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ANTENUPTIAL AND POSTNUPTIAL CONTRACTS IN WASHINGTON

I. INTRODUCTION: VALIDITY OF ANTENUPTIAL AND POSTNUPTIAL CONTRACTS IN THE UNITED STATES

Marriage profoundly affects the individual property rights of a man and a woman. This is true in both community property and common law property states. When a prospective husband or wife has been previously widowed or divorced, it is especially likely that he or she will be aware of the impact of state marital laws on property rights. This experience may engender a desire to avoid or control the law's operation. Prior to marriage, the couple may enter into an antenuptial contract delineating each party's property rights. A postnuptial agreement, executed after marriage, serves the same purpose. Both types of contract are generally considered valid if fairly made.

Each state has developed its own standards for deciding when an antenuptial or postnuptial contract is "fairly" made. This comment analyzes the current requirements for validity imposed by the decisional and statutory law of the State of Washington.

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1. In common law property states, common law or statutory rights of dower and curtesy will limit the spouses' right of testamentary disposition. T. ATKINSON, WILLS §§ 29, 30 (2d ed. 1953). In community property states, property acquired by either spouse during marriage will usually be community property in which each spouse has an undivided one-half interest. W. DE Funiak & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 60 (2d ed. 1971).

2. The increasing number of persons within this class, and therefore potentially interested in such agreements, is indicated by Washington divorce statistics. In the decade from 1965 to 1975 the number of divorces and annulments granted in Washington rose from 10,651 to 25,783. BUREAU OF VITAL STATISTICS, WASHINGTON STATE DEP'T OF SOCIAL AND HEALTH SERVICES, VITAL STATISTICS SUMMARY 73 (1975), PUBLIC HEALTH STATISTICS SECTION, WASHINGTON STATE DEP'T OF HEALTH, WASHINGTON VITAL STATISTICS SUMMARY 85 (1965).

3. One recent publication advising lay persons regarding the use of antenuptial and postnuptial agreements indicates the growing popular interest in this subject. P. ASHLEY, OH PROMISE ME BUT PUT IT IN WRITING (1977).

4. The term "postnuptial agreement" includes "(a) Separation agreements and property settlement agreements entered into upon or in contemplation of divorce, and (b) property settlements made where there is no intention to separate." 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 146 (Supp. 1978).

5. Id.

6. The taxation of validly executed antenuptial agreements is discussed in Comment, Federal Tax Consequences of Antenuptial Contracts, 53 WASH. L. REV. 105 (1977). The tax problems relating to community property settlement agreements exe-
Most states, including Washington, analyze the validity of these contracts in terms of a two-step test: (1) Is the contract "fair" to the wife? (2) If not, has the husband\textsuperscript{7} fully disclosed to his wife the property and legal rights affected by the contract so that his wife's agreement is knowledgeable and voluntary?\textsuperscript{8}

The rigor with which the contract's fairness and the husband's disclosure will be assessed appears to depend upon the court's perception of the actual relationship between the husband and wife. The relationship is generally presumed to be confidential,\textsuperscript{9} requiring a higher standard of disclosure by the husband than would be required

\textsuperscript{7}In most antenuptial or postnuptial contract cases, the wife is the party challenging the contract's validity. Generalized discussions in this comment will assume that situation. Such challenges, however, are not now the exclusive right of wives and the references to the wife as the challenger are only for editorial convenience. See note 9 infra.

\textsuperscript{8}The test applied to antenuptial agreements is more elaborately stated as follows: If the provision made for the wife is disproportionate to the husband's means, or apparently inequitable, unjust and unreasonable, a presumption arises that the husband failed to make a full disclosure. The presumption may be rebutted by proving full knowledge on the wife's part, at the time she signed the agreement, of all facts materially affecting her rights.

\textsuperscript{9}Factors indirectly related to the confidentiality of the relationship may reduce the standard of disclosure. An antenuptial contract preceding a second marriage, and intended to preserve the parties' property for devise to children of a prior marriage, invokes more lenient requirements for validity. See, e.g., In re Estate of Jeurissen, 281 Minn. 240, 161 N.W.2d 324 (1968). Even when a contract does not emphasize estate conservation, in second marriage situations a trial court's finding that the intended wife was "mature," "experienced," or a "business woman" may support a minimal duty of disclosure by the husband. See, e.g., In re West's Estate, 194 Kan. 756, 402 P.2d 117 (1965). In some cases, such a finding nullifies the husband's duty and shifts the responsibility of acquiring any needed information to the intended wife. See, e.g., In re Moore's Will, 53 Misc. 2d 786, 41 N.Y.S.2d 697 (1943).

On the other hand, courts have held antenuptial agreements executed prior to a marriage which produces children (especially a first marriage) valid only if the husband can demonstrate his adherence to a high standard of good faith disclosure. See, e.g., Posner v. Posner, 257 So. 2d 530 (Fla. 1972). A few courts have ruled that the duty of disclosure applies only to husbands. See, e.g., Pniewski v. Przybysz, 183 N.E.2d 437 (Ohio App. 1962). There is a definite trend, however, away from absolute enforcement of the "archaic presumption of the husband's dominance." Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962). A challenging husband is still frequently required to show all the elements necessary to prove fraud, a burden seldom imposed on wives. See, e.g., Stein-Sapir v. Stein-Sapir, 52 App. Div. 2d 115, 382 N.Y.S.2d 799 (1976).

A carefully drawn antenuptial or postnuptial contract can help the husband meet his burden of showing good faith dealing with his wife. A recital of full disclosure, contained in the contract, is usually persuasive evidence that disclosure was actually made. See, e.g., Estate of Youngblood v. Youngblood, 457 S.W.2d 750 (Mo. 1970). CONTRA, In re Estate of Grassman, 183 Neb. 147, 158 N.W.2d 673 (1968). In some jurisdictions the recital shifts the burden of proof to the wife, requiring her to show that disclosure was not made. See, e.g., In re Estate of Stever, 155 Colo. 1, 392 P.2d 286 (1964).
Antenuptial and Postnuptial Contracts

of a party to an ordinary contract. Courts have declined, however, to presume a confidential relationship (or have lowered the standard of candor and good faith required of the husband) in cases in which the parties were not yet married, the marriage was one of convenience, or there was a pending divorce.

The standards for evaluating the validity of antenuptial and postnuptial agreements have been developed, for the most part, in common law property states. While following the general contours of the common law analysis, Washington has developed its own distinctive rules. This is at least partly explained by the fact that in a community property state, like Washington, these contracts often have an immediate impact on property rights, and challenges to their validity frequently occur in dissolution proceedings. In common law jurisdictions, contract challenges arise more often after the death of the first spouse. Further, as will be discussed, the community property system itself affects Washington courts' view of rights to marital property.

