

Gross v. Gross: Ohio's First Step Toward Allowing Private Ordering of the Marital Relationship

I. INTRODUCTION

A. *The Changing Marital Relationship, Private Ordering, and Marital Contracts*

In the last twenty years many changes have occurred in the institution of marriage. Divorce has become commonplace,¹ the rate of remarriage has increased along with the rate of divorce,² and traditional marriage roles have been redefined.³ Married, single, and divorced women are now more economically independent due to greater job opportunities and increasing employment of women.⁴ No-fault divorce statutes and recent United States Supreme Court cases⁵ promoting private ordering of the marital relationship have also weakened the states' role in regulating marriage.

The changes in the marital relationship have caused some states to reverse prior law and validate antenuptial agreements.⁶ An antenuptial, or prenuptial, agreement is a contract entered into by a couple in contemplation of marriage in which the property rights and economic interests of either the prospective wife, or husband, or both, are determined and set forth.⁷ The partners agree upon the distribution of each spouse's assets and spousal support payments in the event of divorce.

The typical antenuptial contract is made by those marrying later in life or by those who have been previously married and have children from the prior marriage(s).⁸ These individuals often have had time to collect assets which they want to pass on to their children or to other specific persons. As the divorce and remarriage rates climb, there are increasing numbers of couples with these concerns. Thus, the

1. The most recent U.S. Dept. of Health and Human Services statistics show that from 1965 to 1979 the rate of divorce increased from 2.5 to 5.4 people per 1,000 of total population, representing an increase from 479,000 to 1,181,000 divorces per year. VITAL STATISTICS OF THE UNITED STATES 1979, Vol. III—MARRIAGE AND DIVORCE, Table 2-1, p. 2-5 (1984).

2. Compare VITAL STATISTICS OF THE UNITED STATES 1969, Vol. III—MARRIAGE AND DIVORCE, Table 1-10, p. 1-10 (1972) with VITAL STATISTICS OF THE UNITED STATES 1979, Vol. III—MARRIAGE AND DIVORCE, Table 1-10, p. 1-11 (1984) (showing that from 1969 to 1979 the rate of remarriages increased from 17.6% to 25.3% for women and from 18.5% to 27.3% for men). See also VITAL STATISTICS OF THE UNITED STATES 1966, Vol. III—MARRIAGE AND DIVORCE, Table 1-10 (1969).

3. L. WEITZMAN, THE MARRIAGE CONTRACT 168 (1981).

4. In 1950, 42.8% of women over 16 worked outside the home compared to 61.4% in 1980. 1980 CENSUS OF THE POPULATION, Vol. 1, Ch. C, Part 1, Fig. 18, p. 1-10m (1983).

5. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state has limited control over the type of birth control used by spouses); *Orr v. Orr*, 440 U.S. 268 (1979) (husband and wife may have an equal duty of support).

6. Those states validating antenuptial agreements with provisions for divorce include: Arkansas, *LeFevers v. LeFevers*, 240 Ark. 992, 403 S.W.2d 65 (1966); Colorado, *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); Connecticut, *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Florida, *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); Illinois, *Volod v. Volod*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Nevada, *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); Ohio, *Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984); Oklahoma, *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); and Oregon, *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973).

7. *Gross v. Gross*, 11 Ohio St. 3d 99, 102, 464 N.E.2d 500, 504 (1984). Antenuptial agreements providing for child custody or visitation have not been enforced because the states believe they have a responsibility to form judicial decrees which will protect the best interests of the children of divorce. See OHIO REV. CODE ANN. § 3109.05 (Page 1980 & Supp. 1984).

8. Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979); Moore, *The Enforceability of Premarital Agreements Contingent upon Divorce*, 10 OHIO N.U.L. REV. 11 (1983).

use of antenuptial contracts has increased and represents an efficient way for these couples to order their relationships privately.⁹

Most states have long allowed premarital agreements which regulate the devolution of property at the death of one spouse as long as a disclosure of assets was made at the execution of the contract and no coercion was involved.¹⁰ Courts have said that premarital agreements containing provisions for property division at death promote marital tranquility.¹¹ By contrast, the prevailing law in the United States on antenuptial agreements regulating property division and spousal support payments upon divorce has been that these agreements are void as against public policy.¹² Public policy reasons for invalidating these agreements have included: (1) the agreements tend to encourage divorce; (2) the contracts tend to commercialize marriage; (3) the agreements may result in economically dependent spouses becoming dependent upon the state for support; (4) the contracts are inconsistent with the husband's duty to support his wife; (5) the contracts are unfair because of the husband's greater knowledge of business and his dominance over the wife; and (6) the contracts are unfair because of the long interval between the contract's formation and the end of the marriage.¹³ However, because social changes such as women's increased independence and the public's acceptance of divorce have negated many of these problems, courts are beginning to view antenuptial agreements with divorce provisions positively—as promoting marriages later in life and second marriages.¹⁴

B. The New Ohio Supreme Court Requirements

In 1984 the Ohio Supreme Court was faced for the first time with the issue of the validity of an antenuptial agreement providing for divorce in *Gross v. Gross*.¹⁵ The court had previously validated antenuptial agreements providing for the devolution of property on one spouse's death.¹⁶ However, lower Ohio courts had reached varying results with respect to antenuptial agreements with divorce provisions.¹⁷

Like other states' courts that have recently validated antenuptial agreements with provisions for divorce, the Ohio Supreme Court in *Gross* believed changes "in the attitudes and mores surrounding marriage" mandated that these agreements be

9. See Clark, *supra* note 8; Moore, *supra* note 8.

10. See *Remington v. Remington*, 69 Colo. 206, 209, 193 P. 550, 551 (1920); *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962); *Wetsel v. Firebaugh*, 258 Ill. 404, 407, 101 N.E. 602, 604 (1913); *In re Muxlow's Estate*, 367 Mich. 133, 137, 116 N.W.2d 43, 45 (1962).

11. *Stilley v. Folger*, 14 Ohio 610, 649 (1846).

12. See Moore, *supra* note 8, at 12.

13. *Id.* at 12-18.

14. See *LeFevers v. LeFevers*, 240 Ark. 992, 993, 403 S.W.2d 65, 66 (1966); *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 46-47, 359 A.2d 719, 721 (1976); *Posner v. Posner*, 233 So.2d 381, 384 (Fla. 1970); *Volid v. Volid*, 6 Ill. App. 3d 386, 390, 286 N.E.2d 42, 46 (1972); *Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 603-04 (1973); *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984); *Unander v. Unander*, 265 Or. 102, 107, 506 P.2d 719, 721 (1973).

15. 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984).

16. *Juhasz v. Juhasz*, 134 Ohio St. 257, 16 N.E.2d 328 (1938); *Stilley v. Folger*, 14 Ohio 610 (1846).

17. *Gross v. Gross*, 4 Ohio Bar 64 (Ct. App. 1983); *Benza v. Benza*, No. 171, slip op. (Ohio Ct. App. Mar. 29, 1978); *Dearbaugh v. Dearbaugh*, 110 Ohio App. 540, 170 N.E.2d 262 (1959); *Kennedy v. Kennedy*, 11 Ohio App. 399 (1919).

validated.¹⁸ The court in *Gross* listed these changes as the greater frequency of divorce and remarriage, the percentage drop in marriage among our citizens (indicating that the court thought antenuptial contracts would promote marriage), the adoption by a number of states of the Uniform Marriage and Divorce Act¹⁹ (which allows courts to consider premarital agreements in framing a divorce decree), and most significantly, the widespread adoption of no-fault divorce laws.²⁰ Ohio Revised Code section 3105.63,²¹ which allows divorcing spouses to draft their own separation agreement, indicated that Ohio should accept antenuptial agreements which have the same purpose. Finally, the court stated that "these changes have altered the public policy view toward antenuptial agreements made in contemplation of a possible divorce."²²

In light of changing public attitudes and to eliminate the conflict among the lower Ohio courts, the Ohio Supreme Court in *Gross* resolved three major issues involved in antenuptial contracts with provisions for divorce. First, the court held that because of the changing attitudes on marriage, antenuptial agreements "containing provisions for the disposition of property and setting forth amounts to be paid as sustenance alimony" on divorce are not contrary to public policy.²³ The court set forth three requirements for valid and enforceable antenuptial agreements: (1) they must be "entered into freely without fraud, duress, coercion or overreaching"; (2) there must have been "a full disclosure or full knowledge, and understanding, of the nature, value and extent of the prospective spouse's property"; and (3) the terms must not "promote or encourage divorce or profiteering by divorce."²⁴ Second, the court held that these agreements may be enforced by the party at fault in the divorce in the absence of an express provision to the contrary.²⁵ Last, the court held that although a court cannot modify property allocation provisions in these agreements at the time of divorce, the trial court can modify the alimony provisions if the provisions are unconscionable at the time of divorce because of changed circumstances.²⁶

In resolving these issues, the Ohio Supreme Court referred to recent cases from other jurisdictions which had considered them.²⁷ These courts used family law and contract law principles to resolve the issues presented in the cases before them. Many courts have applied these principles selectively according to the holding they wished to achieve.²⁸

After referring to cases from other jurisdictions, the Ohio Supreme Court in *Gross* also applied contract law and family law principles to produce a test for

18. 11 Ohio St. 3d 99, 104, 464 N.E.2d 500, 505 (1984).

