the promisor's obligation is not supported by recital of or an apparent provision for consideration in the antenuptial contract, the absence of such a provision renders the contract unenforceable.

2. *Equitable Considerations*

The traditional, astigmatic view of men and women pervades the equitable considerations employed by Ohio courts to determine the validity of antenuptial contracts. Though an enforceable antenuptial contract may contain terms favoring a husband, the close scrutiny applied to all antenuptial contracts is bottomed on the fear that such agreements would be used by a strong, domi-

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74. Subrin, *supra* note 72, at 56-57 (citing Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (Cuy. County 1946)).
75. *Id.* (citing Smith v. Smith, 154 Ga. 702, 115 S.E. 73 (1922)).
76. *Id.* at 56.
79. See 1 Ohio Family Law Form 80, at 667-68; Form 81, at 668-70 (Anderson 1975).
81. *See* note 19 *supra* and accompanying text.
nating husband to impose upon a weak, submissive wife. The following statement from the century-old decision of *Stilley v. Folger* was incorporated into an Ohio decision reported in 1966:

> "What person is so exposed to imposition as a woman, contracting, personally, with her intended husband, just on the eve of marriage, at a time when all prudential considerations are likely to be merged in a confiding attachment, or suppressed from an honorable instinct and sentiment of delicacy."

Surely, "it would be a reproach to the law, if the very virtues and graces of woman were thus allowed to become the successful means of overreaching and defrauding them in bargains." In the modern context, the sentiments expressed in *Stilley* should have no place in the construction of antenuptial agreements. It has been urged that antenuptial contracts actually serve to allay the fears of prospective spouses concerning economic exploitation. Yet the *Stilley* dictum may, in combination with other factors, deter the use of a useful and beneficial tool.

In reviewing the equities of the contract, the courts in Ohio presently focus on three considerations: the good faith of the parties, the full and fair disclosure of the value of the estate in which a party is relinquishing rights, and the granting of fair and reasonable consideration to the relinquishing party. Good faith must attend these contracts because an engagement to marry creates a confidential relationship of trust between the parties, the parties are not dealing at arm's length when they execute the

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83. 14 Ohio 610 (1846).

> Marriage contracts have erased some of these [financial] fears and have permitted some people, who might otherwise have remained single, to feel sufficiently confident to marry. Such contracts may facilitate marriage by alleviating fears of loss and exploitation which might have added to the stress of the marital relationship. The removal of these fears through a marriage contract then permits uncluttered attention to nurturing the marriage.

86. See notes 114-51 *infra* and accompanying text.
87. See, e.g., Mettler v. Warner, 11 Ohio N.P. (n.s.) 363 (C.P. Huron County 1910).
89. *Id.*
90. *Id.* at 264, 16 N.E.2d at 331. See also Pniewski v. Przybysz, 89 Ohio L. Abs. 385,
The requirement of good faith creates a duty in the party in whose estate the other party surrenders rights to give a full and fair disclosure of the nature, extent, and value of the estate. The legal effects of the contract must also be made known to the party relinquishing rights.

The value of the property granted the relinquishing spouse must be a fair and reasonable amount, not out of proportion to the value of the grantor’s estate. The Ohio courts consider several factors in determining the fairness of a settlement; the amount the relinquishing party would have received at law, the circumstances surrounding the transaction, the relative ages of the parties, the amount conveyed to the relinquishing spouse, the number of children the parties have by former marriages, and the size of the grantor’s estate when the contract was executed. If, however, a spouse entered the contract with full awareness of the extent of the grantor’s property and an understanding of the contract’s terms, the court will not invalidate the contract because the settlement is disproportionate.

II. ENFORCEMENT OF ANTENUPTIAL CONTRACTS

Historically, the purpose of an antenuptial contract was to bar the rights of a surviving spouse which arose by operation of law at the death of the other spouse. The promise to relinquish rights was supported by consideration exchanged upon the execution of the contract or vesting upon the death of the spouse in whose estate rights were being relinquished. Ideally, the antenuptial

93. The legal maxim that “one is constructively presumed to know the law” is inapplicable to cases involving antenuptial contracts. Mosier v. Mosier, 72 Ohio L. Abs. 268, 273–74, 133 N.E.2d 202, 207 (Frank. County P. Ct. 1954).
94. Id. at 274, 133 N.E.2d at 208 (citing Juhasz v. Juhasz, 134 Ohio St. 257, 264, 16 N.E.2d 328, 331 (1938)).
95. See Subrin, supra note 72, at 59.
96. Id. at 60. See also Rippner, supra note 77, at 299 (Table A).
98. See note 4 supra and accompanying text.
99. See notes 77–79 supra and accompanying text.
100. See note 46 supra.
101. See note 47 supra. Divorce may unexpectedly affect the enforceability of the
contract was satisfactory to all parties interested in the marriage. The deceased spouse had enjoyed companionship, ensured that his estate would pass without diminution, and had provided a fair and reasonable settlement to his wife. The surviving spouse likewise had a companion and came away from the relationship with a settlement to which the parties had voluntarily assented in good faith. The state benefited because two citizens had remained in a stable marriage relationship. Upon the death of one party, the antenuptial contract eased the state's burden of supporting the surviving spouse. Problems concerning the validity and operation of the contract arose, however, when the parties to the antenuptial agreement subsequently divorced.

A. General Requisites for Enforcement

An antenuptial contract intended to take effect at the death of one of the parties will be given effect if, after executing the contract, the parties consummate the marriage and one party subsequently dies. The effectiveness of the contract is dependent upon full performance of the provisions in favor of the party relinquishing rights. If the contract is designed to bar dower in

antenuptial contract. While courts "may refuse to enforce the executory portion of the contract . . . [they] are reluctant to disturb a prior transfer." 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 90-72 (rev. ed. 1964).

