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Public Policy, The Courts, and Antenuptial Agreements Specifying Alimony

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PUBLIC POLICY, THE COURTS, AND ANTENUPTIAL AGREEMENTS SPECIFYING ALIMONY

Pursuant to the rule that contracts in derogation of the marital relationship are void as against public policy, courts generally have voided alimony provisions in antenuptial agreements. A few jurisdictions, however, have indicated a possible relaxation of their inflexible position toward this type of antenuptial contract. Recently, the Supreme Court of Florida assumed the lead in this area by upholding an antenuptial agreement stipulating alimony. This note will examine the traditional rationale of applying the derogation rule to alimony provisions, suggest the obsolescence of this application in light of new societal conditions, and trace the development of Florida's new decision. Finally, it will propose a solution to problems unresolved by the new decision.

History and Development of Underlying Concepts

A protected legal right clashes with a favored legal status when a couple executes an antenuptial contract containing an alimony provision. The individual's right to contract is counterpoised by the state's interest in preserving the marital relation. The basis for this conflict can be found in the early common law, which influenced the development of both the right to contract and the legal concept of marriage.

Development of the Wife's Right To Contract

At common law, marriage merged the wife's legal identity with that of her husband.[1] The basis for this concept was twofold. Until the Industrial Revolution the medieval Western family was the basic economic and social unit in a predominantly agrarian society. Males worked the land while females managed the internal affairs of the household. The father was the dominant figure in the family's social relations, while the role of the mother was confined solely to domestic duties.[2] Moreover, religious dogma held that man and woman were united into "one flesh" by the solemnization of the marriage vow.[3] The unity fiction enshrined the husband's superiority so completely that a wife could not own or dispose of tangible or intangible property.[4] Similarly, she could not contract, and marriage discharged any agreement made between the spouses before marriage.[5] Thus, antenuptial and postnuptial agreements were not recognized at common law.

What spouses could not do directly, however, they were able to accomplish through a trust device to effect indirect antenuptial agreements. The husband and wife each contracted with a third party who received the

1. 2 A. Lindey, Separation Agreements and Ante-Nuptial Contracts §90.2 (1964).
2. W. Friedmann, Law in a Changing Society 207 (1959).
3. Note, *Interspousal Immunity in Tort: Its Relevance, Constitutionality, and Role in Conflict of Laws*, 21 U. Fla. L. Rev. 484 (1969).
4. W. Friedmann, *supra* note 2, at 239.
5. 2 A. Lindey, *supra* note 1, §90.2.

husband's covenant of support and held it for the use of the wife who made a return promise to the trustee.[6] Concurrently, equity courts gradually developed the concept of a wife's separate property.[7] The gradual extension of legal rights to the wife culminated in the enactment of the Married Women's Property Acts,[8] which made women legally equal to men with respect to property and contracts. Under these acts spouses could contract with each other during marriage, and antenuptial contracts were no longer voided by the unity fiction.

The Law's Concept of Marriage

Along with the extension of property rights to the wife, the basic policies underlying the law of marriage gradually changed. Originally, marriage was exclusively a religious matter, and the ecclesiastical courts maintained sole jurisdiction over both marriage and divorce.[9] Litigating family problems provided the church with revenue, thus impelling the ecclesiastical courts to retain legal authority to resolve all family differences.[10] Because these courts viewed matrimony as a sacrament, marriage was irrevocable.[11] Where consent to divorce or separation was granted, it was only when the parties were wealthy and powerful.[12] In England, jurisdiction of divorce and separation proceedings was not transferred from the ecclesiastical courts to the civil courts until 1857.[13] In America, however, the colonists rejected the sacramental theory of marriage, and marital matters were thus always subject to civil court jurisdiction.[14]

Nevertheless, American courts were profoundly influenced by English tribunals, which, in turn, followed precepts derived from religious dogma that held marriage to be irrevocable. In *Evans v. Evans*,[15] a wife sought legal separation alleging her husband's desertion. The English court stated that a married couple cannot be legally separated because of the mere disinclination of one or both partners to cohabit:[16]

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6. 1 A. LINDEY, *supra* note 1, §3.3.

7. W. FRIEDMANN, *supra* note 2, at 239.

8. *E.g.*, FLA. STAT. ch. 708 (1969). FLA. CONST. art. X, §5 provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law." The 1970 Florida legislature recently enacted a law effective Oct. 1, 1970, which in fact enables men and women to deal with their property without distinction as to sex. This act expressly purports to conform the general laws of Florida with FLA. CONST. art. X, §5. Fla. Laws 1970, ch. 70-4.

9. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 88 (1959).

10. *Id.*

11. "What therefore God has joined together, let not man put asunder." *Matthew* 19:6. The Roman Catholic Church still considers marriage to be irrevocable.

12. P. JACOBSON, *supra* note 9, at 88. The foremost instance was the divorce negotiation between England's Henry VIII and Catherine of Aragon.

13. P. DEVLIN, THE ENFORCEMENT OF MORALS 65 (1965).

14. P. JACOBSON, *supra* note 9, at 89.

15. 1 Hag. Con. 35, 161 Eng. Rep. 466 (1790).

16. *Id.* at 36, 161 Eng. Rep. at 467.

> For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. [Spouses] . . . learn to soften by mutual accommodation that yoke which they know they cannot shake off.

Although American courts recognized that marriage could be dissolved, the theory that the state was a party to the marriage was asserted to rationalize the state's interest.[17] This theory resolved the tension between a policy of marital indissolubility on the one hand and state regulated divorce and separation on the other. Another view rationalizing the state's interest in the marital relationship theorized that marriage is not merely a contract determined by the parties, but a status that imposes upon the parties obligations to society as a whole.[18] Thus, courts have maintained the state's power over marital relationships.

After the enactment of the Married Women's Property Acts, the provisions of some antenuptial contracts inevitably conflicted with the legal concept of marriage, challenging the state's third party role. When this occurred, courts usually emphasized the sacredness of marriage and employing various standards,[19] held that any contract disturbing the marital relationship was void as against public policy.[20] Eventually, precedent compelled rigid application of these public policy rationales, with the result that in many decisions courts mechanically voided alimony provisions by relying on policy that seems questionable today. Current attitudes and social norms relating to marriage and divorce indicate that courts should reexamine the public policy governing antenuptial contracts.

Antenuptial Agreements That Specify Alimony

There are two broad classes of antenuptial contracts: agreements that concern property rights and those concerning personal rights incident to marriage.[21] Courts generally favor prenuptial property agreements specifying the spouses' rights in property acquired by marriage.[22] Such agreements are considered to be consistent with public policy because they ensure domestic harmony by settling potential property disputes prior to marriage.

Antenuptial agreements that waive or vary personal rights or duties may be voided, however, if they appear to undermine the marital relation.

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17. Potter v. Potter, 101 Fla. 1199, 1204, 133 So. 94, 96 (1931); P. Jacobson, *supra* note 9, at 88.

18. Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939); Note, *Marriage, Contracts, and Public Policy*, 54 Harv. L. Rev. 473, 479 (1941). Comment, *"A Check List" for the Drafting of Enforceable Antenuptial Agreements*, 19 U. Miami L. Rev. 615, 631 (1965).

19. *See* text accompanying notes 24-48 *infra*.

20. Restatement of Contracts §§584 (1), 586 (1932).

21. Comment, *supra* note 18, at 630.

22. *E.g.*, Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962).

Because the wife's right to alimony is personal,[23] the courts have closely examined antenuptial agreements that either waive alimony or set fixed sums in lieu of alimony in event of divorce. Until recently such agreements were consistently invalidated on various grounds.[24] Some courts reasoned that a waiver or stipulation of almony would enable a husband to shirk his legal duty of support,[25] which unlike property rights, is considered a duty imposed by law and cannot be distributed or varied by contract.[26]

Another contention supporting this result is that society must be protected from supporting non-wage earners.[27] Whether society would have to support the wife, however, depends on the facts of the particular case.[28] In instances where the antenuptial contract adequately provides for the wife's support, or where the wife is independently wealthy no additional burden on society would exist. Nevertheless, courts have generally been unwilling to admit that *any* antenuptial alimony provision could be valid. Thus, in voiding all such provisions because they allegedly burden society, the courts have failed to consider individual circumstances and have voided contracts somewhat arbitrarily with a mechanically applied rule of law.

In another group of cases alimony provisions in antenuptial agreements were invalidated on the ground that the agreements permitted the husband to mistreat his wife. *Crouch v. Crouch*[29] held void an antenuptial agreement providing for a lump sum payment to the wife in lieu of alimony. The court reasoned that a mercenary husband, knowing that his pecuniary liability was limited by the alimony provision, could abuse his wife with immunity. By forcing her to sue for divorce, such a husband could, in effect, buy a divorce for less than he would otherwise have to pay. Using the same rationale another court stated:[30]

> [T]he existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations and inflict the injury. As it was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution.

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23. Comment, *supra* note 18, at 630.

24. *Id.*

25. Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).

26. Williams v. Williams, 29 Ariz. 538, 243 P. 402 (1926); Hillman v. Hillman, 69 N.Y.S.2d 134 (Sup. Ct., N.Y. County 1947), *aff'd*, 273 App. Div. 960, 79 N.Y.S.2d 325 (1st Dep't 1948).

27. Ryan v. Dockery, 134 Wis. 431, 114 N.W. 820 (1908).

28. *See* text accompanying notes 63-64 *infra*.

29. 53 Tenn. App. 594, 385 S.W.2d 288 (Ct. App. 1964). *Cf.* Rice v. Rice, 148 Fla. 620, 4 So. 2d 850 (1941), where the court recognized that mercenary females sometimes prey upon older husbands. "[T]his case is just another picture of what happens to Grandpa in nine cases out ten when he gets home from Grandma's funeral with some cash and goes angling for a senorita the same vintage of his younger daughters. It is somewhat remarkable that he lacks the intuition to discern that it's the cash and not Grandpa she is playing for . . . ." *Id.* at 624, 4 So. 2d at 851.

30. Pereira v. Pereira, 156 Cal. 1, 4, 103 P. 488, 490 (1909).

Such reasoning presumes a causal connection between the alimony provision and the subsequent divorce action. A detailed examination of the causes of divorce is beyond the scope of this note; however, the modern view holds that divorce is merely legal recognition of marital breakdown,[31] which may be caused by combinations of many factors.[32] One commentator notes that in general "the increasing frequency of marriage failure is rooted in the tensions of modern living, in the desperate search for individual happiness, and in the highly differentiated American culture."[33] To hold that alimony provisions in antenuptial agreements cause divorce in all cases oversimplifies the complex nature of marriage breakdown.[34] While an alimony provision could contribute to marital breakdown in some instances, in other situations it may be entirely irrelevant. The effect of an antenuptial contract on the marriage should be determined on a case-by-case basis, rather than predetermined by application of a mechanistic rule.

Alimony provisions in antenuptial agreements have also been viewed as creating a financial inducement to separation or divorce. Because courts generally believe that marriage is beneficial to society, they have endeavored to discourage the spouse who might be induced to break the marriage vows because of alluring financial stipulations entered into before marriage.[35] Under most of the agreements considered by the courts, the husband would owe his ex-wife less than the amount usually granted under a divorce decree in which alimony was determined solely by the court. Thus, courts have held that enforcement of such antenuptial agreements would give the husband undeserved profit[36] and would necessarily cause disagreement and his eventual abandonment of the marriage.[37] This contention also oversimplifies the causes of divorce.[38] If financial inducements tended to cause divorce, wealthy couples would apparently have a high divorce rate. Yet, studies have shown that the divorce rate is lowest among high income groups.[39] Divorce cannot always be explained by one isolated factor, and courts should not assume that alleged pecuniary profit will necessarily cause it.

A fourth reason often given for voiding antenuptial agreements specifying alimony is that the state is a third party to the marriage. Because the allowance of alimony is determined by the divorce court,[40] which represents the

31. *See* Note, *A Comparative Approach: The Divergent Paths of English and American Divorce Reform—To Take the Step from Fault to Breakdown?*, 22 U. FLA. L. REV. 101, 111-17, 126-28 (1969).

32. Litwak, *Divorce Law as Social Control*, in A MODERN INTRODUCTION TO THE FAMILY 208 (1960).

33. N. BLAKE, THE ROAD TO RENO 229 (1962).

34. Note, *supra* note 31, at 127 states that traditional divorce court procedures are unsuitable to determine whether a marriage has broken down and advocates a clinical approach utilizing psychologists and counselors.

35. Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916).

36. Fincham v. Fincham, 160 Kan. 683, 165 P.2d 209 (1946).

37. Neddo v. Neddo, 56 Kan. 507, 44 P. 1 (1896).

38. *See* text accompanying notes 30-34 *supra*.

39. W. GOODE, AFTER DIVORCE 53 (1956).

40. *E.g.*, FLA. STAT. §61.08 (1969).

state's interest, the consent of the court is required before the parties may validly specify alimony.[41] Adhering to the concept that marriage is a status with certain duties imposed by law, one court voided a contract that provided the wife with 5,000 dollars in lieu of alimony.[42] The court reasoned that the contract was intolerable because it threatened marital rights and duties fixed by law.[43] Thus, the marital status may be modified only with the law's sanction.[44]

In several cases courts have struck down agreements waiving or specifying alimony without offering a legal rationale.[45] These opinions assert that such contracts facilitate separation and divorce and are therefore void as against public policy. Underlying the public policy in these cases and those previously discussed[46] is the notion that marriage is good per se, which is the traditional view maintained by the courts despite significant reorientations in societal values.

