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MARITAL AGREEMENTS IN CONTEMPLATION OF DIVORCE

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Since the end of World War II, the United States has witnessed a substantial upheaval in family life. The rate of divorce has risen dramatically and the rate of remarriage has followed suit.[1] One of the most striking features in this upheaval is the increasing number of married women who are gainfully employed outside of the home in either full- or part-time work.[2] This growing economic independence of women is perhaps both a cause and an effect of the rising divorce rates.

Romantic notions that marriage is forever are beginning to give way to the more realistic assessments that marriages indeed may not last.[3] The pressure has been mounting for ways to provide economic planning to parties in the relatively likely event that their marriages terminate in divorce. The purpose of this article is to focus on one method of obtaining such planning: the marital agreement setting forth the support and property distribution which the parties would follow in the event of divorce. This article will review the law regarding marital agreements in contemplation of divorce as it exists in the United States, and the policy considerations relevant to it. The article will also describe a novel attempt in Michigan to deal with the matter legislatively, and will suggest a further change which would make this a fairer method of settling property interests in the event of a divorce.

I. THE LAW IN THE UNITED STATES

Under prevailing law in the United States, agreements made in contemplation of divorce are considered void as against public

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[1] *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 67 (96th ed. 1975) [hereinafter cited as STATISTICAL ABSTRACT].

[2] Serrin, *Prognosis for Families: They Will Live On*, Detroit Free Press, Feb. 11, 1977, at 1-C, col. 3.

[3] M. MEAD, *Introduction to the 1962 Pelican Edition*, MALE AND FEMALE (Morrow Paperback ed. 1975).

policy.[4] While numerous reasons have been given for this rule,[5] it is commonly asserted that because the state has an interest in every marriage, it is against public policy to enforce agreements that provide for or facilitate its dissolution.[6] Underlying this rationale is a fear that if a spouse can obtain financial benefit in the event of divorce, he or she may thus be encouraged to seek a divorce, possibly leaving the other spouse to be supported by the state. The rule has become so firmly entrenched in American legal thought that many courts have refused to reconsider it or its underlying assumptions.[7] Moreover, many courts have so strictly construed the rule that they have voided provisions that even consider divorce as a possibility, regardless of the circumstances surrounding the execution of the agreement.[8]

In contrast to the rule invalidating agreements in contemplation of divorce is the rule favoring agreements in contemplation of death. In virtually every jurisdiction, prospective or present spouses may contractually determine division of their property in the event of the death of one of the parties.[9] These agreements are favored as allegedly promoting marital tranquility,[10] and are generally enforced if the parties have made a full disclosure of their assets and if the contract was not the product of fraud, duress, or undue influence.[11] The public policy reasons which have caused courts to void agreements contemplating divorce are usually not considered relevant to agreements contemplating death. The courts instead focus on the spouses' interests in the preservation of their respective estates and on their understandable desire to avoid disputes concerning property after one spouse has died.[12]

Although agreements in contemplation of death and those in contemplation of divorce arise from similar concerns, courts, until recently, have persisted in treating them differently. One of the

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[4] *See* 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90-27 (Cum. Supp. 1976).

[5] *See* the excellent discussion in Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 704-05 (1972).

[6] *See, e.g.*, Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950).

[7] *See, e.g.*, Werlein v. Werlein, 27 Wis. 2d 237, 241, 133 N.W.2d 820, 822 (1965).

[8] For example, the dissent in *Fricke* construed the majority as holding that "under no circumstances may the parties contemplating marriage recognize divorce as a possibility . . . and make financial provision for the contingency." 257 Wis. at 133, 42 N.W.2d at 504 (Brown, J., dissenting).

[9] *See* 2 A. LINDEY, *supra* note 4, at § 90-26.

[10] *See, e.g.*, Seuss v. Schukat, 358 Ill. 27, 34, 192 N.E. 668, 671 (1934).

[11] *See, e.g.*, Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).