Ohio has no reported cases addressing the issue whether a party giving consideration to the other may recover it after the divorce. Where consideration has passed, antenuptial agreements will not be rescinded on divorce. In Jackson v. Jackson, 222 Ill. 46, 78 N.E. 19 (1906), the court held that a man who had conveyed real property to his prospective spouse in consideration of the impending marriage could not reclaim it upon divorce. The court reasoned that the marriage was part of the consideration for the transfer. Since the wife had performed that part of the contract, a court in equity would not decree rescission. "[A] court of equity will not ordinarily decree rescission of a contract where there is only a partial failure of consideration . . . [especially . . . where the party against whom the rescission is sought cannot be placed in statu quo]." 2d at 48-49, 78 N.E. at 20. The determinative fact was that the husband "cannot restore the [wife] to the unmarried state in which he found her at the time he conveyed title to her." 2d at 49, 78 N.E. at 20; accord, Johnston v. Johnston, 182 Iowa 481, 166 N.W. 65 (1918); Sparrow v. Sparrow, 172 Minn. 91, 214 N.W. 791 (1927).

All is not lost for the party who has vested some gain in his ex-spouse prior to a divorce. In Ohio, alimony is determined by the separate and relative assets of both parties, not just those of the husband. OHIO REV. CODE ANN. § 3105.18(B)(9), (10) (Page Supp. 1976). This approach to alimony mitigates the financial impact a prior transfer may have had on one of the parties.


sideration of a stated satisfaction, payment of the specified amount is an express condition precedent to enforcement of the bar.\textsuperscript{104} In addition, courts have read an implied condition precedent into antenuptial contracts requiring that the party seeking to enforce the contract must have performed or attempted to perform the spousal obligations incident to the marriage until the death of the other spouse.\textsuperscript{105}

B. The Validity of an Antenuptial Contract Subsequent to a Divorce

The weight of authority holds that "a marriage settlement, valid in its formation and not fraudulently induced, is not abrogated by the divorce of the parties for marital misconduct arising after the marriage, unless the language of the contract contains an express provision against such conduct."\textsuperscript{106} The courts have promulgated sound reasoning in support of this rule. In \textit{Crise v. Smith},\textsuperscript{107} the court concluded that certain rights arise incident to the marriage and other rights arise independent of the marriage. The court held that "all contractual or property rights of either spouse, not arising out of and dependent upon the continuance of the marriage status, survive the divorce . . . , and fall within the scope and operation of the rules and principles governing similar contractual or property rights."\textsuperscript{108} The court explicitly framed its holding in the form of a general rule:

[A] divorce . . . ends all rights of either spouse dependent on marriage, and not actually vested, as curtesy, dower, and the property rights under statutes of distribution, but as a rule transfers of property and contracts executed before divorce are not affected by dissolution of the marital tie.\textsuperscript{109}

Other courts rest their decisions on the strict construction of

\textsuperscript{104} 57 Ohio App. at 149–50, 12 N.E.2d at 300.
\textsuperscript{105} See, e.g., Southern Ohio Sav. Bank & Trust Co. v. Burkhart, 148 Ohio St. 149, 74 N.E.2d 67 (1947).
\textsuperscript{107} 150 Md. 322, 133 A. 110 (1926).
\textsuperscript{108} \textit{Id.} at 327, 133 A. at 112.
\textsuperscript{109} \textit{Id.} at 326, 133 A. at 111. \textit{Cf.} OHIO REV. CODE ANN. § 3105.10 (Page Supp. 1976) (all rights that accrue by virtue of the marriage terminate upon divorce).
the antenuptial contract,\textsuperscript{110} holding that the agreement is governed by the intent of the parties as expressed in the language of the instrument. One court stated that "[i]n the absence of fraud or concealment, antenuptial agreements are valid and enforceable [sic] and it seems to us that the only question in this case is construction of the written contract."\textsuperscript{111} In construing the contract the court held that "[i]f the husband failed to insert clauses to protect his estate in the event of . . . divorce . . . , the courts cannot rewrite the contract for his benefit. The contract here was free from all ambiguities . . . . The agreement was absolute."\textsuperscript{112} The court said that it was not persuaded by the "speculations" of other jurisdictions that "one of the considerations for such agreements is . . . the marriage relation."\textsuperscript{113}

In contrast to the foregoing approach, Ohio adheres to the view that continued performance of marital obligations is part of the consideration that supports the contract.\textsuperscript{114} Under this approach, the lack of an express provision terminating the contract if the parties divorce does not prevent the courts from refusing to enforce its terms.\textsuperscript{115}

Ohio's first reported case considering the validity of an antenuptial contract subsequent to a divorce, \textit{Kennedy v. Kennedy},\textsuperscript{116} indicated that Ohio would adhere to what has been termed "the weight of authority":\textsuperscript{117} the contract would be enforceable unless it contained an express clause for termination upon divorce.

In \textit{Kennedy}, a wife had been awarded a divorce and alimony due to the husband's gross neglect of duty. The husband brought suit maintaining that the award of alimony was in error because an antenuptial contract executed between the parties barred such an award. The contract provided that the husband would "care for and support [the wife] out of his income so long as they should be husband and wife . . . ."\textsuperscript{118} It further provided that "if for

\begin{itemize}
  \item \textsuperscript{110} Sims v. Sims, 186 Neb. 780, 186 N.W.2d 491 (1971); \textit{In re Cavazza's Estate}, 169 Pa. Super. Ct. 246, 82 A.2d 331 (1951).
  \item \textsuperscript{111} \textit{In re Cavazza's Estate}, 169 Pa. Super. Ct. at 246–47, 82 A.2d at 332.
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} at 248, 82 A.2d at 332.
  \item \textsuperscript{114} \textit{See note 78 supra and accompanying text.}
  \item \textsuperscript{115} \textit{See, e.g.,} Southern Ohio Sav. Bank & Trust Co. v. Burkhart, 148 Ohio St. 149, 74 N.E.2d 67 (1947).
  \item \textsuperscript{116} 11 Ohio App. 399 (Cuy. County 1919).
  \item \textsuperscript{117} 2 A. LINDEY, \textit{supra} note 101, § 90, at 90–72. \textit{See also} Annot., 47 A.L.R. 473, 474 (1927).
  \item \textsuperscript{118} Kennedy v. Kennedy, 11 Ohio App. 399, 400 (Cuy. County 1919).
\end{itemize}
any reason the parties should separate and not live together as husband and wife" the wife was to have no interest in the husband's property acquired before the marriage.119 After eighteen months of marriage the parties separated. The trial court concluded that the husband had grossly neglected his duty to his wife, thus breaching both the marital relation and the antenuptial contract; hence the court awarded both a divorce and alimony to the wife. The court of appeals held that "[i]f the contract has not been substantially performed by the husband, then the wife ought not to be barred by such contract of the right to alimony given to her by the statutes of the state."120

