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Domestic Relations—Tentative Requirement of Disclosure and Independent Counsel for Marital Agreements—In re Marriage of Hadley, 88 Wn. 2d 649, 569 P.2d 790 (1977)

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DOMESTIC RELATIONS—TENTATIVE REQUIREMENT OF DISCLOSURE AND INDEPENDENT COUNSEL FOR MARITAL AGREEMENTS—*In re Marriage of Hadley*, 88 Wn. 2d 649, 569 P.2d 790 (1977).

Plaintiff husband and defendant wife executed three property status agreements during their marriage after discovering that the wife had multiple sclerosis.[1] The couple's personal and business counsel drafted the agreements to minimize the wife's death and estate taxes. Before signing the agreements, the wife received advice from the family counsel and travelled to her husband's properties. In addition, the wife engaged another attorney to examine the agreements, but he declined to give her advice because she failed to provide him with necessary information. The husband obtained a dissolution decree embodying the agreements.[2] On appeal, the Washington Supreme Court held (5–3) that the agreements were valid.[3] *In re Marriage of Hadley*, 88 Wn. 2d 649, 565 P.2d 790 (1977).

Hadley tested the validity of property status agreements executed between a husband and wife.[4] The court ostensibly determined the va-

1. The husband, at the time of the marriage, had substantial assets which greatly increased during the marriage. The wife owned no property of significant value before the marriage or at the time of the dissolution. *In re* Marriage of Hadley, 88 Wn. 2d 649, 651–52, 565 P.2d 790, 790–92 (1977).

2. The trial court accepted the agreements as validly characterizing the property as separate or community; the decree reflected that characterization. *Id.* at 654, 565 P.2d at 793.

3. The court also ruled on matters outside the scope of this note, including the trial court's abuse of discretion, the wife's waiver of her right to appeal by accepting the benefit of the decree, the trial court's failure to list and assign each of the properties as separate or community, the trial court's failure to assign a value to each of the Hadley assets and distribute a tax reserve fund to either party, the trial court's substitution of future maintenance payments for the wife's community property interest, and the award of attorney's fees to the wife.

4. Property status agreements may be either postnuptial or antenuptial. Postnuptial agreements are those entered into after marriage between couples still married. Such agreements may be in the form of either a property settlement when the parties do not intend to separate or initiate divorce, or one in contemplation of separation or divorce. An antenuptial agreement is one entered into prior to marriage by prospective spouses, usually delineating the property rights of both or of their children. Friedlander v. Friedlander, 80 Wn. 2d 293, 298–99, 494 P.2d 208, 212 (1972); 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 22–23 (rev. ed. 1967); 1 W. NELSON, DIVORCE & ANNULMENT § 13.03–.06 (2d ed. 1945). Postnuptial and antenuptial property status agreements are executed between parties whose relationship involves trust and confidence, and therefore provides a greater opportunity for one party to gain advantage. Courts have generally described the marital or antenuptial relationship as confidential rather than as fiduciary. *See, e.g., Friedlander*, 80 Wn. 2d at 301, 494 P.2d at 213; Hamlin v. Merlino, 44 Wn. 2d 851, 865, 272 P.2d 125, 132 (1954); *In re* Estate of Madden, 176 Wash. 51, 53, 28 P.2d 280, 281 (1934). *See also* Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); *In re* Strickland's Estate, 181 Neb. 478, 149 N.W.2d 344 (1967); Lightman v. Magid, 54 Tenn. App. 701, 394 S.W.2d 151 (1965); RESTATEMENT (SECOND) OF TRUSTS § 2, Comment b (1959) ("Al-

lidity of the agreements under previously established principles that full disclosure of the amount, character, and value of the property involved must be made to the wife, and that the agreements must be entered into voluntarily on independent advice and with full knowledge of rights.[5]

Prior to *Hadley,* the Washington Supreme Court had required strict compliance with the elements of disclosure and independent advice for a marital contractual transaction to be enforceable.[6] The purpose of this note is to determine the effect of *Hadley* on those requirements. First, it will examine the case law which resulted in the formalistic test. Then, it will analyze this test as applied in *Hadley,* in which the court assessed the fairness of the agreement by employing a balancing approach instead of following the strict test. The note will focus on the confusion which results when the court's actual application is at variance with the standards it articulates. The discussion concludes that the court should clearly establish whether a balancing test or a formal requirements test will govern such transactions.