A valid state interest justifying a public policy protecting marriage does exist. However, public policy should not be inflexibly utilized to void an antenuptial alimony provision that does not endanger the marriage. In certain situations denying effect to contractual variations of traditional marital duties may actually be unwise and unfair.[47] Nevertheless, through such denials the courts have crystallized a doctrine allegedly based on public policy into an unyielding rule of law.[48]

The Legal Concept of Marriage

Courts have advanced three reasons for the importance that judicial decisions accord to marriage:[49] (1) the social organization of the state is founded upon the marital relation; (2) personal morals require preserving the sanctity of marriage; and (3) marriage can be dissolved only by fulfilling statutory requirements, and a contract avoiding these is a fraud upon the state's interest in the marriage compact.

In *Gallemore v. Gallemore*,[50] the Florida supreme court stated that marriage "is regarded by the law and the state as the basis of the social organization. The preservation of that relation is deemed essential to the public welfare."[51] While the family and the marital relation undoubtedly still occupy an important place in modern society, the family and consequently

41. Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961).
42. Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92 (1923).
43. *Id.* at 167, 216 P. at 96.
44. Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784 (1939).
45. Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 783 (1928); Kalsem v. Froland, 207 Iowa 994, 222 N.W. 3 (1928); Scherba v. Scherba, 340 Mich. 228, 65 N.W.2d 758 (1954); Stefonick v. Stefonick, 118 Mont. 486, 167 P.2d 848 (1946).
46. *See* cases cited notes 24-45 *supra*.
47. Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473, 479 (1941).
48. *Id.* at 482.
49. Note, *supra* note 47, at 473.
50. 94 Fla. 516, 114 So. 371 (1927).
51. *Id.* at 518, 114 So. at 372.

the marriage are no longer held together by the physical and economic ties that existed when traditional policy toward marriage evolved.[52] The economic factors once necessitating marital stability and the religious restraints that decreed marriage an indissoluble sacrament are no longer compelling. Moreover, a developing philosophy regards woman as the equal of man, recognizing her equal right to manage her own affairs and stressing the happiness and fulfillment of the individual woman as against the "stern duty imposed by an unalterable status."[53]

Concerning the place of marriage and the family before the law, the Supreme Court of Florida has stated:[54]

> Our civilization and moral standards rest largely upon the existence of homes and the family relation . . . . [a]nd for that reason the State is a party [at] interest in every marriage contract . . . and to this end it is the policy of the State not to permit the dissolution of the marriage relation by any agreement between the other two contracting parties, but only when the State, through its Judicial branch, determines that there are just grounds as provided and defined by statute for the annulment of the marriage relation and enters the decree of this court terminating the contract.

Although marriage may have perpetuated personal morals to some degree, it has been unable to prevent social and economic change from altering the traditional morality of the nineteenth and early twentieth centuries when marriage was regarded as good per se. This is not to suggest that marriage is a dying institution, but rather that increasingly numerous persons consider its essential value to be based on love, companionship, and freedom of choice – not on notions of goodness per se.[55] In the courts' rigid view, however, any individual modification of the legal aspects of marriage is prohibited. Thus, whether or not the amount provided is adequate, an antenuptial contract stipulating the wife's alimony in event of divorce will be invalidated by most courts. Concerning the rule that contracts disturbing the marriage relation are void, one writer said:[56] "When this doctrine was formulated, marriage was considered an irrevocable commitment; as legal impediments and social opprobrium are removed from divorce, more careful consideration may be given to the wisdom all outlawing a contract in a particular case."

Public policy has been defined as "a principle of judicial legislation or interpretation founded on the current needs of the community."[57] Considering

52. W. FRIEDMANN, *supra* note 2, at 216.
53. *Id.* at 216-17.
54. Potter v. Potter, 101 Fla. 1199, 1203-04, 133 So. 94, 96 (1931).
55. Litwak, *supra* note 32, at 212.
56. Note, *supra* note 47, at 473.
57. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 92 (1928).

the breakdown concept of divorce[58] and the results of sociological studies,[59] it seems clear that the arbitrary rationale used by the courts to invalidate alimony provisions is no longer justifiable. If public policy is, in fact, based on current needs, courts should reexamine judicial policy concerning the marital relationship and, if obsolete, appropriately alter it.

The Trend Toward Reason

One of the few cases in which a court scrutinized the situation of the parties before voiding an antenuptial agreement was *Fricke v. Fricke*.[60] The antenuptial contract provided that, in the event of divorce, the wife would receive 2,000 dollars in lieu of alimony. At age 62 the husband had married his housekeeper of thirteen years. The majority opinion adhered to the usual view that the state has an interest in the marital relation and stated that unusual conditions causing an increase in divorce rates did not require the court to change its attitude toward marriage obligations.[61] Noting that dower is inchoate until the husband's death, the court distinguished a prior Wisconsin case[62] that permitted the parties to contract before marriage with respect to dower. Thus, unlike alimony provisions that take effect only on divorce, antenuptial provisions relating to dower were not thought to encourage divorce since they become effective only upon the death of the husband. The court concluded that an antenuptial contract purporting to limit the husband's liability in event of separation or divorce was void as against public policy regardless of the circumstances motivating its adoption or attending its execution.

In a well reasoned dissent, Justice Brown took issue with the majority's holding,[63] reasoning that while public policy favors marriage and encourages marital stability, contracts defining the responsibilities of the contracting parties also promote stability. If contracts generally are desirable, it should not be presumed that contracts in the marital setting promote discord. However, the fixed rule applied by the majority disregarded the adequacy of the provision as well as all other circumstances. The broad decision applied a rule of *malum in se* to a situation that should be measured by a rule of reason. If, in an antenuptial agreement with his wife, a husband made a provision that later seemed too generous, he might be deterred from seeking a divorce and might moderate his own conduct because of the financial penalty he would suffer under the agreement. A widower with a family to

58. California's new divorce law, which provides that a divorce may be granted if irreconcilable differences cause marital breakdown, indicates emerging legal acceptance of the breakdown principle. Cal. Civil Code §4506 (West 1969). *See generally* Note, *supra* note 31.

59. *See* text accompanying notes 25-48 *supra*.

60. 257 Wis. 124, 42 N.W.2d 500 (1950).

61. *Id.* at 126, 42 N.W.2d at 501.

62. Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N.W. 516 (1915).

63. Fricke v. Fricke, 257 Wis. 124, 129-33, 42 N.W.2d 500, 502-04 (1950) (dissenting opinion).

support might desire to marry an independently wealthy woman who neither needs nor wants his support; yet he might be deterred from doing so unless he could limit his liability to protect his immediate family in event of divorce. Thus, in certain circumstances prenuptial agreements specifying alimony may *encourage* the marital relation, rather than disturb it. "Public policy does not require that an elderly woman desiring marriage must remain single if she cannot find a man who is willing to leave everything to chance and put his property at the disposal of the court, if someday a court thinks it proper to grant a divorce. . . ."[64] The dissent concluded that it would be wiser to allow trial courts to determine the validity of prenuptial agreements according to the circumstances of each case, rather than voiding all such agreements by applying ironclad rules.

