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The Premarital Estate Contract and Social Policy

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THE PREMARITAL ESTATE CONTRACT AND SOCIAL POLICY

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I. REQUIREMENTS FOR THE VALIDITY OF THE PREMARITAL ESTATE CONTRACT

Prior to marriage the prospective husband and wife may enter into a contract wherein each, or one of them, releases or limits his or her dower, forced share and intestate rights in the estate of the other in the event he or she survives. Dower and the forced share provide the surviving spouse a portion of the estate of the decedent spouse of which the survivor cannot be deprived by the will of the decedent.[1] Sometimes premarital contracts contain a waiver of or specific provisions for alimony and property division upon divorce, and occasionally such contracts purport to limit the support obligation upon separation during marriage or while the parties are living together. This article deals with the premarital contract which defines the rights of the surviving spouse in the estate of the decedent spouse, but the other type of premarital contract will also be discussed briefly for the purpose of perspective.[2]

The law of the premarital contract which controls the rights of the surviving spouse in the estate of the decedent spouse has developed largely by judicial decision. In recent years, however, some states have legislated on the subject as a result of the Uniform Probate Code which has a section dealing with it.[3] The opinions of the courts in this area are frequently less than models of precise deductive logic. It seems that the subject matter lends itself to verbal rambling and rather blurred

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1. For a discussion of dower and the forced share, see text accompanying notes 16-30 *infra*. Dower, as used in this article, is intended to include the husband's curtesy interest in the wife's land. Forced share is often referred to in the law as elective share or dissent from the will. The community property system, which exists in eight states, does not have dower or the forced share. The spouses own equally all property acquired during the marriage, except that which is acquired by gift or inheritance. This provides some protection against disinheritance.

2. *See* text accompanying notes 33-40 *infra*.

3. UNIFORM PROBATE CODE § 2-204. For states which have adopted this provision, see note 11.

application of principles to facts. A distillation of the cases does, however, produce certain principles which are purportedly determinative of the validity of such contracts in the absence of statute.[4]

The courts have viewed the premarital estate contract very differently from the conventional arm's length trading transaction. By its nature the premarital estate contract provides for a release of rights of the surviving spouse without compensation therefor, or for a designated amount paid at or about the time of the marriage or to be paid from the estate, or for a fraction of the estate which is less than what the survivor would expect to be entitled to pursuant to his or her rights at law. The prevailing judicial view is that if the premarital settlement of the rights of the surviving spouse in the estate of the decedent spouse is not substantively fair under the circumstances existing at the time the contract is executed, the contract is not enforceable, unless at the time of the contract the surviving spouse was adequately informed of the property of the decedent spouse and its value, either by express disclosure by the decedent spouse or from other sources, was aware of the rights she was giving up, and was not unduly pressured to execute the contract.[5] In other words, if the provision is not reasonable as of the time of the contract, then it must appear that the deprived spouse knew what she was doing when she signed the contract and did it voluntarily. Enforceability is determined in accordance with the alternative criteria of substantive fairness or fairness in the making of the contract. It is usually held that if the spouse challenging the contract establishes that the contract was substantively unfair, a presumption arises that she was uninformed or unduly pressured, which places the burden of proof on those issues upon the party upholding the contract.[6]

4. The historical concept of jointure with respect to dower was the antecedent of the modern premarital estate contract. In jointure the prospective husband would transfer an interest in land, to become possessory at his death, to his prospective wife, which would bar her dower. Her assent was not necessary. Later a settlement of personal property would bar dower. It also developed later that the wife's assent was required under jointure. The antenuptial contract has replaced jointure in modern times. *See* 1 AMERICAN LAW OF PROPERTY §§ 5.38, .39 (A.J. Casner ed. 1952).

5. Allison v. Stevens, 269 Ala. 288, 112 So. 2d 451 (1959); Norrell v. Thompson, 252 Ala. 603, 42 So. 2d 461 (1949); Potter v. Collin, 321 So. 2d 128 (Fla. Dist. Ct. App. 1975), *cert. denied*, 336 So. 2d 1180 (Fla. 1976); Watson v. Watson, 5 Ill. 2d 526, 126 N.E.2d 220 (1955); Wilson v. Wilson, 157 Me. 119, 170 A.2d 679 (1961); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); Juhasz v. Juhasz, 134 Ohio St. 257, 16 N.E.2d 328 (1938); Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969); *In re* Estate of Hillegass, 431 Pa. 144, 244 A.2d 672 (1968); Schutterle v. Schutterle, — S.D. —, 260 N.W.2d 341 (1977); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957); *see* H. CLARK, LAW OF DOMESTIC RELATIONS § 1.9, at 30 (1968); 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 36 (rev. ed. 1953). *See also* Comment, *Antenuptial Contracts Determining Property Rights Upon Death or Divorce*, 47 U.M.K.C.L. REV. 31 (1978).

6. Wylie v. Wylie, 249 Ark. 316, 459 S.W.2d 127 (1970); Watson v. Watson, 5 Ill. 2d 526, 126 N.E.2d 220 (1955); Juhasz v. Juhasz, 134 Ohio St. 257, 16 N.E.2d 328 (1938); *In re* Estate of Cobb,

It should be noted that there is authority that the requirement of substantive fairness may be satisfied although the surviving spouse has waived her interest completely and has received nothing in exchange; this would be so if the surviving spouse had independent means or the capacity to earn an adequate living.[7] If the surviving spouse does not have property or a vocation which would assure her an adequate income, substantive fairness will usually require a provision which is not disproportionate to her rights at law on the basis of the property of the decedent spouse at the time of the contract. It should be emphasized that the question of substantive fairness is to be resolved as of the time of the contract, not as of the time of the decedent spouse's death; that is to say, if the provision for the surviving spouse was fair in relation to the decedent spouse's assets at the time of the contract but unfair in relation to the decedent spouse's assets at his death, the criterion of substantive fairness would be satisfied.[8] It is reiterated that the provision for the surviving spouse may be either a transfer of assets at or about the time of the marriage or a promise to provide a specified amount from or a fraction of the estate in the will of the decedent spouse.

The alternative criteria of substantive fairness and fairness in the making of the contract are the consequence of the relationship of trust and confidence between individuals about to be married which may cause one of them to relax his or her guard. Obviously the one with property or the potential therefor who is proposing the waiver of rights, in whole or in part, is on his or her guard, but the one who is giving something up may not be on guard. It is inequitable to allow one of the parties in these circumstances to take advantage of the other's trust by obtaining a partial or total release which is unfair to the trusting party, unless the releasing party has been fully informed and not subject to undue pressure. In the litigation that has occurred, often the initiator of the contract is the business-wise prospective husband and the waiving party is the financially and legally unsophisticated prospective wife

305 P.2d 1028 (Okla. 1956); Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957). There is a minority view that no presumption arises. *In re* Estate of Abbott, 571 P.2d 311 (Colo. Ct. App. 1977); Moss v. Stueven, 200 Neb. 215, 263 N.W.2d 98 (1978); *In re* Estate of Hillegass, 431 Pa. 144, 244 A.2d 672 (1968).

7. Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); *In re* Estate of Strickland, 181 Neb. 478, 149 N.W.2d 344 (1967); *In re* Estate of Davis, 20 N.Y.2d 70, 228 N.E.2d 768, 281 N.Y.S.2d 762 (1967).

8. Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Rocker v. Rocker, 13 Ohio Misc. 199, 232 N.E.2d 445 (1967); *In re* Estate of Vallish, 431 Pa. 88, 244 A.2d 745 (1968); *see* Christians v. Christians, 241 Iowa 1017, 44 N.W.2d 431 (1950); Youngblood v. Youngblood, 457 S.W.2d 750 (Mo. 1970); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957).

who survives and challenges the validity of the contract. Unquestionably such bargaining imbalance reflecting the traditional economic dependence of the female has influenced the courts to require an openness in the making of the contract which is not required between parties bargaining at arm's length.[9]

The Uniform Probate Code provision on this subject is different from the prevailing common law view. Section 2-204 reads in part as follows: "The right of election of a surviving spouse . . . may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure."

The Uniform Probate Code provision requires that there be fair disclosure in all cases and makes no reference to substantive fairness. This means presumably that a premarital contract which is substantively fair but concerning which there was no disclosure of the decedent spouse's assets is invalid. The prevailing common law view, of course, is that such a contract would be enforceable. The Uniform Probate Code provision appears to follow generally, but not in detail, a line of common law authority to the effect that premarital estate contracts are valid if there has been disclosure of the decedent spouse's assets, and, in addition, if the provision for the surviving spouse is disproportionate to the decedent spouse's assets at the time of the contract, a presumption arises that there has not been adequate disclosure, thereby placing the burden of proof with respect to disclosure upon the party upholding the contract. Substantive fairness is never determinative of validity;

9. The premarital estate settlement involves the waiver of rights, in whole or in part, to which the waiving party would otherwise be entitled by law. There is the issue of the contractual consideration for that waiver. If both parties waive, each waiver supports the other. If only one party waives, the marriage itself is sufficient to support the waiver. Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974); Herman v. Goetz, 204 Kan. 91, 460 P.2d 554 (1969); *In re* Estate of Ratony, 443 Pa. 454, 227 A.2d 791 (1971); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972); *see* 2 A. LINDEY, *supra* note 5, § 90, at 32.

For federal gift and estate tax purposes, the release by the surviving spouse of her rights at law in the deceased spouse's estate is not deemed to be consideration for any payment made to her or transfer made for her benefit in exchange for the release. This means that, pursuant to a premarital or postmarital estate contract, an inter vivos payment to her is a "gift," an inter vivos trust with retained life income and remainder to her is included in the deceased spouse's estate, and a payment from the deceased spouse's estate to her is not deductible as a claim against the estate. This follows logically from the fact that, in the absence of any waiver of estate property rights, the surviving spouse's rights at law in the deceased spouse's estate are not deducted from the value of the deceased spouse's property at death for estate tax purposes. The release may be deemed to be consideration, however, if the parties are divorced within two years following the contract. I.R.C. §§ 2034, 2043(b), 2516; *see* C. LOWNDES, R. KRAMER & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES § 14.6 (3d ed. 1974).

disclosure alone determines validity.[10] A small number of states have adopted the Uniform Probate Code provision.[11]

It should be noted that there is limited authority for the position that the premarital contract must be fair in substance *and* there must have been fairness in the making of the contract.[12] There are also cases in which no standard for validity is articulated except some general notion of fairness as of the time of the execution of the contract.[13]

The purpose of this article is to suggest that regardless of the adequacy of disclosure and the voluntariness of the settlement, the premarital estate contract should not be enforceable unless it is substantively fair at the time of the decedent spouse's death, a position which has not been adopted by any of the lines of authority described above.[14]

10. Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937); Rankin v. Schiereck, 166 Iowa 19, 147 N.W. 180 (1914); Potter v. Potter, 234 Ky. 769, 29 S.W.2d 15 (1930); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); *In re* Enyart's Estate, 100 Neb. 337, 160 N.W. 120 (1916). Annot., 27 A.L.R.2d 883 (1953), states that disclosure is an absolute requirement for validity, but many of the cases cited as authority do not support that proposition.

11. The following states have adopted § 2-204 of the Uniform Probate Code: ALASKA STAT. § 13.11.085 (1972); ARIZ. REV. STAT. ANN. § 14-2204 (1975); COLO. REV. STAT. § 15-11-204 (1973); DEL. CODE ANN. tit. 12, § 905 (Cum. Supp. 1977); HAW. REV. STAT. § 560:2-204 (1976); IDAHO CODE § 15-2-208 (Cum. Supp. 1978); IND. CODE ANN. § 29-1-3-7 [6-307] (Burns 1971); MICH. STAT. ANN. § 27.3178(144a) (Cum. Supp. 1978); MONT. REV. CODES ANN. § 91A-2-204 (Supp. 1977); NEB. REV. STAT. § 30-2316 (1975); N.D. CENT. CODE § 30.1-05-04 (2-204) (1976); UTAH CODE ANN. § 75-2-204 (1978).

FLA. STAT. ANN. § 732.702 (Harrison 1976) adopts the Code provision except that disclosure is required for postnuptial contracts but is not required for antenuptial contracts.

MO. ANN. STAT. § 474.220 (Vernon 1956) provides that the antenuptial contract must be fair and there must be disclosure.

Some states have statutes which recognize antenuptial estate settlements but do not set forth standards for validity. *E.g.*, CONN. GEN. STAT. ANN. § 46-12 (West 1978); D.C. CODE § 19-113 (1973); MD. EST. & TRUSTS CODE ANN. § 3-205 (1974); N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(f) (McKinney 1967); N.C. GEN. STAT. § 52-10 (Supp. 1978); OR. REV. STAT. § 114.115 (1977); WIS. STAT. ANN. § 861.07(1) (West 1971).