II. WASHINGTON ANTENUPTIAL AND POSTNUPTIAL CONTRACTS: THE RIGHT OF SPOUSES TO CONTRACT BETWEEN THEMSELVES

Washington statutes and decisional law authorize postnuptial contracts. While antenuptial contracts are not directly authorized by

11. See, e.g., In re Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).
14. In common law jurisdictions contract challenges arise more often after the death of the first spouse. See cases cited in note 9 supra. During the past 70 years, of 31 challenges to the validity of a husband-wife contract considered by a Washington appellate court, 21 of these challenges were raised in a dissolution context. See note 27 infra.
15. See note 61 infra.
16. Several statutes evidence Washington's recognition of the right of a husband and wife to contract regarding the status, and thus the ownership, of their property. One statute provides statutory authorization for agreements which convert into community property any property then held or thereafter acquired, by either the husband or wife, with right of survivorship. Wash. Rev. Code § 26.16.120 (1976). The traditional form of this contract is a "three pronged" community property agreement. See Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 805 (1974).
Spouses are also free to effect a change in the opposite direction. They may "provide by separate property agreement" that their existing property and the future acquisitions of each which otherwise would be community property shall be the separate property of
Washington case law has long recognized the right of a prospective husband and wife to contract between themselves regarding their property.  

Washington spouses' freedom to contract with each other is based upon the ideal that two mature individuals should be free to bargain regarding their property. This ideal must be tempered by the fact that the unique relationship of these parties may make independent bargaining difficult. When an antenuptial or postnuptial contract is challenged, the confidential relationship of the parties may affect the acquiring spouse."  

Id. This possibility is generally recognized by Washington decisional law, and is specifically authorized by statute with respect to deeds of a spouse's community interest in real property. WASH. REV. CODE § 26.16.050 (1976). A recent addition to Washington dissolution law, R.C.W. § 26.09.070, recognizes a couple's right to execute a "separation contract" which is binding on the divorce court unless found to be unfair at its execution. Id. § 26.09.070.

17. An oblique statutory reference to antenuptial contracts is contained in Washington's Statute of Frauds, R.C.W. § 19.36.010, which requires that "[e]very agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry" must be in writing and signed by the party charged with the promise. WASH. REV. CODE § 19.36.010(3) (1976).

18. Clark v. Baker, 76 Wash. 110, 135 P. 1025 (1913) (antenuptial agreement valid so long as it met the usual contract requirements of form and lack of ambiguity).


The question to be decided is whether the nine elements of fraud were proven by clear, cogent, and convincing evidence. These nine elements are as follows:

(1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person to whom made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

Id. at 878, 552 P.2d at 696.

A confidential relationship may modify these requirements in several ways. While proof that there has been no misrepresentation is enough to avoid a charge of fraud, the presence of a nonfamilial confidential relationship raises an affirmative duty to show adequate disclosure. See Pike v. Parallel Film Distributors, 74 Wn. 2d 218, 443 P.2d 804 (1968). The nonfamilial confidential relationship also justifies an otherwise unreasonable reliance on any representations. See Salter v. Heiser, 36 Wn. 2d 536, 219 P.2d 574 (1950). In a familial relationship, other than marriage, the court considers the possibility of undue influence. See McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970). If insufficient consideration is alleged, undue influence must be extreme to overcome the presumption of a gift and the rule that love and affection are sufficient consideration for intrafamily transfers. See Binder v. Binder, 50 Wn. 2d 142, 309 P.2d 1050 (1957).

In determining whether antenuptial and postnuptial agreements are valid, courts do not rely on either the familial or nonfamilial confidential relationship precedents, an omission which emphasizes the unique character of these agreements. The courts' often-expressed concern that an intrafamily transfer is only a gift is not a relevant consideration in this context. Washington decisions interpret antenuptial and postnuptial contracts as creating bargains, not gifts. The two step test, see note 8 and accompanying
analysis of its validity. The court’s use of legal formulas will be affected by its generalizations regarding marriages about to be dissolved as opposed to ongoing marital relationships, as well as by its assessment of the individuals in the particular case. The spectrum ranges from a strict contractual analysis (wherein fraud is the only defense), employed because the parties appear to have bargained at arm’s length,20 to apparent adherence to an unstated rule that wives always win.21

The decisions regarding the validity of Washington antenuptial or postnuptial contracts generally recognize the existence of a confidential relationship between a husband and wife (or prospective husband and wife),22 no matter how independent the spouse may be or how imminent the dissolution. The effect of the confidential relationship is expressly considered in some cases.23 In others, the duties of parties in such a relationship are analyzed as part of the burden of showing good faith imposed on the party asserting good faith by R.C.W. § 26.16.210.24 Under either a confidential relationship or a good faith

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20. Malan v. Malan, 148 Wash. 537, 269 P.2d 536 (1928) (contract analysis used to uphold a separation agreement, with emphasis on the fact that the marriage was the second for both parties, entered into late in life for companionship, not love). Tausick v. Tausick, 52 Wash. 301, 100 P. 757 (1909) (strict fraud analysis used to uphold the validity of a pre-divorce property settlement agreement).

21. This rule is usually applied in cases where there is a clear disparity in bargaining power. See Reagh v. Dickey, 183 Wash. 564, 48 P.2d 941 (1935) (court invalidated a will contract signed by the wife when her opinionated and overbearing husband was ill and she feared her refusal would make him so angry he would die). See also text accompanying footnotes 61 & 62 infra.

22. Friedlander v. Friedlander, 80 Wn. 2d 293, 494 P.2d 208 (1972). The court stated the Washington rule: “It is well recognized that even an engagement to marry creates a confidential relationship.” Id. at 301, 494 P.2d at 213. Contra, In re Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (court said it would not presume a confidential relationship between a man and woman not yet married). See also notes 9–13 and accompanying text supra.


24. WASH. REV. CODE § 26.16.210 (1976). The statute provides, “In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.” Id. See, e.g., Jones v. Jones, 56 Wn. 2d 328, 353 P.2d 441 (1960); In re Marriage of Cohn, 18 Wn. App. 502, 569 P.2d 79 (1977) (analysis of good faith based on the requirements of R.C.W. § 26.16.210). See also In re Marriage of Hadley, 88 Wn. 2d 649, 565 P.2d 790 (1977) (analysis of the requirements of good faith without reference to R.C.W. § 26.16.210).
analysis, the results of Washington cases indicate that the nature of the relationship at the time the contract was made will affect the standards of fair dealing required for validity. Less confidentiality is presumed, probably justifiably, when an agreement is executed in contemplation of dissolution. Recent nondissolution cases show a tendency to minimize the presumed effects of a confidential relationship in all marital situations.\textsuperscript{25} These results appear to evidence a general judicial opinion that modern marriages involve less dependence between spouses and, perhaps, less long-range commitment.

