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Ohio's Love-Hate Relationship with Marital Agreements: Why Ohio Should Lift Its Prohibition on Postnuptial Agreements

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OHIO’S LOVE-HATE RELATIONSHIP WITH MARITAL AGREEMENTS: WHY OHIO SHOULD LIFT ITS PROHIBITION ON POSTNUPTIAL AGREEMENTS

NATASHA WASIL*

ABSTRACT

Ohio has been accepting of prenuptial agreements since its landmark decision in *Gross v. Gross* in 1984, declaring them to be not void *per se* as being against public policy. Unfortunately, Ohio’s evolution of the law regarding marital agreements has remained at a stand-still since *Gross*. Through the twenty-first century, a majority of states have responded to the evolution of marriage by enacting legislation, or judicially by court order, to allow spouses to enter into contracts after marriage to allocate the division of property and legal obligations of the couple in the event of divorce, commonly known as “postnuptial agreements.” Ohio remains in the minority of jurisdictions that strictly prohibit spouses from entering into postnuptial agreements. Ohio Revised Code Section 3103.06 forbids a husband and wife from altering their legal relations after marriage; thus rendering postnuptial agreements void and unenforceable in Ohio. The antiquated language and patriarchal principles of Ohio’s current statute should be revised to modernize Ohio’s law in conformity with other states. Further, Ohio Revised Code Section 3103.06 violates a party’s freedom to contract, and should be amended to allow spouses to alter their legal relations with the enactment of certain conditions to protect the fiduciary relationship from fraud, duress, undue influence, and unconscionability.

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I. INTRODUCTION

Ask anyone about the likelihood of a successful marriage in the United States, and they will tell you the old adage that “fifty percent of marriages end in divorce.” While this may have been true at one time, that is simply no longer the case¹ – much to the credit of various marital agreements available to couples that take the uncertainty out of marriage.²

Marriage and divorce rates in the United States have both decreased in the last ten years.³ The decrease in divorce rates has been linked to an increase in the duration of recent marriages.⁴ On average, Americans are waiting until they are older to get

¹ Renée Peltz Dennison, *Do Half of All Marriages Really End in Divorce?*, PSYCH. TODAY (Apr. 24, 2017), <https://www.psychologytoday.com/us/blog/heart-the-matter/201704/do-half-all-marriages-really-end-in-divorce> [<https://perma.cc/BMJ9-5DZS>].

² Heather L. Locus, *Why Prenuptial and Postnuptial Agreements Lead to Stronger Marriages and Prevent Disastrous Divorces*, FORBES (Sept. 23, 2018, 9:00 AM), <https://www.forbes.com/sites/heatherlocus/2018/09/23/why-prenuptial-and-postnuptial-agreements-lead-to-stronger-marriages-and-prevent-disastrous-divorces/#7af92f1164880> [<https://perma.cc/2LTL-HZHG>].

³ *U.S. Marriage and Divorce Rates by State*, U.S. CENSUS BUREAU (Jan. 15, 2020), <https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state.html> [<https://perma.cc/NR8J-YDEL>].

⁴ “[A]s the divorce rate is calculated as a percentage of marriages, the 18% fall in divorces between 2008 . . . and 2016 isn’t merely a consequence of fewer marriages. The implication is that contemporary unions are lasting longer than those of 10 years ago.” Johnny Wood, *The United States Divorce Rate Is Dropping, Thanks to Millennials*, WORLD ECON. F. (Oct. 5, 2018),

married, contributing to low marriage rates.⁵ Prospective spouses are increasingly prioritizing their careers and financial stability before entering into marriage.⁶ As older and more sophisticated marriage partners, these couples are more likely to want to prearrange their legal obligations in case of separation or divorce.⁷

Prenuptial, postnuptial, and separation agreements each seek to determine a couple's rights and obligations upon divorce.⁸ The distinguishing factor between such agreements is timing. Prenuptial agreements prospectively address the separation and division of property in contemplation of future marriage;⁹ whereas postnuptial agreements retrospectively provide for the division of property after marriage. Postnuptial agreements are entered into, and only become effective, after marriage. Separation agreements are similarly entered into after marriage, but with an important distinction from postnuptial agreements. Separation agreements are entered into with the intent to *end* the marriage.¹⁰ By contrast, spouses entering into prenuptial agreements and postnuptial agreements share a common goal to *preserve* the marriage.¹¹

<https://www.weforum.org/agenda/2018/10/divorce-united-states-dropping-because-millennials/> [<https://perma.cc/5VPJ-QQL5>].

⁵ Marital ages have steadily increased in the United States over the past century. In 2019, the median age at first marriage for men and women was 29.8 years and 28.0 years, respectively. In 1990, the median age at first marriage for men and women was 26.1 and 23.9 years, respectively. By 1970, the median marital age was significantly lower, at 23.2 and 20.8 years, respectively. See *Historical Marital Status Tables: Table MS-2. Estimated Median Age at First Marriage, by Sex: 1890 to the Present*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/families/marital.html> (last revised Nov. 23, 2020) (click on "Table MS-2" under the list of tables to access this Excel datasheet).

⁶ See Hillary Hoffower, *7 Ways Millennials are Changing Marriage, From Signing Prenups to Staying Together Longer Than Past Generations*, BUS. INSIDER (Feb. 4, 2020, 9:43 AM), <https://www.businessinsider.com/how-millennials-are-changing-marriage-divorce-weddings-prenups-2019-5> [<https://perma.cc/7ZQG-CNJ5>] ("[Millennials] are predisposed to protect their interests, especially when it comes to the assets and debt they've had more time to accumulate before marrying."); see also Sandra Alcaide & Lynne Marie Kohm, *Obergefell: A Game-Changer for Women*, 14 AVE MARIA L. REV. 99, 103 (2016) ("[T]he marriage decline has been particularly pronounced among millennials, where the marriage rate dropped from sixty-eight percent to twenty-six percent between 1960 and 2008.").

⁷ See generally Jessica Dickler, *Before Saying 'I Do,' More Millennials Say 'Prenup,'* CNBC (Nov. 25, 2016, 9:00 AM), <https://www.cnn.com/2016/11/25/before-saying-i-do-more-millennials-say-prenup.html> [<https://perma.cc/UXT3-82MK>]; Susan Shain, *The Rise of the Millennial Prenup*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/smarter-living/millennial-prenup-weddings-money.html> [<https://perma.cc/3U79-RVKR>].

⁸ Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 828 (2007).

⁹ *Id.*

¹⁰ PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01(1)(c) (AM. L. INST. 2002).

¹¹ *Id.* § 7.01(1)(b).

Prenuptial agreements have been commonly used for decades as safeguards for men and women who are cautious about entering into marriage, and remain a steady trend in marital law.¹² Postnuptial agreements, though not as common as prenuptial agreements, are an increasingly common tool for the protection of separate property. While the validity of prenuptial agreements is uniformly recognized across the United States,¹³ current law involving postnuptial agreements is sporadic, and lacks such uniformity.¹⁴ Nevertheless, the majority of jurisdictions treat postnuptial agreements as valid and enforceable contracts.¹⁵ State law varies considerably on the issue, with some states addressing the validity of postnuptial agreements by statute, and others by

¹² According to a 2016 survey of family lawyers, 51% of those surveyed saw an increase in prenuptial agreements requests by millennials. Approximately 62% of the respondents noticed an overall increase in the number of clients seeking prenuptial agreements during the past three years. *Prenuptial Agreements on the Rise Finds Survey*, CISION PR NEWSWIRE (Oct. 28, 2016), <https://www.prnewswire.com/news-releases/prenuptial-agreements-on-the-rise-finds-survey-300353444.html> [<https://perma.cc/P97U-VARP>].

¹³ Stephen T. Gary, *To Agree or Not to Agree: Treatment of Post-Nuptial Agreements Under Oklahoma Law*, 63 OKLA. L. REV. 779, 780 (2017); see also *Brewsough v. Brewsough*, 491 N.E.2d 748, 750 (Ohio Ct. Com. Pl. 1985) (noting that prenuptial agreements are recognized in every common-law jurisdiction).