19. UNIFORM MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 218 (1979).

20. 11 Ohio St. 3d 99, 104, 464 N.E.2d 500, 505 (1984).

21. OHIO REV. CODE ANN. § 3105.63 (Page 1980 & Supp. 1984).

22. 11 Ohio St. 3d 99, 104, 464 N.E.2d 500, 505 (1984).

23. *Id.* at 105, 464 N.E.2d at 506.

24. *Id.*

25. *Id.* at 108, 464 N.E.2d at 508.

26. *Id.* at 109, 464 N.E.2d at 509.

27. *Id.* at 104-05, 464 N.E.2d at 505-06. In particular, the Ohio Supreme Court in *Gross* relied on *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) and *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

28. See L. WEITZMAN, *supra* note 3, at 340-41.

validating antenuptial agreements providing for divorce. According to the court in *Gross*, a valid antenuptial agreement must comply with the contract law²⁹ requirements of disclosure and lack of fraud, duress, coercion, and overreaching. The court reaffirmed a traditional family law policy reason³⁰ for not enforcing antenuptial agreements by requiring that the agreement must not promote or encourage divorce or profiteering by divorce. The court also applied the family law concept of "changed circumstances," long used by family courts as a reason to modify alimony and child support decrees³¹ and to invalidate and modify sustenance alimony provisions in antenuptial agreements. In *Gross* the Ohio Supreme Court merged these contract and family law principles to form a three-part test and a guideline for the modification of spousal support provisions.

C. Scope

This Comment will discuss the problems associated with applying family law and contract law principles to validate antenuptial agreements with provisions for divorce. It will assert that new rules must be established to replace some of these principles because the purposes and policies underlying antenuptial agreements are different from those associated with a commercial contract and from a judicial decree or a separation agreement formed at the time of divorce. The disclosure and lack of fraud and coercion requirements will be discussed, along with the problems involved in requiring that the agreement must not promote divorce or profit from divorce. The "changed circumstances" test for invalidating sustenance alimony provisions at divorce will also be critiqued and compared with more appropriate reasons for modification used by other jurisdictions. Finally, this Comment will assert that courts should be able to modify unconscionable property division provisions in the same way they modify unconscionable sustenance alimony provisions.

II. OHIO'S EARLIER CASE LAW

Before discussing the decision in *Gross*, it is necessary to understand the case law that helped shape the Ohio Supreme Court's holding. Although the Ohio Supreme Court had never reviewed an antenuptial agreement with provisions for divorce before *Gross*, several Ohio lower courts had ruled on the validity of these agreements.³²

The Ohio Supreme Court has reviewed antenuptial agreements providing for property division at death several times in the past.³³ The court first validated this

29. 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984). The court stated that these terms would be applied to antenuptial agreements by using their "generally accepted meaning." *Id.* Since these terms have usually been used to review commercial contracts, their generally accepted meaning is that used in commercial contract law.

30. See *supra* text accompanying note 13.

31. See OHIO REV. CODE ANN. §§ 3105.18, 3109.05 (Page 1980 & Supp. 1984).

32. *Gross v. Gross*, 4 Ohio Bar 64 (Ohio Ct. App. 1983); *Benza v. Benza*, No. 171, slip op. (Ohio Ct. App. Mar. 29, 1978); *Dearbaugh v. Dearbaugh*, 110 Ohio App. 540, 170 N.E.2d 262 (1959); *Kennedy v. Kennedy*, 11 Ohio App. 399 (1919).

33. *Southern Ohio Sav. Bank & Trust Co. v. Burkhart*, 148 Ohio St. 149, 74 N.E.2d 67 (1947); *Juhasz v. Juhasz*, 134 Ohio St. 257, 16 N.E.2d 328 (1938); *Stilley v. Folger*, 14 Ohio 610 (1846).

type of agreement in 1846 in *Stilley v. Folger*,³⁴ declaring that public policy favored antenuptial agreements which provide for the enjoyment of property during marriage or at the death of one of the spouses, because these agreements tend to promote domestic happiness by removing a frequent cause of family disputes.³⁵ The court held that this type of contract was enforceable if it was bona fide and contained reasonable provisions for the wife.³⁶ A major factor in the court's decision to validate the agreement in *Stilley* was that the agreement barred the wife's dower right, and the decision to forego a dower interest had been previously allowed in Ohio through a different process.³⁷

In 1938, the Ohio Supreme Court established guidelines in *Juhasz v. Juhasz*³⁸ to determine the enforceability of antenuptial agreements with provisions for property division at death. The wife of the decedent in *Juhasz* claimed that she was not bound by a prenuptial agreement providing for property division at the death of her spouse.³⁹ The court first stated that an agreement to marry gives rise to a confidential relationship between the contracting parties.⁴⁰ The court also held that an antenuptial contract entered into during engagement is valid when the provision reflects a voluntary, intelligent, and knowing decision by the aggrieved spouse.⁴¹ The court held that when the amount provided for the surviving spouse is disproportionate to the decedent spouse's estate and to the amount the surviving spouse would take at law, the burden is on those claiming the validity of the contract to show that the decedent spouse made a full disclosure to the surviving spouse of "the nature, extent and value of the intended husband's property" or that the surviving spouse "had full knowledge thereof without such disclosure."⁴² The court also held that if the surviving spouse had had full knowledge of the assets or if full disclosure had been made and the surviving spouse voluntarily had entered into the contract, the surviving spouse would be bound by the agreement.⁴³ Using these guidelines, the court ruled in *Juhasz* that the wife was bound by the agreement.⁴⁴

The 1982 Ohio Supreme Court decision in *Hook v. Hook*,⁴⁵ a case involving facts similar to those in *Juhasz*, reaffirmed the *Juhasz* guidelines for determining the enforceability of antenuptial agreements with provisions for property division at

34. 14 Ohio 610 (1846).

35. *Id.* at 649.

36. *Id.*

37. *Id.* at 650. A wife was permitted to forego her dower interest voluntarily through a process called jointure. An early Ohio statute, Swans Statutes 296, § 2 (1824), provided for and described the process of jointure: "If any estate shall be conveyed to a woman as jointure, to take effect immediately after the death of her husband, and to continue during her life; such conveyance shall bar her right to dower." The court said the antenuptial agreement became an equitable jointure under Swans Statutes 198, § 2 (1824). *Id.*

38. 134 Ohio St. 257, 16 N.E.2d 328 (1938).

39. *Id.* at 268, 16 N.E.2d at 333.

40. *Id.* at 264, 16 N.E.2d at 331.

41. *See id.* at 264-65, 16 N.E.2d at 331.

42. *Id.* at 264, 16 N.E.2d at 331.

43. *Id.* at 264-65, 16 N.E.2d at 331.

44. *Id.* at 269-70, 16 N.E.2d at 333-34. While the court applied the guidelines discussed *supra* in text accompanying notes 41-43, the court decided against the wife because the statute of limitations had expired. *Id.* at 270, 16 N.E.2d at 334.

45. 69 Ohio St. 2d 234, 431 N.E.2d 667 (1982).

death. In *Hook* the court ruled that a surviving spouse is bound by a disproportionate distribution of the estate at the death of the other spouse if the surviving spouse had voluntarily entered, after full disclosure, into an antenuptial agreement providing for this disproportionate amount.⁴⁶

In *Southern Ohio Savings Bank & Trust Co. v. Burkhart*,⁴⁷ decided in 1947, a couple had drafted an antenuptial agreement which granted the wife support payments after the husband's death.⁴⁸ The husband divorced the wife for gross neglect of duty.⁴⁹ Two years after the divorce the ex-husband died.⁵⁰ Although they had divorced, the ex-wife attempted to enforce the agreement.⁵¹ The Ohio Supreme Court held that the marriage had been the consideration for, and thus a term of, the agreement, and had been breached by the wife's aggression. Therefore, the court held that the agreement was void.⁵² Although the court was ruling on an antenuptial agreement providing for property division at death, the court's position was that when a marriage ended by divorce an antenuptial agreement would no longer be valid due to the lack of consideration.⁵³

Ohio's lower courts had also reviewed antenuptial agreements with property division and sustenance alimony provisions for divorce in several cases prior to the Ohio Supreme Court's 1984 decision in *Gross*. As in *Burkhart*, most of these lower courts considering a prenuptial contract with divorce provisions invalidated the agreement at issue because of the enforcing party's wrongdoing that caused the divorce. The first Ohio case to make this ruling, *Kennedy v. Kennedy*,⁵⁴ decided in 1919, was also the first reported case in Ohio to consider the validity of an antenuptial agreement which takes effect upon divorce. In *Kennedy* the Court of Appeals for Cuyahoga County held that the husband's gross neglect of duty that caused the divorce also constituted a breach of the antenuptial agreement.⁵⁵ Therefore, the wife was allowed to rescind the agreement.⁵⁶

Forty years later, the Court of Appeals for Shelby County in *Dearbaugh v. Dearbaugh*⁵⁷ also ruled that a prenuptial agreement cannot be enforced by the spouse whose wrongdoing caused the divorce. In *Dearbaugh* the court would not allow the husband to enforce an antenuptial agreement at divorce because the wife had been granted a divorce on the ground of the husband's extreme cruelty.⁵⁸

Thus, the courts in *Dearbaugh*, *Kennedy*, and *Burkhart* based their invalidation of agreements on the theory that marriage itself is the consideration for, and thus a term of, the antenuptial contract. In these cases when one party caused the marriage

46. *Id.* at 236, 431 N.E.2d at 669.