III. OVERVIEW OF WASHINGTON DECISIONS: THE DISTINCTION BETWEEN "SEPARATION CONTRACTS" AND "MARITAL CONTRACTS"

Traditional analysis has treated antenuptial contracts separately from agreements created during marriage. The latter category includes agreements executed in preparation for dissolution and agreements within an ongoing marriage, both analyzed together as postnuptial contracts. Since the analysis used by Washington courts appears to vary depending on the degree of confidentiality of the parties' relationship at the time the contract is made, a division different from the usual antenuptial/postnuptial one would be more profitable for the study and prediction of Washington results.

This comment will first consider husband-wife contracts created in contemplation of dissolution. The term "separation contract" will be used to refer to this particular kind of postnuptial contract. The analysis will then turn to those contracts executed when an ongoing marriage is contemplated. Such contracts may be executed before marriage (antenuptial agreement) or during marriage when dissolution is not a consideration (postnuptial agreement). The term adopted for these two kinds of contracts is "marital contract," an indication of the parties' objective, rather than their status, at the time of execution.

Since 1900 the Washington appellate courts have considered the validity of properly executed husband-wife contracts in thirty-one cases involving thirty-two contracts.\textsuperscript{26} Nineteen contracts were held...
valid and thirteen contracts were ruled invalid (i.e., not binding). This apparent tilt in favor of validity is attributable solely to separation contracts. Of those agreements—a total of nineteen—thirteen were held valid, six invalid. The other category, marital contracts, presents an almost even split. Of a total of thirteen contracts, six were held valid, seven invalid. Nevertheless, the distinction between the analysis of separation contracts and marital contracts, apparent from these numbers, is seldom explicitly mentioned in the cases.27


*These figures, drawn from 31 cases, reflect decisions on the validity of 32 contracts. The court upheld the validity of an antenuptial contract and of a separation contract in In re Marriage of Cohn, 18 Wn. App. 502, 569 P.2d 79 (1977).

27. Reference to the differing standards of analysis for the two types of contracts is made in Thompson v. Brozo, 92 Wash. 79, 159 P. 105 (1916). The court distinguished a prior case, Yeager v. Yeager, 82 Wash. 271, 144 P. 22 (1914), by discussing the differing objectives of the contracts in the two cases. Yeager concerned a marital contract executed as part of a reconciliation. It was distinguished in Thompson as the “antithesis” of that case’s separation contract made in contemplation of divorce: “The deed was there procured [in Yeager], not in contemplation of a divorce desired by both parties, but for the professed purpose of preventing a divorce and bringing about a reconciliation. The distinction is too plain to require amplification.” 92 Wash. at 82, 159 P. at 105.

An indirect indication of the differing analyses applied by Washington courts to marital and separation contracts can be seen in the courts’ refusal to be bound by the parties’ own denomination of their agreement as a separation contract. A reconciliation plus a lengthy period of resumed marital relationship following execution of a “separation contract” may lead a court to use tests for validity usually applied to marital contracts.

The effect of a reconciliation was considered in Logan v. Logan, 141 Wash. 62, 250 P. 641 (1926). Refusing to enforce a separation agreement followed by nine years of continuing marriage, the court said, “[I]t is so far as that contract contained an agreement with reference to any prospective divorce action, it had reference only to such a divorce action as was then within the contemplation of the parties.” Id. at 69, 250 P. at 644. See also In re Marriage of Alexander, 14 Wn. App. 222, 540 P.2d 457 (1975). In Alexander the couple executed a separation contract, separated, then were reconciled. In a dissolution action, filed two years after the contract was made, the Washington Court of Appeals held that the property settlement contained in the contract was not
IV. VALIDITY OF WASHINGTON SEPARATION CONTRACTS

The relatively clear rules the Washington courts have developed for separation contracts will be considered before turning to the more confused state of the law regarding marital contracts. The nineteen separation agreement decisions since 1900 reflect, with almost unbroken consistency, a traditional contractual analysis. In the majority of these cases, the only defenses that concern the court have been those available to invalidate any contract: fraud, coercion, and duress. Although the confidential relationship requirements of disclosure, good faith, or both are sometimes mentioned, they are generally dealt with summarily.

A. Predominant Use of Traditional Contract Analysis

Tausick v. Tausick was an early case illustrating the courts' reluctance to set aside a separation contract merely because one of the parties had made a bad bargain. The court upheld the validity of a real property deed from the wife to her husband, executed by her in connection with a pending divorce. While conceding that the settlement represented by the transfer was "improvident," the court said:

Mere inadequacy of consideration is not enough to avoid a contract entered into between parties of mature judgment, nor can one who claims to have been overreached invite the review of a court of equity unless the inadequacy of consideration is so great that a presumption of fraud follows the recital of the transaction.31

By contrast, courts have declined to use the Logan analysis when the execution of the separation contract was followed by a short period of reconciliation, or even a brief remarriage. Jones v. Jones, 56 Wn. 2d 328, 353 P.2d 441 (1960) (separation contract retained its contemplation-of-divorce character, despite the couple's brief remarriage); Burch v. Rice, 37 Wn. 2d 185, 222 P.2d 847 (1950) (the court, distinguishing Logan, upheld a separation contract followed by a six-month reconciliation).

28. See note 26 supra (table).
29. This emphasis on traditional contractual analysis is especially clear in Short v. Short, 54 Wn. 2d 284, 340 P.2d 168 (1959). In Short the Washington Supreme Court agreed with the lower court that there would have to be some compelling reason (and none was shown) to disregard the parties' clearly expressed and fully executed agreement. "The intention of the parties determines whether a property settlement agreement is to be considered as a final adjudication of their rights and property." Id. at 288, 340 P.2d at 170.
30. 52 Wash. 301, 100 P. 757 (1909).
31. Id. at 311-12, 100 P. at 761.
Antenuptial and Postnuptial Contracts

The presumption in *Tausick* that dissolution settlements are binding contracts made by independent parties is apparent in most of the separation contract cases decided in the last seventy years.\(^{32}\)

The challenger's failure to show fraud, duress, or coercion in the execution of the separation contract is the basis of most decisions upholding such contracts. A finding that execution of the contract was voluntary (and therefore lacked coercion or duress), that no fraud was involved, or that both conditions existed underlies nine of the thirteen cases in which the separation agreement was enforced.\(^{33}\) Washington courts are not easily convinced that these traditional contract defenses have been established.\(^{34}\)

B. Limited Consideration of the Marital Confidential Relationship and of Disclosure

Although separation agreement analysis emphasizes, and usually turns upon, the existence of traditional contract defenses, some decisions do discuss confidential relationship considerations.\(^{35}\) In these discussions, the courts appear to recognize the possibility that agreements between a husband and wife about to separate may not have been negotiated at arm's length.