¹⁴ *Id.*

¹⁵ Postnuptial agreements are valid in: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See ALA. CODE § 30-4-9 (2020); ALASKA STAT. § 13.12.213 (2020); CAL. FAM. CODE § 1500 (West 2015); COLO. REV. STAT. §§ 14-2-307 (2014); 14-2-309; FLA. STAT. § 732.702 (2020); 750 ILL. COMP. STAT. 5/502 (2018); KY. REV. STAT. ANN. § 403.180(1) (LexisNexis 1972); LA. CIV. CODE ANN. art. 2329 (1980); MASS. GEN. LAWS ch. 209, § 2 (1963); MICH. COMP. LAWS § 557.23 (1982); MINN. STAT. § 519.11(2005); MISS. CODE ANN. § 93-3-1 (1968); NEV. REV. STAT. § 123.070 (2017); N.M. STAT. ANN. § 40-2-2 (1953); N.C. GEN. STAT. 52-10 (2013); *Tibbs v. Anderson*, 580 So.2d 1337, 1339 (Ala. 1991); *In re Estate of Harber*, 449 P.2d 7, 16 (Ariz. 1969); *Stewart v. Combs*, 243 S.W.3d 294, 299–300 (Ark. 2006); *Perkins v. Sunset Tel. & Tel. Co.*, 103 P. 190, 193–94 (Cal. 1909); *In re Estate of Lewin*, 595 P.2d 1055, 1057 (Colo. App. 1979); *Bedrick v. Bedrick*, 17 A.3d 17, 21 (Conn. 2011); *Conigliaro v. Conigliaro*, No. CN92-6566, 1992 WL 435703, at *7 (Del. Fam. Ct. Sept. 30, 1992); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982); *Balogh v. Balogh*, 332 P.3d 631, 642 (Haw. 2014); *Sword v. Sweet*, 92 P.3d 492, 497 (Idaho 2004); *Flansburg v. Flansburg*, 581 N.E.2d 430, 433 (Ind. Ct. App. 1991); *In re Marriage of Traster*, 291 P.3d 494, 501 (Kan. Ct. App. 2012); *Campbell v. Campbell*, 377 S.W.2d 93, 94 (Ky. Ct. App. 1964); *McGeehan v. McGeehan*, 167 A.3d 579, 597, 599 (Md. 2017); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961 (Mass. 2010); *Lipic v. Lipic*, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003); *Bronfman v. Bronfman*, 645 N.Y.S.2d 20, 21 (App. Div. 1996); *Stoner v. Stoner*, 819 A.2d 529, 533 (Pa. 2003); *Keith v. Keith*, 156 N.W. 910, 911 (S.D. 1916); *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004); *Nesmith v. Burger*, 64 S.W.3d 110, 119 (Tex. Ct. App. 2001); *Pierce v. Pierce*, 994 P.2d 193, 198 (Utah 2000); *Allen v. Allen*, 789 S.E.2d 787, 791 (Va. Ct. App. 2016); *In re Parentage of G.W.-F.*, 285 P.3d 208, 215 (Wash. Ct. App. 2012); *Amber J. v. Shannon J.*, No. 16-0289, 2017 WL 2229978, at *3 (W. Va. May 22, 2017); *Button v. Button*, 388 N.W.2d 546, 550 (Wis. 1986); *Long v. Long*, 413 P.3d 117, 122–23 (Wyo. 2018).

common-law. For example, Illinois, Minnesota, and California each have taken a legislative approach to addressing this issue.¹⁶ Connecticut and Massachusetts, discussed in further detail in Part VI, have addressed the issue judicially.¹⁷

Of the states that have addressed the issue, Ohio remains in the minority of jurisdictions that do not enforce postnuptial agreements as valid contracts.¹⁸ Currently, only four other states – Iowa, Maine, Nebraska, and New Jersey also disfavor postnuptial agreements.¹⁹ Ohio takes a strict approach to the validity of postnuptial agreements, expressly prohibiting them by statute.²⁰ Ohio statutorily allows a husband and wife to enter into a contract with one another,²¹ so long as it does not alter their legal relations.²² A contract between spouses altering their legal relations is only valid in Ohio if it is a separation agreement that contemplates spousal or child support.²³

In 2016, Ohio's divorce rate was nearly double the national average.²⁴ There were a total of 69,177 marriages across Ohio, of which approximately 67% were first

¹⁶ See 750 ILL. COMP. STAT. 5/502(b) (2018) (encouraging the use of postnuptial agreements to “promote amicable settlement of disputes”); MINN. STAT. § 519.11(1) (2005) (conditioning postnuptial agreements on full and fair disclosure of earnings and property and opportunity to consult with independent legal counsel); CAL. FAM. CODE § 721(b) (West 2020) (imposing rebuttable presumption of undue influence).

¹⁷ See generally *Bedrick*, 17 A.3d at 21; *Ansin*, 929 N.E.2d at 961.

¹⁸ Approximately 37 states have addressed, whether legislatively or judicially, the validity of postnuptial agreements. See statutes and cases cited *supra* note 15.

¹⁹ See, e.g., *Hussemann ex rel. Ritter v. Hussemann*, 847 N.W.2d 219, 224 (Iowa 2014) (“Although [the Iowa] legislature authorizes antenuptial agreements, it makes no such allowance for postnuptial agreements.”); *Devney v. Devney*, 886 N.W.2d 61, 68 (Neb. 2016) (holding postnuptial agreements are void at common law and noting Nebraska statutes do not authorize postnuptial agreements unless entered into for purposes of separation); *Pacelli v. Pacelli*, 725 A.2d 56, 62 (N.J. Super. Ct. App. Div. 1999) (holding postnuptial agreements are inherently coercive and must be closely scrutinized, but declining to regard postnuptial agreements as unenforceable in general); see also Susan L. Racey & Joseph M. Ferraro, *The Postnuptial Agreement Renaissance: Can Ohio Emerge From the Dark Ages?*, 29 PROB. L.J. OHIO 195, 195 (2019).

²⁰ OHIO REV. CODE ANN. § 3103.06 (LexisNexis 1953) (“A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.”).

²¹ *Id.* § 3103.05.

²² *Id.* § 3103.06.

²³ *Id.* But cf. *In re Estate of Harber*, 449 P.2d 7, 16 (Ariz. 1969) (permitting spouses to enter into postnuptial agreements without being incident to a contemplated separation or divorce).

²⁴ In 2018, Ohio's divorce rate was 2.9 divorces per 1,000 marriages. The same year, the national divorce rate was 7.7 divorces per 1,000 marriages. *Compare Marriage and Divorce Reports: Vital Statistics (2018)*, OHIO DEP'T OF HEALTH (June 9, 2020), <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/vital-statistics/resources/vs->

marriages.²⁵ In the same year, Ohio issued a total of 35,190 divorces.²⁶ Limiting spouses in Ohio to only prenuptial agreements has not furthered the state's public policy goal of discouraging divorce.²⁷ Postnuptial agreements are a valuable tool that Ohio should adopt in an effort to address the increasing divorce rate throughout the state. Overall, states that have recognized the validity of postnuptial agreements have either lower divorce rates than the national average, or divorce rates that do not differ significantly from the national average.²⁸

This Note criticizes Ohio's refusal to recognize the validity of postnuptial agreements and argues that Ohio should join the majority of jurisdictions that regard postnuptial agreements as valid and enforceable contracts. By remaining in the minority, Ohio denies its citizens the right to a valuable tool in family law that may provide an opportunity to lower the state's increasing divorce rate.

Part II reviews the history of prenuptial agreements in Ohio, the standards under which prenuptial agreements are held to be enforceable contracts, and Ohio's refusal to enforce postnuptial agreements. Part III argues that Ohio's statutory prohibition on postnuptial agreements violates basic principles of contract law, and in particular, limits parties' freedom to contract. A review of postnuptial agreement standards from other jurisdictions provides insight for determining the standard Ohio should adopt in enforcing postnuptial agreements. Part IV offers a standard best suited to protect the fiduciary relationship of spouses in Ohio without sacrificing the freedom to contract. Part V analyzes postnuptial agreements from a public policy standpoint and counters Ohio's primary rationale in prohibiting them – that postnuptial agreements violate public policy by encouraging divorce. This Part further discusses the antiquated language of Ohio's statute prohibiting postnuptial agreements and the need for revision due to gender equality and the legalization of same-sex marriage. This Note concludes with Part VI, proposing draft legislation for Ohio to lift its prohibition on postnuptial agreements, and instead adopt a standard for enforceability that comports with Ohio's public policy rationale. Part VII offers a brief conclusion.

