

Antenuptial Contracts Governing Alimony or Property Rights Upon Divorce: *Osborne v. Osborne*¹ — The traditional treatment of antenuptial contracts governing alimony or property rights upon divorce has been to hold these contracts void on public policy grounds.² Since 1970, however, courts in a growing number of jurisdictions have abandoned this approach, holding instead that such contracts are not void per se.³ The current trend of decisions is based on a recognition of a changed public policy toward divorce,⁴ as well as on an awareness that with the present high rate of divorce,⁵ more people may want to plan realistically for the possibility of divorce.⁶ Nonetheless, even courts which recognize that these contracts may be valid seem markedly reluctant to enforce them.⁷ Concern with the possibilities of overreaching, duress, and change in circumstances between the date of the contract's execution and the

¹ 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981).

² See, e.g., *Norris v. Norris*, 174 N.W.2d 368, 370 (Iowa 1970); *Fincham v. Fincham*, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946); *Mulford v. Mulford*, 211 Neb. 747, 749, 320 N.W.2d 470, 471 (1982); *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950).

³ *Barnhill v. Barnhill*, 386 So.2d 749, 751 (Ala. Civ. App. 1980); *Newman v. Newman*, ____ Colo. ____, ____, 653 P.2d 728, 732 (1982); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 47-48, 359 A.2d 719, 720-22 (1976); *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980); *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *Scherer v. Scherer*, 249 Ga. 635, 640, 292 S.E.2d 662, 666 (1982); *Volid v. Volid*, 6 Ill. App. 3d 386, 391-92, 286 N.E.2d 42, 47 (1972); *Matlock v. Matlock*, 223 Kan. 679, 683, 576 P.2d 629, 633 (1978); *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979); *Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973); *Freeman v. Freeman*, 565 P.2d 365, 367 (Okla. 1977); *Unander v. Unander*, 265 Or. 102, 107, 506 P.2d 719, 721 (1973).

New York and Wisconsin permit these antenuptial contracts by statute. See N.Y. DOM. REL. LAW § 236(B)(3) (Consol. 1981-1982); WIS. STAT. ANN. §§ 767.255(11), 767.26(8) (West 1981).

In addition, several jurisdictions recognize the validity of antenuptial contracts governing property rights upon divorce, but have not recently ruled on the validity of those governing alimony rights. See *Spector v. Spector*, 23 Ariz. App. 131, 136, 531 P.2d 176, 181 (1975); *Tomlinson v. Tomlinson*, 170 Ind. App. 331, 340, 352 N.E.2d 785, 791 (1976); *Flora v. Flora*, 166 Ind. App. 620, 629, 337 N.E.2d 846, 851 (1975); *Hafner v. Hafner*, 295 N.W.2d 567, 571-72 (Minn. 1980); *In re Marriage of Cohn*, 18 Wash. App. 502, 569 P.2d 79 (1977); *Laird v. Laird*, 597 P.2d 463 (Wyo. 1979). The proposed Uniform Marital Property Act of 1981 would also permit prospective spouses to enter antenuptial contracts involving property rights upon divorce. UNIFORM MARITAL PROPERTY ACT §§ 14, 16(a) (Discussion Draft 1981) [hereinafter referred to as UMPA]. Some states accord statutory recognition to these contracts. See, e.g., MINN. STAT. ANN. § 519.11 (West 1982); MONT. CODE ANN. § 40-4-202 (1981); N.C. GEN. STAT. § 50.20(d) (1981).

⁴ See, e.g., *Posner v. Posner*, 233 So. 2d 381, 384-85 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *Unander v. Unander*, 265 Or. 102, 105-06, 506 P.2d 719, 720-21 (1973).

⁵ See, e.g., *Newman v. Newman*, ____ Colo. ____, ____ n.4, 653 P.2d 728, 732 n.4 (1982); *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *Volid v. Volid*, 6 Ill. App. 3d 386, 392, 286 N.E.2d 42, 47 (1972).

⁶ See, e.g., *Newman v. Newman*, ____ Colo. ____, ____ n.4, 653 P.2d 728, 732 n.4 (1982); *In re Marriage of Dawley*, 17 Cal. 3d 342, 352, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976); *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970), *rev'd on other grounds*, 257 So.2d 530 (Fla. 1972).

⁷ See, e.g., *Scherer v. Scherer*, 249 Ga. 635, 641, 292 S.E.2d 662, 666 (1982) (antenuptial contracts governing rights upon divorce "should not be given carte-blanc enforcement"). But see *Newman v. Newman*, ____ Colo. ____, 653 P.2d 728, 734 (1982), in which the Colorado

date of its enforcement has led the courts to impose a variety of restrictions on these antenuptial contracts. Thus, for the contract to be valid, each prospective spouse may be required, before the contract's execution, to disclose to the other his or her financial worth.⁸ This requirement is usually predicated on the idea that the parties to an antenuptial contract occupy a confidential relationship.⁹ The courts may also explicitly require the spouse seeking to enforce the contract to show that the party contesting the contract entered into it voluntarily.¹⁰ In addition, in some jurisdictions, courts may require that the contract not be unconscionable.¹¹ Other jurisdictions require the contractual provision for the ex-spouse to be fair.¹² Finally, in several jurisdictions, courts may modify these contracts under the rules governing postnuptial separation agreements.¹³

Absent an enforceable contract, equitable distribution statutes will govern property rights upon divorce in most states.¹⁴ Such statutes may also govern awards of alimony.¹⁵ These statutes vary in their scope. Some subject only property acquired during the marriage to equitable distribution.¹⁶ Others sub-

Supreme Court observed that "those who enter such agreements in Colorado should do so cautiously and with attention to their interests, for in the final analysis they may receive only that for which they bargained." The effects of *Newman* in Colorado may, however, be less dramatic than this language of the court suggests. Although the *Newman* court will not review property provisions of an antenuptial contract for conscionability or fairness, it will review an alimony provision for conscionability. *Id.* at ____, 653 P.2d at 737. Alimony and property provisions, however, often serve the same function. Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 153 (1979) [hereinafter referred to as Clark]. Therefore, the majority opinion in *Newman* may well have given with one hand and taken with the other, as one judge suggested. *Id.* at ____, 653 P.2d at 736 (Rovira, J., concurring in part and dissenting in part).

⁸ See, e.g., *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 213 (1972).

⁹ *Id.*

¹⁰ See, e.g., *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980). See also Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J. L. REF. 397, 403 (1977) [hereinafter referred to as Klarman]. Klarman suggests that since the voluntariness requirement also applies to ordinary contracts, the explicit statement of voluntariness as a requirement of an antenuptial contract's validity indicates the courts' awareness that the confidential relationship increases the possibility of coercion. *Id.*

¹¹ See, e.g., *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979).

¹² See, e.g., *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981). When conscionability or fairness is required, the relevant time for determining either generally remains an open question. Clark, *supra* note 7, at 151. See, e.g., *Ferry v. Ferry*, 586 S.W.2d 782, 787 (Mo. Ct. App. 1979). At least one jurisdiction, however, explicitly requires the contract to be fair at the date when enforcement is sought. See *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹³ See, e.g., *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *Unander v. Unander*, 265 Or. 102, 107, 506 P.2d 719, 721-22 (1973).

¹⁴ See Foster & Freed, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. 4049, 4056-57 (BNA) (1981) [hereinafter referred to as Foster & Freed]. Foster and Freed list forty common law property states in which the courts have power to equitably distribute property either in the form of property distribution or only as alimony. *Id.* According to Foster and Freed, four of the eight community property states follow a similar rule of equitable distribution. *Id.* at 4056.

¹⁵ See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1981).

¹⁶ See, e.g., N.Y. DOM. REL. LAW § 236(B)(5) (Consol. 1981-1982). Statutes of this

ject all property, including that acquired by gift or inheritance and that acquired before marriage, to equitable distribution.¹⁷ Under either type of statute, a court has discretion to effect what it deems to be a fair or equitable distribution of the spouses' property.¹⁸ Given the broad discretionary power granted to courts by these statutes,¹⁹ the results of the equitable distribution process are unpredictable.²⁰ Antenuptial contracts, then, are important to those who desire to limit alimony rights or to control the distribution of their property in the event of divorce.

In *Osborne v. Osborne*,²¹ the Supreme Judicial Court of Massachusetts followed the current trend of judicial decisions treating antenuptial contracts governing alimony or property rights upon divorce as not per se void.²² At issue in *Osborne* was the validity of an antenuptial contract in which both spouses had waived all rights to alimony or property division under the state's equitable distribution statute.²³ Several hours before their marriage in 1967, Barbara Mallinckrodt and David Osborne executed an antenuptial agreement.²⁴ It provided that neither spouse by virtue of the marriage would acquire any interest in property the other spouse owned before the marriage or acquired thereafter.²⁵ The agreement further provided that in the event of

type purport to exclude property acquired by gift or inheritance from distribution. See N.Y. DOM. REL. LAW § 236(B)(1)(d)(1), (B)(5)(b) (Consol. 1981-1982). They do not necessarily do so, however. M. Glendon, *Property Rights upon Dissolution of Marriages and Informal Unions*, Unpublished Speech Delivered at Cambridge University, England, July 31, 1981, at n.26 (to be published in THE CAMBRIDGE LECTURES — 1981 (1982)) [hereinafter referred to as M. Glendon, *Property Rights*]. Under the New York statute, for example, "The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property." N.Y. DOM. REL. LAW § 236(B)(5)(e) (Consol. 1981-1982).

¹⁷ See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1981). In the majority of states, all property is subject to equitable distribution. See M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 62 (1981) [hereinafter referred to as GLENDON].

¹⁸ See GLENDON, *supra* note 17, at 62. Under a typical statute, a court's discretion is guided by statutory criteria. See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1981). See also Foster & Freed, *supra* note 14, at 4054-55, 4058 (listing states that have statutory criteria).

¹⁹ GLENDON, *supra* note 17, at 63 states that "[t]he wide-ranging power recently given to judges in most states to redistribute all the spouses' assets (including even premarital and inherited property) in a divorce case is the single most distinctive feature of modern American divorce law."

²⁰ GLENDON, *supra* note 17, at 63; Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 432-33 (1976).

²¹ 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981).

²² *Id.* at 2223-24, 428 N.E.2d at 816.

²³ *Id.* at 2219-20, 428 N.E.2d at 813-14.

²⁴ *Id.* at 2218-19, 428 N.E.2d at 813.

²⁵ *Id.* at 2219, 428 N.E.2d at 813.

The relevant provisions of the contract stated that "Barbara and David intend this agreement to be in full discharge of all . . . statutory marital property rights under the statutes or law of any state in which they are now or may hereafter be domiciled" and that "neither, upon or subsequent to said marriage, shall acquire any interest, right or claim in or to the property, real and personal, of whatever kind or wherever situated, which the other now owns, possesses or is entitled to, or which the other may own, possess or become entitled to hereafter. . . ." *Id.*

divorce, neither spouse would be entitled to "any alimony, support money, . . . or to any other money by virtue thereof."²⁶ In addition, the agreement recited that Barbara had sufficient property for her own support²⁷ and that "David, by reason of his becoming a member of the medical profession, contemplates that he will have adequate earning power for his own support."²⁸ An accurate schedule disclosing Barbara's wealth and expectation of inheritance was attached to the agreement.²⁹ David, who first saw the agreement when Barbara's attorney presented it to him several hours before the wedding,³⁰ read it before signing.³¹

Approximately seven years after their marriage, both parties filed actions for divorce.³² David sought to establish an ownership interest in certain real property and, in addition, sought alimony and a division of property under the Massachusetts equitable distribution statute.³³ After submitting the alimony and property claims to a master,³⁴ the probate court adopted the master's finding that the husband should receive neither alimony nor a division of

²⁶ *Id.*

²⁷ *Id.* Barbara was heiress to a family fortune of about \$17,000,000. *Id.* at 2218, 428 N.E.2d at 813. In 1976 her income from this property, most of which was held in trust, was approximately \$540,000. *Id.* at 2218-19, 428 N.E.2d at 813.

²⁸ *Id.* at 2219, 428 N.E.2d at 813. David had no significant assets at that time. *Id.* When the Supreme Judicial Court decided the case, David and Barbara were both practicing physicians and earning "respectable salaries." *Id.* at 2220, 428 N.E.2d at 814. In 1977, David was earning between \$40,000-\$50,000 a year and had a seven year employment contract which included annual increases in salary. Brief of Appellee at 10-11, 32-33, *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981).

²⁹ 1981 Mass. Adv. Sh. 2216, 2219, 428 N.E.2d 810, 813 (1981).

³⁰ *Id.* at 2226, 428 N.E.2d at 817.

³¹ *Id.* at 2219, 428 N.E.2d at 813.

³² *Id.* at 2217, 428 N.E.2d at 812.

³³ *Id.* The equitable distribution statute, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1981) provides:

Upon divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Had the court found the antenuptial agreement invalid, all of the wife's property as well as her expected inheritance would have been potentially subject to distribution.

³⁴ 1981 Mass. Adv. Sh. 2216, 2217, 428 N.E.2d 810, 812 (1981). Upon the husband's motion, the case was also submitted to a second master for findings on the parties' needs and their contributions as homemakers. *Id.* at 2217, 428 N.E.2d at 812. The probate court struck this report in its entirety. *Id.*

property.³⁵ Rather than ruling on the validity of the antenuptial contract as a bar to the husband's claim, however, the court found that the husband was not in need of alimony or an assignment of property.³⁶ The probate court also found that three parcels of real property standing in the joint names of husband and wife were jointly held.³⁷

Both parties appealed the probate court's decision and the Supreme Judicial Court granted the wife's application for direct appellate review.³⁸ The wife claimed that the probate court erred in failing to give full effect to the antenuptial contract and in striking a master's finding that she was sole owner of the real estate held in joint title form.³⁹ Thus, the Supreme Judicial Court was faced with deciding whether antenuptial contracts governing alimony or property rights upon divorce would be valid in Massachusetts, an issue on which the court had not ruled previously.⁴⁰ The contract, the court concluded, was controlling on all claims of the husband.⁴¹ Thus, the court found that the probate court had erred in striking the master's finding that the wife was sole owner of the real property held in joint title form.⁴² In addition, the court found that the contract precluded the husband's claim to alimony and a division of property under the equitable distribution statute.⁴³ In deciding to enforce the contract, the *Osborne* court followed the trend of decisions in other jurisdictions, and held that "an antenuptial contract settling the alimony or property rights of the parties upon divorce is not per se against public policy and may be specifically enforced."⁴⁴

This holding was based on the *Osborne* court's recognition that a changed public policy toward divorce allowed couples to divorce more freely.⁴⁵ The legislature, the court observed, had removed significant obstacles to divorce by

³⁵ *Id.*

³⁶ *Id.* at 2218, 428 N.E.2d at 813.

