Missouri Law Review

Volume 46
Issue 1 *Winter 1981*

Article 13

Winter 1981

Antenuptial Contracts Contingent upon Divorce Are Not Invalid Per Se

Phillip K. Gebhardt

CASENOTES

ANTENUPTIAL CONTRACTS CONTINGENT UPON DIVORCE ARE NOT INVALID PER SE

Ferry v. Ferry[1]

Rita and Nelson Ferry were married in 1973. Each had been married previously, and each prior marriage had produced a child before ending in divorce. A few weeks before they were married, Nelson suggested an antenuptial agreement be drafted by his attorney to settle property questions which might arise incident to death of one spouse or upon divorce. Rita received a copy of the draft, and she signed it in the midst of the hectic rush two days prior to the marriage. Rita had wanted some of the terms changed, but, although agreed to, the proposed changes were never made. She signed the agreement under a mistaken belief, shared by Nelson, that the agreement was necessary to ensure that her son's prospective inheritance from her parents' estates would not be shared with Nelson or his family. She neither sought nor received independent legal advice before signing.

The agreement provided that if Nelson predeceased Rita, she would receive the household furnishings, an automobile, and $1,000. In exchange, she waived all claims to a homestead exemption, family allowance, and other surviving spousal rights. If there were a divorce, Rita would receive the household furnishings and a car. As consideration, she waived all claims for support, alimony, attorney's fees, and costs. The contract contained no specific provision dividing marital property.[2] A schedule of Nelson's assets, including farm equipment, livestock, and cash, was attached to the agreement. None of these assets were valued on the schedule, although they were apparently of significant value. Some bonds and a life insurance policy were omitted completely from the schedule. None of Rita's assets were disclosed in the agreement, apparently because of their nominal worth.

After four years of marriage, Rita commenced an uncontested dissolution action shortly after her separation from Nelson. There was undisputed evidence at the dissolution hearing that Rita had participated in the

1. 586 S.W.2d 782 (Mo. App., W.D. 1979).
2. *See* RSMo § 452.330.2 (1978) (defining "marital property").

day-to-day working of the farmland leased to Nelson. The trial court dissolved the marriage and enforced the antenuptial agreement, setting aside the household furnishings and automobile to Rita and all other property to Nelson. The court also denied Rita's request for maintenance and attorney's fees.

In a case of first impression in Missouri, the Missouri Court of Appeals for the Western District rejected the general rule that antenuptial contracts contingent upon divorce are void as against public policy, and declared these contracts enforceable if conscionable and entered into fairly. The court applied both the standard of conscionability under the separation agreement section of the dissolution statute and the standard of review applicable to antenuptial contracts contingent upon death. It found the contract to be both unconscionable and violative of the standards for antenuptial agreements in contemplation of death. The court also held that Missouri's dissolution statute requires a trial court to identify and divide marital property, irrespective of the validity of the antenuptial agreement.

Historically, all antenuptial contracts purporting to determine support or property rights upon divorce were void as against public policy.[3] The modern trend, however, has been "for courts to analyze the terms of these . . . [agreements] on a case [by] case basis and uphold their validity if they are fair and reasonable."[4] The primary argument supporting the rule

3. *See* Hughes v. Hughes, 251 Ark. 63, 66, 471 S.W.2d 355, 357 (1971); Oliphant v. Oliphant, 177 Ark. 613, 625-26, 7 S.W.2d 783, 788 (1928) (possibly overruled in Dingledine v. Dingledine, 258 Ark. 204, 523 S.W.2d 189 (1975); Hughes v. Hughes, 251 Ark. 63, 471 S.W.2d 355 (1971)); Posner v. Posner, 206 So. 2d 416, 417 (Fla. Dist. Ct. App. 1968), *rev'd*, 233 So. 2d 381 (Fla. 1970); Reynolds v. Reynolds, 217 Ga. 234, 255, 123 S.E.2d 115, 133 (1961); *In re* Marriage of Gudenkauf, 204 N.W.2d 586, 587 (Iowa 1973); Ranney v. Ranney, 219 Kan. 428, 431, 548 P.2d 734, 737-38 (1976); French v. McAnarney, 290 Mass. 544, 548, 195 N.E. 714, 716 (1935); Dearbaugh v. Dearbaugh, 110 Ohio App. 540, 542, 170 N.E.2d 262, 264 (1959); Connolly v. Connolly, 270 N.W.2d 44, 47-48 (S.D. 1978); Crouch v. Crouch, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964); Kunde v. Kunde, 52 Wis. 2d 559, 560, 191 N.W.2d 41, 42 (1971); Fricke v. Fricke, 257 Wis. 124, 127-28, 42 N.W.2d 500, 502 (1950). *See generally* Annot., 57 A.L.R.2d 942 (1958); Annot., 98 A.L.R. 533 (1935); Annot., 70 A.L.R. 826 (1931).