The *Kennedy* decision rests on a strict construction of the contract. The court did not question the validity of the contract but addressed only the issue of enforcement. Since the party seeking enforcement was in breach of the contract's terms, the court would not enforce the contract in his favor. It is manifest that this approach is simple, predictable, and fair. The parties adopted an agreement evidencing their intentions and expectations. If one party wishes to enforce the contract he must have fully performed it.

It is regrettable that the Ohio courts have not followed the *Kennedy* approach. Rather, the courts look beyond the face of the instrument purportedly in search of the intent of the parties.121 Interestingly, the courts have always discovered that the parties intended the validity of the contract to turn upon the continued existence of the marriage relation.122 In practice, the search for intent has become nothing more than a summary conclusion, without a considered discussion of the actual terms of the parties' agreement.123 This mechanical approach to antenuptial contracts—a de facto presumption that the parties intended something not evident on the face of their contract—denies the parties the power to write their own agreement and restricts the usefulness of antenuptial contracts.124

119. *Id.* at 401.
120. *Id.* at 401–02.
122. *Id.* See also Dearbaugh v. Dearbaugh, 110 Ohio App. 540, 170 N.E.2d 262 (Shelby County 1959).
123. See, e.g., Dearbaugh v. Dearbaugh, 110 Ohio App. 540, 170 N.E.2d 262 (Shelby County 1959).
124. "The importance of legally enforceable promises can hardly be over-estimated . . . . The social order rests upon stability, and predictability of conduct, of which keeping
The roots of the present approach can be traced to *Southern Ohio Savings Bank & Trust Co. v. Burkhart*, the first Ohio Supreme Court decision concerning the enforceability of an antenuptial contract after the parties to it had divorced. In *Burkhart* the court, making no reference to *Kennedy*, erroneously stated that the issue was one of first impression in Ohio. In a brief, 3-page declaratory judgment on the enforceability of the contract, the court did not reproduce the terms of the agreement. The sole reference to the antenuptial contract was that

[it] contained a statement that [the husband] had made a will providing for a payment of $300 per month to [the wife] as long as she should live. The contract provided also that she should be paid from his estate the further sum of $1,000 per year for five years. These provisions were in consideration of the remarriage.

The parties had married, divorced, and later remarried. Prior to each marriage they executed an antenuptial contract. Thirteen years after the second marriage, the husband was awarded a divorce due to the wife's aggression. Two years later, on the death of her ex-spouse, the woman sought to enforce the terms of the contract. The executor of the husband's estate sought a declaratory judgment that the agreement was void for failure of consideration. The court held for the executor.

In the instant case the rights the wife agreed to relinquish were those of a surviving spouse. But at the time her former husband died she was not his wife, and hence had no rights as a surviving spouse to relinquish in consideration for the sums she now claims from his estate. Under the terms of the antenuptial contract it was contemplated that she should remain his wife and perform the marriage obligations of a wife as long as he and she lived. This she failed and refused to do... and she cannot in sound reason and good conscience require performance of a contract which she herself has failed and refused to perform.


Judges in the area of antenuptial contracts have found themselves caught in the dilemma of providing contractual freedom on the one hand and, on the other hand, protecting the state against the support of unwanted wards...

The rules used to solve this dilemma must have clarity and predictability...

The present guidelines presented in the decisions involving antenuptial contracts are uncertain and unpredictable... The prevailing sense of uncertainty suggests that the increased use of antenuptial contracts has been in spite of, rather than due to, the applicable rules governing them.

125. 148 Ohio St. 149, 74 N.E.2d 67 (1947).
126. *Id.* at 149, 74 N.E.2d at 67.
127. *Id.* at 152-53, 74 N.E.2d at 68-69.
Burkhart is troublesome for at least two reasons. First, the court did not once refer to the text of the contract to support its conclusion. Second, the court established a rule far exceeding the precedent upon which it relied. The court depended heavily on an Iowa case, York v. Ferner, which, in turn, had relied upon an earlier Iowa case, Jacobs v. Jacobs.

In Jacobs, the antenuptial agreement provided, in part, that each party was to remain secure in his separate property brought to the marriage and that the wife was to be barred of dower. After eight years of marriage, the wife left the husband and refused to return. Upon the husband's death, the wife sought dower. The court held that the antenuptial contract barred her claim:

It is claimed . . . that the contract is . . . without sufficient consideration, and, therefore, ought not in a court of equity to be enforced. We cannot so regard it. The law always looks upon marriage as a civil contract . . . So far as it appears, the contract was freely and voluntarily entered into, without any fraud or imposition . . . [T]he advantages are about equal, and the contract is fair and reasonable. We know of no reason why it should not be enforced.

Jacobs stands in contrast with York, where the antenuptial contract was not enforced. In York, the couple had been married for only fifty-two days when the wife left the husband because of his notorious and frequent drunkenness. Notwithstanding the husband's condition, the court determined that the wife had no cause to leave him; she "took him for better or for worse." With this premise, the court examined the validity of the antenuptial contract with the view that the person claiming under it "did . . . desert and abandon [her husband] without cause." The court concluded that:

The antenuptial contract was based upon the contemplated marriage whereby plaintiff became bound to discharge the duties of a wife . . . The consideration of the instrument is the marriage contract; if it be broken and violated, the antenuptial contract cannot be enforced. It would be monstrous to hold

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128. Though the court asserted that "under the terms of the antenuptial contract it was contemplated that she should remain his wife . . .," id. at 152, 74 N.E.2d at 68, the opinion gives no clue as to what language in the parties' contract reveals this intent. Naturally, the broad rule laid down in Burkhart, not anchored to the specific contractual provisions the court was purportedly construing, was bound to be problematic. See notes 142–51 infra and accompanying text.