[12] *See* Weinstein, *Antenuptial Agreements—What the Law Now Says*, 62 ILL. B.J. 604, 605 (1974).

earliest opinions recognizing their similarity was the dissent in the 1950 case of *Fricke v. Fricke*.[13] The dissenting judge argued that both types of contracts should be enforceable under the same rules, provided the agreement in contemplation of divorce not be *in fact* an inducement to dissolution of the marriage. This opinion recognized that parties might enter into such agreements for proper reasons, and that the agreements at least should not be met with a presumption of invalidity.[14]

It was not until the early 1970's that other decisions began to reconsider the common law rule against agreements made in contemplation of divorce.[15] In *Posner v. Posner*,[16] the Supreme Court of Florida faced the issue squarely and determined that antenuptial agreements settling alimony and property rights upon divorce should not be held void *ab initio* as contrary to public policy. The court held that if the safeguards applied to antenuptial agreements in contemplation of death were applied to similar agreements in contemplation of divorce, and if the divorce was prosecuted in good faith and upon proper grounds, the antenuptial agreement would be valid and enforceable. The court adopted the same three-alternative test which had been applied to antenuptial contracts contemplating death by earlier Florida decisions.[17] For the agreement to be enforceable, there must be (1) a fair and equitable provision for the wife, (2) a full disclosure to the prospective wife of the prospective husband's worth, or (3) general knowledge by the prospective wife of the prospective husband's worth.[18] In addition, the court held that upon a showing of changed circumstances, such antenuptial contracts are subject to the same

[13] 257 Wis. at 129, 42 N.W.2d at 502 (1950) (Brown, J., dissenting).

[14] In some jurisdictions such agreements can be admitted into evidence and considered by the divorce court in determining the equities of a property division. *See, e.g.*, Strandberg v. Strandberg, 33 Wis. 2d 204, 147 N.W.2d 349 (1967). However, the agreements per se are unenforceable and the extent to which their provisions will be incorporated into the final decree rests within the court's discretion.

The Michigan Supreme Court has taken a similar position. In Scherba v. Scherba, 340 Mich. 228, 65 N.W.2d 758 (1954), the court held that the provisions of an antenuptial contract in contemplation of death may be used as a guide in determining an equitable property division upon termination of the marriage.

[15] While a 1960 Oklahoma case, Hudson v. Hudson, 350 P.2d 596 (Okla. 1960), enforced an antenuptial contract in which each spouse waived alimony rights upon divorce, the decision met with virtual nonacceptance, even by the courts within the same jurisdiction. *See* Gamble, *supra* note 5, at 715. Indeed, jurisdictions considering *Hudson* have specially noted that the court in that case did not overrule the older majority rule, but merely ignored it. *See* Norris v. Norris, 174 N.W.2d 368 (Iowa 1970).

[16] 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

[17] *See* Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).

[18] *Id.* at 20. Florida courts have apparently not considered the equities to the husband in these cases.

modification provisions that apply to all support orders in divorce proceedings.[19]

Other states have recently begun to follow the Florida lead in reevaluating the old common law rule. In *Volid v. Volid,*[20] an Illinois appellate court held that permitting "older persons"[21] to anticipate prior to marriage the possibility of divorce and to establish their rights by contract in case the marriage should be dissolved did not violate public policy. As with antenuptial contracts contemplating death, the court held that the parties must enter into the contract contemplating divorce with full knowledge and without fraud, duress, or coercion.[22]

The State of Oregon has also retreated from strict application of the old common law rule, although under a somewhat different rationale. In *Unander v. Unander,*[23] the court stated that antenuptial agreements providing for a partial or complete waiver of alimony will be enforced, unless such enforcement deprives a spouse of support that he or she cannot otherwise secure. The court also required that the agreement be fairly made after a full disclosure of each party's assets. Finally, the court accepted the Florida limitation[24] that, if the circumstances of the parties change, the court can modify the alimony provision just as it can modify a decree based upon a separation agreement that includes a support provision.

Reform in this area has also taken place in community property jurisdictions. In *Buettner v. Buettner,*[25] the Nevada Supreme Court

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[19] FLA. STAT. ANN. § 61.14 (Supp. 1975). This statute provides for modification of support provisions incidental to a divorce based upon a showing of changed circumstances by either party.

It should also be noted that *Posner* left open the question of whether a wife can waive all rights to alimony, temporary and permanent. The court's broad holding indicates that this is possible, so long as the disclosure requirements are met, and the agreement is free from fraud, duress, and overreaching. It is now clear, however, that a husband cannot conclusively abrogate by antenuptial contract his obligation to pay temporary alimony. The Florida courts view such an agreement as unenforceable because it seeks to relieve the husband of his legal duty to support his wife during marriage. Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972). The question of whether a spouse can waive all rights to permanent alimony, however, still remains open.