4. Eule v. Eule, 24 Ill. App. 3d 83, 87, 320 N.E.2d 506, 509 (1974). *See also* Spector v. Spector, 23 Ariz. App. 131, 136, 531 P.2d 176, 181 (1975); *In re* Marriage of Dawley, 17 Cal. 3d 342, 352, 551 P.2d 323, 329-30, 131 Cal. Rptr. 3, 9-10 (1976); Parniawski v. Parniawski, 33 Conn. Supp. 44, ____ , 359 A.2d 719, 721-22 (1976); Posner v. Posner, 233 So. 2d 381, 386 (Fla. 1970); Volid v. Volid, 6 Ill. App. 3d 386, 391-92, 286 N.E.2d 42, 47 (1972); Flora v. Flora, 166 Ind. App. 620, 629-30, 337 N.E.2d 846, 851 (1975); Buettner v. Buettner, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973); Hudson v. Hudson, 350 P.2d 596, 597 (Okla. 1960); Unander v. Unander, 265 Or. 102, 107, 506 P.2d 719, 721 (1973); Fried-

voiding *all* antenuptial agreements in contemplation of divorce is that the state has a fundamental interest in preserving marriage[5] which is thwarted by any antenuptial bargain that induces a separation or divorce.[6] In rebuttal, the modern cases argue that the increased incidence of divorce and the adoption of no-fault divorce statutes require a recognition that the state's interest in preserving marriage should no longer require that persons remain married forever.[7] Rather, with divorce such a commonplace fact of life, prospective marriage partners should be allowed to regulate property and alimony rights in the event their marriage fails.[8] In addition, it is suggested, there has been no empirical showing of a causal relationship between these agreements and divorce.[9] To the contrary, some assert that

---

lander v. Friedlander, 80 Wash. 2d 293, 302, 494 P.2d 208, 214 (1972); Laird v. Laird, 597 P.2d 463, 467 (Wyo. 1979).

5. Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970); French v. McAnarney, 290 Mass. 544, 546, 195 N.E. 714, 715 (1935); Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950); Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 705 (1972); Note, *Interspousal Contracts: The Potential for Validation in Massachusetts*, 9 SUFFOLK U.L. REV. 185, 199 (1974).

6. Ferry v. Ferry, 586 S.W.2d at 785 (citing Evans, *Antenuptial Contracts Determining Property Rights upon Death or Divorce*, 47 U.M.K.C. L. REV. 31, 45 (1978) (quoting 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90-20 (1964))). For example, in Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964), it was suggested that

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

Id. at 604, 385 S.W.2d at 293. Conversely, the ability of a mercenary husband to enforce an antenuptial agreement might induce an innocent wife to endure conduct that would otherwise be a ground for divorce rather than bring an action for dissolution and receive insufficient funds for support. *See* Norris v. Norris, 174 N.W.2d 368, 370 (Iowa 1970).

7. Volid v. Volid, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46 (1972). Stated differently, one court has noted:

> The adoption of the "no fault" concept of divorce is indicative of the state's policy . . . that marriage between spouses who "can't get along" is not worth preserving. We believe a marriage preserved only because good behavior by the husband is enforced by the threat of having to pay alimony is also not worth preserving . . . .

Unander v. Unander, 265 Or. 102, 105, 506 P.2d 719, 721 (1973).

8. Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970). *See also* Spector v. Spector, 23 Ariz. App. 131, 136, 531 P.2d 176, 181 (1975); Parniawski v. Parniawski, 33 Conn. Supp. 44, ____ , 359 A.2d 719, 721 (1976); Volid v. Volid, 6 Ill. App. 3d 386, 392, 286 N.E.2d 42, 47 (1972); Unander v. Unander, 265 Or. 102, 105, 506 P.2d 719, 721 (1973).

9. Volid v. Volid, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46 (1972);

antenuptial contracts, by defining the expectations of the parties, actually promote stability in marriage.[10] In fact, antenuptial agreements settling property rights incident to the *death* of a spouse are *favored* by the law as conducive to marital tranquility.[11]

The second argument for invalidating antenuptial contracts contemplating divorce is that they commercialize the marriage relation.[12] In response it should be noted that the Spanish community property system has always enforced antenuptial contracts.[13] The fact that there is no evidence of denigration of the marriage institution in community property states indicates there is no denigration of marriage as a result of the ability to make antenuptial contracts.

A third argument against enforcing antenuptial contracts contingent upon divorce is that they interfere with the duty of the husband to support

---

Unander v. Unander, 265 Or. 102, 106, 506 P.2d 719, 721 (1973); Fricke v. Fricke, 257 Wis. 124, 130, 42 N.W.2d 500, 503 (1950) (Brown, J., dissenting).