129. 59 Iowa 487, 13 N.W. 630 (1882).

130. 41 Iowa 600 (1876).

131. Id. at 607.

132. 59 Iowa at 188, 13 N.W. at 631.
that a woman could collect an annuity settled upon her by a contract in contemplation of marriage, when after the marriage, without cause, she utterly refused to live with her husband longer than seven weeks and three days. This is the precise case before us. Our conclusions, [that the claim be dismissed], we think, are supported by legal principles and sound reason.133

In both Jacobs and York, the parties executed antenuptial contracts, married, and thereafter the wife ceased performing her marital duties by leaving her husband. Yet in Jacobs the antenuptial contract was enforced to bar the wife of dower, while in York the antenuptial contract was not enforced to settle upon the wife an annuity. In both cases the decision was against the wife, the apparently guilty party. In so holding, however, these courts failed to expressly define useful rules for construing antenuptial contracts. Unfortunately, by relying on these decisions, Burkhart itself failed to articulate useful standards.134

The Burkhart decision relied on three additional out-of-state decisions. Becker v. Becker135 was simply inapposite; there, one party failed to perform an express covenant in the antenuptial contract. Both Veeder v. Veeder136 and New Jersey Title Guarantee & Trust Co. v. Parker137 held that the party seeking to enforce the antenuptial agreement had to prove full performance of all of the express covenants in the contract and either full performance of his marital obligations until the death of the other spouse or full performance of his marital obligations until the other spouse prevented further performance.

The court in Parker looked to the terms of the antenuptial

133. 59 Iowa at 491, 13 N.W. at 632 (citing Jacobs v. Jacobs, 41 Iowa 600 (1876)).
134. The York court relied on Jacobs to assert that its holding was supported by legal principles and sound reason. The ground of distinction, and the source of support, must lie in the length of time that the parties had lived together—eight years in Jacobs and fifty-two days in York.

If the Burkhart court had relied solely on Jacobs and York, the Burkhart result would likely have been different. In Burkhart the couple had been married thirteen years—certainly, on the facts, bringing it closer to Jacobs than to York. However, it is probable that the Burkhart court never read Jacobs, but merely cited to it in borrowing the quote from York that had cited to Jacobs. In this light, the Burkhart decision is understandable. Yet the ultimate result of the Burkhart court’s reliance on York is that the distinction between York and Jacobs—the length of the performance of the marital duties—was submerged.
135. 241 Ill. 423, 89 N.E. 737 (1909).
136. 195 Iowa 587, 192 N.W. 409 (1923).
137. 85 N.J. Eq. 557, 96 A. 574 (1916).
contract to find the intent of the parties and construed the terms strictly. Because the wife had failed to show that she had in good faith performed her marital obligations, she was unable to enforce the contract. The court in *Veeder* did not scrutinize the antenuptial contract but instead adopted the *Parker* holding for the proposition that a spouse must show full performance of his marital obligations to enforce the contract. *Burkhart* echoed the *Veeder* holding and adopted its approach. Thus, instead of employing the rigorous and thoughtful analysis of *Parker*, focusing upon the actual terms of the contract, the *Burkhart* court summarily disposed of the parties' agreement.

In spite of the problems inherent in the *Burkhart* decision, its holding and its approach have been perpetuated in subsequent Ohio decisions. The next reported Ohio case on the enforceability of an antenuptial contract after a divorce was *Dearbaugh v. Dearbaugh*, decided twelve years after *Burkhart*. In *Dearbaugh*, the wife had been granted a divorce from her husband on the ground of extreme cruelty, and alimony had been awarded. The husband brought suit contending that an antenuptial contract between the parties barred an alimony award. The court, quoting from *Burkhart* and the precedent upon which *Burkhart* relied, held for the wife. "The consideration of the instrument [the antenuptial agreement] is the marriage contract, if it be broken and violated, the antenuptial contract can not be enforced." The *Dearbaugh* court, by strictly adhering to *Burkhart*, in turn adopted the problems inherent in *Burkhart*. The court did not refer to the terms of the contract it was construing—in fact, the parties failed to include it in the record on appeal—and the court affirmed the use of a rule that exceeded the authority upon which it was based. By not referring to the terms of the contract it was construing, the court did not rest its decision on the parties' intent, as the *Burkhart* decision had purported to do. Rather, the court in *Dearbaugh* transformed a rule of con-

138. *Id.* at 561, 96 A. at 576.
139. *Id.* at 563, 96 A. at 577. The contract provided that the wife would be entitled to one-third of the husband's income "in event that she should keep her promise to become [his] wife." *Id.* at 561, 96 A. at 576. This was construed by the court as an express condition requiring the wife to perform her marital duties before she could enforce the contract.
141. 148 Ohio St. at 152, 74 N.E.2d at 68.
142. 110 Ohio App. 540, 170 N.E.2d 262 (Shelby County 1959).
143. *Id.* at 542, 170 N.E.2d at 263 (quoting *Burkhart*, 148 Ohio St. at 151, 74 N.E.2d at 68 (quoting *York*, 59 Iowa at 491, 13 N.W. at 632)).
struction allegedly rooted in intent into a mechanical rule that could be applied to render a contract unenforceable without reference to the intent of the parties who made the instrument.\textsuperscript{144}

The latest statement of the rule regarding the enforceability of an antenuptial contract subsequent to a divorce appeared as dictum in \textit{Conley v. Conley}.\textsuperscript{145} The court held that the absence of a recital of consideration in an antenuptial contract rendered the agreement unenforceable. The agreement provided for support payments payable by the husband to the wife but did not recite a reciprocal duty for the wife toward the husband. After the parties divorced,\textsuperscript{146} the husband ceased making support payments. The wife then sued for specific performance of the contract. Although the court denied specific performance based on the lack of consideration, it stated:

