COMMENTS

To Agree or Not to Agree: Treatment of Postnuptial Agreements Under Oklahoma Law

I. Introduction

The conversation where parents inform their children they are getting divorced has become all-too-common in American homes. A recent study revealed that in 2008, 7.1 out of 1,000 Americans got married, while 3.5 out of every 1,000 Americans got divorced.[1] Further, studies showed that between 41% to 50% of first marriages will end in divorce, with the percentage increasing to between 60% to 67% of second marriages, and 73% to 74% of third marriages.[2] With these statistics in mind, the concern that prospective or current spouses may have for individually defined property rights in the case of divorce is not so far-fetched. Statistics support the conclusion that the use of prenuptial agreements ― agreements entered into before marriage ― are on the rise in America: in 2005 approximately 5,000 prenuptial agreements were entered into per month, a significant jump from 1,500 in 2003.[3] When spouses fail to execute an agreement before marriage, they often feel a need to do so during marriage. This type of agreement is called a postnuptial agreement. Postnuptial agreements are increasing in use as well; according to a poll conducted by the American Academy of Matrimonial Lawyers, the number of postnuptial agreements has increased by 50% between the years of 2002–2007.[4] A postnuptial agreement can take one of two forms: (1) modification of an existing prenuptial agreement through a valid postnuptial agreement, or (2) execution of a postnuptial agreement without a prior prenuptial agreement.

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1. CTRS. FOR DISEASE CONTROL AND PREVENTION, MARRIAGE & DIVORCE 1 (2009), http://www.cdc.gov/nchs/fastats/divorce.htm. This divorce number, however, does reflect a national low since 1970. *Id*.

2. Divorce Rate, 1 (2009), http://www.divorcerate.org/.

3. Jean Chatzky, *For Richer or Poorer, Unless We Get Divorced* (2006), http://money.cnn.com/magazines/moneymag/moneymag_archive/2006/04/01/8373333/index.htm.

4. Robert DiGiacomo, *Quit Fighting – Get a Postnuptial Agreement* (2008), http://www.cnn.com/2008/LIVING/personal/04/02/postnuptial.agreement/index.html. The primary difference in the two forms of marital contracts hinges on the timing the agreement is entered into. A prenuptial agreement is entered into before marriage, BLACK'S LAW DICTIONARY 1301 (9th ed. 2009), and a postnuptial agreement is an agreement that is made after marriage. *Id*. at 1286.

Although technically different, both prenuptial and postnuptial agreements share the common objective of defining the distribution of property rights upon the dissolution of a marriage, through either death or divorce. Despite this similarity, the two agreements have not received the same treatment under the law. While prenuptial agreements are valid in all fifty states, approximately twenty-two states have addressed whether postnuptial agreements are valid ─ with the majority finding they are valid.[5] Of the states that do not recognize postnuptial agreements, there does not appear to be any single common variable as to why such agreements are invalid.

A simple hypothetical helps to illustrate a typical situation where a postnuptial agreement might be employed and demonstrates the uncertainties surrounding its treatment under the law. Suppose Matthew and Lisa, Oklahoma residents, enter into a valid prenuptial agreement before their marriage. The prenuptial agreement includes two provisions that deal with the distribution of property rights upon divorce: (1) each spouse's respective property acquired prior to marriage will remain the sole property of that individual, (both during marriage and upon divorce); and (2) in the event of divorce, each spouse will retain a proportionate interest in property acquired after marriage based on each spouse's initial investment in the property.

After marriage, the couple decides to buy a house worth $500,000. Matthew contributes $350,000 to the house ─ an investment equal to

5. The following states have addressed whether postnuptial agreements can be valid: Alabama, Alaska, Arkansas, Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Mississippi, Missouri, New York, Ohio, South Dakota, Tennessee, Utah, and Wisconsin. *See* ALA. CODE §§ 30-4-9, 43-8-72 (West 2009); ALASKA STAT. § 13.12.213 (West 2009); ARK. CODE ANN. §§ 9-11-406, 9-11-502 (West 2009); CAL. FAM. CODE § 1500 (West 2009); COLO. REV. STAT. ANN. § 15-11-207 (West 2009); FLA. STAT. ANN. § 732.702 (West 2009); 750 ILL. COMP. STAT. ANN. 5/502 (West 2009); KY. REV. STAT. ANN. § 403.180(1) (West 2009); MASS. GEN. LAWS ANN. Ch. 209, § 2 (West 2009); MICH. COMP. LAWS ANN. § 557.23 (West 2009); MISS. CODE ANN. § 93-3-1 (West 2009); OHIO REV. CODE ANN. § 3103.06 (West 2009); Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991); *In re* Estate of Harber, 449 P.2d 7, 12 (Ariz. 1969); Perkins v. Sunset Tel. & Tel. Co, 103 P. 190, 193-94 (Cal. 1909); *In re* Estate of Lewin, 595 P.2d 1055, 1057 (Colo. 1979); Flansburg v. Flansburg, 581 N.E.2d 430, 433 (Ind. Ct. App. 1991); Dunsworth v. Dunsworth, 81 P.2d 9, 12 (Kan. 1938); *see* Pearre v. Grossnickle, 114 A. 725, 728 (Md. 1921); Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003); Bronfman v. Bronfman, 229 A.D.2d 314, 315 (N.Y. App. Div. 1996); Keith v. Keith, 156 N.W. 910, 911 (S.D. 1916); Bratton v. Bratton, 136 S.W.3d 595 (Tenn. 2004); Pierce v. Pierce, 994 P.2d 193, 198 (Utah 2000); Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986). While Oklahoma has addressed the issue, the case law on the validity of postnuptial agreements is unclear. *See infra* nn. 7-9 *and* Part IV.

70% of the house's value — and Lisa contributes the remaining $150,000 — an investment equal to 30% of the house's value. Thus, under the second provision of the prenuptial agreement, Matthew would receive 70% of the value of the property upon divorce and Lisa would receive 30%. Now assume tension arises between the spouses. Lisa becomes very fearful that in the event of divorce she will not be able to support herself due to Matthew's greater interest in their marital property. Matthew does not want to see his wife worry, nor does he believe that the couple's marriage will end in divorce. In an attempt to put all worries to rest, Matthew proposes making a postnuptial agreement through an amendment to their prenuptial agreement. He suggests the postmarital property be divided evenly (50% to him and 50% to Lisa) in the event of divorce.[6] Matthew and Lisa both feel good about the proposed change to their prenuptial agreement. However, a very important question crosses their minds: Can they legally use a postnuptial agreement to alter their prenuptial agreement?

While this might appear to be a simple contractual issue — the couple only wants to modify an existing contract — appearances are often deceptive. Although postnuptial agreements contain characteristics of an ordinary contract, determining whether traditional principles of contract law govern such agreements is not as clear-cut as it might seem. Two different Oklahoma courts have addressed this very issue,[7] reaching two very different determinations: one holding that spouses can alter their property rights through postnuptial agreements,[8] and the other holding that Oklahoma law does not allow spouses to alter their property rights postnuptially.[9]

This comment first explores the various legal principles used by courts nationwide to determine the validity of postnuptial agreements. This comment then discusses the applicability of those principles under Oklahoma law. This comment argues that, although postnuptial agreements are a special contract, much like their prenuptial counterparts, postnuptial agreements can be valid, and basic principles

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6. This is a simplified hypothetical, but it serves the purpose of highlighting a situation when a couple might want to amend or modify a prenuptial agreement. Realistically, situations surrounding modifications of prenuptial agreements are far more complex and involve many factors and interests.

7. *See*, *e.g.*, Hendrick v. Hendrick, 1999 OK CIV APP 15, 976 P.2d 1071 (Okla. Civ. App. Div. 1 1998); Boyer v. Boyer, 1996 OK CIV APP 94, 925 P.2d 82 (Okla. Civ. App. Div. 4 1996).

8. *See Boyer*, 1996 OK CIV APP 94, 925 P.2d 82.

9. *See Hendrick*, 1999 OK CIV APP 15, 976 P.2d 1071.

that govern the validity of prenuptial agreements should be applied to the analysis required to determine whether individual postnuptial agreements are valid. Further, this comment suggests requirements that should be met in order to create a valid postnuptial agreement.

A firm grasp on the nature of prenuptial agreements is essential to fully understanding the issues facing postnuptial agreements; thus, Part II of this comment discusses the legal development of prenuptial agreements through the United States. Part III provides a detailed analysis of the historical development of postnuptial agreements in the United States and the jurisprudence surrounding postnuptial agreements nationwide. Part IV discusses Oklahoma's current statutory and common law relevant to postnuptial validity and presents the contradictory stances taken by Oklahoma's appellate courts. Part V proposes justifications for why postnuptial agreements can and should be valid under Oklahoma law, and then suggests specific requirements to make a valid postnuptial agreement. This comment concludes in Part VI by suggesting that Oklahoma establish clear precedent that postnuptial agreements can be valid and detail what elements are required to make a valid postnuptial agreement.

II. History of Prenuptial Agreements

A. Historical Background of Prenuptial Agreements

The development of prenuptial agreements within the United States originated in the Statute of Uses, a seventeenth-century English law.[10] The Statute of Uses allowed a woman to waive her right to dower ─ that is, to waive her right to receive a one-third interest in her husband's estate for life ─ upon the death of her husband.[11] Originally, a wife was not considered an heir of her husband; thus, when a husband died the wife had no interest in his estate and consequently, little means to provide for herself.[12] The Statute of Uses effectively functioned as a prenuptial agreement to waive a woman's right to dower.

In the United States, statutes modeled after the Statute of Uses were enacted that allowed a woman to waive her right to dower.[13] Prenuptial

10. *See generally* LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS 361-64 (2001).

11. *See* MORGAN, *supra* note 10, at 362.

12. JOHN E. CRIBBET ET AL., PROPERTY CASES AND MATERIALS 324 (7th ed. 1996) (1960).

13. MORGAN, *supra* note 10, at 364; *see also* B. Bernard Wolson, *Husband and Wife—Antenuptial Contracts*, 41 MICH. L. REV. 1133, 1134 (1943).

agreements that waived a woman's right to dower were not initially subjected to a high level of scrutiny.[14] For example, in *Reiger v. Schaible*, the Supreme Court of Nebraska held that agreements that waived the right to dower were valid as long as the agreement was fair, equitable, and entered into in good faith.[15] Although such prenuptial agreements were used solely to waive a woman's right to dower, these agreements would eventually be used to create, relinquish, or alter property rights between prospective spouses.[16]

Generally speaking, prenuptial agreements covering any right other than the right to dower had a very weak existence before the Married Women's Property Act.[17] Most commentators agree that the Married Women's Property Act resulted in the modern form of the prenuptial agreement, which began to receive acceptance in the legal community.[18] Before the nineteenth century, a husband would receive, upon marriage, a substantial interest in all real and personal property his wife owned before marriage.[19] Under the Married Women's Property Act, however, women were given the right to enter into contracts with respect to their property because the act gave women an ownership interest in their premarital and postmarital property.[20] Also enacted in the same time period was the Earning Statute, which allowed women to work outside of the home for a wage and to receive that wage themselves.[21] These two acts gave women greater freedom and ability to negotiate with their spouses when it came to defining marital-property rights.

Despite the changing legal landscape regarding marital contracts, the ability of spouses to contractually define their property rights was not widely accepted. For much of the history of prenuptial agreements, an agreement contemplating divorce as the means of dissolution to marriage (as opposed to death) was considered invalid as against public policy.[22] Courts justified such positions by asserting that prenuptial

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14. *See* Reiger v. Schaible, 115 N.W. 560 (Neb. 1908).

15. *Id.* at 566.

16. Irvine v. Irvine, 685 N.E.2d 67, 70 (Ind. Ct. App. 1997).

17. Married Women's Property Act, 1882, c. 75, §§ 1-27 (Eng.).

18. Suzanne D. Albert, *The Perils of Premarital Provisions*, 48 R.I. B.J. 5, 5 (2000).

19. *See* CAROLYN R. BARONE & ROBERT D. OSTER, DRAFTING AND LITIGATING PRENUPTIAL AGREEMENTS IN RHODE ISLAND 3 (1996).