10. Fricke v. Fricke, 257 Wis. 124, 130, 42 N.W.2d 500, 503 (1950) (Brown, J., dissenting). One writer has commented:

> Perhaps the most effective argument in support of interspousal contracts is that these contracts would further the state's goal of supporting the continuance and stability of marriage. The essence of an interspousal contract is the effort by the spouses to articulate and negotiate their expectations of individual behavior within a framework of shared marital goals. . . . At the same time that it attempts to prevent divorce, an interspousal contract may recognize that such a possibility exists for every marriage.

Note, *supra* note 5, at 204.

11. *See, e.g.*, Norris v. Norris, 174 N.W.2d 368 (Iowa 1970). Some courts advocate treating antenuptial contracts contingent upon divorce in the same manner as they treat antenuptial contracts contingent upon death. *See* Flora v. Flora, 166 Ind. App. 620, 629, 337 N.E.2d 846, 851 (1975); Hudson v. Hudson, 350 P.2d 596, 597 (Okla. 1960).

12. *See* Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950); Evans, *Antenuptial Contracts Determining Property Rights upon Death or Divorce*, 47 U.M.K.C. L. REV. 31, 45 (1978); Gamble, *supra* note 5, at 705. A parallel concern is that if the state allows spouses to regulate their relationship by contract, courts will become bogged down in regulating trivial incidents of the marital relation. Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 150, 161 (1979); Gamble, *supra*, at 705; Note, *supra* note 5, at 199, 213 n.151. *Cf.* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974) (arguing that the traditional assumptions on which the definition of marriage are based are anachronistic and that the marriage partners should be able to fashion the legal structure of the relationship).

13. The rationale of the community property system for allowing enforcement of antenuptial agreements is that the state should regulate the conjugal partnership only if the spouses fail to do so. W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 59, at 116 (2d ed. 1971).

his wife.[14] If the husband were allowed to avoid this obligation by contract, many dependent spouses would have to rely on charity for their livelihood.[15] Furthermore, many women might be cheated out of compensation in the form of support and property rights for their nonmarket labor during marriage, such as childrearing and maintenance of the home.[16] A rebuttal to this position is that any antenuptial agreement which does not provide adequate support to an economically dependent spouse probably would be unenforceable under the standards of "conscionability"[17] or "reasonable support"[18] utilized by courts upholding these agreements.

A further objection to antenuptial contracts contemplating divorce is that they are inherently unfair.[19] This argument has at least three aspects. First, there is usually a long time lag between execution of the antenuptial contract and dissolution. Thus, what may be fair at the time of execution probably will not be reasonable at dissolution because of intervening changes in circumstances.[20] Second, any enforceable antenuptial contract deprives the trial judge of his discretionary power to create equity between the parties.[21] Third, it is suggested that the usual dependent economic status of women means they have less business acumen and less bargaining strength than their male counterparts.[22] The response of some courts to

---

14. One court has observed:

> [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. This argument has more and more cogency as government increasingly considers itself responsible for the adequate support of its citizens.

Reiling v. Reiling, 256 Or. 448, 450, 474 P.2d 327, 328 (1970) (overruled in Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973)). *But see* Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974) (arguing that the wife's support rights are illusory at best).

15. *See* Evans, *supra* note 12, at 47; Gamble, *supra* note 5, at 705.

16. *See* Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, 405 (1977).

17. *See* notes 31-35 and accompanying text *infra*.

18. *See* note 4 and accompanying text *supra*.

19. *See* Evans, *supra* note 12, at 49; Klarman, *supra* note 16, at 405.

20. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 1.9, at 28-29 (1968).

21. Posner v. Posner, 206 So. 2d 416, 417 (Fla. Dist. Ct. App. 1968), *rev'd*, 233 So. 2d 381 (Fla. 1970). For example, RSMo § 452.330.1 (1978) provides that "the court . . . shall divide the marital property in such proportions as the court deems just after considering all relevant factors." Thus, any contract provision varying the result that would have been reached by the trial judge is inherently "unjust."

22. Reiling v. Reiling, 256 Or. 448, 451, 474 P.2d 327, 328 (1970) (overruled in Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973)). *But see* Note, *supra* note 5, at 200 (arguing that the judiciary should shed its paternalistic attitude towards women).

the inherent unfairness argument is to enforce these contracts only if they are conscionable.[23] If the contract is conscionable it is by definition fair.