[20] 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

[21] *Id.* at 392, 286 N.E.2d at 47. It is unclear how this holding would relate to "younger persons," if at all.

[22] A subsequent decision, Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974), approved the *Volid* position, but emphasized that the provisions of an antenuptial contract must be "fair and equitable" in order to be enforced. 24 Ill. App. 3d at 88, 320 N.E.2d at 510. The *Eule* court also held that a wife cannot waive all rights to temporary alimony by antenuptial contract, as the husband's support duties continue until final termination of the marriage. *Accord,* Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972).

[23] 265 Or. 102, 506 P.2d 719 (1973).

[24] *See* Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds,* 257 So. 2d 530 (Fla. 1972).

[25] 89 Nev. 39, 505 P.2d 600 (1973).

declared that antenuptial contracts settling alimony and property rights on divorce are not void as against public policy. However, the court retained equitable power to refuse to enforce an antenuptial contract on the grounds that the contract is unconscionable or was obtained through fraud, misrepresentation, material nondisclosure, or duress. Yet, as the court noted, this limitation represents no departure from established law since courts exercise such power generally in all contract litigation.

California, another community property state, has also begun a retreat from the rule prohibiting contracts in contemplation of divorce. In *In re Marriage of Higgason,*[26] the California Supreme Court stated, "[A]n agreement must be made in contemplation that the marriage relation will continue until the parties are separated by death. Contracts which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy."[27] The California Supreme Court expressly disapproved this language in *Dawley v. Dawley*[28] by enforcing an antenuptial contract in which the parties agreed to hold their respective earnings and other property acquired during their marriage as separate property. The agreement by its terms did not expressly provide for divorce, but surrounding circumstances clearly indicated that the parties did not contemplate a lasting marriage.[29] The court rejected the wife's contention that the agreement violated public policy because it implied an early divorce. The court further stated that the objective language of the contract itself controls and that an agreement violates public policy "only insofar as its terms encourage or promote dissolution."[30]

Although all of the above decisions concern antenuptial agreements, the same considerations appear to exist for postnuptial agreements which provide for settlement of rights upon divorce, but which do not contemplate or encourage an imminent separation. The leading example of the similarity between the treatment of antenuptial and postnuptial agreements comes from Arizona, a community property state. In 1969, the Arizona Supreme Court in *In re Harber's Estate* [31] first held that a married couple may divide present and prospective property by postnuptial agreement, even immediately prior to an imminent separation or divorce. This deci-

[26] 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).
[27] 10 Cal. 3d at 485, 516 P.2d at 295, 110 Cal. Rptr. at 903.
[28] 2 FAM. L. REP. (BNA) 2588 (Cal. Sup. Ct., June 29, 1976).
[29] When the agreement was made, the wife was pregnant, unmarried, and in danger of losing her job as a schoolteacher because of her situation. The husband was also encouraged to enter into the agreement because the wife had threatened to institute a paternity suit against him, creating adverse publicity and jeopardizing his job.
[30] 2 FAM. L. REP. (BNA) at 2588.
[31] 104 Ariz. 79, 449 P.2d 7 (1969).

sion, as did those in Florida and Illinois,[32] required that the agreement be free from fraud, coercion, and undue influence, and that the wife act with full knowledge of the property involved and her rights therein. It also imposed the additional limitation that the settlement be fair and equitable.[33]

In 1975, an Arizona appellate court, in *Spector v. Spector,*[34] indicated that these same policy considerations apply to antenuptial agreements. The court held that even before marriage, parties can contractually settle their rights to present or future property in the event of divorce, whether or not the property is community or separate. On the basis of *Harber's Estate,* the court determined that applicable law did not prohibit prospective abrogation of rights to community property. It thus found "no reason why an antenuptial contract should be accorded different legal treatment than a postnuptial contract."[35]

In *Capps v. Capps II,*[36] the Virginia Supreme Court did not completely repudiate the old common law rule, but held that postnuptial agreements specifying property rights in the event of divorce were not contrary to public policy unless they were collusive or actually facilitated a separation or divorce.[37] Applying this rule, the court enforced an agreement which provided that if either party instituted an action for divorce or separate maintenance, the wife would surrender her interest in the marital home, and the husband would assume all mortgage obligations. The court held that the agreement did not facilitate divorce or separation, but instead tended to promote continuation of the marriage. It is unclear how the court reached this conclusion because the husband filed for divorce and it was apparently in his financial interest to do so. Nevertheless, the court appeared to reject the traditional assumption [38] that agreements providing one spouse with pecuniary benefits in the event of a divorce are necessarily destructive of the marriage relationship.