I. PRIOR CASE LAW

Washington law dealing with standards for valid marital agreements was unsettled prior to *Hadley.* The *Hadley* court cited two cases, *Hamlin v. Merlino*[7] and *Friedlander v. Friedlander,*[8] as setting forth the applicable standards.[9] *Hamlin* established a test whereby the

though the relation is not a fiduciary relation, it may, nevertheless, be a confidential relationship . . . particularly likely to exist where there is a family relationship. . . .") The dissent in *Hadley,* however, describes the marital relationship as fiduciary. 88 Wn. 2d at 670, 565 P.2d at 799, whereas the court in *In re* Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976), stated that parties "who are not yet married are not presumed to share a confidential relationship." *Id.* at 355, 551 P.2d at 331, 131 Cal. Rptr. at 11.

Some authorities fail to make a distinction between the terms confidential and fiduciary. *See e.g.,* J. CALAMARI & J. PERILLO, CONTRACTS 275 (2d ed. 1977); Note, *Use of Non-Confidential Relationship Undue Influence in Contract Rescission,* 49 NOTRE DAME LAW. 631, 632 (1974).

5. 88 Wn. 2d at 654, 565 P.2d at 793.

6. Friedlander v. Friedlander, 80 Wn. 2d 293, 494 P.2d 201 (1972).

7. 44 Wn. 2d 851, 272 P.2d 125 (1954).

8. 80 Wn. 2d 293, 494 P.2d 201 (1972).

9. Statutes have been enacted with respect to only two types of marital agreements: those concerning the disposition of community property to be effective on death, WASH. REV. CODE § 26.16.120 (1976), and separation contracts, WASH. REV. CODE § 26.09.070 (1976). A combination of conveyance statutes and Washington case law may also give a husband and wife "a right to deal in every possible manner with their

court balanced various enumerated circumstances. *Friedlander,* however, shifted the emphasis of that test to one formally establishing certain of these circumstances as necessary elements of an enforceable marital contract.

In *Hamlin,* an antenuptial agreement provided that property separately owned prior to marriage and property acquired during the marriage in the name of one spouse alone would retain its separate character subsequent to the marriage.[10] The husband, appointed administrator of his wife's estate at her death, showed a small bank account as the single asset of her estate. He claimed that pursuant to the agreement, all other property was his separate property.[11]

The court stated that, to be valid, an antenuptial agreement must reasonably provide for the wife, or the husband must disclose his worth to her before she signs.[12] According to the court, because marriage creates a confidential relationship, the husband had the burden of proving that his wife fully understood "the nature and significance of the contract, and that she freely and voluntarily entered into it."[13] The husband failed to meet that burden.

The *Hamlin* court examined many circumstances bearing upon the fairness of an antenuptial contract, including the value of each party's property, their children by prior marriages, the business experience of each party, and who prepared the agreement.[14] The court did not re-

property," including changing by agreement, the separate status of property. Volz v. Zang, 113 Wash. 378, 381, 94 P. 409, 410 (1920).

The Washington legislature, unlike other legislatures, has failed to enact provisions covering antenuptial agreements. *See* 3 C. VERNIER, AMERICAN FAMILY LAWS: HUSBAND AND WIFE § 155 (1935). The bulk of antenuptial agreement legislation deals with requirements of form and recording.

10. 44 Wn. 2d at 853–54, 272 P.2d at 126.

11. *Id.* at 856, 272 P.2d at 128. The husband had a successful importing and wholesale business, the wife had significant property holdings, and each had children by a prior marriage. *Id.* at 853–54, 272 P.2d at 126.

12. *Id.* at 864–65, 272 P.2d at 132, (citing Juhasz v. Juhasz, 134 Ohio St. 257, 264, 16 N.E.2d 328, 331 (1938), and 2 A. LINDEY, *supra* note 4, § 90). The court held that the agreement was unfair because it allowed the husband unilaterally to place community property in his own name. 44 Wn. 2d at 865–66, 272 P.2d at 132–33.