³⁷ *Id.* at 2217, 428 N.E.2d at 812. The first master had concluded that this property belonged solely to the wife. *Id.*

³⁸ *Id.*

³⁹ *Id.* at 2218, 428 N.E.2d at 813.

⁴⁰ *Id.* at 2219-20, 428 N.E.2d at 813-14.

⁴¹ *Id.* at 2218, 428 N.E.2d at 813.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2223-24, 428 N.E.2d at 816. The court left open the question of the validity of antenuptial contracts purporting to limit the duty of either spouse to support the other during marriage. *Id.* at 2224, 428 N.E.2d at 816. Thus it is open to the court to rule in a future case that waivers of alimony covering the period between separation and divorce may not be enforced. Courts in two jurisdictions which have held that antenuptial contracts governing alimony and property rights upon divorce are not per se invalid have already done so. *See Belcher v. Belcher*, 271 So. 2d 7, 10 (Fla. 1972) (waiver will be considered by the court but is not controlling) and *Eule v. Eule*, 24 Ill. App. 3d 83, 88, 320 N.E.2d 506, 510 (1974) (clause in antenuptial contract forfeiting wife's right to temporary alimony if the marriage ended within seven years held void). *See also Holliday v. Holliday*, 358 So. 2d 618, 620 & n.6 (La. 1978) (holding waiver of alimony pendente lite in an antenuptial contract void as against public policy, but leaving open the issue of the validity of waivers of permanent alimony).

⁴⁵ 1981 Mass. Adv. Sh. 2216, 2223, 428 N.E.2d 810, 815 (1981).

abolishing the doctrine of recrimination⁴⁶ and by adopting irretrievable breakdown as a ground for divorce.⁴⁷ In the court's view, since the legislature had removed significant obstacles to divorce, there was no reason not to allow prospective spouses "the freedom to settle their rights in the event their marriage should prove unsuccessful, and thus remove a potential obstacle to their divorce."⁴⁸

Having acknowledged the freedom of prospective spouses to contract, the court immediately qualified this freedom.⁴⁹ Without explaining its reasoning, the court observed that it was not appropriate to leave the freedom to enter such contracts unrestricted.⁵⁰ Thus, in dicta,⁵¹ the court established "some guidelines" for determining the extent to which these contracts could be enforced.⁵² The court first stated that the validity of the contract would be judged by the fair disclosure rules delineated in *Rosenberg v. Lipnick*,⁵³ a 1979 Massachusetts Supreme Judicial Court case concerning the validity of antenuptial contracts governing rights upon death. In *Rosenberg*, the court established that the parties to an antenuptial contract would be viewed as occupying a confidential relationship.⁵⁴ Then, based on this confidential relationship, the *Rosenberg* court imposed on each party the burden of disclosing to the other, prior to the contract's execution, the amount, character, and value of his or her assets.⁵⁵ The *Rosenberg* court also stated that in determining the validity of an antenuptial contract, a court may consider the following factors: (1) whether the contract contains a fair and reasonable provision as measured at the date of its execution for the party contesting the contract,⁵⁶ (2) whether the contract's execution was preceded by full disclosure or the party contesting the contract had, or should have had, independent knowledge of the other party's worth, and (3)

⁴⁶ *Id.* (citing MASS. GEN. LAWS ch. 208, § 1 (1975)). Recrimination is a defense to a divorce based on fault grounds. The doctrine "automatically preclud[es] a divorce of parties who have each been guilty of marital misconduct of equal stature toward the other. . . ." *Mogged v. Mogged*, 55 Ill. 2d 221, 223, 302 N.E.2d 293, 294 (1973).

⁴⁷ *Id.* (citing MASS. GEN. LAWS ch. 208, § 1 (1975)). Divorce on the ground of irretrievable breakdown of the marriage is also referred to as no fault divorce. Massachusetts General Laws chapter 208, § 1, establishes two different procedures for obtaining a divorce on the ground of irretrievable breakdown.

⁴⁸ 1981 Mass. Adv. Sh. 2216, 2223, 428 N.E.2d 810, 815-16 (1981).

⁴⁹ *Id.* at 2224, 428 N.E.2d at 816.

⁵⁰ *Id.*

⁵¹ *Id.* The contract at issue in *Osborne* was entered before the Supreme Judicial Court established that it would apply fair disclosure rules to antenuptial contracts. These rules apply only to contracts entered after March 30, 1979. *Rosenberg v. Lipnick*, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979).

⁵² 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

⁵³ *Id.* at 2224, 428 N.E.2d at 816, citing *Rosenberg v. Lipnick*, 377 Mass. 666, 389 N.E.2d 385 (1979).

⁵⁴ 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979).

⁵⁵ *Id.* at 671, 389 N.E.2d at 388.

⁵⁶ *Id.* at 672, 389 N.E.2d at 388. The reasonableness of the contract's monetary provision is to be judged in light of the parties' respective worth, ages, intelligence, literacy, business acumen, and prior family ties or commitments. *Id.* at 672, 389 N.E.2d at 389.

whether the contract contains a waiver by the party contesting the contract's validity.⁵⁷

In addition to establishing that *Rosenberg's* fair disclosure rules would determine the validity of antenuptial contracts governing rights upon divorce, the *Osborne* court set forth other guidelines for determining the extent to which these contracts should be enforced. First, the court observed that these contracts would be binding on courts to the same extent as postnuptial separation agreements since, in the court's view, the same public policies applied to both kinds of agreements.⁵⁸ Thus, the court established that these antenuptial contracts must be fair and reasonable at the time of the judgment nisi.⁵⁹ Second, the court established that courts may modify these contracts in certain situations.⁶⁰ In conjunction with this guideline, the court provided two examples of situations calling for modification. One concerned a spouse who would be a public charge if the contract were enforced without modification; the other, custody provisions not in a child's best interests.⁶¹ Last, the court observed that some contracts might "so unreasonably encourage divorce as to be unenforceable on grounds of public policy."⁶²

After establishing these guidelines for determining the enforceability of antenuptial contracts governing rights upon divorce, the court addressed whether an antenuptial contract may govern rights in property acquired after marriage.⁶³ The court rejected the husband's claim that even if the antenuptial

⁵⁷ *Id.* at 672, 389 N.E.2d at 388.

⁵⁸ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

⁵⁹ *Id.* at 2224, 428 N.E.2d at 816. A judgment nisi does not dissolve the marriage. A judgment nisi may become absolute six months after its entry. MASS. GEN. LAWS ANN. ch. 208, § 21 (West 1981).

⁶⁰ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

⁶¹ *Id.* at 2224, 428 N.E.2d at 816.

⁶² *Id.* at 2225, 428 N.E.2d at 816. The RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981), cited in *Osborne*, contains one example of such a contract. Illustration 5 sets forth an antenuptial contract providing that the husband will settle one million dollars on his prospective wife in the event of divorce. The RESTATEMENT notes that a court may decide that the large settlement unreasonably encourages divorce and may refuse to enforce the contract on public policy grounds.

Clark, however, has observed that in states which have adopted irretrievable breakdown as a ground for divorce, "[t]he antenuptial agreement . . . can hardly be more conducive to divorce than the divorce grounds themselves." Clark, *supra* note 7, at 149. Most states, including Massachusetts, recognize irretrievable breakdown as a ground for divorce. MASS. GEN. LAWS ANN. ch. 208, § 1 (West 1975); Foster & Freed, *supra* note 14, at 4051. It seems likely, then, that the *Osborne* court's retention of power to refuse to enforce contracts unreasonably encouraging divorce will have little effect on the enforcement of antenuptial contracts. Therefore, this restriction on the enforcement of antenuptial contracts will not be discussed in this casenote.

⁶³ 1981 Mass. Adv. Sh. 2216, 2225, 428 N.E.2d 810, 816-17 (1981).

The court also resolved two other claims presented by the husband. First, it rejected his claim that the contract was invalid because signed under duress. The court noted that although the husband first saw the contract a few hours before the wedding, he and his intended wife had discussed the agreement previously. *Id.* at 2226, 428 N.E.2d at 817. Second, the court rejected the husband's claim of a half interest in three parcels of real estate held in joint title form, finding that the presumption of a gift had been rebutted. *Id.* at 2226-30, 428 N.E.2d at 817-19.

contract were valid, the state statute recognizing antenuptial contracts precluded application of the contract to property acquired during the marriage.⁶⁴ The statute, Massachusetts General Laws chapter 209, section 25, states in substance that before marriage prospective spouses may enter a written contract providing that property possessed by either spouse "at the time of the marriage" will remain or become the property of the husband or wife.⁶⁵ The husband claimed that the statutory language "at the time of the marriage" precluded application of the contract to property acquired after the marriage.⁶⁶ In rejecting this claim, the court noted that the statute, which was enacted in 1845, was intended to remove the common law disability of prospective spouses to enter an enforceable contract to be performed during marriage.⁶⁷ In the court's view, the statute did "not affect the rights of the parties to determine their rights upon termination of the marriage."⁶⁸ Thus, in *Osborne* the court established that antenuptial contracts governing rights upon divorce could determine the parties' rights in property acquired during the marriage.⁶⁹

In summary, *Osborne* established that antenuptial contracts governing alimony or property rights upon divorce were not per se void and could govern property acquired during marriage, but that to be enforceable, the contract must not only meet *Rosenberg's* fair disclosure rules but also must be fair and reasonable at the time of the judgment nisi. In addition, the *Osborne* court established that such contracts may be subject to modification and that some contracts might so unreasonably encourage divorce as to be unenforceable on public policy grounds.

Osborne's significance is twofold. First, *Osborne* established that it is now possible for prospective spouses in Massachusetts to contract out of the equitable distribution statute which otherwise would govern awards of alimony and distribution of property upon divorce. Second, and more importantly, the possibility of contracting out of the equitable distribution statute is largely undercut by restrictions the court imposed on the parties' freedom to enter a binding and enforceable antenuptial contract. Three of these restrictions render the enforcement of any antenuptial contract uncertain.⁷⁰ The first

⁶⁴ *Id.* at 2225, 428 N.E.2d at 817.

⁶⁵ The statute provides in pertinent part that

At any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party may be seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract.

MASS. GEN. LAWS ANN. ch. 209, § 25 (West 1958) (enacted in 1845 as ch. 208, § 1).

⁶⁶ 1981 Mass. Adv. Sh. 2216, 2225, 428 N.E.2d 810, 816 (1981).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 2225, 428 N.E.2d at 817.

⁷⁰ See Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 693, 729 (1972) [hereinafter referred to as Gamble]. See also Note, *Antenuptial Contracts Determining Property Rights Upon Death or Divorce*, 47 U.M. KANSAS CITY L. REV. 31, 32 (1978) [hereinafter referred to as

restriction, that the contract be valid under *Rosenberg's* fair disclosure rules,⁷¹ and the second restriction, that the contract be fair and reasonable at the time of its enforcement,⁷² center on the fairness of the contractual provision for the party contesting the contract. Both restrictions, in effect, require the parties to foresee what a court will view as fair.⁷³ The second restriction, that the contract must be fair and reasonable at the time of the judgment nisi, exacerbates the fairness restriction's inherent uncertainty by requiring parties to determine before marriage how long the marriage is likely to last and how much circumstances may change between the time of the contract's execution and its enforcement. In addition, since one of the primary purposes of these antenuptial contracts is to limit alimony or property claims,⁷⁴ few contracts are likely to seem fair in the light of state laws.⁷⁵ Thus, the absolute requirement that the contract be fair and reasonable at the time of its enforcement may mean that few such contracts will be enforceable. The third restriction, that the courts may modify the contract in certain situations, including that in which a spouse would be a public charge if the contract were enforced as written,⁷⁶ also creates uncertainty. The public charge restriction may be a lower standard for enforceability than that requiring the contract to be fair and reasonable at the time of its enforcement.⁷⁷ Thus, *Osborne* leaves open the possibility that a contract which has been found enforceable at the time of the judgment nisi may later be modified by the courts to prevent one spouse from becoming a public charge.

By adopting inherently ambiguous guidelines, the *Osborne* court has imposed restrictions on antenuptial contracts which, at best, make contracting out of the equitable distribution statute uncertain, and, at worst, may make contracting out almost impossible. Yet it is questionable whether a statute granting a court discretion to distribute all of a spouse's property in a manner it views as fair can meet the needs and desires of those who use antenuptial contracts.⁷⁸ People who enter these contracts usually have been married at least

Note, *Antenuptial Contracts*] suggesting that the judicial attitude toward antenuptial contracts "is at best confused and unpredictable, and at worst frankly hostile."

⁷¹ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

⁷² *Id.*

⁷³ See Klarman, *supra* note 10, at 403 stating that "[t]his amorphous [fairness] standard handicaps individuals in their future planning because it is virtually impossible to predetermine what a court may find to be a fair provision."

⁷⁴ See Gamble, *supra* note 70, at 724-25 (discussing antenuptial contracts governing rights upon death). See also Estate of Friedman, 483 Pa. 614, 626, 398 A.2d 615, 621 (1978) (noting also that "[a]lthough one purpose of antenuptial agreements is to foreclose litigation, there have been many cases in which the validity of such contracts have been contested.").