It is clear from this discussion that the law regarding agreements in contemplation of divorce is in a state of flux. Changes in the law

[32] *See* notes 16 and 20 and accompanying text *supra.*

[33] *Accord,* Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974).

[34] 23 Ariz. App. 131, 531 P.2d 176 (1975).

[35] *Id.* at 138, 531 P.2d at 183.

[36] 2 FAM. L. REP. (BNA) 2086 (Va. Sup. Ct., Dec. 1, 1975).

[37] It appears that the court meant that such an agreement will be more closely scrutinized in light of surrounding circumstances in order to determine whether the agreement itself caused the dissolution. This position sharply contrasts with that taken by the California court in Dawley v. Dawley, 2 FAM. L. REP. (BNA) 2588 (Cal. Sup. Ct., June 29, 1976), where the court stated that it will consider only the objective language of the agreement itself.

[38] *See* Gamble, *supra* note 5, at 705.

regarding such agreements have not come about by statute,[39] but rather by judicial decisions which have repudiated the old common law approach. It should also be noted that compared to common law property states a disproportionate number of community property jurisdictions have liberalized their rules and now permit the enforcement of agreements in contemplation of divorce. This situation may be attributable to the greater economic equality of marital partners under the community property regimes.[40]

As noted above, those jurisdictions which enforce such agreements impose some limitations.[41] Courts often expressly require the agreement to be free from fraud and undue influence. While this rule generally applies to all contractual litigation, the presence of an express requirement indicates judicial recognition of the increased opportunities for fraud and coercion that exist in the confidential relationship between present or prospective spouses. The existence of this confidential relationship has also given rise in some jurisdictions to the requirement that complete financial disclosure must precede the making of an enforceable contract.

While judicial recognition of the enforceability of agreements in contemplation of divorce may assist individuals in realistically planning for the future, the end result of such planning is by no means certain. In some states, the contractual provisions may be modified if either party demonstrates that circumstances have changed since they made the agreement. In others, the courts will refuse to enforce any provision that deprives a spouse of necessary support. The most significant limitation is the requirement in some jurisdictions that the agreement be fair and equitable. This amorphous standard handicaps individuals in their future planning because it is virtually impossible to predetermine what a court may find to be a fair provision.

Despite such limitations, these decisions have been significant steps in the contemporary development of domestic relations and contract law. The traditional view still prevails in most jurisdictions—contracts that contemplate dissolution of the marriage by divorce are generally void as against public policy. The new trend, however, indicates a more thoughtful analysis rather than blind adherence to the stare decisis of the old common law rule.

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[39] Even the Uniform Marriage and Divorce Act does not deal with contracts in contemplation of divorce.

[40] While a review of the law in all jurisdictions is beyond the scope of this article, it does appear that a greater proportion of community property states have adopted the new approach. *See* notes 25-30 and accompanying text *supra*.

[41] This information has been compiled by jurisdiction in the APPENDIX attached hereto, and appears in the same order as discussed in the text.

II. POLICY CONSIDERATIONS

A wide variety of policy reasons have been offered in support of the common law rule that all antenuptial as well as virtually all postnuptial agreements in contemplation of divorce are void and unenforceable as against public policy.[42] These reasons are often confusing, and sometimes contradictory. For example, many courts have said that such agreements violate the sanctity of the marriage relationship by making it economically advantageous for one party of the marriage to seek divorce.[43] Other courts have noted that a disadvantageous agreement, if valid, could instead improperly force a party to endure an insufferable marriage rather than court economic disaster by pursuing divorce.[44]

The generally unstated assumptions which underlie these comments are that society has an interest in the preservation or termination of marriage relationships and that the present refusal of most courts to enforce these marital agreements has a salutary effect on the underlying relationships. It is not at all clear, however, that these assumptions are valid. Indeed, courts have not closely evaluated the process by which they determine property and support rights in general, and whether their present practices, whatever they are, might also have significant but unrecognized and unevaluated effects on the continuation or termination of marriage relationships.