13. 44 Wn. 2d at 866–67, 272 P.2d at 133. Arguably, the *Hamlin* test is concerned more with a disclosure of the rights involved in a marital agreement than with a detailed property disclosure. *See In re* Estate of Madden, 176 Wash. 51, 28 P.2d 280 (1934) (a spouse must know which rights are waived under a property settlement agreement and must have some knowledge of the amount of the estate involved). A subsequent case suggests that it may be unnecessary for a party to disclose essential property information, as long as the other spouse knew at the time of marriage or shortly thereafter that property was owned by the party prior to the marriage. *In re* Estate of Bubb, 53 Wn. 2d 131, 134, 331 P.2d 859, 861 (1958).

14. 44 Wn. 2d at 866, 272 P.2d at 133.

quire that each party be provided with independent legal or other advice, but weighed the availability and character of advice along with the other enumerated circumstances.[15] In *Friedlander*, however, the court shifted from the *Hamlin* balancing approach to a formalistic analysis.

In *Friedlander*, the court reiterated the *Hamlin* test, but applied it more rigidly.[16] It required first, that there be either a reasonable provision for the wife[17] or a "full and fair disclosure of all material facts

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15. The court expressly considered two circumstances omitted in 2 A. LINDEY, *supra* note 4, § 90: who prepared the agreement, and the parties' business experience. It also found that "[the wife] apparently was provided with no independent legal or other advice." 44 Wn. 2d at 867, 272 P.2d at 133. It is obvious, therefore, that advice was only one of several elements weighed, for if advice were a strict requirement, the court could have made short shrift of the agreement.

The court previously declined to require independent advice in *In re* Estate of Madden, 176 Wash. 51, 28 P.2d 280 (1934). The *Madden* court cited authority from another jurisdiction which included the prerequisite of competent and independent advice, and then considered whether the wife had relinquished her rights in the valuable community property "without independent advice or advice from the deceased." *Id.* at 58, 28 P.2d at 283.

16. The Friedlanders executed an antenuptial agreement to avoid the type of difficulties encountered during the husband's prior marriage. 80 Wn. 2d at 301, 494 P.2d at 213. The husband's attorney drafted an agreement designed to protect the separate character of the husband's sizeable holdings. Prior to drafting the agreement, the attorney and the husband's brother, also an attorney, explained the intended provisions to the wife. *Id.* at 302, 494 P.2d at 214.

17. The Washington Supreme Court recently recognized the fair and reasonable provision standard as legitimate, even if only as an alternative. Whitney v. Seattle-First Nat'l Bank, 90 Wn. 2d 105, 111, 579 P.2d 937 (1978). Arguably, the requirement of a fair and reasonable provision should be omitted. What may be thought of as a reasonable provision at the time the agreement is executed may be found later to be highly unreasonable. In the past the court had given great weight to the fact that a provision distributed property disproportionately. *In re* Estate of Madden, 176 Wash. 51, 28 P.2d 280 (1934) (wife relinquished, for $1,000, her rights in property worth $8.000). Now, however, disparate provisions are not conclusive indicators of unfairness. *See, e.g.*, Halvorsen v. Halvorsen, 3 Wn. App. 827, 479 P.2d 161 (1970) (wife received only $500 a month and assurances that the community's million-dollar tugboat enterprise, retained by the husband, would go to a son); Peste v. Peste, 1 Wn. App. 19, 459 P.2d 70 (1969) (pursuant to agreement, wife was awarded her personal effects, certain household furnishings, and $6600; husband received the balance of the community property, including a partnership admittedly valued at at least $100,000). *See also* Canter v. Palmer, 166 So. 2d 466 (Fla. 1964) (active misrepresentation rather than disproportionate provisions warranted setting aside an antenuptial agreement); *In re* Estate of West, 194 Kan. 736, 402 P.2d 117 (1965) (valid agreement where husband's property was in excess of $460,000 while the wife's provision was for $27,000); Rocker v. Rocker, 13 Ohio Misc. 199, 232 N.E.2d 445 (1967) (provision for wife one-fifth the size of husband's estate, worth approximately $50,000, was not wholly disproportionate). *Contra*, Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962) (court may consider whether provisions would enable spouse to live in a manner reasonably in concert with the way of life before dissolution, and at least as comfortably as life before marriage); *In re* Estate of Vallish, 431 Pa. 88, 244 A.2d 745 (1968) (antenuptial agreement which failed to provide for the wife was invalid unless a full disclosure was made of the decedent's assets); Walls, *Agreements as to the Character of Property*, WASHINGTON COMMUNITY PROPERTY DESK-