A requirement that the party defending the agreement show his or her good faith in the contract's execution is one means of compensating for the possible effect of a confidential relationship. R.C.W. § 26.16.210 appears to require this analysis;\(^{36}\) nevertheless, the statute

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34. For example, the fact that a separation agreement settlement is disproportionate does not necessarily make the contract fraudulent. See Thompson v. Brozo, 92 Wash. 79, 159 P. 105 (1916).

35. The one case in which a Washington court invalidated a separation contract because of fraud indicates the extreme circumstances needed to justify this result. In Richardson v. Richardson, 36 Wash. 272, 78 P. 920 (1904), the wife received a divorce settlement of $2,500 out of the couple's $23,000 in community property. The court was persuaded to invalidate the contract by the wife's evidence that she signed the contract because of her husband's threats and intimidation.

36. The statute is quoted in note 24 *supra*. In Erfurth v. Erfurth, 90 Wash. 521, 156 P. 523 (1916), the court held that the statute was applied only to attacks by third parties. That decision was overruled in *In re Madden's Estate*, 176 Wash. 51, 28 P.2d 280 (1934). *Madden* established the rule that the good faith statute is applicable to challenges by a spouse, as well as to challenges by a third party. Cf. *Jones v. Jones*, 56 Wn. 2d 328, 353 P.2d 441 (1960) (challenge by a third party).
is seldom mentioned in separation contract cases. When it is discussed, the analysis of its requirements is usually cursory, and does not lead to invalidation of the contract.

*In re Madden’s Estate* is the only separation contract case in which the statutory good faith requirement was applied with any rigor. The evidence showed that during a violent quarrel the husband wrote and the wife signed an agreement to convey to him by deed all her community property rights in exchange for $1,000, an amount the court later described as grossly inadequate. The court then used the statutory good faith requirement to invalidate the contract as clearly not the product of arm’s length negotiations.

Analysis of the nonchallenger’s disclosures and the actual knowledge of the challenger is a second means by which a court may recognize the impact of a confidential relationship and implement a test less strict than the usual fraud requirements. Nevertheless, as with the good faith test, consideration by the courts of disclosure and actual knowledge in separation contract cases is generally quite limited and the test for validity is easily met. The cases indicate that adequate disclosure is shown by evidence that the wife had time to consider the contract’s effect, or that the wife understood the terms offered by the husband (even though he expressly refused to reveal the value of the property affected by the contract). The contract also has been

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37. *See In re Bubb’s Estate, 53 Wn. 2d 131, 331 P.2d 859 (1958).* In that separation contract case, the court merely used R.C.W. § 26.16.210 as a starting point for the application of a strict fraud test. From this statute [R.C.W. § 26.16.210], petitioner argues that the property settlement agreement is presumptively fraudulent. We do not agree. Although, on numerous occasions, this court has scrutinized, with particular care, transactions between husbands and wives and agreements affecting their property rights,... it has never held that such agreements or transactions are presumptively fraudulent. *Id.* at 134, 331 P.2d at 861.

38. The good faith required by R.C.W. § 26.16.210 is mentioned in only five Washington separation contract cases. Analysis of the statute led to invalidation of the contract in only one of the cases. *In re Madden’s Estate, 176 Wash. 51, 28 P.2d 280 (1934).*

39. *Id.* at 54, 28 P.2d at 282.

40. After the usual declaration that husband-wife contracts are not presumptively fraudulent, the *Madden* court said, “The statute, however (Rem. Rev. Stat., § 5828 [precursor to R.C.W. § 26.16.210]), does impose upon the executor here [the husband] the burden of establishing the fairness and good faith of the agreement.” *Id.* at 54, 28 P.2d at 282.

41. Only one case, *In re Marriage of Cohn, 18 Wn. App. 502, 569 P.2d 79 (1977),* includes an extended analysis of the duty of disclosure and requirement of actual knowledge. This may be explained by the fact that the case also concerned the validity of an antenuptial contract.

42. *Tausick v. Tausick,* 52 Wash. 301, 100 P. 757 (1909).

Antenuptial and Postnuptial Contracts

sustained when the wife was told she could get separate counsel (but did not do so), and when the wife could have requested more information (but failed to do so). Courts analyzing disclosure and actual knowledge have invalidated only one of the ten separation contract cases in which those factors are mentioned.

Washington courts' reluctance to apply the confidential relationship requirements of good faith or disclosure with any intensity appears to signal an unspoken judicial presumption that an imminent dissolution sharpens the parties' self-interest so that inequality of bargaining positions is unlikely. The relatively few separation contract cases in which courts have held contracts invalid under either a strict contractual or a confidential relationship analysis support this hypothesis. These contracts presented situations, recognized by the court, which did not merit an assumption of arm's length negotiation.

C. Effect of the 1973 Dissolution Act Presumption of Validity on the Application of the Good Faith Statute

The one analytic problem relating to separation contracts with which the courts have not yet dealt is the effect of the 1973 Washington Dissolution Act on the analysis which has traditionally been applied to these cases. Specifically, R.C.W. § 26.09.070(3), which

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47. In both In re Madden's Estate, 176 Wash. 51, 28 P.2d 280 (1934), and Richardson v. Richardson, 36 Wash. 272, 78 P. 920 (1904), the respective courts found that gross inequity of the contract, coupled with duress, indicated inequality of bargaining position. A strict fraud test was applied in Richardson and probably could have been used in Madden.

In Logan v. Logan, 141 Wash. 62, 250 P. 641 (1926), and In re Marriage of Alexander, 14 Wn. App. 222, 540 P.2d 457 (1975), the contracts were invalidated because a lengthy period of reconciliation followed execution of the separation contract. See note 27 supra and note 55 infra. While neither case clearly enunciates the analytic basis of the decision, strict contractual analysis would invalidate use of the contract for a later dissolution, not contemplated at the time of execution, as being an application not within the parties' intent. Another explanation of the results in these cases may be that courts presume that parties who discuss dissolution and then are reconciled are not so completely estranged that a presumption of arm's length negotiation would be justified.