Few courts have approached antenuptial agreements specifying alimony with a rule of reason. The Georgia supreme court has even held that the presence of an alimony provision voided an entire prenuptial contract and that it was error to admit the agreement in evidence for any purpose.[65] Usually, however, courts have voided only the provisions relating to alimony and have upheld other provisions prescribing the spouse's property rights.[66] A recent decision invalidated an antenuptial contract that sought to divide an estate in event of divorce but admitted it in evidence on the issue of property division.[67]

Two non-Florida cases have upheld alimony provisions in antenuptial contracts. In *Hudson v. Hudson,*[68] the Oklahoma supreme court upheld a prenuptial agreement providing that neither spouse would assert any claim for alimony in event of divorce, thus limiting their claims to property acquired during the marriage. A lower court had granted alimony to the wife despite the agreement, but the appellate court held that no alimony was justified. No reason for the decision was given; the court merely cited authority for the premise that antenuptial contracts were conducive to marital harmony because they settled disputes prior to marriage.[69] The second case, *Reiling v. Reiling,*[70] is a more thoughtful decision. Before marriage, the parties released all rights in each other's property, and the woman waived her alimony rights. Nevertheless, a lower court granted the wife alimony. In reversing the alimony award on appeal, the Oregon court considered the fair disclosure surrounding execution of the agreement and the fact that the wife was planning to return to work.[71] This decision employed

64. *Id.* at 132, 42 N.W.2d at 504 (dissenting opinion).

65. Reynolds v. Reynolds, 217 Ga. 234, 255, 123 S.E.2d 115, 134 (1961).

66. Comment, *supra* note 18, at 632.

67. Strandburg v. Strandburg, 33 Wis. 2d 204, 147 N.W.2d 349 (1967). The antenuptial contract in this case specified the property that the wife would receive at her husband's death, not at divorce. The court refused to recognize the validity of such an agreement effective at divorce, reasoning that to do so would allow the parties indirectly to achieve the same result as a prenuptial agreement that took effect in event of divorce.

68. 350 P.2d 596 (Okla. 1960).

69. *Id.* at 598.

70. 463 P.2d 591 (Ore. App. 1970).

71. Although the actual written agreement considered in this case was executed after

a highly desirable factual analysis and considered such factors as whether support is necessary, the fairness of the agreement's execution, and the adequacy of the provision for the wife.

In most of the cases that have reached the appellate courts, the provision for the wife has been *inadequate* and *unfair*. An antenuptial agreement providing that, upon divorce, the wife was to receive 100 dollars in lieu of alimony for each year of the marriage, and was to leave the marital home forever within twenty-four hours after receiving the settlement was considered "a wicked device to evade the laws applicable to marriage relations . . . ."[72] In view of the frequent inequity of such agreements, it is understandable that courts have reacted with outrage and voided such agreements.[73] Nonetheless, by choosing to invalidate these contracts with a rigid, inflexible rule of law, the courts have prevented parties from agreeing in good faith to limit a spouse's alimony even where a limitation is justified.

That some prenuptial agreements are admitted in evidence for the purpose of determining the equities of a proposed property division indicates that some courts are beginning to modify their inflexible view of antenuptial contracts specifying alimony.[74] The traditional view was apparently rejected altogether in *Hudson* and *Reiling*. Recent cases also indicate a change in the attitude of Florida courts toward antenuptial agreements — a change that has culminated in a decision espousing a more modern viewpoint of family law.

Antenuptial Agreements in Florida

It is necessary to examine Florida law pertaining to alimony before considering judicial treatment of alimony provisions in antenuptial agreements. The framework of statutory and case law relating to alimony generally affects the courts' reasoning concerning alimony provisions.

Alimony Provisions in Separation Agreements

Florida statutes provide that the court shall make orders awarding alimony, such award to be determined from the circumstances of the parties

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the marriage ceremony, it was based on an oral antenuptial agreement, and the court and the parties treated it as an antenuptial contract. *Id.* at 592.

One statement in the opinion might dilute the case's strength as precedent. The court said: "[T]he parties . . . have not questioned [the agreement's] validity by reason of the time of execution . . . ." *Id.* at 592. It is unclear if this means the wife failed to contend that the provision waiving alimony was void because it was contained in an antenuptial contract. If this issue was not raised, the case has little meaning; such a possibility is plausible because: "[T]he [wife] testified that she would be going to work in a short time and while some support would no doubt be convenient to her, there is no showing of necessity for support." *Id.* at 592.

72. *In re* Duncan, 87 Colo. 149, 285 P. 757, 70 A.L.R. 824 (1930).

73. The *Duncan* opinion asserted that the agreement was an attempt to legalize prostitution at $100 per year. *Id.* at 152, 285 P. at 757.

74. *See* cases cited *infra* note 129.

and the nature of the case.[75] This statute appears to vest sole discretion in the chancellor, who apparently would not be bound by stipulations of the parties relating to alimony. However, another statutory section authorizes the circuit courts to modify or confirm alimony or support payments as determined by agreement between husband and wife.[76] This statute implies that spouses may employ separation agreements[77] to stipulate alimony. Unless directly conducive to the procurement of divorce, separation agreements that concerned both property and alimony and that were executed in contemplation of divorce have been upheld by the Florida supreme court.[78] The court has also stated: "Agreements made in good faith, free from fraud, deceit or trickery relating to alimony between husband and wife, or the adjustment of their property rights, though made in contemplation of divorce, can or may be sustained or upheld by the courts."[79]

In most instances Florida courts have felt bound by stipulations in separation agreements that prescribe alimony.[80] The First District Court of Appeal has held that good faith separation agreements should be respected by the courts[81] and that provisions of such agreements constituting a final settlement between the parties should be construed according to ordinary contract law.[82] Cases from the second district indicate that separation agreements have been respected in the absence of fraud, overreaching or concealment[83] but that the power to adjudicate the reasonableness and fairness of the agreement was retained by the court.[84] The Third District Court of Appeal has also recognized stipulations for support and alimony in separation agreements saying: "The amount of support for a wife which the parties have agreed upon should be held to be binding and applicable in the event of divorce unless there is a sufficient showing of change of circumstances to warrant and require its modification."[85]

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75. FLA. STAT. §61.08 (1969).

76. FLA. STAT. §61.14 (1969).

77. Separation agreements are contracts entered into after marriage, which contemplate separation or divorce. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS §§90.38, .18 (1964).

78. *E.g.*, Gallemore v. Gallemore, 94 Fla. 516, 114 So. 371 (1927).

79. Miller v. Miller, 149 Fla. 722, 726, 7 So. 2d 9, 11 (1942).

80. In Underwood v. Underwood, 64 So. 2d 281 (Fla. 1953), the Florida supreme court said Florida courts should not abrogate alimony provisions in a separation agreement without the consent of the parties. However, this is merely dicta since the case involved the subsequent modification of an alimony award after the agreement had been incorporated in the divorce decree. A decree providing for alimony payments may subsequently be modified even though it incorporates a separation agreement. If the agreement is a property settlement that disposes of all rights of the parties, it is not modifiable. *See* Beuchert, *Power of Florida Courts To Modify Marital Settlements*, 15 U. FLA. L. REV. 487 (1963).

