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Casenotes: Domestic Relations — Antenuptial Agreements — Antenuptial Agreements Waiving Alimony Are Not Void per se. Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984)

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DOMESTIC RELATIONS — ANTENUPTIAL AGREEMENTS — ANTENUPTIAL AGREEMENTS WAIVING ALIMONY ARE NOT VOID PER SE. *Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984).

After eight years of marriage, a wife sued her husband for divorce *a mensa et thoro*,[1] child support, and other relief. Her husband raised preliminary objections to the request for alimony based on an antenuptial agreement waiving all claims for alimony or support.[2] The trial court, relying on Maryland decisional law, declared the antenuptial agreement null and void as against public policy and awarded the wife alimony *pendente lite* and child support.[3] On appeal,[4] the Court of Appeals of Maryland in *Frey v. Frey*[5] held that antenuptial agreements waiving alimony are no longer void *ab initio* as contrary to public policy.[6]

Common law favored agreements made in contemplation of marriage.[7] These agreements are considered contracts and thus must comport with the general contract principles of fairness and consideration.[8] Moreover, the state, because of the special nature of these contracts,

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1. Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984). Divorce *a mensa et thoro* is a partial divorce that terminates cohabitation, but does not otherwise affect the legal marital status. *See* BLACK'S LAW DICTIONARY 431 (5th ed. 1979). Divorce *a vinculo matrimonii* completely dissolves the marriage bond. *Id.*
2. Frey v. Frey, 298 Md. 552, 554, 471 A.2d 705, 706 (1984). As to the issue of maintenance the agreement provides in pertinent part:
   > That in the event of any separation by the parties for any reason, the parties hereto agree that they shall release and waive any claims for alimony pendente lite, permanent alimony, or support or maintenance of any other type and description, as the result of such separation, or as the result of any differences between the parties.

   Brief and Appendix of Appellee at 5, Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984).
3. Frey v. Frey, 298 Md. 552, 555, 471 A.2d 705, 706 (1984). Alimony *pendente lite* is a temporary provision of support made pending a suit for divorce. *See* BLACK'S LAW DICTIONARY 67 (5th ed. 1979).
4. The husband appealed and the Court of Appeals of Maryland granted his writ of certiorari, prior to consideration by the court of special appeals because of the important public policy issue. The court of appeals first disposed of the jurisdictional issue by noting appealability under MD. CTS. & JUD. PROC. CODE ANN. § 12-303(c)(5) (1984), which permits an appeal from an interlocutory circuit court order for the payment of money. Frey v. Frey, 298 Md. 552, 555, 471 A.2d 705, 707 (1984).
5. 298 Md. 552, 471 A.2d 705 (1984).
6. *Id.* at 563, 471 A.2d at 710. The court of appeals remanded the proceeding to the trial court for a factual determination as to the validity of the agreement.
7. C. VERNIER, AMERICAN FAMILY LAWS 51 (Vol. III 1935). As early as 1866, Maryland courts recognized the lawfulness of antenuptial agreements. For example, in Naill v. Maurer, 25 Md. 532 (1866), the court of appeals enforced an antenuptial contract barring the wife's dower rights since she entered into it in good faith, and with a full and clear understanding of its purpose. *See also* Schnepfe v. Schnepfe, 124 Md. 330, 92 A. 891 (1914) (enforcing antenuptial agreement providing for cash payment in lieu of dower despite wife's abandonment of her husband); Busey Ex'r. v. McCurley, 61 Md. 436 (1883) (enforcing antenuptial agreement where wife waived her dower rights in exchange for a house).
8. H. CLARK, THE LAW OF DOMESTIC RELATIONS 27 (1968).

requires additional safeguards before it will enforce the agreement. For example, to protect the public interest in preserving the marital relationship, the state is considered a third party to every marital contract.[9] In this role the state defines the marital relationship, the procedures for dissolution, and the attending duties and benefits.[10] The courts will not enforce private contracts that interfere with targeted areas of state interest, such as spousal and child support.[11] Also, since the special relationship of those engaged to be married is ill served by the arm's length standard of commercial contracts,[12] some courts have consistently applied a higher standard of review when determining the validity of marriage contracts.[13] In effect, this approach reflects an attempt to strike a balance between the state's interest in preserving marriage and the citizens' right to contract freely.[14]