If either or both of the parties to a separation contract shall at the time of the exe-
gives separation contracts presumed validity, appears to conflict with the burden of proof requirement of the good faith statute, R.C.W. § 26.16.210.\textsuperscript{50}

When a Washington court analyzes the effect of a marital contract on a dissolution property distribution, it has great discretion to invalidate the contract if it was not "just and equitable."\textsuperscript{51} Such discretion was authorized by R.C.W. § 26.08.110, now repealed by the 1973 Dissolution Act and replaced by R.C.W. § 26.09.080.\textsuperscript{52} Trial court discretion under R.C.W. § 26.08.110 to invalidate husband-wife contracts found to be unjust or unfair also applied to separation contracts, but it was seldom mentioned in that context.\textsuperscript{53} Nevertheless, in the few separation contract cases where the trial court did exercise its discretion to invalidate the contract, it appears that the burden of showing the contract's fairness was placed on the party asserting its binding effect: "In an action for divorce, a property settlement or

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\caption{Diagram of the effect of separation contracts on property distribution.}
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\begin{itemize}
\item [50.] See note 24 supra.
\item [51.] Erickson v. Erickson, 53 Wn. 2d 832, 337 P.2d 297 (1959).
\item [52.] R.C.W. § 26.08.110 gave the divorce court power to make "such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce . . . and to the party through whom the property was acquired." WASH. REV. CODE ANN. § 26.08.110 (West 1961) (repealed 1973).
\item [53.] The theoretical power of the divorce court, prior to passage of the Washington Dissolution Act of 1973, to use its discretion to invalidate a separation contract is most clearly stated in Richardson v. Richardson, 69 Wn. 2d 59, 417 P.2d 157 (1966). That case, which upholds the use of divorce court discretion to invalidate a separation contract which was at least arguably "fair," represents the apogee of that analysis. Since it was the last appellate decision to hold a separation contract invalid prior to passage of R.C.W. § 26.09.070(3), which limits trial court review of separation contracts, Richardson is presumably now of only historical interest. Rieke, The Dissolution Act of 1973: From Status to Contract? 49 WASH. L. REV. 375, 394–98 (1974), contains further analysis of the effect of R.C.W. § 26.09.070(3).
agreement between the parties may be entirely disregarded by the court, and should be followed in dividing the property between the parties . . . only when the court is satisfied that the agreement is fair and just . . . ."\(^{54}\)

This burden of proof placed on the one asserting the contract's validity is analogous to the burden of showing good faith imposed by R.C.W. § 26.16.210 in that the same party would assert both fairness and good faith. Thus, prior to the enactment of the 1973 Dissolution Act, the requirements of R.C.W. § 26.16.210, although seldom used in analyzing separation contracts, could have been used without any statutory conflict. The revised dissolution law appears to have changed this situation.

The new separation contract statute, R.C.W. § 26.09.070(3), creates a presumption of validity by switching the burden of showing a contract is unfair to the one challenging its binding effect; the agreement is binding unless shown to be unfair.\(^{55}\) With the statutory burden of proof now placed on the challenger, it would be inconsistent also to invoke the good faith statute which places the burden of proving essentially the same thing (that the contract is fair) on the non-challenger.

In enacting the presumption of validity statute, R.C.W. § 26.09.070(3), the legislature appears to have excepted separation contracts from those husband-wife contracts to which the good faith statute previously applied. Both statutory interpretation and case analysis, however, lead to the conclusion that this exception should be strictly limited to contracts executed in contemplation of dissolution. The presumption of validity statute expressly applies only to "separation contract[s]."\(^{56}\) Although that term is not specifically defined, the legislature authorized "separation contracts" to promote the settlement

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54. Atkins v. Superior Court, 1 Wn. 2d 677, 685, 97 P.2d 139, 142 (1939).
55. Unfortunately, the only application of this new rule has muddied what appears to be a clear statutory pronouncement. In In re Marriage of Alexander, 14 Wn. App. 222, 540 P.2d 457 (1975), the appellate court upheld the trial court's disregard of a property settlement agreement, which was executed prior to a two year period of reconciliation before a dissolution action was finally commenced. The court could have based a finding of invalidity on the rationale in Logan v. Logan, 141 Wash. 62, 250 P. 641 (1926). See note 27 supra. Instead, the court considered the parties' changed circumstances after two years and then, unaccountably, indicated that their contract was not enforceable under R.C.W. § 26.09.070(3), because it was "'unfair at the time of its execution.'" In re Marriage of Alexander, 14 Wn. App. 222, 224 n.2, 540 P.2d 457, 459 n.2 (1975).
of disputes attendant upon separation or the filing of petition for dissolution. Therefore, a contract negotiated at the end of a marital relationship is clearly contemplated. Further, the statute appears to codify separation contract case analysis in which courts have seldom dealt with the question of who has the burden of proof, notwithstanding the good faith statute. If the presumption of validity statute is applied only to predissolution agreements, as this comment argues it should be, the statutory good faith protection will have been eliminated only for those husband-wife contracts, the negotiation of which is least likely to be affected by a confidential relationship.

V. VALIDITY OF WASHINGTON MARITAL CONTRACTS

Contracts between husband and wife, executed before or during an ongoing marriage, elicit a critical review from Washington courts. Until recently, the analysis of marital contract cases has borne only a superficial resemblance to that used in separation contract cases. Three recent cases, however, cast doubt on the continued vitality of some previously applied marital contract rules. These three cases suggest at least partial acceptance of the traditional contractual standards for validity used in separation contract cases. This change may be explained by a general perception that women, as they become more independent, need less protection. Concurrently, paternalistic court decisions, compensating for the influence of overbearing husbands, have become less justifiable in light of recent Washington statutory changes.

57. R.C.W. § 26.09.070(1) provides:
The parties to a marriage, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage, a decree of legal separation, or declaration of invalidity of their marriage, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the custody, support, and visitation of their children and for the release of each other from all obligation except that expressed in the contract.

58. See text accompanying footnotes 36–38 supra.


60. Three pieces of legislation, passed within the past decade, are especially relevant to marital contract analysis:

(1) Washington community property law was changed so that husbands are no longer the sole managers of the marital community's personal property. Prior to its amendment in 1972, R.C.W. § 26.16.030 provided that "[t]he husband shall have the management and control of community personal property, with a like power of disposition as
Antenuptial and Postnuptial Contracts

A. The Traditional Approach

Early Washington marital contract decisions appear to have turned on the courts' unexplained "rule" that wives (and only wives) should be protected from the untoward effects of marital contracts. This double standard is best seen by comparing the emphasis placed on the adequacy of the consideration involved. In two early cases the contracts were upheld when challenged by the husband, despite the clear inadequacy of consideration given by the wives. In each case involving a wife's challenge to the contract, however, the court held the contract invalid. The courts expressed great concern over the inadequacy of consideration and found that the burden of showing good faith was not sustained by the husband.