81. Westberry v. Westberry, 191 So. 2d 871 (1st D.C.A. Fla. 1966); Hostler v. Hostler, 151 So. 2d 672 (1st D.C.A. Fla. 1963).

82. Sedell v. Sedell, 100 So. 2d 639 (1st D.C.A. Fla. 1958).

83. Pemelman v. Pemelman, 186 So. 2d 552 (2d D.C.A. Fla. 1966); Howell v. Howell, 164 So. 2d 231 (2d D.C.A. Fla. 1964).

84. Cordrey v. Cordrey, 206 So. 2d 234 (2d D.C.A. Fla. 1968).

85. Brenske v. Brenske, 151 So. 2d 58, 61 (3d D.C.A. Fla.), *cert. denied*, 155 So. 2d

Thus, Florida courts have agreed that separation agreements specifying alimony are permissible so long as they are fairly made. This approach is reasonable since the parties themselves would seem best qualified to determine what amounts of support the wife should receive and how their property should be distributed. If the parties stipulate their issues for the court, more harmony during divorce proceedings should result and the parties may plan for the future with certainty, relying on their existing stipulations.

Considering this reasoning and Florida precedent, it was surprising when *Dawkins v. Dawkins*[86] held that Florida Statutes, section 65.08,[87] vested sole discretion in the chancellor to settle alimony, and that the parties could not divest him of this discretion by contract. The per curiam opinion asserted that agreements not violative of public policy could be adopted by the chancellor, but that "there is no statute or rule of law which says they must be."[88] For authority the court relied on *Florida National Bank and Trust Co. v. United States*,[89] which involved a suit for alleged overpayment of estate taxes by a bank, executor of decedent husband's estate. At issue was the taxable character of a transfer of stock in accordance with a separation agreement incorporated into the divorce decree. The federal district court construed section 65.08 and Florida case law as permissive in nature, giving the chancellor complete discretion in adopting agreements of the parties even if the parties regarded the agreement as a binding contract. However, the agreement in *Florida National Bank* was not a binding contract between the husband and wife because the parties expressly stipulated that their agreement would be ineffective until adopted by the chancellor as part of the divorce decree.[90] In short, the parties themselves gave the chancellor discretion to adopt their agreement. The Florida court's reliance on *Florida National Bank* thus seems misplaced since the agreement in *Dawkins* was effective between the parties when made. However, *Dawkins* may be reconciled with the weight of Florida precedent in that the chancellor found the separation agreement was unfair and overreaching, not meeting the required criterion of fairness.[91] It is unclear why the decision was not expressly based on the lack of fairness, thereby remaining consistent with the past reasoning of Florida courts.

Gelfo v. Gelfo[92] is less easily reconciled. There was no evidence of fraud or unfairness in the procurement of the separation agreement,[93] which provided for the wife's waiver of alimony as consideration for her husband's

693 (Fla. 1963); *accord*, Bare v. Bare 120 So. 2d 186 (3d D.C.A. Fla. 1960).

86. 172 So. 2d 633 (2d D.C.A. Fla. 1965).

87. This provision was substantially the same as present FLA. STAT. §61.08 (1969). *See* text accompanying note 75 *supra*.

88. Dawkins v. Dawkins, 172 So. 2d 633, 634 (2d D.C.A. Fla. 1965).

89. 182 F. Supp. 76 (S.D. Fla. 1960).

90. *Id.* at 78.

91. *See* text and cases accompanying notes 78-85 *supra*.

92. 198 So. 2d 353 (2d D.C.A. Fla. 1967).

93. The court noted that the husband's lawyer drew up the separation agreement while the wife did not have an attorney, but conceded that there was no fraud or unfairness. *Id.* at 354.

promise to transfer certain property. Nevertheless, the chancellor voided the agreement holding that no consideration was given in exchange for the wife's waiver of alimony. The Third District Court of Appeal, despite its earlier pronouncements to the contrary,[94] held that the chancellor was justified in disregarding the agreement and cited *Dawkins* as authority. The opinion admitted the decision would be difficult to reconcile with the weight of authority, but insisted that the chancellor could void the agreement if, in his discretion, he believed it unconscionable. Judge Swann dissented, arguing that the court should uphold a good faith agreement executed voluntarily and that the husband's promise, which he subsequently carried out, was adequate consideration for the wife's waiver of alimony.[95]

These decisions were unfortunate because they rendered uncertain the viability of existing agreements made in good faith between husband and wife. Carried to their logical conclusion, the decisions mean that the chancellor may completely disregard the desires of the spouses even when their wishes are reduced to contract. Moreover, if the chancellor were not bound by an alimony provision in a separation agreement, by implication, he would also not be bound by an alimony provision in an antenuptial agreement. Conversely, if he *were* bound by either of these agreements, the other would also bind him unless public policy voided the agreement.

Alimony Provisions in Antenuptial Agreements

Florida courts first considered the validity of antenuptial contracts in 1869.[96] Such agreements have been upheld if they were executed in good faith and without fraud or concealment.[97] The Supreme Court of Florida has enforced antenuptial contracts that deal exclusively with property rights.[98] Moreover, a presumption exists in Florida that antenuptial contracts are valid, and the burden of proving otherwise is on the party challenging the contract.[99]

To successfully challenge an antenuptial agreement in Florida, the contesting party must show that the agreement does not conform to the standards laid down by the Florida supreme court in *Del Vecchio v. Del Vecchio*.[100] In that case the plaintiff wife sued the executor of her deceased husband's estate to set aside an antenuptial agreement that released the wife's dower interest in consideration of the conveyance of a house to the wife. She

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94. *See* text accompanying note 84 *supra* and notes 110-111 *infra*.

95. Gelfo v. Gelfo, 198 So. 2d 353, 356 (3d D.C.A. Fla. 1967) (dissenting opinion).

96. Caulk v. Fox, 13 Fla. 148 (1869).

97. Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); J. CARSON, A PRACTICAL TREATISE ON THE LAW OF THE FAMILY, MARRIAGE AND DIVORCE IN FLORIDA 81 (1950).

98. North v. Ringling, 149 Fla. 739, 7 So. 2d 476 (1942); Northern Trust Co. v. King, 149 Fla. 611, 6 So. 2d 539 (1942). The United States Supreme Court has recognized the validity of prenuptial agreements in Florida except with respect to the wife's right of support. Fahs v. Merrill, 324 U.S. 308, 309 (1945).

99. Johnson v. Johnson, 140 So. 2d 358, 361 (2d D.C.A. Fla. 1962).

100. 143 So. 2d 17 (Fla. 1962).

alleged that she had not received full disclosure of her husband's property, and on this basis the trial court struck down the agreement. The intermediate appellate court reversed[101] and held that failure of the husband to disclose his assets where the wife knew or should have known of her husband's substantial means would not void the agreement.