II. BACKGROUND

A. History of Prenuptial Agreements in Ohio

In 1846, the Supreme Court of Ohio declared that prenuptial agreements, commonly referred to as antenuptial agreements, were “in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes – contentions about property, and especially allowances to the wife.”²⁹ Ohio has long held that “prenuptial agreements controlling the distribution of assets upon

marriedivorce2018 (click on “download” to access the data in Excel format), with U.S. CENSUS BUREAU, *supra* note 3.

²⁵ Of the 65,660 marriages that occurred in Ohio in 2018, 46,266 were first marriages for the bride, and 45,858 were first marriages for the groom. See OHIO DEP'T OF HEALTH, *supra* note 24.

²⁶ *Id.*

²⁷ *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984).

²⁸ See generally U.S. CENSUS BUREAU, *supra* note 5.

²⁹ *Stilley v. Folger*, 14 Ohio 610, 649 (1846).

the death of a spouse may be enforceable.”³⁰ In *Juhasz v. Juhasz*, the Supreme Court of Ohio held that “a prenuptial contract would be enforced upon the death of a spouse if it was voluntarily entered into and if the provision for the surviving spouse was fair and reasonable under all the circumstances.”³¹ Even if a provision is wholly disproportionate, the agreement may still be enforced if voluntarily entered into with full disclosure or knowledge.³²

The Supreme Court of Ohio later set forth certain conditions for the validity of prenuptial agreements in *Gross v. Gross*, after determining that prenuptial agreements were not void as being against public policy.³³ Upon a review of several public policy factors, the court concluded that the “modern trends of marriage and divorce across the country dictate that reasonable laws must be forthcoming to accommodate these changing social attitudes.”³⁴ The court noted that these types of agreements may reasonably “tend to promote or facilitate marriage, rather than encourage divorce.”³⁵ Ohio law currently does not permit prenuptial agreements to be changed or revised after marriage.³⁶

B. Ohio's Standard for Prenuptial Agreements: *Gross v. Gross*

In *Gross v. Gross*, the Supreme Court of Ohio held that prenuptial agreements are “not void *per se* as being against public policy.”³⁷ In reaching this conclusion, the court was influenced by contemporary social changes, such as the greater frequency of divorce, the decline in marriage rates, the adoption by a number of states of the provisions of the Uniform Marriage and Divorce Act, and most significantly, the widespread adoption of “no fault” divorce laws.³⁸ *Gross* set forth three conditions for the validity and enforceability of prenuptial agreements in Ohio. Such agreements are enforceable if: (1) “they have been entered into freely without fraud, duress, coercion

³⁰ *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1345 (Ohio 1994).

³¹ *Id.*

³² *Juhasz v. Juhasz*, 16 N.E.2d 328, 331 (Ohio 1938).

³³ The *Gross* court stated:

We, therefore, join those other jurisdictions that have expressed the growing trend of legal thought in this country that provisions contained within antenuptial agreements providing for the disposition of property and awarding sustenance alimony upon a subsequent divorce of the parties are not void *per se* as being against public policy.

Gross v. Gross, 464 N.E.2d 500, 506 (Ohio 1984).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *Hoffman v. Dobbins*, No. 24633, 2009 WL 3119635, at *2 (Ohio Ct. App. Sept. 30, 2009).

³⁷ *Gross*, 464 N.E.2d at 506.

³⁸ *Id.* at 505.

or overreaching”; (2) “there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the prospective spouse’s property”; and (3) “the terms do not promote or encourage divorce or profiteering by divorce.”³⁹ Upon judicial review, prenuptial agreements must meet the general tests of fairness, and must be construed in cognizance of the marital fiduciary relationship.⁴⁰ Parties must act in good faith, with a high degree of fairness and disclosure of all circumstances which materially bear on the prenuptial agreement.⁴¹

Prenuptial agreements that are entered into as a result of fraud, duress, or coercion are void and unenforceable. Agreements that are the product of overreaching, either by a spouse’s artifice or cunning to outwit or cheat the other, or by significant disparity in the understanding of the nature of the transaction, are similarly invalid.⁴² According to *Gross*, the elements of the second condition may be satisfied either by an attachment of a listing of the assets of each of the parties to the agreement, or alternatively, evidence of full disclosure by other means.⁴³ The aim of *Gross*’s third condition is to encourage a fair and equitable distribution of property upon separation that does not violate public policy.⁴⁴ The third condition seeks to eliminate profiteering by divorce by avoiding scenarios where parties enter into prenuptial agreements that provide a significant windfall to the benefit of one spouse upon divorce, and within a short period of time the benefitting party abandons the marriage.⁴⁵

C. Ohio’s Treatment of Postnuptial Agreements

Ohio’s adoption of the three-part test in *Gross* was a product of the increasingly adopted—and now universal—view that prenuptial agreements are not against public policy. However, unlike the majority of jurisdictions across the United States, Ohio arbitrarily continues to fail to recognize the validity of postnuptial agreements. Ohio expressly prohibits postnuptial agreements and amendments to existing prenuptial agreements by statute.⁴⁶ Ohio courts have strictly applied Ohio Revised Code Section 3103.06 in holding that postnuptial agreements are void and unenforceable.

In *Brewsaugh v. Brewsaugh*, the Highland County Probate Court refused to enforce a postnuptial agreement created by a husband and wife while living in New Mexico.⁴⁷ The husband was a long-time resident of Ohio, maintained an Ohio driver’s

³⁹ *Id.* at 506.

⁴⁰ *Id.* at 508.

⁴¹ *Id.*

⁴² *Id.* at 506.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; see, e.g., *In re Nagy*, No. 07-99-0303-CV, 2000 Tex. App. LEXIS 3015, at *1–2 (Tex. Ct. App. May 9, 2000) (filing for divorce within two months of signing postnuptial agreement).

⁴⁶ OHIO REV. CODE ANN. § 3103.06 (LexisNexis 1953).

⁴⁷ *Brewsaugh v. Brewsaugh*, 491 N.E.2d 748, 751 (Ohio 1985).

license, and filed his income tax returns in Ohio.⁴⁸ After marriage, the couple resided in Ohio, but often spent winters in New Mexico.⁴⁹ In light of the fact that both spouses were domiciled in Ohio, the Court held that the postnuptial agreement created was invalid and unenforceable under Section 3103.06.⁵⁰ Similarly, the Ninth District Court of Appeals held that an amendment to a prenuptial agreement that occurred after marriage was void and unenforceable for altering the legal relations of a husband and wife in violation of Section 3103.06.⁵¹

Ohio recognizes only two exceptions to Ohio Revised Code Section 3103.06. First, the statute permits spouses to alter their legal relations if entering into a separation agreement.⁵² The separation agreement must expressly state that the parties are to separate, or live separate and apart in the future, or it risks coming within the express prohibition in Ohio Revised Code Section 3103.06.⁵³ The second exception is that an oral prenuptial agreement that is memorialized in writing after the marriage will not violate the statutory prohibition of Section 3103.06 if the oral agreement is referred to in the written contract and the writing states that it is a memorandum of the oral agreement.⁵⁴ Reducing an oral contract made prior to marriage to writing satisfies the statute of frauds, rendering the agreement compliant with Section 3103.06. Therefore, it is simply a valid prenuptial contract which is reduced to writing after marriage.⁵⁵

Ohio's legislative history lacks an explanation for the prohibition of postnuptial agreements.⁵⁶ The rationale may be inferred from Ohio's public policy concerns of encouraging divorce, as stated in *Gross*.⁵⁷ Others have assumed that the primary reason is protection of the fiduciary relationship of spouses.⁵⁸ More specifically, a concern is that the interdependence implicit in a marital relationship may easily result

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 751–52.

⁵¹ *Hoffman v. Dobbins*, No. 24633, 2009 WL 3119635, at *2 (Ohio Ct. App. Sept. 30, 2009).