12. Christians v. Christians, 241 Iowa 1017, 441 N.W.2d 431 (1950); *In re* Estate of Murdock, 213 Kan. 837, 519 P.2d 108 (1974); *In re* Estate of Broadie, 208 Kan. 621, 493 P.2d 289 (1972). These criteria were used in determining the validity of a postnuptial contract settling property interests in a community property jurisdiction. *In re* Estate of Harber, 104 Ariz. 79, 449 P.2d 7 (1969). MO. REV. STAT. § 474.220 (1955), adopts this position, but Youngblood v. Youngblood, 457 S.W.2d 750 (Mo. 1970), seems to interpret the statute to provide for alternative criteria.

13. Rockwell v. Rockwell, 24 Mich. App. 593, 180 N.W.2d 498 (1970) (postnuptial contract); *In re* Estate of Jeurissen, 281 Minn. 240, 161 N.W.2d 324 (1968); McQuate v. White, 389 S.W.2d 206 (Mo. 1965) (postnuptial contract); *In re* Estate of Moss, 200 Neb. 215, 263 N.W.2d 98 (1978); Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955). *See also In re* Estate of Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974).

14. In 1976 the Michigan Law Revision Commission proposed that MICH. STAT. ANN. § 27.3178(144a) (Supp. 1978), which is the Uniform Probate Code provision on premarital estate contracts, be amended by adding the following sentence: "If, however, since execution of the agreement there has been a change of circumstances which would make the enforcement of the agreement unfair or inequitable, such modification thereof shall be made by a court of equity as fairness shall require." MICHIGAN LAW REVISION COMMISSION, ELEVENTH ANNUAL REPORT 41

Occasionally the estate contract is entered into during marriage. It appears from the reported litigation that this is uncommon relative to the premarital settlement. The courts have generally employed the same considerations with respect to validity as in the premarital contract,[15] as does Uniform Probate Code section 2-204.

II. DOWER AND THE FORCED SHARE

There would be little need for a premarital settlement of estate rights unless the surviving spouse was entitled to a portion of the decedent spouse's estate of which she could not be deprived by the will of the decedent. A brief discussion of the antidisinheritance devices which obtain in our legal system and their policy objectives will serve as background for the subsequent critique of the existing law of the premarital estate contract.

Historically the wife was protected from disinheritance by dower. Dower was a property interest of the wife which attached by operation of law to all real property owned by the husband during the marriage. While the husband was alive, dower provided the wife no possessory interest in or other benefit from the land to which it attached. If the wife predeceased the husband, dower became a nullity. If, however, the husband died survived by the wife, she was entitled to a possessory life estate in one-third of the land to which dower attached.

The wife's dower interest was not subject to the claims of the husband's creditors during his life or at his death. Once dower attached, there was nothing the husband could do without the wife's consent to get rid of it.[16] Any transferee of the husband's interest took subject to dower unless the wife voluntarily released it. Divorce, however, usually destroyed the wife's dower interest.[17]

A large majority of the states have abolished dower,[18] as does the

(1976). This proposed amendment has not been enacted. *See generally* Klarman, *Antenuptial Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397 (1977).

15. *See, e.g.*, Rockwell v. Rockwell, 24 Mich. App. 593, 180 N.W.2d 498 (1970); McQuate v. White, 389 S.W.2d 206 (Mo. 1965); *In re* Estate of Ratony, 443 Pa. 454, 277 A.2d 791 (1971); *In re* Estate of Beat, 25 Wis. 2d 315, 130 N.W.2d 739 (1964).

16. It is accepted that dower can be released by the wife (husband) during marriage by joining in a deed to the husband's (wife's) grantee, without any consideration passing to the releasing spouse and without regard to the question of disclosure. Presumably this is accepted to facilitate commerce in land. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 5.34.

17. For a detailed discussion of dower, see *id.* §§ 5.1-.49. See also 2 R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 209-213 (P. Rohan ed. 1977).

18. *See* E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 142 n.2 (2d ed. 1977); J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 517-18 (2d ed. 1978); J. ROBINSON, AN AMERICAN LEGAL ALMANAC 107-10 (1978).

Uniform Probate Code.[19] Of those that have retained it, some have modified it in certain respects. For example, some states have limited dower to land owned by the husband at death; this enables the husband to transfer good title to his land during his life without any participation by his wife.[20] Today statutes typically provide that at the husband's death the wife must manifest an election to claim the benefit of her dower interest.

Some states that have retained dower have given the husband the same interest in the lands owned by the wife during the marriage. Historically the husband had much broader rights in the lands of his wife, under the doctrines of the estate by the marital right and curtesy. These gave the husband the possessory and beneficial interest in all the wife's land during the marriage, and, if a child was born alive, a continuing possessory interest for the husband's life after the wife's death.[21] This was essentially a sexist perquisite of marriage, and only incidentally protection against disinheritance. The estate by the marital right and curtesy no longer exist; if the husband has something called curtesy today in a particular jurisdiction, it is the same as the wife's dower interest or substantially so.[22]

As wealth came to be held predominantly in forms other than land, such as corporate stocks, bonds, and bank accounts, dower ceased to be adequate protection against disinheritance. During the past century, most states have enacted forced share statutes to better protect the surviving spouse from disinheritance.[23] The forced share statutes give the surviving spouse, husband or wife, a certain fraction of the probate estate of the decedent spouse, of which the surviving spouse cannot be deprived by the will of the decedent. The fraction is typically the share the survivor would be entitled to if the decedent died intestate but never in excess of a certain fraction such as one-half. The probate estate is that property of the decedent which passes through formal estate administration, *i.e.*, the assets owned by the decedent in his sole name

19. UNIFORM PROBATE CODE § 2-113.

20. *E.g.*, MASS. ANN. LAWS ch. 189, § 1 (Michie/Law. Co-op 1969).

21. For a detailed discussion of the estate by the marital right and curtesy, see 2 AMERICAN LAW OF PROPERTY, *supra* note 4, §§ 5.50-.76. *See also* 2 R. POWELL, *supra* note 17, ¶¶ 210-213.

22. *See* E. CLARK, L. LUSKY & A. MURPHY, *supra* note 18, at 142; J. DUKEMINIER & S. JOHANSON, *supra* note 18, at 518.

23. W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 3 (1960); J. RITCHIE, N. ALFORD & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 123 (5th ed. 1977); J. ROBINSON, *supra* note 18, at 139-43; E. SCOLES & E. HALBACH, DECEDENTS' ESTATES AND TRUSTS 73 (2d ed. 1973). UNIFORM PROBATE CODE §§ 2-201 to -207 provide for the forced share.

or as tenant in common at death. The probate estate is to be distinguished from nonprobate assets, sometimes referred to as will substitutes, such as joint and survivor property, life insurance payable to specific beneficiaries, savings account trusts, other revocable living trusts, and survivor pension rights, the benefits of which pass directly to a beneficiary and do not become subject to the estate administration process. Originally forced share statutes were not applicable to nonprobate assets, but today some include such assets. Some courts have subjected certain revocable trusts and other inter vivos transfers to the forced share despite the language of the statute limiting its application to probate assets.[24]

Under the forced share the interest taken by the surviving spouse is a fee interest. The forced share is subject to the claims of the creditors of the decedent; if the estate is insolvent, the forced share avails the surviving spouse nothing. The surviving spouse must manifest an election to take the forced share; it is sometimes referred to as "taking against the will."