relating to the amount, character and value of the property involved,"[18] and second, that there be independent advice for the prospective spouse who is giving up his or her rights.[19] According to the court, the husband satisfied neither requirement; the agreement was therefore void.[20] It is upon the unsettled base of *Hamlin* and *Friedlander* that *Hadley* rests.

II. ANALYSIS OF *HADLEY*

Hadley adds to the confusion surrounding marital agreement standards by failing to clarify the test practitioners must meet to draft an enforceable agreement.[21] If the equities of *Hadley* and *Friedlander* are considered, it may be contended that the wife in *Hadley* was far more deserving of judicial relief from her agreement than was the wife

BOOK § 18.4 (1977) (courts will look very carefully at agreements which make a provision for one spouse that is greatly disproportionate to the provision made for the other).

18. 80 Wn. 2d at 302, 494 P.2d at 214. A limit was imposed on disclosure, in that a spouse need not know "the *exact* financial status of the other spouse's resources." *Id.*

19. *Id.* at 303, 494 P.2d at 214.

20. *Id.*

21. The *Hadley* court implied that one standard governs both antenuptial and postnuptial agreements. The parties in *Hadley* both urged that *Hamlin* and *Friedlander*, which dealt with antenuptial agreements, also applied to an agreement made during the marriage. 88 Wn. 2d at 654, 565 P.2d at 793. It was of little consequence to the majority in *Hadley* that the agreements, executed for estate planning, were used in dissolution proceedings.

One can argue that only one standard should govern marital agreements. With more than one out of three marriages ending in divorce, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 67 (1975), a party should recognize the risk that a marriage could end in dissolution, and that an agreement entered into prior to separation may be used to establish the rights of the parties in the dissolution proceedings.

Washington has declined to hold that the validity of a marital contract in a particular situation depends upon the date the parties executed the agreement in relation to the date of the parties' marriage. The court in *Hamlin* found that the rule of good faith applicable to antenuptial contracts corresponded "to the same kind of test for fair dealing this court has required of a husband who had contracted with his wife after marriage with respect to their property rights." 44 Wn. 2d at 865, 272 P.2d at 132. *Cf. In re* Estate of Nelson, 85 Wn. 2d 602, 537 P.2d 765 (1975) (separation agreements survive the death of one of the parties unless it can be proven that that was not the parties' intent); *In re* Estate of Bubb, 53 Wn. 2d 131, 331 P.2d 859 (1958) (separation agreement used in probate proceeding). *Contra, Friedlander,* 80 Wn. 2d at 298, 494 P.2d at 212 ("It is significant that the transaction involved a *prenuptial agreement* as distinguished from a *postnuptial or separation agreement.*") (emphasis in original).

See generally Klarman, *Marital Agreements in Contemplation of Divorce,* 10 U. MICH. J.L. REF. 406 (1977); Walls, *supra* note 17, § 18.11, at 18-8. The *Hamlin* and *Friedlander* requirements are probably as applicable after marriage as before. Although their independent counsel requirement was then inapplicable to postnuptial agreements, it has been suggested that where there are disproportionate provisions, independent advisers should be employed. *Id.*

in *Friedlander*. The wife in *Hadley* was arguably naive concerning the marital contractual transaction[22] while the wife in *Friedlander* was intelligent and skilled in business.[23] The *Hadley* court could have continued applying the formalistic *Friedlander* test and voided the agreements. In effect, *Hadley* suspends the stringent test of *Friedlander;* yet the court's use of language reminiscent of *Friedlander* leaves doubts whether the suspension will be permanent.