⁵² OHIO REV. CODE ANN. § 3103.06 (LexisNexis 1953).

⁵³ *Brewsaugh*, 491 N.E.2d at 750; *see also* *Smith v. Smith*, 112 N.E.2d 346, 348 (Ohio Ct. Com. Pl. 1953).

⁵⁴ *In re Estate of Weber*, 167 N.E.2d 98, 103 (Ohio 1960).

⁵⁵ *Brewsaugh*, 491 N.E.2d at 750.

⁵⁶ Ohio cases do not provide any reasoning or analysis as to the legislature's intent in enacting § 3103.06. *See, e.g., Brewsaugh*, 491 N.E.2d at 750; *see also* *Gary*, *supra* note 13, at 795.

⁵⁷ One element for the validity of prenuptial agreements in Ohio is that “the terms do not promote or encourage divorce or profiteering by divorce.” *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984).

⁵⁸ *See, e.g., Williams*, *supra* note 8, at 843 (citing STANLEY MORGANSTERN & BEATRICE SOWOLD, *BALDWIN'S OHIO PRACTICE: DOMESTIC RELATIONS LAW* § 12:17 (2003 & Supp. 2007) (“Married persons are embroiled in a highly delicate relationship of trust and interdependence. . . . A contract entered during marriage is likely not to be entered at arms’ length’.”)).

in one spouse taking advantage of the other or imposing a postnuptial agreement on the other.⁵⁹ By prohibiting postnuptial agreements, Ohio purports to limit the potentiality for coercion or duress that may arise between spouses during negotiation.⁶⁰ However, other jurisdictions have upheld postnuptial agreements while adequately protecting the fiduciary relationship. For example, California has adopted a rebuttable presumption of duress based on similar concerns that must first be overcome to enforce a postnuptial agreement.⁶¹ By being overly cautious, Ohio in turn severely limits married parties' ability to contract, which otherwise contravenes their rights to freely contract were they not married.

III. OHIO'S PROHIBITION ON POSTNUPTIAL AGREEMENTS VIOLATES BASIC CONTRACTUAL PRINCIPLES

The validity of postnuptial agreements is consistent with the basic notion of contract law that two consensual parties are free to contract with one another, absent undue influence, fraud, mistake, or duress.⁶² Similar to prenuptial agreements, postnuptial agreements are contracts that must be analyzed in accordance with the well-settled principles of contract law. It is well-established that prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria applicable to other types of contracts.⁶³ "Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements."⁶⁴

Ohio already uses a contractual approach in determining the validity of prenuptial agreements.⁶⁵ In addition to the requirements set forth in *Gross v. Gross*, Ohio prenuptial agreements must include all the elements of a contract, including offer, acceptance, consideration, manifestation of mutual assent, and contractual capacity.⁶⁶ Prior to considering whether a "prenuptial agreement meets the *Gross* conditions, a court must implicitly conclude that the prenuptial agreement contains all the elements of an ordinary contract."⁶⁷ "If a prenuptial agreement is not, in fact, a valid contract, the court need not address the *Gross* conditions."⁶⁸

⁵⁹ *Id.*

⁶⁰ Such forms of duress are "rarely discernible by a court and are most commonly not witnessed by a disinterested third party." *Id.*

⁶¹ *Id.* at 804; *see, e.g.*, CAL. FAM. CODE § 721(b) (West 2020).

⁶² *See generally* Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994).

⁶³ Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

⁶⁴ *Id.*

⁶⁵ *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at *3 (Ohio Ct. App. July 10, 2008) (citing *Fletcher*, 628 N.E.2d at 1346).

⁶⁶ *Id.* (citing *Kostelnik v. Helper*, 770 N.E.2d 58, 61 (Ohio 2002)).

⁶⁷ *Id.*

⁶⁸ *Id.*

Ohio's current statutory prohibition on postnuptial agreements violates the same fundamental contractual principles Ohio has long recognized and adopted for prenuptial agreements. If the requisite elements of offer, acceptance, and consideration exist, together with the mutual assent of both parties, spouses should be free to enter into a contract, even one that alters their legal relations.⁶⁹ In lifting its ban on postnuptial agreements, Ohio should adopt a preliminary contractual standard similar to the existing standard for prenuptial agreements. Thus, postnuptial agreements would be valid so long as they comport with general contractual principles, including offer, acceptance, consideration, capacity, and most significantly, mutual assent.

After determining that the same preliminary contractual analysis should apply to postnuptial agreements in Ohio, the more significant question is which conditions Ohio should adopt in recognizing the validity of postnuptial agreements. Courts must carefully scrutinize postnuptial agreements to determine whether they are inequitable or unconscionable in light of the fiduciary nature of the marital relationship. In determining the correct standard to apply, a review of current standards from various jurisdictions is necessary.

While many states address the issue legislatively with varying approaches,⁷⁰ Connecticut and Massachusetts are the most recent states to judicially address the validity of postnuptial agreements, with similar, yet discernible standards.⁷¹

A. *The Bedrick Standard*

In 2011, Connecticut adopted a contractual approach to the validity and enforcement of postnuptial agreements aimed at creating a stricter standard than prenuptial agreements.⁷² The Supreme Court of Connecticut held that postnuptial agreements “are valid and enforceable and generally must comply with contract principles.”⁷³ The decision deviated from Connecticut's existing standard for prenuptial agreements by imposing additional restrictions for postnuptial agreements that require a thorough examination of such agreements upon judicial review, including that the terms be “both fair and equitable at the time of execution,” and “not unconscionable at the time of dissolution.”⁷⁴

⁶⁹ Some courts are split as to whether consideration is a necessary element for the validity of postnuptial agreements, and if so, what constitutes sufficient consideration. *Compare* Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004) (holding that forbearance from impending separation or divorce may be adequate consideration for a postnuptial agreement), *with* Simmons v. Simmons, 249 S.W.3d 843, 845, 846–47 (Ark. Ct. App. 2007) (holding twenty-five year marriage was not valid consideration for a postnuptial agreement as past consideration could not support a current promise).

⁷⁰ *See infra* Part III(C).

⁷¹ *See* Bedrick v. Bedrick, 17 A.3d 17 (Conn. 2011); Ansin v. Craven-Ansin, 929 N.E.2d 955 (Mass. 2010).

⁷² *Bedrick*, 17 A.3d at 23.

⁷³ *Id.* at 21.

⁷⁴ *Id.*

Connecticut's standard for postnuptial agreements is subject to greater scrutiny than Connecticut's law governing prenuptial agreements.⁷⁵ Postnuptial agreements have a greater risk for coercion than prenuptial agreements due to the fiduciary relationship between spouses.⁷⁶ Connecticut recognized this risk in *Bedrick v. Bedrick* by requiring parties to postnuptial agreements to contract under different conditions from either prospective spouses or spouses who have intended to dissolve their marriage.⁷⁷ Consequently, Connecticut subjects postnuptial agreements to special scrutiny to safeguard spouses from undue influence, duress, or coercion.⁷⁸ Spouses may be less cautious in contracting with one another than they would be with a third-party.⁷⁹ "With lessened caution comes greater potential for one spouse to take advantage of the other."⁸⁰ Spouses owe a fiduciary duty to each other during the marriage. Connecticut's standard reflects the fiduciary nature of the marital relationship by refusing to treat postnuptial agreements as arm's length transactions,⁸¹ but rather marital agreements subject to careful scrutiny.

1. Fair and Equitable Terms

As a result of the unique nature of the marital relationship, *Bedrick* demands that the terms of postnuptial agreements be fair and equitable at the time of execution.⁸² This condition requires that the agreement is made voluntarily, "without any undue influence, fraud, coercion, duress, or similar defect."⁸³ The Supreme Court of Connecticut adopted a totality of the circumstances test to determine whether the terms of a postnuptial agreement are fair and equitable at the time of execution.⁸⁴ A court

⁷⁵ *Id.* at 23.

⁷⁶ "Prospective spouses share a 'confidential relationship'; but spouses share the institution of marriage, 'one of the most fundamental of human relationships.'" *Id.* at 26 (first quoting *Friezo v. Friezo*, 914 A.2d 533, 549 (Conn. 2007); and then quoting *Davis v. Davis*, 175 A. 574, 577 (Conn. 1934)).

