

## ANTENUPTIAL AGREEMENTS

Judith T. Younger<sup>†</sup>

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Antenuptial agreements are made by prospective spouses in contemplation and consideration of marriage.<sup>1</sup> They showed up in our legal system in the sixteenth century when couples used them in attempts to alter the incidents of the legal marital property regime.<sup>2</sup> The validity of these agreements was then uncertain. They were thus the subject of litigation.<sup>3</sup> Now, 400 years later, couples are still using antenuptial agreements to alter the incidents of the marital property regime, their validity is still uncertain and they are still the subject of litigation.

I have addressed antenuptial agreements as a genre twice before<sup>4</sup> and revisit them now, ten years later, to see how they fare.

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<sup>†</sup> Joseph E. Wargo Anoka County Bar Association Professor of Family Law. My thanks to Elizabeth K. Lee '03 for her help with this paper.

1. See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 1(1), 9B U.L.A. 371 (1983 & Supp. 2001). These are sometimes called “premarital” or “prenuptial” agreements.

2. Both chancery and common law courts were passing on their validity. 5 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 310-12 (3rd ed. 1945).

3. *Id.*

4. Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L.

Part I of this article is an introduction; it describes the typical antenuptial agreement, the dilemma these agreements present for the law and the special rules of fairness developed for assessing their validity. Part II is a review of the cases decided by the highest state courts in the last ten years. Part III is a brief discussion of the Uniform Premarital Agreement Act and the ALI Principles of Family Dissolution. Finally, Part IV is the Conclusion which discusses drafting for validity.

## I. INTRODUCTION

Today's garden-variety antenuptial agreement is made between engaged<sup>5</sup> parties on the eve of marriage.<sup>6</sup> The parties are in a confidential relationship,<sup>7</sup> likely to be of unequal bargaining power<sup>8</sup> and in less than rational states.<sup>9</sup> They are thus ripe for overreaching and prone to making bad bargains. The purpose of their agreement is to alter the state-prescribed marital property regime which would otherwise apply to them when the marriage ends.<sup>10</sup> The agreement, thus, deals with matters of great interest and importance to the state: property division, support, elective or

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REV. 1059 (1988); Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. L. 1 (1992).

5. The Oxford English Dictionary defines "engaged" to mean: "That is under a promise to marry; betrothed." 5 OXFORD ENGLISH DICTIONARY 248 (2d ed. 1991).

6. Literally, in too many cases. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §7.05 cmt. d (Tentative Draft No. 4 2000) [hereinafter PRINCIPLES].

7. E.g., *Sogg v. Nev. State Bank*, 832 P.2d 781, 783-84 (Nev. 1992); *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1346 (Ohio 1994); *Estate of Beesley v. Harris*, 883 P.2d 1343, 1346-47 (Utah 1994).

8. See *Marriage of Bonds v. Bonds*, 5 P.3d 815, 817 (Cal. 2000) (concerning husband who was a major league baseball player and foreign, unemployed wife); *McAlpine v. McAlpine*, 679 So.2d 85, 94 (La. 1996) (Justice Johnson concurring in part, dissenting in part) (concerning husband who was attorney); *Randolph v. Randolph*, 937 S.W.2d 815, 817 (Tenn. 1996) (concerning husband who was successful real estate businessman owning assets amounting to approximately \$800,000 while wife owned virtually no assets); *Beesley*, 883 P.2d at 1345 (concerning husband who owned many assets while wife was nurse's aid making \$3.50 an hour); *Sogg*, 832 P.2d at 785-86 (concerning millionaire husband and wife who was a sporadically employed country singer).

9. They are in love and suffering from the limits of cognition and bounded rationality. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995). But see *In re Estate of Thies*, 903 P.2d 186, 190 (Mont. 1995) (holding the parties "are not assumed to have lost their judgmental faculties because of their pending marriage").

10. See, e.g., *Fletcher*, 628 N.E.2d at 1347.

intestate shares, allowances, exemptions and homestead. Typically, the parties waive some or all of these rights.<sup>11</sup> The agreement is executed by the parties before the marriage has begun and enforced, if at all, when the marriage ends. There is, thus, likely to be a long time lapse between execution and enforcement during which the parties' circumstances may change radically in unforeseen ways.

While the antenuptial agreement is a contract, it is not an ordinary contract. Its parties, purpose, subject matter and the time between execution and enforcement set it apart. This deviation creates a dilemma for the law. Prospective spouses, of course, have an interest in making their own bargains and, thereby, settling rights which might otherwise be litigated. As freely made bargains, antenuptial agreements should be encouraged and enforced. To the extent, however, that they are likely to be the product of overreaching, vary or diminish the state-prescribed protections for the couple, or may become unfair by the time enforcement is sought, the law is wary of according them validity. This conflict makes antenuptial agreements less stable than ordinary contracts and explains why ordinary contract rules are not sufficient to contain them. Historically, antenuptial provisions dealing with death of a spouse have had a better prospect for enforcement than those governing divorce.<sup>12</sup> The latter were at one time considered void *ab initio* as violative of public policy.<sup>13</sup> The law has reconsidered and since about 1970, provisions governing both types of marital dissolution stand on a more equal footing. Exactly what that footing is varies from state to state. Generally, courts facing a challenge to the validity of an antenuptial agreement will examine the antenuptial agreement more stringently than they would an ordinary contract. This examination includes the circumstances surrounding execution of the agreement as well as the circumstances in which it is sought to be enforced. Courts look for both procedural and substantive fairness.

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11. See, e.g., *McAlpine*, 679 So. 2d at 91-92; *Thies*, 903 P.2d at 188.

12. *Rider v. Rider*, 669 N.E.2d 160, 162 (Ind. 1996).

13. *Brooks v. Brooks*, 733 P.2d 1044, 1048-49 (Alaska 1987). See discussion *infra* Part II A-C.

*Special Rules of Fairness for Antenuptial Agreements**Procedure*

Procedural fairness in this context is generally thought to mean that the parties entered the agreement voluntarily, after making financial disclosure to each other.<sup>14</sup> The search for voluntariness begins as a common law review for fraud, overreaching or sharp dealing,<sup>15</sup> but goes further than the similar inquiry for ordinary contracts. Courts look at the circumstances of the parties, their experience, the time of the signing of the agreement in relation to the wedding and the representation of each party by independent counsel.<sup>16</sup> The requirement of disclosure is closely related to voluntariness. Most agreements contain waivers of marital property rights which cannot be fair or voluntary if the waiving party has no idea of the other's assets. The standard for disclosure varies from state to state, with the relative sophistication of the parties,<sup>17</sup> apparent fairness or unfairness of the terms of the agreement<sup>18</sup> and other circumstances unique to the litigants.<sup>19</sup> The standard is described variously as "fair,"<sup>20</sup> "full,"<sup>21</sup> "full and fair,"<sup>22</sup> "material,"<sup>23</sup> and "adequate."<sup>24</sup> At a minimum, it should be sufficient to give each party a clear idea of the other's resources.<sup>25</sup> A simple and effective procedure for ensuring disclosure is to attach schedules to the agreement itself.<sup>26</sup> A lack of

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14. *E.g.*, *De Lorean v. De Lorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986); *Gross v. Gross*, 464 N.E.2d 500, 506 (Ohio 1984).