47. 148 Ohio St. 149, 74 N.E.2d 67 (1947).

48. *Id.* at 149, 74 N.E.2d at 67.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 152-53, 74 N.E.2d at 68-69.

53. *Id.* at 151-52, 74 N.E.2d at 68.

54. 11 Ohio App. 399 (1919).

55. *Id.* at 401.

56. *Id.* at 402.

57. 110 Ohio App. 540, 170 N.E.2d 262 (1959).

58. *Id.* at 542, 170 N.E.2d at 263.

to terminate through that party's own wrongdoing, that party could no longer enforce the agreement.

One recent unreported Ohio case, however, used a different method to determine the enforceability of antenuptial agreements. In *Benza v. Benza*⁵⁹ the Court of Appeals for Warren County examined the intent of the parties at the time of the execution of the agreement to determine enforceability and rejected the rationale used in *Dearbaugh*, *Kennedy*, and *Burkhart*. The court in *Benza* was not ruling on the validity of the contract, because the contract had been determined to be valid and binding in a previous action from which no appeal had been taken.⁶⁰ However, in dicta the *Benza* court stated that the antenuptial agreement in that case should be enforced because "when considered from its four corners, the antenuptial agreement is so comprehensive as to include a waiver of any right to alimony by the parties thereto."⁶¹

Prior to the Ohio Supreme Court decision in *Gross*, the *Benza* holding represented a minority view. Most of the lower Ohio courts followed the *Burkhart* rule and would not allow the party at fault in a divorce to enforce an antenuptial agreement. Because no-fault divorce has only recently been enacted in Ohio,⁶² the majority rule meant that at least one spouse, the spouse at fault, could not enforce the agreement.

III. *GROSS v. GROSS*

A. *The Trial Court Decision*

The trial court in *Gross*, the Franklin County Court of Common Pleas, Division of Domestic Relations, relying on *Benza*,⁶³ held that the parties had intended through their antenuptial agreement to set forth the property and support rights of each spouse upon divorce.⁶⁴ *Gross* involved a typical antenuptial agreement because both spouses had been previously married and Mr. Gross attempted through the agreement to preserve his assets for his sons from a prior marriage.⁶⁵ The trial court incorporated the divorce provisions in the Grosses' antenuptial agreement into the divorce decree.⁶⁶ The agreement contained the following property division and support provisions: (1) that the wife would be entitled to a maximum of \$200 per month sustenance alimony if the court decided to grant her alimony; (2) that she would not receive any of her husband's property on divorce except for one-half the equity in the marital residence; (3) that the wife would be entitled to all the furniture and personal

59. No. 171, slip op. (Ohio Ct. App. Mar. 29, 1978).

60. See *Gross v. Gross*, 4 Ohio Bar 64, 67 (Ct. App. 1983).

61. No. 171, slip op., 4 (Ohio Ct. App. Mar. 29, 1978).

62. Ohio's no-fault divorce statute, OHIO REV. CODE ANN. § 3105.01 (K) (Page 1980 & Supp. 1984) was enacted in 1974.

63. See the appeals court decision in *Gross v. Gross*, 4 Ohio Bar 64, 67 (Ct. App. 1983).

64. *Id.* at 65.

65. *Gross v. Gross*, 11 Ohio St. 3d 99, 100, 464 N.E.2d 500, 502 (1984).

66. *Gross v. Gross*, 4 Ohio Bar 64, 65 (Ct. App. 1983).

property other than her husband's purely personal property; (4) that the husband would create, by will or trust, a trust for the wife with a principal of the lesser of \$200,000 or twenty percent of the husband's net estate.⁶⁷ The agreement also provided that the husband would not pay for the wife's attorney's fees or costs for a divorce.⁶⁸

B. *The Appellate Court Decision*

The Court of Appeals for Franklin County reversed the trial court's holding, stating that the trial court erred in validating the divorce provisions in the agreement and including them in the divorce decree.⁶⁹ The court of appeals believed that the trial court should not have followed *Benza*, but rather should have applied the Ohio Supreme Court's rule established in *Burkhart* and followed in *Dearbaugh* and *Kennedy*.⁷⁰ Because the wife was granted a divorce due to the husband's extreme cruelty in *Gross*, the court of appeals held that the husband could not enforce the antenuptial agreement.⁷¹

Judge Moyer concurred in the judgment but disagreed with the majority's reasoning.⁷² He stated that the Ohio Supreme Court should re-examine the broad rule it pronounced in *Burkhart* because of the rule's inflexibility and all-encompassing nature.⁷³ He felt that reconsideration was particularly important because the Ohio Supreme Court had not examined the issue since 1947.⁷⁴

Judge Moyer also stated that, at a minimum, the Ohio Supreme Court should hold that an antenuptial agreement should bind the parties if the court determines that the agreement did not encourage the divorce.⁷⁵ He believed that the testimony showed that the Grosses' agreement promoted, rather than discouraged, their thirteen-year marriage because the husband would not have married without the agreement.⁷⁶ He also believed that the Grosses' agreement was conscionable because at the agreement's formation each spouse was represented by an attorney (Mrs. Gross' attorney had advised her not to sign the agreement)⁷⁷ and a complete list of each party's assets was attached to the agreement.⁷⁸

C. *The Ohio Supreme Court Decision*

On appeal, the Ohio Supreme Court did reexamine the *Burkhart* rule in *Gross* and reversed the appellate court's decision, holding that the husband's marital

67. *Gross v. Gross*, 11 Ohio St. 3d 99, 101, 464 N.E.2d 500, 503 (1984).

68. *Id.*

69. *Gross v. Gross*, 4 Ohio Bar 64, 67-68 (Ct. App. 1983).

70. *Id.* at 67.

71. *Id.*

72. *Id.* at 70 (Moyer, J., concurring).

73. *Id.* at 69.

74. *Id.*

75. *Id.*

76. *Id.* at 70.

77. *Id.* at 69.

78. *Gross v. Gross*, 11 Ohio St. 3d 99, 101, 464 N.E.2d 500, 503 (1984).

misconduct did not affect the enforceability of the agreement.⁷⁹ The court suggested that the mutual promises of the spouses, rather than the marriage, are the consideration for a prenuptial agreement.⁸⁰ The court replaced the old law with a three-part test of disclosure, nonpromotion of divorce, and lack of fraud, duress, coercion, or overreaching.⁸¹ The court also approved the *Benza* rationale by stating that "the intent of the parties at the time of the execution of the agreement is also of prime importance."⁸²

The Ohio Supreme Court upheld the property division allocation in *Gross* after applying the three-part test.⁸³ Although the support provisions were also valid according to the three-part test, the court ordered increased support to the wife because of "changed circumstances" which caused the provisions to be unconscionable:⁸⁴ the husband's wealth had substantially increased after the execution of the agreement. The court believed that the underlying state interest in the wife's welfare permitted the state to require that the wife's standard of living be maintained at this new level.⁸⁵

IV. ANALYSIS OF THE OHIO SUPREME COURT'S NEW RULES IN *GROSS*

A. Disclosure and Lack of Fraud, Duress, Coercion, and Overreaching

The Grosses' agreement passed the first two requirements of the Ohio Supreme Court's three-part test which required a lack of "fraud, duress, coercion or overreaching" in executing the agreement and "full disclosure, or full knowledge, and understanding, of the nature, value and extent of the prospective spouse's property."⁸⁶ The guidelines the court gave for applying these two requirements were brief. The court stated that the elements of the first condition—lack of fraud, duress, coercion, and overreaching—should be applied by using their generally accepted meanings.⁸⁷ The court further defined overreaching as "one party by artifice or cunning, or by significant disparity to understand the nature of the transaction, to

79. *Id.* at 108, 464 N.E.2d at 508.

80. *Id.* at 107, 464 N.E.2d at 508.

81. *Id.* at 105, 464 N.E.2d at 506; see also *supra* text accompanying note 24.

82. *Id.* at 107, 464 N.E.2d at 508.

83. *Id.* at 108-09, 464 N.E.2d at 509.