Historically, antenuptial agreements defining property distribution and rights to support upon divorce implicated two areas of state concern. First, the state had an interest in preserving marriage because it was considered the foundation of society. The moral, economic, and social well-being of the citizenry was seen as directly dependent upon the stability of the family.[15] Thus, antenuptial agreements inducing separation or divorce were void as against public policy[16] even if the

9. Comment, *The Modern Theory and Practice of Antenuptial Agreements*, 5 J. MAR. J. PRAC. & PROC. 179, 179-80 (1971). *But cf.* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974) (in view of changing societal and individual needs the state's interest is no longer significant enough to justify its interference in the private marital relationship).
10. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-01 to -08 (1984) (Marital Property Act); MD. FAM. LAW. CODE ANN. §§ 7-101 to -105, 8-101 to -103, 11-101 to -111 (1984) (alimony provisions).
11. H. CLARK, *supra* note 8, at 28-29, *citing* Fincham v. Fincham, 160 Kan. 683, 165 P.2d 209 (1946); Hilbert v. Hilbert, 168 Md. 364, 177 A. 914 (1935); Franch v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).
12. For a discussion of one court's application of the commercial conscionability standard to an antenuptial contract, see Note, *Antenuptial Contracts Contingent Upon Divorce are Not Invalid Per Se*: Ferry v. Ferry, 46 MO. L. REV. 228 (1981).
13. Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); *see also* Weitzman, *supra* note 9, at 1242-43.
14. Comment, *supra* note 9, at 179.
15. Weitzman, *supra* note 9, at 1242-43.
16. *See, e.g., In re* Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973) (antenuptial agreements are void *ab initio*, not just on the facts of each case); Cohn v. Cohn, 209 Md. 470, 121 A.2d 704 (1956) (where the amount of the award upon divorce was directly related to the length of the marriage, the court likened it to "severance pay" rather than an equitable settlement of property rights); Duncan v. Duncan, 652 S.W.2d 913 (Tenn. Ct. App. 1983) (provision limiting spouse's liability for alimony is conducive to divorce); *cf.* Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (invalidated agreement that waived alimony if either party sought a divorce within seven years of the marriage); Norris v. Norris, 174 N.W.2d 368 (Iowa 1970) (innocent party will have to endure conduct which would constitute grounds for divorce because an agreement made inadequate provision

agreements were otherwise valid.[17] Substantial changes in the public's attitude toward marriage and divorce, however, have weakened this interest. The state has no interest in preserving failed marriages, as evidenced by the liberalized divorce laws in many states.[18] Further, the traditional roles of husband and wife are no longer rigidly defined. The new economic and social equality between the spouses and increased participation of women in the economy mitigate the need for the court's continued paternalism.[19] Indeed, many courts now suggest that antenuptial agreements may actually promote marital stability.[20]

The second area of state interest implicated was spousal support. Specifically, the state wanted to prevent its citizens from becoming wards of the state and thereby a drain on the public coffers.[21] Indeed, the state interest was so strong that support is considered an essential of marriage.[22] States thus prohibited agreements regulating support because the duty of spousal support was defined by law and could not be altered by contract.[23] Agreements regulating property, however, were allowed because, unlike support, property was not considered an essential of marriage.[24]

In *Cohn v. Cohn*,[25] the Court of Appeals of Maryland recognized the state's interest in preserving marriage and supporting its citizens.[26] In *Cohn*, the court ruled that antenuptial agreements barring alimony

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for support). *But see* H. CLARK, *supra* note 8, at 28 (agreement providing inducement for one party to seek divorce will often have the opposite effect on the other party).