15. *E.g.*, *Newman v. Newman*, 653 P.2d 728, 733 (Colo. 1982).

16. *E.g.*, *Norris v. Norris*, 419 A.2d 982, 985 (D.C. 1980).

17. *E.g.*, *Sogg v. Nev. State Bank*, 832 P.2d 781, 785 (Nev. 1992) ("Vicky is in fact extremely unsophisticated with respect to business matters").

18. *E.g.*, *In re the Marriage of Spiegel*, 553 N.W.2d 309, 316 (Iowa 1996).

19. *E.g.*, *Randolph v. Randolph*, 937 S.W.2d 815, 818 (Tenn. 1996) (holding that wife's cancer illness was a significant factor in determining the agreement's validity).

20. *E.g.*, *Wiley v. Iverson*, 985 P.2d 1176, 1180 (Mont. 1999); *In re Thies*, 903 P.2d 186, 190 (Mont. 1995).

21. *E.g.*, *Sogg*, 832 P.2d at 786.

22. *E.g.*, *Simeone v. Simeone*, 581 A.2d 162, 167 (Pa. 1990); *Randolph*, 937 S.W.2d at 817.

23. *E.g.*, *Beesley v. Harris*, 883 P.2d 1343, 1348 (Utah 1994).

24. *E.g.*, *In re Marriage of Spiegel*, 553 N.W.2d 309, 317 (Iowa 1996).

25. "[A] general knowledge of the true nature and extent of the other's property is sufficient." *Id.*

26. *Randolph*, 937 S.W.2d at 821.

disclosure can be overcome by a waiver<sup>27</sup> or a showing that a party had actual knowledge of the other's assets.<sup>28</sup>

### *Substance*

The review for substantive fairness is more difficult to describe. As it applies to the terms of the agreement, it is not a substitution of the court's notions of what is right for the parties' bargain.<sup>29</sup> It is "amorphous,"<sup>30</sup> made on a case by case basis<sup>31</sup> and the standard is variously described as "reasonable,"<sup>32</sup> "fair,"<sup>33</sup> "not unconscionable,"<sup>34</sup> and "equitable,"<sup>35</sup> for example. Substantive fairness is sometimes measured, along with procedural fairness, at the time of execution of the agreement<sup>36</sup> and, with increasing frequency, at the time of enforcement as well.<sup>37</sup> In making this review, courts try to avoid hardship visited on a party by unforeseen consequences of enforcement—for example, a spouse left at a drastically lower standard of living, unable to provide, or a public charge.<sup>38</sup>

Typical of the broadest review of an antenuptial agreement in terms of substantive fairness is the Minnesota case of *McKee-Johnson v. Johnson*,<sup>39</sup> decided in 1989. In it, after finding the agreement procedurally fair, the Minnesota Supreme Court remanded the case to the trial court for a review of substantive fairness at both the time of execution and the time of enforcement. It told the lower court its job was to review the substantive fairness of the agreement in light of circumstances at execution by inquiring "into facts bearing upon the reasonable expectations of each signatory as to the scope and ultimate effect of the contract" if the marriage ended

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27. *E.g.*, *Hafner v. Hafner*, 295 N.W.2d 567, 571-72 (Minn. 1980).

28. *E.g.*, *Randolph*, 937 S.W.2d at 817.

29. *E.g.*, *Newman v. Newman*, 653 P.2d 728,734 (Colo. 1982); *Gross v. Gross*, 464 N.E.2d 500, 509 (Ohio 1984).

30. *Button v. Button*, 388 N.W.2d 546, 551 (Wis. 1986).

31. *Id.*

32. *E.g.*, *In re Marriage of Spiegel*, 553 N.W.2d 309, 315 (Iowa 1996).

33. *E.g.*, *Sogg v. Nev. State Bank*, 832 P.2d 781, 785 (Nev. 1992).

34. *E.g.*, *Penhallow v. Penhallow*, 649 A.2d 1016, 1022 (R.I. 1994).

35. *E.g.*, *Button*, 388 N.W.2d at 547.

36. *E.g.*, *Penhallow*, 649 A.2d at 1021.

37. *E.g.*, *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 267 (Minn. 1989); *Rider v. Rider*, 669 N.E.2d 160, 164 (Ind. 1996).

38. *E.g.*, *Newman*, 653 P.2d at 734-35; *Gross*, 464 N.E.2d at 510.

39. 444 N.W.2d 259.

in divorce.<sup>40</sup> The lower court was to undertake a further substantive review to determine “what effect, if any, the birth of the parties’ child, and any sequences of that event, significantly resulted in changed circumstances” that would make “the enforcement . . . oppressive and unconscionable.”<sup>41</sup> The court said it could not state precise rules for the review to aid the trial courts because each case hinges on its specific facts. It summed up by saying, “[t]rial courts engaging in such a review must strike a balance between the law’s policy favoring freedom of contract between informed consenting adults, and substantive fairness—admittedly a difficult task.”<sup>42</sup>

At the other end of the spectrum on the issue of substantive fairness is the Pennsylvania case of *Simeone v. Simeone*,<sup>43</sup> decided a year after *McKee-Johnson*.<sup>44</sup> In it, the Supreme Court of Pennsylvania upheld the agreement before it as procedurally fair, but abandoned its earlier position that it would review antenuptial agreements for substantive fairness. In its judgment, such a review at the time of execution severely undermines the functioning and reliability of an agreement and is, therefore, not a proper subject for judicial inquiry.<sup>45</sup> It also rejected any inquiry into substantive fairness at the time of enforcement. Although it recognized that post-execution events like “the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events”<sup>46</sup> might cause unfairness at enforcement, it declined to review for them.<sup>47</sup> In its view, all such events are foreseeable; thus, if parties do not include them in their agreements, they should be seen as having contracted to bear the risks of their occurrence.<sup>48</sup> Courts should not ignore this “by proceeding to determine whether a prenuptial agreement was . . . reasonable at the time of its inception or the time of divorce.”<sup>49</sup>

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40. *Id.* at 267.

41. *Id.*

42. *Id.* at 267-68.

43. 581 A.2d 162 (Pa. 1990).

44. 444 N.W.2d 259 (Minn. 1989).