Other policy reasons courts give for refusing to enforce these agreements include such technical niceties as a failure of consideration. The marriage itself was thought by some to be the consideration which upon dissolution could no longer support the agreement.[45] Again, the decisions make little effort to evaluate whether the doctrine of consideration, developed primarily in commercial transactions, should be applied to marital agreements and, if so, how.[46]

Other courts have referred to society's continuing interest in the

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[42] *See* 1 A. LINDEY, *supra* note 4, at § 4-1.

[43] *See, e.g.*, Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950). *See also* Gamble, *supra* note 5, at 705; Note, *Modern Theory and Practice of Antenuptial Agreements*, 5 J. MAR. J. PRAC. & PROC. 179, 201 (1971).

[44] *See* Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1955).

[45] York v. Ferner, 59 Iowa 487, 13 N.W. 630 (1882). *See also* Note, *supra* note 43, at 199.

[46] Michigan cases have addressed the consideration issue only with respect to agreements in contemplation of death, and have held that marriage itself is sufficient consideration for either spouse's waiver of an interest in the other's estate. *See* MICHIGAN LAW REVISION COMMISSION, *Antenuptial Agreements in Michigan*, 3rd ANN. REP. 67, 71 (1968). The question remains whether the same rule would apply if the current statute is amended as proposed to authorize agreements in contemplation of divorce. *See* discussion in part III *infra*.

financial support of its citizens. They consequently have refused to enforce those agreements which would render one of the spouses a ward of the state.[47] These courts take the position that it is preferable to impose the duty to maintain or support the ex-spouse upon a comparatively financially able spouse than to make the support of this person the obligation of society as a whole. The obvious inequities of this position in circumstances such as a marriage of short duration reveal the often shallow, self-serving reasoning behind such a policy.

It might also be argued that notwithstanding the private agreements of the parties, society has a duty to guarantee the rights of a dependent spouse even after the termination of the marriage. Although such concerns are usually voiced in favor of wives, the courts occasionally require provision for a dependent husband.[48] This argument derives from the fact that the rearing of children and the maintenance of the home require a substantial commitment of time and effort on the part of one or both of the spouses. If one spouse disproportionately made this commitment, it could be argued that the state should protect the spouse from financial need, even after divorce. The policy supposedly insures the continued willingness of marital partners to undertake the financially dependent but socially necessary functions of childrearing and homemaking.[49] This argument may not be consistent, however, with the changing circumstances of an increasing number and percentage of married women working outside the home or with the policy in favor of enforcement of marital agreements in contemplation of death.

Whatever the stated reasons for refusing to enforce agreements in the event of divorce, they seem to suggest an underlying reason that these agreements are inherently unfair. Presumably the agreements do not take into consideration the traditional division of labor in the average household whereby the wife, even if she

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[47] For example, the Supreme Court of Oregon has held that antenuptial agreements concerning alimony will be enforced "unless enforcement deprives a spouse of support that he or she cannot otherwise secure." Unander v. Unander, 265 Or. 102, 107, 506 P.2d 719, 721 (1973).

[48] In *In re* Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973), the California Supreme Court held invalid an antenuptial agreement in which a wealthy 73 year-old woman and a 48 year-old waiter of little means waived their mutual rights to support. The court noted that the husband had become totally disabled after the agreement was made, and that the wife was able to provide support for the husband. Whether or not support duties continued after dissolution of the marriage was held to be a question for the court alone. 10 Cal. 3d at 488, 516 P.2d at 297, 110 Cal. Rptr. at 905.

[49] Bartke, *Community Property Law Reform in the United States and in Canada—A Comparison and Critique*, 50 TUL. L. REV. 213, 262 (1976). Professor Bartke argues for a system of marital property that will guarantee the nonincome-producing wife an equal role in the ownership, management, and control of the family property. He believes that the preservation of the nuclear family is at stake.

works outside the home, foregoes substantial occupational advancement and consequently suffers a reduced future earning capacity.[50] They do not take into account the disproportionate bargaining strength of the parties to the contract, especially where one spouse is significantly more affluent than the other. They also fail to consider the duration of the marriage and the changes of circumstances that might occur during that time,[51] as well as the difference in contributions which the spouses have made to the relationship and to the accumulation of property.