20. *See* BARONE & OSTER, *supra* note 19, at 3 (1996); *see generally* NORMA BAUSCH, IN THE EYES OF THE LAW (1987).

21. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 71 (1998).

22. Rebecca Glass, *Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California*, 92 CAL. L. REV. 215, 221 (2004).

agreements that contemplated divorce would ruin the sanctity of marriage and "lead to endless, minor litigation, and encourage the property-owning spouse to desert the other spouse."[23] Thus, the common law approach to prenuptial agreements was skeptical and paternalistic.[24] However, this began to subside with the continued progression of women's rights and treatment in society.

Given the rise of women's equality, the number of women in the work place, and the growing contractual rights of women,[25] the Florida Supreme Court concluded in *Posner v. Posner* that prenuptial agreements contemplating divorce were no longer *per se* void as against public policy.[26] Other courts began to follow the trend established by the Florida Supreme Court.[27] The adoption of the Uniform Premarital Agreement Act (UPAA) in 1983 provided evidence of state legislatures viewing prenuptial agreements in a different light.[28] The UPAA was an attempt to establish conformity among states in treating prenuptial agreements as simply a form of a contract.[29] The most notable right the UPAA promulgated was that of prospective spouses to control their marital contracts, specifically including a couple's ability to control property rights in virtually any situation not violating public policy.[30]

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23. Glass, *supra* note 22, at 92; *see also* Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 704-05 (1971).

24. Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997); *see also Estate of Burgess*, 1982 OK CIV APP 22, ¶ 10, 646 P.2d 623, 625.

25. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 253 (1994).

26. Posner v. Posner, 233 So. 2d 381, 285 (Fla. 1970).

27. *See* Brooks v. Brooks, 733 P.2d 1044, 1048 (Alaska 1987); Newman v. Newman, 653 P.2d 728 (Colo.1982); Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982); *In re* Bowen, 475 N.E.2d 690 (Ind. 1985); *In re* Adams, 729 P.2d 1151 (Kan. 1986); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (Ohio 1984).

28. The Uniform Premarital Agreement Act references & annotations, 9C U.L.A. 35 (2001), lists twenty-five states and the District of Columbia which adopted and enforced the UPAA. The twenty-five states include: Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia. *Id*. In *Dematteo v. Dematteo*, 762 N.E.2d 797, 809 n.28 (Mass. 2002), however, twenty-eight states and the District of Columbia are listed as adopting and enforcing the UPAA. This footnote concludes that, along with the twenty-five states listed above, four additional states have adopted and enforced the UPAA. Those four states are: Iowa, Mississippi, West Virginia, and Wisconsin. *Id*.

29. Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 899 (1997).

30. Unif. Premarital Agreement Act § 3 (amended 2001), 9C U.L.A. 43 (1983).

Alongside growing acceptance of prenuptial agreements in different contexts, requirements were imposed in order to create a valid prenuptial agreement.

B. Legal Requirements of a Valid Prenuptial Agreement

Prenuptial agreements are simply contracts; therefore offer, acceptance, and consideration must be present.[31] The elements of offer and acceptance are normally non-issues; whereas consideration, an area that once provided for dispute, is viewed as fulfilled by the marriage itself.[32] There are generally four additional requirements of a valid prenuptial agreement: (1) the agreement does not violate public policy; (2) the agreement is entered into voluntarily; (3) there is a full and fair disclosure of assets before signing an agreement; and (4) the agreement is substantively fair and conscionable. It should be noted that not all states require all the elements.[33] Normally states require some combination of the following.

1. Public Policy

Prenuptial agreements may not violate public policy. One way a prenuptial agreement may violate public policy is if the agreement encourages divorce.[34] An agreement that denies a party a divorce if

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31. *Id.* § 2.

32. *See* Roberts v. Roberts, 802 So. 2d 230, 233 (Ala. Civ. App. 2001); Eule v. Eule, 320 N.E.2d 506, 509 (Ill. Ct. App. 1974); Watson v. Watson, 497 A.2d 794, 801 (Md. 1984); Matter of Burgess' Estate, 1982 OK CIV APP 22, ¶ 16, 646 P.2d 623, 626 (Okla. Civ. App. 1982); Bratton v. Bratton, 136 S.W.3d 595, 600 (Tenn. 2004); Friedlander v. Friedlander, 494 P.2d 208, 300 (Wash. 1972).

33. *See* Griffin v. Griffin, 2004 OK CIV APP 58, 94 P.3d 96, 99 (holding an agreement must either be fair and reasonable from the position of the party opposing enforcement, or there must be a full and fair disclosure of the other party's financial position); Chiles v. Chiles, 779 S.W.2d 127 (Tex. App. 1989) (holding whether a prenuptial agreement is fair is immaterial to determining enforceability of such agreement), *rev'd on other grounds*, 790 S.W.2d 819 (Tex. App. 1990); Dexter v. Dexter, 371 S.E.2d 816 (Va. Ct. App. 1988) (holding pre- or postnuptial agreements can be void if against public policy).

34. RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1981). A contract that tends to encourage divorce is unreasonable as against public policy. *See In re* Noghrey, 215 Cal. Rptr. 153 (Ct. App. 1985) (holding an agreement that gave a wife certain assets that were large in comparison to the marital estate was invalid); *Dexter*, 371 S.E.2d 816 (stating in dicta a clause of a marital agreement that required husband to pay wife $1,000 per month upon separation or divorce that was large in comparison to the marital estate is unenforceable); Coggins v. Coggins, 601 So. 2d 109 (Ala. Civ. App. 1992) (holding a prenuptial agreement that encouraged divorce by awarding one party a disproportionate share of the marital estate was invalid).

grounds exist for divorce, however, is also against public policy.[35] Other situations may exist where a prenuptial agreement may be void as violating public policy.[36] For example, in *Favort v. Barnes*, a Louisiana appellate court held that a prenuptial agreement that attempted to control the behavior of spouses by limiting sexual intercourse to once a week was unenforceable.[37] Also, in *In Re Marriage of Fox*, a Washington appellate court held it was against public policy, and thus unenforceable, for prenuptial agreements to affect visitation or child support rights.[38] Some state legislatures have cleared any confusion surrounding what kind of agreements may violate public policy by simply holding that a prenuptial agreement cannot be held void solely due to public policy concerns.[39]

2. Voluntary Execution

Prenuptial agreements must be entered into and executed voluntarily in order to be upheld as valid.[40] Courts hold that spouses maintain a confidential relationship when entering into a prenuptial agreement.[41] This presumption of a confidential relationship in prenuptial agreements is of unique importance because it confers the status of a special contract.[42] Traditionally, when parties sign a business contract it is

35. Towles v. Towles, 182 S.E.2d 53 (S.C. 1971).

36. *See* Lacks v. Lacks, 189 N.E.2d 487 (N.Y. 1963) (holding a prenuptial agreement was not enforceable because it purported to establish term where one spouse was to pay the other); Boyer v. Boyer, 1996 OK CIV APP 94, 925 P.2d 82 (Okla. Civ. App. Div. 4 1996) (holding the agreement cannot change a spouse's duty to support the other spouse).

37. *See* Favort v. Barnes, 332 So. 2d 873 (La. Ct. App. 1976).

38. *See In Re* Marriage of Fox, 795 P.2d 1170 (Wash. Ct. App. 1990).

39. *See* Griffin v. Griffin, 2004 OK CIV APP 58, ¶ 11, 94 P.3d 96, 99 (interpreting the effects of the state legislature's amendment to the pertinent statute as having the effect of creating no public policy bar to prenuptial agreements).

40. McHugh v. McHugh, 436 A.2d 8 (Conn. 1980).

41. *See* Hamilton v. Hamilton, 51 So. 2d 13, 188 (Ala. 1950); Burnes v. Burnes, 157 S.W.2d 24, 27 (Ark. 1942); Linker v. Linker, 470 P.2d 921 (Colo. Ct. App. 1970); Lutgert v. Lutgert, 338 So. 2d 1111, 1115 (Fla. Dist. Ct. App. 1976); Watson v. Watson, 126 N.E.2d 220, 222 (Ill. 1955); Christians v. Christians, 44 N.W.2d 431, 433 (Iowa 1950); Martin v. Farber, 510 A.2d 608 (Md. Ct. Spec. App. 1986); Estate of Serbus v. Serbus, 324 N.W.2d 381, 385 (Minn. 1982) (overruled on the ground that lack of an opportunity to consult with independent counsel does not automatically cause a prenuptial agreement to valid); Manhart v. Manhart, 1986 OK 12, ¶ 30, 725 P.2d 1234, 1238-39; Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986).

42. *See Hamilton*, 51 So. 2d at 188; *Burnes*, 157 S.W.2d at 27; *Linker*, 470 P.2d 921; *Lutgert*, 338 So. 2d at 1115; *Watson*, 126 N.E.2d at 222; *Christians*, 44 N.W.2d at 433; *Martin*, 510 A.2d 608; *Estate of Serbus*, 324 N.W.2d at 385; *Manhart*, ¶ 30, 725 P.2d at 1238-39; *Button*, 388 N.W.2d at 550.

assumed each party has considered his best interests and acted in a manner consistent with those interests.[43] When prospective spouses decide to enter into a prenuptial agreement, however, those spouses may not be thinking in terms of their best interest but instead may be driven by their emotions.[44]

The law combats this potential lack of self-interest by holding that prospective spouses are in a confidential relationship.[45] This confidential relationship imposes upon the parties the *duty* to act as fiduciaries.[46] Although the meaning of "fiduciary relationship" is vague, it appears that the requirement is not as concerned with substantive fairness as it is with procedural fairness.[47] For example, in *Sumpter v. Kosinski*, a Michigan appellate court held that disparity of prenuptial provisions alone would not invalidate the agreement.[48] With respect to procedural fairness, courts require that an agreement be entered into voluntarily to satisfy the fiduciary duty.[49] Courts consider three elements when determining if an agreement is voluntary: (1) time given to sign the agreement; (2) ability to consult independent counsel; and (3) presence of fraud, misrepresentation, and duress.[50]

Spouses must be given a fair amount of time to sign a prenuptial agreement.[51] The primary focus of this requirement revolves around when a prenuptial agreement is presented to a spouse to sign and when the agreement must ultimately be signed.[52] For example, in both Ohio and Florida courts determined that a prenuptial agreement was not entered into voluntarily because the wife did not know about the

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43. *See* MORGAN, *supra* note 10, at 396 (2001).

44. *See Sumpter v. Kosinski*, 419 N.W.2d 463, 471 (Mich. Ct. App. 1988) (finding when individuals are dealing with matters of the heart often times the advice of legal counsel is often disregarded).

45. *See Hamilton*, 51 So. 2d at 188; *Burnes*, 157 S.W.2d at 27; *Linker*, 470 P.2d 921; *Lutgert*, 338 So. 2d at 1115; *Watson*, 126 N.E.2d at 222; *Christians*, 44 N.W.2d at 433; *Martin*, 510 A.2d 608; *Estate of Serbus*, 324 N.W.2d at 385; *Manhart*, ¶ 30, 725 P.2d at 1238-39; *Button*, 388 N.W.2d at 550.

46. *See Estate of Serbus*, 324 N.W.2d at 385 (describing the relationship of the parties as having a fiduciary duty with one another); *Watson*, 126 N.E.2d at 222 (describing the relationship between spouses as one of either confidence or fiduciary).

47. *See Sumpter*, 419 N.W.2d 463

48. *Id.*

49. *See In re* Estate of Lutz, 1997 ND 82, 563 N.W.2d 90 (N.D. 1997).

50. *See* Zimmie v. Zimmie, 464 N.E.2d 142 (Ohio 1984); *In re Estate of Lutz*, ¶ 34, 563 N.W.2d 90; Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979).

51. *See* Plant v. Plant, 320 So. 2d 455, 457-59 (Fla. Dist. Ct. App. 1975).