The clearest analysis of the traditional approach to review of marital contracts was presented in 1954, in Hamlin v. Merlino.
That decision made explicit the reasoning that underlies the results in the earlier cases. In response to an attack by the wife's devisees, the court held invalid an antenuptial agreement executed prior to a marriage which was the second for both husband and wife. The analysis focused on the combined effect of a confidential relationship and the parties' unequal power (as prescribed by statute) to manage property acquired by the marital community. The *Hamlin* court also considered other factors in determining the contract's validity: Mrs. Merlino could not read or write and had received no independent counsel regarding the agreement. The court's overriding concern, however, was the unequal positions of the parties, prescribed by societal norm and reinforced by community property law. That inequality required strict enforcement of the husband's duties under the good faith statute.

The next major pronouncement on the requirements for a valid marital contract came almost twenty years later, in *Friedlander v. Friedlander*. *Friedlander* represents the apogee of Washington's strict scrutiny of marital contracts. The court's rules, apparently enunciated in order to guarantee wives' protection from overreaching husbands, became anachronisms almost immediately.

The Friedlanders' antenuptial contract was invalidated in a divorce action. Citing *Hamlin v. Merlino*, the *Friedlander* court stressed the

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64. Under Washington community property law, all the benefits from the parties' contract went to Mr. Merlino:

The full significance of [the provisions of the parties' agreement] can be seen only when the relative positions of the parties are considered. Under our basic community property statute, RCW 26.16.030, the husband is made the manager of the community personal property...

... It is apparent that, under our law, the agreement between Angelo and Lucia Merlino, in so far as it affected property which otherwise would belong to the community, heavily favored Angelo. It was he who had the management and control of the community property. He had the opportunity and the power to take or place community property in his own name and, thus, to change its character to that of his separate property [by operation of the antenuptial agreement]. *Id.* at 865-66, 272 P.2d at 132.


66. In *Erickson v. Erickson*, 53 Wn. 2d 832, 337 P.2d 297 (1959), a per curiam opinion upheld the trial court's use of discretion in making an unequal divorce property settlement notwithstanding the provisions of a previously executed community property agreement.

The court, in *In re Napier's Estate*, 55 Wn. 2d 194, 347 P.2d 192 (1959), upheld a widow's transfer of her community property to a testamentary trust set up by her husband. The court appeared to assume that the will contract, which required the transfer, was not binding but found that the transfer, once completed, was itself valid. *Id.* at 200, 347 P.2d at 196.

67. 80 Wn. 2d 293, 494 P.2d 208 (1972).
Antenuptial and Postnuptial Contracts

importance of the couple's confidential relationship.68 This created the husband's burden of showing that the contract, in which provision for the wife was disproportionate to his means, was executed by his wife voluntarily and with full knowledge.69 The court found that Mr. Friedlander had not made the disclosures necessary to his wife's knowledgeable execution of the contract.70 Presumably this finding alone would justify the conclusion that he had not sustained his burden of showing good faith dealing with his wife. The court, however, citing *Hamlin*, added a "rule" that the wife must have signed the contract "on independent advice with full knowledge of her rights."71 Finally, and again unnecessarily, the court concluded that this contract was void at its inception.

B. Recent Interpretations of the Independent Advice Requirement

Since *Friedlander*, Washington courts and attorneys have wrestled with the apparently absolute requirement of independent counsel and the corollary, that a contract without it is void, rather than merely voidable. In 1973 a court of appeals decision appeared to signal the possibility of some retrenchment.72 How far that retrenchment has actually gone is the question raised by the Washington Supreme Court's

68. *Id.* at 301, 494 P.2d at 213.
69. The court stated the standard for evaluating the husband's good faith disclosure: [The wife need not] know the exact financial status of his resources. However, she must at least have a full and fair disclosure of all material facts relating to the amount, character and value of the property involved so that she will not be prejudiced by the lack of information, but can intelligently determine whether she desires to enter the prenuptial contract. *Id.* at 302, 494 P.2d at 214 (emphasis in original).
70. *Id.* at 303, 494 P.2d at 214.
71. *Id.* (emphasis in original).

It is unlikely that the writers of the *Hamlin* decision would recognize this as their "rule." What the *Friedlander* court used is an edited version (without adding ellipses for the deleted material) of a quote in *Hamlin* of a long passage from 2 A. LINDEY, supra note 4. The emphasis on independent advice was supplied by the *Friedlander* court. The *Hamlin* opinion only mentioned the lack of independent advice as one of many factors that would bear on the fairness of an antenuptial contract. Hamlin v. Merlino, 44 Wn. 2d 851, 864, 272 P.2d 125, 132 (1954).
72. In Moore v. Moore, 9 Wn. App. 951, 515 P.2d 1309 (1973), the appellate court pointedly noted that the lower court decision invalidating an antenuptial agreement by applying the *Friedlander* rule was not appealed and therefore was not reviewable by the court. The court then stated, unnecessarily for the decision at hand, that *Friedlander* stood for the proposition that, in the absence of a full and fair disclosure of all assets, an antenuptial agreement is void. *Id.* at 953, 515 P.2d at 1310. The independent advice requirement is conspicuously missing from this restatement.

The *Hadley* court upheld the use of marital contracts, executed as part of the couple's estate plan, as the basis of a dissolution property disposition. The court restated the *Friedlander* and *Hamlin* tests76 for marital contract validity and found that they had been met.