17. Weitzman, *supra* note 9, at 1263 (quoting RESTATEMENT OF CONTRACTS § 586 (1932)).
18. Weitzman, *supra* note 9, at 1264. One court interpreted the statutory change as legislative support of amicable settlement of disputes within marriage. Newman v. Newman, 653 P.2d 728, 731 (Colo. 1982).
19. Weitzman, *supra* note 9, at 1266-68; *see, e.g.*, Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976).
20. *See, e.g.*, Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Newman v. Newman, 653 P.2d 728 (Colo. 1982); Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973); Schutterle v. Schutterle, 260 N.W.2d 341 (S.D. 1977).
21. Weitzman, *supra* note 9, at 1260.
22. RESTATEMENT (SECOND) OF CONTRACTS § 190 comment a (1979).
23. Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975); Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974); Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976); *In re* Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973); Holliday v. Holliday, 358 So. 2d 618 (La. 1977); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).
24. *See supra* notes 7-8 and accompanying text.
25. 209 Md. 470, 121 A.2d 704 (1956).
26. *Id.* at 475, 121 A.2d at 706. The court found the Cohn agreement, though executed with full disclosure of the husband's assets, to have directly induced the husband's desertion of his wife. The agreement provided for a lump sum award to the wife in lieu of property and support. The amount of the award was determined by the number of years of marriage: the longer the marriage the larger the award. The husband deserted his wife just days before a scheduled increase. The

were per se invalid.[27] Maryland followed the *Cohn* rule for twenty-eight years until it was expressly renounced in *Frey v. Frey*[28] as no longer responsive to the public interest.[29] In doing so Maryland joined the majority of jurisdictions, which have abandoned the absolute prohibition of these agreements in favor of a case by case approach.[30]

The case by case approach in antenuptial cases evolved from the changes in marital roles and the public attitude toward marriage and divorce.[31] The *Cohn* decision was based on the preservation of marriage[32] and support of spouses,[33] but subsequent increased public interest in dissolving failed marriages has since prompted states to enact more liberal divorce laws.[34] By implication, this has severely weakened the state's interest in preserving marriage. Furthermore, in questioning whether antenuptial agreements induce divorce, some states have concluded that these agreements actually encourage marital stability by permitting advance determination of the parties' respective property interests.[35] Thus, the state's interest in preserving marriage is no longer a basis for a per se prohibition of these agreements.

It is not as easy to dispose of the state's interest in spousal support, particularly upon separation or divorce.[36] At the very least the state is concerned that its citizens shall not become public wards.[37] This interest, coupled with the special relationship of the parties, has prompted a compromise between freedom of contract principles and the absolute prohibition rule. The modern trend jurisdictions have developed a new approach holding that the agreements are not void per se, but they will be closely scrutinized for fraud, overreaching and unconscionability,

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court thus concluded that the terms of the agreement induced his desertion. *Id.* at 477, 121 A.2d at 707.

27. *Id.* at 477, 121 A.2d at 707.
28. 298 Md. 552, 471 A.2d 705 (1984).
29. *Id.* at 558, 471 A.2d at 708.
30. *See, e.g.*, Newman v. Newman, 653 P.2d 728 (Colo. 1982); Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Singer v. Singer, 318 So. 2d 438 (Fla. 1975); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973).
31. *See, e.g.*, Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Newman v. Newman, 653 P.2d 728 (Colo. 1982); 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, 170 Ind. App. 331, 352 N.E.2d 785 (1976); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973).
32. *See supra* notes 14-20 and accompanying text.
33. *See supra* notes 21-27 and accompanying text.
34. Weitzman, *supra* note 9, at 1264; *see also* MD. FAM. LAW CODE ANN. § 7-103 (1984).
35. *See supra* note 20.
36. Comment, *For Better Or For Worse . . . . But Just In Case, Are Antenuptial Agreements Enforceable?*, 1982 U. ILL. L. REV. 531. Only four jurisdictions lack alimony or spousal support statutes. Weitzman, *supra* note 9, at 1185 n.77.
37. One commentator has argued that this is the extent of the state's interest. Weitzman, *supra* note 9, at 1244.

and may be invalidated on that basis.[38]

Courts thus subject support contracts to close scrutiny. The various tests developed by the courts for this purpose have emphasized three general areas of concern: whether the agreement was validly procured; whether the agreement was fair in result; and determining which party has the burden of proving the validity of the agreement.