84. *Id.* at 109, 111, 464 N.E.2d at 509, 510. On remand for a more lucrative sustenance alimony determination for Mrs. Gross, the Franklin County Common Pleas Court, Division of Domestic Relations awarded Mrs. Gross \$2,500 per month in sustenance alimony. The common pleas court did not grant Mrs. Gross' \$60,000 attorney fees, thus, the court enforced the provision in the couple's antenuptial agreement which stated that on divorce Mr. Gross would not pay for Mrs. Gross' attorney's fees. However, the court said that even if an antenuptial agreement disallowed attorney fees, in the proper case attorney fees might be granted as part of the maintenance alimony where the dispute was solely about the maintenance alimony. On appeal, the Franklin County Court of Appeals affirmed the common pleas court decision. Judge Whiteside, however, stated in his separate opinion that the sustenance alimony awarded was unconscionable considering: (1) that Mr. Gross' 1981 income was \$359,887, (2) Mr. Gross' assets were worth approximately \$8,000,000, (3) Mrs. Gross had incurred legal fees of \$60,000, and (4) the couple had enjoyed a high standard of living. Judge Whiteside stated the minimum reasonable sustenance alimony to award in this case would have been \$4,000 per month. *Gross v. Gross*, No. 85AP-32, slip op. at 2758 (Ohio 10th Dist. Ct. App. Sept. 19, 1985).

85. *Gross v. Gross*, 11 Ohio St. 3d 99, 110, 464 N.E.2d 500, 510 (1984).

86. *Id.* at 105, 464 N.E.2d at 506.

87. *Id.*

outwit or cheat the other.”⁸⁸ The court stated that the second requirement in the three-part test, disclosure, “would be satisfied either by attaching a list of the parties’ assets to the agreement, or by showing that there had been a full disclosure by other means.”⁸⁹

Both disclosure (or lack of misrepresentation) and lack of fraud, duress, coercion, and overreaching are basic and necessary contract requirements, especially when applied to antenuptial agreements. In *Gross* the Ohio Supreme Court stated that because the parties are facing an anticipated marriage when drafting the antenuptial agreement, they are in a fiduciary relationship and they “must act in good faith, with a high degree of fairness and disclosure of all circumstances which materially bear on the antenuptial agreement.”⁹⁰ Because of this trusting and confidential relationship, there is an increased opportunity for coercion or overreaching by the stronger party. Therefore, the need to determine that there was no fraud, coercion, or overreaching and that there was a truthful disclosure of assets by both prospective spouses at the execution of an antenuptial agreement is crucial.

Other courts and commentators have also declared that engaged couples are in a fiduciary relationship requiring a high degree of good faith in executing a contract.⁹¹ The Florida Supreme Court in *Del Vecchio v. Del Vecchio*⁹² recognized this relationship by stating, “[s]ince [parties to an antenuptial agreement] do not deal at arm’s length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.”⁹³ Professor Homer Clark, of the University of Colorado Law School, has stated that there is an affirmative duty imposed upon each prospective spouse to disclose his or her financial status and that this duty goes beyond what is normally required for commercial contracts because of the confidential relationship involved.⁹⁴ Thus, the basic contract principles of full disclosure and lack of overreaching are particularly necessary requirements for the formation of antenuptial contracts executed by individuals in the trusting and confidential engagement relationship.

These first two prongs of the Ohio Supreme Court’s three-part test also enable Ohio courts to focus on the procedural soundness of the antenuptial agreement at the time of formation, rather than allowing the courts to make a substantive review of the provisions. Lenore Weitzman, in her book *The Marriage Contract*, advocates a procedural rather than substantive review of antenuptial agreements because a substantive review allows judges to use their own discretion to determine what is best for the parties.⁹⁵ Weitzman believes that because a procedural review precludes judicial bias, it furthers the private ordering policy and allows couples to realize their

88. *Id.*

89. *Id.*

90. *Id.* at 108, 464 N.E.2d at 509.

91. *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982); *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 21 (Fla. 1962); *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 502 (1950) (superseded by Wis. STAT. § 767.255 (1977)); Clark, *supra* note 8, at 144; Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 720 (1972).

92. 143 So. 2d 17 (Fla. 1962) (disclosure rule superseded by FLA. STAT. 732.702(2) (1983)).

93. *Id.* at 21.

94. See Clark, *supra* note 8, at 144.

95. See L. WEITZMAN, *supra* note 3, at 353–59.

expectation interests.⁹⁶ Use of the contract principles of disclosure and lack of fraud and coercion to determine the validity of the antenuptial contract allows fair review of agreements for conscionability and provides couples with the greatest amount of drafting freedom.

Although the lack of fraud, coercion, duress, and overreaching requirements allow a great deal of flexibility in drafting and are necessary to the formation of a conscionable antenuptial contract, Ohio courts may have to develop new rules for their application to antenuptial agreements. The Ohio Supreme Court in *Gross* did define how the term "overreaching" is to be applied to antenuptial contracts.⁹⁷ However, the court did not explain how the terms "fraud," "coercion," and "duress" are to be applied to antenuptial contracts. Black's Law Dictionary defines "fraud" as an intentional perversion of the truth to induce another to part with a valuable legal right.⁹⁸ "Duress" is defined as illegal imprisonment or threat of harm used to induce another to act contrary to his free will,⁹⁹ and "coercion" is similarly defined as "compelling by force or arms or threat."¹⁰⁰

Although they have general definitions, these terms usually have been applied only to commercial contracts. Professor Clark's discussion of greater disclosure and good faith requirements in antenuptial contracts as compared to commercial contracts demonstrates the need for new definitions for commercial contract terms when applied to antenuptial agreements.¹⁰¹ Until these new rules are developed, drafters and courts may face some confusion. Ohio courts should not return to outdated rules. An Ohio court could easily interpret "coercion" or "overreaching" to mean that the provisions for the economically dependent spouse must be "fair and reasonable," as stated by the Ohio Supreme Court in *Juhasz*.¹⁰² Such an interpretation could cause a regression of the private ordering policy.

The Missouri case of *Ferry v. Ferry*¹⁰³ presented an example of the difficulties inherent in using commercially applied principles for the review of antenuptial contracts.¹⁰⁴ As in *Gross*, the Missouri appellate court in *Ferry* did not explain how to apply commercial contract terms to antenuptial agreements. The *Ferry* court stated that the standard of conscionability for an antenuptial agreement would be the same conscionability standard used in commercial contract law.¹⁰⁵ One commentator has pointed out that the commercial contract standard of conscionability in the Uniform Commercial Code is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the

96. *Id.*

97. See *supra* text accompanying note 88.

98. BLACK'S LAW DICTIONARY 594 (5th ed. 1979).

99. *Id.* at 452.

100. *Id.* at 234.

101. See *supra* text accompanying note 94.

102. *Juhasz v. Juhasz*, 134 Ohio St. 257, 264, 16 N.E.2d 328, 331 (1938); see also *supra* text accompanying note 41.

103. 586 S.W.2d 782 (Mo. Ct. App. 1979).

104. Note, *Antenuptial Contracts Contingent upon Divorce Are Not Invalid Per Se*, 46 Mo. L. Rev. 228 (1981).

105. 586 S.W.2d 782, 786 (Mo. Ct. App. 1979).

making of the contract.”¹⁰⁶ This commentator correctly states that it is difficult to see how a test of conscionability that uses concepts such as “commercial needs” and “commercial background” is to be adapted to antenuptial agreements.¹⁰⁷ He asserts that the *Ferry* court, by its own terms, did not apply this standard of conscionability,¹⁰⁸ and that this lack of definition would only confuse drafters and couples considering marriage.¹⁰⁹

The definition of disclosure given by the Ohio Supreme Court in *Gross* may also cause Ohio courts difficulty when applied to certain fact situations. As long as the parties have attached a complete and truthful list of their assets to the agreement at the time of formation, the disclosure requirement, according to the Ohio Supreme Court, will be fulfilled.¹¹⁰ The court also stated that, in lieu of an attached list, a showing that there had been a full disclosure by other means may be made¹¹¹ (however, because of the difficulty in ascertaining what other means of disclosure a court may accept, commentators have advised that attaching a list of assets is best to avoid later problems).¹¹² Professor Homer Clark also suggests that each spouse should be advised by his or her own lawyer, because reliance by an economically dependent spouse upon the independent spouse’s lawyer may cause unconscionability problems.¹¹³

Professor Charles Gamble believes that because the courts have not applied the disclosure requirement equally to both the spouses, the economically independent spouse makes a greater showing of disclosure than the economically dependent spouse.¹¹⁴ He believes that the economically dependent spouse should have a duty to inquire equal to that of the economically independent spouse’s duty to disclose.¹¹⁵ In light of the increasing equivalence of wealth between the sexes, the equal imposition of this duty may not be as objectionable in the future. In the meantime, Ohio courts should apply this rule in like manner to both the economically dependent and independent spouses.

As antenuptial agreements become more popular, Ohio courts will further define the disclosure and lack of fraud, duress, and coercion requirements, thereby eliminating the present ambiguity problem of applying these commercial contract terms to antenuptial agreements. Generally, these requirements are well suited to antenuptial agreements, because they allow private ordering with minimal interference from the courts.

106. See Note, *supra* note 104, at 234 (emphasis omitted). See also U.C.C. § 2-302, Official Comment (1978).

107. See Note, *supra* note 104, at 235.

108. *Id.*

109. *Id.* at 237.

110. *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984).

111. *Id.*

112. See Clark, *supra* note 8, at 146, and Note, *supra* note 104, at 238.

113. See Clark, *supra* note 8, at 146.

114. See Gamble, *supra* note 91, at 723-24.

115. *Id.* at 726.