52. *Zimmie*, 464 N.E.2d 142

agreement, or was not presented with the agreement until the day before the couple was to be married.[53]

The nature of the first element of voluntariness — providing a reasonable time between presenting a prenuptial agreement and the required signing date — is directly related to the second element considered when determining voluntariness. The lack of an opportunity to consult independent counsel[54] about a prenuptial agreement "is a significant factual factor in weighing the voluntariness" of the agreement.[55] It is the *opportunity* to consult independent counsel that is important in this analysis, as opposed to the actual presence of independent counsel when a prenuptial agreement is signed.[56]

For example, in *Warren v. Warren*, the wife challenged the validity of a prenuptial agreement upon the dissolution of her marriage with her husband.[57] The wife claimed she was coerced into signing the agreement; however, the court found this claim unpersuasive.[58] Upholding the prenuptial agreement, the court noted the wife had two months of ample opportunity to seek independent counsel — but chose not to.[59] By contrast, if a spouse *never* had an opportunity to consult independent counsel, then a prenuptial agreement will be considered involuntary, and thus, the agreement will be unenforceable.[60]

The last element of the voluntariness inquiry involves an absence of fraud, misrepresentation, or duress surrounding the signing of a prenuptial agreement.[61] Prenuptial agreements that have been declared

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53. *Id.*; *Plant*, 320 at, 457-59; *see also* Roberts v. Roberts, 802 So. 2d 230, 233-34 (Ala. Civ. App. 2001).

54. Independent counsel means counsel of that spouse's own choosing. *Lutgert v. Lutgert*, 338 So. 2d 1111, 1115 (Fla. Dist. Ct. App. 1976). Consulting with the counsel of the spouse presenting the prenuptial agreement does not constitute independent counsel. *See id.*

55. *In re* Estate of Lutz, 1997 ND 82, 563 N.W.2d 90, 98 (N.D. 1997).

56. Rhyne-Morris v. Morris, 671 So. 2d 748 (Ala. Civ. App. 1995) (holding the absence of independent counsel is not determinative when analyzing the validity of a prenuptial agreement); *see* Cannon v. Cannon, 846 A.2d 1127 (Md. Ct. Spec. App. 2004), cert. granted, 855 A.2d 349 (Md. 2004) and judgment aff'd, 865 A.2d 563 (Md. 2005) (standing for the proposition that a spouse is not required to actually consult independent counsel for a prenuptial agreement to be valid).

57. Warren v. Warren, 523 N.E.2d 680, 681-82 (Ill. Ct. App. 1988).

58. *Id.* at 683.

59. *Id.*

60. McMullin v. McMullin, 926 S.W.2d 108 (Mo. Ct. App. 1996) (holding the prenuptial agreement was unenforceable because the wife was never given the opportunity to meet with independent counsel).

61. *See* Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979); Ex Parte Williams, 617 So. 2d 1033 (Ala. 1992).

void based on either fraud or misrepresentation often deal with situations where one spouse is presented a prenuptial agreement with little time to review its contents and the presenting spouse promises to change certain terms or provisions of the agreement after it is signed.[62] In *Ferry v. Ferry*, the court found the prenuptial agreement void when a wife signed the agreement without independent counsel and in reliance on a promise by the husband to change certain terms of the agreement after marriage.[63]

Just as duress is a defense to the enforcement of a traditional contract, it is also a defense to the enforcement of a prenuptial agreement.[64] Duress most frequently arises in the prenuptial agreement context when the woman is pregnant at the time the prenuptial agreement is presented.[65] Pregnancy, however, does not constitute duress *per se*; rather, the presence of duress must be determined on a case-by-case basis.[66] For example, in *Hamilton v. Hamilton*, the Pennsylvania Superior Court concluded that a prenuptial agreement was not signed under duress despite the wife's pregnancy at the time of signing because she had received advice of independent counsel and disregarded that advice.[67] Conversely, a man's refusal to marry his pregnant fiancé unless she signed a prenuptial agreement, coupled with the woman's desire to maintain credibility within the community despite her extramarital pregnancy, led one court to find duress was present.[68]

3. Full and Fair Disclosure

Generally spouses are required to make a full and fair disclosure of their respective financial conditions before a prenuptial agreement is signed.[69] This requirement contains two distinct parts. First, spouses are typically required to disclose the nature of their assets to one another, such as whether investments are made in stocks, bonds or property.[70] Second, there must be a full and fair disclosure of an

62. *See Ferry*, 586 S.W.2d at 783.
63. *Id*. at 783, 786-88.
64. *See Ex Parte Williams*, 617 So. 2d 1033.
65. *See id*.
66. *See* Hamilton v. Hamilton, 591 A.2d 720 (Pa. 1991).
67. *Id.*
68. *Ex Parte Williams*, 617 So. 2d 1033.
69. *See* Wylie v. Wylie, 459 S.W.2d 127 (Ark. 1970); *In re* Marriage of Lewis, 808 S.W.2d 919 (Mo. Ct. App. 1991).
70. King v. King, 66 S.W.3d 28, 35 (Mo. Ct. App. W.D. 2001); Matter of Benker's Estate, 331 N.W.2d 193, 196-97 (Mich. 1982).

estimation of one's assets;[71] however, this does not require an exact determination of net worth.[72] Similarly, the disclosure does not require each party to offer a detailed list of the nature of *each* asset individually, such as "financial statements of net worth and income . . . ."[73] Rather, simply a list placing assets into general categories will suffice.[74] As long as a spouse is given information that represents a general approximation of the other spouse's net worth, a full disclosure has occurred.[75] Where a disclosure is not made or is not full and fair, the prenuptial agreement will be held void.[76]

For example, in *Wylie v. Wylie*, the husband represented that he was only worth $200,000, when in fact he was actually worth closer to $475,500.[77] Finding the prenuptial agreement invalid, the Arkansas Supreme Court noted that not only did the wife not know the value of the husband's estate at the time the agreement was signed, but the husband acted *affirmatively* to hide his wealth when he "endeavored to prevent her from knowing his actual worth."[78] Similarly, in *In re Marriage of Lewis*, a Missouri appellate court found a husband's disclosure to be inadequate where he disclosed only a list of the assets and not values, concluding that the wife could not have known or guessed the assets' values.[79]

The duty of prospective spouses to act as fiduciaries, created through the presumed confidential relationship, raises another caveat in the full and fair disclosure requirement. Unlike typical contracts, it is generally recognized that each spouse has an affirmative duty to make a full and fair disclosure — it is not seen as the duty of the other spouse to request a disclosure of the other's assets.[80] Although the burden to disclose

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71. *King*, 66 at 35; Colonna v. Colonna, 791A.2d 353, 355 (Pa. 2001).

72. Griffin v. Griffin, 2004 OK CIV APP 58, ¶ 33-34, 94 P.3d 96, 104 (Okla. Civ. App. 2004), cert. denied, (May 24, 2004); *see also* Nanini v. Nanini, 802 P.2d 438 (Ariz. Ct. App. 1990).

73. *In re* Estate of Hill, 335 N.W.2d 750, 753 (Neb. 1983); *see* Laird v. Laird, 597 P.2d 463, 468 (Wyo. 1979).

74. *Id.*

75. *Griffin*, ¶ 33-34, 94 P.3d at 104.

76. *See* Wylie v. Wylie, 459 S.W.2d 127, 128-29 (Ark. 1970); *In re* Marriage of Lewis, 808 S.W.2d 919, 922 (Mo. Ct. App. 1991).

77. *Wylie*, 459 S.W.2d at 128-29.

78. *Id*. at 130. Evidence of different circumstances was provided to show the husband took active steps to keep his wife from being a part of any discussions of his actual worth.

79. *In re Marriage of Lewis*, 808 S.W.2d at 922.

80. *In re* Estate of Lebsock, 618 P.2d 683, 687 (Colo. Ct. App. 1980); Hjortaas v. McCabe, 656 So. 2d 168, 170 (Fla. Dist. Ct. App. 1995); Ryken v. Ryken, 461 N.W.2d

assets is an affirmative duty placed on both spouses, a prenuptial agreement normally will not be ruled invalid simply because one party claims the other did not take affirmative action to make a disclosure of their assets.[81] A failure to disclose assets, without more, will not support a finding of fraud or execution of undue influence without additional proof to support such a claim.[82]

4. Substantive Fairness and Conscionability

The requirement of substantive fairness and conscionability of a prenuptial agreement is concerned with the fairness of the agreement itself.[83] The scope of this requirement varies among states. States that have adopted the UPAA require a party to show *both* a full and fair disclosure of assets and that a prenuptial agreement is substantively fair and conscionable.[84] Alternatively, states that have not adopted the UPAA may allow a party to show either that the agreement was fair, just, and equitable from the other party's perspective *or* that the second party voluntarily entered into the agreement with full knowledge of the first party's estate and advice from independent counsel.[85]

Many states have adopted either a test that holds a prenuptial agreement must be substantively "fair"[86] *or* one that holds it must be substantively "conscionable."[87] Although the difference in the two terms is often just one of degree, it can also be an important distinction in certain situations — what might qualify as "unfair" may still be classified as "conscionable." Whether the court employs a test based on fairness or conscionability, a number of the following factors are normally considered by the courts: the assets owned by each party, the experience or intelligence of each party, each party's respective standard of living during the marriage, the purpose of the agreement, the length

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122,125 (S.D. 1990).

81. *Freiman v. Freiman*, 680 N.Y.S.2d 797, 799 (Sup. Ct. 1998).

82. *Id.*

83. *See* Estate of Harber v. Staley, 449 P.2d 7, 16 (Ariz. 1969); Burtoff v. Burtoff, 418 So. 2d 1085 (D.C. 1980); Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988); Sande v. Sande, 360 P.2d 998, 1001 (Idaho 1961); Rose v. Rose, 526 N.E.2d 231 (Ind. Ct. App. 1988); Button v. Button, 388 N.W.2d 546 (Wis. 1986).

84. *Estate of Harber*, 449 P.2d at 16; *Sande*, 360 P.2d at 1001; *see also* Morgan, *supra* note 10, at 419.

85. Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991); Estate of Lewin v. First Nat'l Bank of Denver, 595 P.2d 1055, 1058 (Colo. App. 1979); Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987).

86. *Burtoff*, 418 So. 2d 1085; *Button*, 388 N.W.2d 546.

87. *Lewis*, 748 P.2d 1362; *Rose*, 526 N.E.2d 231.

of the marriage, each party's premarital property, and the type of property acquired during marriage.[88]

III. Postnuptial Agreements

A. Historical Development of Postnuptial Agreements

At common law, postnuptial agreements were invalid but were often enforced in courts of equity.[89] Postnuptial agreements were void at common law because they traditionally sought to waive rights that had not accrued — a woman's right to dower.[90] Additionally, when two individuals were married they were no longer viewed as two separate individuals, but were merged into *one*, and a person cannot make a contract with himself.[91] Further, postnuptial agreements were void as against public policy because they promoted divorce.[92] Similarly, a postnuptial agreement that attempted to release one spouse from her legal obligation to support the other was void.[93]

Many of the same forces that led to the legal acceptance of prenuptial agreements also led to the legal enforceability of postnuptial agreements, although at a much slower pace.[94] Specifically, the development of the Married Women's Property Act and changing societal views of women led a majority of the courts that confronted the validity of postnuptial agreements to consider such agreements valid under respective state law.[95] Courts also began to change their perspective on the nature of marriage by encouraging parties to settle their disputes privately.[96] Although not as commonly used as prenuptial

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88. *See generally* Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962); *In re* Estate of Hildegass, 244 A.2d 672, 675-76 (Pa. 1968); *Button*, 388 at 551-52.

89. *Ficklin's Adm'r v. Rixey*, 17 S.E. 325, 326 (Va. 1893); *see also Ruling Case Law* 600 (9th ed. 1915).

90. *Merchants' Nat. Bank of Mobile v. Hubbard*, 133 So. 723, 727 (Ala. 1931).

91. *Butterfield v. Stanton*, 44 Miss 15 (Miss. Oct Term 1870); *see Bendler v. Bendler*, 69 A.2d 302, 305 (N.J. 1949); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 445 (Cooley 3d. ed. 1884).

92. *Cumming v. Cumming*, 102 S.E. 572, 576 (Va. 1920) (stating such in dicta); *In re Cooper's Estate*, 403 P.2D 984, 987-88 (Kan. 1965).

93. *Robbins v. Continental Nat. Bank & Trust Co. of Chicago*, 58 N.E.2d 254, 259 (Ill. App. Ct. 1944).