45. *Simeone*, 581 A.2d at 166.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

## II. THE CASES SINCE *SIMEONE*

Since *Simeone*,<sup>50</sup> the highest courts of twelve states have decided fourteen cases in which they ruled on the validity of challenged antenuptial agreements. A review of these cases shows that courts continue to scrutinize these agreements for procedural and substantive fairness. However, one court, after conducting such a review, expressed its dislike for the process of reviewing for substance.

### A. *Substance and Procedure*

In *In re Marriage of Spiegel*,<sup>51</sup> decided by the Supreme Court of Iowa in 1996, the wife attacked the agreement as being procedurally and substantively unfair.<sup>52</sup> The trial court agreed as to procedural unfairness, finding that it was “gained through fraud, duress, and undue influence.”<sup>53</sup> The husband appealed, relying on the fact that the prospective wife was represented by counsel who fully advised her of the deficiencies of the agreement.<sup>54</sup> She, nevertheless, signed it.<sup>55</sup> The Supreme Court disagreed with the trial court. It found the agreement “fairly, freely, and understandingly entered into,”<sup>56</sup> despite the fact that the prospective husband lied about the reasons for wanting it<sup>57</sup> and his timing presented the prospective wife “with the dilemma of canceling a wedding or submitting to the agreement.”<sup>58</sup> It said, “Sara signed the agreement voluntarily, albeit reluctantly.”<sup>59</sup> A dissenting justice, accepting the majority’s facts, thought the agreement should not be enforced because of the prospective husband’s conduct.<sup>60</sup>

The court found the agreement substantively fair as well. The

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50. 581 A.2d 162.

51. 553 N.W.2d 309 (Iowa 1996).

52. *Id.* at 316-17.

53. *Id.* at 313.

54. *Id.* at 312.

55. *Id.*

56. *Id.* at 315.

57. *Id.* at 311, 317.

58. *Id.* at 317.

59. *Id.*

60. “A.J.’s conduct and timing robbed Sara of a fair ability to reject the agreement. Notwithstanding the availability of legal counsel, I think she was, because of A.J.’s conduct, not equipped to accept her lawyer’s advice.” *Id.* at 322 (Harris, J., dissenting).

test, it said, was that “[t]he person challenging the agreement must prove its terms are unfair or the person’s waiver of rights was not knowing and voluntary . . . .”<sup>61</sup> Further, the court stated, “we hold the terms of an agreement are fair when the provisions of the contract are mutual or the division of property is consistent with the financial condition of the parties at the time of execution.”<sup>62</sup> The court declined to substitute its notions of fairness for the parties’ bargain.<sup>63</sup> It pointed out that the wife did not forfeit all marital rights, but retained her statutory rights on the husband’s death and received a joint interest in the marital home.<sup>64</sup> Her net worth thus increased during marriage.<sup>65</sup> In addition, the relinquishment of marital rights on divorce was mutual, as were all other provisions of the agreement.<sup>66</sup> Thus, the agreement was substantively fair. The husband did not suggest in his argument that the court should abandon its usual review for substantive fairness; however, the court, noting “that issue is not before us,” nevertheless took the occasion to discuss it.<sup>67</sup> It expressed increasing reluctance to review antenuptial agreements for substance, lamented the “amorphous” nature of such reviews, the difficulties involved in making them and stated its approval of *Simeone v. Simeone*.<sup>68</sup> It said:

[a] court should not ignore the parties’ expressed intent by proceeding to determine whether a prenuptial agreement was, in the court’s view, reasonable at the time of inception or the time of divorce. These are exactly the sorts of judicial determinations that such agreements are designed to avoid. Rare indeed is the agreement that is beyond possible challenge when reasonableness is involved.<sup>69</sup>

In three other cases in which the substance of the agreements was an issue, the courts employed different standards but showed no reluctance in reviewing for substance. In *Sogg v. Nevada State Bank*,<sup>70</sup> the Nevada Supreme Court stated the standard as follows:

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61. *Id.* at 316

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 315.

68. 581 A.2d 162 (Pa. 1990).

69. *Spiegel*, 553 N.W.2d at 315.

70. 832 P.2d 781 (Nev. 1992).

antenuptial agreements are

enforceable unless unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress . . . . Because of the presumed fiduciary relationship existing between parties who are engaged to be married, a presumption of fraud has been found where the agreement entered greatly disfavors one of the parties.<sup>71</sup>

The presumption of fraud arose in this case because the agreement signed by the prospective wife “left her with no resources or means of support in the event of divorce, and because [she] probably would have received more under the community property laws of Nevada . . . .”<sup>72</sup> Because the prospective wife had not had an opportunity to get the advice of an independent attorney, was not experienced in business, was pushed into signing the agreement by the prospective husband and did not have the benefit of full disclosure of his assets, the presumption was not rebutted and the antenuptial agreement was invalid.<sup>73</sup> The court so held despite the fact that the parties, when they married, were fifty-five and eighty-seven, respectively, had been married before and the present marriage lasted a mere eight months.<sup>74</sup>

In *Penhallow v. Penhallow*,<sup>75</sup> the defendant was fifty and the plaintiff was seventy-eight at the time of the marriage. The plaintiff had never been married and the defendant had been divorced after twenty-eight years. The present marriage lasted four years.<sup>76</sup> The plaintiff was not represented by counsel and the agreement, drafted by the defendant’s lawyer,<sup>77</sup> was signed on the day of the wedding.<sup>78</sup> This case is not in the usual mold in terms of the parties’ positions or the agreement’s terms. Here, the husband challenged the agreement and the wife sought to enforce it.<sup>79</sup> On

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71. *Id.* at 783-84.

72. *Id.* at 784.

73. *Id.* at 785-86.

74. *Id.* at 782-83.

75. 649 A.2d 1016 (R.I. 1994).

76. *Id.* at 1018-19.

77. *Id.* at 1018. It is undisputed that the plaintiff did not have the assistance of counsel at the time the agreement was signed. *Id.* at 1022. However, the Uniform Premarital Agreement Act does not require the presence of counsel as a condition for enforceability of a premarital agreement. *Id.*

78. *Id.* at 1018.

79. *Id.* at 1019.

its face, the agreement was one-sided.<sup>80</sup> Under the premarital agreement (1) all the wife's property was to remain her separate property; (2) the husband was to transfer all his realty into a tenancy by the entirety with the wife; and (3) the husband was to transfer his cash and the contents of his safety deposit boxes into a joint tenancy with her. If the wife initiated a divorce, separation or annulment of the marriage, she was required to return all property acquired under the agreement.<sup>81</sup> If, however, the husband initiated such a proceeding, the wife would retain fifty percent of what she had acquired.<sup>82</sup> The family court invalidated the agreement on the ground that it was unconscionable when executed.<sup>83</sup> Under the Rhode Island version of the Uniform Premarital Agreement Act, unconscionability at execution is not enough to invalidate an agreement.<sup>84</sup> The challenger must also prove by clear and convincing evidence that he did not enter into it voluntarily and that before executing it he was not provided with fair and reasonable disclosure, did not waive such disclosure or have actual knowledge of the other party's assets.<sup>85</sup> This, according to the Rhode Island Supreme Court, the husband failed to do. Thus, it reversed the lower court and found the agreement enforceable.<sup>86</sup>

In *Matter of the Estate of Lutz*,<sup>87</sup> the North Dakota Supreme Court tested an antenuptial agreement containing mutual waivers of the prospective spouses' shares of each other's estates for voluntariness and unconscionability at both execution and at enforcement.<sup>88</sup> The surviving spouse was unrepresented at execution of the agreement<sup>89</sup> but eight months elapsed between the time she received a draft of it and the time it was executed.