⁷⁵ See Note, *Antenuptial Contracts*, *supra* note 70, at 41 (referring to antenuptial contracts governing rights upon death).

⁷⁶ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

⁷⁷ See *infra* text accompanying notes 202-17.

⁷⁸ See *supra* text accompanying notes 14-20. That the equitable distribution process accords with the desires of any divorcing couple is open to question. See GLENDON, *supra* note 17, at 65-66, suggesting that equitable distribution laws "ignore both intent and behavior." See also M. Glendon, *Property Rights*, *supra* note 16, at 9 (observing that one drawback of equitable distribu-

once previously.⁷⁹ Some have children or ex-spouses from prior marriages to support.⁸⁰ Others may wish to leave their property to their children on death.⁸¹ In addition, in at least some instances, but for the antenuptial contract there would be no marriage.⁸² The equitable distribution statute affords neither the certainty nor the choice⁸³ in their financial affairs which people who enter these contracts seek.

This casenote will suggest that in light of the high rate of divorce and the unpredictable results of the equitable distribution process, there is a great need for more certain rules to govern the enforcement of antenuptial contracts. Those who enter these contracts do so because they want to plan realistically for the possibility of divorce, to limit alimony or property rights, and to foreclose litigation. The rules now applied to these contracts render their enforcement uncertain. It will be submitted that the rules governing these contracts should be concerned with the fairness of the process of entering the contract, not with the fairness of the contract itself. Part I of this casenote will discuss the traditional void per se treatment of antenuptial contracts governing rights upon divorce. Part II will offer a critique of the *Osborne* court's approach, suggesting that the guidelines established by the court do little to meet the need for predictability and choice in this area of the law, and thus the guidelines are a potent source for defeating the expectations and needs of the parties to these contracts. Finally, Part III will suggest adoption of a statute to govern enforcement of these contracts. That statute will be concerned with the fairness of the process of entering the agreement.

I. THE TRADITIONAL RULE VERSUS THE CURRENT TREND

Antenuptial contracts governing the rights of prospective spouses in one another's estates upon death have long been favored by the law as promoting marital harmony.⁸⁴ Prior to 1970, however, similar contracts purporting to

tion is that "the system, because of inconsistency in results among apparently similar cases, is widely perceived as unfair by litigants").

⁷⁹ See *Gamble*, *supra* note 70, at 730-33. See also *Clark*, *supra* note 7, at 141 (stating that "[t]he typical antenuptial agreement is made by an older man and woman . . . who have previously been married . . .").

⁸⁰ See, e.g., *Unander v. Unander*, 265 Or. 102, 104, 506 P.2d 719, 720 (1973).

⁸¹ See *Gamble*, *supra* note 70, at 730-33.

⁸² See, e.g., *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980); *Burtoff v. Burtoff*, 418 A.2d 1085, 1087 (D.C. App. 1980); *In re Marriage of Headington*, 41 Or. App. 503, 505-06, 599 P.2d 1173, 1174 (1979).

⁸³ See *Newman v. Newman*, ____ Colo. ____, ____ n.4, 653 P.2d 728, 732 n.4 (1982).

⁸⁴ See, e.g., *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962) (stating that "such agreements are in harmony with public policy and often conducive to marital tranquility . . ."); *Rosenberg v. Lipnick*, 377 Mass. 666, 673, 389 N.E.2d 385, 389 (1979) (stating that "[t]he right to make antenuptial agreements settling property rights in advance of marriage is a valuable personal right which courts should not regulate destructively."). *Contra Note, Antenuptial Contracts*, *supra* note 70, at 32 (suggesting that although courts in theory favor antenuptial contracts governing rights upon death, they are nonetheless frequently found unenforceable).

govern the alimony and property rights of spouses upon divorce generally were held void as contrary to public policy.⁸⁵ Typically, the courts held that such antenuptial contracts were contrary to public policy on one or more of three grounds.⁸⁶ Frequently, the courts viewed these contracts as promoting or facilitating separation or divorce by offering one party a financial incentive to end the marriage.⁸⁷ Some courts viewed these contracts as denigrating the status of marriage.⁸⁸ Other courts referred to the state's or the public's interest in preventing one spouse from becoming a public charge as a reason to hold the contract void as contrary to public policy.⁸⁹

The current trend, however, is to hold that antenuptial contracts governing the alimony or property rights of spouses upon separation or divorce are not void per se. The landmark case is *Posner v. Posner*,⁹⁰ decided by the Florida Supreme Court in 1970. The *Posner* court based its rejection of the traditional void as against public policy rule on two principal grounds. First, the court questioned the proposition that these antenuptial contracts facilitated or promoted divorce.⁹¹ The court noted that antenuptial contracts governing the spouses' rights in one another's estates upon death long had been viewed as

A discussion of antenuptial contracts governing rights of the parties on death is outside the scope of this casenote. For a discussion of these contracts see Clark, *supra* note 7 and Note, *Antenuptial Contracts*, *supra* note 70 (the articles discuss contracts governing rights upon both death and divorce).

⁸⁵ See, e.g., *Oliphant v. Oliphant*, 177 Ark. 613, 625, 7 S.W.2d 783, 788 (1928). See generally 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 90-33 (1979 & Supp. 1981) [hereinafter referred to as LINDEY].

In one case prior to 1970, *Hudson v. Hudson*, 350 P.2d 596, 597 (Okla. 1960), the Oklahoma Supreme Court did enforce an antenuptial contract waiving alimony and property division. The *Hudson* court gave no reason for doing so other than that the contract was entered "fairly, freely, understandingly and without fraud, that its provisions were reasonable and that said contract was valid." *Id.* *Hudson* has recently been reaffirmed by the Oklahoma Supreme Court in *Freeman v. Freeman*, 565 P.2d 365, 366-67 (Okla. 1977).

⁸⁶ 1981 Mass. Adv. Sh. 2216, 2220, 428 N.E.2d 810, 814 (1981).

⁸⁷ See, e.g., *Fincham v. Fincham*, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946) (provision in an antenuptial contract limiting husband's liability to \$2000 in event of separation found to "invite and encourage a separation as a source of pecuniary profit to the husband"); *Cohn v. Cohn*, 209 Md. 470, 475, 477, 121 A.2d 704, 706, 707 (1956) (court refused to enforce what it termed a "buy out" provision of an antenuptial contract providing that the wife would receive \$5000 in lieu of alimony, finding that the provision induced separation); *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968) (during the marriage, the husband executed a contract providing that if he ever left his wife, all his property would be hers; the court found the contract void on public policy grounds, stating that if the contract were enforceable "it would induce the wife to goad the husband into separating from her in order that the agreement could be put into effect . . ."); *Crouch v. Crouch*, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964) (if contract limiting husband's liability were enforceable, he could "through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay").

⁸⁸ See, e.g., *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950).

⁸⁹ See, e.g., *Norris v. Norris*, 174 N.W.2d 368, 370 (Iowa 1970) (antenuptial contract relieving husband of duty to pay alimony against the public interest).

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

⁹¹ *Id.* at 383-84.

promoting marital harmony.⁹² Such contracts had been enforced in decedent's estate cases despite the presence in the contract of provisions governing rights upon divorce.⁹³ The court observed that in some circumstances it was "not inconceivable" that these agreements also might be viewed as promoting divorce.⁹⁴ A spouse unhappy with the death provisions of a contract might, for example, provoke a divorce to gain greater financial benefits through an alimony award, since the divorce provisions of the contract would not be enforced.⁹⁵ Yet this argument had not been used to invalidate antenuptial contracts governing rights upon death.⁹⁶ Thus, in the court's view, the argument that antenuptial contracts governing rights upon divorce promoted divorce was entitled to little weight.⁹⁷

A second and more important basis for the *Posner* court's decision was the change in public policy towards divorce.⁹⁸ The *Posner* court noted that although marriage had once been viewed as "practically indissoluble," both the public and the state were now more accepting of divorce.⁹⁹ This increased acceptance of divorce was, in the court's view, manifested in the high rate of divorce and the then new concept of no fault divorce.¹⁰⁰ In the court's view, this change in public policy required a different rule for antenuptial contracts governing alimony or property rights of spouses upon divorce.¹⁰¹ Thus, the court determined that these contracts would no longer be treated as void per se.¹⁰²

For an antenuptial contract to be held valid, however, *Posner* established that two conditions had to be met. First, the contract had to be valid under rules the court had previously established for determining the validity of antenuptial contracts governing the spouses' property rights upon death.¹⁰³ These rules established that an antenuptial contract would be valid if it could meet one of three alternative requirements.¹⁰⁴ Thus, the contract would be valid if it contained a fair and reasonable provision for the wife.¹⁰⁵ Absent a fair provi-

⁹² *Id.* at 383.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 383-84. See also Gamble, *supra* note 70, at 712 (suggesting the impossibility of drafting an antenuptial contract which would not make it profitable in monetary terms for one of the spouses to seek a divorce).

⁹⁸ *Id.* at 383-85.

⁹⁹ *Id.* at 384.

¹⁰⁰ *Id.* Florida did not have no fault divorce when *Posner* was decided.

¹⁰¹ *Id.* at 385.

¹⁰² *Id.*

¹⁰³ *Id.*, citing *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962).

¹⁰⁴ *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962). These rules no longer apply to antenuptial contracts governing rights upon death. The Florida legislature has eliminated *Del Vecchio's* fair disclosure rules in the context of antenuptial contracts governing rights upon death. Florida Statute § 732.702(2) provides that no disclosure is required for an antenuptial contract governing rights upon death. FLA. STAT. ANN. § 732.702(2) (West 1976). See *infra* note 191 for a discussion of this statute.

¹⁰⁵ *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962).

sion, the contract would be valid if, prior to the contract's execution, the husband fully disclosed to the wife his worth.¹⁰⁶ Absent a fair provision or disclosure, the contract would be valid if, prior to its execution, the wife had general knowledge of her prospective husband's worth.¹⁰⁷ If an antenuptial contract met one of these alternative requirements, *Posner's* first condition for its validity would be met. As a second condition for the contract's validity, *Posner* required that the divorce be sought in good faith.¹⁰⁸ The court noted that if the contract met both of these conditions, it would be held valid as to conditions existing at the time of its execution.¹⁰⁹ But the contract, the court established, would be subject to modification if circumstances had changed since its execution.¹¹⁰

Since the landmark decision in *Posner*, only a few jurisdictions ruling on the validity of antenuptial contracts governing alimony or property rights upon divorce have continued to apply the void per se rule to all such contracts.¹¹¹ Another jurisdiction continues to apply the void per se rule to contracts governing alimony or support rights¹¹² but has upheld contracts governing property rights.¹¹³ The current trend is to follow *Posner* in holding that antenuptial contracts governing the alimony or property rights of the spouses upon divorce are not void per se.¹¹⁴

II. CRITIQUE OF *OSBORNE*

In *Osborne*, the court established that antenuptial contracts governing alimony or property rights upon divorce were not per se invalid in Massachusetts and may be specifically enforced.¹¹⁵ But the restrictions the court imposed on these contracts render contracting out of the unpredictable rule of equitable distribution uncertain. By establishing that to be enforceable, a contract must be valid under *Rosenberg's* fair disclosure rules¹¹⁶ and that, in addition, it must be fair and reasonable at the time of the judgment nisi,¹¹⁷ *Osborne* suggests that

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.*

¹⁰⁸ *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Modification of the antenuptial contract would be determined under the laws governing postnuptial separation agreements. *Id.*

¹¹¹ *See, e.g., In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa 1979); *Mulford v. Mulford*, 211 Neb. 747, 749, 320 N.W.2d 470, 471 (1982).

¹¹² *See, e.g., In re Marriage of Higgason*, 10 Cal. 3d 476, 485, 516 P.2d 289, 295, 110 Cal. Rptr. 897, 903 (1973) (*en banc*). *See also Connolly v. Connolly*, 270 N.W.2d 44, 47 (S.D. 1978) (relying on public's interest in preventing one spouse from becoming a public charge).

¹¹³ *In re Marriage of Dawley*, 17 Cal. 3d 342, 352, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976) (*en banc*) (disapproving dictum in *Higgason* that antenuptial contracts are invalid unless the parties contemplated a marriage lasting until death); *In re Marriage of Higgason*, 10 Cal. 3d 476, 485, 516 P.2d 289, 295, 110 Cal. Rptr. 897, 903 (1973) (*en banc*).

¹¹⁴ *See cases cited supra* note 3.

¹¹⁵ 1981 Mass. Adv. Sh. 2216, 2223-24, 428 N.E.2d 810, 816 (1981).

¹¹⁶ *Id.* at 2224, 428 N.E.2d at 816.

¹¹⁷ *Id.*

the fairness of the contractual provision will be the primary factor determining the contract's enforceability. Because the parties to these contracts cannot foresee how circumstances may change¹¹⁸ and what a court will view as fair, the contract's enforceability will be uncertain until it is litigated upon divorce. Finally, by establishing that the courts may modify a contract if its enforcement would make one spouse a public charge,¹¹⁹ the *Osborne* court seems to have established that even if a contract is valid under *Rosenberg's* fair disclosure rules and is found fair and reasonable at the time of the judgment nisi, it may be modified later.

The *Osborne* court's decision can be challenged on four grounds. First, the court's incorporation of *Rosenberg's* fair disclosure rules rests on the assumption that a confidential relationship exists between the parties to an antenuptial contract and that courts can determine the effects of that relationship. The assumption is questionable.¹²⁰ Second, the fair disclosure rules themselves are inherently ambiguous and the results of their application difficult to predict.¹²¹ Third, the requirement that the contract be fair and reasonable at the time of its enforcement is also inherently ambiguous.¹²² Finally, the court's decision leaves unclear the circumstances in which a contract may be modified and the extent of that modification.¹²³ Thus, the *Osborne* court's approach is not fully responsive to both the needs and wishes of those who desire to settle their rights with the certainty, and perhaps from their perspective, the fairness, which the equitable distribution statute does not afford.