94. *See* Ronald B. Standler, PRENUPTIAL AND POSTNUPTIAL CONTRACT LAW IN THE USA, Sept. 12, 2009, http://www.rbs2.com/dcontract.pdf.

95. *See* Paul Brewer, *Family Law — Bratton v. Bratton: The Tennessee Supreme Court Considers Postnuptial Agreements and Allows Married Parties to Agree That They May Eventually Disagree*, 35 U. MEM. L. REV. 579, 581-82 (2005);

96. *Bronfman v. Bronfman*, 229 A.D.2d 314, 315 (N.Y. App. Div. 1996).

agreements, postnuptial agreements have become a means of addressing a very practical problem among spouses: a lack of foresight.

When spouses are engaged and have not weathered the challenges presented by marriage, they often do not consider the hardships that can arise during marriage, or they might not be able to foresee specific situations as potential problems.[97] Postnuptial agreements commonly become a means of resolution for tensions that arise from unforeseen problems. For example, one of the most typical difficulties spouses face involves marital finances.[98] Tension can arise when one or both spouses have either a substantial increase (examples might range from the common — new business success or inheritance — to the uncommon — winning the lottery) or decrease in net worth (usually through some form of mounting debt). Regardless of the couple's specific reasons for entering into a postnuptial agreement, all agreements share one attribute: the agreement serves as a means to control one's financial situation and provides a level of certainty and peace of mind.

Postnuptial agreements are also desirable because many couples view a prenuptial agreement as admitting the possibility of divorce, and thus they choose to forego the opportunity to execute a prenuptial agreement, only to determine later in marriage that some kind of marital contract would be very beneficial. Engaged couples often view life through the lens of romanticism rather than realism. Thus, many do not consider the potential need for a prenuptial agreement. Given the current trends within American jurisprudence, many couples are afforded the opportunity to enter into an agreement, very similar to a prenuptial agreement, after they are married. Postnuptial agreements allow couples to tailor the agreement to their specific needs through first-hand experience.

B. Current Legal Treatment Nationwide

Approximately twenty-two states have clearly addressed the validity of postnuptial agreements.[99] States have recognized postnuptial

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97. Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 828 (2007).

98. *See* Susan Berfield, *Does your Marriage Need a Postnup?*, BUS. WK., Oct. 2, 2009, at 80 (providing an example of a postnuptial agreement that was entered into due to financial tensions).

99. Alabama, Alaska, Arkansas, Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Mississippi, Missouri, New York, Ohio, South Dakota, Tennessee, Utah, and Wisconsin. *See* ALA. CODE §§ 30-4-9, 43-8-72 (West 2009); ALASKA STAT. § 13.12.213 (West 2009); ARK. CODE ANN. §§ 9-11-406, 9-11-502 (West 2009); CAL. FAM. CODE § 1500 (West 2009); COLO. REV. STAT. ANN. § 15-11-

agreements either through judicial channels or through state legislatures.[100] Although the two methods might initially appear separate, they are often intertwined when determining the validity of postnuptial agreements.[101] One group of state legislatures has created specific statutory provisions addressing whether a postnuptial agreement can detail the distribution of marital property upon dissolution of a marriage.[102] A different group of state legislatures has *attempted* to address the issue, but has failed to establish clear principles detailing how postnuptial agreements should be treated, thus requiring the state's judicial branch to ultimately make a determination of the issue.[103] Still a third group of state legislatures has declined to address the issue entirely, leaving the judiciary responsible for determining the validity of postnuptial agreements.[104] For purposes of this comment, the discussion

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207 (West 2009); FLA. STAT. ANN. § 732.702 (West 2009); 750 ILL. COMP. STAT. ANN. 5/502 (West 2009); KY. REV. STAT. ANN. § 403.180(1) (West 2009); MASS. GEN. LAWS ANN. Ch. 209, § 2 (West 2009); MICH. COMP. LAWS ANN. § 557.23 (West 2009); MISS. CODE ANN. § 93-3-1 (West 2009); OHIO REV. CODE ANN. § 3103.06 (West 2009); Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991); *In re* Estate of Harber, 449 P.2d 7, 12 (Ariz. 1969); Perkins v. Sunset Tel. & Tel. Co, 103 P. 190, 193-94 (Cal. 1909); *In re* Estate of Lewin, 595 P.2d 1055, 1057 (Colo. 1979); Flansburg v. Flansburg, 581 N.E.2d 430, 433 (Ind. Ct. App. 1991); Dunsworth v. Dunsworth, 81 P.2d 9, 12 (Kan. 1938); *see* Pearre v. Grossnickle, 114 A. 725, 728 (Md. 1921); Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003); Bronfman v. Bronfman, 229 A.D.2d 314, 315 (N.Y. App. Div. 1996); Keith v. Keith, 156 N.W. 910, 911 (S.D. 1916); Bratton v. Bratton, 136 S.W.3d 595 (Tenn. 2004); Pierce v. Pierce, 994 P.2d 193, 198 (Utah 2000); Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986).

100. For example, Ohio and Illinois have dealt with this problem through legislative channels, whereas Arizona, Kansas, and Maryland have used judicial channels to resolve the problem. *See id.*

101. Each of the following states has statutes and case law that help resolve the issue: Alabama, Alaska, Arkansas, California, Colorado, Florida, Kentucky, Massachusetts, Michigan, and Mississippi. *See* ALA. CODE §§ 30-4-9, 43-8-72; ALASKA STAT. § 13.12.213; ARK. CODE ANN. §§ 9-11-406, 9-11-502; CAL. FAM. CODE § 1500; COLO. REV. STAT. ANN. § 15-11-207; FLA. STAT. ANN. § 732.702); KY. REV. STAT. ANN. § 403.180(1); MASS. GEN. LAWS ANN. Ch. 209, § 2; MICH. COMP. LAWS ANN. § 557.23; MISS. CODE ANN. § 93-3-1; *Tibbs*, 580 So. 2d at 1339; *Perkins*, 103 P. at 193-94; *In re Estate of Lewin*, 595 P.2d at 1057.

102. *See* 750 ILL. COMP. STAT. ANN. 5/502; OHIO REV. CODE ANN. § 3103.06.

103. *See Tibbs*, 580 So. 2d at 1339 (using ALA. CODE § 43-8-72 as support for the proposition that postnuptial agreements are valid under Alabama law); *In re Estate of Lewin*, 595 P.2d at 1057 (relying on COLO. REV. STAT. ANN. § 15-11-204 to support the conclusion that spouses can enter into postnuptial agreements).

104. *In re Estate of Harber*, 449 P.2d at 15-16 (holding spouses have the right to contract with each other regarding property through a postnuptial agreement); Matlock v. Matlock, 576 P.2d 629, 633 (Kan. 1978) (holding that spouses can use a postnuptial agreement to determine property rights between each other); *Pearre*, 114 A. at 728 (justifying the validity of postnuptial agreement by finding that women can waive their right

of states that have addressed the validity of postnuptial agreements are divided into three categories: (1) states with a statute clearly on point, (2) states relying on a judicial interpretation of a state statute, and (3) states dependent solely on judicial determination.

1. State Statute Clearly On Point

Several states have explicitly addressed the validity of postnuptial agreements through enactment of statutes, eliminating the need for judicial interpretation to clarify the intent of such statutes.[105] The unambiguous language of these statutes results in little need to litigate issues surrounding such statutes, thereby effectively precluding any case law on the subject.[106]

Ohio serves as an example of a state that has a statute with unambiguous language.[107] Ohio's statute reads: "A husband and wife cannot, by any contract with each other, alter their legal relations . . . ."[108] Because of the clear language of this statute, very few cases even address the validity of postnuptial agreements in Ohio, and in the few instances where the issue has come before an Ohio court, the courts have simply held that postnuptial agreements violate Ohio statutory law and are therefore invalid.[109] The Ohio cases do not offer any analysis or reasoning of the legislature's intent to hold postnuptial agreements invalid.[110] Further, there is no legislative history available to explain why the legislature chose to ban postnuptial agreements under Ohio law.

Illinois is another state that has a statute with unambiguous language; however, unlike Ohio, Illinois permits postnuptial agreements.[111] The relevant Illinois statute states: "[T]o promote amicable settlement of disputes between parties to a marriage attendant upon the dissolution of their marriage, the parties may enter into a written or oral agreement

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to dower pre- or postnuptially).

105. 750 ILL. COMP. STAT. ANN. 5/502; OHIO REV. CODE ANN. § 3103.06.

106. The only cases dealing with postnuptial agreements that have come before Illinois courts involve factual issues of the postnuptial agreement. *See* Marriage of Richardson, 606 N.E.2d 56 (Ill. App. Ct. 1992); Matter of Estate of Brosseau, 531 N.E.2d 158 (Ill. App. Ct. 1988). Ohio courts have clearly held postnuptial agreements invalid as violating Ohio's statutory law. *See* Brewsaugh v. Brewsaugh, 491 N.E.2d 748, 750 (1985).

107. OHIO REV. CODE ANN. § 3103.06.

108. *Id.*

109. *Brewsaugh*, 491 N.E.2d at 750; *see* Hoffman v. Dobbins, 2009 WL 3119635 (Ohio. App. 2009); Howard v. Howard, 1989 WL 109745 (Ohio App. 1989); Burgin v. Burgin, 1987 WL 15090 (Ohio App. 1987).

110. *See Brewsaugh*, 491 N.E.2d 748.

111. 750 ILL. COMP. STAT. ANN. 5/502 (West 2009).

containing provisions for disposition of any property owned . . . ."[112] Again, there are no judicial opinions that support or offer analysis as to why the legislature intended to recognize postnuptial agreements.[113]

2. State Statute Plus Judicial Interpretation

Some states legislatures appear to have attempted to address postnuptial agreements through statutes,[114] but judicial interpretation of those statutes is necessary to truly determine whether postnuptial agreements can be valid. These state judiciaries have interpreted primarily two types of statutes. The first type of statute includes language allowing a specific property right, such as a right to homestead allowance, to be waived or altered through either a pre- or postnuptial agreement.[115] The other type of statute allows husbands and wives to enter into transactions with each other regarding their respective property rights.[116]

a) Ability to Alter or Waive Specific Property Rights

Statutes that provide for the alteration or waiver of specific property rights have typically been interpreted to permit spouses to pre- or postnuptially agree to change *any* of their property rights, not just the rights stated in the statute.[117] Judicial branches that have addressed postnuptial agreements this way have effectively extended the ability to

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112. *Id.*

113. Cases have come before Illinois courts, however, as inquiries into whether a specific postnuptial agreement is valid are based upon the specific factual situation. *See*, *e.g.*, Marriage of Richardson, 606 N.E.2d 56 (Ill. App. Ct. 1992); Matter of Estate of Brosseau, 531 N.E.2d 158 (Ill. App. Ct. 1988).

114. *See* ALA. CODE §§ 30-4-9, 43-8-72 (West 2009); ALASKA STAT. § 13.12.213 (West 2009); ARK. CODE ANN. §§ 9-11-406, 9-11-502 (West 2009); CAL. FAM. CODE § 1500 (West 2009); COLO. REV. STAT. ANN. § 15-11-207 (West 2009); FLA. STAT. ANN. § 732.702 (West 2009); KY. REV. STAT. ANN. § 403.180(1) (West 2009); MASS. GEN. LAWS ANN. Ch. 209, § 2 (West 2009); MICH. COMP. LAWS ANN. § 557.23 (West 2009); MISS. CODE ANN. § 93-3-1 (West 2009).

115. *See* ALA. CODE § 43-8-72; ALASKA STAT. § 13.12.213; COLO. REV. STAT. ANN. §§ 15-11-204, 15-11-207; FLA. STAT. ANN. § 732.702.

116. *See* ALA. CODE § 30-4-9; ARK. CODE ANN. § 9-11-502; CAL. FAM. CODE § 1500; KY. REV. STAT. ANN. § 403.180(1); MASS. GEN. LAWS ANN. Ch. 209, § 2; MICH. COMP. LAWS ANN. § 557.23; MISS. CODE ANN. § 93-3-1.