⁷⁷ *Id.* at 27.

⁷⁸ "The circumstances surrounding [postnuptial] agreements in contract are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage." *Id.* at 26.

⁷⁹ *Id.* at 27.

⁸⁰ *Id.*

⁸¹ "[P]ostnuptial agreements 'should not be treated as mere "business deals.'" They recognize that, just like prospective spouses, 'parties to these agreements do not quite deal at arm's length but . . . stand in a relation of mutual confidence and trust.'" *Id.* at 26 (quoting *Stoner v. Stoner*, 819 A.2d 529, 533 (Pa. 2003)).

⁸² *Id.* at 27; see also *Bratton v. Bratton*, 136 S.W.3d 595, 601 (Tenn. 2004) (subjecting postnuptial agreements to close scrutiny to ensure that they are fair and equitable due to the confidential relationship between husband and wife).

⁸³ *Bedrick*, 17 A.3d at 27.

⁸⁴ *Id.* at 28.

may consider the nature and complexity of the agreement's terms;⁸⁵ the extent and disparity in marital assets; the parties' respective age, sophistication, education, employment, experience, prior marriage, or other traits potentially affecting the ability to understand the agreement; the amount of time available to each spouse to reflect upon the agreement; and each party's access to independent counsel.⁸⁶ Further supporting the fiduciary relationship between spouses, "each spouse must be given full, fair and reasonable disclosure of the amount, character, and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse."⁸⁷

2. Unconscionability

Under the *Bedrick* standard, if a court finds that unfairness exists after the totality of the circumstances analysis, it may still enforce a postnuptial agreement if the spouses knowingly contracted for an unequal distribution of assets at the time of dissolution.⁸⁸ *Bedrick* reinforces the principle that two contracting parties are bound by the terms of their agreement.⁸⁹ Absent unforeseen circumstances that render the agreement unconscionable at the time of enforcement, a postnuptial agreement will not be unconscionable simply for a contractually bargained-for uneven distribution of assets.⁹⁰ Marriage is innately subject to unforeseeable circumstances,⁹¹ as parties are "notoriously optimistic" about the likelihood of success of the marriage, and "notoriously bad at foreseeing the potential disputes that will arise during the marriage."⁹² While it is generally not feasible for prospective spouses to contract for all possible future events at the onset of the marriage, a postnuptial agreement will not be found unconscionable without the existence of significantly changed or unforeseen

⁸⁵ The Connecticut Supreme Court discussed the complexity factor in this way:

Although the length and complexity of a postnuptial agreement comprise one of many factors courts may consider in evaluating the enforceability of such an agreement, that factor is relevant only insofar as it bears on the question of whether the parties understood the agreement's terms at the time of execution.

Yun Zhou v. Hao Zhang, 223 A.3d 775, 791 (Conn. 2020) (citation omitted).

⁸⁶ *Id.* at 783.

⁸⁷ *Id.*

⁸⁸ "Unfairness or inequality alone does not render a postnuptial agreement unconscionable; spouses may agree on an unequal distribution of assets at dissolution." *Id.* at 792 (citing *Bedrick*, 17 A.3d at 23).

⁸⁹ See also *Lipic v. Lipic*, 103 S.W.3d 144, 150 (Mo. Ct. App. 2003) ("[T]he mere fact that hindsight may indicate the provisions of the agreement were improvident does not render the agreement unconscionable.").

⁹⁰ *Bedrick*, 17 A.3d at 28.

⁹¹ *Id.*

⁹² Williams, *supra* note 8, at 828.

circumstances from the time of execution of the agreement.⁹³ If the requisite elements of a contract are met, the court will refuse to inquire into the reasonableness of the bargain absent such circumstances that render the agreement unconscionable.

The doctrine of unconscionability seeks to “prevent oppression and unfair surprise.”⁹⁴ Contracts are unconscionable when an absence of meaningful choice exists on behalf of one party, coupled with contract terms that are unreasonably favorable to the other party.⁹⁵ Connecticut courts decide the question of unconscionability as a matter of law based on the facts and circumstances of the case.⁹⁶ In determining whether a postnuptial agreement is unconscionable at the time of dissolution, courts consider a change in circumstances that significantly affect the marital relationship, such as the birth of children, loss of employment, or relocation to a different state.⁹⁷

The postnuptial agreement at issue in *Bedrick* was held to be unconscionable. The parties had amended their postnuptial agreement multiple times; the most recent revision being approximately eighteen years before Mrs. Bedrick filed for divorce.⁹⁸ The postnuptial agreement provided that a cash settlement of \$75,000.00 was to be paid in lieu of alimony in the event of divorce.⁹⁹ At the time of dissolution, the marital estate was valued at over \$927,123.00.¹⁰⁰ The Supreme Court of Connecticut upheld the trial court’s determination of unconscionability due to drastically changed financial circumstances since the agreement was last modified in 1989.¹⁰¹ Since then, Mr. and Mrs. Bedrick had a child together, and Mr. Bedrick’s car wash business, which had initially prospered in the 1990s, had deteriorated financially by the 2000s.¹⁰²

B. *The Craven-Ansin Standard*

In *Ansin v. Craven-Ansin*, Massachusetts adopted a postnuptial agreement standard reminiscent of the *Bedrick* standard, with a few additional limitations. *Craven-Ansin* adopted five conditions for the validity of postnuptial agreements, including whether:

⁹³ *Bedrick*, 17 A.3d at 28.

⁹⁴ *Cheshire Mortg. Serv. v. Montes*, 612 A.2d 1130, 1135 (Conn. 1992).

⁹⁵ *Bender v. Bender*, 975 A.2d 636, 658 (Conn. 2009); *see also* *Lipic v. Lipic*, 103 S.W.3d 144, 149–50 (Mo. Ct. App. 2003) (“[A] post-nuptial agreement is unconscionable when ‘the inequality is so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.’”).

⁹⁶ *Bedrick*, 17 A.3d at 28.

⁹⁷ *Id.*

⁹⁸ *Id.* at 21–22.

⁹⁹ *Id.* at 22.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 29.

(1) each party had access to separate legal counsel; (2) the agreement was obtained by fraud or coercion; (3) full disclosure of assets existed prior to execution of the agreement; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets; and (5) the terms of the agreement are fair and reasonable both at the time of execution and at the time of the divorce.¹⁰³

The burden of proving these elements lies with the party seeking to enforce the postnuptial agreement.¹⁰⁴

1. Fraud and Coercion

Postnuptial agreements are unenforceable if a spouse's consent was obtained through fraud or coercion.¹⁰⁵ Enforceability of a postnuptial agreement relies on the informed and voluntary consent of each spouse.¹⁰⁶ In *Craven-Ansin*, the value of the combined marital assets was approximately \$19 million at the time of execution of the agreement.¹⁰⁷ The couple utilized a professional financial planner for financial advice and preparation of joint tax returns, with whom they met with on a quarterly basis.¹⁰⁸ The husband and wife each retained independent counsel to negotiate the postnuptial agreement, which went through several drafts over the course of four months before it was finalized and signed.¹⁰⁹ In upholding the enforcement of the postnuptial agreement, the Massachusetts Supreme Judicial Court determined that the agreement was not a product of fraud or coercion, as each spouse had separate counsel who vigorously negotiated on their behalf, and each were well-informed of the marital assets at the time of execution.¹¹⁰ Thus, the evidence supported the conclusion that the wife, the non-movant, made a voluntary choice to sign the postnuptial agreement.¹¹¹ The wife's consent was not obtained through fraud or coercion.

2. Disclosure of Assets

Similar to *Bedrick*, Massachusetts adopts a standard of greater scrutiny with respect to the asset disclosure required by postnuptial agreements.¹¹² Spouses, as fiduciaries to each other, are held to the "highest standards of good faith and fair

¹⁰³ *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963–64 (Mass. 2010).

¹⁰⁴ *Id.* at 964.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 964–65.

¹⁰⁷ *Id.* at 959.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 960.

¹¹⁰ *Id.* at 964.