The Florida supreme court refused to adopt this reasoning and ruled that, as in separation agreements,[102] full and fair disclosure of the husband's assets must be made to the wife before she signs an antenuptial agreement. Moreover, when provision for the wife is disproportionate to the husband's means, the burden shifts to the husband or his executor to show that his wife had, or reasonably should have had, full knowledge of her husband's property.[103] The supreme court then stated the criteria for a valid antenuptial agreement: either a fair and reasonable provision for the wife, or a full and frank disclosure to the wife of the husband's assets, or the wife's general and approximate knowledge of the husband's property. Mere inadequacy of the wife's provision will not alone invalidate an antenuptial contract; however, if the provision is unfair, it must appear that the wife understood her waiver of rights. It is also preferable, but not prerequisite, that she have independent advice. The fairness of the agreement is measured at the time of the agreement's execution and is evaluated with respect to the husband's property at that time. Fair provisions should enable the wife to live after marriage in a reasonable manner and not less comfortably than before the marriage. Moreover, the burden is on the husband to inform, rather than on his wife to inquire. Although the courts no longer recognize the archaic presumption of the husband's dominance, judges are aware that the parties do not always deal at arm's length.[104]

After *Del Vecchio,* a Florida appellate court upheld the inadequate provisions of an antenuptial agreement on the basis that the wife, who was advised by an attorney, had full understanding of her rights when she signed the agreement.[105] The court stated there must be fraudulent concealment in order to set the agreement aside.[106] Florida courts have also applied the contract doctrine of rescission to antenuptial agreements where the parties in effect abandoned the agreement,[107] and the admission of parol evidence has been permitted where the agreement was ambiguous on its face.[108] Appellate courts have given the chancellor's determination of the validity of an antenuptial agreement the same weight as a jury verdict and have overturned such a determination only where there existed no competent evidence upon which his findings could be based.[109]

101. Del Vecchio v. Del Vecchio, 132 So. 2d 771 (3d D.C.A. Fla. 1961).
102. Weeks v. Weeks, 143 Fla. 686, 689, 197 So. 393, 394 (1940).
103. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962).
104. *Id.* at 21.
105. Cantor v. Palmer, 166 So. 2d 466 (3d D.C.A. Fla. 1964).
106. *Id.* at 468.
107. McMullen v. McMullen, 185 So. 2d 191 (2d D.C.A. Fla. 1966).
108. Mead v. Mead, 193 So. 2d 476 (3d D.C.A. Fla. 1967).
109. Reese v. Reese, 212 So. 2d 33 (3d D.C.A. Fla. 1968); Fern v. Fern, 207 So. 2d 291 (3d D.C.A. Fla. 1968).

Recently, the Third District Court of Appeal of Florida considered two antenuptial agreements specifying alimony. In *Lindsay v. Lindsay*,[110] the husband and wife had agreed that the wife would waive all her rights to alimony and support in the event of separation and divorce. The court of appeal affirmed the chancellor's finding that the agreement was void and held, although *Del Vecchio* implied that a husband and wife may agree on alimony in event of a separation or divorce, it did not validate an antenuptial agreement in which the wife waived her rights entirely, receiving nothing in return. In *Sack v. Sack*,[111] the same court substantially held that the validity of an antenuptial agreement in which the wife waived alimony in return for one dollar should be measured by the *Del Vecchio* standards if divorce were granted on remand. These two decisions indicated that antenuptial agreements specifying alimony would be valid in Florida provided the *Del Vecchio* requirements were met.

Uncertainty still remained however, because none of the decisions upholding antenuptial alimony provisions had considered the effect of public policy on such provisions. Moreover, it was not entirely certain that the chancellor was required to honor alimony provisions in either separation or antenuptial agreements.[112]

This uncertainty has apparently been resolved by the recent case of *Posner v. Posner*.[113] At age 22 Sari Frazier met her husband-to-be, Victor Posner, when she went "to meet a millionaire."[114] During their four-year courtship Sari urged Victor to marry her and to have an antenuptial agreement drawn up.[115] Prior to the marriage Sari discussed the unexecuted antenuptial agreement, which completely disclosed Posner's assets, with her father and her attorney.[116] After five years of marriage and two children, Sari sued for alimony unconnected with divorce, child support, and a decree voiding the antenuptial agreement. The chancellor entered a final decree that granted the husband's counterclaim for divorce and provided 1,200 dollars per month for child support and 600 dollars per month alimony to the wife. The chancellor specifically concluded as a matter of law that the antenuptial agreement was a legally binding contract between the parties.[117] The wife appealed.

In reversing, the Third District Court of Appeal split three ways. Judge Hendry, writing for the court, followed the reasoning adopted in *Dawkins*

110. 163 So. 2d 336 (3d D.C.A. Fla.), *cert. denied*, 170 So. 2d 587 (Fla. 1964), *appeal dismissed*, 176 So. 2d 132 (3d D.C.A. Fla. 1967).

111. 184 So. 2d 434 (3d D.C.A. Fla. 1966), *rehearing denied*, 203 So. 2d 370 (3d D.C.A. Fla. 1967).

112. *See* text accompanying notes 86-95 *supra*.

113. 233 So. 2d 381 (Fla. 1970), *rev'g* 206 So. 2d 416 (3d D.C.A. Fla. 1968).

114. Brief for Petitioner at 6, Posner v. Posner, 233 So. 2d 381 (Fla. 1970).

115. *Id.* at 7.

116. Posner v. Posner, 206 So. 2d 416, 420 (3d D.C.A. Fla. 1968) (dissenting opinion). The antenuptial agreement provided that in event of divorce, Sari would accept $600 per month in lieu of alimony or support, the payments continuing until her death or remarriage. If Victor died prior to that time, the payments would cease and Sari would receive a lump sum of $21,600. *Id.* at 416.

117. *Id.* at 417.

and *Gelfo*.[118] Under this view the chancellor has complete discretion to determine alimony, and, although he may use an antenuptial agreement to aid him in determining the appropriate amount, he is not bound to accept the stipulation of the parties in an antenuptial agreement. Thus, the court concluded the chancellor had erred in construing the Posners' agreement as a "legally binding contract between the parties."

Chief Judge Carroll concurred in the reversal, but argued that the alimony provision of the antenuptial agreement was void as against public policy. He believed Judge Hendry's opinion gave the chancellor the power either to accept or reject an antenuptial contract relating to alimony and concluded that this was undesirable because it renders uncertain whether parties may rely on such agreements. Judge Carroll distinguished *Del Vecchio* on the ground that public policy invalidates only antenuptial contracts specifying alimony but does not void antenuptial agreements dealing with property rights. Citing as precedent the weight of authority from other jurisdictions,[119] he expressly repudiated his statement in *Sack*[120] that the validity of an alimony provision in an antenuptial agreement should be measured by *Del Vecchio*. It is unclear why public policy was not considered in the earlier decisions of this same court. If actually relevant, and more than merely a rationale resorted to when logic fails, it would seem to warrant consistent application.