B. Promotion of Divorce

The third prong of the three-part test pronounced by the Ohio Supreme Court in *Gross* is the family law requirement, espoused in many prior domestic cases,¹¹⁶ that the antenuptial agreement's provisions not "promote or encourage divorce or profiteering by divorce."¹¹⁷ The court stated that one example of promotion of divorce would be "where the parties enter into an antenuptial agreement which provides a significant sum either by way of property settlement or alimony at the time of a divorce, and after the lapse of an undue [sic] short period of time one of the parties abandons the marriage or otherwise disregards the marriage vows."¹¹⁸

Because the court gave only this one example of a provision which would be invalid because it encourages divorce, domestic relations courts are left to determine other situations which may promote divorce. Whenever a couple divorces within a short time after the marriage ceremony, a domestic relations court may now use its discretion to find that because one party benefits from the agreement, the agreement promotes divorce. The Kansas Supreme Court in *Fincham v. Fincham*¹¹⁹ held that a provision in an antenuptial agreement entitling the husband to pay the wife \$2000 in complete settlement of every claim the wife might have against him was invalid because it promoted divorce.¹²⁰ The court theorized that the husband would have realized that he could end the marriage at the cost of only \$2000.¹²¹ Under *Gross*, an Ohio domestic relations court could also find that such a provision may be a contributing cause to a divorce, because the court has great discretion in interpreting the phrase "promoting or encouraging divorce or profiteering from divorce."

Professor Gamble agrees that drafters and prospective spouses face a difficult task if it is necessary to write provisions that a court could not interpret as promoting divorce:

It would be an insurmountable challenge to draft an antenuptial contract settling property rights in such terms that it would not be profitable, in a pecuniary sense, for one spouse or the other to seek a divorce. Practically every conceivable antenuptial contract looking toward financial settlement would, in this sense, encourage divorce.¹²²

According to Gamble, the only way that a prospective couple can meet the test of nonpromotion of divorce is to "strike upon some mysterious formula"¹²³ that would divide the couple's property as the divorce court would ultimately divide it. At a minimum, under this rule, the provisions must be agreeable to the divorce court. Requiring court approval of the provisions undercuts the private ordering benefit of antenuptial agreements and destroys the parties expectation interests as well.

116. See, e.g., *Fincham v. Fincham*, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946); *Appleby v. Appleby*, 100 Minn. 408, 426, 111 N.W. 305, 310 (1907); *Fricke v. Fricke*, 257 Wis. 124, 127-28, 42 N.W.2d 500, 502 (1930); *Crouch v. Crouch*, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (Tenn. App. 1964).

117. *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984).

118. *Id.*

119. 160 Kan. 683, 165 P.2d 209 (1946), *modified*, 161 Kan. 753, 173 P.2d 244 (1946).

120. *Id.* at 688, 165 P.2d at 213.

121. *Id.*

122. See Gamble, *supra* note 91, at 712.

123. *Id.*

Some state supreme courts have recognized that terms such as "promoting divorce" or "encouraging divorce" are too indefinite. Therefore, these courts have declared that only in specified situations will an antenuptial agreement be invalidated for promotion of divorce. Nineteen years after *Fincham*, the Kansas Supreme Court stated in *In re Estate of Cooper*¹²⁴ that Kansas courts should void provisions in an antenuptial agreement only when the provisions either obligated one spouse not to defend or contest a divorce suit by the other spouse, or obligated one spouse to sue for or procure a divorce.¹²⁵ Similarly, the Florida Supreme Court in *Allen v. Allen*¹²⁶ specified that those divorce agreements which are illegal as contrary to public policy are only those which have the effect of "withdrawing opposition to the divorce or not to contest it or to conceal the true cause thereof by alleging another."¹²⁷ These agreements "have no reference to bona fide agreements relating to alimony or the adjustment of property rights between husband and wife, though in contemplation of divorce, if they are not directly conducive to the procurement of it."¹²⁸

Kansas and Florida require something more than just clauses providing for property division before their courts will determine that the agreement promotes divorce. As Judge Moyer pointed out in his concurrence in the Ohio court of appeals' decision in *Gross*,¹²⁹ the Restatement (Second) of Contracts states that "[a] promise that merely disposes of property rights in the event of divorce or separation does not of itself tend unreasonably to encourage either."¹³⁰

The Kansas and Florida Supreme Courts in *Cooper* and *Allen* have more narrowly defined what they considered to be "promoting divorce." At a minimum, the Ohio Supreme Court should also define the nonpromotion of divorce requirement more narrowly, rather than giving only one possible situation in which the phrase "promoting divorce" is construed.

One of the most far-reaching cases to decide whether antenuptial agreements promote divorce was the 1976 California Supreme Court decision in *In re Marriage of Dawley*.¹³¹ In *Dawley* an unmarried teacher who became pregnant asked the father of the unborn child to marry her—temporarily—because the woman feared that she would lose her job if she gave birth as an unwed mother.¹³² The couple drafted an antenuptial agreement in which the father agreed to support her for fourteen months while she took a leave of absence, and he agreed to support the child until age twenty-one. In addition, the agreement stated that each spouse disclaimed all rights, including the community property rights, of the other, and that earnings acquired during the marriage would be kept separate.¹³³ As it happened, the couple stayed together not fourteen months but eight years. When they finally did divorce, the wife

124. 195 Kan. 174, 403 P.2d 984 (1965).

125. *Id.* at 180, 403 P.2d at 988-89.

126. 111 Fla. 733, 150 So. 237 (1933).

127. *Id.* at 735, 150 So. at 238.

128. *Id.* at 735-36, 150 So. at 238.

129. *Gross v. Gross*, 4 Ohio Bar 64, 68 (1983) (Moyer, J., concurring).

130. RESTATEMENT (SECOND) OF CONTRACTS § 190(2)(c) (1979).

131. 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

132. *Id.* at 346-47, 551 P.2d at 325-26, 131 Cal. Rptr. at 6.

133. *Id.* at 347-48, 551 P.2d at 327, 131 Cal. Rptr. at 6-7.

challenged the agreement, claiming that it violated public policy since it did not contemplate a marriage until death.¹³⁴ The California Supreme Court, however, upheld the validity of the agreement, although the court candidly acknowledged that it was made in contemplation of divorce.¹³⁵ The court rejected past dictum that antenuptial agreements "must be made in contemplation that the marriage relation will continue until the parties are separated by death."¹³⁶ The court said that the new test was whether the language of the contract objectively promoted dissolution of the marriage.¹³⁷ The California Supreme Court also said that it would not use a subjective test because "under a test based upon the subjective contemplation of the parties, neither persons dealing with the parties nor even the parties themselves could rely on the terms of the antenuptial agreement."¹³⁸ Addressing the public policy considerations the court said: "Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage."¹³⁹

Some states have decided to eliminate entirely the requirement that an antenuptial contract must not promote divorce to be enforceable.¹⁴⁰ The Supreme Court of Oregon in *Unander v. Unander*¹⁴¹ stated that it now doubted the validity of its previous assumption that such agreements encourage divorce.¹⁴² In reversing the prior law, the court in *Unander* relied upon Oregon's present policy that marriage between spouses who "'cannot get along' is not worth preserving."¹⁴³ This policy, the court said had been demonstrated by Oregon's adoption of a no-fault divorce statute.¹⁴⁴ The court stated further that it believed that "a marriage preserved only because good behavior by [one spouse] is enforced by the threat of having to pay alimony is also not worth preserving."¹⁴⁵

Commentators agree with the *Unander* court's reasoning that the widespread enactment by the states of no-fault divorce statutes indicates that society no longer has any objection to the termination of a marriage which the spouses themselves wish to end; therefore, the "nonpromotion of divorce" requirement is no longer valid.¹⁴⁶ Professor Clark has concluded that an antenuptial agreement "can hardly be more conducive to divorce than the [no-fault] divorce grounds themselves."¹⁴⁷

Other policy reasons also mandate the elimination of the requirement that an antenuptial agreement not promote divorce. The Ohio Supreme Court admitted in *Gross* that "it may be reasonably concluded that these types of agreements tend to

134. *Id.* at 349, 551 P.2d at 327-28, 131 Cal. Rptr. at 7-8.

135. *Id.* at 358, 551 P.2d at 333-34, 131 Cal. Rptr. at 13.

136. *In re Higgason*, 10 Cal. 3d 476, 485, 516 P.2d 289, 295, 110 Cal. Rptr. 897, 903 (1973).

137. *See In re Dawley*, 17 Cal. 3d 342, 352, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976).

138. *Id.* at 352, 551 P.2d at 329, 131 Cal. Rptr. at 9.

139. *Id.* at 358, 551 P.2d at 333, 131 Cal. Rptr. at 13.

140. *Hudson v. Hudson*, 350 P.2d 596, 597 (Okla. 1960); *see infra* text accompanying note 141.

141. 265 Or. 102, 506 P.2d 719 (1973).

142. *Id.* at 105, 506 P.2d at 720.

143. *Id.* at 105, 506 P.2d at 721.