Frequently a substantial portion of the decedent spouse's wealth will be in the form of will substitutes; this may be done to avoid the delay and expense of probate administration, or possibly to avoid or minimize the surviving spouse's forced share rights in the estate. Many forced share statutes are anachronistic in their limitation to the probate estate. The Uniform Probate Code, which has been adopted in some states, subjects many nonprobate assets to the forced share, as do the forced share statutes of several states which have not adopted the Uniform Probate Code.[25]

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24. *E.g.*, Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); Cochran's Adm'r v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954); Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947). For a thorough study of this subject, see W. MACDONALD, *supra* note 23. Cases are collected and discussed in Annot., 39 A.L.R.3d 14 (1971), and Annot., 64 A.L.R.3d 187 (1975). *See also* Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 993-1006 (1977).

25. UNIFORM PROBATE CODE § 2-201 provides the surviving spouse with a forced share of "one-third of the augmented estate" of the decedent spouse. The augmented estate is defined in § 2-202 as the probate estate plus living transfers in favor of others than the surviving spouse such as revocable trusts, irrevocable trusts with retained life income, joint and survivorship property, and outright gifts within two years of death in excess of $3000, as well as property owned by the surviving spouse at the decedent's spouse's death which was received by living gift from the decedent. It is interesting that life insurance and pension benefits payable to someone other than the surviving spouse are not part of the augmented estate, and remain available as a means to disinherit. Outright living gifts without strings or retained benefits generally remain available as a means of disinheriting the surviving spouse.

Several states which have not adopted the Uniform Probate Code have subjected certain inter vivos transfers to the forced share by legislation. *E.g.*, ILL. ANN. STAT. ch. 3, § 701 (Smith-Hurd

Some states which have legislated the forced share have also retained dower. If the surviving spouse is dissatisfied with the provision for her in the decedent's will, she must make an election between dower and the forced share.[26] Almost invariably the forced share will be chosen; as a practical matter, dower will be chosen only if the decedent's estate is insolvent or heavily burdened with debt.

Why do we have a forced share? What are the reasons which justify limiting testamentary freedom in this fashion? Certainly one reason is to provide support to the surviving spouse. The forced share is not limited, however, to the surviving spouse who is in need; it is available to the survivor who has substantial property of her own, or who is capable of earning an adequate living. The forced share also deals inadequately with the need for support because the fraction does not vary with the size of the estate; one-third of a $1,000,000 estate would provide adequate support to a surviving spouse without means, but one-third of a $200,000 estate would not.

Another reason for the forced share is to compensate the survivor for her indirect contribution to the accumulation of wealth by the decedent. The traditional family consists of a husband-father who earns money and a wife-mother who keeps house and cares for the children. The homemaker's efforts free the husband to work and thereby contribute to the wealth accumulated in the husband's name. The forced share, however, is not limited to the wealth accumulated during the marriage. It is also available to the working husband who survives the homemaking wife who has inherited wealth from her parents. The forced share is also available to the surviving spouse of the second marriage late in life during which there was no homemaking or wealth accumulation.[27]

The forced share is a rather crude means of achieving the objectives of support and compensation for contribution in circumstances in which such considerations obtain. If such considerations do not obtain, the forced share may be justified as the sharing which inheres in the marriage relationship regardless of financial need or compensation. It

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Supp. 1977); VT. STAT. ANN. tit. 14, § 473 (1974); TENN. CODE ANN. § 31-616 (1977); N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1967); MINN. STAT. ANN. § 525.213 (West 1975); PA. CONS. STAT. ANN. tit. 20, § 6111 (Purdon 1975); MO. ANN. STAT. § 474.150(1) (Vernon 1956); WIS. STAT. ANN. § 861.17 (West 1971); N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1967); TENN. CODE ANN. § 31-616 (1977); VT. STAT. ANN. tit. 14, § 473 (1974).

26. *E.g.*, MICH. STAT. ANN. § 27.3178(139) (1975); N.C. GEN. STAT. § 30-1 (1976).

27. For a discussion of the social purposes of the forced share, see J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 23, at 123-25; Haskell, *Restraints upon the Disinheritance of Family Members*, in DEATH, TAXES AND FAMILY PROPERTY 107 (E. Halbach ed. 1977); Kulzer, *Property and the Family: Spousal Protection*, 4 RUT.-CAM. L.J. 195, 209-20 (1973).

is interesting to note that Great Britain places discretion in the court to change the dispositive terms of the decedent spouse's will or the intestate division, as the case may be, if necessary to provide adequately for the support of the surviving spouse who would otherwise be in need; this is the only protection afforded the surviving spouse from disinheritance.[28] In this country we have chosen not to vest such discretionary power in our probate courts for the purpose of support or any other purpose. We adopted an inflexible fractional method and have chosen to retain it despite suggestions that the flexible British approach is preferable.[29]

As indicated above, in many states the forced share can be minimized or avoided by the use of certain nonprobate transfers, and this can be done without the property-owning spouse giving up any financial benefit during his lifetime. For example, the property-owning spouse may create a revocable living trust, retaining the life interest, and having the principal pass to someone other than the surviving spouse upon his death. Certain forms of "survivor" bank accounts or bonds may also be used for this purpose. If the property-owning spouse can disinherit the surviving spouse wholly or partially by such means, and decides to do so, there is little or no need for a premarital contract in which the surviving spouse waives her rights or settles for less than she would be entitled to at law. Where the obvious purpose of such devices, however, is to disinherit, there is always the possibility that a court in the future will subject them to the forced share, and this makes it advisable to obtain a waiver of rights in any event. Of course, if such devices do in fact achieve their objective, the question of the validity or invalidity of the premarital contract becomes irrelevant.[30]

28. Inheritance (Provision for Family and Dependent's) Act, 1975, c. 63. This statute also protects children of the decedent. Similar flexible restraints on testation exist in New Zealand, Australia and Canada.

29. *See* W. MACDONALD, *supra* note 23, at 290-327; Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); Haskell, *supra* note 27; Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 177 (1955); Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUT.-CAM. L.J. 673 (1977).