¹¹¹ *Id.* at 964–65.

¹¹² *Id.* at 965.

dealing in the performance of their contractual obligations.”¹¹³ Full and fair disclosure of financial circumstances and assets, whether jointly or separately held, is required for each individual spouse to make an informed decision regarding the terms of the agreement.¹¹⁴ This requirement is satisfied if the party seeking to enforce the agreement provided his or her spouse with a written statement containing an approximation of the spouse’s significant assets, annual income, and any significant future acquisitions or changes in income to which the party is legally entitled or expects to realize in the near future.¹¹⁵ The disclosure does not need to be exact to be considered “full” disclosure – the most approximate value of the assets will suffice.¹¹⁶ The full disclosure requirement guards against fraud and coercion in the negotiation of the agreement as the parties have a clear understanding of the extent of the assets and obligations to be divided.¹¹⁷

3. Waiver

Massachusetts views the waiver requirement as being central to a contractual-based approach because it ensures that “each party is exercising a meaningful choice when he or she agrees to give up certain rights.”¹¹⁸ Considerations include “the adequacy of the time to review the agreement, the parties’ understanding of the terms of the agreement and their effect, and a party’s understanding of his or her rights in the absence of an agreement.”¹¹⁹ In *Craven-Ansin*, the postnuptial agreement at issue included express language that satisfied the waiver requirement.¹²⁰ Other evidence taken into account by the Massachusetts Supreme Judicial Court in upholding the parties’ postnuptial agreement included that the wife was represented by independent counsel, affirmed in writing that she understood the rights she was waiving, and did not claim that she did not understand any terms of the agreement.¹²¹

¹¹³ *Id.* (“The obligation is greater with respect to marital agreements because each spouse owes a duty of absolute fidelity to the other.”).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 966.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 965; *see also* *Stoner v. Stoner*, 819 A.2d 529, 533 (Pa. 2003) (noting that the full disclosure requirement satisfies the higher burden of fiduciary relationships).

¹¹⁸ *Ansin*, 929 N.E.2d at 967. *But cf.* *Stoner*, 819 A.2d at 533 (refusing to incorporate waiver requirement as additional safeguard for postnuptial agreements).

¹¹⁹ *Ansin*, 929 N.E.2d at 967.

¹²⁰ The postnuptial agreement provided that it should govern “in lieu of and in full discharge and satisfaction of the rights which otherwise arise by reason of their marriage.” *Id.*

¹²¹ *Id.*

4. Fair and Reasonable Terms

The heightened scrutiny standard reappears in the fair and reasonable terms condition of *Craven-Ansin*.¹²² The test set forth in *Craven-Ansin* focuses on the totality of the circumstances in which the agreement was reached.¹²³ However, *Craven-Ansin* affords far greater discretion to the judge than the *Bedrick* approach. In determining whether terms are fair and reasonable, a judge utilizes factors typically employed in the evaluation of a separation agreement, including:

- (1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory, and if the judge deems is appropriate, the discretionary factors set forth in G.L.c. 208 § 34.¹²⁴

The totality of the circumstances test is further broadened from the approach in *Bedrick* in that the judge may allow "greater latitude for agreements reached where each party is represented by separate counsel of their own choosing."¹²⁵ Indeed, the wide discretion delegated to the judge is corroborated by the extensive list of considerations that may be relevant in a judge's determination of fair and reasonable terms, including: the magnitude of disparity resulting from the terms of the postnuptial agreement versus applicable legal principles; whether the purpose of the agreement was to benefit or protect the interests of third parties; and the impact of enforcement upon the parties' children.¹²⁶ Other factors evaluated by the court may include the "length of the marriage, the motives of the contracting spouses, their respective bargaining positions, the circumstances giving rise to the marital agreement, the

¹²² "Because a marital agreement is executed when the parties do not contemplate divorce and when they owe absolute fidelity to each other, the heightened scrutiny . . . applies in this context as well." *Id.* at 968.

¹²³ *Id.*

¹²⁴ The court continued:

In relevant part, HN33 G. L. c. 208, § 34, provides that a judge "shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. . . . [T]he court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

Id. at 969 n.20 (alteration in original).

¹²⁵ *Id.* at 968.

¹²⁶ *Id.*

degree of the pressure, if any, experienced by the contesting spouse, and other circumstances the judge finds relevant.”¹²⁷ Most significantly, the court may uphold a postnuptial agreement with an unfair distribution of assets, “as long as a judge has concluded that the agreement is fair and reasonable.”¹²⁸

C. Legislative Approaches

Several jurisdictions confront the validity of postnuptial agreements by statute, with varying approaches. Colorado and North Dakota have adopted the Uniform Premarital and Marital Agreements Act (“UPMAA”).¹²⁹ The UPMAA treats prenuptial agreements and postnuptial agreements under the same set of principles and requirements.¹³⁰ The UPMAA seeks to achieve clarity and consistency in the enforceability of marital agreements across the United States.¹³¹ While it recognizes risks such as fairness, duress, and undue influence that may predominate in postnuptial agreements, the UPMAA indicates the traditional principles of contract law are sufficient to deal with such issues.¹³²

The UPMAA requires postnuptial agreements to be in writing and signed by both parties to be valid.¹³³ The agreement will be immediately effective upon signing.¹³⁴ A postnuptial agreement will be unenforceable under the UPMAA if the party against whom enforcement is sought proves that consent to the agreement was involuntary or obtained through duress.¹³⁵ Furthermore, if a party did not have access to independent legal representation, the agreement must include a notice of waiver of rights.¹³⁶ The UPMAA also requires full disclosure of assets prior to signing.¹³⁷

Illinois expressly encourages the use of postnuptial agreements to “promote amicable settlement of disputes,” subject only to a court’s determination of unconscionability.¹³⁸ Alabama defers to traditional contract principles and expressly

¹²⁷ *Id.*

¹²⁸ *Id.* at 969.

¹²⁹ COLO. REV. STAT. § 14-2-301 (2014); N.D. CENT. CODE § 14-03.2-02 (2013).

¹³⁰ Linda J. Ravdin, *Premarital Agreements and the Uniform Acts*, 39 FAM. ADVOC. 34, 35 (2017).

¹³¹ UNIF. PREMARITAL & MARITAL AGREEMENTS ACT, prefatory note at 1 (UNIF. L. COMM’N 2012).

¹³² *Id.* at 2.

¹³³ *Id.* § 6.

¹³⁴ *Id.* § 7.

¹³⁵ *Id.* § 9(a).

¹³⁶ *Id.* For an example of what constitutes an adequate waiver of rights, see, e.g., *infra* note 141.

¹³⁷ UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(a), (d).

¹³⁸ 750 ILL. COMP. STAT. 5/502(b) (2018). The statute provides:

recognizes the obligation of spousal fiduciary duty.¹³⁹ Colorado imposes a waiver requirement if a party is not represented by independent counsel.¹⁴⁰ In such cases, postnuptial agreements require a conspicuous notice of waiver of rights.¹⁴¹

Minnesota similarly provides that postnuptial agreements are valid and enforceable if: “(a) there is a full and fair disclosure of the earnings and property of each party, and (b) the parties have had an opportunity to consult with legal counsel of their own choice.”¹⁴² Minnesota is one of several jurisdictions that utilize a rebuttable presumption for determining validity. A postnuptial agreement is presumed to be unenforceable if either spouse files for legal separation or dissolution within two years of the date of execution.¹⁴³ In California, a rebuttable presumption of undue influence exists, arising from the requirement that spouses have a fiduciary duty to one another.¹⁴⁴ Louisiana uniquely requires spouses to obtain court approval prior to entering into a postnuptial agreement.¹⁴⁵

The terms of the agreement, except those providing for the support and parental responsibility allocation 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, on their own motion or on request of the court, that the agreement is unconscionable.

Id.

¹³⁹ “The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations.” ALA. CODE. § 30-4-9 (2020).

¹⁴⁰ COLO. REV. STAT. § 14-2-309 (2014).