The *Ferry* court in deciding whether antenuptial agreements contingent upon divorce are void as against public policy held that "it is no longer valid merely to assign 'public policy' as a basis to reject such agreements if fairly reached between the parties and if adequately providing support for the [economically dependent] spouse consistent with need and available resources."[24] The court based this conclusion on two premises. First, the court stated that no "significant current authority"[25] supports the proposition that all antenuptial contracts contingent upon divorce are unenforceable on grounds of public policy. Second, the court believed Missouri's enactment of the dissolution statute manifested an overriding public policy favoring amicable settlement of maintenance and property questions whether the settlement be by antenuptial or by separation agreement.[26]

The *Ferry* court looked to the dissolution statute for the standards to be used in determining the enforceability of antenuptial agreements contingent upon divorce. This creates a problem in that the separation agreement section of the dissolution statute does not apply to antenuptial agreements on its face. The statute allows parties to make a conscionable written agreement "attendant upon their separation or the dissolution of their marriage."[27] In *In re Marriage of Bequette*[28] a separation agreement

23. *See, e.g.*, Ferry v. Ferry, 586 S.W.2d 782 (Mo. App., W.D. 1979).

24. *Id.* at 786.

25. *Id.* There are a few recent cases which voided antenuptial contracts contingent upon divorce on grounds of public policy. *See, e.g., In re* Marriage of Gudenkauf, 204 N.W.2d 586, 587 (Iowa 1973); Ranney v. Ranney, 219 Kan. 428, 431, 548 P.2d 734, 737-38 (1976); Connolly v. Connolly, 270 N.W.2d 44, 47-48 (S.D. 1978). These courts used public policy in a way similar to the fashion the *Ferry* court used the doctrine of conscionability, *i.e.*, to strike down any contract that it does not like.

26. As authority the court quoted the comments to the UNIFORM MARRIAGE AND DIVORCE ACT § 306 (1970 version): "This section entirely reverses the older view that property settlement agreements are against public policy because they tend to promote divorce." The *Ferry* court took this language out of context, however. This section of the statute deals only with *separation* agreements, while the issue in *Ferry* was the validity of *antenuptial* agreements providing for property division and maintenance in the event of divorce. Separation agreements are made at arms length, attendant to separation; the current economic circumstances of each party can be ascertained and reflected in the agreement. Antenuptial agreements, on the other hand, are made when the parties have mutual confidence and trust, years before marital break-up. Thus, when an antenuptial property settlement contingent upon divorce is produced at trial, it is highly unlikely to further amicability between the parties.

27. RSMo § 452.325 (1978) provides in part:

1. To promote the amicable settlement of disputes between the parties

was held not made "attendant upon . . . separation" because it was made six months before separation.[29] In *Ferry* the antenuptial contract was entered into about four years prior to the separation. In fact, it is hard to imagine an antenuptial agreement made attendant upon separation since these agreements are made attendant to marriage.[30] Thus, the separation section of the dissolution statute does not apply to contracts such as the one in *Ferry*, but the court nevertheless applied the statute.

A second problem with the *Ferry* court's application of the separation agreement section of the statute is the court's use of the conscionability doctrine. The court required the contract in *Ferry* to meet the conscionability standard implicit in the separation agreement section of the dissolution statute. The court held that the standard of conscionability in the dissolution statute is the "same standard employed in commercial law,"[31] citing as authority the Official Comments to the Uniform Marriage and Divorce Act. The Comments to the Uniform Commercial Code state the test for commercial conscionability as "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing *at the time of the making of the contract*."[32]

---

to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the custody, support and visitation of their children.

2. In a proceeding for the dissolution of marriage or for legal separation, the terms of the separation agreement, except terms providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, . . . that the separation agreement is unconscionable.

28. 563 S.W.2d 528 (Mo. App., St. L. 1978).

29. *Id.* at 530-31. The *Bequette* court seemed to reason that the purpose of RSMO § 452.325 (1978) is to allow spouses to bargain for a property settlement, but only at arms length. If the agreement is not made in connection with an imminent separation, the spouses are still in a relation of confidence, and economic circumstances at the time of dissolution are as yet unknown. 563 S.W.2d at 531.

30. It is possible to contemplate marriage and divorce in the same instrument. *See In re* Marriage of Dawley, 17 Cal. 3d 342, 349-50, 551 P.2d 323, 327-28, 131 Cal. Rptr. 3, 7-8 (1976) (sole purpose of marriage was to legitimize a child, after which, the agreement provided that most of the incidents of marriage would not continue).

31. 586 S.W.2d at 786. But the standard for this test may be questioned after two recent cases dealing with separation agreements. Rojas v. Rojas, 595 S.W.2d 729 (Mo. App., W.D. 1980); Block v. Block, 593 S.W.2d 584 (Mo. App., W.D. 1980).