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80. *Id.* at 1018.

81. *Id.*

82. *Id.*

83. *Id.* at 1020.

84. *Id.* at 1021 (citing R.I. GEN. LAWS 1956 § 15-17-6(a)(2)(1988)).

85. *Id.* at 1022.

86. There was an issue about plaintiff's mental capacity to enter the agreement in the first place. Husband did not plead incapacity in his complaint; the trial court refused to consider testimony on the subject and the supreme court refused to deal with the issue on appeal. *Id.* at 1023. It seems, however, that justice was ultimately done when the Rhode Island Supreme Court later held that defendant's filing a complaint for protection from abuse constituted an initiation of the parties' separation which required her to return all property she acquired under the antenuptial agreement. *Penhallow*, 725 A.2d at 896.

87. 620 N.W.2d 589 (N.D. 2000).

88. *Id.* at 595, 596.

89. *Id.* at 595.

The court thus found she had had plenty of time to consult her own counsel.<sup>90</sup> The court also rejected her claims of unconscionability at execution and enforcement.<sup>91</sup> It said, “Lavilla voluntarily entered into the agreement, and has received exactly what she agreed to receive.”<sup>92</sup>

*B. Substance: Alimony Waivers*

Alimony (spousal support) has always been a sensitive subject in the context of antenuptial agreements. Some states have refused to permit agreements to control the issue holding that provisions which attempt to do so are void per se. Others have allowed such provisions, subjecting them to a review for fairness at enforcement. In the ten years since the *Simeone* case, five<sup>93</sup> of the states’ highest courts addressed the validity of antenuptial waivers of alimony: the waivers were enforced in all but one case. The California,<sup>94</sup> Louisiana,<sup>95</sup> and Tennessee Supreme Courts<sup>96</sup> held that alimony waivers are no longer void per se, as against public policy, and are, thus, proper subjects of antenuptial agreements. Each court then proceeded to uphold the waiver as applied to the particular couple before it. The Supreme Court of California declined to decide “whether circumstances existing at the time enforcement of such a waiver is sought might make enforcement unjust.”<sup>97</sup> The majority,

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90. *Id.*

91. *Id.* at 597.

92. *Id.*

93. *Pendleton v. Pendleton*, 5 P.3d 839 (Cal. 2000); *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996); *In re Marriage of Spiegel*, 553 N.W.2d 309 (Iowa 1996); *McAlpine v. McAlpine*, 679 So.2d 85 (La. 1996); *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996).

94. *E.g.*, *Pendleton*, 5 P.3d 839.

95. *E.g.*, *McAlpine*, 679 So.2d 85.

96. *E.g.*, *Cary*, 937 S.W.2d 777.

97. *Pendleton*, 5 P.3d 839. In this case each spouse, at the time of dissolution, had a net worth of approximately \$2.5 million. Wife was an aspiring writer with a master’s degree and two children from an earlier marriage. She declared her monthly gross income as \$5,772 (including \$1,352 in social security benefits for the children). Husband was a businessman with a doctorate in pharmacology and a law degree; he owned interests in various business ventures and companies. Each party was represented at execution of the agreement by independent counsel. Thus the court concluded:

that no public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver.

thus, incurred the wrath of the dissenting Justice Kennard who accused it of abdicating its responsibility for laying out guidelines to the bench, bar and public “explaining when, if ever, such waivers are enforceable.”<sup>98</sup>

Both Louisiana<sup>99</sup> and Tennessee<sup>100</sup> made the tests of enforceability of alimony waivers clear. In Louisiana, the supreme court, reversing the court of appeals, found the waiver did not violate public policy and would be enforced or not enforced according to the rules applicable to other contracts, “namely the Civil Code articles dealing with capacity, consent, error, fraud, and duress.”<sup>101</sup> Applying the Code, the majority upheld the waiver. Two dissenters thought the prospective wife was coerced. In Tennessee, the standard laid out by the supreme court is essentially the same as that of the Uniform Premarital Agreement Act;<sup>102</sup> however, Tennessee has not adopted it. The court said:

So long as the antenuptial agreement was entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching, the provision limiting or waiving alimony will be enforced, with one exception . . . . The trial court must examine the terms of the antenuptial agreement at the time of the divorce to ensure that its enforcement will not result in the spouse being deprived of alimony, becoming a public charge. If a spouse would be rendered a public charge by specific enforcement, the trial court must void the provision and award alimony.<sup>103</sup>

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*Id.* at 848.

98. *Id.* at 852.

99. *E.g.*, *McAlpine*, 679 So. 2d at 85.

100. *E.g.*, *Cary*, 937 S.W.2d 777.

101. *McAlpine*, 679 So. 2d at 93. In addition to an alimony waiver, the antenuptial agreement provided for a separate property regime and a lump sum payment to wife of \$25,000 at divorce if the marriage lasted less than six years and \$50,000 if it lasted longer. *Id.* at 86. If wife contested the alimony waiver the lump sum payment provisions would be null and void. *McAlpine v. McAlpine*, 637 So. 2d 1163, 1163-64 (La. Ct. App. 1994). Prospective wife was presented with the agreement one week before the wedding after the wedding invitations had been mailed. Prospective husband was a lawyer and prospective wife was unrepresented. Neither prospective husband nor his lawyer suggested to her that she obtain counsel. Two dissenting members of the court thought the agreement was the product of duress or of overreaching and should not be enforced. *McAlpine*, 679 So.2d at 93-94.

102. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9B U.L.A. 376 (1983).

103. *Cary*, 937 S.W.2d at 781. In the case before it the parties were a forty-two-year-old lawyer and a thirty-year-old teacher with a Master's degree and eleven

The Court upheld the waiver as applied to a wife with teaching experience.