30. There is authority for the proposition that if an antenuptial contract provides for a certain fraction of the estate to the surviving spouse in lieu of her rights at law, substantial inter vivos gifts made for the purpose of defeating the contract are voidable. Dubin v. Wise, 41 Ill. App. 3d 132, 354 N.E.2d 403 (1976); Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919); Dickinson v. Lane, 193 N.Y. 18, 85 N.E. 818, 102 N.Y.S. 1134 (1908).

III. WHY THE LAW SHOULD BE CHANGED

It is the opinion of the writer that the prevailing common law alternative criteria for validity of premarital estate contracts of substantive fairness or fairness in the making of the contract, the Uniform Probate Code sole criterion of fair disclosure, and the other judicial criteria described above, are unsound. The law should require for enforceability that the contractual provision for, or the uncompensated waiver by, the surviving spouse be fair to her as of the time of the decedent spouse's death based upon the survivor's accustomed living standard. The surviving spouse's property and her capacity to earn a living would be salient considerations in the determination of the fairness of the contract. Another consideration would be the needs of the decedent spouse's children. It should be emphasized that the contract may be fair as of the decedent spouse's death although the surviving spouse has waived her forced share without any compensation therefor, if she has independent means or is capable of earning a living which will support her adequately in accordance with her customary living standard. The upshot is that the surviving spouse should not be deprived of her interest in the decedent spouse's estate if this means that she becomes a burden on her children or other relatives or has to look to the state for support. The writer believes it is contrary to public policy to enforce a contract in the context of the marital relationship which deprives one of the parties of his or her rights under legislation enacted for his or her financial protection if this results in hardship. Such legislation was enacted because of the unique characteristics of, and special responsibilities which attach to, the marital relationship in our culture.

It may be that the surviving spouse is capable of supporting herself adequately but has kept house and raised the children over a period of years, thereby contributing indirectly to the decedent spouse's accumulated wealth. A good argument can certainly be made that the premarital contract barring any claim to the decedent's spouse's estate is unfair in this situation and should not be enforced. The reason for denying enforceability in this circumstance is, in the writer's opinion, less compelling than in the situation in which the survivor is in need of support, and consequently it is not proposed that contractual freedom be limited in this circumstance. The idea of marital sharing as a basis for the surviving spouse's rights in the estate of the decedent spouse is always applicable, but it is not proposed that premarital contractual freedom be limited in the interest of that objective.

The question to be answered is why two adult individuals about to be married should not be free to contract away their rights in the estate of the other. Freedom of contract is a fundamental principle of our legal system, but of course it is subject to numerous qualifications in the interest of societal objectives which are deemed to be of greater importance. Nowhere is this more evident than in the marital relationship. Marriage is essentially a status consisting of rights and duties imposed by law, most of which are not modifiable by contract.[31] Some, however, are modifiable by agreement of the parties if certain conditions are complied with. The statutory forced share in the estate of the decedent spouse is such a modifiable attribute if certain conditions are met. The writer's position is that the conditions are not stringent enough.

Many of the legal attributes of marriage, such as support, alimony, property division on divorce, and the forced share, are premised to a substantial degree on the existence of the traditional family in which the husband has a productive vocation and the wife keeps house and raises the children, leaving the wife in her middle and late years without the capability of earning an adequate living. It is now fashionable to declare that the "liberation" of women from the home calls for a change in the legal attributes of the marital relationship, or at least a relaxation of the rules which restrict the modification of these attributes by contract.[32] Not all women, however, have chosen to be liberated from the home, and those that think they are may have a change of heart after some years of marriage. Financial dependence is still a fact of life for many married women. It may be premature to adjust radically the legal attributes of marriage to the condition of the "new woman." This is said without any implied value judgment concerning the contemporary trend.

It is not the purpose of this article, nor is it within the capacity of the writer, to deal broadly with the relationship between the law of

31. RESTATEMENT OF CONTRACTS § 587 (1932) provides: "A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal." For a discussion of the power to modify the marital relationship by contract, see C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 891-900 (1976). *See also* 6A CORBIN ON CONTRACTS § 1474 (1962); H. KRAUSE, FAMILY LAW IN A NUTSHELL 30-32, 58-67 (1977); Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441 (1976).

32. *See* Fleischmann, *Marriage by Contract: Defining the Terms of Relationship*, 8 FAM. L.Q. 27 (1974); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974); Comment, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROB. 607 (1973); Comment, *Marital Contracts Which May Be Put Asunder*, 13 J. FAM. L. 23 (1973); Note, *Interspousal Contracts: The Potential for Validation in Massachusetts*, 9 SUFFOLK L. REV. 185 (1974).

marriage and the vocational, economic, and social freedom that has recently become available to women. The new opportunities for women, however, do not militate against the position that the premarital contract settling property rights at death must in all events be financially fair at the time it is operative, because circumstances prevent many women from exploiting these opportunities. The new freedom for women bears on the issue, however, in the respect that it is more likely in the future that the widow will be capable of supporting herself after her husband's death, and that as a consequence her waiver of her rights in his estate will meet the proposed test of fairness as of the time of the husband's death. There can be little doubt, however, that many women are going to need the protection of the statutory forced share, the new freedom notwithstanding.

Given that many women will continue to need protection against disinheritance because of their role as housewife and the consequent lack of vocational opportunity, the question remains why they should not be permitted to contract away this protection if they are fully informed and know what they are giving up when they sign the contract. The issue is the relative importance of contractual freedom and this particular legal attribute of the marriage relationship. Some of the attributes of the marital relationship imposed by law are not modifiable by contract and others are modifiable only under certain circumstances because the state has a great interest in the maintenance of such attributes. The interspousal obligation of support during marriage is one such nonmodifiable attribute. If the parties could contract away the obligation of support regardless of the need of the party otherwise entitled to support, it would seem there would be little meaning to the institution of marriage for the parties who did so. At its best, marriage is a voluntary sharing, and at least it is a legal commitment of support. In economic terms, the state's interest is in seeing to it that individuals do not become a burden on others or the state treasury. In broader social terms, however, the state's interest is the viability of the institution of marriage which is considered by most to be fundamental to an orderly and moral society. If there is no responsibility, there is little substance to the relationship. The state cannot enforce emotional support, but it can enforce financial support. If man and woman choose to live together without legal commitment, they are, as a practical matter, free to do so in these times without interference by the state. If for any reason the parties wish the benefit of marital status, the responsibility of support must be accepted.

The marital attribute of the forced share in the decedent spouse's estate is a form of marital sharing, albeit after the fact. It is suggested that responsibility for providing for the surviving spouse contributes to the viability of the institution of marriage. Stating it another way, to allow the parties to contract away protection regardless of need is to detract from the marriage commitment and to erode the institution of marriage to that extent.