The third member of the court, Judge Swann, dissented, asserting that the majority holding unjustifiably voided alimony provisions in antenuptial contracts in all circumstances. He contended that all antenuptial agreements, even those containing alimony provisions, should be measured by *Del Vecchio* standards. Moreover, since married women are permitted to stipulate alimony in separation agreements,[121] single women should be accorded the same right. The dissent noted that the facts of *Posner* indicated the provision for the wife was fair and that she received complete and full disclosure as required by law. The opinion also argued that, if a woman could waive her statutory dower rights by antenuptial agreement, she should be able to contract concerning her alimony. After deciding the case the court *sua sponte* certified the cause to the Florida supreme court.[122]

The Supreme Court of Florida unanimously reversed, holding that the *Del Vecchio* principles controlled and that the chancellor had correctly applied these principles.[123] On the basis of the *Del Vecchio* standards, the opinion upheld the chancellor's conclusion that the antenuptial agreement

118. *See* text accompanying notes 86-95 *supra*.

119. *See* text and cases accompanying notes 25-73 *supra*.

120. *See* text accompanying note 111 *supra*.

121. *See* text accompanying note 77 *supra*.

122. Certification was accomplished pursuant to FLA. CONST. art. V, §2. The question certified was: "[W]hether a provision of an antenuptial contract, specifying an amount of alimony to be accepted by a prospective wife in the event of separation or divorce is valid, or is void as against public policy." Posner v. Posner, No. 37,162, at 2 (Fla., April 9, 1969), *aff'd on rehearing*, 233 So. 2d 381 (Fla. 1970).

123. Posner v. Posner, No. 37,162 (Fla. April 9, 1969).

was a legally binding contract. "Had the *Del Vecchio* criteria not been met, the chancellor would have been justified in declaring that the antenuptial agreement was invalid and thus not binding on the court. . . . [T]his was not the factual posture of the case at bar."[124] The court disposed of the public policy argument by stating perfunctorily that the distinction between alimony in *Posner* and dower in *Del Vecchio* is immaterial as far as Florida's public policy is concerned.

This opinion did not fully clarify Florida's policy regarding alimony provisions in antenuptial contracts, and it left certain issues unresolved. First, to assert that waiving alimony is no different from waiving dower evades the question because the two are intrinsically different. Dower is determined by the amount of real property the husband owned during his marriage and the amount of personal property he possessed at his death.[125] Alimony, on the other hand, is based on two factors: the ability of the husband to provide for his ex-wife, and the needs of the wife based on the standard of living created by the husband during the marriage.[126] These two factors suggest the second unresolved issue: modification of the stipulated alimony. If the husband loses his ability to pay the stipulated amount, it seems unfair to hold him to his promise. Likewise, if the wife's needs have become disproportionate to the stipulated award, she should not be left without adequate means of support. Nonetheless, the original opinion in *Posner* indicated that the lower courts should construe this type of antenuptial agreement as strictly as any other contract.

The court may have realized that its opinion inadequately considered the issues because rehearing was granted and another opinion issued nearly a year later.[127] This new opinion thoroughly discusses the relevant public policy issues. Writing for the majority, Mr. Justice Roberts noted that the state traditionally had maiantained an interest in marriage as the foundation of society, and this interest is responsible for the rule voiding alimony provisions in antenuptial contracts. He then recognized, however, that society's view of marriage is changing, that divorce rates are rising, and radical new divorce laws are being adopted.[128] These facts induce couples to settle more than their property rights in antenuptial agreements and to stipulate alimony in event of possible divorce. Moreover, the use of these agreements relating to divorce is increasingly sanctioned by the courts.[129]

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124. *Id.* at 5.

125. FLA. STAT. §731.34 (1969).

126. Jacobs v. Jacobs, 50 So. 2d 169, 173 (Fla. 1951).

127. Posner v. Posner, 233 So. 2d 381 (Fla. 1970).

128. "[W]e cannot blind ourselves to the fact that the concept of the 'sanctity' of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no 'guilty' party—is being advocated by many groups and has been adopted by the State of California . . . ." *Id.* at 384.

129. The opinion cited the following cases: LeFevers v. LeFevers, 240 Ark. 992, 403 S.W.2d 65 (1966) court did not question the validity of antenuptial agreement that

The opinion concluded that these societal changes required a change in public policy and consequently in the rule that antenuptial agreements settling alimony and property rights upon divorce are void. If the agreement meets the *Del Vecchio* standards, and if the divorce is prosecuted in good faith so that the agreement cannot be said to have encouraged the divorce, the agreement is valid.

Such an agreement may be modified when originally presented to the chancellor and after the divorce decree is entered.[130] Modification must be carried out under applicable statutory[131] and case law[132] and should be allowed only upon a showing of compelling circumstances. For example, the husband must show that he can no longer meet his obligations or the wife must demonstrate her increased need.[133]

Modification should prevent abuse of antenuptial agreements. An alimony provision in a fairly executed antenuptial agreement is not used to cut off the wife's support. It limits the husband's alimony liability to an amount agreed to constitute a sum sufficient for the wife. Such an agreement primarily protects a husband from the avarice of a bitter wife during divorce proceedings,[134] and it prohibits the use of alimony as a punishment.

Posner ends all speculation about the validity of alimony provisions in antenuptial agreements in Florida. It also implies that Florida courts should properly respect alimony provisions in separation agreements when full disclosure of the husband's assets has been made. The decision seems certain to be a leading case in a trend toward liberalized family law.

Further Proposals and Considerations

While *Posner* may seem dramatic, it is a logical step when viewed against the development of cases dealing with antenuptial agreements. It would

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provided that in event of divorce the wife should be restored to her own property rights); *In re* Muxlow's Estate, 367 Mich. 133, 116 N.W.2d 43 (1962) (in a suit between heirs of the spouse the court upheld antenuptial agreement limiting the husband's spousal obligations to the wife in event of divorce); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960) (antenuptial contract limiting alimony in event of divorce was upheld); Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1955) (court held valid a forfeiture provision in antenuptial contract that was applicable only when divorce was filed in bad faith; Strandburg v. Strandburg, 33 Wis. 2d 204, 147 N.W.2d 349 (1967) (provision in antenuptial contract calling for property division in event of divorce was admissible in evidence to help determine the division).

130. Posner v. Posner 233 So. 2d 381 (Fla. 1970).

131. *E.g.*, FLA. STAT. §61.14 (1969) (this statute was enacted during the depression of the 1930's to alleviate hard-pressed husbands); Posner v. Posner, 233 So. 2d 381, 387 (Fla. 1970) (concurring opinion).

132. *See* note 80 *supra.*

133. Posner v. Posner, 233 So. 2d 381, 387 (Fla. 1970) (concurring opinion). If the wife shows an increased need justifying modification, the court will then consider the ex-husband's current ability to pay.