In determining valid procurement, the presence of fraud, duress, or misrepresentation can invalidate an antenuptial agreement.[39] The agreement must be executed voluntarily, with knowledge of its content and legal effect.[40] The use of independent legal counsel, though not required, is probative of validity.[41] Most importantly, many courts have required either actual knowledge or some degree of disclosure of financial worth.[42]

The adequacy[43] of the agreement's provisions is considered under the second area of concern: fairness in result. Since this element most

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38. *See, e.g.*, Newman v. Newman, 653 P.2d 728 (Colo. 1982); Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Burtoff v. Burtoff, 419 A.2d 1085 (D.C. 1980); Singer v. Singer, 318 So. 2d 438 (Fla. 1975); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Matlock v. Matlock, 223 Kan. 679, 576 P.2d 629 (1978); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979); 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 (1973). Some courts have held that parties may contract but the court has ultimate authority as to whether to enforce the agreement. *See, e.g.*, Flora v. Flora, 166 Ind. App. 620, 337 N.E.2d 846 (1975); Connolly v. Connolly, 270 N.W.2d 44 (S.D. 1978); Schutterle v. Schutterle, 260 N.W.2d 341 (S.D. 1977). *Contra In re* Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973); Norris v. Norris, 174 N.W.2d 368 (Iowa 1970); Mulford v. Mulford, 211 Neb. 747, 320 N.W.2d 470 (1982); Duncan v. Duncan, 652 S.W.2d 913 (Tenn. App. 1983).

39. *See, e.g.*, Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.W.2d 42 (1972); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973).

40. *See, e.g.*, Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Posner v. Posner, 257 So. 2d 530 (Fla. 1972); Matlock v. Matlock, 223 Kan. 679, 576 P.2d 629 (1978); *cf.* Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955) (property agreement invalid since the wife did not understand it).

41. *See, e.g.*, Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975); Matlock v. Matlock, 223 Kan. 679, 576 P.2d 629 (1978); Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955).

42. *See, e.g.*, Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975); Matlock v. Matlock, 223 Kan. 679, 576 P.2d 629 (1978); Herman v. Goetz, 204 Kan. 91, 460 P.2d 554 (1969); *cf.* Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955) (agreement invalid since the husband made no disclosure to his wife before she executed a property settlement agreement). *But cf.* Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962) (court devised two-pronged test: full disclosure or actual knowledge required only if the provision is inadequate). The same test was applied in Schutterle v. Schutterle, 260 N.W.2d 341 (S.D. 1977). *See also* Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967) (unfairly disproportionate provision in the absence of disclosure or actual knowledge places burden of proving that the agreement was knowingly and voluntarily made on the party seeking to enforce it).

43. Courts also refer to adequacy as conscionability, fairness or reasonableness. *See,*

directly affects the state's interest in spousal support, courts scrutinize it with a view toward protecting this interest. Toward this end, courts have used four different approaches.[44] The first approach, which measures the adequacy of the provision at the time the contract was executed, will validate the agreement if it was fair at the time it was made.[45] The second approach requires that the provision be adequate at both the time of execution and enforcement.[46] The third approach measures adequacy only at the time of enforcement, finding unconscionability when enforcement results in insufficient financial means for the spouse.[47] The fourth approach measures adequacy at the time of execution, but permits modification at the time of enforcement.[48]

The third area of concern is allocating the burden of proving the validity of the agreement. Courts have used several different approaches with no clear trend evolving. One court has allocated the burden to the husband, under the clear and convincing standard of proof.[49] Another court has held that there is a presumption of validity unless circumstances show otherwise.[50] Another court has developed a

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e.g., Newman v. Newman, 653 P.2d 728 (Colo. 1982); Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).

44. *See* Note, *supra* note 12, at 235 n.33.