Courts of equity, of course, do attempt to deal with these considerations when determining property and support rights upon divorce. Some of them have expressly stated that they would not permit parties, by private agreement, to divest the equity courts of this discretionary jurisdiction.[52]

On the other hand, persuasive policy arguments can be made to support the enforcement of marital agreements in contemplation of divorce. The state should not lightly abrogate the freedom of individuals to plan for the future with some degree of certainty. Today, when more than one out of three marriages end in divorce,[53] a party would be almost foolhardy not to recognize and minimize the risk that he or she is taking when entering into a marriage relationship.

Although it is probably impossible to survey accurately the kinds of people who would make use of marital agreements, one informal study found that most of them were older people who were entering into a second marriage.[54] These people had children or other financial obligations from their previous marriage for which they felt obligated to provide before entering into a new relationship. Other people likely to use these agreements include spouses with relatively equal earning power who wish to preserve their own assets for their respective estates in the event of either divorce or death. Finally, the most traditional use of the marital agreements is where spouses and their respective families wish to preserve inherited estates intact for their own family descendents.[55] The question

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[50] *See* Note, *supra* note 43, at 187.

[51] One authority in the field of domestic relations has argued that the real reason for invalidating agreements in contemplation of divorce is that although the provisions may be fair when made, they may be unfair when the divorce or separation occurs. H. CLARK, LAW OF DOMESTIC RELATIONS 28-29 (1968).

[52] *See* Gamble, *supra* note 5, at 705.

[53] *See* STATISTICAL ABSTRACT, *supra* note 1, at 67.

[54] Gamble, *supra* note 5, at 730.

[55] *See, e.g.*, Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962). *See also* Note, *supra* note 43, at 200.

arises as to whether the courts and legislatures should continue to deprive these people of their freedom to make such plans in the event of divorce.

The fairness question is one which must be considered candidly on both sides of this issue. Divorce courts have not been universally acclaimed for the fairness with which they divide property and provide support. In fact, the arbitrariness evident in some of these proceedings has caused many to wonder whether individuals could not by agreement do at least as good a job, if not a substantially better one.

When courts suggest that the traditional rule promotes the maintenance of marriage, one must inquire whether the growing number of jurisdictions which provide no-fault divorce have abdicated their interest in the maintenance of marriages which one or both of the parties wish to terminate.[56] There is also the question whether the state actually has an overriding interest in requiring former spouses to support each other so that they do not become charges on the public, and if so, to what limitations should this interest be subject.

In view of the nature and extent of these conflicting policies, the question remains which side of the issue yields the better result. An examination of the cases and commentators does not reveal a clear answer to this question. Rather, it appears that there have been unfair results in divorce proceedings, irrespective of whether or not the jurisdictions involved authorize marital agreements in contemplation of divorce. Our legal system operates least effectively when it attempts to deal most comprehensively and fairly with matters of domestic concern. Marriage is not strictly a commercial venture. Yet it does contain, without question, major financial aspects. People who live and work together and raise a family are tied closely to each other in economic as well as emotional and social ways. How these economic expectations should best be protected by society is the real issue.

Although neither the combined arguments for or against agreements in contemplation of divorce are overwhelmingly convincing, consistency with other laws dealing with similar matters is itself a significant value. Treatment of agreements in contemplation of death should be reviewed from this perspective. The question is whether the policies with respect to a surviving spouse's rights should be substantially different from those with respect to a divorced spouse's rights. The old arguments regarding the preservation of marriage are of no persuasive effect in states which provide

[56] It has also been noted that where no minor children are involved, and where the spouses can function independently in society, the state has little interest in the continuaton of the marriage. Volid v. Volid, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46 (1972).

for no-fault divorce or which tolerate a divorce rate of greater than thirty-three percent.[57] Likewise, the interest of the state in requiring former spouses to support each other so that they do not become wards of society is no greater in the event of death, where it is not required, than in the event of divorce, where it is. In short, there seems to be no policy argument which outweighs the value of consistency in the treatment of these marital contracts, regardless of whether the marriage terminated by death or by divorce.

Planning for the division of property and support obligations upon termination of a marriage should not turn upon technical legal refinements, such as consideration,[58] or the distinction between alimony and property division.[59] Rather, it should be hedged with real protection so that the parties enter into the agreement freely, without coercion, fraud or duress, and with a full and fair understanding of the nature of their partner's assets and the kinds of interests which they are giving up by virtue of the agreement.