32. U.C.C. § 2-302, Official Comment (1962 version) (emphasis added).

It is difficult to see how a test of conscionability that utilizes concepts such as "commercial needs" and "commercial background" is to be adapted to antenuptial agreements contingent upon divorce. In fact, the court by its own terms may not have applied this standard of conscionability. The *Ferry* court expressly reserved the question of whether an antenuptial agreement contingent upon divorce would be tested for conscionability at the time it is executed or at dissolution when it is to be enforced.[33] The commercial law standard for conscionability, however, clearly judges the contract for conscionability at the time of its making.[34] If the *Ferry* court had applied the commercial law standard of conscionability, it would not have had to reserve the issue of when the contract is to be judged for conscionability, for that question would already have been answered. Further evidence that the *Ferry* court did not intend to transplant unaltered the commercial conscionability test from commercial settings to the domestic relations area is the fact that the same court which decided *Ferry* stated in *Wilkerson v. Wilkerson*[35] that the Uniform Commercial Code has no relevance to a dissolution proceeding in Missouri. Yet

---

33. 586 S.W.2d at 787. At least four approaches have been advocated in determining when to judge the conscionability of an antenuptial contract contingent upon divorce. One is not to enforce the contract unless it provides an adequate amount of support at the time the contract is enforced. Connolly v. Connolly, 270 N.W.2d 44, 47 (S.D. 1978), *noted in* Ferry v. Ferry, 586 S.W.2d at 787 n.3. A second approach is to measure validity at the execution of the contract and to provide that the contract can be modified as if it were a maintenance award. Posner v. Posner, 233 So. 2d 381, 386 (Fla. 1970) (Spector, J., concurring). Another approach is to require that the contract provide an adequate amount of support at its inception *and* at the time it is enforced. Clark, *supra* note 12, at 151. *See* Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972). A fourth response is to measure the adequacy of the provision only at the time of execution. Posner v. Posner, 233 So. 2d 381, 385-86 (Fla. 1970).

As a practical matter the time at which the amount of support is measured for reasonableness may not be as critical as it seems. Evidence used to determine the adequacy of the provision is presented at the dissolution proceeding, and the court's decision is thus arguably tainted by the changes that have occurred in the intervening years. *See* Cathey, *Ante-Nuptial Agreements in Arkansas—A Drafter's Problem*, 24 ARK. L. REV. 275, 291 (1970).

The *Ferry* court may have implicitly answered the question of when the contract must be conscionable by applying the commercial law conscionability standard in RSMO § 452.325 (1978). 586 S.W.2d at 786. Under the U.C.C. standard, conscionability is to be determined at the time the contract was entered. *See* note 32 and accompanying text *supra*. On the other hand, Professor Clark argues that use of the vague conscionability doctrine is a compromise position by which a court can skirt the issue of when the contract is to be tested for reasonableness. Clark, *supra*, at 151 n.50.

34. *See* note 32 and accompanying text *supra*.

35. 555 S.W.2d 689, 690-91 (Mo. App., K.C. 1977). *Accord, In re* Marriage of Baker, 584 S.W.2d 449, 450 (Mo. App., S.D. 1979).

the Uniform Commercial Code section 2-302 embodies the standard of commercial conscionability the *Ferry* court applied to antenuptial agreements contingent upon divorce. The focus of conscionability in the dissolution context should not be exclusively on one-sidedness and oppression in bargaining position, as is the focus of the commercial conscionability standard, but should include a determination of whether the contract provides adequate support for an economically dependent spouse.

In addition to the conscionability test, the *Ferry* court held that the standards of judicial review for antenuptial agreements that predated the enactment of the dissolution statute "have . . . survived and are implicit in the statutory directives which now govern the trial courts in property division and maintenance awards in dissolution cases."[36] Since the only antenuptial agreements that were valid before the *Ferry* case were antenuptial agreements contingent upon death, the court has applied implicitly the standards of review for antenuptial agreements contingent upon death to antenuptial agreements contingent upon divorce. Generally, the Missouri Probate Code requires full disclosure of the nature and extent of the parties' assets and that the economically dependent spouse receive "fair consideration under all the circumstances" in order for there to be a valid antenuptial agreement contingent upon death.[37] It is not clear whether "fair consideration under all the circumstances" is the same standard as the conscionability doctrine applied by the *Ferry* court. What is clear from *Ferry* is that an antenuptial contract contingent upon divorce must be conscionable *and* the economically independent spouse must make full disclosure of his or her financial assets before the contract is enforceable in Missouri.[38]

The final holding in *Ferry* was that the trial court has the obligation to identify and divide marital property, irrespective of the validity of the

---

36. 586 S.W.2d at 786.

37. *See* RSMo §§ 474.120, .220 (1978).