In addition . . . the document might be deemed unenforceable where the writing itself reasonably reveals the intent of the parties that the duty to perform [the contract] is conditioned upon the continued legal existence of the marriage . . . and where the termination of that marriage by divorce removes the condition, relieving \textit{both parties} of any further duty to perform.\textsuperscript{147}

Thus, albeit only by way of dictum, the rule promulgated by the \textit{Conley} court can be stated thus: when the court can perceive that the parties intended the contract to be valid only so long as the marriage continued, the agreement becomes unenforceable by both parties upon termination of the marriage. This interpretation, like those in \textit{Burkhart} and \textit{Dearbaugh}, is troublesome. The Ohio cases are devoid of examples of language within antenuptial contracts evidencing the intent referred to in \textit{Conley}. Further, \textit{Conley} indicates that upon termination of the marriage the contract may be unenforceable by \textit{either} party—a principle not supported by prior Ohio authority.\textsuperscript{148}

\begin{flushleft}
\textsuperscript{144} The court indicated that a breach of an express promise made in the antenuptial contract was not the sole ground for granting relief to the non-defaulting party. \textit{Id.} at 542, 170 N.E.2d at 264. The court thus opened the door to unbridled judicial intervention in the private arrangements of the parties regardless of how they have chosen to write their agreement.

\textsuperscript{145} 45 Ohio App. 2d 1, 340 N.E.2d 430 (Ham. County 1975).

\textsuperscript{146} The ground for the divorce was not revealed in the opinion.

\textsuperscript{147} Conley v. Conley, 45 Ohio App. 2d 1, 3, 340 N.E.2d 430, 432 (Ham. County 1975) (emphasis added).

\textsuperscript{148} Prior to \textit{Conley}, the decisions focused upon the enforceability of an antenuptial contract subsequent to a divorce in favor of the party that failed to perform either an express or implied term of the contract. Southern Ohio Sav. Bank & Trust Co. v. Burkhart, 148 Ohio St. 149, 74 N.E.2d 67 (1947); Dearbaugh v. Dearbaugh, 110 Ohio App. 540, 170 N.E.2d 262 (Shelby County 1959); Kennedy v. Kennedy, 11 Ohio App. 399 (Cuy.
In sum, as the Ohio courts were confronted with antenuptial contracts that contained no express provision for termination in case of divorce, they had to either enforce the contract after the divorce or find some way to render it unenforceable. The courts chose the latter path, notwithstanding the fact that the parties could have inserted clauses in their contracts to protect their respective estates in the event of a subsequent divorce. Thus, the Ohio courts have forsaken strict construction of the contract in favor of a purported search for the intent of the parties. Since the decisions reveal no clue as to what language evidences the parties’ intent, the cases serve as a poor foundation for predicting judicial reaction to antenuptial contracts. The absence of guidelines for finding intent in antenuptial contracts undermines the desirability of adhering to an approach which purportedly enforces antenuptial contracts according to the intent of the parties. A broader rule striking down all antenuptial contracts subsequent to a divorce is fraught with inequities. Since the essential function of formalizing a relationship by contract is to assure stability and predictability through fulfillment of expectation, it is desirable

County 1919). No Ohio court had gone so far as to say that both parties were barred from enforcing the agreement subsequent to a divorce.

149. *See, e.g.,* Rosenstiel v. Rosenstiel, 368 F. Supp. 51 (S.D.N.Y. 1973), *aff’d*, 503 F.2d 1397 (2d Cir. 1974). “The antenuptial agreement . . . included a provision that ‘upon condition that [plaintiff] survive [defendant] and upon further condition that at the time of [defendant’s] death the said parties have not been divorced or separated by decree of a court of competent jurisdiction, or separated by written agreement . . . .’” Id. at 62 (emphasis omitted).

The antenuptial contract in *Conley* contained the following clause: “In the event of a mutual or legal separation or of separate maintenance . . . . I also agree to pay you (Mary Ann) $50.00 per week beginning with the first weekly payday after the date of separation. I agree to continue payments until changed by mutual or legal agreement.” *Id.* at 4 n.2, 340 N.E.2d at 433 n.2.

150. The inequity of utilizing a blanket rule based solely upon performance of the marital obligations until death is apparent in the following examples:

i) Prospective spouses A and B execute an antenuptial contract, marry, and live together one year. B dies. Under the blanket rule, A gets the settlement under the contract. ii) Prospective spouses C and D execute an antenuptial contract, marry, and live together ten years. D then divorces C. One year later D dies. C cannot enforce their antenuptial contract under the blanket rule.

151. *See generally* J. Murray, Jr., Murray on Contracts § 1, at 3 n.4 and accompanying text (2d rev. ed. 1974); *see also* Fricke v. Fricke, 257 Wis. 124, 130, 42 N.W.2d 500, 503 (1950) (dissenting opinion):

Public policy, of course, favors marriage and is concerned with its stability. I think it must be conceded that, in other relationships, contracts defining the expectations and responsibilities of the contracting parties promote stability. If they are desirable in other human activities there should be, at least, no presumption that they tend to promote discord in marriage. And even in marriage any-
that the courts adopt an approach aimed at furthering, rather than defeating, the intent of the contracting parties.

III. PROPOSALS AND CONSIDERATIONS

"Its [the law’s] principles or rules or concepts are not always finalities. They may mark what is only a stage of progress, or at times a stage of retrogression. Even so, their implications are something more than vanities. They are to be heeded like the laws of nature till superseded by another formulation more truthful in its expression of the order of the juristic universe." 152

It is plain that the state has an interest in providing its citizens, prior to marriage, with a tool by which they can determine their relative property rights as spouses. 153 "If the policy is to allow parties to antenuptially determine property rights, then there must be rules that will facilitate and guide premarital planning." 154 At the same time, it is widely recognized that the state has a special interest in preserving the marital relation. 155 The courts must adopt rules relating to antenuptial contracts that maximize the parties’ contractual freedom 156 without simultaneously undermining the state’s interest in societal stability and self-supporting citizenry. 157 These rules must reflect modern social attitudes toward male-female roles, marriage, death, and divorce. 158 In any event, one can think of possible problems which it is well to be agreed upon before the ceremony.