45. *See* Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); *accord* Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972) (court stated that it would construe, not make, contracts); Matlock v. Matlock, 223 Kan. 679, 576 P.2d 629 (1978) (court enforced agreement that waived alimony because there was full disclosure and the wife understood the agreement and had participated in the negotiations); *cf.* Herman v. Goetz, 204 Kan. 91, 460 P.2d 554 (1969) (court enforced property agreement, noting that the wife had actual knowledge of her husband's financial affairs).

46. *See* Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975). Under this agreement the wife received $200,000 in lieu of alimony. The parties had met one month before the wedding and the marriage lasted 16 months. The court found the agreement fair and reasonable under the circumstances.

47. Newman v. Newman, 653 P.2d 728, 734 (Colo. 1982); *see also* Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973) (antenuptial agreement should be enforced unless it deprives a spouse of needed support not otherwise obtainable).

48. Courts using this method have applied different standards for allowing modification. In 1962, the Supreme Court of Florida developed a fairness test under which a provision was considered fair if it enabled the dependent spouse to maintain a similar standard of living as in marriage. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962). Later, in Posner v. Posner, 257 So. 2d 530, 533 (Fla. 1972), the same court, in accordance with state law, permitted modification for a change in circumstances, which it noted was the same standard used for modifying postnuptial agreements. Other courts have held that the issue of support is a matter for judicial determination and, therefore, even a valid antenuptial agreement is subject to judicial review. Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810, 816 (1981); *cf.* Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976) (valid antenuptial agreement just one factor used in considering an award for support); Flora v. Flora, 166 Ind. App. 620, 337 N.E.2d 846 (1975) (court not bound to accept terms of valid antenuptial agreement).

49. Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975).

50. *See, e.g.*, Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976); Flora v. Flora, 166 Ind. App. 620, 337 N.E.2d 846 (1975).

rule that interrelates the requirements of disclosure and adequacy. It held that while ordinarily the burden is on the party alleging invalidity, if the provision is facially unreasonable, a presumption of concealment arises that shifts the burden to the other party.[51]

Prior to *Frey*, Maryland courts were not concerned with proving the validity of antenuptial agreements affecting support because the agreements were per se invalid. *Levy v. Sherman*,[52] a 1945 decision by the Court of Appeals of Maryland, established a standard to determine the validity of antenuptial agreements affecting property rights. The *Levy* court first noted that the parties to an antenuptial agreement have a confidential relationship, imposing a duty on each to make a frank, full, and truthful disclosure. Then it applied a two-pronged test: if the disclosure is inadequate and the provision in the agreement is unfairly disproportionate to the other's financial worth, an implication of fraud arises placing a burden on the one seeking enforcement to show that it was knowingly and voluntarily executed, with the opportunity to obtain independent legal advice.[53]

Twenty-two years later, the court of appeals applied the *Levy* test in *Hartz v. Hartz*.[54] The *Hartz* court enforced an antenuptial agreement that preserved the premarital property interests of the husband and wife. Further, the court delineated the factors for testing agreements in the absence of adequate disclosure or knowledge. First, the agreement must be fair and equitable under the circumstances.[55] This is determined by comparing the benefit gained with the rights relinquished, measured at the time the agreement was formed. Second, the repudiator must have executed it freely and understandingly.[56] If these two requirements are met, disclosure or knowledge is not necessary, even though the parties have a confidential relationship.[57]

In *Frey v. Frey*,[58] the Court of Appeals of Maryland addressed this issue for the first time since *Cohn v. Cohn*.[59] Expressly overruling *Cohn*, the *Frey* court held that antenuptial agreements waiving alimony

51. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962); *accord* Posner v. Posner, 257 So. 2d 530, 534 (Fla. 1972) (where the provision for the wife was disproportionate to the husband's wealth at the time of making the agreement, the burden shifted to the husband).
52. 185 Md. 63, 43 A.2d 25 (1945).
53. *Id.* at 73-74, 43 A.2d at 29. The court found the agreement valid and enforced it.
54. 248 Md. 47, 234 A.2d 865 (1967). The wife, who had a great deal of financial and business acumen, initiated and negotiated the agreement to protect her own estate. The agreement was later similarly altered to protect the husband's estate. The parties thereafter executed the agreement. Therefore, there was no doubt that the wife fully understood the terms and effect of the agreement, and that she signed it voluntarily. *Id.* at 50-54, 234 A.2d at 867-70.
55. *Id.* at 58, 234 A.2d at 871-72.
56. *Id.*
57. *Id.*
58. 298 Md. 552, 471 A.2d 705 (1984).
59. 209 Md. 470, 121 A.2d 704 (1956).