In *Hadley,* the court stated that the *Friedlander* test applied. It then determined the validity of the property status agreement by examining "(1) whether full disclosure has been made by the respondent of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by the spouse of her rights."[24] The court, however, merely reiterated the formal *Friedlander* test, and then proceeded to apply a *Hamlin* ad hoc balancing approach, considering all circumstances of the case. In *Friedlander,* the court set forth the circumstances surrounding the transaction which caused the agreement to fail to comply with the standards of full disclosure and independent advice. Those circumstances in *Friedlander* can be profitably compared with those in *Hadley* which, however minimally, satisfied the test.

First, *Friedlander* rejected the proposition that an agreement only generally referring to a spouse's property and assets meets the full disclosure requirement.[25] In *Hadley,* however, a general disclosure was sufficient. The husband's disclosure consisted of merely informing his wife of developments after she had travelled to his major businesses.[26] The record omitted any indication that the information supplied by the husband dealt with specific property values or changes of character in the property. The majority failed, as pointed out by the dissent,

22. The court mentions only the age, health, and premarital financial status of the wife, 88 Wn. 2d at 651, 565 P.2d at 791, without discussing her intelligence, education, or business experience, as it did in *Friedlander, see* note 23 *infra,* and *Hamlin, see* note 14 and accompanying text *supra.*

23. At the time of appeal the wife was within two quarters of completing her fine arts degree and was operating a promising art gallery business. 80 Wn. 2d at 298, 494 P.2d at 211.

24. 88 Wn. 2d at 654, 565 P.2d at 793.

25. 80 Wn. 2d at 302, 494 P.2d at 214.

26. 88 Wn. 2d at 655, 565 P.2d at 793. The trial court found that the agreements had been based on a study conducted by a certified public accountant and an attorney which characterized the assets and their respective sources. The record is unclear as to whether this study was shown or explained to the wife.

to require in clear and direct terms that "all material facts" be disclosed.[27] The general disclosure of financial status permitted by *Hadley* is less informative than the articulated full disclosure requirement and could prevent a spouse from realizing that he or she waived a claim to property characterized as separate pursuant to an agreement.

Second, *Hadley* also plainly departs from the *Friedlander* independent advice principle. The wife in *Friedlander* lacked independent advice, although the family attorney had informed her of the general nature and effect of the agreement.[28] A combination of two elements satisfied the independent advice standard in *Hadley,* although neither element standing alone would have met the *Friedlander* independent advice concept. First, the wife in *Hadley* obtained advice from the counsel who handled the family's business affairs and who drafted the agreements.[29] Similar advice was insufficient in *Friedlander.* Second,

27. *Id.* at 666, 667, 565 P.2d at 799, 800. The dissent stated that the wife failed to receive information that the agreements could be used for dissolution proceedings in addition to estate planning purposes. The dissent also indicated that the independent attorney was unable to advise the wife because he lacked necessary information and the wife "didn't have that information." *Id.* at 667, 565 P.2d at 800.

28. 80 Wn. 2d at 302, 494 P.2d at 214. The husband's brother, an attorney, informed the wife in the same manner. *Id.*

29. 88 Wn. 2d at 655, 565 P.2d at 793. The wife had spoken highly of the lawyer. Ethically, advice sanctioned in *Hadley* may be inconsistent with the attorney's professional responsibility. The question of whether the lawyer can, when requested, represent both parties in marital relationships has been raised. Rieke, *The Dissolution Act of 1973: From Status to Contract?,* 49 WASH. L. REV. 385 (1974). Washington courts have often given an affirmative answer. *See* Lee v. Lee, 27 Wn. 2d 389, 178 P.2d 296 (1947) (an attorney, previously unacquainted with either party, drafted a valid property settlement conveyance and agreement releasing the husband of all obligations to his wife, despite the husband's lack of separate advice); Halvorsen v. Halvorsen, 3 Wn. App. 827, 830, 479 P.2d 161, 163 (1970) (wife's family attorney, at her request, prepared a valid property settlement, although she had been under a psychiatrist's care; she had been told "that she could obtain independent counsel and ought to do so if she felt a conflict of interest existed"); Peste v. Peste, 1 Wn. App. 19, 22, 459 P.2d 70, 73 (1969) (property settlement agreement was valid where the wife had been "repeatedly and independently advised by a number of people . . . 'to get her own attorney' "). In *Halvorsen,* it was pointed out that such representation may cause difficulties. 3 Wn. App. at 830, 479 P.2d at 163. The attorney must depend on his or her own conscience to satisfactorily eliminate conflicts of interest. Canon 5 of the ABA Code of Professional Responsibility states that a lawyer should exercise independent professional judgment on behalf of a client. A lawyer "must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15. This is particularly true in a marital situation, in which one attorney is likely to have represented both parties in the past. The lawyer may represent both parties "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C). *See generally* Aronson, *Conflict of Interest,* 52 WASH. L. REV. 807, 826-27 (1977).