In Indiana,<sup>104</sup> the supreme court, using the test of unconscionability at enforcement, reversed two lower courts to uphold the validity of an alimony waiver. It did so despite the fact that the wife's health had deteriorated so badly during the couple's four and one-half year marriage that she could no longer work, enforcement of the waiver might force her to sell her home and her claims for disability and social security had been denied.<sup>105</sup> The court noted that the wife brought most of the property to the marriage. At divorce she had assets of at least \$65,000 (largely the value of her house) and received \$645 a month in child support from a former spouse.<sup>106</sup> The husband brought into the marriage a few personal assets and a modest income from more than thirty-five years of work.<sup>107</sup> During the marriage, he retired and at divorce he had assets worth a few thousand dollars and a pension of \$1,247 a month.<sup>108</sup> The court observed that, at the time of execution of the agreement, the husband was nearing retirement and the wife had had several surgeries. "If support had been important to either . . . surely it would have been included . . . ."<sup>109</sup> According to the court, "unconscionability involves a gross disparity,"<sup>110</sup> and a finding of it at enforcement requires a comparison of the parties' situations.<sup>111</sup>

Unfortunately, the comparison the court made was the wrong one. It compared the financial situations of the parties at

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years of teaching experience. *Id.* at 777. In upholding the alimony waiver the Court said, "there is nothing in the record to suggest that enforcement of the agreement will render Cathy Cary, a person with substantial prior teaching experience, a public charge." *Id.* at 782.

104. *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996).

105. *Id.* at 161.

106. *Id.* at 164.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. The court found that:

[e]nforcement of the antenuptial agreement would leave one spouse with virtually all of the real and personal property, while leaving the other spouse with a modest income stream. This is what the parties brought into their short marriage, and this is what they sought to protect. The alternative, as ordered by the trial court, would provide [wife] with almost all of the property *and* a significant percentage of the income stream. Given [husband's] limited financial position, we do not find enforcement to be unconscionable.

*Id.*

enforcement.<sup>112</sup> The crucial comparison, however, is between the challenging party's expectations at the time of execution and his or her situation at enforcement. At the time the agreement was executed, both parties were working, she as an auditor, he at the same company where he had worked for thirty-five years. Obviously, the parties did not expect one of them to become disabled and, thus, unable to work. Accordingly, they did not provide for it. By the time of enforcement of the agreement, there was a radical change in Mrs. Rider's circumstances. The trial court found enforcement "would leave Mrs. Rider unable to provide for her reasonable needs," that she was "not capable of supporting herself" by earning income and that she did "not possess assets sufficient to provide her with adequate support."<sup>113</sup> The supreme court should have relieved her from the harshness of enforcement, as had the two lower courts before it.

In *In re Matter of Spiegel*,<sup>114</sup> the Iowa Supreme Court refused to enforce an alimony waiver even though it was made during a period of time when such waivers were permissible.<sup>115</sup> It adhered to past and present Iowa law holding that such waivers are void.<sup>116</sup> Accordingly, the court awarded alimony of \$3,000 a month to the wife, reducing the trial court's \$7,000 a month award by more than one half.<sup>117</sup>

### C. Procedure

In six cases, wives challenged the validity of the antenuptial agreements on procedural grounds alone, namely that the agreement was not entered into voluntarily and/or that the prospective husbands failed to disclose. In three of these cases the challengers were surviving widows and in three they were divorcees. In *Matter of Estate of Beesley*,<sup>118</sup> the agreement limited the wife's share of the husband's estate to fifty percent.<sup>119</sup> The couple met through a personal ad. He lived in Utah and she lived in Texas.<sup>120</sup> He was well off with "substantial possessions," including commercial real

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112. *Id.*

113. *Id.* at 161

114. 553 N.W.2d 309 (Iowa 1996).

115. *Id.* at 319.

116. *Id.*

117. *Id.* at 320.

118. 883 P.2d 1343 (Utah 1994).

119. *Id.* at 1345.

120. *Id.*

estate, several airplanes and automobiles, as well as investment and retirement income.<sup>121</sup> She was a nurse's aid earning about \$3.50 an hour.<sup>122</sup> He flew to Texas to meet her.<sup>123</sup> She agreed to marry him, quit her job and travel with him to Utah.<sup>124</sup> There he asked her to sign an antenuptial agreement.<sup>125</sup> Neither party was represented by counsel at signing; indeed, the prospective husband had a standard form to which he made several changes.<sup>126</sup> The prospective wife typed the agreement and both signed it.<sup>127</sup> When the husband died intestate five years after the marriage the wife challenged the agreement on the grounds that there was no financial disclosure<sup>128</sup> and that she was coerced into signing it because she had quit her job, agreed to marry and moved from Texas to Utah before the prospective husband ever raised the issue of such an agreement.<sup>129</sup> While "material nondisclosure" would ordinarily invalidate an antenuptial agreement,<sup>130</sup> the court found that it did not do so in this case because the agreement provided the wife with a percentage of the estate rather than a specific sum;<sup>131</sup> there was no evidence she'd have done anything differently had she known her husband's net worth;<sup>132</sup> and her share under the agreement exceeded the amount she would have received under Utah's elective share statutes.<sup>133</sup> The court also rejected the wife's claim of involuntariness, accepting the lower court's findings of fact.<sup>134</sup> In *Matter of Estate of Thies*,<sup>135</sup> both parties waived their elective shares under the antenuptial agreement.<sup>136</sup> Upon the husband's death the wife challenged this provision as it applied to her, based upon his failure to disclose.<sup>137</sup> The agreement itself acknowledged that the parties had fully disclosed to each other; however, there were

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1347.

129. *Id.* at 1348.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1349.

135. 903 P.2d 186 (Mont. 1995).

136. *Id.* at 187.

137. *Id.*

no lists of assets or values attached to it.<sup>138</sup> The court nevertheless found the statutory test of “fair disclosure” satisfied.<sup>139</sup> Justice Leaphart dissented,<sup>140</sup> pointing out that the agreement was prepared by the husband’s attorney who testified that at the fifteen-minute meeting to discuss and sign it, neither he nor the prospective husband disclosed husband’s assets to the wife.<sup>141</sup> She was not represented by counsel and had not read the agreement.<sup>142</sup> In the dissenter’s view, “Montana is now alone in holding that the test of ‘fair disclosure’ can be satisfied with a mere recitation of disclosure in the absence of any financial information from independent sources or other mitigating circumstances.”<sup>143</sup> In *Wiley v. Iverson*,<sup>144</sup> the Montana Supreme Court again considered the validity of an antenuptial waiver of a widow’s rights. Again, the agreement alleged disclosure but the schedules showing the prospective husband’s assets were not attached to it when the prospective wife read it.<sup>145</sup> The court reaffirmed its decision in *Thies*<sup>146</sup> and its language from the earlier case:

Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. *Each party has a duty to consider and evaluate the information received before signing an agreement* since they are not assumed to have lost their judgmental facilities because of their pending marriage.<sup>147</sup>

It again upheld the agreement.<sup>148</sup> Significantly, Justice Leaphart now concurred in the judgment,<sup>149</sup> presumably because the wife and husband had worked together for years before deciding to marry and the wife was close to the husband’s family even before the marriage.<sup>150</sup> Thus, she had actual knowledge of his

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138. *Id.* at 190.