A. *The Confidential Relationship*

In *Osborne*, the court adopted *Rosenberg's* fair disclosure rules to judge the validity of antenuptial contracts governing rights upon divorce.¹²⁴ Underlying these disclosure rules is the confidential relationship said to exist between the parties to an antenuptial contract.¹²⁵ Because of this confidential relationship, prospective spouses are seen as susceptible to overreaching by one another in entering such contracts.¹²⁶ To prevent overreaching, courts have imposed fair

¹¹⁸ See, e.g., *In re Marriage of Stokes*, 43 Colo. App. 461, 608 P.2d 824, 828 (1979) (parties enter into antenuptial agreements because they cannot foretell the future).

¹¹⁹ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹²⁰ See *infra* notes 124-58 and accompanying text.

¹²¹ See *infra* notes 161-92 and accompanying text.

¹²² See *infra* notes 195-201 and accompanying text.

¹²³ See *infra* notes 202-17 and accompanying text.

¹²⁴ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹²⁵ See, e.g., *In re Estate of Lopata*, ___ Colo. ___, ___, 641 P.2d 952, 956 (1982); *Rosenberg v. Lipnick*, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 213-14 (1972). Cf. *Unander v. Unander*, 265 Or. 102, 107 n.2, 506 P.2d 719, 721 n.2 (1973) (duty of disclosure based on fiduciary duty of parties entering an antenuptial contract).

¹²⁶ *Hartz v. Hartz*, 248 Md. 47, 57, 234 A.2d 865, 871 (1967); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 301, 494 P.2d 208, 213 (1972); Klarman, *supra* note 10, at 403.

disclosure rules on parties seeking to enter enforceable antenuptial contracts.¹²⁷ These rules, in turn, are one source of uncertainty concerning the enforceability of antenuptial contracts.¹²⁸ It is important, therefore, to determine whether the theory of a confidential relationship offered to justify these rules is sound today.¹²⁹

There are no Massachusetts cases shedding light on this question. Cases from other jurisdictions do, however, offer some illumination. These cases reveal that at the heart of the confidential relationship doctrine was the courts' paternalistic belief that women entering these contracts could be easily overreached.¹³⁰ Although early cases, like more recent ones, often spoke in terms of imposing the duties flowing from the confidential relationship on both parties to the contract,¹³¹ in practice the doctrine was used to protect women.¹³² Thus, in one early case, the court observed that "courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife."¹³³ In another, the court stated that "[a]fter betrothal a woman is presumed to be subject in such matters to the influence of her prospective husband. . . ."¹³⁴ Today, however, antenuptial contract cases, at least those arising in a divorce context, refer less often to the confidential relationship doctrine. Nonetheless, courts continue to apply rules derived from that doctrine.¹³⁵ Thus, the extent to which courts have departed from paternalistic assumptions concerning women's susceptibility to overreaching remains unclear.¹³⁶

¹²⁷ See, e.g., *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 213-14 (1972); *LINDEY*, *supra* note 85, at 90-55.

¹²⁸ Note, *Antenuptial Contracts*, *supra* note 70, at 32.

¹²⁹ The confidential relationship is also the source of other special rules applied to these contracts. *Gamble*, *supra* note 70, at 719-20. One such rule is close scrutiny of the contract. See, e.g., *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980); *Lutgert v. Lutgert*, 338 So. 2d 1111, 1115 (Fla. Dist. Ct. App. 1976). But see *Laird v. Laird*, 597 P.2d 463, 468 (Wyo. 1979) (rejecting close scrutiny of antenuptial contracts "because it springs from the archaic presumption of inequality of husband and wife").

The confidential relationship is not the only source of the rules governing these antenuptial contracts. The state's interest in preventing one spouse from becoming a public charge is another. See, e.g., *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981); *Unander v. Unander*, 265 Or. 102, 107, 506 P.2d 719, 721 (1973). See also *Clark*, *supra* note 7, at 151 (suggesting that the time lag between execution and enforcement of these agreements is one reason for the courts to scrutinize antenuptial contracts more closely).

¹³⁰ *Gamble*, *supra* note 70, at 719-20. *Gamble* states that the courts have taken the view "that between persons in the premartimonial [*sic*] state there is a mystical, confidential relationship which anesthetizes the senses of the female partner." *Id.* at 719. See, e.g., *Stilley v. Folger*, 14 Ohio 610, 614 (1846); *Rocker v. Rocker*, 42 Ohio Op. 2d 184, 189 (1967).

¹³¹ See, e.g., *Rosenberg v. Lipnick*, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979); *Estate of Serbus v. Serbus*, 324 N.W.2d 381, 385 (Minn. 1982); *Pierce v. Pierce*, 71 N.Y. 154, 158 (1877); *Kline v. Kline*, 57 Pa. 121, 122 (1928).

¹³² *Gamble*, *supra* note 70, at 719-20, 723-26; *Babb v. Babb*, 604 S.W.2d 574, 578 (Ark. Ct. App. 1980); *In re Estate of Lopata*, ____ Colo. ____, ____ n.6, 641 P.2d 952, 955 n.6 (1982).

¹³³ *Pierce v. Pierce*, 71 N.Y. 154, 158 (1877).

¹³⁴ *Denison v. Dawes*, 121 Me. 402, 404, 117 A. 314, 315 (1922).

¹³⁵ See, e.g., *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980) (contract valid); *Ferry v. Ferry*, 586 S.W.2d 782, 786-87 (Mo. Ct. App. 1979) (contract invalid).

¹³⁶ *LINDEY*, *supra* note 85, at 90-49, states that "Times have changed. Women's libera-

The paternalistic underpinnings of the confidential relationship doctrine are not its only flaw. Further flaws inhere in the three approaches courts have used to determine whether a confidential relationship exists between the parties to an antenuptial contract.¹³⁷ Some courts, like the *Rosenberg* court, have irrebuttably presumed that the parties occupy a confidential relationship.¹³⁸ The vice of this approach is that it fails to take into account marriages of convenience.¹³⁹ The second approach finds a confidential relationship when the parties are engaged.¹⁴⁰ But commentators suggest that it is anomalous to view the parties as dealing at arm's length before engagement, yet automatically occupying a confidential relationship immediately thereafter.¹⁴¹ Third, some courts look at the particular factual situation to determine whether a confidential relationship exists.¹⁴² The results of this approach are unpredictable.¹⁴³ Final-

tion has had a far-reaching effect." Cases such as *Newman*, in which the Colorado Supreme Court presumed that prospective spouses can "act independently and rationally" in entering antenuptial contracts, bear out this statement. See *Newman v. Newman*, ____ Colo. ____, 653 P.2d 728, 733 (1982). Other cases, however, suggest that times have changed less dramatically. In *Lutgert*, one Florida district court of appeals voided an antenuptial contract for involuntariness on the prospective wife's part. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1112 (Fla. Dist. Ct. App. 1976). The court acknowledged that the wife could not have been "mesmerized by prehymental ardor" since she had been married twice before. *Id.* at 1116. Nonetheless, the court found that the wife had been coerced into signing the contract because the husband "sprang" it on her twenty-four hours before the wedding, refusing to marry her unless the contract was signed. *Id.* The circumstances were, perhaps, less coercive than the court found, for as the court also noted, the parties had discussed entering an antenuptial contract for "perhaps up to a year before the marriage." *Id.* at 1114.

¹³⁷ *Gamble*, *supra* note 70, at 720-23.

¹³⁸ See, e.g., *Rosenberg v. Lipnick*, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 213 (1972). *Contra In re Marriage of Dawley*, 17 Cal. 3d 342, 355, 551 P.2d 323, 331, 131 Cal. Rptr. 3, 11 (1976) (parties not yet married are not presumed to share a confidential relationship).

¹³⁹ *Gamble*, *supra* note 70, at 720. In jurisdictions which do not irrebuttably presume that the parties to an antenuptial contract occupy a confidential relationship, disclosure is not required if the marriage is one of convenience and the contract governs rights upon death. See, e.g., *Rocker v. Rocker*, 42 Ohio Op. 2d 184, 193 (1967); *Lightman v. Magid*, 54 Tenn. App. 701, 713, 394 S.W.2d 151, 157 (1965).

¹⁴⁰ See, e.g., *Hook v. Hook*, 69 Ohio St. 2d 234, 235, 431 N.E.2d 667, 669 (1982); *Denison v. Dawes*, 121 Me. 402, 404, 117 A. 314, 315 (1922); Cf. *Newman v. Newman*, ____ Colo. ____, 653 P.2d 728, 732 (1982) (engagement creates a fiduciary relationship).

¹⁴¹ *Gamble*, *supra* note 70, at 721; Note, *Antenuptial Contracts*, *supra* note 70, at 34. Cf. *Ortel v. Gettig*, 207 Md. 594, 611-12, 116 A.2d 145, 153 (1955) (noting that it is "anomalous to say that the instant before a woman signs an antenuptial agreement she deals with her prospective husband as a stranger, and he with her, but that in the twinkling of an eye, after they append their signatures to the instrument, a confidential relationship exists between them.").

¹⁴² See, e.g., *Estate of Serbus v. Serbus*, 324 N.W.2d 381, 384 (Minn. 1982); *Lightman v. Magid*, 54 Tenn. App. 701, 713, 394 S.W.2d 151, 157 (1965).

¹⁴³ *Gamble*, *supra* note 70, at 722. As *Gamble* suggests, courts differ in the weight they accord such facts as the age of the parties. *Id.* at 722-23. See, e.g., *Estate of Serbus v. Serbus*, 324 N.W.2d 381, 383, 385 (Minn. 1982) (prospective husband was sixty-eight, prospective wife, sixty-five — confidential relationship); *Lightman v. Magid*, 54 Tenn. App. 701, 710, 713-14, 394 S.W.2d 151, 156-57 (1965) (groom, seventy-one, bride, fifty-eight — no confidential relationship).

ly, common to all three approaches is the assumption that courts can determine when a confidential relationship exists. But given the lack of consensus among the courts about how to make that identification, that assumption is open to question.¹⁴⁴

More problematic than identification of the confidential relationship itself is the effect that courts in the past have seen as following from that relationship. As Professor Gamble has suggested, courts applying the confidential relationship doctrine generally have begun with a flawed premise.¹⁴⁵ Women have been viewed as being incapable of assessing or acting in their own best interests, so blinded are they by infatuation.¹⁴⁶ Thus, the courts, fearing that women could easily be overreached by the intellectually dominant male, became the protectors of women.¹⁴⁷

Whatever might once have been said in favor of this view of women, today it is anachronistic. The confidential relationship doctrine, as Gamble suggests, accords with neither our society's view of women as men's equals nor with the nature of the premarital relationship itself.¹⁴⁸ In enforcing antenuptial contracts governing rights upon death, several courts have explicitly recognized the validity of Gamble's criticisms.¹⁴⁹ Thus, one court observed that the burden of fair disclosure imposed on a prospective husband had been "based on an assumption that the male was the dominant force in the relationship and that the female was susceptible to his influence."¹⁵⁰ In the court's view, there was "substantial doubt" concerning the accuracy of that assumption.¹⁵¹ Other

¹⁴⁴ Gamble, *supra* note 70, at 723. Gamble states that the lack of consensus among the courts "seems to affirm that such an identification is beyond any court's ability." *Id.* But cf. Clark, *supra* note 7, at 144, stating that "many courts take the view that prospective spouses are in a confidential relationship, and this seems clearly correct."

¹⁴⁵ Gamble, *supra* note 70, at 719-20.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 720; Babb v. Babb, 604 S.W.2d 574, 577 (Ark. Ct. App. 1980); *In re Estate of Burgess*, 646 P.2d 623, 625 (Okla. Ct. App. 1982).

¹⁴⁸ Gamble, *supra* note 70, at 693, 723.

¹⁴⁹ Babb v. Babb, 604 S.W.2d 574, 577-79 (Ark. Ct. App. 1980); *In re Estate of Lopata*, ___ Colo. ___, ___ n.6, 641 P.2d 952, 954 n.6 (1982); Potter v. Collin, 321 S.W.2d 128, 132 (Fla. Dist. Ct. App. 1975). In *Potter*, the court quoted Gamble and concluded that "[i]n this day and age there is no longer any suggestion that women are unequal and in need of the protective arm of the court." *Id.* at 132. *Potter* enforced an antenuptial contract governing rights upon death which made a "penurious provision" for the wife, who had signed the contract over her attorney's objections. *Id.* at 130-33. In upholding the contract, the *Potter* court rejected the trial court's view that in these circumstances a finding of involuntariness could be based on the woman's being so anxious to marry her prospective husband "that she would have agreed to any terms" he imposed. *Id.* at 131-32. In the view of the *Potter* court, "the courts [were] not free to interfere with lawful but improvident marital agreements knowingly entered into by a person sui juris." *Id.* at 131.

¹⁵⁰ *In re Estate of Lopata*, ___ Colo. ___, ___ n.6, 641 P.2d 952, 955 n.6 (1982).

¹⁵¹ *Id.* at ___ n.6, 641 P.2d at 955 n.6. See also *In re Estate of Burgess*, 646 P.2d 623, 625 (Okla. Ct. App. 1982) ("It will no longer do for courts to look on women who are about to be married as if they were insensible ninnies, pathetically vulnerable to overreaching by their fiances and in need of special judicial protection.").

courts, in enforcing antenuptial contracts upon divorce, have stated that their former role as protectors of women is no longer appropriate.¹⁵²

Insofar as the confidential relationship doctrine has been used as a basis for scrutinizing the substantive fairness of the contract — and it would seem, as a basis for relieving some women of contracts they have entered knowingly and voluntarily¹⁵³ — the desirability of its continued use is questionable. Overreaching can occur in the execution of antenuptial contracts, but since one purpose of such contracts is to limit or waive rights,¹⁵⁴ the fairness of the contractual provision is not a reliable indicator of overreaching.¹⁵⁵ An approach preferable to the current one would be to begin with the premise that people are capable of acting independently and in their own best interests in entering these contracts.¹⁵⁶ Such an approach would be more in accord with our

¹⁵² *Spector v. Spector*, 23 Ariz. App. 131, 137, 531 P.2d 176, 182 (1975); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 47-48, 359 A.2d 719, 721 (1976). See also the concurring opinion of Justice Schroeder in *Ranney v. Ranney*, 219 Kan. 428, 434, 548 P.2d 734, 739 (1976), suggesting that change in constitutional doctrine concerning the rights of women "foreshadows a requirement that courts shed their overzealous supervisory protecting mantle concerning women's acts when women exercise their constitutional freedom." Justice Schroeder saw a changed constitutional doctrine both in the close scrutiny applied by the United States Supreme Court to statutory classifications based on sex and in a state statute prohibiting discrimination on the basis of sex. *Id.* at 434, 548 P.2d at 739.