144. *Id.*

145. *Id.*

146. *See Clark, supra* note 8, at 149; and *Moore, supra* note 8, at 13-14.

147. *See Clark, supra* note 8, at 149.

promote or facilitate marriage, rather than encourage divorce,"¹⁴⁸ a proposition approved by various courts and commentators.¹⁴⁹ As discussed, antenuptial agreements typically are made by older couples with substantial assets, to preserve those assets for children of a prior marriage.¹⁵⁰ Refusal to enforce these agreements may have the perverse effect of deterring a person with substantial assets from getting married. Moreover, once the couple is married, an antenuptial agreement may also promote marital stability by defining expectations and responsibilities.¹⁵¹ Similarly, such agreements can reduce the hostility and destructiveness of a divorce, should one occur.¹⁵² In addition, no empirical evidence supports the contention that giving legal recognition to premarital contracts with provisions for divorce has any effect on the probability of divorce.¹⁵³

By requiring that a prenuptial contract not "promote or encourage divorce or profiteering by divorce," the traditional family law standard, the Ohio Supreme Court is perpetuating an outdated principle and is out of step with modern policy. The Ohio Supreme Court admitted in *Gross* that a major reason in the *past* for invalidating these agreements was that "provisions in such contracts which provide for one spouse to forfeit marital property or conjugal rights are potentially profitable to the other party, would encourage divorce and, therefore, would be contrary to the state's interest in preserving the marriage."¹⁵⁴ The court then recognized that many changes have taken place in the last fifteen years in society's attitudes towards marriage.¹⁵⁵ Yet, after stating the past reasons for invalidating these agreements and recognizing that attitudes have changed, the court preserved this outdated family law requirement in its nonpromotion of divorce test.

In view of society's present attitudes on marriage, the problems involved in trying to draft the perfect agreement that does not, in the court's opinion, promote divorce, and the policy that the parties' expectation interest not be destroyed, the Ohio Supreme Court should have eliminated the requirement that an antenuptial agreement must not promote divorce. At a minimum, the court should have listed, in a general manner, situations in which an agreement would be determined to promote divorce or profiteering from divorce. Other states have listed such situations to aid drafters, to inform prospective couples, and to help domestic relations courts interpret antenuptial agreements.

148. *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984).

149. See *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982); *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970); *Clark*, *supra* note 8, at 142; *Moore*, *supra* note 8, at 13.

150. See *supra* text accompanying note 8.

151. See *Clark*, *supra* note 8, at 149.

152. *Id.*

153. *Volid v. Volid*, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46 (1972); *Moore*, *supra* note 8, at 13.

154. 11 Ohio St. 3d 99, 104, 464 N.E.2d 500, 505 (1984).

155. *Id.*

C. Change in Circumstances

1. Ohio's Changed Circumstance Test

After the three-part test—lack of fraud, duress, coercion, and overreaching; disclosure; and nonpromotion of divorce—has been met, the Ohio Supreme Court in *Gross* stated that an antenuptial agreement will generally be held valid.¹⁵⁶ Although property division provisions can then be enforced because they will be considered fair at the time the document is executed,¹⁵⁷ the court stated that sustenance alimony provisions must meet the additional test of being conscionable at the time of divorce.¹⁵⁸ The court did not define “conscionability;” the court asserted that the family law concept of “changed circumstances” constituted unconscionability.¹⁵⁹ In determining whether changed circumstances have made support provisions unconscionable at divorce, the reviewing court should apply the factors found in Ohio Revised Code section 3105.18,¹⁶⁰ (regulating alimony). A footnote to the *Gross* opinion reiterated several factors listed in Ohio Revised Code section 3105.18 which may constitute changed circumstances resulting in a finding that the agreement was unconscionable at the time of divorce.¹⁶¹ These factors included an extreme health problem, change in employability of a spouse, responsibility for the children of the marriage at divorce, and an increased standard of living during the marriage.¹⁶²

Using this “changed circumstances” test, the Ohio Supreme Court found that the Grosses’ agreement did contain unconscionable sustenance alimony provisions.¹⁶³ The court believed that because Mr. Gross’ assets and net income had increased substantially since the marriage, his wife’s standard of living had increased considerably since the execution of the agreement. This was a sufficient change in circumstances to render the alimony provisions unconscionable, because to require “the wife to return from this opulent standard of living” to the living standard which would be required within the limitations of the support provisions would “occasion a hardship or be significantly difficult for the former wife.”¹⁶⁴

2. The “Needs” Test

In formulating the “changed circumstances” standard for modifying sustenance alimony provisions, the Ohio Supreme Court relied on the Colorado Supreme Court’s pronouncement of the standard in *Newman v. Newman*.¹⁶⁵ However, the Ohio Supreme Court misinterpreted the Colorado Supreme Court’s use of the “changed circumstances” standard. The Ohio Supreme Court correctly stated that *Newman*

156. *Id.* at 105, 464 N.E.2d at 506.

157. *Id.* at 109, 464 N.E.2d at 509.

158. *Id.*

159. *Id.*

160. *Id.* at 109–10, 464 N.E.2d at 509–10. See also OHIO REV. CODE ANN. § 3105.18 (Page 1980 & Supp. 1984).

161. 11 Ohio St. 3d 99, 109 n.11, 464 N.E.2d 500, 509 n.11 (1984).

162. *Id.* at 110 n.12, 464 N.E.2d at 510 n.12. See OHIO REV. CODE ANN. § 3105.18(B) (Page 1980 & Supp. 1984).

163. *Gross v. Gross*, 11 Ohio St. 3d 99, 111, 464 N.E.2d 500, 510 (1984).

164. *Id.* at 110, 464 N.E.2d at 510.

165. 653 P.2d 728 (Colo. 1982).

held that the changed circumstances of the parties may be a reason for the trial court to amend a sustenance alimony provision.¹⁶⁶ However, it ignored the Colorado Supreme Court's limitation of its "changed circumstances" test to whether the dependent spouse could no longer support himself or herself under the provisions of the contract: "In our view, unconscionability . . . as applied to a maintenance agreement exists when enforcement of the terms of the agreement results in a spouse having insufficient property to provide for his reasonable needs and who is otherwise unable to support himself through appropriate employment."¹⁶⁷

The approach in *Newman* can be characterized as a "needs" test for determining whether sustenance alimony provisions in an antenuptial contract should be modified. Unlike the Ohio Supreme Court in *Gross*, the Colorado Supreme Court would not modify a spousal support provision merely because of a change in living standards after marriage.

Other states have also limited modification of sustenance alimony provisions to circumstances when a spouse cannot reasonably support himself or herself on the alimony granted by the provisions. In discussing the modification of a sustenance alimony provision, the Oregon Supreme Court in *Unander v. Unander*¹⁶⁸ stated: "We have now come to the conclusion that antenuptial agreements concerning alimony should be enforced unless enforcement deprives the spouse of support that he or she cannot otherwise secure."¹⁶⁹ Thus, according to the Oregon and Colorado Supreme Courts, when the dependent spouse has another reasonable means of support, even a provision providing for no alimony may not be modified.¹⁷⁰

Professor Clark agrees with these courts. He states that "the law now seems to be developing in the direction of permitting spouses, by means of an antenuptial agreement, to control their obligations for alimony or maintenance on divorce or separation, provided the agreement . . . makes adequate provision for each spouse in view of the *needs* and resources of each."¹⁷¹

This "needs" test promoted by Clark and used by Oregon and Colorado to decide when a sustenance alimony provision should be modified also most effectively preserves the other modern policy reasons for enforcing antenuptial agreements providing for divorce. As discussed above, Ohio and other states have validated these agreements because attitudes about marriage have changed. Divorce and remarriage have increased, and courts have agreed that these contracts promote second marriages because they allow the parties to enter the marriage confident that their assets will be preserved in case of divorce.¹⁷² An Illinois court of appeals, when evaluating an antenuptial contract in *Valid v. Valid*,¹⁷³ stressed the importance of this private

166. *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984).

167. 653 P.2d 728, 735 (Colo. 1982).

168. 265 Or. 102, 506 P.2d 719 (1973).

169. *Id.* at 107, 506 P.2d at 721.

170. Some courts have already validated antenuptial agreements providing for no sustenance alimony for the dependent spouse upon divorce. See *Eule v. Eule*, 24 Ill. App. 3d 83, 89-90, 320 N.E.2d 506, 511 (1974); *Hudson v. Hudson*, 350 P.2d 596, 597-98 (Okla. 1960).

171. See Clark, *supra* note 8, at 150-51 (emphasis added).

172. *Newman v. Newman*, 653 P.2d 728, 731 (Colo. 1982); *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970).