139. *Id.*

140. *Id.* at 191.

141. *Id.* at 192.

142. *Id.*

143. *Id.*

144. 985 P.2d 1176 (Mont. 1999).

145. *Id.*

146. *Id.* at 1181 (citing holding of *Thies*, 903 P.2d at 190).

147. *Id.* (emphasis in original).

148. *Id.* at 1181-82.

149. *Id.* at 1182.

150. *See id.* at 1181.

assets and sources of income.<sup>151</sup>

In *Randolph v. Randolph*,<sup>152</sup> the challenge was based on the argument that the husband failed to disclose and the wife, thus, did not have enough information to enter the agreement “knowledgeably.”<sup>153</sup> According to the Tennessee Supreme Court, “knowledgeably” means:

that the spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that a full and fair disclosure of the nature, extent and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse’s holdings.<sup>154</sup>

In this case the parties, C.L. and Virginia, were fifty-two and forty-six respectively.<sup>155</sup> He had been married five times before while she had been married once and had a thirteen-year-old son.<sup>156</sup> The couple, and Virginia’s son, lived together for about a year before the marriage.<sup>157</sup> At the time, she had “virtually no assets” and he had substantial real estate holdings and a net worth of about \$500,000 to \$600,000.<sup>158</sup> Virginia testified that she had never seen the agreement until the day she signed it—one day before the wedding.<sup>159</sup> The agreement, apparently, recited that she had independent counsel but, in actuality, she did not.<sup>160</sup> Neither did she have actual knowledge of C.L.’s assets and he made no disclosure.<sup>161</sup> The court stated that he was “a learned businessman very shrewd in his dealings.”<sup>162</sup> She had no business experience or knowledge.<sup>163</sup> She was suffering from breast cancer at the time she signed the agreement and was responsible for a minor child.<sup>164</sup> She

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151. *See id.*

152. 937 S.W.2d 815 (Tenn. 1996).

153. *Id.* at 817.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 818.

160. *Id.*

161. *Id.* at 818, 822.

162. *Id.* at 818.

163. *Id.*

164. *Id.*

testified that her only choice was to sign the agreement or be thrown out of the residence she and her son had shared with C.L. for the previous year.<sup>165</sup> The trial and appellate courts all agreed that the antenuptial agreement should not be enforced.<sup>166</sup>

In *Fletcher v. Fletcher*,<sup>167</sup> the Supreme Court of Ohio, in a four to three decision, upheld the validity of an antenuptial agreement which, though it did not mention the word “divorce,” operated to deprive the wife of any marital property. The wife challenged it as the product of fraud, duress, coercion or overreaching by husband. The prospective husband was represented by a partner of the attorney who represented the prospective wife in her previous divorce.<sup>168</sup> The wife was told that she could have independent legal counsel but she declined.<sup>169</sup> The agreement was executed the day before the wedding.<sup>170</sup> The majority of the court laid down the rules it purportedly applied:

When an antenuptial agreement provides disproportionately less than the party challenging it would have received under an equitable distribution, the burden is on the one claiming the validity of the contract to show that the other party entered into it with the benefit of full knowledge or disclosure of the assets of the proponent. The burden of proving fraud, duress, coercion or overreaching, however, remains with the party challenging the agreement.<sup>171</sup>

The court further stated that “the party financially disadvantaged must have a meaningful opportunity to consult with counsel.”<sup>172</sup> There was no issue of disclosure since schedules were attached to the agreement. The issue was overreaching. The burden of proof was on the wife. The majority acknowledged that certain facts gave weight to the wife’s argument: the agreement never mentioned divorce, the relationship between the attorney who represented prospective wife in her earlier divorce and the attorney who drafted the agreement may have led her to trust him unduly and the antenuptial agreement was presented to her on the

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165. *Id.*

166. *Id.* at 823.

167. 628 N.E.2d 1343 (Ohio 1994).

168. *Id.* at 1345.

169. *Id.*

170. *Id.* at 1348.

171. *Id.* at 1347.

172. *Id.* at 1348.

eve of the wedding.<sup>173</sup> The court, nevertheless, upheld the agreement. The dissenters thought the agreement “should be unenforceable since its terms were unclear, the circumstances evidence that it was not entered into freely without fraud, duress, coercion, or overreaching, and . . . [husband] attempt[ed] to use it to deny [wife] her right to share in property acquired by the couple during their marriage.”<sup>174</sup>

In *Randolph*<sup>175</sup> and *Sogg. v. Nevada State Bank*,<sup>176</sup> the only two of these fourteen cases in which the agreements were invalidated, the courts characterized the parties relationship as “confidential,” or “fiduciary:” they, thus, owed each other “the utmost good faith.”<sup>177</sup> Most jurisdictions agree.<sup>178</sup> California, however, repudiates such a view of the parties. Thus, in *In re Marriage of Bonds*,<sup>179</sup> a foreign-born, unrepresented wife who signed an antenuptial agreement on the eve of her wedding to a major league baseball player was held not entitled to have the voluntariness of the agreement assessed on the assumption of a confidential or fiduciary relationship between the parties.<sup>180</sup> It was, thus, not subject to strict scrutiny even though she, the less-sophisticated party, did not have independent counsel, waived all her marital rights, husband’s annual salary had grown from \$106,000 at execution of the agreement to \$8,000,000 at dissolution of the marriage and the agreement itself was a shambles—no original was presented at trial and what was presented was incomplete and filled with mistakes.<sup>181</sup> The supreme court accepted the trial court’s conclusion that the prospective wife entered the agreement voluntarily,<sup>182</sup> reversing the intermediate court which disagreed.<sup>183</sup> The supreme court said:

Because the Uniform Act was intended to enhance the enforceability of premarital agreements, because it expressly places the burden of proof upon the person challenging the agreement, and finally because the California statute imposing fiduciary duties in the family

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173. *Id.* at 1347-48.

174. *Id.* at 1350 (emphasis in original).

175. 937 S.W.2d 815 (Tenn. 1996).

176. 832 P.2d 781 (Nev. 1992).

177. *Randolph*, 937 S.W.2d at 819.

178. *See supra* note 7.

179. 5 P.3d 815 (Cal. 2000).

180. *Id.* at 831.

181. *Bonds v. Bonds*, 83 Cal. Rptr. 2d 783, 787, 789, 803 (Cal. Ct. App. 1999).

182. *Bonds*, 5 P.3d at 833-34.