134. Judge Swann asserted that Mrs. Posner was really saying: "[I]t ain't enough alimony, now, I want more." Posner v. Posner, 206 So. 2d 416, 420 (3d D.C.A. Fla. 1968) (dissenting opinion).

be premature to consider this case as signalling an end to development of this area of family law. Legal rules that simplify difficult determinations of fact may be needed.

To protect the woman from deception and the man from having an antenuptial agreement disregarded in divorce court, it is suggested that the courts presume that antenuptial agreements are made at arm's length when each party is represented by legal counsel. Both sides would then strive for full disclosure of the husband's assets. If such a rule were adopted, the husband would be induced to insure that his wife was represented by an attorney in order to protect himself against later claims of nondisclosure. Since it would be easy for the chancellor to determine if the wife were represented, such a rule could save court time now spent in factfinding at the trial court level.[135] Moreover, many attorneys have become skilled at marital counseling because of their extensive experience in domestic relations law. A rule invoking the assistance of attorneys before the marriage would also benefit the parties by allowing them to become knowledgeable in advance about the legal aspects of their marriage.[136] This rule also recognizes that the courts should be reluctant to treat an antenuptial agreement made by unassisted parties as just another contract.[137] At the same time, the attorney would protect the interests of the wife and, in so doing, would indirectly protect the state's interest in the marital relation.

A rule encouraging both parties to secure counsel to draw up an antenuptial agreement is expedient considering the group characteristics of those who usually execute antenuptial agreements. A study has shown that only 18 per cent of the couples obtaining a divorce have property worth more than 4,000 dollars to be divided in the divorce action.[138] Those who executed antenuptial agreements containing alimony provisions in the decided cases were almost exclusively middle aged or older, and most of the spouses had been married before.[139] The person who considers adopting an antenuptial agreement generally owns property accumulated over the years. He wants to protect his property from disposal by a divorce court, and often is motivated by a desire to save his property for children of a first marriage. Such a person has probably dealt with attorneys and is likely to consult with them when he decides to marry; it seems only fair that his fiancee should also receive the benefit of an attorney's advice.

Florida courts have not yet recognized two other policy considerations.

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135. The evidentiary hearings in *Posner* produced 900 pages of testimony. Posner v. Posner, No. 37,162 (Fla., April 9, 1969), *aff'd on rehearing*, 233 So. 2d 381 (Fla. 1970).

136. *See* Comment, *Preventive Law and Family Law: Pre-Marital Phases and Purposes*, 12 VILL. L. REV. 839 (1967).

137. "At the outset we must recognize that there is a vast difference between a contract made in the market place and one relating to the institution of marriage." Posner v. Posner, 233 So. 2d 381, 382 (Fla. 1970). This proposal does not preclude needed modification of the agreement. *See* text accompanying notes 130-134 *supra*.

138. W. GOODE, AFTER DIVORCE 217 (1956). The percentage is undoubtedly higher today, but inflation, as well as increased affluence, probably is responsible for much of the increase. The fact remains that most divorces occur in lower economic strata. *Id.*

139. *See* cases cited noted 25-72 *supra*.

First, a study has shown a direct positive correlation between an ex-husband's favorable attitude toward his alimony payments and the continuity of such payments.[140] A man who thinks an alimony award is too high is more likely to default on his payments than one who feels that he is paying a just amount. Common sense suggests that a man who has contracted for an alimony award in an antenuptial agreement would usually feel the award justified. Thus, the *Posner* decision could increase the consistency of alimony payments.

Second, allowing single women to execute antenuptial contracts containing alimony provisions furthers the single woman's right to contract. The new Florida constitution provides for spousal equality as to property matters,[141] and a new statute makes this extension of women's rights a reality.[142] Since married women may sign alimony provisions in separation agreements,[143] unmarried women logically should also be allowed to sign alimony provisions in antenuptial agreements. It has been asserted that parties to an antenuptial agreement do not deal at arm's length,[144] and that an unmarried woman, giddy over her upcoming marriage, cannot make a rational decision. However, a married woman who is faced with the break-up of her marriage is probably equally irrational. One study of domestic relations cases concluded:[145]

> The "traditional psychological basis of law that man is a responsible being able to choose his own ends and make his own adjustments" doesn't seem to hold up in a considerable proportion of family court cases. Perhaps the trauma of domestic disharmony so disturbs the emotions of the spouses that their judgment becomes unsettled and they are unable to think.

If the law presumes that an emotionally unsettled wife can validly contract with respect to alimony in a separation agreement, it is discriminatory and arbitrary to prohibit a single woman from so contracting in an antenuptial agreement. Fortunately, the *Posner* case ends this anomaly.

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140. W. GOODE, AFTER DIVORCE 224 (1956).

141. FLA. CONST. art. X, §5 (1968) provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real or personal; except that dower or curtesy may be established and regulated by law." *See also* Note, *Interspousal Immunity in Tort: Its Relevance, Constitutionality, and Role in Conflict of Laws*, 21 U. FLA. L. REV. 484, 490-94 (1969), for a discussion of how the new Florida constitution affects spousal immunity in tort actions—another legacy of the common law unity fiction of unity between husband and wife.

142. The 1970 Florida legislature enacted a bill that removes all common law disabilities of married women in the holding and disposition of their property. For example, the husband is no longer required to join in the wife's conveyances. Fla. Laws 1970, ch. 70-4.

143. *See* text accompanying notes 76-79 *supra*.

144. Comment, *"A Check List" for the Drafting of Enforceable Antenuptial Agreements*, 19 U. MIAMI L. REV. 615, 619 (1965).

145. Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 602, 608-09 (1958).

CONCLUSION

It is clear that the rule voiding alimony provisions is anachronistic. Although the rule may have been sensible when marriage was considered an indissoluble sacrament that was superior to the right of an individual to contract, the reasons for the rule seem obsolete today. Sociologists list so many causes for divorce that ascribing the breakdown of a marriage to an alimony provision in an antenuptial agreement seems an absurd oversimplification. Moreover, the social concept of marriage outside the courts is changing so rapidly that the law must either change or be alienated from common social norms. One commentator has stated:[146]

> The modern trend seems to be to regard marriage as a status only in the subordinate sense, the relationship being primarily that of contract, which can be abrogated or dissolved and with considerably more ease than one could extricate one's self from the liabilities arising out of a business relationship.

It is extremely doubtful that the courts will soon view marriage as a simple contract.[147] However, the Florida courts have discontinued striking down otherwise valid antenuptial contracts on public policy grounds. Hopefully, this development foreshadows more individual freedom in shaping one's own interpersonal relationships with regard to marriage.

C. THOMAS ZIMMER

146. McGuire, *Civil Law Concerning Marriage*, in FUNDAMENTAL MARRIAGE COUNSELING 416 (Cavanagh ed. 1963), *cited in* Comment, *supra* note 136, at 842.

147. *See Comment*, note 136 *supra*.