Despite some evidence that Mrs. Hadley did not fully understand the contracts, the court concluded that Mr. Hadley demonstrated good faith and candor in his dealings with his wife.77 *Hadley* further relaxed the standards for marital contract validity by modifying the *Friedlander* independent advice requirement almost beyond recognition. Mrs. Hadley had asked an attorney for advice but failed to bring him the information he thought necessary, so no advice was ever given. That was enough: "While this [failure to provide the needed information] may have been an unfortunate omission on her [Mrs. Hadley's] part, it is unfair to penalize Mr. Hadley for it."78

In *In re Marriage of Cohn*,79 the court upheld the use of an antenuptial contract and a separation contract as the basis for a dissolution property disposition. With the help of the *Hadley* court's interpretation of the *Hamlin-Friedlander* tests, the *Cohn* court held that there was no absolute requirement of independent counsel. According to the court, *Friedlander* and *Hamlin* only require that "if advice is given, . . . it be from an independent party."80 Then, following the implicit ruling in *Hadley*, the *Cohn* court put the burden of getting such advice on the challenging spouse.81

In *Whitney v. Seattle-First National Bank*, a widow's challenge to a

76. 88 Wn. 2d at 654, 565 P.2d at 793. According to the *Hadley* court, the tests from *Hamlin* and *Friedlander* are:
   (1) whether full disclosure has been made by respondent [Mr. Hadley] of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully [sic] and voluntarily on independent advice and with full knowledge by the spouse of her rights.
   id.
77.  id. at 655, 565 P.2d at 793.
78.  id.
79. 18 Wn. App. 502, 569 P.2d 79.
80. id. at 509, 569 P.2d at 83.
81. The court in *Cohn* said:
   If Mrs. Cohn did not understand the provisions of the property settlement agree-
Antenuptial and Postnuptial Contracts

will contract which she and her husband had signed was rejected. The supreme court discussed the independent counsel requirements developed in the Hamlin, Friedlander, and Hadley decisions. Nevertheless, it avoided the difficult problem of applying those requirements in a manner consistent with both the language and result in Hadley by distinguishing all three cases. The Whitney court found that the agreements involved in Hamlin, Friedlander, and Hadley did not make fair and reasonable provision for the wife. By contrast, the Whitneys' contract was fair. The court then held:

Because the [Whitneys'] agreement was fair and reasonable, and because [Mrs. Whitney] has not shown fraud or overreaching, there is no absolute requirement that the wife have acted upon the competent independent advice of counsel, or that she be specifically informed of her right to seek the same.

Despite the Hadley court's purported adherence to Hamlin and Friedlander, it is clear that between 1972 and 1977 there was a distinct change in Washington's judicial view of marital contracts. As the Hadley decision indicates, the distinction is not between antenuptial and postnuptial contracts. What appears to be missing from recent cases is the protective attitude toward wives that was so apparent in Hamlin and Friedlander. The contrast between the treatment given the relatively self-sufficient Polly Friedlander, who was protected by the court, and the apparently dependent Claudette Hadley, who was not protected, evidences this change but does not explain it.

The Hadley decision contains very few clues to the rationale underlying this change. One indication of the court's rationale is its emphasis on the contractual nature of the Hadley's agreements, and the possible reliance thereon by third parties, as well as by Mr. and Mrs.

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82. 90 Wn. 2d at 10–11, 579 P.2d at 939–40.
83. Id. at 111, 579 P.2d at 940.
84. 88 Wn. 2d at 654, 565 P.2d at 793.
85. Polly Friedlander is described in the Friedlander opinion as 40 years old and in good health. At the time of the dissolution she was two quarters away from obtaining a college degree in fine arts and operated her own commercial art gallery. 80 Wn. 2d at 298, 494 P.2d at 211. In contrast, Claudette Hadley was dying of multiple sclerosis, confined to a wheelchair, and by her testimony, dependent on her husband's business advice. 88 Wn. 2d at 651, 669, 565 P.2d at 791–92, 801.
Hadley. At one point the court said the agreements were valid merely because there was no fraud or overreaching by the husband. This contractual analysis was, of course, not used in *Hamlin* or *Friedlander*.

C. Statutory Changes Since Friedlander

The *Hamlin* court avoided using the traditional fraud standard because the parties' relationship was both confidential and unequal. The latter was true because R.C.W. § 26.16.030 authorized Mr. Hamlin, but not Mrs. Hamlin, to manage community property. That same law prevailed during the Friedlanders' marriage. In 1972, however, the legislature amended R.C.W. § 26.16.030 so that either the husband or wife could manage the community property. Legislative history indicates that the “purpose [of the 1972 Community Property Amendments was] to establish the equal positions of the two spouses.”

The effect of this statutory change on the application of the *Hamlin* and *Friedlander* precedents is not mentioned in the *Hadley* opinion. This omission may stem from the fact that neither party's appellate brief mentions the 1972 amendment of R.C.W. § 26.16.030. Also, a direct application of the changed statute would have been difficult since not all of the *Hadley* agreements were executed after 1972. Nevertheless, because of the *Hamlin* court's reliance on the old form of

86. 88 Wn. 2d at 655, 565 P.2d at 793.
87. Id.

Professor Harry Cross, who was a member of the drafting committee for the 1972 changes, reports that the committee considered the desirability of providing protection for wives by requiring joint actions by the husband and wife. However, the committee's final conclusion was that equality was more important than protection, so the final bill included few joint action requirements. Professor Cross concludes:

The thrust of the legislation is to establish equality for husband and wife as regards their community property so each has a managing and transferring power with reference to all community property, essentially as extensive as the husband's managing power has theretofore been.

Id. at 9.

the statute, the amendment of the statute necessarily affects the analysis of Washington marital contracts. The amendment will have to be dealt with explicitly in a future case, probably one in which the agreement being challenged was executed after 1972.

The effect of the statutory change allowing wives to manage community property will likely be evaluated in connection with the good faith statute, R.C.W. § 26.16.210. In Hamlin the high standard for the husband's duties of disclosure was supported by the statutory good faith requirement and the husband's statutory privilege of managing community property.92 The results in Hadley and Cohn demonstrate that Washington courts are applying a diminished standard for proving good faith disclosure of the value of the property involved and the effect of the contract. This lessening of the good faith requirement may be explained by the disappearance of the unequal management basis for the Hamlin decision. It is probable that eventually, the court will expressly recognize that removal of wives' statutory disability supports liberalization of the standard.

Hadley appears to have eroded any possible effect of the good faith statute on the independent advice requirement. In that case the court appeared to hold that, once counsel was made available, the burden was on the challenger to take advantage of that advice.93 The Cohn court went further, placing on the challenger the onus of proving that he or she sought any needed disclosures.94 Such a shift in the burden of proof is understandable in the context of separation contracts when the presumed validity statute and the good faith statute interact.95 A shift in the burden of proof to avoid the Friedlander absolute requirement of independent advice might also be justifiable.96 Nevertheless, the Cohn court's extension of this shift in the burden of proof, beyond

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92. See notes 63–65 and accompanying text supra.
93. 88 Wn. 2d at 655, 565 P.2d at 795.
94. 18 Wn. App. at 309–10, 569 P.2d at 83–84.
95. See text following note 55 supra.
96. Language in the Whitney case makes it probable that relaxation of the Friedlander independent advice "rule" will not be implemented by the drastic shift in the burden of proof used by the Cohn court. The Whitney court mentions a general rule that "independent advice is only one factor to be considered in the analysis of the overall transaction." 90 Wn. 2d at 109, 579 P.2d at 938. This discussion is unnecessary to the final decision in Whitney, that independent advice prior to execution of a "fair" marital contract is not necessary. It seems likely, however, that in analyzing "unfair" contracts, like those in Hadley, the Whitney court's factor approach will be adopted. Given the factual context of Hadley, it appears that availability of counsel, as much as actual counsel, will be considered a factor in determining overall fairness.
the independent advice requirement to other elements in marital contract analysis such as disclosure, appears unjustified. The equal management statute, R.C.W. § 26.16.030, by its own terms does not require such a drastically nullifying effect on the good faith statute as the presumption of validity statute perhaps does.