38. 586 S.W.2d at 786. There is a split of authority as to whether full disclosure or a reasonable provision for the economically dependent spouse is required for a valid antenuptial contract contingent upon death. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962), is the leading case holding that if full disclosure is made, then no provision for the economically dependent spouse is required. *See also* Potter v. Collin, 321 So. 2d 128, 131 (Fla. Dist. Ct. App. 1975). In Lindsay v. Lindsay, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964), the court applied the *Del Vecchio* rule requiring *either* a reasonable provision for the economically dependent spouse *or* full disclosure in order to uphold antenuptial contracts contingent upon *divorce*. There are two Missouri cases, Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 756 (Mo. En Banc 1970), and Marshall v. Estate of Marshall, 529 S.W.2d 914, 918 (Mo. App., K.C. 1975), which go some way in adopting the *Del Vecchio* rule. If the *Del Vecchio* rule is adopted by Missouri in the future as to antenuptial contracts contingent upon death, one could make the argument that the same rule should be applied to antenuptial contracts contingent upon divorce.

antenuptial agreement. The contract in *Ferry* made no reference to marital property. This was unfortunate in that it leaves unanswered the question whether such a contract may validly designate property in the antenuptial agreement as the "separate property"[39] of the parties. The definition of marital property in the dissolution statute provides that property may be excluded from "marital property" by "valid agreement."[40] Since *Ferry* held that antenuptial agreements contingent upon divorce are valid agreements, one can argue that it is possible to exclude property from the jurisdiction of the trial court at a dissolution proceeding by antenuptial agreement. On the other hand, one could argue that the language "valid agreement" in the dissolution statute refers only to separation agreements on the theory that separation agreements are the only agreements that were provided for or contemplated by the legislature when it enacted the dissolution statute.

Ferry leaves the draftsman of an antenuptial agreement with an exceedingly delicate task.[41] Because of the vagueness of the conscionability doctrine and the uncertainty whether an antenuptial contract contingent upon divorce will be tested for conscionability at the time of execution or at the time of dissolution, no one can predict with any reasonable certainty whether a provision in an antenuptial agreement will be enforceable. To preserve as much of the contract as possible one can include in the contract a severability clause to the effect that the invalidity of any provision shall not affect the validity of any other provision.[42] Putting case names in the

39. Although there is no statutory definition of "separate property," what is meant by this term is property owned by the marriage partner that is not marital property, and thus, not within the trial court's jurisdiction to divide property at the dissolution proceeding under RSMo § 452.330 (1978).

40. RSMo § 452.330.2 (1978). This section provides that "'*marital property*' means all property acquired by either spouse subsequent to the marriage except: . . . (4) Property excluded by valid agreement of the parties . . . ."

41. Forms for antenuptial agreements may be found in 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90 (1980); Peterson & Eckhardt, *Legal Forms*, 6 MISSOURI PRACTICE SERIES § 582 (1960); 9 AM. JUR. LEGAL FORMS 2d §§ 139:11-:44 (1972 & Cum. Supp. 1980).

42. *See* Cathey, *supra* note 33, at 288. *See also* Cathey, *Ante-Nuptial Agreements in Arkansas—Divorce Provisions*, 29 ARK. L. REV. 480 (1976). Courts disagree as to whether they should strike down the whole contract or just the offending clause. Gamble, *supra* note 5, at 708. In Reiling v. Reiling, 256 Or. 448, 474 P.2d 327 (1970) (overruled in Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973)), a support provision in an antenuptial contract contingent upon divorce was struck down as against public policy. In Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916), invalid provisions contingent upon divorce were severed from provisions contingent upon the death of a spouse and the death provisions enforced. It should be noted, however, that RSMo § 452.325 (1978), upon which the *Ferry* court relied, makes no reference to severability and requires unqualifiedly that the parties renegotiate a new contract after a finding of unconscionability, at least in the case of separation agreements.

contract would alert the trial judge at the dissolution proceeding that the draftsman was "attempting to follow a permissible pattern. . . . Nothing can be lost by the practice and, hopefully, it will encourage the courts to give full recognition to the case precedents upon which the legal draftsman has relied."[43]

Also, the differing levels of enforceability of these contracts among the states can cause conflict of laws problems. For example, if the parties execute an antenuptial agreement contingent upon divorce in Missouri, which now recognizes the validity of these agreements under *Ferry*, and later change their residence and institute dissolution proceedings in a state that still voids these contracts on grounds of public policy, such as Kansas or Iowa,[44] the issue of invalidity on grounds of public policy is reopened. To avoid this type problem, a conflict of laws provision could be used.[45]

The danger that the antenuptial contract will be invalidated because there was insufficient disclosure can also be reduced by the draftsman. Proof of full and frank disclosure[46] can best be effected by a recital by the dependent spouse in the antenuptial agreement that such disclosure was made. The recital should be *coupled*, however, with a schedule of the economically independent spouse's assets. Using only a recital may be insufficient. This is because the parol evidence rule will not keep out extrinsic evidence that there was insufficient disclosure.[47] The proponent prob-

---

43. *See* Cathey, *Ante-Nuptial Agreements in Arkansas—Divorce Provisions*, 29 ARK. L. REV. 480, 484 (1976).