¹⁴¹ Colorado waiver language must be substantially similar to the following:

If you sign this agreement, you may be: [g]iving up your right to be supported by the person you are marrying or to whom you are married; [g]iving up your right to ownership or control of money and property; [a]greeing to pay bills and debts of the person you are marrying or to whom you are married; [g]iving up your right to money and property if your marriage ends or the person to whom you are married dies; [and] [g]iving up your right to have your legal fees paid.

Id. § 14-2-309(3).

¹⁴² MINN. STAT. § 519.11(1) (2005).

¹⁴³ *Id.* § 519.11(1a)(d).

¹⁴⁴ “This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners.” CAL. FAM. CODE § 721(b) (West 2020).

¹⁴⁵ Spouses may enter into postnuptial agreements “only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules.” LA. CIV. CODE ANN. art. 2329 (1980).

IV. THE PROPER STANDARD FOR OHIO POSTNUPTIAL AGREEMENTS

It is time for Ohio to join the majority of states that allow marital couples to have control over their own marriages, rather than legislatively restrict agreements that married couples may make. In order to accomplish this, the legislature should amend Ohio Revised Code Section 3103.06 to permit spouses to enter into contracts that alter their legal relations. Absent any public or legislative discourse on the topic, Ohio will remain in the minority by prohibiting postnuptial agreements on the notion that postnuptial agreements are against public policy because they promote divorce.

If Ohio were to amend its statute to lift its prohibition on postnuptial agreements, the legislature would likely impose certain conditions to address concerns of unfairness, undue influence, and coercion. The *Bedrick* standard comports most with Ohio's stringent public policy requirements that strive to ensure that one party to the marriage is not exploiting the other or using unfair pressure to force an agreement that is not equitable. *Bedrick's* standard for postnuptial agreements is stricter than the standard laid down by the Supreme Court of Ohio in *Gross* for prenuptial agreements. *Gross* fails to adequately address the concern for unconscionability, listing only three basic requirements for prenuptial agreements – freely entering into the agreement; full disclosure and understanding of assets; and terms that do not encourage divorce.¹⁴⁶

Bedrick adequately focuses on protecting the fiduciary relationship – a principle that comports with Ohio's public policy rationale.¹⁴⁷ Ohio should shift the focus from its antiquated public policy perspective for postnuptial agreements to a modern contractual perspective that protects spouses while preserving parties' freedom to contract. The *Bedrick* standard best exemplifies the standard Ohio should adopt for the enforcement of postnuptial agreements. The standard set forth in *Ansin-Craven* is unwieldy and grants excessive discretion to the judge in determining validity and thus diminishes spouses' contractual freedom. Moreover, traditional contractual remedies will suffice to protect spouses in postnuptial agreements. Courts should be limited in their inquiry into the reasonableness of the bargain, absent a finding of unconscionability or other contractual principle that may invalidate the agreement.

Ohio unfairly denies spouses the freedom to contract with one another that they, together, decide is in the best interest of their marriage. By prohibiting postnuptial agreements, Ohio denies spouses the opportunity to enter into new agreements or revise outdated prenuptial agreements that may not accurately reflect the current conditions of the marriage. Current Ohio law does not permit spouses to amend prenuptial agreements even to correct errors or ambiguities in the existing agreement.¹⁴⁸ Postnuptial agreements provide spouses with greater accuracy in determining their rights and obligations than prenuptial agreements. At the onset of the marriage, parties may only make assumptions regarding future conditions.¹⁴⁹ Changed or unforeseen circumstances often arise in the marriage that warrant spouses' alteration of their legal relations in the form of a postnuptial agreement.

¹⁴⁶ *Gross v. Gross*, 464 N.E.2d 500, 504 (Ohio 1984).

¹⁴⁷ See *infra* Part V.

¹⁴⁸ OHIO REV. CODE ANN. § 3103.06 (LexisNexis 1953).

¹⁴⁹ Williams, *supra* note 8, at 828.

Following *Bedrick* and the majority of jurisdictions, Ohio should adopt express conditions for the validity and enforcement of postnuptial agreements to protect the fiduciary relationship between spouses. As a preliminary matter, postnuptial agreements must be in writing to comply with the statute of frauds.¹⁵⁰ The legislature may opt to require notarization of the agreement as an added safeguard against fraud, duress, undue influence, and other doctrines that may potentially invalidate postnuptial agreements. Express conditions should be implemented to further reduce this risk, such as fair and equitable terms at the time of execution and full disclosure of each spouse's assets and financial obligations. In harmony with other states, Ohio postnuptial agreements must not be unconscionable at the time of enforcement. Following *Bedrick*'s strict scrutiny approach ensures that the fiduciary relationship of the spouses is protected, and reduces the risk of a finding of unenforceability. Such express conditions also preserve the party's freedom to contract, as the court will be less likely to inquire as to the reasonableness of the bargain if the conditions are met.

If Ohio is concerned about the possibility of "profiteering by divorce,"¹⁵¹ the legislature should follow Minnesota's lead and further tighten requirements by adopting a rebuttable presumption of unenforceability if either spouse files for divorce within a certain number of years of the execution date. As an additional safeguard, Ohio should require representation of each spouse by independent counsel, consistent with common practice in marital agreements to protect the fiduciary relationship.

V. PUBLIC POLICY FAVORS THE ENFORCEMENT OF POSTNUPTIAL AGREEMENTS IN OHIO

Ohio currently resides with a minority of jurisdictions that claim postnuptial agreements are invalid and unenforceable as a matter of public policy.¹⁵² Ohio's public policy rationale is inconsistent with the majority of states that hold postnuptial agreements are consistent with public policy, and may even further the marital relationship.¹⁵³ Furthermore, Ohio's view on postnuptial agreements contradicts its own standard for prenuptial agreements, which are not contrary to public policy as long as the "terms do not promote or encourage divorce or profiteering by divorce."¹⁵⁴

¹⁵⁰ OHIO REV. CODE ANN. § 1335.05.

¹⁵¹ *Gross*, 464 N.E.2d at 506.

¹⁵² The majority of jurisdictions across the United States acknowledge that postnuptial agreements do not violate public policy. *See, e.g.*, *Bedrick v. Bedrick*, 17 A.3d 17, 24 (Conn. 2011) ("Postnuptial agreements are consistent with public policy; they realistically acknowledge the high incidence of divorce and its effect upon our population."); *Lipic v. Lipic*, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003) (noting an absence of any public policy reasons why postnuptial agreements should not be enforced).

¹⁵³ "By alleviating anxiety over uncertainty in the determination of legal rights and obligations upon dissolution, postnuptial agreements do not encourage or facilitate dissolution; in fact, they harmonize with our public policy favoring enduring marriages." *In re Marriage of Traster*, 291 P.3d 494, 501 (Kan. Ct. App. 2012); *see also* *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 969 (Mass. 2010) (rejecting the theory that postnuptial agreements are against public policy).

¹⁵⁴ *Gross*, 464 N.E.2d at 504.

Ohio's prohibition on postnuptial agreements dates back to principles of early common law holding that a wife had no independent legal identity from her husband.¹⁵⁵ This patriarchal view of the law has no place in modern society.¹⁵⁶ A wife has a separate legal existence from her husband, evidenced by the basic principle that any competent individual is free to enter into a contract on his or her own terms, as long as the contract is not contrary to public policy.¹⁵⁷ Ohio specifically espouses this principle through Ohio Revised Code section 3103.05, which provides that a "husband or wife may enter into any engagement or transaction with the other, or with any other person."¹⁵⁸ However, Ohio arbitrarily draws the line at contracts between a husband and wife that alter the legal relationship between the spouses. Indeed, Ohio permits spouses to enter into prenuptial agreements, claiming such agreements are not contrary to public policy, while treating postnuptial agreements as being void *per se* as being against public policy.¹⁵⁹

A contract is against public policy if it is injurious to the interest of the public, contravenes an established societal interest, violates public statute, or interferes with public welfare and safety.¹⁶⁰ "Public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together and to prevent separation."¹⁶¹ Marital contracts are generally not contrary to public policy unless they encourage divorce or separation.¹⁶² "An agreement will be found to promote or encourage divorce if it obligates a spouse to procure a divorce, or obligates a spouse not to defend or contest a divorce."¹⁶³ However, in the absence of

¹⁵⁵ *Nolin v. Pearson*, 77 N.E. 890, 890 (Mass. 1906).