¹⁵³ See, e.g., *Babb v. Babb*, 604 S.W.2d 574, 577-78 (Ark. Ct. App. 1980) (antenuptial contract governing rights upon death) noting the possibility and observing that the presumption of a confidential relationship "which seems to be solely for the protection of women is indicative of the theme of antenuptial agreement cases, i.e., the intellectual domination by males of females." The *Babb* court did not decide whether to reject the presumption of a confidential relationship in all cases, but held only that in the particular case "a woman who is 57 years old, who has some business experience and who apparently was concerned about holding on to her property which so clearly exceeded in value that of her prospective husband will not be permitted to excuse her allegedly unknowing entry into an antenuptial agreement by saying she was 'in love.'" *Id.* at 577. See also the dissenting opinion of Justice Smith in *Burnes v. Burnes*, 203 Ark. 334, 343-44, 157 S.W.2d 24, 28-29 (1941) (antenuptial contract governing rights upon death). Justice Smith, in dissenting from the majority's invalidation of the contract, observed that the contract was being nullified "solely because of a belief by judges that it is inequitable and (secondarily) because appellant says it was not explained to her." *Id.* at 343, 157 S.W.2d at 28. In his view, by nullifying the contract, the court had established a rule

that a woman may, by means of a written agreement, proceed with marriage and accept its benefits for thirteen years, or for any other period. She may . . . admit to a witness whose credibility is not impeached that she understood her rights were to terminate with the death of her husband; then, on second thought, counter with the unsupported assertion that she did not read the contract, and was therefore not informed.

Id. at 343-44, 157 S.W.2d at 28-29.

¹⁵⁴ See *Gamble*, *supra* note 70, at 724-25. See also *Clark*, *supra* note 7, at 154, observing that many antenuptial agreements "are drafted so as merely to read that each spouse waives all rights which he may have in the property of the other by virtue of the marriage. . . ."

¹⁵⁵ See Note, *Antenuptial Contracts*, *supra* note 70, at 41 ("every antenuptial contract is unfair at least by the legislative standards indicated in the laws of descent and distribution").

¹⁵⁶ See, e.g., *Newman v. Newman*, ____ Colo. ____, ____, 653 P.2d 728, 733 (1982) (terming the relationship confidential but stating that "there is an assumption in the law that the parties are essentially able to act independently and rationally concerning their present and future property interests in relation to their prospective marriage").

society's view of women and of the premarital relationship. It would also recognize that many who use these contracts have been married before¹⁵⁷ and thus can be expected to be aware of the rights they would have upon divorce in the absence of an antenuptial contract.¹⁵⁸

By beginning with the premise that those who use these antenuptial contracts are capable of contracting independently and rationally, courts could take a significant step toward adopting rules making the enforceability of antenuptial contracts more certain. Ironically, the Massachusetts Supreme Judicial Court adopted the confidential relationship doctrine and its fair disclosure rules at a time when a few jurisdictions have begun to question the soundness of both.¹⁵⁹ The language the Massachusetts Supreme Judicial Court used in *Rosenberg* to adopt the confidential relationship doctrine is, perhaps, flexible enough for the court to also adopt the premise that the parties to an antenuptial contract are able to contract independently and rationally.¹⁶⁰ Whether the court will do so can only be answered in future cases.

B. Fair Disclosure

The first restriction which the *Osborne* court placed on antenuptial contracts governing rights upon divorce is premised on the confidential relationship doctrine.¹⁶¹ In *Osborne*, the court stated that to be valid, these antenuptial contracts must meet *Rosenberg's* fair disclosure rules.¹⁶² Under these rules, each party to an antenuptial contract has the duty of disclosing to the other the amount, character, and value of his or her assets.¹⁶³

¹⁵⁷ Clark, *supra* note 7, at 141.

¹⁵⁸ See, e.g., *Newman v. Newman*, ____ Colo. ____, ____, 653 P.2d 728, 733 (1982). In enforcing the contract in *Newman* over the wife's claims of unconscionability and fraud, the Colorado Supreme Court noted that the wife "was a mature person who had once before been through the financial difficulties of a divorce" and that she had "decided not to obtain independent counsel." *Id.* at ____, 653 P.2d at 733.

¹⁵⁹ See, e.g., *In re Estate of Lopata*, ____ Colo. ____, ____, n.6, 641 P.2d 952, 954 n.6 (1982); FLA. STAT. ANN. § 732.702(2) (West 1976).

¹⁶⁰ 377 Mass. 666, 671-73, 389 N.E.2d 385, 388-89 (1979).

¹⁶¹ See *supra* notes 124-25 and accompanying text.

¹⁶² 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

Compliance with *Rosenberg's* fair disclosure rules should establish not only the validity but also the enforceability of an antenuptial contract litigated in an estate context. See *Rosenberg v. Lipnick*, 377 Mass. 666, 671-72, 389 N.E.2d 385, 388-89 (1979). If an antenuptial contract is litigated in a divorce context, however, compliance with *Rosenberg's* fair disclosure rules will establish only its validity, not its enforceability. *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981). The fair provision discussed in this section refers to a provision which was fair at the date of the contract's execution. Such a provision will establish the validity of an antenuptial contract litigated in a divorce context. *Id.* at 2224, 428 N.E.2d at 816. The fairness discussed in section C *infra*, at text accompanying notes 195-201, refers to fairness at the time of enforcement. Such fairness is necessary to establish the enforceability of an antenuptial contract litigated in a divorce context. *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹⁶³ *Rosenberg v. Lipnick*, 377 Mass. 666, 670, 389 N.E.2d 385, 388 (1979).

Despite *Rosenberg's* emphasis on disclosure, this requirement does not seem to be absolute.¹⁶⁴ The fair disclosure rules delineated in *Rosenberg* appear to be in substance the majority rule for determining the validity of antenuptial contracts governing rights upon death.¹⁶⁵ Under the majority rule, a contract is valid if one of the following alternative requirements is met. First, a contract will be valid if it contains a fair and reasonable monetary provision for the party contesting the contract as measured at the date of the contract's execution.¹⁶⁶ Second, in the absence of a fair provision, the contract will be valid if prior to its execution, the party contesting the contract was fully informed of the other party's worth.¹⁶⁷ Finally, in the absence of either a fair provision or disclosure, the contract will be valid if, prior to its execution, the party contesting the contract had independent knowledge of the other party's worth.¹⁶⁸ Since *Osborne*

¹⁶⁴ In *Rosenberg*, the husband had not disclosed his assets to his prospective wife prior to the contract's execution. *Id.* at 668, 389 N.E.2d at 386. *Rosenberg's* fair disclosure rules did not apply to the antenuptial contract at issue, since those rules apply on a prospective basis. *Id.* at 667-78, 389 N.E.2d at 386. The court noted, however, that even if the contract's validity were determined under the new rules, the contract might well have been enforceable, since the wife "was advised by counsel that she should request disclosure but decided not to for fear it might result in no marriage." *Id.* at 672-73, 389 N.E.2d at 389.

¹⁶⁵ After stating that the parties would be viewed as occupying a confidential relationship and imposing on both the duty of disclosure, the court in *Rosenberg* listed several other factors which it may consider in determining the validity of an antenuptial contract. *Id.* at 671-72, 389 N.E.2d at 388. Thus, the court stated that it may consider whether:

(1) the contract contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth.

Id. at 672, 389 N.E.2d at 388. The first and second factors in *Rosenberg*, excluding the alternative test of constructive knowledge, state the majority rule. In addition, in a footnote to the factors the court may consider in determining the validity of an antenuptial contract, the *Rosenberg* court cited cases from other jurisdictions following the majority rule. *Id.* at 672 n.3, 389 N.E.2d at 388 n.3 (1979), citing *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); *Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865 (1967); *In re Kaufman's Estate*, 404 Pa. 131, 171 A.2d 48 (1961); *In re McClellan's Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 494 P.2d 208 (1972) (antenuptial contract governing property rights upon divorce).

¹⁶⁶ See, e.g., *Hartz v. Hartz*, 248 Md. 47, 56-58, 234 A.2d 865, 870-72 (1967); *Schutterle v. Schutterle*, 260 N.W.2d 341, 348 (S.D. 1977).

The fairness and reasonableness of the contractual provision is determined in reference to the parties' respective worth, ages, intelligence, literacy, business acumen and prior family ties or commitments. *Rosenberg v. Lipnick*, 377 Mass. 666, 672, 389 N.E.2d 385, 389 (1979). In jurisdictions which follow the majority rule, a fair provision for the party contesting the contract indicates that he or she was not overreached and thus renders the contract valid in the absence of disclosure. See, e.g., *Hartz v. Hartz*, 248 Md. 47, 58, 234 A.2d 865, 871-72 (1967).

¹⁶⁷ See, e.g., *Schutterle v. Schutterle*, 260 N.W.2d 341, 348 (S.D. 1977). Other jurisdictions have indicated that the disclosure need not be of the exact value of each party's assets. Rather, it must be a full and fair disclosure of all material facts so that an intelligent decision about whether to sign the contract can be made. See, e.g., *Estate of Friedman*, 483 Pa. 614, 628, 398 A.2d 615, 622 (1978); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 214 (1972).

¹⁶⁸ The courts recognize that an intelligent waiver of statutory rights can be made by a party who had general knowledge of the other party's worth. See, e.g., *Hartz v. Hartz*, 248 Md.

establishes that the validity of antenuptial contracts governing rights upon divorce will be judged under *Rosenberg's* fair disclosure rules,¹⁶⁹ it seems that the validity of these contracts will be determined in accordance with the rule applied by a majority of courts to antenuptial contracts governing rights upon death.¹⁷⁰

Because there are as yet no Massachusetts cases applying the majority rule, the effect of this rule on the validity of a litigated antenuptial contract is unclear. Cases from other jurisdictions do, however, shed some light on its effect. Analysis of the cases suggests that application of the majority rule creates uncertainty concerning the validity of any antenuptial contract.¹⁷¹

As one step in determining whether an antenuptial contract is valid, a court applying the majority rule will examine the fairness of the contractual provision for the party contesting the contract.¹⁷² Fairness is determined as of the date of the contract's execution.¹⁷³ The highly discretionary nature of a fairness standard has led to unpredictable results.¹⁷⁴ Cases from jurisdictions other than Massachusetts have differed concerning what constitutes a fair and reasonable provision for the party contesting the contract. In one court's view, if the marriage was short, an antenuptial contract would be fair "if it allow[ed] each spouse to live as well as before the marriage."¹⁷⁵ But other courts have focused on the prospective husband's worth in determining whether the contractual provision is fair.¹⁷⁶

The fairness standard's inconsistency offers little assurance that any antenuptial contract will be found valid. Critics of this standard have suggested

47, 56-57, 234 A.2d 865, 870-71 (1967); *In re Estate of Youngblood v. Youngblood*, 457 S.W.2d 750, 756-57 (Mo. 1970).

¹⁶⁹ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹⁷⁰ Several other jurisdictions apply this rule to antenuptial contracts governing rights upon divorce. *See, e.g.*, *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980) (contracts governing alimony or property rights); *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970) (same); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 308, 214 (1972) (holding limited to contracts governing property rights).

¹⁷¹ *See Gamble, supra* note 70, at 729.

¹⁷² *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116 (Fla. Dist. Ct. App. 1976). *See also* *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980) ("[t]he starting point of our examination is the contract's fairness").

¹⁷³ *See, e.g.*, *Estate of Youngblood v. Youngblood*, 457 S.W.2d 750, 756 (Mo. 1970).

¹⁷⁴ *See Gamble, supra* note 70, at 724-25; Note, *Antenuptial Contracts, supra* note 70, at 41.

¹⁷⁵ *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980). The court noted, however, that it might apply a different fairness standard if the marriage had been a long term one. *Id.* at 1089 n.3. Thus, the court suggested that in the case of a long term marriage, the parties' standard of living during the marriage might be used to measure fairness. *Id.* The use of two different standards for determining the fairness of the antenuptial contract will make it difficult for the parties to plan realistically for the financial consequences of divorce.

¹⁷⁶ *Posner v. Posner*, 257 So. 2d 530, 534 (Fla. 1972) (the court also considered the fairness of the contract's provision in relation to the marital standard of living); *Plant v. Plant*, 320 So. 2d 455, 457 (Fla. Dist. Ct. App. 1975) (the court also considered the premarital standard of living of the party seeking to enforce the contract).

A further inconsistency in the cases concerns the burden of proof. In some jurisdictions,

that it can be used by courts to invalidate contracts they simply dislike.¹⁷⁷ Cases reaching different results on similar facts offer some support for this theory.¹⁷⁸

if the court determines that the contractual provision for the party contesting the antenuptial contract is unfair, a presumption of nondisclosure or involuntariness is raised and the burden of proof on these issues is shifted to the party seeking to enforce the contract. *See, e.g.,* Lutgert v. Lutgert, 338 So. 2d 1111, 1115-16 (Fla. Dist. Ct. App. 1976). *See also* Hosmer v. Hosmer, 611 S.W.2d 32, 35-36 (Mo. Ct. App. 1980), in which the court recognized that the cases in its own jurisdiction were inconsistent on the question of who bore the burden of proof. The *Hosmer* court did not resolve the question. Instead, the court simply concluded that the contract was invalid, regardless of which party bore the burden of proof. *Id.* at 36.