117. *See* Tibbs v. Anderson, 580 So.2d 1337, 1339 (Ala. 1991) (using ALA. CODE § 43-8-72 (West 2009) as support for the proposition that postnuptial agreements are valid under Alabama law); *In re* Estate of Lewin, 595 P.2d 1055, 1057 (Colo. 1979) (relying on COLO. REV. STAT. ANN. § 15-11-204 as supporting the conclusion that spouses can enter into postnuptial agreements).

pre- or postnuptially agree to alter or waive rights that are beyond those specifically enumerated within the statutory language without offering any analysis as to why these statutes support this conclusion.

For example, in *Tibbs v. Anderson*, the Alabama Supreme Court made a clear and simple statement: "[W]e note that . . . postnuptial agreements are valid in Alabama."[118] To support this proposition, the court cited an Alabama statute allowing spouses to postnuptially waive a specific property right.[119] Although the Alabama Supreme Court did not provide any reasoning why this statute supported allowing spouses to postnuptially waive other property rights, one can speculate that the court made the decision in light of society's changing views of women, specifically the acceptance of the view that women are equal with men. Like the Alabama Supreme Court, other state judicial branches have interpreted statutes to support the conclusion that postnuptial agreements can be valid without providing additional support as to why such statutes allow spouses to postnuptially modify any property right.

b) Ability of Spouses to Enter Into Contracts

The second type of statute that arguably covers postnuptial agreements is one which allows spouses to enter into transactions with each other regarding their respective property rights. As an example, Oklahoma's statute reads: "Either husband or wife may enter into any engagement or transaction with the other, . . . respecting property . . . ."[120] An important distinction must be noted because a simple transaction between a husband and wife dealing with property rights might not be the same thing as a pre- or postnuptial agreement, depending upon the jurisdiction.[121] When spouses agree to contract with each other regarding property rights, their respective property rights are affected upon the signature of the property transaction. For example, suppose Bob and Laura agree to a transaction which specifies that upon the completion of the immediate transaction, Laura will gain sole ownership of their home, and in exchange Bob will receive all ownership rights in stock once jointly owned by the spouses. In this

118. *Tibbs*, 580 So.2d at 1339.

119. *Id.*

120. 43 OKLA. STAT. § 204 (2001). Similar statutes include ARK. CODE ANN. §§ 9-11-406, 9-11-502; KY. REV. STAT. ANN. § 403.180(1); MASS. GEN. LAWS ANN. ch. 209, § 2.

121. *See* Hendrick v. Hendrick, 1999 OK CIV APP 15, ¶ 13, 976 P.2d 1071, 1073 (discussing that when a spouse conveys to another an interest in marital property prior to dissolution of the marriage, such property is removed from the marital estate; thus, the transaction affects property interests before a pre- or postnuptial agreement would).

example, the property rights of the spouses are affected upon the completion (normally the signature) of the transaction.

By contrast, the unique feature of a pre- or postnuptial agreement is that the parties' property rights are not affected until dissolution of the marriage.[122] Thus, at the time a postnuptial agreement is signed, a spouse's individual property rights have not been affected ― only rights of expected interests in property have been affected.[123] Use of another example will help clarify this point. Suppose Ginny and Joe enter into a postnuptial agreement which states that upon the dissolution of marriage, Ginny will receive all interest in their home property, and Joe will receive all interest in any investment real-estate property held. Under this example, neither Joe's rights in their home property, nor Ginny's rights in the investment real-estate property will be affected until the dissolution of their marriage. Thus, Ginny and Joe have altered their *prospective* property rights.

The Kentucky Supreme Court provides an example of typical judicial analysis of these statutes.[124] The Kentucky legislature enacted a statute allowing spouses to enter into agreements that detail how property will be distributed upon dissolution of marriage.[125] In *Edwardson v. Edwardson*, the Kentucky Supreme court relied on this statute to support the conclusion that postnuptial agreements can be valid.[126] Unfortunately, the court offered no analysis explaining why this statute specifically supported the conclusion that postnuptial agreements can be valid; it almost appeared as though the court felt it was obvious due to its lack of analysis.[127] State judiciaries that have interpreted statutes similar to Kentucky's statute cited above have effectively held that spouses can not only enter into transactions that affect their property rights upon completion of the transaction, but spouses can also enter into transactions that affect their prospective property rights.

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122. *Hendrick*, 1999 OK CIV APP 15, ¶ 13, 976 P.2d 1071, 1073

123. *See In re* Blaydes' Estate, 202 OK 558, 216 P.2d 277, 280 (discussing that a spouse does not have any actual property rights ― only expectation of future property rights ― in the other spouse's property until death or divorce).

124. Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. S. Ct. 1990).

125. KY. REV. STAT. ANN. § 403.180(1).

126. *Edwardson*, 798 S.W.2d at 945-46 n.2.

127. *See id*.

3. Judicial Precedent Standing Alone

Several states that have addressed the validity of postnuptial agreements have done so based solely on common law principles, supporting such holdings on freedom of contract theories.[128] According to these states, postnuptial agreements are simply contracts.[129] Accordingly, any contract can be valid provided that certain requirements are met. Specifically, the contract must be fair, just and equitable, and free from fraud, overreaching, or misrepresentation.[130] These requirements are not unique to postnuptial agreements but are common to all traditional contracts.[131]

In *In Re Estate of Harber*, the Arizona Supreme Court was faced with a question of first impression: whether a postnuptial agreement can be valid.[132] The court began its analysis by stating that although Arizona had a statute addressing how prenuptial agreements were to be treated, this statute was not applicable to postnuptial agreements.[133] The court continued by discussing at great length the legal development and treatment of women's status by noting that through statutory and common law recognition, a woman is an independent individual and has all the same rights to manage her affairs that are enjoyed by men.[134] Reaching its final determination, the court stated that due to the "equal status of women [and] men under the law," spouses are to enjoy all rights to contract with each other regarding property rights, both

128. Arizona, Kansas, and Maryland are states that rely solely on common-law principles to control postnuptial validity. *re* Estate of Harber, 449 P.2d 7, 12 (Ariz. 1969); Dunsworth v. Dunsworth, 81 P.2d 9, 12 (Kan. 1938); *see* Pearre v. Grossnickle, 114 A. 725, 728 (Md. 1921).

129. *In re Estate of Harber*, 449 P.2d at 12; *Dunsworth*, 81 P.2d at 12; *see Pearre*, 114 A. at 728.

130. *In re Estate of Harber*, 449 P.2d at 15 (holding that postnuptial agreements that distribute property rights currently or prospectively can be valid conditioned upon meeting special safeguards); *Dunsworth*, 81 P.2d at 12 (finding that a postnuptial agreement can be valid as long as certain requirements are met); *see Pearre*, 114 A. at 728; *see also* Perkins v. Sunset Tel. & Tel. Co, 103 P. 190, 193-94 (Cal. 1909) (holding that spouses could contract with respect to property rights currently held or in expectancy, which was later codified in CAL. FAM. CODE § 1500 (West 2009).

131. *See* RESTATEMENT (SECOND) OF CONTRACT § 164 (1981) (recognizing that a misrepresentation can make a contract voidable); RESTATEMENT (SECOND) OF CONTRACT § 177 (1981) (holding that undue influence can make a contract voidable); U.C.C. § 2-302 (allowing courts the discretion to enforce unconscionable terms or provisions of a contract).

132. *In re Estate of Harber*, 449 P.2d at 14.

133. *Id.*; ARIZ. REV. STAT. ANN. § 25-201 (2009) (defining a prenuptial agreement).

134. *In re Estate of Harber*, 449 P.2d at 14.

presently and anticipated.[135] The court additionally supported its determination when it noted that spouses already enjoyed the right to convey interests in property that were otherwise considered community property, thus taking such property outside the marital estate.[136] Thus, two factors ultimately guided the court to conclude that postnuptial agreements could be valid: (1) the legal development of women's status, and (2) the existence of other contractual rights shared between spouses prior to this case.

The California Supreme Court also addressed the validity of postnuptial agreements in *Perkins v. Sunset Telephone & Telegraph Company*.[137] The court reached the conclusion that spouses can determine their property rights upon dissolution of marriage through contract, either pre- or postnuptially.[138] In reaching its determination, the court stated: "[T]he utmost freedom of contract exists in California between husband and wife."[139] Thus, the court relied upon the theory of freedom to contract as justification that spouses have the ability to enter into postnuptial agreements under California law.

IV. Treatment of Postnuptial Agreements Under Oklahoma Law

A. Oklahoma Statutory Implications

Two different Oklahoma Courts of Civil Appeal have addressed whether postnuptial agreements can be valid under Oklahoma law, each providing a very different answer.[140] Both courts based their decision principally on interpretations of two different Oklahoma statutes they felt addressed and resolved the problem.[141] The two statutes discussed in the appellate court opinions are title 43, sections 204 (transactions between spouses statute) and 121 (division of property statute). In addition to these two Oklahoma appellate court decisions, the Oklahoma Supreme Court addressed postnuptial validity when it interpreted title

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135. *Id*. at 15.
136. *Id.*
137. *Perkins v. Sunset Tel. & Tel. Co*, 103 P. 190, 193 (Cal. 1909).
138. *Id*. at 193-94.
139. *Id.* at 194.
140. *See* Hendrick v. Hendrick, 1999 OK CIV APP 15, 976 P.2d 1071; Boyer v. Boyer, 1996 OK CIV APP 94, 925 P.2d 82.
141. *See Hendrick*, 1999 OK CIV APP 15, 976 P.2d 1071 (Okla. Civ. App. Div. 1 1998) (interpreting 43 OKLA. STAT. §§ 121, 204); *Boyer*, 1996 OK CIV APP 94, 925 P.2d 82 (interpreting 43 OKLA. STAT. § 204).

84, section 44,[142] and when it interpreted what is now title 43, section 203.[143] The cases interpreting title 43, sections 204 and 121, and title 84, section 44 provide guidance to postnuptial validity, however, the issue will be answered primarily based upon the language of the three statutes.

1. Transactions Between Spouses Statute

Oklahoma's transaction between spouses statute is of particular importance to the validity of postnuptial agreements, and reads as follows:

> Either husband or wife may enter into any engagement or transaction with the other, or with any other person, *respecting property*, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the action of persons occupying confidential relations with each other as defined by the title on trust.[144]

On its face, this statute appears to give married couples the ability to enter into transactions with each other respecting property ― including marital property.[145] This interpretation of the statute, however, is not without dispute.[146] An alternative interpretation of this statute only allows spouses to contract to affect presently–held interests in property and not prospective interests contingent upon death or divorce.[147]

2. Division of Property Upon Divorce

Oklahoma's division of property statute describes how marital property will be distributed upon *divorce*. The language of the statute reads as follows:

> The court shall enter its decree confirming in each spouse the property owned by him or her before marriage and the undisposed-of property acquired after marriage by him or her

142. *See* Atkinson v. Barr, 1967 OK 103, 428 P.2d 316 (Okla. 1967) (interpreting 84 OKLA. STAT. § 44).

143. *See* Crane v. Howard, 1951 OK 282, 243 P.2d 998 (Okla. 1951) (holding postnuptial agreements cannot affect the forced heir statute).

144. 43 OKLA. STAT. § 204 (2001). It is worth noting that the statute explicitly holds that spouses are in a confidential relationship, similar to a fiduciary relationship, when entering contracts regarding property.

145. *Id.*; *see Boyer*, 1996 OK CIV APP 94, 925 P.2d 82.

146. *See Hendrick*, 1999 OK CIV APP 15, 976 P.2d 1071.

147. *Id.* at ¶ 12, 976 P.2d at 1073.