The position taken in this article is obviously premised upon the value of the institution of marriage and the interest of the state in maintaining it substantially in its traditional legal form. If one disregards the complicating factor of the upbringing of children, one can easily imagine a society in which men and women paired off informally or contractually, without benefit or burden of the legal consequences of marriage as we know them other than those contracted for. Whether this would be conducive to a happy or stable society is something else again. It certainly would offer gratification without responsibility, which qualifies as the underlying principle of social decadence. Of course, if children are involved, another social and moral dimension appears, and the free-wheeling nonmarital relationship presumably loses some of its attractiveness, unless one is willing to delegate their upbringing to the state, an alternative of vast ramifications.

It is of interest to compare the manner in which the courts have dealt with the premarital divorce contract. The traditional judicial response has been that premarital contracts waiving or specifying alimony or property division or both upon divorce are contrary to public policy and void.[33] The reasoning that has often been used to support this position is that such contracts, if enforceable, would be conducive to the dissolution of the marriage because they make divorce less onerous than it otherwise would be. This is certainly true if alimony and property division are waived, at least for the partner who benefits. If alimony and property division are not waived but specified, then the financial consequences of divorce are made more certain, and possibly less onerous, and in either event divorce is thereby facilitated.

In recent years some jurisdictions have adopted the position that

33. Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961); *In re* Gudenkauf, 204 N.W.2d 586 (Iowa 1973); Stratton v. Wilson, 170 Ky. 61, 185 S.W. 522 (1916); Cohn v. Cohn, 209 Md. 740, 121 A.2d 704 (1956); Scherba v. Scherba, 340 Mich. 228, 65 N.W.2d 758 (1954); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); Kunde v. Kunde, 52 Wis. 2d 559, 191 N.W.2d 41 (1971). *See also* H. CLARK, *supra* note 5, at 28; 2 A. LINDEY, *supra* note 5, § 90 at 26.

premarital contracts waiving or specifying alimony and property division on divorce are valid under certain circumstances.[34] Some courts have held that the premarital contract concerning divorce is valid if there is compliance with the alternative conditions which attach to the validity of the premarital contract concerning property rights at death, *i.e.*, substantive fairness determined at the time of contracting, or adequate knowledge of the spouse's property and its value and the absence of inordinate pressure to agree to the settlement.[35] Other courts have spoken broadly of the requirement of fairness, with emphasis upon disclosure.[36] Some courts which validate the premarital contract on divorce have held that the contract is subject to judicial modification if circumstances have changed from the time of the contract to the time of the divorce or thereafter.[37] This enables the court to require fairness at the time the contract becomes operative, provided there has been a change in circumstances.

The judicial power of modification of the premarital divorce contract in the event its terms are unfair at the time of the divorce, as recognized by several courts, suggests that a similar power to modify may be appropriate with respect to the premarital estate contract which is found to be unfair at the death of the decedent spouse under the rule proposed in this article. If the settlement is unfair, the alternatives are to declare it invalid, leaving the surviving spouse to his or her forced share, or to modify it to make it fair within the limits of the forced

34. Hughes v. Hughes, 251 Ark. 63, 471 S.W.2d 355 (1971); Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Tomlinson v. Tomlinson, 352 N.E.2d 785 (Ind. Ct. App. 1976); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1972); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972). *In re* Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973), held that prenuptial settlement of property rights on divorce is valid but settlement of alimony is invalid.

35. Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972).

36. Hughes v. Hughes, 251 Ark. 63, 471 S.W.2d 355 (1971); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Tomlinson v. Tomlinson, 352 N.E.2d 785 (Ind. Ct. App. 1976); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1972).

37. Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Tomlinson v. Tomlinson, 352 N.E.2d 785 (Ind. Ct. App. 1976); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1972). The following are recent articles discussing the developing law concerning premarital divorce settlement: Branca & Steinberg, *Antenuptial Agreements Under California Law: An Examination of the Current Law and In Re Marriage of Dawley*, 11 U.S.F.L. REV. 317 (1977); Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972); Klarman, *supra* note 14; Note, *The Impact of the Revolution in Georgia's Divorce Law on Antenuptial Agreements*, 11 GA. L. REV. 406 (1976).

share. The former course would be consistent with the tradition of inflexibility with respect to marital property rights at death. It is proposed, however, that modification would be the preferable result. If the premarital contract which is found to be unfair is modified, it has substantial legal significance because it limits the survivor to something less than the forced share.

The postmarital divorce contract has been treated in the same manner as the premarital contract, unless it falls into the category of the separation agreement. The contract between married parties entered into after separation or upon the verge of separation, which settles predivorce maintenance on separation and alimony and property division on divorce, is generally recognized as binding if it is substantively fair and if there was adequate disclosure and no overreaching. Many cases have held that the agreement is modifiable by the court upon divorce if the provision for the spouse is not adequate at that time.[38] The difference in treatment from the premarital contract is presumably justified on the ground that the agreement made after or immediately prior to separation is not conducive to divorce because the break-up has already occurred. It seems, however, that such agreements also facilitate divorce.

The parties to the marriage cannot validly contract before or after marriage concerning the duty of support while living together[39] or after separation,[40] except that the separation agreement may validly provide for support after separation.

IV. Objections That May Be Raised to the Proposed Change

Unquestionably the proposed rule that the premarital contract must be substantively fair at the time of the decedent spouse's death makes for uncertainty with respect to the rights of the parties. Whether or not the contract is enforceable in accordance with its terms depends

38. H. Clark, *supra* note 5, §§ 16.2, .10, .13.

39. *In re* Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); *In re* Estate of Muxlow, 367 Mich. 133, 116 N.W.2d 43 (1962); Lacks v. Lacks, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963); Cord v. Neuhoff, — Nev. —, 573 P.2d 1170 (1978).

40. *In re* Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972); Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974); French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Holliday v. Holliday, — La. —, 358 So. 2d 618 (1978); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961). *See also* H. Clark, *supra* note 5, at 28; 2 A. Lindey, *supra* note 5, § 90, at 27. *But see In re* Estate of Slight, 467 Pa. 619, 359 A.2d 773 (1976) (recognizing in dictum the validity of premarital settlements of marriage support obligations).

38. H. Clark, *supra* note 5, §§ 16.2, 16.2, .10, .13.10, .13.

upon circumstances that cannot be known with any degree of certainty at the time of the contract or during the marriage. Under existing law, whether or not the contract is enforceable can be known, in theory at least, at the time the contract is signed. In fact, however, there is considerable uncertainty as to the validity of the premarital contract under existing law because the requirements of substantive fairness at the time of the contract or, in the absence of fairness, adequate disclosure and nonoverreaching, leave much to the discretion of the judiciary.