153. See text accompanying notes 36–40 supra.

154. Gamble, supra note 124, at 729.

155. See note 16 supra.

156. See note 15 supra.


158. Compare the following:

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...

With divorce such a commonplace fact of life, it is fair to assume that many
a viable solution requires a revamping of the courts' assumptions and legal precepts in both the formation of antenuptial contracts and the enforcement of such contracts.

A. Proposal

A revision of Ohio's approach to antenuptial contracts must begin with and be guided by considerations that "insure that the spouses knowingly enter into the contractual relationship." Therefore, there is merit to the existing precedent requiring full and fair disclosure of the nature and extent of the estates of the prospective spouses. Moreover, though the following proposal is aimed at bringing the rules relating to antenuptial contracts in closer alignment with those of contracts generally, it does not purport to apply to prospective spouses principles geared toward commercial dealings: "there is a vast difference between a contract made in the marketplace and one relating to the institution of marriage."

The proposal is two-pronged. First, the courts should establish a presumption that the parties have bargained at arm's length if each was represented by independent counsel upon the execution of the contract; this would infuse the law of antenuptial con-
tracts with the general law of contracts. If one of the parties to the contract proves that he was not represented by independent counsel at the time of execution—a rather light burden—the presumption would be rebutted. The court would then pursue the second prong of the analysis by carefully examining the actual bargaining position of the parties. This approach avoids the problematic anachronism which presently governs the formation of antenuptial contracts—the "confidential relationship." Stated simply, the first part of the proposal is a presumption of arm's length bargaining; the second part of the proposal applies in the event the presumption is rebutted and requires the adoption of rules which realistically reflect the modern prenuptial relationship.

Several benefits flow from the presumption of arm's length bargaining where the parties are represented by counsel. The presence of counsel curbs deception, assures fair disclosure and negotiation of a fair and adequate settlement, and educates the


163. In other words, the courts should recognize a greater "freedom of parties to settle their rights in good faith as they see fit . . . This would result in judicial deference to the fair and reasonable provisions made by the parties in the assumption that they were in the best positions to determine property distribution and alimony payments." Note, Unander v. Unander: Recognition of the Alimony Provision in Antenuptial Contracts, 10 WILLAMETTE L.J. 117, 122-23 (1973).


It is generally true that persons engaged to marry do stand in a confidential relationship towards each other. Antenuptial agreements are carefully scrutinized by the courts, particularly as to the question of full disclosure as to the nature and extent of the property of each. However, this duty is generally placed upon the prospective husband by the law which also requires that the prospective wife clearly understand the contract that is being entered into . . . . However, . . . there is no reciprocal duty on the part of the prospective wife toward the prospective husband . . . .

It certainly follows as a natural corollary that if there is no absolute duty on the part of a prospective wife to disclose the nature and extent of her property, especially in a marriage of convenience between mature adults, consequently, there is no absolute requirement in the law that the prospective husband know and comprehend exactly the contents of an antenuptial agreement. [citations omitted].

In Pniewski, the husband was elderly, did not understand the agreement, and was not represented by independent counsel when the agreement was executed. The contract was held to be a valid bar to survivorship rights in his wife's estate.

See generally notes 90 & 91 supra and accompanying text; see also Gamble, supra note 124, at 720-23.
parties concerning the legal rights and duties which flow from the marriage relationship. Perhaps most important, the presumption fosters predictability in the enforcement of antenuptial contracts. The courts can defer to the contractual provisions on the presumption that the presence of counsel assured a true reflection in the agreement of the parties' intent. This would displace the present interventionism of Ohio courts in their purported search for the intent of the parties.

Moreover, the requirement of independent counsel would probably not discourage prospective spouses from employing the antenuptial contract. Most spouses who have executed antenuptial contracts in the past have been married previously, are generally of middle age or older, have dealt with attorneys before, and would in any event seek the advice of an attorney in drafting an antenuptial agreement. Hence, the requirement of counsel is not an additional burden on the parties who typically employ antenuptial contracts. Rather, it recognizes actual practice in the formation of the agreement.

The mechanics of the proposal are simple. In construing an antenuptial contract, the court will examine the face of the document to determine if it complies with governing legal principles. If so, the presumption arises that the parties had full knowledge of the nature of the agreement they were executing, the nature and extent of the estate in which rights were being relinquished, and that disclosure was made truthfully and in good faith. On its face, the contract settlement should be presumptively fair, adequate, and not disproportionate. To rebut the presumption the contesting party need only prove that he was not represented by independent counsel at the execution of the contract. To facilitate the proof of the presence of counsel a simple tactic would be to have each party's attorney subscribe to the contract. Alternatively, the contestant could depose the party resisting the action. Other options are the use of a notary or attestation witnesses.

166. See note 151 supra and accompanying text.
167. See notes 114-51 supra and accompanying text.
168. See Gamble, supra note 124, at 733; Note, supra note 165, at 131.
169. Id.
170. See Note, supra note 165, at 131.
171. See notes 69-80 supra and accompanying text.
Upon rebuttal, the court is faced with four questions: (1) did the parties know the nature of the agreement they were entering; (2) did the relinquishing party know the extent of the estate in which he was relinquishing rights; (3) did the party in whose estate rights were being relinquished make a truthful disclosure in good faith; and (4) is the settlement fair and reasonable? The approach employed by the courts in considering these questions is critical to the outcome of litigation of these contracts. The present approach, rooted in the notion of the "confidential relationship," must be abandoned in favor of an approach that focuses on the actual bargaining position of the parties. In practice the proposed approach would require the court to make a determination of the relative bargaining powers by reference to all the surrounding circumstances, including the ages of the parties, financial experience, and the purpose of the marriage. Under the proposal, the courts ultimately lose some power to strike down antenuptial contracts by abandoning the traditional focus and adopting a test focused on actual bargaining strength. The latter approach will afford the courts less latitude to find constructive conditions in the contracts. Also, the adoption of rules realistically reflecting modern prenuptial relationships will curb arbitrary judicial imposition of legal principles based on outmoded social premises. The courts will, however, retain the "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." In this manner the proposal achieves and guarantees equity.