are not void per se as contrary to public policy.[60] The court adopted the majority trend's view that public policy concerning marriage and divorce has changed since its decision in *Cohn*.[61] The court noted that divorce has become commonplace[62] and that the state has no interest in preserving a marriage that has deteriorated beyond reconciliation.[63] In addition, the state's interest in spousal support is no longer advanced by the traditional view of the husband as provider and the wife as homemaker. The expanding employment opportunities for women have moderated the husband's duty of support.[64] In view of these social changes, the court abandoned the *Cohn* prohibition as not responsive to current public interests. Rather, the court reasoned that these interests can be better served by independently evaluating the validity of each agreement.[65]

The *Frey* court found legislative expression to support its decision in Maryland's Marital Property Act.[66] This statute concerns property distribution in divorce proceedings and permits the exclusion of marital property and family use personal property by valid agreement of the parties. The court thus reasoned that antenuptial agreements are favored in law, and should be enforced if valid.[67] A dissent, however, argued that the Marital Property Act[68] does not enunciate public policy concerning alimony, but instead merely codifies earlier decisional law that validated agreements disposing of property.[69]

In *Frey*, the court of appeals adopted a flexible approach to determine the validity of antenuptial agreements by replacing the absolute prohibition with a case by case determination.[70] The validity of an agreement is determined by an application of the *Hartz* test,[71] which required either disclosure or a fair agreement voluntarily and understandingly made. The *Frey* court, however, has expanded the scope of this test in several respects.

First, the *Frey* court's language indicates that all the *Hartz* factors are mandatory.[72] This is in direct contradiction of the two-pronged ap-

60. *Frey*, 298 Md. at 558, 471 A.2d at 708.
61. *Id.* at 561, 471 A.2d at 710.
62. *Id.* at 560, 471 A.2d at 709.
63. *Id.* This is evidenced by a state law that provides for voluntary separation and divorce. MD. FAM. LAW CODE ANN. § 7-103(a)(3) (1984).
64. *Frey*, 298 Md. at 560, 471 A.2d at 709 (quoting Volid v. Volid, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46-47 (1972)).
65. *Frey*, 298 Md. at 563, 471 A.2d at 711.
66. *Id.* at 562-63, 471 A.2d at 710 (construing MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(c), (e) (1984)).
67. *Frey*, 298 Md. at 563, 471 A.2d at 710.
68. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01 to -08 (1984).
69. *Frey*, 298 Md. at 565, 471 A.2d at 711-12 (Smith, J., dissenting).
70. *Id.* at 563, 471 A.2d at 711.
71. *Id.* at 564, 471 A.2d at 711.
72. *Id.* at 564-65, 471 A.2d at 711. The court listed the factors:

> The agreement *must* be fair and equitable in procurement and result. The parties *must* make frank, full, and truthful disclosure of all their

proach of *Hartz*, which waived the disclosure requirement in the face of a fair provision.[73] Second, one factor requires that the agreement be fair and equitable in result.[74] Result can be measured as of the time of contract formation, as in *Hartz*,[75] or at the time of contract effect, which is at separation or divorce. Although the court's language is somewhat ambiguous, the latter approach is more consistent with the common usage of the word "result."[76] Thus, it is arguable that the *Frey* court did not intend a strict application of the *Hartz* factors. Rather, expressly following the *Hartz* lead, the *Frey* court has developed a preferable, albeit slightly different approach for testing the validity of agreements affecting support. Since neither support needs nor the ability to pay support can be determined in advance, the fairness of a support provision before marriage is irrelevant. Accordingly, measuring the adequacy of the provision at the time of its application is a more analytically sound approach, and is more responsive to the state's interest in the adequate support of its citizens.