Several of the courts which have recently upheld premarital contracts concerning alimony and property division on divorce have reserved the power to modify the contract if a change of circumstances since the time of the contract renders it unfair. The traditionally valid separation agreement has been held by many courts to be subject to modification if found to be unfair at the time of the divorce or thereafter. Uncertainty is the necessary consequence of the protective attitude which the courts have adopted in the area of contracts affecting alimony and property rights on divorce and at death. It is a function of the subordination of contractual freedom to a societal objective of greater value.

This quality of uncertainty of enforceability is not unusual in the law. A covenant restricting land to certain uses which is initially enforceable may be held to be unenforceable at a later date if a change in the nature of the neighborhood makes it unreasonable or unfair to enforce the covenant. An example would be a covenant restricting the use of land to single-family residential purposes, entered into when the surrounding area was residential, which covenant the promisee wishes to enforce after the surrounding area has become predominantly commercial.[41] The body of contract law dealing with frustration of purpose also provides many examples of legal obligations which cease to be such because of circumstances which make it unfair or unreasonable to enforce them.[42]

In recent years many states have legislated what has come to be known as "no-fault" divorce. This establishes as a ground for divorce the "irretrievable breakdown" of the marriage, frequently with a requirement that the parties live apart for a period of time to confirm the

41. 2 AMERICAN LAW OF PROPERTY, *supra* note 4, §§ 9.22, .39; 5 R. POWELL, *supra* note 17, § 684.

42. 6 CORBIN ON CONTRACTS §§ 1353-1361 (1962).

existence of the breakdown.[43] The ground is in contrast to the traditional grounds of fault for divorce, such as adultery, desertion and cruelty. In effect, this legislation enables the parties to terminate the marriage if it is not working. This legislation has been a response to the greater demand for and social acceptability of divorce, and also to the collusion and perjury which often are the consequence of the fault grounds.[44] The question arises whether "no-fault" divorce militates against the position advocated in this article.

"No-fault" divorce has no logical relationship to the legal attributes of responsibility during marriage and upon its termination by divorce or death. It does not follow from the availability of easy divorce that the marital attributes should be more freely modifiable contractually or that the institution of marriage has been devalued. "No-fault" divorce simply manifests a recognition that no useful purpose is served by making it difficult for people to dissolve their marriage when they no longer wish to be married. There is no reason for it to be viewed as a step in the development of the relaxation of the responsibilities imposed by law upon the parties to marriage, and a substitution therefor of the regulation of the marital relationship by contract. It is submitted that "no-fault" divorce serves a social objective which is wholly independent of the question of the responsibility of one marriage partner for the financial security of the other during marriage, upon divorce or after death.

Legal realists are likely to contend that although the common law rule and the Uniform Probate Code rule concerning premarital contracts dealing with property rights at death allow for financially unfair treatment of the surviving spouse, nevertheless the court or jury has the opportunity to invalidate the unfair agreement by finding that the disclosure was inadequate in some respect or that there was some form of overreaching in the execution of the agreement. Certainly there is evidence in the cases of this, but there are also cases of financially unfair agreements which have been upheld; the cases discussed below are illustrative of such results. In addition, the fundamental weakness of

43. For a listing of the states which have adopted the no-fault approach, in one form or another, see Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297 (1977). The UNIFORM MARRIAGE AND DIVORCE ACT § 305 provides for divorce on the basis of irretrievable breakdown. See also C. FOOTE, R. LEVY & F. SANDER, *supra* note 31, at 1101-09, for a discussion of recent developments in this area.

44. For a discussion of collusion and other undesirable aspects of divorce litigation under traditional divorce law, see M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 51-105 (1972). *See also* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

legal realist reasoning in this situation and others is that it does not take into account the influence of the rule upon the decision to litigate or compromise the dispute. In sum, rules remain important in our legal system.

V. HARSH RESULTS AND JUDICIAL DISCRETION

The case of *Christians v. Christians*[45] is an example of a result which was financially harsh to the surviving spouse. Christina and Charles were married in 1928, at which time she was forty-five and the mother of six children by her former husband from whom she was divorced in 1914, and he was fifty-eight and a widower with two adult sons. Christina had received only ten dollars per month alimony and had supported herself by cooking in hotels and other work. She had no property.

Christina and Charles entered into a contract two days before the marriage which provided that if Christina survived Charles she would receive $5,000 from his estate in place of all rights which she would otherwise have as a widow "either as dower . . . or as a distributive share of the personal property and estate."[46] At that time Charles' assets had a value of about $20,000. Charles died in 1948, survived by Christina, at which time his assets, which were substantially the same as at the time of the marriage, had a value of about $75,000. Christina brought this action against Charles' two sons as executors of Charles' estate and individually, to set aside the antenuptial contract on grounds that it was inadequate to provide for her and disproportionate to Charles' worth, and that she was overreached and defrauded. The trial court held that the contract was not fraudulent, was fair, and valid. The Supreme Court of Iowa affirmed the decision.

Charles made the contract because he wanted to assure that his sons by his prior marriage would receive his estate. Christina testified that she did not understand the size of Charles' estate or the rights of a widow in the estate of her husband or the terms of the contract. The contract was prepared by Charles' attorney, and Christina did not have counsel of her own. Charles' attorney testified that before the signing he explained the contract to her, and that she acknowledged to him that Charles had disclosed the nature of his property to her.

The Iowa Supreme Court stated the law to be that the terms of an

45. 241 Iowa 1017, 44 N.W.2d 431 (1950).
46. *Id.* at 1019, 44 N.W.2d at 432.

antenuptial contract must be fair *and* there must be disclosure and no overreaching. Substantive fairness of the provision for Christina was to be determined as of the time the contract was made, not at the time of Charles' death. The court evidenced its awareness of the harshness of the result as follows:

> The difficulty in this case is not with the 1928 antenuptial contract but with the subsequent inflation which increased the money value of Mr. Christians' property and depreciated the purchasing power of plaintiff's $5,000 settlement. That neither party to the contract contemplated this change in conditions does not require the cancellation of the contract. . . . The record does not show the provision for plaintiff was unjust or disproportionate to Mr. Christians' worth in 1928.[47]

The court also concurred in the trial court's findings that there was no concealment or overreaching by Charles, and that Christina was aware of the effect of the contract upon her rights.

The result in *Potter v. Collin*[48] may or may not strike one as harsh, depending upon one's interpretation of the relationship between the parties to the premarital contract. At the time of their premarital contract Frederick Collin was eighty-one, twice unhappily married and divorced, vigorous, domineering, and worth $1,800,000, and Dorothy Reitz was forty-seven, once married and divorced, and relatively impecunious. Dorothy had a high school education, held jobs as a bookkeeper, secretary, and salesperson, and had a very small income from an interest in a modest apartment building. The parties had dated for several years prior to their marriage.