173. See notes 90 & 91 supra and accompanying text. The stereotypical presumption that the man holds the superior bargaining position is reflected in the evidentiary rule that the husband must meet a more stringent standard of proof than would his wife in challenging the validity of an antenuptial contract. See Pniewski v. Przybysz, 89 Ohio L. Abs. 385, 183 N.E.2d 437 (Ct. App. Cuy. County 1962).

For a general discussion of these inequities, see Gamble, supra note 124, at 723-26: [It is suggested that there is an important conclusion to be drawn from the fact that few husbands contest the antenuptial contract. This hesitation of husbands to contest the contract may be due, not to virtue and respect for deceased wives, but to the courts placing a greater burden of proof upon the contesting husband than upon the wife.

174. See note 152 supra.

B. Developments

Several jurisdictions have begun to redefine the role of antenuptial contracts in divorce proceedings in two interrelated contexts. First, there is a growing body of authority upholding the enforceability of antenuptial agreements stipulating the disposition of alimony rights. Second, there is a trend toward employing antenuptial agreements to determine the equities of alimony and property division where the agreement is wholly or partly unenforceable. These are issues which the courts of Ohio must one day confront.

1. Enforcement of Antenuptial Contracts Which Settle the Alimony and Property Rights of the Parties Upon Divorce

Traditionally, antenuptial contracts contemplating divorce have been invalidated on two public policy grounds: (1) such contracts are contrary to the state's interest in preserving the marriage relationship, because they "provide for, facilitate or tend to induce a separation or divorce," and (2) the state has an interest in assuring that the husband adequately meet his support obligation, so that the divorced wife need not seek public assistance.

Recently, a number of decisions have reexamined the foundation of the public policy rules and have upheld contracts contemplating a future divorce or separation if their terms are fair and reasonable. Several considerations have prompted the courts to abandon the old rule: the practical difficulty of determining when such a contract invites, promotes, or encourages divorce; the absence of empirical evidence that such agreements actually encourage divorce or separation; and the erosion of the concept


177. There are no reported cases in Ohio on these issues as of the date of this writing.


179. Id. See note 61 supra.


The modern view holds that divorce is merely legal recognition of marital breakdown, which may be caused by combinations of many factors. One commentator notes that in general "the increasing frequency of marriage failure is
that marriage is an indissoluble relationship.\textsuperscript{183}

Moreover, the current legislative trend in favor of "no fault" divorce reflects a state policy that "marriage between spouses who 'can't get along' is not worth preserving."\textsuperscript{184} One court reasoned that it was anomalous to permit prospective spouses to waive dower in an antenuptial agreement and yet forbid them from planning upon an agreed support arrangement in the event of a future divorce.\textsuperscript{185}

Such cases indicate that courts will no longer hold contracts contemplating divorce void from their inception as contrary to public policy,\textsuperscript{186} but instead will examine the terms of each contract on a case-by-case basis and uphold the agreement if its terms are fair and reasonable.\textsuperscript{187} Antenuptial contracts have been upheld where they provided for a release from all claims for alimony and property in consideration for a lump-sum payment.\textsuperscript{188} In other cases, courts have enforced contracts providing that neither party would seek alimony nor claim any of the separate property of the other in the event of a divorce.\textsuperscript{189} In examining these contracts the courts generally focus on whether the parties "entered into the antenuptial contract fairly, freely, understandingly and without fraud, that its provisions were reasonable and that said contract was valid."\textsuperscript{190} In determining the reasonableness of the support terms of antenuptial contracts contemplating divorce, it is likely that the courts will refer to the same factors that govern the

\textsuperscript{183} Id. at 117 (footnotes omitted).
\textsuperscript{184} Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970).
\textsuperscript{185} Unander v. Unander, 265 Ore. 102, 105, 506 P.2d 719, 721 (1973).
\textsuperscript{186} Volid v. Volid, 6 Ill. App. 3d 386, 392, 286 N.E.2d 42, 47 (1972). "It may be . . . cogently argued that a contract which defines the expectations and responsibilities of the parties promotes . . . marital stability." \textit{Id}. at 391, 286 N.E.2d at 46.
adequacy of alimony awards. In practical terms this means that the courts will examine the circumstances of the parties at the time of divorce to determine their relative needs and abilities. Therefore, upon a showing that a spouse's circumstances have materially changed so that the amount agreed upon is inappropriate at the time of the divorce, the court will not enforce the contract's provision for alimony. This is particularly significant because it is likely—except in marriages of short duration—that the agreement will not provide adequate support for one of the parties.

2. Use of Antenuptial Contracts to Determine the Equitable Division of Property in Divorce Proceedings

There have been no Ohio decisions addressing the possible use of antenuptial agreements to determine property settlement in divorce proceedings. However, Ohio courts can find guidance in the law of several other jurisdictions which have confronted the issue. The issue concerning the use of antenuptial contracts to determine the equities in a divorce proceeding has arisen in three contexts. In a jurisdiction where the courts strike down antenuptial contracts contemplating divorce under the contrary-to-public-policy rule, the antenuptial contract has been used to determine the value of the separate assets of the parties before marriage.

191. See, e.g., Unander v. Unander, 265 Ore. 102, 107, 506 P.2d 719, 721 (1973): "[A]ntenuptial 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." (footnotes omitted). Accord Eule v. Eule, 24 Ill. App. 3d 83, 87, 320 N.E.2d 506, 510 (1974).