the wife in *Hadley* consulted but failed to obtain advice from an independent attorney. Her consultation added nothing to the advice received from the family attorney and would also have been inadequate to satisfy the strict *Friedlander* test.[30]

Arguably, *Hadley* followed *Hamlin* in taking account of independent advice as one of many circumstances to be considered, rather than making such advice a formal requirement. Other jurisdictions also take a balancing approach, weighing various circumstances.[31] Courts may look at the general and approximate knowledge one spouse has of the other's property,[32] and whether the property is complicated in nature.[33] The relative situations of the parties, including their ages, experiences, health, family ties,[34] and geographic ties,[35]

30. It may be contended that advice rendered by someone other than an attorney would be sufficient. *See Hamlin,* 44 Wn. 2d at 867, 272 P.2d at 133 (the wife "was provided with no independent legal or *other* advice." (emphasis added)). Impliedly, a spouse's family member may give adequate advice. Brewer v. Brewer, 84 Ohio App. 35, 78 N.E.2d 919, 921-22 (1948) (separation agreement struck down when husband deprived his wife of the opportunity to seek independent advice from her family or from counsel when the advice would have been of real assistance to her in deciding whether to enter into a separation agreement). Any competent advice may also suffice. Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).

31. *See, e.g., In re* Estate of Sayegh, 118 Cal. App. 2d 327, 257 P.2d 995 (1953) ("independent advice of counsel is not essential but is a circumstance to be considered in determining the validity of an antenuptial agreement"); Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (competent and independent advice is preferable, but not necessarily a required prerequisite to a free and voluntary signing); Sande v. Sande, 83 Idaho 233, 360 P.2d 998, 1003 (1961) (rule against enforcing agreements which are unfair because of overreaching is "especially applicable where the wife was ignorant of her rights, and acted without independent counsel," but is "not necessarily so limited"); Brewer v. Brewer, 84 Ohio App. 35, 78 N.E.2d 919 (1948); Pniewski v. Przybysz, 183 N.E.2d 437 (Ohio Ct. App. 1962) (antenuptial agreement held valid despite protests of husband, who understood little or no English, but who had considerable business experience and who had the agreement read to him in his own language; dicta: independent advice, applicable only to the wife, does not exist as a requirement in the law).

See also Whitney v. Seattle First Nat'l Bank, 16 Wn. App. 905, 560 P.2d 360 (1977), *aff'd,* 90 Wn. 2d 105, 579 P.2d 937 (1978). In *Whitney,* the appellate court stated that the requirement that independent advice must be sought or that a recommendation to seek independent counsel be expressed is "only one factor to be considered in the fairness of the overall transaction." *Id.* at 909, 560 P.2d at 364. The transaction in *Whitney* involved an agreement executed coextensively with the execution of wills by the wife and her late husband. All documents contained terms contrary to the wife's expectations, but were held valid. *Id.*

32. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962); *In re* Estate of Gelb, 425 Pa. 117, 228 A.2d 367, 372 (1967) (dissenting opinion) (majority held that decedent grossly misrepresented his assets, worth in excess of $260,000, rather than $100,000 as stated in the antenuptial agreement).

33. Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 757 (Mo. 1970) (assets of decedent, consisting of a 240-acre farm, were of a simple and uncomplicated nature).

34. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962).

35. Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 757 (Mo. 1970) (both

may be examined. In addition, courts may take into account the existence of children by prior marriages, the wife's independent means, and the intelligence of the parties.[36]

The *Hadley* court considered only a few of the criteria stated above: the general knowledge of the wife concerning the husband's property, the parties' ages, and their health.[37] The court emphasized instead the reliance of the husband and third parties on the agreements. The majority found justifiable reliance because the wife incorporated the agreements in her will and she waited until a late date to contest their validity.[38]

The dissent pointed out that reliance by a spouse should not be considered in determining whether a marital agreement was entered into voluntarily by both parties.[39] A husband is under a duty to make a full disclosure to his wife. The majority's position allows him to circumvent his duty if he receives an enforceable agreement merely by obtaining his wife's signature on the agreement without making a full disclosure to her and then taking some action in reliance on the agreement. According to the dissent, the husband gave the wife inadequate information and therefore unjustifiably relied upon the agreements.[40]

Although the same test was stated in both cases, *Hadley* required the husband to comply with only minimal duties when compared with *Friedlander*. *Hadley* allows a spouse to enforce an agreement when he or she makes a general disclosure of assets to the other spouse and the other spouse has had an opportunity to receive independent advice, but has not in fact done so. In addition, it allows those circumstances to be balanced with others to determine whether there was a fair marital agreement.

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parties to an antenuptial agreement reared their families and accumulated their property in the same rural community).

36. *Hamlin*, 44 Wn. 2d at 866, 272 P.2d at 133; *In re* Estate of Gelb, 425 Pa. 117, 228 A.2d 367, 372 (1967) (dissenting opinion).

37. 88 Wn. 2d at 651, 655, 565 P.2d at 791, 793.

38. *Id.* at 655, 565 P.2d at 793. A survey of the applicable Washington case law failed to disclose any prior cases in which reliance was the determinative factor. *Id.*

39. *Id.* at 669, 565 P.2d at 801. The dissent did not speculate on whether "an estoppel could be urged in specific cases as to third persons," because the record showed no justifiable reliance by third persons. *Id.*

40. *Id.* at 669, 565 P.2d at 801. *See* Leonard v. Washington Employers, Inc., 77 Wn. 2d 271, 461 P.2d 538 (1969). In *Leonard*, the court stated that equitable estoppel is inapplicable where both parties have the same means of ascertaining the truth. Equitable estoppel would, however, apply to a spouse with access to the truth who attempted to enforce an agreement upon an uninformed spouse who was without means of ascertaining the truth. *Id.* at 280, 461 P.2d at 544.

III. SUBSEQUENT CASE LAW

Hadley satisfied neither those practitioners who have relied upon the stringent *Friedlander* test nor those desiring a new, less demanding test of validity. The court created great confusion by failing to make explicit its ad hoc approach. The confusion is evidenced by the decisions in *In re Cohn*[41] and *Whitney v. Seattle-First National Bank*.[42]

In *Cohn,* the court of appeals applied the validity standards less rigidly than did the supreme court in *Hamlin* and *Hadley,* and far less rigidly than it did in *Friedlander*. The *Cohn* court stated that the full disclosure requirement is met if the wife had knowledge of the exact financial status of her husband's resources or the "circumstances were such that she reasonably could have had such knowledge."[43] The court then examined the plaintiff wife's ability to determine intelligently that she desired to enter into an antenuptial contract and concluded that she could have had knowledge of her husband's resources. It considered the couple's meretricious relationship prior to the agreement[44] and the wife's intelligence.[45] The court stated that the husband's financial status had been discussed to such a degree that the attorney had enough information to draft the agreement, implying that the wife also should have had enough information. To bolster its conclusion, the court noted that the agreement referred to a tax loss involving a carry-over of separate funds, and that material relating to the husband's separate property was left in the house in a desk accessible to both parties.[46]

