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Domestic Relations--Antenuptial Agreements in Contemplation of Divorce

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upon certificate of the court wherein the case is pending."³² The statute clearly reads that expenses will be paid to protect the state's interest, but the indigent's interest is unprotected. The prosecution is supplied with funds to cross-examine defendant's witness, but this is unnecessary if defendant cannot afford the expense to take the deposition. It is ironic that the state's interest is so completely protected while the indigent is left to shift for himself. The court in affirming the denial of defendant's motion for payment of public funds to take the deposition of a nonresident witness stated that there was no law authorizing the trial court to make such payments.³³ It would seem that any denial of the essential expenses required for the adequate defense of an indigent is a deprivation of a poor person's right to effective assistance of counsel as guaranteed by the sixth amendment of the United States Constitution. If defendant should petition in the Federal Courts for a writ of habeas corpus, it will be interesting to note the determination of this issue.

Joseph Wagoner

³² *Id.*

³³ The Supreme Court of Kansas handled the lack of statutory authorization thus:

The granting or denying of a motion to provide supporting services to counsel for an indigent defendant is a matter within the discretion of the trial court, whose ruling will not be disturbed in the absence of a showing that such discretion was abused to the extent that the defendant's substantial rights were prejudiced.

Kansas v. Young, 203 Kan. 296, 300, 454 P.2d 724, 728 (1969).

Domestic Relations—Antenuptial Agreements In Contemplation Of Divorce

Husband was granted a divorce from Wife, the decree providing that Husband pay six hundred dollars per month alimony. The amount of alimony was agreed upon in an antenuptial agreement between the parties, but the lower court held the alimony agreement was not binding. On appeal, the intermediate appellate court affirmed the divorce decree and an award of child support, and stated that there were alternative views concerning the amount of alimony agreed upon in the antenuptial agreement. The three theories were:

(1) that the parties may validly agree upon alimony in an antenuptial agreement but that the trial court is not bound by this agreement; (2) that such an agreement is void as against public policy; and (3) that an antenuptial agreement respecting alimony is entitled to the same consideration and should be just as binding as an antenuptial agreement settling property rights of the wife in her husband's estate upon his death.¹

The Florida Supreme Court, considering the validity of antenuptial agreements respecting alimony as a question of public interest, adopted the third view. Held, an antenuptial agreement under proper conditions is valid, subject to modification on a showing of changed conditions. *Posner v. Posner* 233 So. 2d 381 (Fla. 1970).

Antenuptial agreements have generally been held valid if they deal with the disposition of property of the spouses upon their deaths,² and if they clearly make reasonable provisions for the wife and a full and fair disclosure of the husband's worth.³ On the other hand, antenuptial agreements involving *alimony* considerations have generally been held void. Such agreements have been thought to encourage and facilitate separation and divorce,⁴ and, therefore, courts have found these agreements to the contrary to public policy.⁵ A second argument against antenuptial agreements

¹ *Posner v. Posner*, 233 So. 2d 381, 382 (Fla. 1970).

² *Id.* at 384.

³ In *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 21 (Fla. 1964), the court stated:

the relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract. The courts will no longer indulge the archaic presumption of dominance by the husband but they will scrutinize such agreements and will require good faith disclosure by the prospective husband of the material facts relating to the character and value of his property showing that the prospective bride possessed such general and approximate knowledge of his property as to enable her to reach an intelligent decision to enter into the agreement.

⁴ See, e.g., *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964).

⁵ See *William v. Williams*, 29 Ariz. 438, 243 P.2d 402 (1926); *Watson v. Watson*, 37 Ind. App. 548, 77 N.E. 355 (1906); *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956); *Stefonick v. Stefonick*, 118 Mont. 486, 167 P.2d 848 (1946); *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961). Although no West Virginia cases specifically dealing with an antenuptial agreement respecting alimony have been found, West Virginia would probably follow the majority of jurisdictions holding such agreements to be void as contrary to public policy. See, *Ryan v. Griffin*, 199 Va. 891, 103 S.E.2d 240 (1958); *Wallihan v. Hughes*, 196 Va. 117, 82 S.E.2d 553 (1954); *Cumming v. Cumming*, 127 Va. 16, 102 S.E. 572 (1920); 12 M. J., *Marriage Contracts and Settlements*, §§ 1, 2, 3 (1950). The primary public policy consideration is the state's interest in marriage. See *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970).

regarding alimony is that husbands should not be given the means to relieve themselves of their marital obligation of support.⁶ For the foregoing and other reasons, antenuptial agreements respecting alimony are invalid in many United States jurisdictions.⁷

At first glance, the *Posner* decision is contrary to decisions in most jurisdictions. On closer examination, however, the *Posner* court made an important distinction between situations where antenuptial alimony agreements are subsequently followed by divorce proceedings in bad faith and those which are followed by divorce proceedings in good faith.⁸ The court stated, "If such an agreement is valid when tested . . . and if, in addition, it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that . . . it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to the conditions existing at the time the agreement was made."⁹ *Hudson v. Hudson*,¹⁰ an Oklahoma decision, held that a judgment for alimony would not be valid if the parties to the divorce proceeding had entered into a valid antenuptial agreement providing for no alimony.¹¹ In *Hudson* "the court simply applied . . . the rule applicable to antenuptial contracts settling property rights upon the death of a spouse and thus tacitly, if not expressly, discarded the contrary-to-public rule."¹² Although the *Hudson* court upheld the antenuptial agreement, the court stated that the agreement had to be just and reasonable and that the court would not have upheld the "no-alimony" agreement if the parties had acquired additional property after marriage.¹³

A variety of cases closely reflects the *Posner* position. The Michigan court in *In Re Muxlow's Estate*,¹⁴ upheld an antenuptial agreement concerning property rights after the death or divorce of spouses because "[n]othing in the agreement can be said to make separation or divorce more attractive to either party Accordingly, since it cannot be held that any effective provision of this

⁶ See, e.g., *Neddo v. Neddo*, 56 Kan. 507, 44 P. 1 (1896) (an early view in which the court refused to allow a husband to shield himself by an antenuptial contract from his legal obligation of support).