Complicated statutes have been proposed authorizing these kinds of agreements. One proposal sets forth in detail the relative duties of the parties to inquire into and to disclose the nature of their personal assets, and creates presumptions and burdens of proof in the event of litigation.[60] This approach can be unduly burdensome and may not guarantee the equitable results it attempts to provide. In any event, agreements could be drafted to include sufficient recitals to show the scope of the information to which the parties were privy.

Finally, it should be observed that even those jurisdictions which enforce these agreements attach additional limitations to them.[61] Some states still maintain a broad interest in the support of the waiving spouse. As a result, they may permit judicial modification of the agreement whenever there is a showing of changed cir-

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[57] *See* STATISTICAL ABSTRACT, *supra* note 1, at 68.

[58] *See* note 46 *supra*.

[59] The distinctions between alimony and property division which have been developed in some cases appear to be distinctions without a difference. *See* Gamble, *supra* note 5, at 708. If a party is ordered to pay substantial alimony, there is probably no need for a property division in that the alimony might well serve the same purpose.

It should also be noted that the present Michigan statute authorizing agreements in contemplation of death deals with support and property without making any distinction. MICH. COMP. LAWS. ANN. § 702.74a (Supp. 1975).

[60] *See* Gamble, *supra* note 5, at 733. Gamble proposes separate statutes for agreements stipulating property rights and those stipulating alimony rights. Under both provisions, however, each spouse must be represented by independent counsel, there must be a listing of each spouse's interest in specific types of property, and the agreement must be acknowledged before a notary public. Compliance with these provisions raises an irrebuttable presumption of full disclosure and a further presumption of validity. Noncompliance raises no presumption, and the contesting spouse has the burden of proving material concealment, misrepresentation, or fraud. With respect to alimony, neither an unreasonable provision nor the absence of a provision has any effect upn enforceability or the burden of proof.

[61] *See* the APPENDIX attached hereto.

cumstances.[62] Other states hold the agreement unenforceable if it deprives a spouse of support that he or she cannot otherwise secure.[63] Following this view, a statute could authorize the courts to set aside an agreement, but only to the extent of assuring some minimal standard of support for each of the spouses. If properly defined, this power would limit the uncertainty spouses would face upon divorce. The standard of support could be defined as subsistence (welfare level), middle income, or the style to which the spouse has become accustomed. The minimum standard could depend upon the level at which public policy deemed it necessary for the court to intervene, or could be based upon the parties' prior standard of living.

III. PROPOSED LEGISLATIVE ACTION IN MICHIGAN

Considerations such as those outlined above have led the Michigan Law Revision Commission to propose to the Michigan Legislature some liberalization of the law regarding marital agreements.[64] The prior Michigan law was based upon a statute enacted in 1969[65] as a result of an earlier proposal of the Commission.[66] That statute authorized virtually all marital agreements made in contemplation of death, and postnuptial agreements made in contemplation of divorce but only where the parties had already separated. By its silence, the Legislature left intact the common law which invalidates almost all antenuptial agreements dealing with property and support rights made in contemplation of divorce, as well as similar postnuptial agreements made before separation.[67]

In its recent proposal, the Commission recognized that concepts of public policy with respect to marital agreements have changed substantially over the years. It found that no overriding public policy exists today which should preclude the enforceability of

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[62] *See, e.g.*, Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

[63] *See, e.g.*, Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973).

[64] MICHIGAN LAW REVISION COMMISSION, *Recommendation Relating to Marital Agreements*, 12th ANN. REP. (to be published 1977). The study report submitted with the Commission's Recommendation was written by the author of this article.

[65] MICH. COMP. LAWS ANN. § 702.74a (Supp. 1975). Section 74a was added to Act No. 288 of the Public Acts of 1939 ("the probate code") by Act No. 139 of the Public Acts of 1969 (effective March 20, 1970).

[66] MICHIGAN LAW REVISION COMMISSION, *Recommendation Relating to Antenuptial and Marital Agreements*, 3d ANN. REP. 27 (1968).

[67] Scherba v. Scherba, 340 Mich. 288, 65 N.W.2d 758 (1954); *In re* Muxlow's Estate, 367 Mich. 133, 116 N.W.2d 43 (1962).

marital agreements in contemplation of divorce, regardless of whether they were made before or after marriage or separation. It therefore proposed legislation which would authorize the enforcement of all such marital agreements, whenever executed under certain conditions applicable to both divorce and death situations.