> in his or her own right . . . . As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall, *subject to a valid antenuptial contract* in writing, make such division between the parties as may appear just and reasonable . . . .[148]

Thus, the statute grants each party to the dissolved marriage the ability to retain property that was acquired by them before marriage, as well as property acquired solely by them after marriage.[149] Further, the statute authorizes courts to divide jointly-acquired property between the parties as it deems just and reasonable.[150] The statute, however, places a limitation on a court's ability to divide joint property ─ such power is subject to a valid prenuptial agreement.[151] In the case of divorce, a prenuptial agreement governs the distribution of marital property.[152]

3. Oklahoma Forced Heir Statute

Oklahoma's Forced Heir Statute controls how a decedent's property is distributed upon his *death*. The statute reads:

> Every estate in property may be disposed of by will; provided however, that a will shall be *subservient to any antenuptial marriage contract* in writing; but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law . . . .[153]

The statute allows an individual to choose to dispose of his property through a will as opposed to intestate succession.[154] If an individual chooses to control the distribution of his property through a will, the statute, however, places a limitation on the individual's ability to control the distribution of his estate.[155] If the individual has a spouse, then he

148. 43 OKLA. STAT. § 121 (Supp. 2007). An antenuptial agreement is the same thing as a prenuptial agreement.
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. 84 OKLA. STAT. § 44 (2001).
154. *See id.*; 84 OKLA. STAT. § 213 (2001) is Oklahoma's intestate succession statute.
155. *See* 84 OKLA. STAT. § 44.

cannot, by will, provide that his spouse receive less than one-half of the value of joint-industry property.[156]

The statute also requires that a prenuptial agreement control over a valid will or distribution through intestate succession.[157] Additionally, the limitation placed on an individual's ability to control the distribution of his property through a will ― not being able to leave his spouse an interest in his estate that would be less than one-half the value of joint-industry property ― is not placed on the individual when he chooses to use a prenuptial agreement as the means to distribute his property.[158] Thus, it appears that the statute gives an individual greater rights to control his estate if a prenuptial agreement is used.

B. Oklahoma Supreme Court Guidance

1. The Interplay Between the Oklahoma Statutes

Determining how the different statutes relate to each other is where Oklahoma courts have been in conflict. In *Hendrick v. Hendrick*, an Oklahoma Court of Civil Appeals held that Oklahoma's division of property statute controls when determining whether a postnuptial agreement can be valid, and such statute mandates that a court determine the division of property upon dissolution of a marriage, subject *only* to a prenuptial agreement.[159] *Hendrick* also held that title 43, section 204, governing transactions between spouses, is not relevant to the analysis when determining whether a postnuptial agreement can be valid.[160] In *Boyer v. Boyer*, a decision by a different Oklahoma Court of Civil Appeals, the court held that title 43, section 204 *was* relevant to postnuptial validity and allowed spouses to affect their property rights through a postnuptial agreement.[161]

Along with the two Oklahoma Court of Civil Appeals cases, there are some Oklahoma Supreme Court cases that addressed the validity of postnuptial agreements in the very limited context of the forced heir statute.[162] This section will begin with a discussion of the Oklahoma

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156. *See id.*

157. *See* 84 OKLA. STAT. § 44.

158. *See id.*; BLACK'S LAW DICTIONARY, *supra* note 4, at 176, 517 (9th ed. 2009); Talley v. Harris, 1947 OK 218, ¶9, 182 P.2d 765, 768 (Okla. 1947) (holding the limitation clause of title 84, section 213 applies only to the "every estate in property to be disposed of by will" clause and not the prenuptial clause).

159. *See* Hendrick v. Hendrick, 1999 OK CIV APP 15, 976 P.2d 1071.

160. *See id.*

161. *See* Boyer v. Boyer, 1996 OK CIV APP 94, 925 P.2d 82.

162. *See* Atkinson v. Barr, 1967 OK 103, 428 P.2d 316 (Okla. 1967); Crane v. Howard,

Supreme Court's decision in *Atkinson v. Barr*, as it is the most recent representative case, and will then address the two appellate court decisions in chronological order.

2. The Decision of Atkinson v. Barr

The Oklahoma Supreme Court addressed the validity of postnuptial agreements in a limited context approximately thirty years prior to *Boyer* and *Hendrick*. In *Atkinson*, the Oklahoma Supreme Court addressed whether spouses could postnuptially waive their rights under Oklahoma's forced heir statute.[163] This case involved a deed between a husband and wife relating to homestead property.[164] A few years after marriage, the husband and wife separated for a short period, and during this separation period the husband purported to convey his interest in the couple's homestead property to his wife by quit-claim deed.[165] The court determined that through the quit-claim deed, the husband had conveyed any and all rights he had in the homestead property to his wife.[166]

Ultimately, the separation period lasted only six weeks, and the couple resumed living together in their homestead property for approximately another year and a half before the wife died.[167] After the wife died intestate, the husband continued to live in the property until his death.[168] The quit-claim deed executed by the husband, during the separation period, came into question after he died and his executor began to probate his will.[169] The wife's statutory heirs claimed that when the husband executed the quit-claim deed he not only gave up his current interest in the homestead property but also his right to a share of

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1951 OK 282, 243 P.2d 998 (Okla. 1951); *In re* Blayde's Estate, 1950 OK 73, 216 P.2d 277 (Okla. 1950).

163. *Id.* 84 OKLA. STAT. § 44 (2001) is also known as "forced heir statute." The forced heir statute basically holds that a spouse cannot by will or prenuptial agreement leave their spouse an amount of their estate that would be less than one-half of the value of property obtained through joint industry.

164. *Atkinson*, ¶ 6, 428 P.2d at 318.

165. *Id.* A quit-claim deed purports to convey any and all interest that one individual currently holds in property to the recipient of the quit-claim deed, without warranty title.

166. *Id.* ¶ 23, 428 P.2d at 320

167. *See id.* ¶ 6, 428 P.2d at 318. The six-week separation period began in August of 1949 and the wife died in April of 1951. Thus, the couple lived in the homestead property post-separation for approximately a year and a half.

168. *Id.* ¶¶ 6-8, 428 P.2d at 318.

169. *Id.* ¶¶ 8-9, 428 P.2d at 318.

the property through intestate succession.[170] The executor of the husband's estate claimed the quit-claim deed could not deprive the husband of his statutory right of inheritance from his wife through the forced heir statute.[171]

The Oklahoma Supreme Court was forced to determine whether the husband had conveyed away his statutory right of inheritance in the couple's homestead property by the quit-claim deed.[172] In this situation, the wife's heirs claimed the quit-claim deed essentially functioned as a postnuptial agreement attempting to waive the husband's inheritance rights, through the forced heir statute, in the homestead property.[173] The Oklahoma Supreme Court ultimately concluded that despite the quit-claim deed, the husband could not waive his statutory right to an interest in his homestead property through a postnuptial agreement.[174]

According to Oklahoma's statute of descent and distribution applicable at the time, a spouse was entitled to a one-third interest in homestead property if the decedent left more than one child or heir.[175] In this case, the Oklahoma Supreme Court concluded that when the wife died intestate leaving two children, her husband was entitled to a one-third interest in their homestead property, and the husband could not postnuptially agree to waive this interest in the property.[176] The court held that Oklahoma's forced heir statute forbid the husband from waiving his statutory interest in the homestead property through a postnuptial agreement.[177] At the time, this statute read:

> Every estate in property may be disposed of by will; provided however, that a will shall be subservient to any [prenuptial] marriage contract in writing; but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive *less in value* than would be obtained through *succession by law*. . . .[178]

In conclusion, the Oklahoma Supreme Court held title 84, section 44 prohibited a spouse from waiving his statutory right of inheritance

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170. *Id.* ¶¶ 6-9, 428 P.2d at 318.
171. *Id.* ¶ 11, 428 P.2d at 319.
172. *See Atkinson*, 1967 OK 103, 428 P.2d 316.
173. *Id.* ¶ 23, 428 P.2d at 320.
174. *Id.* ¶ 29, 428 P.2d at 320-21.
175. 84 OKLA. STAT. § 213 (2001).
176. *Atkinson*, ¶ 29, 428 P.2d at 320-21.
177. *Id.* (interpreting 84 OKLA. STAT. § 44).
178. 84 OKLA. STAT. § 44.

through a postnuptial agreement;[179] however, the Oklahoma Supreme Court did not go so far as to say that all postnuptial agreements are per se invalid. From the facts of *Atkinson*, the court's decision appears controlling in situations where spouses try to use a postnuptial agreement to create a marital agreement independent of a prenuptial agreement. It is uncertain, however, if this case is controlling in situations where spouses try to use a postnuptial agreement to simply modify an existent prenuptial agreement.

C. The Boyer v. Boyer Analysis

In *Boyer v. Boyer*, the Oklahoma Court of Civil Appeals was faced with the issue of whether a valid prenuptial agreement could be modified during marriage by use of a postnuptial agreement.[180] In September 1989, Glenn and Judy Boyer were married.[181] Before their marriage, the couple entered into a valid prenuptial agreement which stated that each party would retain sole possession of property owned prior to marriage and "any increase in value of the separate property would remain separate."[182] In 1991, the couple wanted to make improvements to one of the wife's separate pieces of real-estate using the husband's funds.[183] The couple attempted to modify their prenuptial agreement to reflect the husband's investment in the wife's property, which would give the husband a proportionate interest in the property that reflected his investment.[184] Eventually the coupled filed for divorce in December 1994, and the wife challenged the validity of the postnuptial modification to the prenuptial agreement.[185]

The *Boyer* court began its analysis of the validity of postnuptial agreements by discussing title 43, section 204, governing transactions between spouses.[186] In discussing the statute, the *Boyer* court called upon an Oklahoma Supreme Court case, *Manhart v. Manhart*, that analyzed the same statute.[187] The *Boyer* court noted the Oklahoma

179. *Atkinson*, ¶ 29, 428 P.2d at 320-21 (citing *Crane v. Howard*, 1951 OK 282, 243 P.2d 998).

180. Boyer v. Boyer, 1996 OK CIV APP 94, ¶ 9, 925 P.2d 82, 84.

181. *Id.* ¶ 2, 925 P.2d at 83.

182. *Id.*

183. *Id.* ¶ 3, 925 P.2d at 83.

184. *Id.*

185. *Id.* ¶¶ 4-6, 925 P.2d at 83.

186. *Id.* ¶ 10, 925 P.2d at 84.

187. *Id.* ¶ 11, 925 P.2d at 84 (citing Manhart v. Manhart, 1986 OK 12, 725 P.2d 1234 (Okla. 1986)).

Supreme Court stated "that spouses may contract with each other and alter their legal relations as to property" and that spouses may alter their marital relations regarding property by either conveying a property interest to the other or by taking joint property out of the marital estate that would otherwise be subject to equitable division.[188] The *Boyer* court further clarified that the ability of spouses to contract with each other was limited by statute to contracts affecting property rights only.[189]

To support its position that postnuptial agreements are valid under Oklahoma law, the *Boyer* court provided an additional theory based on contract principles.[190] The court stated that Oklahoma clearly recognized that a contract may be modified by mutual consent and consideration; thus, basic contract law permitted a prenuptial agreement ― a form of a contract ― to be modified through a postnuptial agreement.[191] Additionally, the court supported the contract theory by stating that because a prenuptial agreement can be rescinded or revoked, it followed that a prenuptial agreement could also be modified postnuptially.[192] The contract theory based analysis, however, appeared to be limited to specific factual situations. It seemed as if the analysis pertained to factual situations where spouses wanted to modify an existing prenuptial agreement through a postnuptial agreement, as opposed to situations where a postnuptial agreement is the first marital agreement between a couple.

The court ultimately concluded its analysis by holding that postnuptial agreements can be valid and then imposed certain requirements in order for a postnuptial agreement to be valid: (1) the agreement is fairly entered into, (2) the intentions of the parties are clear, (3) the agreement is substantively fair, and (4) the agreement "does not contravene public policy."[193]

D. Postnuptial Treatment Under Hendrick v. Hendrick

Two years later, in *Hendrick*, a different Oklahoma Court of Civil Appeals considered the validity of postnuptial agreements.[194] The

188. *Id.* ¶ 11, 925 P.2d at 84 (citing Manhart v. Manhart, 1986 OK 12, 725 P.2d 1234 (Okla. 1986)).

189. *Id.* ¶ 11 n.3, 925 P.2d at 84 n.3; *see* 43 OKLA. STAT. § 205 (2001)).

190. *Id.* ¶ 14, 925 P.2d at 85.

191. *Id.*

192. *Id.* ¶ 15, 925 P.2d at 85.