41. 18 Wn. App. 502, 569 P.2d 79 (1977).
42. 90 Wn. 2d 105, 579 P.2d 937 (1978). *See* note 31 and accompanying text *supra.*
43. *Id.* at 508, 569 P.2d at 83. The court suggested that *Hadley* and *Friedlander* subscribed to the proposition that sufficient disclosure occurs when there is circumstantial evidence indicating that one spouse reasonably should know the exact financial status of the other. *Id.* at 507, 569 P.2d at 82. Arguably, this reduces the quantum of proof necessary to meet the burden of proof imposed on the husband by R.C.W. § 26.16.210, which provides that "[i]n every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be on the party asserting the good faith." WASH. REV. CODE § 26.16.210 (1976). For support of tests similar to *Cohn,* see Del Vecchio v. Del Vecchio, 143 So. 2d 17 (1962) (wife bound by antenuptial agreement notwithstanding the husband's failure to disclose if "she had or reasonably should have had a general and approximate knowledge of the character and extent of his property"); 2 A. LINDEY, *supra* note 4, § 90, at 84, *cited in Friedlander,* 80 Wn. 2d at 300, 494 P.2d at 213.
44. 18 Wn. App. at 508, 569 P.2d at 83.
45. *Id.* at 503, 569 P.2d at 80. The wife had completed approximately two-thirds of a bachelor's degree.
46. *Id.* at 508, 569 P.2d at 83.

Neither *Friedlander* nor *Hadley* held that accessibility to pertinent information satisfies the disclosure standard. In *Cohn,* however, the court of appeals suggested that a spouse must affirmatively seek information to be protected by the disclosure standards. The court also unexpectedly referred to independent advice as advice that, if given, is from an independent party.[47] *Friedlander* and *Hadley* required some contact with an independent source of advice, but the appellate court in *Cohn* rejected that requirement in cases where advice is neither provided by one spouse nor sought and obtained by the other.

Cohn is an example of a divergent interpretation resulting from the lack of clarity in *Hadley*. In *Whitney,* however, the Washington Supreme Court attempted to make *Hamlin, Friedlander,* and *Hadley* consistent.[48] The court stated that there are alternative methods for obtaining a valid agreement executed between spouses or prospective spouses, reiterating the *Hamlin* standards. If the agreement is fair and reasonable, the *Whitney* court held that there is no absolute requirement of "competent, independent advice of counsel, or that [a spouse] be specifically informed of [the] right to seek the same."[49] Thus, far from making the law harmonious, the unanimous *Whitney* court left unanswered the critical question raised by *Hadley* and *Cohn* as to what constitutes independent counsel and full disclosure.[50]

IV. CONCLUSION

Hadley relaxed the formal requirements applied to validate property status agreements executed between a husband and wife. The court failed to articulate its actual test, consisting of an ad hoc determination of fairness. Individuals in a marital or antenuptial confidential relationship should be allowed to plan for the future with a degree of certainty.[51] The court may facilitate marital planning ei-

47. *Id.* at 509, 569 P.2d at 83.
48. 90 Wn. 2d at 109–10, 579 P.2d at 939.
49. *Id.* at 111, 579 P.2d at 940.
50. The court failed entirely to mention *Cohn,* and failed to examine the sufficency of advice and disclosure upheld in *Hadley.*
51. In the past, however, the court has pointed out that there is a strong state interest in controlling separation agreements which may militate against self-determination by the contracting couple. Decker v. Decker, 52 Wn. 2d 456, 326 P.2d 332 (1959). The court stated,

> Certain language in some marital-relations decisions of this and other courts appears to emphasize unduly the contractual rights of the parties in the settlement

ther by actually applying the test stated in *Hadley* and *Friedlander* or by enunciating a less rigid balancing approach enumerating the circumstances it will consider.

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of their marital difficulties by agreement or contract. . . .

. . . .

It is clear that the parties to a divorce action cannot foreclose the public interest in their marital responsibilities by a contract or agreement of settlement.

Id. at 464–65, 326 P.2d at 336–37 (dictum). *See* Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500, 501 (1951) ("There are three parties to a marriage contract—the husband, the wife, and the state."). *But see* Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972). In *Posner*, the court recognized that the sanctity of marriage has greatly eroded, in spite of the state's vital interest. It held that antenuptial agreements settling alimony and property rights of the parties upon divorce are not void *ab initio* as against public policy. *Id.*