The contract was prepared by Frederick's lawyer and was reviewed by Dorothy's lawyer who advised that she not sign it because it was a "bad business proposition." Frederick also furnished Dorothy with a detailed disclosure of his assets. The contract provided that Dorothy was to receive $20,000 from his estate in exchange for her waiver of her statutory rights in his estate. The contract also provided for a financial settlement in the event of divorce, and for specific monthly amounts to be given Dorothy for various living expenses during the marriage. Frederick died seventeen months after the marriage. It was a happy marriage.

Dorothy brought the action to set aside the contract. The trial

47. *Id.* at 1022, 44 N.W.2d at 433-34.

48. 321 So. 2d 128 (Fla. Dist. Ct. App. 1975), *cert. denied*, 336 So. 2d 1180 (Fla. 1976).

court held the contract void, finding its terms so inadequate as to shock the conscience of the court. The appellate court reversed the trial court.

The appellate court stated that the law of the state was that premarital contracts settling rights in the estate of the parties are valid if they are substantively fair, or, if not, if the parties were informed with respect to the property of the other party and their rights at law in the estate of the other. The court recognized that the provision for Dorothy was "seemingly unreasonable and penurious." It concluded, however, that Dorothy was fully informed at the time she entered into the contract. The court summarized its position as follows:

> [A]ny adult contemplating marriage who is sui juris can voluntarily agree to take all, little, or nothing from his or her prospective spouse's estate upon the latter's death, if the former is fully informed at the time he or she so elects. This rule applies to women as well as men. In this day and age there is no longer any suggestion that women are unequal and in need of the protection of the court.[49]

This was a clear case of disclosure and knowledge of rights, and under the prevailing law, the court had little choice but to uphold the contract. If one were to assume, however, that the facts of disclosure were somewhat murky, it should be noted that the alternatives were the validation of the contract providing the widow $20,000, or invalidation resulting in the distribution to the widow of very substantial wealth after a predictably brief marriage. It seems to make sense for the law to allow a third choice, namely, modification of the agreement by the court to make it financially fair, within the limits of the statutory rights of the surviving spouse, as suggested above.

Kosik v. George[50] is illustrative of the decisional discretion that may be exercised by the court to avoid a result which would be financially harsh to the surviving spouse. Earl and Marian executed a contract three days before their marriage in which they waived their rights in the other's estate. Earl was a sophisticated real estate businessman with assets of about $100,000, and Marian was a retail sales clerk with a high school education and assets of about $4,000. Both had been married and divorced and had children.

Earl's lawyer drafted the contract. It was never suggested to Marian that she should obtain counsel to review it. There never was any formal disclosure of Earl's assets to Marian, but she knew he owned real estate and was a "wealthy man." From conversation with Earl and

49. *Id.* at 132.

50. 253 Or. 15, 452 P.2d 560 (1969).

his attorney, she understood in a very general way that she was giving up her rights in his property, but no detailed or specific explanation of the nature of those rights was made to her. They remained married until Earl's death ten years later.

Earl died intestate with an estate of about $90,000. After the marriage Earl purchased a home for them valued at $14,500, and placed the title in their names as tenants by the entirety. Earl also made Marian a beneficiary on a $5,000 insurance policy on his life.

Earl's daughter brought an action for a declaratory judgment that Marian had waived her rights in Earl's estate by the premarital contract. The trial court held the contract to be void, and the Supreme Court of Oregon affirmed, reasoning as follows:

> Where, by the terms of a prenuptial agreement, the provision for the wife as the survivor is clearly disproportionate to the husband's wealth, it raises a presumption of designed concealment, and places the burden on those claiming under it in his right to show that there was a full knowledge and understanding on the part of the wife at the time of execution of all the facts materially affecting her interests, viz., the extent of his wealth and her rights in his property as his survivor, and how modified by the proposed agreement. . . .
>
> . . . .
>
> We deem it unnecessary to decide whether defendant had adequate knowledge of the worth of Mr. George before she signed the prenuptial contract and before entering into the marriage, but we do hold that George breached the fiduciary relationship existing between him and the defendant by securing her signature to the proposed agreement without first according to defendant a reasonable opportunity to learn what property rights she would have as his wife (and potentially as his widow) that would be altered or extinguished by the agreement.
>
> The fact that the parties were engaged, coupled with a wide disparity in their business experience, knowledge and financial worth, invoked a responsibility in George and his attorney to fully inform defendant regarding the consequences to executing the agreement proferred to her, a duty that was neglected. The agreement was therefore invalid.[51]

There is little doubt that a court could have found that Marian was adequately informed, but the manner in which the contract was "negotiated" made the widow the sympathetic favorite of the court, despite the tenancy by the entirety property and the life insurance policy.

The overwhelming majority of cases concerning the validity of premarital estate contracts involve parties in their middle or late years

51. *Id.* at 22-23, 452 P.2d at 563-64.

who have been previously married and one or both of whom have children.[52] Although frequently the contract provides for waiver of rights by both parties, the party challenging the validity of the contract is almost invariably the widow, which is attributable to the greater life expectancy of women, to the fact that in most cases the wife is younger than the husband, and to the fact that usually the husband has accumulated property and the wife has not. The cases discussed above are typical in these respects.

It is the writer's impression that only a small minority of the cases arrive at a result which is harsh to the surviving spouse. In a majority of the cases in which the premarital waiver is upheld against the widow's challenge, she appeared to have had enough to live on from her own property or had been provided for otherwise by the decedent or was capable of supporting herself adequately. Harsh results, however, do occur. There are also the unknown factors of suits that were not brought because the law was unfavorable and settlements that were made for the same reason.

VI. CONCLUSION

The law permits the total or substantial disinheritance of a surviving spouse if this has been contracted by the parties, provided the survivor was adequately informed and not unduly pressured at the time the contract was made. It is immaterial under the law that the survivor has little or no property and is incapable of supporting herself adequately. This is permitted despite a statutory policy prohibiting disinheritance in the absence of contract.

It is the thrust of this article that premarital estate contracts should not be enforceable if this results in financial hardship for the surviving spouse, *i.e.*, if her property is inadequate for her support and she is not capable of earning an adequate living in accordance with a reasonable approximation of her accustomed standard. Freedom of contract should be subordinate to the responsibility which inheres in the marriage relationship, one aspect of which is provision for the survivor who is in need. Contractual avoidance of marital responsibility has an erosive effect upon the institution of marriage and should not be countenanced by the law.

52. For an analysis of litigation in these terms, see Gamble, *supra* note 37, at 730.