173. 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

ordering by stating that persons contemplating marriage should be given the right to waive marital rights or limit them by contract without being prevented from doing so by the courts.¹⁷⁴ In *Unander* the Oregon Supreme Court agreed that a large number of citizens need to "be able to freely enter into antenuptial agreements in the knowledge that their bargain is inviolate as any other."¹⁷⁵

United States Supreme Court decisions such as *Griswold v. Connecticut*¹⁷⁶ and *Orr v. Orr*¹⁷⁷ have also promoted private ordering of the marital relationship.¹⁷⁸ The needs test promotes the policies of private ordering, preserving the expectation interests of the parties and thereby promoting marriages that might not otherwise occur, because it allows most alimony provisions to be enforced. Under the needs test, any alimony provision will be enforced as long as both spouses are otherwise self-sufficient at divorce and the agreement was conscionable at the time it was written. The needs test assures prospective spouses that in the event of divorce, they will retain the property they expected to retain, thus removing a disincentive to marry.

The needs test also promotes other major policy considerations. It satisfies the state's responsibility for making certain that its dependent divorced citizens receive needed support and relieves the state of its burden of providing for that support. It also allows antenuptial agreements containing divorce provisions to be treated similarly to antenuptial agreements containing provisions for the division of property and support at death, because courts have long enforced disproportionate property and support provisions in the latter type of agreement.¹⁷⁹

3. Critique of Ohio's Changed Circumstances Test

a. Ohio Revised Code Section 3105.18

The Ohio Supreme Court in *Gross* stated that a spouse's need would be one factor used to determine whether changed circumstances, which mandate the modification of an alimony provision, have occurred.¹⁸⁰ However, the court added a burdensome and unnecessary requirement to its test by allowing Ohio courts to consider the other factors in Ohio Revised Code section 3105.18 (Ohio's alimony statute) to determine whether circumstances have changed at divorce. Factors such as standard of living changes burden the changed circumstances review with requirements that undercut the modern policy reasons for antenuptial contracts. Putting these additional restrictions on maintenance alimony provisions discourages private order-

174. *Id.* at 392, 286 N.E.2d at 47.

175. *Unander v. Unander*, 265 Or. 102, 108, 506 P.2d 719, 722 (1973).

176. 381 U.S. 479 (1965) (state has limited control over the type of birth control used by spouses).

177. 440 U.S. 268 (1979) (husband and wife may have an equal duty of support).

178. Professor Gamble states that "the common denominator of concern in formulating any rule is to insure that these antenuptial agreements will not shift the burden of supporting the prospective spouse upon the state through its welfare department." Gamble, *supra* note 91, at 729.

179. *Hook v. Hook*, 69 Ohio St. 2d 234, 236, 238, 431 N.E.2d 667, 669-70 (1982); *Troha v. Sneller*, 169 Ohio St. 397, 402, 159 N.E.2d 899, 902 (1959); *Juhasz v. Juhasz*, 134 Ohio St. 257, 264-65, 16 N.E.2d 328, 331 (1938).

180. *Gross v. Gross*, 11 Ohio St. 3d 99, 109 n.11, 464 N.E.2d 500, 509 n.11 (1984).

ing, because prospective spouses will not bother drafting agreements which are likely to be modified by the court at the time of divorce. Couples may also be more reluctant to enter marriage if they cannot be assured of preserving their assets.

The change in standard of living factor is a particularly bad test to use to determine the conscionability of sustenance alimony provisions. Whenever persons of dissimilar economic status marry, which is the typical situation when an antenuptial agreement is drafted, one spouse's standard of living will change. The reason the wealthier spouse drafts a prenuptial agreement is to keep the poorer spouse from receiving assets at divorce. Justice James Celebrezze, in a separate opinion in *Gross*, stated that the standard of living test for sustenance alimony is also flawed by illogic, because a spouse who saves little and spends recklessly will be allowed to continue an opulent standard of living, while a frugal spouse might be deprived of any claim to savings.¹⁸¹

b. *Antenuptial Agreements Compared with Separation Agreements and Judicial Divorce Decrees*

Another flaw in the Ohio Supreme Court's use of the factors listed in the Ohio alimony statute to determine the enforceability of sustenance alimony provisions in antenuptial agreements was that the purposes and policies supporting antenuptial agreements are very different than those underlying judicial divorce decrees or separation agreements at divorce. The Colorado Supreme Court in *Newman* recognized this difference and formulated a different test, the "needs" test, for the modification of support provisions in antenuptial agreements, rather than using the statutory test for the modification of support provisions in separation agreements:

[T]here are valid reasons for distinguishing between the review for unconscionability prescribed by the statute for separation agreements, . . . and the review of the antenuptial agreements which focus on the property the parties bring into the marriage, and which establish the parties' expectation of financial benefits to be obtained by virtue of the marriage.¹⁸²

According to the *Newman* court, parties to an antenuptial agreement are concerned with removing as much uncertainty as possible from the potential division of property at the death of one party or at the dissolution of their planned marriage.¹⁸³ The court clarified the difference between this planning purpose of antenuptial agreements and the purpose of separation agreements at divorce by stating:

[T]here is an assumption in the law that the parties are essentially able to act independently and rationally concerning their present and future property interests in relation to their prospective marriage. . . . Separation agreements, on the other hand, are designed to enable divorcing parties to reach an amicable out-of-court settlement of their claims to the property of the other as affected by the marriage relationship and the circumstances then existing.¹⁸⁴

181. *Id.* at 113, 464 N.E.2d at 512 (Celebrezze, J., concurring in part and dissenting in part).

182. *Newman v. Newman*, 653 P.2d 728, 733 (Colo. 1982).

183. *Id.*

184. *Id.*

Thus, the purpose of the parties entering into an antenuptial agreement is to form a contract in which exchanged promises are the consideration. There is no consideration, however, involved in a divorce decree or separation agreement incorporated into a divorce decree, because the decree is an order of the court. Separation agreements may be reviewed by a court with contract jurisdiction, but contract principles, rather than Ohio Revised Code section 3105.18, will be used to determine the agreement's enforceability.

Policy reasons, as well as purposes, also differ for antenuptial agreements and for separation agreements or divorce decrees granting alimony. An antenuptial agreement is a privately ordered contract distributing property rights before marriage and is used to encourage a marriage that might not otherwise occur. It therefore provides for marital stability by defining expectations and responsibilities. By contrast, at the formation of a separation agreement or judicial divorce decree, the spousal separation has already occurred, and the promotion of a stable marriage relationship is no longer a factor.

Because of the fundamental differences in policy and purpose between antenuptial contracts and separation agreements or divorce decrees, family courts' review of these instruments should be different. Ohio courts should develop a separate formula for reviewing the modification of alimony provisions in antenuptial agreements, instead of using Ohio Revised Code section 3105.18, which was developed with the policies and purposes of alimony judicially decreed at divorce in mind.

c. Judicial Discretion

Most importantly, Ohio's "changed circumstances" test, which is to be applied by using the factors in Ohio Revised Code section 3105.18, gives Ohio courts too much discretion in deciding when to modify sustenance alimony provisions. Ohio courts have eleven factors (at least; these factors are not exclusive) in section 3105.18 to choose from in justifying their reason for the modification of sustenance alimony provisions. Some of these factors, such as the change in living standard during the marriage, are very subjective.

One commentator, discussing Michigan's change of circumstances test, stated that "unless a change of circumstances is more narrowly defined, any court might be justified in setting aside a marital agreement which conflicts with the way the court itself would have distributed the property."¹⁸⁵ According to this commentator, mere passage of time might be considered a change of circumstances which might induce some judges to impose their view of fairness upon the parties, notwithstanding the parties' prior written agreement.¹⁸⁶

Lenore Weitzman, in *The Marriage Contract* agrees that the changed circumstances standard is "a subjective standard in that it is based on the judge's subjective assessment of fairness. It is also subjective in that it is likely to vary from judge to

185. Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REFORM 397, 410 (1977).

186. *Id.*

judge . . . a review for fairness inevitably allows a judge more discretion.”¹⁸⁷ A study on Ohio domestic decisions has shown that domestic judges, left to their own discretion, produce a wide variety of sustenance alimony orders when given the same factual case.¹⁸⁸ Weitzman advocates that the courts use pure procedural contract standards to review alimony provisions in prenuptial agreements.¹⁸⁹ She believes this will best promote private ordering and marriage, because couples will know that their original agreement will not be changed if the procedural formalities, such as lack of fraud, duress, and coercion, are met.¹⁹⁰

Although the sterile review advocated by Weitzman would promote private ordering and preserve the couple’s expectation interests, the review of an antenuptial agreement requires a more stringent test because of the state’s responsibility for the welfare of the divorced dependent spouse. Even though the “nonpromotion of divorce” standard is outdated, the policy that a state has a responsibility for the welfare of its divorced dependent citizens should continue. The state would have to provide for these dependents if they were not otherwise supplied with the necessities of life. A pure procedural review of sustenance alimony provisions would not determine whether these provisions would give an economically dependent spouse the necessities of life after the divorce, because the needs of the dependent spouse would never be reviewed. A pure procedural review of spousal support provisions in a prenuptial contract therefore is inappropriate.

4. Summary of the “Needs” Test

The “needs” test provides the best standard of review because it fulfills the state’s responsibility for making certain dependent spouses’ needs are provided without welfare assistance, yet it allows only minimal or no judicial discretion. Using the “needs” standard of review is more objective than using the eleven factors in Ohio Revised Code section 3105.18, because the court must focus on only one factor: whether the alimony provisions or the dependent spouse’s own resources will provide this spouse with the necessities of life. The couple’s standard of living need never be considered. Under this test, the court should only consider whether the alimony provisions or the dependent party’s resources will provide him or her with the necessities of life—food, clothing, and shelter. The judge should only review the alimony provisions and the dependent spouse’s circumstances to determine if these needs are met.