A footnote in *Rosenberg v. Lipnick*, 377 Mass. 666, 672 n.3, 389 N.E.2d 385, 388 n.3 (1979), suggests that the Supreme Judicial Court of Massachusetts may adopt a shifting burden of proof linked to the fairness of the contractual provision for the party contesting the contract and may join that shifting burden of proof to presumptions of nondisclosure or involuntariness. All of the cases cited in the *Rosenberg* footnote, including one concerning the validity of an antenuptial contract governing rights upon divorce, initially place the burden of proof on the party contesting the contract, but raise a presumption of nondisclosure or involuntariness and shift the burden of proof if the contractual provision is found to be unfair. *Id.* at 672 n.3, 389 N.E.2d at 388 n.3 (citing *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); *Guhl v. Guhl*, 376 Ill. 100, 33 N.E.2d 444 (1941); *In re Estate of Parish*, 236 Iowa 822, 20 N.W.2d 32 (1945); *Burns v. Spiker*, 109 Kan. 22, 202 P. 370 (1921); *Denison v. Dawes*, 121 Me. 402, 117 A. 314 (1922); *In re McClellan's Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *Friedlander v. Friedlander*, 80 Wash. 2d 293, 494 P.2d 208 (1972); *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N.W. 516 (1915)).

¹⁷⁷ *See* Note, *Antenuptial Contracts*, *supra* note 70, at 36 (observing that in the context of antenuptial contracts governing rights upon death, the alternative requirement that the contract contain a fair provision for the wife has been used "as a device to strike down, on a notion of fairness, a contract which is otherwise valid").

¹⁷⁸ Compare *Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976) with *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981). In both cases the party contesting the validity of the contract claimed that he or she had signed the antenuptial contract under duress. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116; *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226, 428 N.E.2d 810, 817 (1981). In both, the party contesting the contract was aware of the other party's wealth. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1115 ("[t]he wife was fully aware before the marriage, of course, that the husband was a man of great wealth . . ."); *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226 n.8, 428 N.E.2d 810, 817 n.8 (the extent and nature of the prospective wife's assets were fully disclosed to her husband). In addition, the parties in each case had discussed entering an antenuptial contract at some time prior to the contract's execution. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1114 ("the subject of an antenuptial agreement had been brought up on more than one occasion for perhaps up to a year before the marriage . . ."); *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226, 428 N.E.2d 810, 817 ("at some point after [the couple's] engagement and before the wedding they had discussed the antenuptial agreement"). Finally, both antenuptial contracts were executed just prior to the wedding. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116 ("husband sprang the agreement upon the wife and demanded its execution within twenty-four hours of the wedding"); *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226, 428 N.E.2d 810, 817 (1981) (husband "saw the contract for the first time a few hours before the wedding ceremony when it was presented to him by his wife's attorney for signing"). *See also* Reply Brief of Appellant at 7, *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981) (husband "was summarily summonsed by the wife's attorney during a formal wedding luncheon party . . ."). In *Lutgert*, the court voided the contract for involuntariness on the wife's part, noting that the husband had in effect issued the ultimatum "No agreement, no wedding." *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116. To the court, this "ultimatum" was sufficiently coercive to overcome the wife's volition. *Id.* In *Osborne*, in contrast, the contract was found valid, the court finding that there was "ample evidence" to support the master's finding that the husband had entered the contract voluntarily. *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226, 428 N.E.2d 810, 817 (1981).

If a contract does not contain a fair provision for the party contesting its validity, that party's actual or constructive knowledge of the other's worth will render the contract valid.¹⁷⁹ But the cases differ on what facts are sufficient to demonstrate the contesting party's actual or constructive knowledge of the other's worth.¹⁸⁰ One court regarded the fact that the parties to an antenuptial contract lived together before marriage as a factor indicating that the wife had constructive knowledge of her intended husband's means.¹⁸¹ Another court, however, while recognizing that constructive knowledge of the other's worth will render a contract valid, found an antenuptial contract invalid without discussing whether the wife had such knowledge where the parties lived together before the marriage.¹⁸²

If prior to a contract's execution, the party seeking to enforce the contract has fully disclosed his or her worth to the other party, that in itself should render the contract valid because it indicates a knowing waiver by the party contesting the contract of his or her rights.¹⁸³ The *Osborne* court looked favorably on an itemized list, attached to the antenuptial contract, which fully disclosed the extent and nature of the assets of the spouse who sought to enforce the contract.¹⁸⁴ But absent such a list, the adequacy of disclosure becomes an issue.¹⁸⁵ Under the majority rule, independent knowledge of the other party's worth or a fair contractual provision will render the contract valid despite lack of disclosure.¹⁸⁶ The determination of what constitutes a fair provision is, however, a subjective one.¹⁸⁷ Further, cases are inconsistent concerning what facts are sufficient to establish independent knowledge.¹⁸⁸ It is not surprising, then, that lack of disclosure is one ground on which many contracts are found invalid.¹⁸⁹

The different results in the two cases could, perhaps, be explained by one difference in the facts found. In *Lutgert*, the wife objected to signing the contract when it was presented to her. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1117. The husband in *Osborne* did not. See Reply Brief of Appellant at 8, *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981). An equally plausible theory, however, is that the court in *Lutgert* assumed the traditional role of women's protector.

¹⁷⁹ See, e.g., *Rosenberg v. Lipnick*, 377 Mass. 666, 672, 389 N.E.2d 385, 388 (1979); *In re Estate of Youngblood v. Youngblood*, 457 S.W.2d 750, 756 (Mo. 1970).

¹⁸⁰ Note, *Antenuptial Contracts*, *supra* note 70, at 39.

¹⁸¹ *In re Marriage of Cohn*, 18 Wash. App. 502, 508, 569 P.2d 79, 83 (1977).

¹⁸² *Hosmer v. Hosmer*, 611 S.W.2d 32, 35-37 (Mo. Ct. App. 1980).

¹⁸³ See, e.g., *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20-21 (Fla. 1962).

¹⁸⁴ 1981 Mass. Adv. Sh. 2216, 2226 n.8, 428 N.E.2d 810, 817 n.8 (1981).

¹⁸⁵ See, e.g., *Friedlander v. Friedlander*, 80 Wash. 2d 293, 302, 494 P.2d 208, 214 (1972) (contract found invalid). See also *Laird v. Laird*, 597 P.2d 463, 467-68 (Wyo. 1979) (enforcing the contract and noting that "[t]here are a multitude of cases on the matter of financial disclosure. . . . The decisions in those cases are as various, and in many cases as wondrous, as are these facts" [prospective husband knew his wife had substantial wealth when he executed the antenuptial contract.]).

¹⁸⁶ See *supra* notes 165-68 and accompanying text.

¹⁸⁷ See *supra* notes 172-78 and accompanying text.

¹⁸⁸ See *supra* notes 180-82 and accompanying text.

¹⁸⁹ See, e.g., *Norris v. Norris*, 419 A.2d 982, 983-84 (D.C. App. 1980); *Weintraub v.*

In that disclosure has been required to assure an intelligent waiver of rights by a prospective spouse,¹⁹⁰ some sort of disclosure rule seems inevitable in the context of antenuptial contracts governing rights upon divorce.¹⁹¹ But the desirability of requiring prospective spouses to disclose to one another the value of their assets should, perhaps, be reexamined.¹⁹² If the disclosure requirement is to be continued, some procedure allowing the prospective spouses to establish disclosure upon entering the contract should be adopted. Adoption of such a procedure would offer some protection for a party giving up rights under the contract, since he or she would waive rights with knowledge of the other's assets. By establishing that disclosure had occurred, such a procedure would also offer some protection for a party seeking to safeguard assets.

At present, however, there is no such statutory procedure in Massachusetts. Thus, to establish the validity of an antenuptial contract, prospective spouses must comply with *Rosenberg's* fair disclosure rules. These rules, in summary, seem to require that the party contesting the contract entered the contract with knowledge of the other's worth or, alternatively, that the contractual provision was fair at the time of the contract's execution.¹⁹³ Knowledge will be established by showing that disclosure took place or that the party contesting the contract had actual or constructive knowledge of the other's worth.¹⁹⁴

C. Fair at the Time of Enforcement

An antenuptial contract found valid under the fair disclosure rules incorporated in *Osborne* will not necessarily be enforceable. As its second broad

Weintraub, 417 So.2d 629, 629 (Fla. 1982); *Plant v. Plant*, 320 So. 2d 455, 457 (Fla. Dist. Ct. App. 1975); *Ferry v. Ferry*, 586 S.W.2d 782, 787 (Mo. Ct. App. 1979); *In re Marriage of Norris*, 51 Or. App. 43, 624 P.2d 636, 640 (1981).

¹⁹⁰ LINDEY, *supra* note 85, at 90-55 to 90-56.

¹⁹¹ One legislature has rejected the requirement of disclosure for antenuptial contracts governing rights on death. FLA. STAT. ANN. § 732.702(2) (West 1976). That statute, which is part of the state's probate code, provides as follows:

Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract, or waiver is executed after marriage. *No disclosure* shall be required for an agreement, contract, or waiver executed *before marriage*. (emphasis added)

The Florida Supreme Court has held, however, that the disclosure requirement still applies to antenuptial contracts litigated in a divorce context. *Weintraub v. Weintraub*, 417 So. 2d 629, 629 (Fla. 1982). In doing so, the court observed that the rationale for not requiring disclosure in an estate context did not apply to divorce cases. *Id.* at 631. If a contract were challenged in an estate context, the court noted, the estate might find it difficult to prove disclosure after the wealthy spouse's death. *Id.* In a divorce case, however, both spouses would be available to testify on the issue of disclosure. *Id.*

¹⁹² See Gamble, *supra* note 70, at 733-34 n.150, stating as follows:

[a] listing of the properties without the corresponding estimated values would be preferable because (1) estimated evaluation invites both conscious and mistaken underevaluation and thus invites attack upon these agreements; (2) it would appear to be no overwhelming burden for a contracting spouse, usually the wife, to make, on the basis of the listed property, his (her) own evaluation of what he (she) is giving up.

¹⁹³ See *supra* notes 162-68 and accompanying text.

¹⁹⁴ See *supra* notes 167-68 and accompanying text.

restriction on antenuptial contracts, the *Osborne* court established that these contracts would be binding on the courts to the same extent as postnuptial separation agreements.¹⁹⁵ Thus, the *Osborne* court stated that, in order to be enforceable, an antenuptial contract governing alimony or property rights upon divorce must be fair and reasonable at the time of the judgment nisi.¹⁹⁶

Requiring the terms of an antenuptial contract to meet a discretionary fairness and reasonableness standard at this later date is the most significant restriction which the *Osborne* court imposed on the freedom of the parties to enter a binding and enforceable antenuptial contract. This restriction requires those entering these contracts to determine how much circumstances may change between the time of the contract's execution and the time of its enforce-

¹⁹⁵ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

¹⁹⁶ *Id.* at 2224, 428 N.E.2d at 816. This restriction also governs the enforceability of postnuptial separation agreements in Massachusetts. The *Osborne* court, in establishing that this restriction would also apply to antenuptial contracts governing rights upon divorce, cited an earlier Supreme Judicial Court decision which set forth rules to govern postnuptial separation agreements *See Knox v. Remick*, 371 Mass. 433, 436-37, 358 N.E.2d 432, 435-36 (1976). The *Osborne* court's decision to apply the rules governing postnuptial separation agreements to these antenuptial contracts is in line with a trend in the cases. *See Clark, supra* note 7, at 151 (observing that "the rules for antenuptial agreements are being assimilated to those applicable to separation agreements"). But the *Osborne* court's decision differs from decisions in other jurisdictions in that *Osborne* explicitly requires the contract to be fair as of the date of enforcement. Clark observes that [w]hile the cases following *Posner* all insist that the antenuptial agreement must be fair and must make adequate provision for the spouses, they have yet to face one remaining question . . . are the fairness and adequacy of the agreement to be determined as of the date on which the agreement was executed, or as of the date on which enforcement is sought, or perhaps as of both dates?

Clark, *supra* note 7, at 151. Clark suggests that either fairness or conscionability be required as of both dates. *Id.* at 151 & n.50.

Two cases permitting antenuptial contracts governing alimony and property rights upon divorce may in effect require the contract to be fair and reasonable at the time of enforcement. *See Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980). In *Burtoff*, the court stated that the fairness of the contract would be judged in light of many of the factors governing alimony awards, including the duration of the marriage. *Id.* Thus, the *Burtoff* court suggested that it may employ two different standards for measuring the contract's fairness. If the marriage is short, the contract "will be considered fair if it allows each spouse to live as well as before the marriage." *Id.* If the marriage is "of many years' duration," the contract may be fair if it "enable[s] the spouse to live according to the standard established during the marriage." *Id.* at 1089 n.3. The *Burtoff* court further observed that its opinion did not address the question of modification of the contract. *Id.* at 1089 n.4. *See also Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970) (stating that the questions of the binding effect of a valid contract and of modification of the contract should be decided under the law governing postnuptial separation agreements).

New York requires by statute that the maintenance provisions of antenuptial agreements be "fair and reasonable at the time of the making of the agreement and . . . not unconscionable at the time of entry of final judgment." N.Y. DOM. REL. LAW § 236(B)(3) (Consol. 1981-1982). The proposed Uniform Marital Property Act of 1981 would also require that antenuptial contracts not be unconscionable at the time of division of property. UMPA, *supra* note 3, at § 16(a).

One jurisdiction has explicitly established that fairness will be determined as of the date of the contract's execution, but that jurisdiction allows antenuptial contracts governing property rights only. *See Spector v. Spector*, 23 Ariz. App. 131, 140, 531 P.2d 176, 185 (1975).

ment and what a court will view as fair.¹⁹⁷ Thus, the restriction may make contracting out of the equitable distribution system almost impossible.