193. *Id.*

194. Hendrick v. Hendrick, 1999 OK CIV APP 15, ¶ 2, 976 P.2d 1071.

parties in this case were married in 1985 and entered into a prenuptial agreement before marriage.[195] Under the prenuptial agreement, the wife waived any and all rights to the real and personal property of the husband to which she might otherwise be entitled.[196] The prenuptial agreement provided that after five years of marriage, the wife would be entitled to receive property worth $1,000,000 from the husband in the event of divorce.[197] In 1989, the husband made gifts to his wife with a value of approximately $5,000,000.[198] The couple then entered into two different postnuptial agreements modifying the prenuptial agreement: the first postnuptial agreement stated that the gifts alleviated any liability the husband might have in the case of divorce under the original prenuptial agreement, and the second postnuptial agreement stated that the wife would have to give back any of the gifts that exceeded $1,000,000 in value in the event of divorce.[199] In 1995, the wife filed for divorce and challenged the validity of the postnuptial agreements.[200]

The court started its analysis of postnuptial agreements by stating that marriage is a statutory creature and "each spouse has a statutory share in the marital estate in the event of divorce."[201] Thus, the only way to affect these rights is through a statute.[202] The court then reiterated that the language of Oklahoma's division of property statute states that an equitable division of marital property is subject to *only* one thing — a valid prenuptial agreement,[203] and stated that by its very nature a prenuptial agreement is one entered into before marriage.[204] Thus, a modification of a prenuptial agreement changes the very nature of the agreement, and it is no longer a prenuptial agreement, but a postnuptial agreement.[205]

The court then addressed whether title 43, section 204 supported postnuptial agreement validity.[206] The court held that the language of the statue allowed one spouse to gift or convey to the other spouse his

195. *Id.* at 1071.
196. *Id.*
197. *Id.* ¶ 2, 976 P.2d at 1071-72.
198. *Id.* ¶ 3, 976 P.2d at 1072.
199. *Id.* ¶¶ 4-5, 976 P.2d at 1072.
200. *Id.* ¶ 6, 976 P.2d at 1072.
201. *Id.* ¶ 9, 976 P.2d at 1072.
202. *Id.*
203. *Id.* ¶ 12, 976 P.2d at 1073.
204. *Id.* ¶ 11, 976 P.2d at 1072-73.
205. *Id.*
206. *Id.* ¶ 12, 976 P.2d at 1073.

interest in marital property, which would have the effect of taking the property out of the marital estate.[207] The effects of a section 204 conveyance are distinguishable from the effects of a postnuptial agreement because a postnuptial agreement "is only effective upon the contingency of divorce and/or death," whereas a section 204 conveyance is effective immediately.[208] Therefore, a postnuptial agreement affects the marital estate only upon the contingency of one of those events, and section 204 does not support this kind of alteration to spousal property rights.[209]

The court continued its discussion of *Boyer* and provided further analysis of why the *Boyer* court erroneously found postnuptial agreements valid.[210] In addition to the section 204 discussion, the *Hendrick* court stated that *Boyer* interpreted the Oklahoma Supreme Court's decision in *Manhart* incorrectly.[211] The *Manhart* case did not deal with a prenuptial or postnuptial agreement, but instead dealt with a section 204 transaction of property between spouses, which took the property out of the marital estate.[212] The *Hendrick* analysis of the difference in a postnuptial agreement and a section 204 transaction explains why the *Hendrick* court held *Manhart* did not support the validity of postnuptial agreements, as *Boyer* held it did.

The court also addressed *Boyer's* proposition that contract law allows prenuptial agreements to be modified through a postnuptial agreement. The *Hendrick* court stated that the proposition that a prenuptial agreement could be postnuptially modified simply because a prenuptial agreement could be rescinded "is [simply] a legal non sequitur."[213] But the court did not provide any further analysis to support that contract law was not applicable to the situation.[214] Thus, all of the above reasons led the *Hendrick* court to hold that postnuptial agreements (either through modifying an earlier marital agreement or starting new) are not valid.[215]

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* ¶ 13, 976 P.2d at 1073.
211. *Id.*
212. *Id.*
213. *Id.* ¶ 14, 976 P.2d at 1073. A legal non sequitur means an inference or conclusion that does not logically follow from the premise. BLACK'S LAW DICTIONARY, *supra* note 4, at 1157 (9th ed. 2009).
214. *Hendrick*, ¶ 14, 976 P.2d at 1073.
215. *Id.* ¶ 17, 976 P.2d at 1074.

V. The Applicability of Oklahoma Statutes to Postnuptial Agreement Validity

Essential to addressing postnuptial agreement validity in Oklahoma is determining which Oklahoma statutes are relevant to the issue and in what situations. All three statutes, title 43, sections 121 and 204 and title 84, section 44, seem to play a role in determining postnuptial agreement validity. This section will begin by addressing the relationship of the three Oklahoma statutes. Next, in addition to addressing to what extent each respective Oklahoma statute pertains to the issue, this section will suggest that the effects of the Oklahoma Supreme Court's decision in *Atkinson* will guide the determination of whether postnuptial agreements are valid. This section concludes with a suggested change to Oklahoma's statutory scheme in order to allow postnuptial agreements to be valid in all situations, which is in line with Oklahoma's policy of favoring marital agreements in general.

A. Postnuptial Agreement Validity Under Oklahoma's Current Statutory Scheme

1. Relationship of Oklahoma's Three Postnuptial Agreement Statutes

Title 43, section 204, Oklahoma's spousal statute, contains the broadest language of the three Oklahoma statutes relevant to postnuptial validity;[216] thus, this is the best statute to begin the discussion of the relationship of the three. This statute gives spouses the general ability to enter into transactions with each other in whatever forms those transactions may take.[217] Section 204 also gives spouses the ability to enter into marital contracts respecting property generally.[218] Whether the agreement is prenuptial in nature, or an agreement to convey interests in marital property, section 204 is what allows this type of transaction.[219]

Unlike the *Boyer* court holding, section 204 should not guide a court's determination when addressing postnuptial agreement validity. *Boyer* incorrectly relied on section 204 to support its holding that a prenuptial agreement could be modified through a postnuptial agreement.[220] Although some states have relied on statutes with

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216. *See* 43 OKLA. STAT. § 204 (2001).
217. *See id.*
218. *See id.*
219. *See id.*
220. Boyer v. Boyer, 1996 OK CIV APP 94, 925 P.2d 82.

language similar to section 204, those states do not have any other statutes that are more pertinent to postnuptial validity.[221] While it may be appropriate to use section 204 as a starting point when discussing postnuptial agreement validity, exclusive reliance on this statute is improper because Oklahoma maintains statutes that are more germane to postnuptial validity.[222] Thus, these other statutes should govern a court's analysis of postnuptial validity.

Title 43, section 121 instructs Oklahoma courts of the proper procedures to use when distributing property upon a divorce.[223] Title 84, section 44 serves the same function for Oklahoma courts except that it guides how to dispose of property upon the death of spouses.[224] Since attempting to define property rights is the most common situation in which a postnuptial agreement is used, title 43, section 121 and title 84, section 44 are the two statutes that courts should look to when determining whether a postnuptial agreement can detail how property is supposed to be distributed. Because these two statutes differ in language, it is important to look at the effects of each separately.

Title 84, section 44 is found in the Wills and Succession section of Oklahoma's statute scheme.[225] The majority of this statute deals more with wills than it does with marital agreements, as it states that an individual can create a will to bypass Oklahoma's intestate statute.[226] Further, the statute places restrictions on wills as discussed in Part IV.A.3 of this comment. The second clause of subpart A of this statute, however, contains language that relates this statute to marital contracts, as it states that wills will be subject to a prenuptial agreement.[227] Thus, when a court probates a decedent's estate and the decedent had a prenuptial agreement with his spouse, the court looks to a prenuptial agreement to determine how the decedent's estate is to be distributed.[228] In the event that no prenuptial agreement exists, the court then looks to see if the decedent had a will to guide in the distribution of his estate, and turns finally to Oklahoma's intestate succession if the decedent did

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221. *See* ARK. CODE ANN. §§ 9-11-406, 9-11-502 (West 2009); MASS. GEN. LAWS ANN. ch. 209, § 2 (West 2009). Reference Part III.B.2.b. for discussion of statutes with this type of general language.

222. *See* 43 OKLA. STAT. § 121 (Supp. 2007); 84 OKLA. STAT. § 44 (2001).

223. 43 OKLA. STAT. § 121.

224. *See* 84 OKLA. STAT. § 44.

225. *See id*.

226. *See id*.

227. *See id*.

228. *See id*.

not provide a prenuptial agreement or will.[229] It is also important to note that the statute states a will is subject to a prenuptial agreement, and gives no other legal device this authority.[230]

Title 43, section 121 specifically addresses how property is to be distributed upon divorce.[231] Section 121 gives the court the authority to make an equitable distribution of property acquired jointly during marriage, whether the title of the property is "in either or both of the said parties," as the court sees fit.[232] The statute, however, places a limitation on this power of the court; the court must give effect to a valid prenuptial agreement.[233] As in title 84, section 44, the court's equitable division authority is subject to a prenuptial agreement, and no other devices are similarly listed.[234]

Both title 84, section 44 and title 43, section 121 explicitly address only prenuptial agreements and not postnuptial agreements.[235] When considering basic principles of statutory construction, it is important that the only listed exception to both statutes is the existence of a prenuptial agreement. "The primary goal of statutory construction is to determine legislative intent,"[236] and the legal maxim "expressio unius est exclusio alterius" is used to determine legislative intent.[237] This maxim stands for the proposition that "the mention of one thing in a statute impliedly excludes another thing."[238] Since Oklahoma does not publish legislative history, application of this legal maxim is particularly appropriate in determining the legislature's intentions through both title 84, section 44 and title 43, section 121. Since the two statutes call specifically for

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229. *See id*.

230. *See id*.

231. 43 OKLA. STAT. § 121 (Supp. 2007).

232. *Id*.

233. *See id*.

234. *See id*.

235. *See* 84 OKLA. STAT. § 44 (2001); 43 OKLA. STAT. § 121; Atkinson v. Barr, 1967 OK 103, 428 P.2d 316 (Okla. 1967).

236. TXO Production Corp. v. Oklahoma Corp. Comm'n, 1992 OK 39, ¶7, 829 P.2d 964, 968-69 (Okla. 1992).

237. R.R. Tway, Inc. v. Okla. Tax Comm'n, 1995 OK 129, ¶ 17, 910 P.2d 972, 977 (Okla. 1995).

238. Pub. Serv. Co. of Okla. v. State ex rel. Corp. Comm'n, 1992 OK 153, ¶ 16, 842 P.2d 750, 753. The Oklahoma Supreme Court continued describing this legal maxim by stating: "The maxim is to be applied only as an aid in arriving at intention and should never be followed to the extent of overriding a different legislative intent." *Id*. Since Oklahoma does not provide legislative history, it seems the only way application of the maxim could be found to override legislative intent would be if language as explicit as that empowering prenuptial agreements existed elsewhere in the statutes.

prenuptial agreements as a limitation to either a will or the court's equitable division power, the statutes impliedly exclude postnuptial agreements as another limitation. Postnuptial agreements are not explicitly mentioned anywhere else in the Oklahoma statutes. Thus, a postnuptial agreement that is used to create a new marital contract appears to violate both title 84, section 44 and title 43, section 121, and is therefore unenforceable.

2. The Proper Application of Oklahoma's Statutes With Regard to Postnuptial Validity

Revisiting the Oklahoma Supreme Court's decision and analysis in *Atkinson* serves as a guide in ascertaining how postnuptial agreements should be treated under Oklahoma's current law. In addition to *Atkinson*, Oklahoma's policy of favoring marital agreements will help determine how postnuptial agreements should be treated in Oklahoma. After considering the language of title 84, section 44 and title 43, section 121, *Atkinson*'s analysis, and Oklahoma's favorable treatment of marital agreements, determining postnuptial validity will ultimately hinge on the use of the postnuptial agreement: either as a modification to a prenuptial agreement or as a means to create a new marital agreement between spouses.