⁷ See cases collected in *Annots.*, 57 A.L.R.2d 942 (1958); 164 A.L.R. 1236 (1946); 98 A.L.R. 530 (1935); 70 A.L.R. 826 (1931).

⁸ *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970).

⁹ *Id.*

¹⁰ 350 P.2d 596 (Okla. 1960).

¹¹ *Id.* at 597.

¹² *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970).

¹³ *Hudson v. Hudson*, 350 P.2d 596, 597, 598 (Okla. 1970).

¹⁴ 367 Mich. 133, 116 N.W.2d 43 (1962).

agreement provided for, facilitated, or tended to induce a separation or divorce, the agreement was not against public policy¹⁵ In *Sanders v. Sanders*,¹⁶ the Tennessee court held an antenuptial property agreement was not against public policy if the divorce were prosecuted in good faith.¹⁷ And in *Shultz v. Brabender*,¹⁸ the Montana court took an analogous position concerning postnuptial agreements by distinguishing between an agreement facilitating a divorce (invalid) and an agreement which is subsequently followed by a divorce sought on proper grounds (valid).¹⁹

In *Law of Domestic Relations*, Professor Clark stated that perhaps the primary reason courts object to antenuptial agreements respecting alimony and support is that although the provisions may be fair when made, they may not be fair when the parties are subsequently divorced.²⁰ Because future circumstances often change, courts have refused to enforce antenuptial contracts that attempt to limit the husband's future support obligations.²¹ This objection is eliminated by the *Posner* decision's provision that a modification of the decree for alimony may be had by a showing of a change in circumstances.²² The Florida court, by recognizing the validity of this antenuptial agreement but retaining the right to modify the sum, reached practically the same result as the Wisconsin court in *Strandberg v. Strandberg*,²³ which held such an antenuptial contract void but allowed it to be introduced to help determine the settlement after the divorce.²⁴

The reasoning in *Posner* stems from the court's awareness of the changing attitudes and public policy concerning divorce.²⁵ The trend "requires a change in the rule respecting antenuptial agree-

¹⁵ *Id.* at 137, 116 N.W.2d at 46.

¹⁶ 40 Tenn. App. 20, 288 S.W.2d 473 (1955).

¹⁷ *Id.* at 35, 288 S.W.2d at 479.

¹⁸ 136 Mont. 152, reported *sub nom.* *Shultz v. Fox*, 345 P.2d 1045 (1959).

¹⁹ *Id.* at 160, 345 P.2d at 1050.

²⁰ H. CLARK, *Law of Domestic Relations* § 1.9, at 29 (1968).

²¹ *Id.*

²² West Virginia courts, by statute, are allowed to modify alimony and maintenance upon a showing of change of circumstances. By recognizing the antenuptial agreement as binding, the Florida court incorporated the agreement into the decree with the stipulation that it could be modified. A West Virginia court could well reach the same result. *See*, W. VA. CODE ch. 48, art. 2, § 15, 16 (Michie Supp. 1970).

²³ 33 Wis. 2d 204, 147 N.W.2d 349 (1967).

²⁴ *Id.* at 209, 147 N.W.2d at 351.

²⁵ *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970). The court stressed the changing societal attitudes concerning marriage and divorce, citing California's adoption of a non-guilty party concept in divorce proceedings. *See*, Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306 (1970).

ments settling alimony and property rights of the parties upon divorce . . . [and] such agreements should no longer be held to be void *ab initio* as 'contrary to public policy.'"²⁶ This decision is illustrative of a more situationalist approach to antenuptial alimony agreements. As the *Posner* court noted, "With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners . . . might want to consider . . . the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail."²⁷

Henry C. Bowen

²⁶ *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970).

²⁷ *Id.* at 384.

Draft Law—Requirements For Classification And Exemption As Conscientious Objector

Elliott Ashton Welsh, II, was convicted in a United States District Court for refusal to submit to induction into the Armed Forces.¹ Welsh contended that section 6 (j)² of the Universal Military Training and Service Act exempted him from service in the armed forces because he was conscientiously opposed to war as a result of his "religious training and belief."³ The United States Court of Appeals for the Ninth Circuit found that Welsh had no religious basis for his conscientious objection claim and therefore affirmed the conviction.⁴ Welsh then petitioned the United States Supreme Court for certiorari, which was granted on the basis of that court's decision in *United States v. Seeger*.⁵ *Held*, reversed. The decision of the court of appeals was found to be inconsistent with the Court's holding in *Seeger*.

¹ 50 App. U.S.C. § 462 (a) (1968).

² 50 App. U.S.C. § 456 (j) (Supp. V 1970):

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religion training and belief," does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . .

³ *Welsh v. United States*, 398 U.S. 333 (1970).

⁴ *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

⁵ 380 U.S. 163 (1965), *aff'g*, 326 F.2d 846 (2d Cir. 1964), *rev'g*, 216 F. Supp. 516 (S.D.N.Y. 1963).