44. *See* note 25 *supra*.

45. The provision recommended for use in Arkansas is:

> The validity of this contract, matters affecting its interpretation, and its effect shall be governed by the law of Arkansas even though the domicile of the marriage, that of either or both of the parties to this agreement, or the nature, extent or location of any property owned by either may change after the execution of this agreement. This agreement shall govern as to the rights of either party in the real estate of the other upon the death of the first to die except as the law of the state in which real estate is located may prohibit the application of this contract to the rights of a surviving spouse in real property located outside the State of Arkansas.

Cathey, *supra* note 33, at 276.

46. For the requirements of disclosure for antenuptial contracts contingent upon death in Missouri, see Mathis v. Crane, 360 Mo. 631, 641, 230 S.W.2d 707, 712 (1950); Wilson v. Wilson, 354 S.W.2d 532, 544-46 (Mo. App., Spr. 1962); Annot., 27 A.L.R.2d 873 (1953). *But cf.* Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 757-58 (Mo. En Banc 1970) (marriage of convenience; wife's business judgment was therefore not clouded).

47. *See, e.g., In re* Strickland's Estate, 181 Neb. 478, 484-85, 149 N.W.2d 344, 351 (1967) (parol evidence rule does not apply to recitals of fact in a contract); *In re* Gelb's Estate, 425 Pa. 117, 120, 228 A.2d 367, 369 (1967) (full disclosure is a substantive element of a valid antenuptial contract contingent upon

ably has the burden of showing full and frank disclosure,[48] which can best be satisfied by use of a schedule. In addition, *Ferry* indicates the schedule should contain the values of the various assets. This was not done in *Ferry* and probably was a factor weighing against the husband.[49] Moreover, listing assets in a schedule may help minimize the risk that assets will not be disclosed because the owner has forgotten about them, such as the life insurance policy and bonds in *Ferry*.[50]

Another problem for the draftsman is determining what amount is reasonable support for the economically dependent spouse. *In re Estate of Hillegass*[51] listed the following factors in determining reasonableness:

> *Reasonableness* will depend upon the totality of all the facts and circumstances *at the time of the Agreement*, including (a) the financial worth of the intended husband; (b) the financial status of the intended wife; (c) the age of the parties; (d) the number of children each has; (e) the intelligence of the parties; (f) whether the . . . [dependent spouse] aided in the accumulation of the wealth of the . . . [economically independent spouse]; and (g) the standard of living which the . . . [dependent spouse] had before marriage and could reasonably expect to have during marriage.[52]

Given the confidential relationship between the prospective marriage partners[53] and the conflicts of interest inherent in advising both parties,[54]

---

death that must be proved by extrinsic evidence). *But cf.* McQuate v. White, 389 S.W.2d 206, 212 (Mo. 1965) ("the solemn provisions and recitals in such an agreement may not be lightly brushed aside").

48. Generally, in the context of antenuptial agreements contingent upon death, the party challenging the antenuptial contract has the burden of showing that the provision for support in the contract is unreasonable, then a presumption of concealment arises which places the burden of showing full disclosure on the proponent of the contract. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962). Missouri recognizes a similar presumption. Donaldson v. Donaldson, 249 Mo. 228, 248, 155 S.W. 791, 797 (1913). It is unclear whether this presumption applies to antenuptial contracts contingent upon divorce.

49. 586 S.W.2d at 784.

50. *Id.*

51. 431 Pa. 144, 244 A.2d 672 (1968).

52. *Id.* at 150, 244 A.2d at 675-76. The factors in the recovery of maintenance under the Missouri dissolution statute are also probably relevant in determining the reasonableness of the provision for the wife. *See* RSMo § 452.335 (1978).

53. *See* Jones v. McGonigle, 327 Mo. 457, 464, 37 S.W.2d 892, 894 (1931); Donaldson v. Donaldson, 249 Mo. 228, 248, 155 S.W. 791, 797 (1913).

54. Serious ethical problems arise when both parties to the antenuptial agreement request representation by a single attorney. It is suggested the attorney should immediately establish which party he is representing and inform the other party of this fact. He then should suggest that a non-represented party obtain separate counsel. If separate counsel is not obtained, the attorney should by sepa-

the requirement of independent legal advice is almost absolute.[55] The absence of separate representation was a key factor in *Ferry*. Had the wife received legal advice before she signed the agreement, the legal misapprehension which induced her to sign the contract probably would have been dispelled. *Ferry* does not make clear whether independent legal advice is absolutely essential for a valid antenuptial agreement contingent upon divorce or whether the lack of independent advice was merely a factor used in finding the contract invalid.[56]