192. Unander v. Unander, 265 Ore. 102, 107-08, 506 P.2d 719, 721-22 (1973). A related issue is modification of alimony granted pursuant to the terms of an antenuptial agreement incorporated into a divorce decree. Courts reaching the issue in dicta indicate that such decrees would be as susceptible to modification as would any other alimony decrees. Id.; accord, Posner v. Posner, 233 So. 2d 381, 386 (Fla. 1970) (concurring opinion).

193. Alimony is to be distinguished from a division of the property. The distinction may be more technical than real in Ohio practice. A division of property is returning to each spouse that which is his and determining what interest each has in property that was acquired through joint contribution and effort. A division is an ascertainment of ownership. Alimony is the payment from the property of one spouse to the other to discharge a duty owed.


195. See Kunde v. Kunde, 52 Wis. 2d 559, 560, 191 N.W.2d 41, 41 (1971); Strandberg
In a jurisdiction which does not adhere to the contrary-to-public-policy rule, an antenuptial contract held invalid on other grounds has been used as evidence of the surrounding circumstances relevant in allocating the property rights of the parties. In a jurisdiction which does not adhere to the contrary-to-public-policy rule, courts have divided assets between the parties according to the terms of a valid antenuptial contract.

Apparently, the value of an antenuptial contract in a divorce proceeding depends not on the rules pertaining to the enforcement of such contracts but rather on the rules pertaining to awards of alimony and property settlements. Recent developments in the law regarding alimony awards and property settlements portend substantial benefit from the use of antenuptial contracts in divorce proceedings.

At common law, the husband was responsible for the full and unrelieved support of his wife. Alimony developed as a statutory substitute for the marital right of support. Court interpretation required the husband to support and maintain his wife in accordance with his means and their standard of living, regardless of the wife's separate property and resources. This has been modified to permit an examination of various mediating factors such as the wife's assets and income...

Under Ohio law, alimony may be granted to either spouse. In 1974, the Ohio General Assembly amended the alimony law, enumerating eleven criteria to be followed by the courts in calculating the postmarital support obligation. The statutory lan-

v. Strandberg, 33 Wis. 2d 204, 207, 147 N.W.2d 349, 351 (1967); Werlein v. Werlein, 27 Wis. 2d 237, 241, 133 N.W.2d 820, 822–23 (1965).
200. Section 3105.18 provides:
(A) In a divorce, dissolution of marriage, or alimony proceedings, the court of common pleas may allow alimony as it deems reasonable to either party. The alimony may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, as the court deems equitable.
(B) In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all the relevant factors, including:
(1) The relative earning abilities of the parties;
(2) The ages, and the physical and emotional conditions of the parties;
(3) The retirement benefits of the parties;
(4) The expectancies and inheritances of the parties;
(5) The duration of the marriage;
language is neutral; it refers to the "party," "spouse," or "parties" and does not distinguish between the husband or wife. This reflects the Ohio view that alimony should be awarded to either party based on need. The amount of alimony to be allowed in any given case rests in the sound discretion of the court. The amount awarded is to be determined by the financial and physical condition of the parties and their needs at the time of the hearing of the action for alimony.

Regardless of whether Ohio courts will uphold the validity of antenuptial agreements containing terms governing the disposition of property in the event of divorce, the agreements may be used to determine the equities in a divorce proceeding. This would be fully consistent with the policy upon which the Ohio alimony statute is grounded. The theory . . . is that the return of individual property plus the division of marital property will meet the needs of the parties. If that doesn't meet the needs, then, and only then, is there resort to maintenance (alimony).

The antenuptial contract, through either explicit recital of the separate property of one or both of the parties or through inference, discloses the separate assets which the parties brought into

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(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;

(7) The standard of living of the parties established during the marriage;

(8) The relative extent of education of the parties;

(9) The relative assets and liabilities of the parties;

(10) The property brought to the marriage by either party;

(11) The contribution of a spouse as a homemaker.


203. The theory of § 3105.18, as well as the standards by which the determination of alimony is made under that section, is similar to that of the Uniform Marriage and Divorce Act. UNIFORM MARRIAGE AND DIVORCE ACT (1970), reprinted in 5 FAM. L. Q. 205 (1971). See also OHIO LEGAL CENTER INSTITUTE, supra note 193, II(D), at 4.08–4.11.

204. OHIO LEGAL CENTER INSTITUTE, supra note 193, II(D)(3), at 4.09.


206. See, e.g., Tomlinson v. Tomlinson, 352 N.E.2d 785, 787 (Ind. Ct. App. 1976); Buettner v. Buettner, 89 Nev. 39, 41, 505 P.2d 600, 601–02 (1973) (in both cases assets of only one party were recited in the contract). In such cases the court could subtract the separate property listed in the antenuptial contract from the aggregate assets of both parties.
the marriage and thereby provides evidence satisfying two statutory criteria for determining an award: "The relative assets and liabilities of the parties . . . [and] [t]he property brought to the marriage by either party." Thus, there appears to be no impediment to this limited use of antenuptial contracts in determining equitable property division and alimony in Ohio, even where the courts refuse to enforce terms contemplating divorce.

IV. CONCLUSION

In Ohio antenuptial contracts have seldom been litigated. When these agreements have been challenged, the courts have strictly adhered to precedent. As a result, their analysis of antenuptial contracts is grounded on traditional mores rather than modern values. In their effort to do equity, the courts' approach—a purported search for the intent of the parties, without explicit reference to the terms of the instrument—has resulted in a prevailing sense of uncertainty concerning the rules surrounding both formation and enforcement of such contracts.

Fundamental changes are occurring in society's perception of the role of the female vis-à-vis the male, changing the concept of marriage, marital roles, and divorce. This transformation has increased the use of antenuptial agreements and fueled litigation involving them. Ohio's present approach to antenuptial contracts is problematic and anachronistic. It should be abandoned in favor of a new approach aimed at producing predictable results based on modern values.

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to determine the separate property of the party who did not list his assets in the agreement and the joint property of the parties.