Despite the increasing independence and self-sufficiency of wives, the relationship of a couple within, or prior to, an ongoing marriage remains "one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement." This relationship contrasts with the adversary position often assumed by parties to a separation contract. The distinction between marital and pre-separation relationships justifies the continued use of the good faith statute in analyzing marital contracts, even though it may no longer be applicable to separation contracts.

VI. CONCLUSION: SUGGESTIONS FOR THE EXECUTION OF A VALID ANTENUPTIAL OR POSTNUPTIAL CONTRACT

The Friedlander "rule," that a marital contract is initially invalid when each spouse does not have independent advice, appears to be dead. But the Hadley statement of a two-pronged test, requiring full disclosure and voluntary, knowledgeable execution, certainly remains. The Hadley decision does not clearly specify the circumstances which trigger the test. The conservative practitioner, however, would anticipate its use whenever the contract makes a property disposition to the wife which is disproportionate to the means of the husband. This is essentially the test used in Friedlander. With the passage of the Washington equivalent of the Equal Rights Amendment, as well as R.C.W. §§ 26.09.070(3) and 26.16.030, the same tests will likely be applied to challenges by a husband. Based on current Washington

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97. Friedlander, 80 Wn. 2d at 301, 494 P.2d at 213.
98. The interpretation of the Hadley decision made by the Whitney court reinforces this prediction. In Whitney, the court said that the trial court in Hadley made no finding that the Hadley agreements "made fair and reasonable provision for the wife. The fact that the trial court did not so find resulted in the application of the alternative test, whether the agreements in Hadley were "voluntarily and knowingly signed." " 90 Wn. 2d at 110-111, 579 P.2d at 939 (quoting Hadley, 88 Wn. 2d at 654-55, 565 P.2d at 790).
99. WASH. CONST. art. XXXI, § 1.
100. See text following notes 49 and 88 supra.
Antenuptial and Postnuptial Contracts

law, the following suggestions for the execution of a valid "disproportionate" marital contract may be helpful:

(1) Disclosure: No Washington decision has considered the effect of a recital of full disclosure\(^{101}\) in an antenuptial or postnuptial contract. Decisions in other states indicate that such a recital, especially if an actual disclosure of the amount and value of the property involved is also included in the contract, should be persuasive that adequate disclosure has been made.\(^{102}\)

(2) Explanation of the contract's effect: The drafting attorney should provide both parties with a documented explanation of the contract's effect. Since the status of the independent advice requirement is still not completely clear, this procedure should be followed even though one spouse has been advised to seek separate counsel.\(^{103}\) The Hadley court, in a dissolution proceeding, enforced a contract intended (and apparently explained to the wife) as an estate planning device. Nevertheless, an explanation of all the contract's possible effects, unintended as well as intended, would be prudent.

(3) Independent counsel: Although the Hadley decision made it clear that a "disproportionate" marital contract will not be held invalid solely because one spouse did not have independent counsel, lack of counsel is still a factor which a court will consider.\(^{104}\) In Hadley two facts appear to support the court's conclusion that the independent advice requirement was met: the drafting attorney was the "family lawyer" and Mrs. Hadley's ineffectual attempt to seek independent counsel indicated that she was at least aware of the possibility of obtaining counsel. When the drafting attorney has previously

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101. A recital of disclosure is a statement in the contract that each party has completely disclosed to the other the value of his or her property and the effect the contract will have on the other's rights to that property. This is to be distinguished from actual disclosure, in the contract, of the property involved including a description and accurate estimate of value. It would be advisable to include both the recital and actual disclosure in any husband-wife contract.

102. See note 9 supra.

103. The Cohn court held that the independent advice requirement meant only that any advice given must be independent. 18 Wn. App. at 509, 569 P.2d at 83. That decision would apparently require an attorney who drafted a marital contract for the husband to hand it to the wife without comment other than a request for her signature.

It is unlikely, however, that the Washington Supreme Court would approve such a procedure. Relaxation of the independent advice requirement did not negate the requirement of disclosure in the Hadley case. 88 Wn. 2d at 635, 565 P.2d at 793. This position is reaffirmed by the discussion of the Hadley decision in Whitney. 90 Wn. 2d at 110–11, 579 P.2d 939–40.

104. See note 98 supra.
represented only one of the parties (and therefore is not the "family lawyer"), the documented suggestion of independent counsel for the unrepresented spouse is clearly in order. Such a suggestion from the "family lawyer" may not be necessary, but as the court in Whitney advised,\(^{105}\) it will help to insure the contract's validity in a later challenge.

(4) Good faith: Finally, the Washington statutory requirement of good faith dealings between husband and wife still applies to marital agreements. Despite the increasing independence of wives, there may still be circumstances in which proof of the husband's good faith would be very difficult. To guarantee the contract's validity, the attorney should consider the relative bargaining positions of the parties at the time of execution. In extreme situations anything less than independent advice is likely to invite a return to protective precedents. Strict scrutiny may be predicted when a wife (or intended wife) is young, unsophisticated, lacks schooling or work experience, is unfamiliar with the English language, or cannot read or write. In such situations only the wife's consultation with an independent attorney is likely to meet the second Hadley requirement, that the contract be entered into "voluntarily on independent advice and with full knowledge by the spouse of her rights."\(^{106}\)

_Nancy C. Phelps*

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\(^{105}\) After ruling that the lack of independent counsel did not invalidate a "fair" marital contract, the _Whitney_ court disclaimed any intent to "dissuade counsel from recommending that independent counsel be consulted in appropriate cases." 90 Wn. 2d at 111, 579 P.2d at 940. The court then advised: "The presence of advice from independent counsel is a desirable cautionary step, however, where there is a possibility that the fairness or reasonableness of the agreement will be subject to later attack." _Id._ at 111-12, 579 P.2d at 940.

\(^{106}\) 88 Wn. 2d at 654, 565 P.2d at 793.