¹⁵⁶ See *Stoner v. Stoner*, 819 A.2d 529, 532 (Pa. 2003) (declining to adopt a paternalistic approach to postnuptial agreements by refusing to implement a waiver requirement, noting such an approach assumes the wife lacks the intelligence or ability to protect her own rights); see also *In re Estate of Harber*, 449 P.2d 7, 15 (Ariz. 1969) ("In view of the relatively equal status of women to men under the law, that married couples should not be deprived of the right by contract to divide their property as they please, both presently and prospectively, assuming the contract is voluntary, free from fraud, and is fair and equitable.").

¹⁵⁷ *In re Marriage of Traster*, 291 P.3d at 500.

¹⁵⁸ OHIO REV. CODE ANN. § 3103.05 (LexisNexis 1953).

¹⁵⁹ Compare *Gross*, 464 N.E.2d at 506 (noting that prenuptial agreements tend to promote or facilitate marriage, rather than encourage divorce), with *Brewsaugh v. Brewsaugh*, 491 N.E.2d 748 (Ohio 1985) (holding out-of-state postnuptial agreement unenforceable in Ohio in violation of Section 3103.06 of the Ohio Revised Code). See also *Hoffman v. Dobbins*, No. 24633, 2009 WL 3119635, at *5 (Ohio Ct. App. Sept. 30, 2009) (rejecting wife's public policy argument that prohibiting postnuptial agreements would require "parties wishing to modify certain provisions of an antenuptial agreement . . . to divorce, execute a new antenuptial agreement, and remarry").

¹⁶⁰ *In re Marriage of Traster*, 291 P.3d at 500.

¹⁶¹ *Id.*

¹⁶² *Id.* at 501.

¹⁶³ *Id.*

terms or conditions that encourage divorce or separation, postnuptial agreements are considered to be consistent with public policy in that they encourage the private resolution of domestic disputes without resort to separation or divorce.¹⁶⁴

Postnuptial agreements do not encourage divorce or separation, but rather they allow spouses to voluntarily contract to determine their rights and obligations in the event of dissolution. Postnuptial agreements are consistent with public policy as spouses who enter into such agreements intend to preserve the marriage. Thus, postnuptial agreements promote the unity of a married couple who intend to remain in the marital relationship, rather than encouraging separation and divorce. Ohio's current prohibition on postnuptial agreements is likely to have the opposite of its intended effect. While spouses may not enter into contracts after marriage to alter their legal relations, Ohio expressly allows such an agreement if the parties agree to an immediate separation.¹⁶⁵

Indeed, Ohio's statutory prohibition on postnuptial agreements precludes the possibility that a married couple could strengthen their marriage, and better determine and protect their rights with a consensual postnuptial agreement. Without the ability to alter their rights in a changing marital landscape, Ohio's prohibition is just as likely to push a couple to separation as it is to prevent it.

Moreover, the language of Ohio Revised Code Section 3103.06 is antiquated and must be amended to reflect current public policy. The beginning of the statute provides that "[a] husband and wife cannot, by any contract with each other, alter their legal relations."¹⁶⁶ As a preliminary matter, the phrase "husband and wife" should be amended to "spouses," to reflect the legalization of same-sex marriage.¹⁶⁷ Gender equality necessitates the removal of gender-specific terms, such as "husband" and "wife." Contract law does not distinguish between men and women, and as simple contracts, marital agreements are no different.

VI. PROPOSED LEGISLATION FOR OHIO REVISED CODE SECTION 3103.06

The Ohio State Bar Association's Estate Planning, Trust, and Probate Law Section Postnuptial Committee (the "Postnuptial Committee") has recently proposed legislation to amend Ohio Revised Code Section 3103.06 to lift Ohio's prohibition on postnuptial agreements.¹⁶⁸ The Postnuptial Committee's proposed revisions to Ohio Revised Code Sections 3103.05 and 3103.06 state as follows:

Proposed R.C. § 3103.05. Contracts. Spouses may enter into any agreement or transaction with each other, or with any other person, which either might if unmarried; subject, in agreements or transactions between spouses, to the general rules which control the actions of persons occupying confidential relations with each other; and to the extent an agreement alters the legal

¹⁶⁴ *Id.*

¹⁶⁵ See OHIO REV. CODE ANN. § 3103.05 (LexisNexis 1953).

¹⁶⁶ *Id.* § 3103.06.

¹⁶⁷ See generally *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015) (legalizing same-sex marriage as a fundamental right in all States).

¹⁶⁸ Racey & Ferraro, *supra* note 19, at 197–98.

relations between the spouses, such agreement shall comply with requirements of Section 3103.06.¹⁶⁹

Proposed R.C. § 3103.06. Contracts Affecting Marriage. Spouses may by agreement do one or more of the following:

- (A) Alter their legal relations with each other;
- (B) Modify or terminate any written agreement affecting their legal relations with each other, whether such agreement was entered into by the parties prior to or during the marriage; and
- (C) Agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

An agreement entered into pursuant to this section shall be in writing.¹⁷⁰

Ohio should also adopt express conditions in Section 3103.06 that would further protect the fiduciary relationship between spouses. Incorporating requirements such as fair and equitable terms at the time of execution and full disclosure of assets would subject parties to a high degree of good faith and fair dealing. Such conditions lower the probability that a court will find the agreement to be unenforceable, thus preserving the parties' freedom to contract.

The following is an alternative proposal by this author to the Postnuptial Committee's proposed legislation,¹⁷¹ incorporating the express conditions discussed *supra*:

Proposed R.C. § 3103.06. Contracts Affecting Marriage. Spouses may by agreement do one or more of the following:

- (A) Alter their legal relations with each other, *subject to the rules of law as to contracts by and between persons standing in confidential relations*;
- (B) Modify or terminate any written agreement affecting their legal relations with each other, whether such agreement was entered into by the parties prior to or during the marriage; and
- (C) Agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

A postnuptial contract is valid and enforceable only if each spouse provides full disclosure of the extent of their respective assets and obligations, and the terms are procedurally and substantively fair and equitable both at the time of its execution and at the time of its enforcement.

An agreement entered into pursuant to this section shall be in writing.

¹⁶⁹ *Id.* at 198.

¹⁷⁰ *Id.*

¹⁷¹ Changes from the Postnuptial Committee's proposed legislation are emphasized in *italics*.

VII. CONCLUSION

Since *Gross v. Gross*, Ohio has stalled in its evolution of marital law. Ohio can no longer be considered an innovator in family law so long as it remains in the minority of jurisdictions that prohibit postnuptial agreements. The high rate of divorce and movement towards gender equality demands that Ohio Revised Code Section 3103.06 be revised to allow spouses to freely contract with one another regarding their legal rights and obligations in the event of dissolution. Allowing two consensual spouses to contract with one another is consistent with the basic notions of contract law. Removing such prohibition will allow married couples to protect themselves after marriage in cases of unforeseen circumstances, or to update an existing prenuptial agreement that has become outdated. Postnuptial agreements provide spouses with the opportunity to contract more precisely to reflect the current financial state of the marriage, rather than remain bound by their assumptions at the onset of the marriage. Strict scrutiny in determining the enforceability of postnuptial agreements adequately protects the fiduciary relationship of spouses from fraud, duress, and undue influence. The legislative approach is most attractive as it removes the uncertainty over whether a court will uphold a postnuptial agreement for reasons of fairness or unconscionability.

Postnuptial agreements are not contrary to public policy as they do not encourage separation or divorce. Postnuptial agreements are distinguishable from separation agreements in that postnuptial agreements are entered into to preserve the marital relationship. Postnuptial agreements are most similar to prenuptial agreements in this respect – the validity of which is uniformly recognized across the United States. Ohio has recognized the validity of prenuptial agreements since 1984, holding that they comport with the public policy of family unity. The same rationale applies to postnuptial agreements, which differ only in the timing of when the contract is executed. Time is of the essence for Ohio to amend Ohio Revised Code Section 3103.06 to lift Ohio's prohibition on postnuptial agreements, and instead provide that such agreements are valid and enforceable contracts between spouses.