183. *Bonds*, 83 Cal. Rptr. 2d at 787.

law setting applies only to spouses, we do not believe that the commissioners of our Legislature contemplated that the voluntariness of a premarital agreement would be examined in light of the strict fiduciary duties imposed on persons such as lawyers, or imposed expressly by statute upon persons who are married.<sup>184</sup>

### III. THE UNIFORM PREMARITAL AGREEMENT ACT AND THE AMERICAN LAW INSTITUTE PRINCIPLES OF FAMILY DISSOLUTION

California was the first state to adopt the Uniform Premarital Agreement Act,<sup>185</sup> although it, like a number of other jurisdictions,<sup>186</sup> modified it to conform more closely to its own prior law.<sup>187</sup> Since California's adoption in 1985, twenty-five states followed suit. The Act is now law in whole or part in some twenty-six states.<sup>188</sup> The last adoptions were Texas and Indiana in 1997.<sup>189</sup> As the California Supreme Court pointed out in the *Bonds* case,<sup>190</sup> the Act was intended to enhance the enforceability of antenuptial agreements.<sup>191</sup> To that end, it specifically included spousal support as a permissible subject for antenuptial agreement<sup>192</sup> and attempted to circumscribe courts in their reviews of these agreements for procedural and substantive fairness. Under it, a spouse could avoid enforcement of an antenuptial agreement only by proving that at the time of execution it (1) was not voluntary, or (2) that it was unconscionable,<sup>193</sup> there was no reasonable financial disclosure,<sup>194</sup> the right to disclosure was not waived and that the challenger did

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184. *Bonds*, 5 P.3d at 832.

185. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369-80 (1983 & Supp. 2001).

186. *Id.* at 372 (Supp. 2001).

187. California deleted subdivision (a)(4) from §3 of the UPAA; this section would have permitted the parties to contract with respect to modification or elimination of spousal support. It also eliminated §6(b) providing for modification of alimony or support waivers, which, if enforced, would cause a spouse to become a public charge. *Pendleton v. Fireman*, 5 P.3d 839, 841 (Cal. 2000); *Bonds*, 5 P.3d at 822.

188. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 147 (Supp. 2001).

189. *Id.*

190. 5 P.3d at 832.

191. *Id.* at 832.

192. UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373-74 (1983 & Supp. 2001).

193. *Id.* § 6.

194. *Id.*

not have independent knowledge of the other party's finances.<sup>195</sup> The Act also limited the review at enforcement to provisions waiving or modifying spousal support rights which, if enforced, would result in making a spouse eligible for public assistance.<sup>196</sup> It has been roundly criticized,<sup>197</sup> of course, and whether it has accomplished its goals in the adopting jurisdictions is hard to determine. As one reads through the cases one is still struck by the uncertainty of enforcement of these agreements and the lack of uniformity in result, not only from jurisdiction to jurisdiction,<sup>198</sup> but among trial and appellate courts ruling on the same facts in the same case and in the same state.

Enter then, the American Law Institute, with its new Principles of Family Dissolution.<sup>199</sup> The Principles provide procedural requirements for antenuptial agreements<sup>200</sup> of the sort already required by most, if not all, states.<sup>201</sup> These requirements are a signed writing,<sup>202</sup> financial disclosure<sup>203</sup> and a showing of informed consent not obtained under duress.<sup>204</sup> The latter is the rough equivalent of the common law and Uniform Act requirements of voluntariness.<sup>205</sup> The Reporters justify the new language by stating their desire to focus the courts' attention on the tactics of the proponent of the agreement rather than on the state of mind of the challenger; however, the change seems little more than a misguided example of "elegant variation."<sup>206</sup> The Principles raise a presumption of informed consent and the absence of duress if the

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195. *Id.*

196. *Id.* §§ 3, 6.

197. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993) (discussing the conflicts between the Act and modern law and concluding that the Act promotes contractual autonomy); Younger, *Perspectives on Antenuptial Agreements*, *supra* note 4, at 1086-90 (criticizing the Act and discussing improvement by the addition of five new amendments).

198. *Compare* Sogg v. Nev. State Bank, 832 P.2d 781 (Nev. 1992) (concluding that prospective husband's overreaching rendered the agreement involuntary and invalid) *with* Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994) (upholding agreement as valid even though prospective husband's overreaching rendered the agreement involuntary).

199. PRINCIPLES, *supra* note 6.

200. *Id.* § 7.05.

201. *See id.* § 7.05 Reporter's Notes.

202. *Id.* § 7.05(1).

203. *Id.* § 7.05(5).

204. *Id.* § 7.05(2).

205. *Id.* § 7.05, cmt. b.

206. JACQUES BARZUN, *SIMPLE & DIRECT: A RHETORIC FOR WRITERS* 108 (1975).

agreement was executed at least thirty days before the parties' marriage,<sup>207</sup> both parties were advised to obtain legal counsel and had opportunity to do so.<sup>208</sup> In an important departure from existing law, the Principles put the burden of proving the lack of duress and the presence of consent on the party who is trying to enforce the agreement.<sup>209</sup> The Reporters hope that this change in the usual contract rule<sup>210</sup> will "caution[] the stronger party against overreaching tactics that would make this burden of proof more difficult to meet."<sup>211</sup> Had this provision been in effect in Louisiana and Ohio, it might well have changed the results in a number of the cases discussed.<sup>212</sup> In cases where one party did not have independent counsel, for the presumption to arise, the agreement must contain understandable language explaining the significance of its terms and the fact that the parties' interests may be adverse with respect to them.<sup>213</sup>

It is on the subject of substantive fairness that the principles are most remarkable. They depart from the Uniform Act and the common law by omitting any requirement of substantive fairness at the time of execution of an antenuptial agreement. If contained in a signed writing and entered with disclosure, without duress and with informed consent, the agreement satisfies the test at execution no matter how one-sided or unfair its terms. At enforcement, however, the Principles call for a wider substantive review of these agreements<sup>214</sup> than called for by the Uniform Act.<sup>215</sup> They, thus, move closer to *McKee-Johnson v. Johnson*<sup>216</sup> and the Minnesota standard. The Principles would prohibit enforcement of antenuptial agreements whenever enforcement would "work a substantial injustice."<sup>217</sup> Here, again, the Principles opt for new language abandoning the old standard of unconscionableness at

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207. PRINCIPLES, *supra* note 6, § 7.05(3)(a).

208. *Id.* § 7.05(3)(b).

209. *Id.* § 7.05(2).

210. *See, e.g.*, *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1346 (Ohio 1994).

211. PRINCIPLES, *supra* note 6, § 7.05, cmt. b.

212. *E.g.*, *McAlpine v. McAlpine*, 679 So.2d 85 (La. 1996); *Fletcher*, 628 N.E.2d 1343.

213. PRINCIPLES, *supra* note 6, § 7.05(3)(c)(1)-(2).

214. *Id.* § 7.07.

215. UNIF. PREMARITAL AGREEMENT ACT § 6(B), 9B U.L.A. 373-74 (1983 & Supp. 2001).

216. 444 N.W.2d 259 (Minn. 1989) (holding that substantive fairness requirements should be examined both at inception and at dissolution).