Despite the improvements in Maryland law, *Frey* presents several problems. First, one of the reasons support needs are unforeseeable is that family needs constantly change. In response to this fluctuating economic variable, support provisions must be subject to modification. Currently, Maryland law does not permit the modification of antenuptial agreements, although a court does have discretion to alter alimony provisions in both separation agreements and divorce decrees.[77] The General Assembly needs to resolve this issue to protect the state's interest in spousal support.

Second, the *Frey* court left unanswered the question of which party has the burden of proving the validity of the agreement. The court of appeals has stated that a confidential relationship exists between the parties, but did not explain the effect of this relationship. The question is further confused in light of recent decisions by the court of special appeals that have abrogated the presumption of a confidential relationship between spouses.[78] Whether the *Frey* court in-

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> assets. The agreement *must* be 'entered into voluntarily, freely, and with full knowledge of its meaning and effect.' Further, we have emphasized the importance of independent legal advice in evaluating whether the agreement was voluntarily and understandingly made. Also, in evaluating the disclosure and procurement of the agreement, the trial judge must remember that the parties stand in a confidential relationship.

Id. (citing *Hartz*, 248 Md. at 56, 234 A.2d at 870 (emphasis supplied)).

73. *Hartz*, 248 Md. at 58, 234 A.2d at 871-72; *see supra* notes 54-57 and accompanying text.
74. *Frey*, 298 Md. at 563, 471 A.2d at 711.
75. *Hartz*, 248 Md. at 57, 234 A.2d at 871.
76. "Result" means "a consequence, effect, issue or conclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1937 (1976).
77. MD. FAM. LAW CODE ANN. §§ 8-103, 11-107(b) (1984).
78. Bell v. Bell, 38 Md. App. 10, 13, 379 A.2d 419, 421 (1977), *cert. denied*, 282 Md. 729 (1978). A confidential relationship exists when the relationship between the parties is such that the wife would assume that her husband would only act con-

tended to advocate the presumption in the antenuptial context is unclear, but it is inconsistent to presume a confidential relationship between unmarried persons and deny it as between a husband and wife.

Third, the *Frey* court's reliance on the Maryland Marital Property Act as a definitive expression of legislative intent to validate antenuptial agreements is misplaced. While the Marital Property Act is the appropriate vehicle for interpreting agreements concerning property, it is irrelevant in the alimony context.[79]

Fourth, the court of appeals in *Frey* has shown a willingness to refashion an outmoded rule in accordance with current public interests.[80] The result in *Frey* is consistent with the court's perception of the changes in societal perceptions concerning divorce, and the court was correct in its decision to eliminate the absolute bar to antenuptial agreements contemplating divorce. By requiring full disclosure in every agreement and that fairness be measured at the time of separation or divorce, the *Frey* court has correctly mandated a stricter validity test for agreements effecting support. Further, since support needs cannot be accurately foreseen, measuring the fairness of the provision at the time of its effect is more apt to result in adequate support and, therefore, is more responsive to the state's interest in spousal support. Once a means of modifying these agreements is provided, the new approach will prove to be an equitable balance between individual and state interests.

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sistently with her welfare. McClellan v. McClellan, 52 Md. App. 525, 531, 451 A.2d 334, 338 (1982). When a confidential relationship exists the burden shifts to the husband to prove that the agreement was fair. Absent proof of a confidential relationship, a separation agreement is presumed valid. *Id.* at 531, 451 A.2d at 338-39 (citing Cronin v. Hebditch, 195 Md. 607, 74 A.2d 50 (1950)).

79. *Frey*, 298 Md. at 565, 471 A.2d at 711-12 (Smith, J., dissenting).

80. That the court has the power and authority to do so is well-established. *Id.* at 562, 471 A.2d at 707-08 (citing Boblitz v. Boblitz, 296 Md. 242, 462 A.2d 506 (1983)).