For some, a review for needs alone may seem too dispassionate. However, this review would be made only after the alimony provisions had already passed the three-part *Gross* test.¹⁹¹ The dependent spouse will have entered into the agreement

187. See L. WEITZMAN, *supra* note 3, at 354.

188. Milligan, *Guidelines in Alimony & Support for Ohio*, 52 OHIO ST. B.A. REP. 2009, 2025 (1979). This article documents the results of a study on judicial awards granted in a hypothetical divorce case. In the hypothetical case, Ohio domestic judges awarded sustenance alimony to the wife ranging from zero to \$17,600.

189. See L. WEITZMAN, *supra* note 3, at 359.

190. *Id.*

191. *Gross v. Gross*, 11 Ohio St. 3d 99, 105, 464 N.E.2d 500, 506 (1984).

without fraud, duress, or coercion, of the spouse's own free will, after a complete disclosure of assets has been made, and after being advised by a lawyer. Many antenuptial agreements dividing property at death that provided grossly inadequate support for the surviving spouse have been upheld under the same circumstances.¹⁹² Under the "needs" test, couples may also use their freedom to contract to provide for changed circumstances, such as a change in standard of living or inflation, by adding a clause to that effect in the agreement. The "needs" test would only be used to determine spousal support payments. Courts may still consider a family's standard of living and the best interests of children to determine child support payments.¹⁹³

Because the "needs" test promotes freedom of contract, satisfies the state's burden to support dependent citizens, and restricts judicial discretion, it is better suited for the review of alimony provisions in antenuptial contracts than Ohio's "changed circumstances" test or procedural review. In essence, by stating that the "changed circumstances" standard is to be used to review a sustenance alimony provision, the Ohio Supreme Court is saying that this type of provision is invalid, because a domestic judge is left free to make any alimony allowance he or she chooses as long as the decision can be supported by one of the eleven factors in the alimony statute—a simple task.

D. Sustenance Alimony and Property Division

The Ohio Supreme Court's different treatment of sustenance alimony provisions and property provisions in antenuptial contracts is also improper because of the difficulty inherent in differentiating between the two. In *Wolfe v. Wolfe*,¹⁹⁴ an important Ohio case discussing the modification of property and alimony provisions, the Ohio Supreme Court recognized this dilemma, stating that "[c]ourts have long recognized that the monetary provision made for wives at divorce casts a mixed hue of 'alimony' and a division of property."¹⁹⁵ The court in *Wolfe* further confused this identification by stating that alimony could be given "either in real or personal property, or both, or in money, payable in gross or in installments."¹⁹⁶

Perhaps because of this difficulty, the Ohio General Assembly chose to enact just one statute, Ohio Revised Code section 3105.18,¹⁹⁷ to guide judicial decrees for both sustenance alimony and property division at divorce. The inclusion of review for property division and sustenance alimony under one statute may demonstrate the legislature's conclusion that at divorce property division and sustenance alimony serve the same purpose.

Professors Gamble and Clark agree that because distinguishing between property division and sustenance alimony provisions is so difficult, the two should be treated

192. *Hook v. Hook*, 69 Ohio St. 2d 234, 236, 238, 431 N.E.2d 667, 669-70 (1982); *Troha v. Sneller*, 169 Ohio St. 397, 402, 159 N.E.2d 899, 902 (1959); *Juhasz v. Juhasz*, 134 Ohio St. 257, 264-65, 16 N.E.2d 328, 331 (1938).

193. See OHIO REV. CODE ANN. § 3109.05 (Page 1980 & Supp. 1984).

194. 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976), *overruled*, *Cherry v. Cherry*, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981).

195. *Id.* at 411, 350 N.E.2d at 421-22.

196. *Id.* at 412, 350 N.E.2d at 422.

197. See OHIO REV. CODE ANN. § 3105.18 (Page 1980 & Supp. 1984).

similarly. Clark believes that the two should "share the same fate," because property division often performs essentially the same function as alimony.¹⁹⁸ Gamble maintains that antenuptial agreements especially lend themselves to the lack of differentiation in judicial treatment that is accorded alimony and property settlement provisions.¹⁹⁹ The provisions stipulating alimony and property division are so interconnected that it is usually simpler to void the entire agreement, if one provision is determined to be unconscionable, than it is to recognize any distinction between the provisions.²⁰⁰ Magnifying the problem, he states, is the fact that antenuptial contracts consisting solely of property division provisions are rare.²⁰¹ As an example of how interconnected sustenance alimony provisions and property provisions can be in antenuptial contracts, Gamble says that such contracts often state that upon divorce, the wife will receive a set payment which includes both an alimony settlement and a property settlement.²⁰² Professors Gamble and Clark therefore agree that separating sustenance alimony and property division provisions and determining their legal effect is obviously difficult.

Justice Celebrezze also expressed the impropriety of the different treatment of support provisions and property division provisions in his separate opinion in the Ohio Supreme Court's decision in *Gross*.²⁰³ Justice Celebrezze cited *Ranney v. Ranney*,²⁰⁴ in which the Kansas Supreme Court held that an agreement which waives any claim of a spouse to property acquired during the marriage, regardless of that spouse's contribution, may be unconscionable.²⁰⁵ Justice Celebrezze concluded that the majority's rule in *Gross* may be sexist in that it does not look at the possibility that the wife may have contributed to the acquisition of marital property through work outside the home or by being a homemaker.²⁰⁶

Providing a conscionability test for property division provisions as well as for sustenance alimony provisions would provide a means to regulate the problem discussed by Justice Celebrezze, at least enough to ensure that dependent spouses will not typically be relegated to the rolls of welfare recipients at divorce. A conscionability test for both types of provisions will also eliminate the virtually impossible task of classifying provisions which are really one and the same.

The "needs" standard is the appropriate standard for conscionability review of both types of clauses, because the purposes and policy reasons for these provisions in antenuptial contracts are the same. By validating both types of provisions, the state is promoting private ordering and marriage. By providing for a "needs" conscionability review, the state will be assuring that divorced dependent spouses are provided with the necessities of life. The "needs" test may not totally eradicate the problem

198. See Clark, *supra* note 8, at 153.

199. See Gamble, *supra* note 91, at 709.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Gross v. Gross*, 11 Ohio St. 3d 99, 111, 464 N.E.2d 500, 511 (1984) (Celebrezze, J., concurring in part and dissenting in part).

204. 219 Kan. 428, 548 P.2d 734 (1976).

205. *Id.* at 432-33, 548 P.2d at 738.

206. 11 Ohio St. 3d 99, 113, 464 N.E.2d 500, 512 (1984) (Celebrezze, J., concurring in part and dissenting in part).

of the dependent spouse's contribution to the marital assets as discussed by Justice Celebrezze,²⁰⁷ but it will assure that a dependent spouse's needs are met from the proceeds or use of marital property or through support payments.

V. CONCLUSION

Because of recent social changes, the antenuptial agreement is being used more frequently and is likely to take on new functions. Young people are waiting until a later age, when they have greater assets, to enter their first marriages.²⁰⁸ Therefore, the antenuptial agreement may begin to be used more frequently by parties entering first marriages. Older, previously married parties, among whom antenuptial contracts were already common, will also continue increasingly to use these agreements because of decisions such as *Gross*. National trends indicate that private ordering is becoming more socially acceptable, because people want more control over their own personal lives with minimum government interference.²⁰⁹ Through *Gross*, Ohio has taken the first step towards allowing private ordering of the marital relationship.

Although Ohio's first step is commendable, that step needs to be perfected. Merging past family law principles with modern contract law concepts is a difficult task, because of their polarity. In blending these concepts, the purposes and policies underlying modern antenuptial contracts must be preserved. Outdated family law concepts, such as "nonpromotion of divorce" or requiring the economically dependent spouse to maintain the dependent spouse's marital lifestyle, must be eliminated. Promoting private ordering should be maximized while assuring that Ohio's divorced dependent spouses receive necessary support. Reviewing procedural conscionability at the time of contract formation by using disclosure and lack of fraud or overreaching standards, but making certain that dependent spouses will receive the necessities of life after divorce, completely fulfills these modern purposes and policies for antenuptial agreements created to divide property and provide sustenance alimony at divorce.

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207. *Id.*

208. In 1969, 72% of the brides and 58% of the grooms that year were under 25 years old. This rate steadily decreased from 1969 to 1979. In 1979, only 60% of the brides and 45% of the grooms were under 25 years old. VITAL STATISTICS OF THE UNITED STATES 1979, Vol. III—MARRIAGE AND DIVORCE, Table 1-16, p. 1-16 (1984); VITAL STATISTICS OF THE UNITED STATES 1969, Vol. III—MARRIAGE AND DIVORCE, Table 1-16, p. 1-16 (1972).

209. See Moore, *supra* note 8, at 19.