217. PRINCIPLES, *supra* note 6, § 7.07(1).

enforcement. They lay out guidelines to help Courts in applying the new language. Before making any inquiry into the effects of enforcement, under the Principles, one of three prerequisites must be present: the passage of a certain number of years after execution;<sup>218</sup> or the birth or adoption of a child to parties who had no children at execution;<sup>219</sup> or a significant, unexpected change in circumstances since execution.<sup>220</sup> If one of these events has occurred the court can consider whether the enforcement of the agreement would work a substantial injustice.<sup>221</sup> Again, in an attempt to help courts with the inquiry, the Principles lay out a number of factors which courts already consider: the disparity of outcome under the agreement and under the marital property regime;<sup>222</sup> the likely circumstances of the party challenging the agreement had the marriage never taken place;<sup>223</sup> whether the agreement was designed to benefit or protect the interests of third parties;<sup>224</sup> and the impact of its enforcement on post-execution children.<sup>225</sup> Overall, the Principles are to be applauded for incorporating the best practices of the courts and trying to tread a middle ground between those who would refuse to enforce antenuptial agreements altogether and those who would enforce them as ordinary business contracts.<sup>226</sup>

#### IV. CONCLUSION: DRAFTING FOR VALIDITY

Whatever the exact fairness rules are in any particular jurisdiction, predictability remains an attainable goal in the drafting of antenuptial agreements. The parties and their lawyers have complete control over the circumstances surrounding execution of the agreement as well as its contents. Both parties should be represented by independent counsel who see that the

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218. *Id.* § 7.07 (2)(a).

219. *Id.* § 7.07(2)(b).

220. *Id.* § 7.07(2)(c).

221. *Id.* § 7.07(2).

222. *Id.* § 7.07(3)(a).

223. *Id.* § 7.07(3)(b).

224. *Id.* § 7.07(3)(c).

225. *Id.* § 7.07(3)(d).

226. “This Chapter takes a position between the English rule that premarital contracts are not binding, and that the recent statements of some American courts that these contracts should be enforced as ordinary business contracts. This intermediate position is in fact consistent with the actual practice of many, if not most, American courts.” Unfortunately the Principles don’t apply to agreements that govern death of a spouse. *Id.* § 7.02 cmt. a.

parties make full disclosure to each other. As the California Supreme Court said in the *Bonds* case,<sup>227</sup> “the best assurance of enforceability is independent representation for both parties,”<sup>228</sup> and the Supreme Court of Tennessee said in *Randolph*,<sup>229</sup> “a fairly simple and effective method of proving disclosure is to attach a net worth schedule of assets, liabilities, and income to the agreement itself.”<sup>230</sup> Lawyers should see to it that both parties have counsel. They should do so for their own benefit<sup>231</sup> as well as for the benefit of their clients. They should incorporate schedules of the parties’ assets into the agreement, review it for fairness, urge the parties to revise patently unfair provisions and explain in the agreement any which remain. If these guidelines are followed, the agreement will be fairly procured and substantively fair at execution. As simple as these precautions seem to be, the cases show that many lawyers ignore them. In eleven of the fourteen cases discussed in this article, the parties challenging the agreement were not represented by independent counsel at execution. In two cases,<sup>232</sup> whether the challenging party had been represented or not is not apparent from the reports. In one case,<sup>233</sup> neither party had counsel. In at least five<sup>234</sup> of the cases, the agreements did not incorporate schedules of assets. Perhaps a prime example of how not to do it comes from the *Bonds* case.<sup>235</sup> The agreement was apparently a “thing of shreds and patches,”<sup>236</sup> contained “numerous typographical errors,” referred to “schedules” of separate property but none were attached.<sup>237</sup> The prospective wife was not represented. The supreme court said “there is evidence that Barry

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227. *Bonds v. Bonds*, 5 P.3d 815 (Cal. 2000).

228. *Id.* at 833.

229. *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996).

230. *Id.* at 821.

231. So as to avoid any arguments that they owe a duty to the unrepresented party or are engaged in a conflict of interest. See, e.g., *Bonds*, 5 P.3d at 883; *Lutz v. Lutz*, 620 N.W.2d 589, 594 (R.I. 2000); MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983).

232. *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996); *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996).

233. *Estate of Beesley v. Harris*, 833 P.2d 1343 (Utah 1994).

234. *Bonds*, 5 P.3d 815; *Estate of Thies v. Lowe*, 903 P.2d 186 (Mont. 1995); *Sogg v. Nev. State Bank*, 832 P.2d 781 (Nev. 1992); *Randolph*, 937 S.W.2d 815; *Beesley*, 833 P.2d 1343.

235. 5 P.3d 815.

236. Gilbert and Sullivan, *A Wandering Minstrel I*, from *The Mikado*, lyrics in GILBERT AND SULLIVAN AT HOME 152 (1927).

237. *Bonds v. Bonds*, 83 Cal. Rptr.2d 783, 788-89 (Cal. Ct. App. 1999).

did not understand the legal fine points of the agreement any more than Sun did.”<sup>238</sup> No “responsible attorney could have reasonably predicted” that this agreement would be enforced.<sup>239</sup> Yet the court upheld it as voluntarily entered into and valid.

As to the substantive fairness of an agreement at enforcement, it is obvious that no lawyer or party can control future events. The birth of a child or changes in a spouse’s financial status, employability or health after execution may make enforcement of the agreement seem unfair even though it was fairly procured and substantively fair when executed. The key to softening the impact of post-execution events is to foresee their possible occurrence and to provide for them.<sup>240</sup> The *Rider*<sup>241</sup> case is another prime example of how not to do it. At the time the agreement was executed, both parties were working. Obviously, the parties did not expect one of them to become disabled and did not provide for it. They should have foreseen that possibility and planned for it.<sup>242</sup> Had they done so, certainly it would have enhanced the stability of their agreement. Two courts held it unenforceable but the Supreme Court of Indiana mistakenly upheld it.<sup>243</sup> The lesson to learn from this review is that lawyers are making unnecessary mistakes and so are courts. Lawyers are allowing parties to go unrepresented, not attaching asset schedules to their agreements, failing to plan for foreseeable events and engaging in sloppy drafting. Courts, perhaps brain-washed by the hyperbole accompanying the Uniform Act, are enforcing agreements they should set aside. The ALI Principles with their emphasis on representation and the review for substance at enforcement, may herald a much needed improvement in lawyering and judging in this field. It remains to be seen if they will be followed.

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238. *Bonds*, 5 P.3d at 837. *See also* *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1348 (Ohio 1994) (“Prenuptial agreements are often drafted in such a way as to be nearly incomprehensible to a layperson.”).

239. *Bonds*, 83 Cal.Rptr.2d at 803.

240. *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).

241. *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996).

242. *Id.* at 164.

243. *See supra* notes 104-13.