A final problem of which the family law practitioner should be aware is what kind of writing is necessary for a valid antenuptial contract contingent upon divorce? In Missouri, antenuptial contracts contingent upon death must be written,[57] as must separation agreements.[58] Antenuptial agreements also fall within Missouri's enactment of the Statute of Frauds.[59] Arguably, the only Missouri statute which covers antenuptial

---

rate letter or recital in the contract declare that he has not attempted to give the non-represented party any legal advice. If the spouses are separately represented by counsel, the attorney drafting the agreement should obtain a certificate from the other attorney that he has consulted with his client and advised him of the contract's legal effect. Cathey, *supra* note 33, at 277-80, 290. *See* MO. SUP. CT. R. 4, EC 5-15 to -16. *Cf.* MO. BAR ADVISORY COMMITTEE, FORMAL OPINION 109, 30 J. MO. BAR 168 (1974) (advising that it is ethical for an attorney to draft a joint petition for dissolution of marriage provided the parties are in agreement on all things and the attorney makes clear that he is representing only one of the petitioners).

55. Ignoring the ethical considerations, "there is no hard and fast rule requiring that . . . persons standing in a fiduciary or confidential relation . . . have . . . independent advice." Annot., 123 A.L.R. 1505, 1505-06 (1939). Another approach is to presume dominance by the husband and make this presumption rebuttable only by proof of independent advice. *Id.* at 1506. A third approach is to say that there is no full and frank disclosure unless the parties have independent advice. Friedlander v. Friedlander, 80 Wash. 2d 293, 302-03, 494 P.2d 208, 214 (1972). *Contra, In re* Marriage of Hadley, 88 Wash. 2d 649, 655, 565 P.2d 790, 793 (1977); *In re* Marriage of Cohn, 18 Wash. App. 502, 508-10, 569 P.2d 79, 83 (1977).

56. 586 S.W.2d at 787.

57. The Missouri statute provides:

> The rights of inheritance or any other statutory rights of a surviving spouse of a decedent who dies intestate shall be deemed to have been waived if prior to, or after, the marriage such intended spouse or spouse by a written contract did agree to waive such rights, after full disclosure of the nature and extent thereof, including the nature and extent of all property interests of the parties, and if the thing or promise given to the waiving party is a fair consideration under all the circumstances.

RSMo § 474.120 (1978). *See also id.* § 474.220.

58. *See* statute cited note 27 *supra.*

59. "No action shall be brought . . . to charge any person upon any agreement made in consideration of marriage, . . . unless the agreement . . . or some

contracts contingent upon divorce is the Statute of Frauds.[60] An unresolved issue is whether a written memorandum signed by the party to be charged satisfies the writing requirement under the dissolution and probate laws.[61] This becomes important in considering the transmutation doctrine.[62] Some cases hold that an oral antenuptial agreement to transmute separate property into marital or community property that is ratified or executed after the marriage satisfies the Statute of Frauds requirement and is enforceable.[63]

As the first Missouri case on the subject, the *Ferry* decision ostensibly makes a significant change in the law by declaring that antenuptial contracts contingent upon divorce are not per se invalid as against public policy. But by requiring that these contracts pass both the conscionability standard applied to separation agreements and the standards of review for antenuptial contracts contingent upon death, the court as a practical matter may have made a valid contract impossible to draft. Uncertainty as to whether the contract will be judged for conscionability at the time of execution, the time of enforcement, or both, the question of what standard gauges conscionability, and the problem of what constitutes a reasonable amount of support for an economically dependent spouse, leave the draftsman in a dilemma. On one horn of the dilemma an attorney can offer to draft an antenuptial contract contingent upon divorce with the *hope* that upon divorce it will not be deemed unconscionable. On the other horn of the dilemma, since there is a good likelihood that any antenuptial agreement contingent upon divorce that a draftsman could write, even if conscionable at the time it was drafted, would be "unconscionable" at the time the contract is enforced due to intervening changes in circumstances, it might be best to avoid drafting antenuptial agreements contingent upon divorce by making sure that the language used can be construed to be effective only upon the *death* of one of the marital partners. Of course, this alternative deprives the parties of any benefits an antenuptial contract contingent upon divorce would provide. This unhappy state of affairs will

---

memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . . ." RSMo § 432.010 (1978).

60. *See* Branca & Steinberg, *Antenuptial Agreements Under California Law: An Examination of the Current Law and* In re Marriage of Dawley, 11 U.S.F.L. REV. 317, 319 (1977).

61. RSMo § 432.010 (1978).

62. The transmutation doctrine allows transformation of separate property into marital or community property by express or implied agreement of spouses or by gift *inter se*. Missouri appears to recognize this doctrine. *See* Daniels v. Daniels, 557 S.W.2d 702, 704 (Mo. App., K.C. 1977).

63. Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659 (1956); Handley v. Handley, 113 Cal. App. 2d 280, 283-84, 248 P.2d 59, 61 (1952).