The fairness and reasonableness standard applied to separation agreements, and now, under *Osborne*, applicable to antenuptial contracts governing rights upon divorce, is vague. The *Osborne* court did not suggest what criteria would be used to judge fairness and reasonableness. However, in Massachusetts, when a divorce is sought on the ground of irretrievable breakdown of the marriage, the court is required by statute to judge the propriety of the provisions in the parties' separation agreement for support, alimony, and disposition of marital property in reference in the state's equitable distribution statute.¹⁹⁸ Since the *Osborne* court has decided to apply the rules governing separation agreements to these antenuptial contracts,¹⁹⁹ a Massachusetts court faced with judging the fairness and reasonableness of an antenuptial contract governing rights upon divorce may well look to the equitable distribution statute.

Yet, if courts determine the validity of antenuptial contracts governing rights upon divorce by reference to the equitable distribution statute, it seems unlikely that many such contracts could be deemed fair and reasonable. One of the primary reasons for entering an antenuptial contract is to limit or waive rights created by state marital or property law.²⁰⁰ Thus, the requirement that the contract be fair and reasonable at the time of its enforcement frustrates one of the purposes of these antenuptial contracts. It also thwarts realistic planning for the financial consequences of divorce. The requirement that the contract be fair and reasonable at the time of its enforcement is intended to take into account changes in circumstances between the time of the contract's execution and the time of its enforcement.²⁰¹ But the desirability of applying this discretionary standard to an antenuptial contract which the parties have freely entered is highly questionable.

D. *Modification of the Contract*

As its third restriction on the enforceability of antenuptial contracts governing alimony and property rights upon divorce, the *Osborne* court established

¹⁹⁷ See Klarman, *supra* note 10, at 403.

¹⁹⁸ See MASS. GEN. LAWS ANN. ch. 208, § 1A (West 1981). The statute provides in relevant part that

[a]fter a hearing on a separation agreement which has been presented to the court, the court shall, within thirty days of said hearing, make a finding as to . . . whether or not the agreement has made proper provisions for custody, for support and maintenance, for alimony and for the disposition of marital property, where applicable. In making its finding, the court shall apply the provisions of [the equitable distribution statute]

See *supra* note 33 for the text of the equitable distribution statute.

¹⁹⁹ See *supra* note 195 and accompanying text.

²⁰⁰ See *supra* note 154 for authority.

²⁰¹ Clark, *supra* note 7, at 151.

that courts may modify these contracts in certain situations, for example, where one spouse is or will become a public charge if the contract is specifically enforced.²⁰² This restriction, like the others, creates uncertainty concerning the enforceability of antenuptial contracts. The uncertainty arises in part because the *Osborne* court did not explicitly identify the standard it will use to determine when or whether a contract should be modified. Since the court did not do so, its opinion leaves unclear the circumstances in which courts may modify these antenuptial contracts.

In stating that courts may modify these contracts in certain situations,²⁰³ the *Osborne* court may have intended to suggest that an antenuptial contract governing rights upon divorce may be modified to make it fair and reasonable at the time of its initial enforcement. The example linked to the court's statement concerning modification, a spouse who would be a public charge if the contract were specifically enforced,²⁰⁴ may define the court's standard of fairness and reasonableness. The contract, therefore, would be modified to the extent necessary to make it fair and reasonable, that is, only to the extent necessary to prevent a spouse from becoming a public charge. Although this interpretation is plausible, a spouse who would be a public charge probably falls under a not unconscionable standard, rather than a fairness standard.²⁰⁵ Thus, the court's public charge example is only an example and does not define its fairness standard. An antenuptial contract, then, might be subject to considerable modification to make it fair and reasonable at the time of its initial enforcement.

The *Osborne* court's statement concerning modification is open to another interpretation. In establishing that antenuptial contracts governing rights upon

²⁰² 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981). The court also established that the courts may modify the contract if a provision affecting the custody of a child is not in the child's best interest. *Id.* at 2224, 428 N.E.2d at 816. The *Osborne* court is surely right in viewing the best interests of the child as paramount to the contractual freedom of the parties. The state's interest in the welfare of a minor child is stronger than its interest in the welfare of an ex-spouse. *See Knox v. Remick*, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976). The state's interest is particularly strong when the contract is an antenuptial one, since the parties to such contracts cannot themselves foresee where the child's interests will lie. Thus, if the custody of a child is contested at the time of the contract's initial enforcement, the courts should have the power to determine which spouse shall have custody of the child, notwithstanding the provisions of the agreement. In addition, the courts should retain power to modify contractual provisions for child support both at the time of the contract's initial enforcement and at a later time. The right to support is the child's right, as the *Osborne* court implicitly recognized by citing *Knox v. Remick*. *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981), citing *Knox v. Remick*, 371 Mass. 433, 358 N.E.2d 432 (1976). In *Knox*, the Supreme Judicial Court recognized that provisions in a separation agreement fixing child support stood on a "different footing" than provisions fixing spousal support: "[p]arents may not bargain away the rights of their children to support from either one of them." 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976).

²⁰³ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

²⁰⁴ *Id.* at 2224, 428 N.E.2d at 816.

²⁰⁵ *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(3) (Consol. 1981-1982). For the pertinent part of that statute, see *supra* note 196.

divorce would be subject to modification, the court may have been referring to later modification of a contract originally found fair and reasonable and thus enforceable. The *Osborne* court's restriction allowing modification of an antenuptial contract in certain situations, for example, where one spouse would be a public charge if the contract were specifically enforced, also applies to postnuptial separation agreements.²⁰⁶ In establishing that this restriction now would apply to antenuptial contracts governing rights upon divorce, the *Osborne* court cited *Knox v. Remick*,²⁰⁷ an earlier Supreme Judicial Court decision involving the modification of a postnuptial separation agreement. *Knox* in dicta set forth a rule to govern actions in which one party later sought spousal support in excess of the amount provided in the parties' postnuptial separation agreement.²⁰⁸ That rule is, in substance, the rule the *Osborne* court may have adopted to determine whether the courts should modify an antenuptial contract governing rights upon divorce. The *Knox* court's statement of the rule and the reasons underlying the rule shed some light on the modification of these antenuptial contracts.

The rule set forth in *Knox* established that if the postnuptial separation agreement had been fair and reasonable at the time of the judgment nisi, then the spousal "support provisions should be specifically enforced, absent countervailing equities."²⁰⁹ As the primary instance of a countervailing equity, the *Knox* court set forth a spouse who is or would become a public charge if the agreement were specifically enforced.²¹⁰ In that instance, the *Knox* court observed, the court could order spousal support pursuant to its statutory authority,²¹¹ "not specifically enforcing the separation agreement to the point where the separation agreement would be used to impose support obligations on the taxpayers of the Commonwealth."²¹² Although the *Knox* court suggested that there might be other equities which would warrant a denial of specific enforcement of the agreement's spousal support provision,²¹³ the decision suggests that this provision of the agreement will be accorded considerable finality.²¹⁴ The *Knox* court, in adopting this rule to govern specific enforce-

²⁰⁶ See *infra* notes 207-09 and accompanying text.

²⁰⁷ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981), citing *Knox v. Remick*, 371 Mass. 433, 358 N.E.2d 432 (1976).

²⁰⁸ 371 Mass. 433, 436-37, 358 N.E.2d 432, 435-36 (1976).

²⁰⁹ *Id.* at 436-37, 358 N.E.2d at 435-36.

²¹⁰ *Id.* at 437, 358 N.E.2d at 436.

²¹¹ *Id.* If the judgment nisi contained a provision for alimony, the courts have authority to modify that provision under Massachusetts General Laws chapter 208, section 37. MASS. GEN. LAWS ANN. ch. 208, § 37 (West 1981). In modifying the alimony provision, the court considers the factors set forth in the equitable distribution statute. MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1981). If no provision for alimony was made at the time of divorce, the court has authority to order alimony under the equitable distribution statute. For the text of that statute, see *supra* note 33.

²¹² 371 Mass. 433, 437, 358 N.E.2d 432, 436.

²¹³ *Id.* at 437, 358 N.E.2d at 436.

²¹⁴ A more recent decision also suggests that the spousal support provisions of a separa-

ment, observed that it saw no reason why parties to a separation agreement could "not agree to a permanent resolution of their mutual rights and obligations, including support obligations between them."²¹⁵

The *Osborne* court, in establishing that the courts may modify antenuptial contracts governing rights upon divorce in certain situations, for example, where one spouse is or will become a public charge,²¹⁶ may have in substance adopted the *Knox* rule. If the *Osborne* court has done so, it has established that if the antenuptial contract was fair and reasonable at the time of the judgment nisi, it will not usually be modified at a later date. The *Osborne* court's adoption of this rule would also mean, however, that an antenuptial contract will always be subject to modification at a later date, even if it was fair and reasonable at the time of the judgment nisi. Thus, even if the antenuptial contract was initially enforceable, the party who sought the protection of the contract can never be certain that the courts will not modify the contract later to prevent an ex-spouse from becoming a public charge. The court's retention of authority to modify the contract in this situation is, admittedly, an expression of the public policies underlying the laws governing separation agreements.²¹⁷ But this rule, which allows modification of the antenuptial contract at any later date, in effect may require one ex-spouse to serve as a private insurer for the other, perhaps long after the marriage has ended in divorce. A recent Massachusetts Court of Appeals decision illustrates the inequities of the rule that allows modification to prevent an ex-spouse from becoming a public charge.

In *Talbot v. Talbot*,²¹⁸ a wife sought alimony more than eight years after the divorce judgment.²¹⁹ No alimony had been ordered in the divorce decree.²²⁰ The probate judge dismissed the wife's later complaint for alimony,²²¹ finding that she was " 'capable of meeting her usual needs without support from the husband.' "²²² The Appeals Court reversed and remanded,²²³ noting that this finding was clearly erroneous.²²⁴ The Appeals

tion agreement will be accorded considerable finality. In *Stansel*, the Massachusetts Supreme Judicial Court held that " 'any countervailing equities' interposed by the party seeking to avoid the effect of the separation agreement must be at least as compelling as these [*Knox*'s] two grounds if that party is to prevail." *Stansel v. Stansel*, 385 Mass. 510, 516, 432 N.E.2d 691, 695 (1982). The first ground referred to by the *Stansel* court was a spouse who is or would become a public charge if the agreement were specifically enforced. *Id.* at 515, 432 N.E.2d at 695. The second was a spouse raising the agreement as a bar to modification who had not complied with the provisions of the agreement. *Id.* The court cited *Osborne* as being in accord with its decision in *Stansel*. *Id.* at 515-16, 432 N.E.2d at 695.

²¹⁵ *Id.* at 436, 358 N.E.2d at 435.

²¹⁶ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

²¹⁷ *Id.* at 2224, 428 N.E.2d at 816.

²¹⁸ *Talbot v. Talbot*, 13 Mass. App. Ct. 456, 434 N.E.2d 215 (1982).

²¹⁹ *Id.* at 456-57, 434 N.E.2d at 216. The marriage itself had lasted approximately six years. *Id.* at 456, 434 N.E.2d at 216.

²²⁰ *Id.*

²²¹ *Id.* at 457, 434 N.E.2d at 216.

²²² *Id.* at 458, 434 N.E.2d at 217.

²²³ *Id.* at 460, 434 N.E.2d at 218.

²²⁴ *Id.* at 458, 434 N.E.2d at 217. The Appeals Court observed that it was obvious that

Court also observed that the trial judge's conclusion was based on an error of law in that despite a judge's broad discretion under the equitable distribution statute, "a judge may not ignore the policy expressed in our cases which 'protects the public from the burden of assuming the support obligations of [a] . . . spouse who is able to pay.'"²²⁵ The court noted that even a fair and reasonable separation agreement will not be enforced so as "to impose support obligations on the taxpayers" and that the *Osborne* court's decision concerning antenuptial contracts was in accord with this rule.²²⁶ Thus, the Appeals Court established that if the husband, who had remarried and appeared to be supporting four children,²²⁷ were able to pay support to his former wife, he would be required to do so in order that she would not become or continue to be a public charge.²²⁸

In establishing that the husband would now be required to pay support if he were able, the Appeals Court expressed its dissatisfaction with the provision of the equitable distribution statute allowing alimony to be sought "at any time after a divorce."²²⁹ The court observed that it was "most troublesome to impose additional burdens on a husband long after he reasonably believed he was free of obligation to his former wife. . . ."²³⁰ But, the court noted, it saw "no legislative intent to limit the husband's liability."²³¹ The court further noted that one commentator has criticized this open-ended liability and that some jurisdictions have a contrary policy.²³²

the wife could not live on her income. *Id.* The wife was living in public housing. *Id.* at 457, 434 N.E.2d at 216. She had been hospitalized for mental illness several times prior to the couple's separation and eighteen to twenty times after the divorce. *Id.* Her income was minimal and she had no assets. *Id.* At the time of the hearing she was a full time college student. *Id.* The probate judge had found that acquisition of a college degree would enhance the wife's employability, but that mental illness might at times limit her ability to work. *Id.*

²²⁵ *Id.* at 458, 434 N.E.2d at 217. Brackets and elipsis are the court's.

²²⁶ *Id.*

²²⁷ *Id.* There was no evidence concerning the second wife's income. *Id.* The court noted that the trial judge had concluded that the husband was supporting his second wife and four children. *Id.* In remanding the case the Appeals Court observed that the second wife's income, assets and obligations should be considered in determining the husband's ability to pay. *Id.* at 460, 434 N.E.2d at 218.

At the time of divorce, the husband earned \$12,000 a year. *Id.* at 458, 434 N.E.2d at 217. By the time of the later action for alimony, the husband earned over \$35,000 a year. *Id.* But in addition to supporting his second wife and four children, he was carrying a mortgage of over \$50,000 on his house. *Id.*

²²⁸ *Id.* at 459, 434 N.E.2d at 217.

²²⁹ *Id.* at 459-60, 434 N.E.2d at 218, (quoting MASS. GEN. LAWS ch. 208, § 34). The court observed that under this statute an award of alimony can be made if circumstances have changed, even though no award of alimony was made at the time of divorce. *Id.* at 460, 434 N.E.2d at 218.