This proposal included the continuation of the requirements that these agreements be made in writing, upon fair disclosure, and in the absence of fraud or duress. The Commission went one step further, however, in recognizing that the consequences of such agreements to the parties may be the same regardless of whether the marriage terminates by death or divorce. It proposed, for both kinds of agreements, that a court of equity should have the right to modify such agreements where there has been a change of circumstances which would make the enforcement of the agreement unfair or inequitable. This power to modify did not exist in the prior law and it represents a significant change in that statute as well as in the older common law relating to agreements in contemplation of death.

By recommending the above changes, the Commission properly recognized that marital agreements, whether in contemplation of divorce or death and whether executed before or after marriage or separation, raise basically the same policy considerations. The Commission's choice of deferring to a court of equity in the event of changed circumstances reflects the confidence that the end results will be fairer than a firm adherence to the terms of the contract. The Commission apparently believed that what might be lost in terms of predictability would be gained in terms of fairness.

The Commission's confidence in the equity system may be misplaced. Unless a change of circumstances is more narrowly defined, any court might be justified in setting aside a marital agreement which conflicts with the way the court itself would have distributed the property. Mere passage of time could be considered a change of circumstance which might induce some judges to impose their view of fairness upon parties, notwithstanding their prior written agreement.

It should be noted that the law in Michigan, as in other jurisdictions, has permitted marital agreements in contemplation of divorce to be used as the de facto basis for pending divorce settlements.[68] Thus, it might be concluded that the Commission sought, by its recommendations, to elevate marital agreements in contem-

[68] Scherba v. Scherba, 340 Mich. 288, 65 N.W.2d 758 (1954).

Other jurisdictions have taken this view. In Strandberg v. Strandberg, 33 Wis. 3d 204, 147 N.W.2d 349 (1967), the Wisconsin Supreme Court held that although an antenuptial agreement contemplating divorce is void, it can be admitted into evidence and used as a guide in determining the equities of a property division.

plation of divorce from being de facto guides for property distribution to providing a legal basis for distribution when the enforcement of such an agreement would be fair. Such a result would not yield the full measure of predictability that parties may have desired. Yet it may represent the biggest step a legislature would be willing to take toward that predictability.

IV. CONCLUSIONS

Compromises like the one achieved by the Michigan Law Revision Commission will continue to be worked out. It will nevertheless be difficult to achieve the proper balance between predictability and fairness. Our fluctuating attitudes toward the economic role of women will make such compromises extremely difficult to apply in individual cases. Further, assumptions regarding the economic independence of women may be disadvantageous to women who have chosen not to work outside of the home. The failure to make these assumptions, however, may create a heavy burden on husbands held to support their prior family as well as their second family, depite their former wives' potential for self-sufficiency. The fact that our society has not decided who should support whom, under what circumstances, and for how long makes the question of divorce settlement extremely difficult.

As marital agreements in contemplation of divorce gain greater usage, however, they may by their terms be drafted to provide for greater flexibility to accommodate the parties' change of circumstances without judicial interference. The agreements could provide allowances for subsequent changes due to health, number of children, ability to work, and so on, with a reasonable provision for both spouses in the event one or more of these conditions should occur.

The need for such agreements is quite clear. The millions of people who are likely to appear in a divorce court ought to have the means to provide some predictable financial results if such an event should occur. Elaboration of these agreements and the compromises that will be worked out in the future will hopefully resolve these questions so that these arrangements will be workable and maybe even beneficial for all parties concerned.

APPENDIX

Express Limitations Placed On Contracts In Contemplation of Divorce By Jurisdictions Recognizing Their Enforceability

LIMITATION	JURISDICTION						
	Fla.	Ill.	Ore.	Nev.	Cal.	Ariz.	Va.
Absence of Fraud or Duress	X	X	X	X		X	
Divorce Must be Prosecuted in Good Faith	X						X
Fair and Equitable Provisions	X*	X				X	
Full Disclosure	X*	X	X	X		X	
General Knowledge of Other Spouse's Assets	X*						
Modification on Changed Circumstances	X		X				
No Waiver of Temporary Alimony	X	X					
Enforcement Must Not Deprive Spouse of Necessary Support			X				
Unconscionable Contract Not Enforceable				X			
Terms of Contract Must Not Encourage Divorce					X		X**

*alternative requirement

**court looks to external circumstances as well as objective language in order to determine whether or not the contract encouraged divorce.