²³⁰ *Id.* at 459, 434 N.E.2d at 218. The court observed that it was especially troublesome to do so where the husband "has voluntarily shouldered full responsibility for his children because of the wife's illness." *Id.*

²³¹ *Id.*

²³² *Id.* at 460 n.3, 434 N.E.2d at 218 n.3.

Talbot demonstrates that open-ended liability can operate in an inequitable manner. But both *Talbot* and *Osborne* make explicit that the reason for imposing such liability is to prevent an ex-spouse from becoming a burden on the taxpayer.²³³ Yet the *Talbot* court's criticisms²³⁴ raise the question of whether some time limit on this liability is desirable. At present, however, under the rule adopted in *Osborne*, there appears to be no time limit. *Osborne*, in summary, seems to establish that an antenuptial contract which has been enforced at the time of divorce may later be modified, at least when modification is necessary to prevent an ex-spouse from becoming a public charge.²³⁵ Whether modification will be permitted in other circumstances is an issue left unclear by *Osborne*.

III. PROPOSED STATUTE

In *Osborne*, the Supreme Judicial Court of Massachusetts followed the current trend of judicial decisions holding that antenuptial contracts governing alimony and property rights upon divorce are not per se against public policy and may be specifically enforced. Recognizing that these contracts may be valid is an improvement upon the traditional void per se rule since the latter forecloses any possibility of planning realistically for the financial consequences of divorce. But *Osborne* is also an example of a court's establishing guidelines to determine the enforceability of these antenuptial contracts which will render their enforcement uncertain. By adopting *Rosenberg's* fair disclosure rules,²³⁶ the *Osborne* court has established that a contract will be valid if, prior to its execution, each party has fully disclosed to the other the amount, character and value of his or her assets.²³⁷ An itemized list of assets and their values, attached to the contract, should comply with this fair disclosure requirement. But one commentator has suggested that those required to list the value of assets may mistakenly or consciously undervalue assets, thus rendering the contract subject to attack.²³⁸ In the absence of disclosure, a fair provision for the party contesting the contract, as measured at the date of the contract's execution, will render the contract valid.²³⁹ But fairness is a subjective standard and its ambiguity invites challenges to the contract's validity. A more significant hindrance to certainty than the fair disclosure rules is *Osborne's* second guideline, under which the antenuptial contract must be fair and reasonable at the time of the judgment nisi to be enforceable.²⁴⁰ This guideline is too discretionary and un-

²³³ *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981); *Talbot v. Talbot*, 13 Mass. App. Ct. 456, 458, 434 N.E.2d 215, 217 (1982).

²³⁴ See *supra* text accompanying notes 229-32.

²³⁵ See *supra* text accompanying notes 203-17.

²³⁶ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981), citing *Rosenberg v. Lipnick*, 377 Mass. 666, 389 N.E.2d 385 (1979).

²³⁷ See the discussion of *Rosenberg supra* notes 162-94 and accompanying text.

²³⁸ See *supra* note 192.

²³⁹ See *supra* notes 166-78 and accompanying text.

²⁴⁰ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

predictable, simply repeating the flaws inherent in the equitable distribution process. *Osborne's* third guideline, which permits later judicial modification of the contract, if, for example, one spouse is or will become a public charge,²⁴¹ also creates uncertainty and possible inequity in that even an initially enforceable contract can apparently be set aside long after a marriage has ended.²⁴²

Admittedly, however, the *Osborne* court is one of a small number of courts to recognize that antenuptial contracts governing both alimony and property rights upon divorce may be specifically enforced.²⁴³ The court's decision to apply the rules governing the enforceability of postnuptial separation agreements to these antenuptial contracts is in accord with the public policies underlying the laws governing separation agreements, as the court itself acknowledged.²⁴⁴ But these rules render the enforceability of these antenuptial contracts too uncertain and should be changed by statute. Our society is too diverse, marriage perhaps means too many different things to different people, for everyone to be required to risk all property upon divorce under the equitable distribution statute. Antenuptial contracts are used most often by those who have been married at least once before.²⁴⁵ Often, the prospective spouses are past middle age.²⁴⁶ The parties, themselves, before the marriage, may well be the best judges of the contract's fairness, best able to take into account situations in which but for the antenuptial contract there would be no marriage.²⁴⁷ They, perhaps, are best able to balance their needs and desires — the prior spousal or child support obligations of one of the parties,²⁴⁸ the desire of one party to keep property intact for children of a previous marriage,²⁴⁹ the desire to avoid litigation, and to protect substantial property,²⁵⁰ or more simply a house acquired before the marriage,²⁵¹ from equitable distribution.

The role of the courts in determining both the validity and enforceability of these antenuptial contracts should be limited to scrutinizing the fairness of the contract formation process, not the fairness of the contract itself. One commentator has suggested that despite the poetic language used in some judicial opinions, the real concern of the state is preventing one ex-spouse from becoming a burden upon the welfare roles.²⁵² Thus, any statute intended to render

²⁴¹ *Id.*

²⁴² See *supra* notes 202-17 and accompanying text.

²⁴³ See cases cited *supra* in note 3.

²⁴⁴ 1981 Mass. Adv. Sh. 2216, 2224, 428 N.E.2d 810, 816 (1981).

²⁴⁵ See *supra* note 79 for authority.

²⁴⁶ See Gamble, *supra* note 70, at 723.

²⁴⁷ See cases cited *supra* in note 82.

²⁴⁸ See, e.g., *Unander v. Unander*, 265 Or. 102, 104, 506 P.2d 719, 720 (1973).

²⁴⁹ See, e.g., *Burtoff v. Burtoff*, 418 A.2d 1085, 1087 (D.C. App. 1980); *In re Marriage of Headington*, 41 Or. App. 503, 505, 599 P.2d 1173 (1979).

²⁵⁰ See, e.g., *Burtoff v. Burtoff*, 418 A.2d 1085, 1087 (D.C. App. 1980).

²⁵¹ *In re Marriage of Coward*, 35 Or. App. 677, 679, 582 P.2d 834, 835 (1978).

²⁵² See Gamble, *supra* note 70, at 729.

the enforcement of these antenuptial contracts more certain should take into account this state interest. Further, since overreaching can occur in the execution of these antenuptial contracts, a statute should take this into account. But such a statute should also be based on a recognition that claims of non-disclosure, duress, overreaching, or undue influence will be frequent if the validity of the antenuptial contract is litigated.²⁵³

New York, in 1980, in enacting a statute providing for the equitable distribution of property upon divorce, enacted, as part of that statute, a provision which allows intended spouses to contract out of the statutory framework to some extent.²⁵⁴ The provision of the New York statute governing the property provisions of these contracts, if joined to procedures recommended by Professor Gamble,²⁵⁵ should be enacted so that prospective spouses can enter a valid and binding antenuptial contract governing their property rights upon divorce. New York Domestic Relations Law, chapter 236(B)(3) provides in pertinent part:

Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include . . .
(2) provision for the ownership, division, or distribution of separate and marital property. . . .²⁵⁶

This provision contains no requirement that the property provisions of an antenuptial contract be fair and reasonable or not unconscionable either at the time of the contract's execution or at the time of its enforcement. It does, however, leave open claims of nondisclosure, duress, and the like. To foreclose many of these claims, the statute should also include a modified form of the provisions recommended by Professor Gamble.²⁵⁷ Thus, the statute should provide that if both parties to the contract have been represented by independ-

²⁵³ See, e.g., *Spector v. Spector*, 23 Ariz. App. 131, 140, 531 P.2d 176, 185 (1975) (contract valid); *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116 (Fla. App. 1976) (contract invalid); *Tomlinson v. Tomlinson*, 170 Ind. App. 331, 334, 352 N.E.2d 785, 787 (1976) (contract valid); *Matlock v. Matlock*, 223 Kan. 679, 682, 576 P.2d 629, 633 (1978) (contract valid); *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216, 2226, 428 N.E.2d 810, 817 (1981) (contract valid); *Ferry v. Ferry*, 586 S.W.2d 782, 787 (Mo. Ct. App. 1979) (contract invalid); *Laird v. Laird*, 597 P.2d 463, 467 (Wyo. 1979). See also *Carnell v. Carnell*, 398 So. 2d 503, 506 (Fla. App. 1981) (contract valid) in which the husband, an attorney who had drafted his own antenuptial contract, later claimed that he had been overreached by his prospective wife who, he claimed, was " 'cool as a cucumber' while he was 'swept off his feet.' "

²⁵⁴ N.Y. DOM. REL. LAW § 236(B)(3) (Consol. 1981-1982).

²⁵⁵ See Gamble, *supra* note 70, at 733-35.

²⁵⁶ N.Y. DOM. REL. LAW § 236(B)(3)(2) (Consol. 1981-1982). New York, in contrast to Massachusetts, does not necessarily subject premarital, gift and inherited property to equitable distribution. See N.Y. DOM. REL. LAW § 236(B)(1), (5) (Consol. 1981-1982) and note 16 *supra*.

²⁵⁷ See Gamble, *supra* note 70, at 733-35.

ent legal counsel²⁵⁸ or have had the opportunity to consult counsel of their own choice,²⁵⁹ and if both have listed their assets in the contract, then actual fraud committed in the execution of the contract shall be the sole ground for challenging the validity and enforceability of the property provisions of the antenuptial contract.²⁶⁰ In the absence of actual fraud, the property provisions of the antenuptial contract shall be binding.

In enacting a statute permitting spouses to contract out of the equitable distribution statute, New York also recognized the interest of prospective spouses in settling possible alimony claims before the marriage. New York Domestic Relations Law, chapter 236(B)(3) provides in pertinent part that an antenuptial contract may include

(3) provision for the amount and duration of maintenance . . . , subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment. . . .²⁶¹

The flaw in this provision of the statute is that it introduces the subjective and ambiguous concepts of fairness and conscionability.²⁶² Thus, both the enforceability and modifiability of the contractual provision governing alimony would be uncertain until the contract were litigated. Professor Gamble has proposed a statute which would eliminate much of the uncertainty, but at the same time take into account the state's interest in not assuming the burden of supporting ex-spouses.²⁶³ That statute provides in substance that the alimony provisions of antenuptial contracts shall be binding on the spouse waiving rights, provided that

(a) both parties have been represented by independent legal counsel in the execution of the contract²⁶⁴ or have had the opportunity to consult counsel of their own choice²⁶⁵ and,

(b) both parties have disclosed their assets in the contract and,

²⁵⁸ Gamble, *supra* note 70, at 733.

²⁵⁹ Gamble's proposal does not include this provision. One current statute does, however, include such a provision. MINN. STAT. ANN. § 519.11(1) (West 1982).

To further protect the party disadvantaged by the contract, the statute might also provide that its provisions will apply only if the contract has been executed in the presence of two witnesses, acknowledged by the parties before a notary, and executed prior to the day of the marriage. *See, e.g.*, MINN. STAT. ANN. § 519.11(2) (West 1982).

²⁶⁰ Gamble, *supra* note 70, at 733-35.

²⁶¹ N.Y. DOM. REL. LAW § 236(B)(3) (3). (Consol. 1981-1982).

²⁶² The proposed UMPA of 1981 shares this flaw. Although the UMPA allows prospective spouses to enter antenuptial contracts concerning property rights, to be enforceable the contract must be not unconscionable at the time of property division. UMPA, *supra* note 3, at § 16(a).

²⁶³ *See* Gamble, *supra* note 70, at 733-36.

²⁶⁴ Gamble, *supra* note 70, at 733-36.

²⁶⁵ Gamble's proposal does not include this provision. *See supra* note 259.

(c) there has been no actual fraud in the execution of the contract.²⁶⁶

The statute proposed by Professor Gamble further provides in substance that

(d) if one spouse is a public charge, then the Department of Welfare may seek reimbursement of payments from the other ex-spouse.²⁶⁷

The desirability of section (d) of this statute is questionable. In essence, it would impose the same open-ended liability on an ex-spouse that the present rules governing antenuptial contracts do.²⁶⁸ Thus, the same objections to this kind of liability apply. When marriage itself is often no longer lifelong, a potentially lifelong spousal support obligation may no longer accord with the societal concept of what marriage entails. Thus, the statute should impose a time limit on the spousal support liability of an ex-spouse.²⁶⁹ The statute should, therefore, further provide that

The Department of Welfare may not seek reimbursement of payments from an ex-spouse in any case in which such payments have been made more than one year after a judgment of divorce has been entered.

Finally, the statute should provide that

If the parties to an antenuptial contract do not follow the procedures set forth in this statute, then in any action in which the validity and enforceability of the contract is at issue, only ordinary contract defenses shall be available.²⁷⁰

CONCLUSION

In holding that antenuptial contracts governing alimony or property rights upon divorce may be specifically enforced, the *Osborne* court has joined a minority of courts. The decisions of these courts implicitly or explicitly recognize that in a society in which both divorce and remarriage are common, prospective spouses have a significant interest in planning for the financial consequences of divorce. But the rules which govern the enforceability of these antenuptial contracts renders their enforcement uncertain. The rules established by the *Osborne* court do express, however, the public policies underlying the laws governing awards of alimony and division of property upon divorce.

²⁶⁶ See Gamble, *supra* note 70, at 733-36.

²⁶⁷ See Gamble, *supra* note 70, at 736.

²⁶⁸ See *supra* notes 202-35 and accompanying text.

²⁶⁹ For additional reasons to impose a time limit, see *supra* notes 218-32 and accompanying text. A further reason for establishing a time limit on spousal support claims is that the state's interest in requiring one ex-spouse to support another so that he or she does not become a public charge may not in all instances be compelling. See Klarman, *supra* note 10, at 407, raising, but not answering this question.

²⁷⁰ See, e.g., *Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973).

But these laws — if they meet anyone's needs or desires — are not sufficiently responsive to the needs or desires of people entering a second, third, or fourth marriage, or of people entering a first marriage with substantial property. These laws should be corrected for their overinclusiveness by enactment of a statute permitting prospective spouses to enter a binding and enforceable antenuptial contract governing alimony and property rights.

PAMELA M. DONNA