In *Atkinson*, the court held the wife's heirs were arguing the quit-claim deed served as postnuptial agreement to waive the husband's statutory rights of inheritance.[239] Thus, the postnuptial agreement would have served to create an entirely new marital agreement.[240] The *Atkinson* court relied on title 84, section 44 for guidance in addressing postnuptial validity and did not discuss whether a postnuptial agreement could be used to modify a prenuptial agreement.[241] The court simply stated, "[a] postnuptial agreement of a husband and wife not to dissent from the will of the other, and waiving the right of the husband or wife to take the other's estate under the law of intestate succession, is not authorized by statute and is invalid and unenforceable."[242] Thus, the Oklahoma Supreme Court made clear that title 84, section 44 makes a will subservient to a prenuptial agreement *only*, and not to postnuptial agreements, as well.[243] Because *Atkinson* dealt with a situation where a

239. Atkinson v. Barr, 1967 OK 103, ¶ 23, 428 P.2d 316, 320 (Okla. 1967).
240. *Id.*
241. *See id.* ¶ 29, 428 P.2d at 320-21.
242. *Id.* (quoting *Crane v. Howard*, 1951 OK 282, ¶ 0, 243 P.2d 998, 999).
243. *See Id.*

postnuptial agreement was used to create an entirely new marital agreement, it is unclear whether the holding and analysis of *Atkinson* controls in situations where a postnuptial agreement is used to modify an existing prenuptial agreement.

Considering the uncertainty of *Atkinson*'s applicability to situations where the use of a postnuptial agreement is to simply modify a prenuptial agreement, and that the language of both title 84, section 44 and title 43, section 121 fails to provide an explicit answer for this situation, a gap exists for the Oklahoma courts to fill with common law principles. An understanding of Oklahoma's position of favoring marital agreements helps to provide guidance on how courts should fill this gap left by the legislature.

As a whole, the state of Oklahoma, through both its judicial and legislative branches, favors the use of marital contracts between spouses.[244] Historically, however, this was not the case; women were viewed with an attitude of paternalism.[245] Thus, courts were very skeptical of any form of marital agreement. Specifically, prenuptial agreements were once viewed as "a wicked device to evade the laws applicable to marriage relations, property rights, and divorces. . . ."[246] This view of marital contracts, however, began to change. Women were no longer seen as insensible or especially vulnerable "to overreaching by their fiancés and in need of special judicial protection."[247] The Oklahoma Supreme Court recognized this change in attitude in 1935 when it stated that prenuptial agreements were favored by law.[248] In addition to being favored by law, the areas a prenuptial agreement can cover have expanded since their development in the twentieth century.[249] Although a prenuptial agreements that was made in contemplation of divorce was not *per se* unenforceable, in 1977 the Oklahoma Supreme Court made clear that prenuptial agreements were not unenforceable simply because they contemplated such divorce.[250]

The Oklahoma Legislature also continued to expand spouses' ability to contract with one another when it enacted title 43, section 204,

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244. *See* 43 OKLA. STAT. § 121 (Supp. 2007); 43 OKLA. STAT. § 204 (2001); Manhart v. Manhart, 1986 Ok 12, ¶ 29, 725 P.2d 1234, 1238 (Okla. 1986); Estate of Burgess, 1982 OK CIV APP 22, ¶ 12, 646 P.2d 623, 625 (Okla. Civ. App. Div. 1 1982).

245. *Estate of Burgess*, ¶ 10, 646 P.2d at 625.

246. *Id.*

247. *Id.* ¶ 12, 646 P.2d at 625.

248. *Leonard v. Prentice*, 1935 OK 427, ¶ 17, 43 P.2d 776, 780 (Okla. 1935).

249. *See* discussion *supra* Part II.A.

250. Freeman v. Freeman, 1977 OK 110, ¶ 2, 565 P.2d 365, 367 (Okla. 1977).

regarding transactions between spouses.[251] "At common-law, Husband and Wife could not have contracted to convey Wife's [property] interest;" however, title 43, section 204 modified this common law rule.[252] The Oklahoma Legislature further expanded the power of marital agreements when it amended title 43, section 121.[253] Oklahoma courts had once held that a prenuptial agreement could not prohibit a court's equitable division powers in divorce cases.[254] In 1992, the Oklahoma Legislature amended title 43, section 121 by inserting "subject to a valid [prenuptial] contract in writing," thus, making the court's equitable division powers subject to a valid prenuptial agreement.[255]

In addition to the judicial and legislative shifts toward favoring marital contracts, there are also many policy justifications that support the use of marital contracts. For example, postnuptial agreements might actually foster the institution of marriage because without one, some couples might not be willing to marry since they would not be able to order their affairs as they see fit.[256] Additionally, postnuptial agreements can help prevent future dispute among prospective spouses because they will know how each other's property will be disposed of in the future.[257] Similarly, use of postnuptial agreements help promote domestic happiness by allowing couples to privately resolve any potential conflict associated with distribution of property.[258]

Over time, Oklahoma courts appear to almost advocate the use of marital contracts when the situation calls for one, showing great preference for their use. Considering this attitude toward marital agreements in general, it seems that the use of a postnuptial agreement as a means to modify a prenuptial agreement is in line with Oklahoma's policy of favoring these types of agreements and providing spouses the ability to control their own affairs. Additionally, the two statutes relevant to distribution of property — title 84, section 44 and title 43, section 121 — require only that a valid prenuptial agreement be in

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251. *See* 43 OKLA. STAT. § 204 (2001).

252. Manhart v. Manhart, 1986 Ok 12, ¶ 29, 725 P.2d 1234, 1238 (Okla. 1986).

253. *See* 43 OKLA. STAT. § 121 (Supp. 2007).

254. *See* Taylor v. Taylor, 1991 OK CIV APP 126, ¶ 10-11, 832 P.2d 429, 431-32 (Okla. Civ. App. Div. 1 1991).

255. *See* 43 OKLA. STAT. § 121.

256. Estate of Burgess, 1982 OK CIV APP 22, ¶ 13, 646 P.2d 623, 625-26 (Okla. Civ. App. Div. 1 1982).

257. *Id*. ¶ 14, 646 P.2d at 626.

258. *See* Leonard v. Prentice, 1935 OK 427, 43 P.2d 776 (Okla. 1935).

existence for a court to consider the marital contract when distributing property.[259] Thus, in the situation where a marriage dissolves from death or divorce, and a couple has made a modification to a valid prenuptial agreement postnuptially, that prenuptial agreement was in existence when the couple was married. Simply modifying the prenuptial agreement postnuptially need not change the fact that the prenuptial agreement was in existence before marriage, thus satisfying title 84, section 44 and title 43, section 121. Further, it seems in line with Oklahoma's policy towards favoring prenuptial agreements to consider a modification to a prenuptial agreement as nothing more than a reflection of the parties' intention to continue to align their affairs as they see fit. Additionally, the ability to modify the prenuptial agreement postnuptially serves Oklahoma's desire for spouses to resolve private disputes privately.

The court in *Boyer* was misguided in using title 43, section 204 to justify that a postnuptial agreement can modify a prenuptial agreement, while the *Hendrick* court relied on the proper statute — title 43, section 121 — but came to the wrong conclusion, that prenuptial agreements could not be amended through postnuptial agreements.[260] The court in *Hendrick* analogized that case with the Oklahoma Supreme Court's decision in *Atkinson*.[261] As addressed above, the law under Oklahoma should treat the use of postnuptial agreements differently depending on their use: either as a modification tool or a means to create an entirely new marital contract.

The *Hendrick* court overlooked this distinction and chose to apply *Atkinson*, a case dealing with a postnuptial agreement attempting to create a new marital contract, to the distinguishable facts before it, which dealt with using a postnuptial agreement as a way to modify a prenuptial agreement.[262] In addition to the incorrect use of *Atkinson*, the *Hendrick* court overlooked the policy of both Oklahoma's legislature and judiciary of favoring marital contracts and disregarded the proposition that allowing modification of prenuptial agreements postnuptially serves to further the same policies that favor the use of marital contracts generally.

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259. *See* 43 OKLA. STAT. § 121; 84 OKLA. STAT. § 44 (2001).

260. Hendrick v. Hendrick, 1999 OK CIV APP 15, 976 P.2d 1071.

261. *Id.* ¶ 16, 976 P.2d at 1073-74.

262. *See* Atkinson v. Barr, 1967 OK 103, ¶ 23, 428 P.2d 316, 320 (Okla. 1967); *Hendrick*, 1999 OK CIV APP 15, 976 P.2d 1071.

B. Proposed Changes to Oklahoma's Statutes to Enhance Postnuptial Agreement Treatment

The Oklahoma Legislature should consider amending title 84, section 44 and title 43, section 121 to allow spouses to enter into entirely new marital contracts postnuptially. Such an amendment would coincide with Oklahoma's policy goals of giving married couples the ability to control their property, which is the same goal that is currently served by prenuptial agreements. Prenuptial agreements receive favorable treatment in part because they help foster marriage;[263] in certain situations postnuptial agreements can also help foster a couple's decision to remain married. Just as a prenuptial agreement helps foster marriage by providing couples that would not marry unless they could manage their affairs a means to accomplish their desired control, a postnuptial agreement can provide married couples a way to resolve disputes, which might end in divorce unless a resolution is found by allowing them the ability to control their property after marriage.

In addition to promoting and sustaining marriage, postnuptial agreements that create new marital contracts can help not only sustain a marriage but can also create more amicable and loving marriages. As noted earlier, spouses often want to use a postnuptial agreement, whether by amending a prenuptial agreement or creating a new marital agreement, to resolve problems that could not have been foreseen before marriage. Allowing couples to create new marital contracts through a postnuptial agreement is simply a recognition of the reality that many couples do not know what their marriage will look like and what difficulties might arise. Although many couples might not end their marriage over these unforeseen challenges, affording couples the ability to control their marriages would create a better living environment for them and other family member living in the same home — such as children.

Amending title 84, section 44 and title 43, section 121 would not require a total statutory overhaul, but simply an insertion into the already existing statutory language. Oklahoma could use Alabama's statute relevant to postnuptial agreement validity as a model for the amendments necessary to title 84, section 44 and title 43, section 121. The Alabama statute reads: "The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt

263. Griffin v. Griffin, 2004 OK CIV APP 58, ¶ 17, 94 P.3d 96, 100 (Okla. Civ. App. Div. 3 2004).

property and family allowance, or any of them, may be waived, wholly or partially, before or *after* marriage . . . ."[264]

For title 84, section 44 and title 43, section 121 only the words "or postnuptial" would need to be inserted into the respective statutes. Thus, title 84, section 44(b)(1) would read: "Every estate in property may be disposed of by will except that a will shall be subservient to any antenuptial *or postnuptial* marriage contract in writing." Title 43, section 121 would read: "As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall, subject to a valid [antenuptial] *or postnuptial* contract in writing . . . ."

If Oklahoma makes amendments to title 84, section 44 and title 43, section 121, courts should impose similar requirements to those it imposes on prenuptial agreements to determine on a case-by-case basis if a specific postnuptial agreement is valid. The requirements that make a prenuptial agreement valid can be employed on postnuptial agreements that create new marital contracts to ensure one party is not being unduly taken advantage of. Because courts already consider spouses to be in a confidential relationship and the status of a confidential relationship requires spouses to act as fiduciaries, spouses creating a new marital contract through a postnuptial agreement would already be under a duty to act as fiduciaries. Just as courts require that prenuptial agreements be entered into voluntarily to satisfy the duty of spouses to act as fiduciaries, so should a court require that spouses enter into a postnuptial agreement voluntarily.

The requirement of voluntariness would help address the concern that one spouse was exercising undue influence over the other when creating a new marital agreement through a postnuptial agreement. When a court considers the elements of voluntariness — (1) time given to sign the agreement; (2) ability to consult independent counsel; and (3) presence of fraud, misrepresentation, and duress[265] — it is effectively protecting the interests of either spouse and ensuring the postnuptial agreement was entered into validly. The other requirements of prenuptial agreements, (1) the agreement is not against public policy, (2) there is a full and fair disclosure of assets, and (3) the agreement is substantively fair and

264. ALA. CODE § 43-8-72 (West 2009).

265. See part II.B.2 for further discussion of each individual element of voluntariness.

conscionable, can all be equally applied to a postnuptial agreement creating a new marital agreement.

VI. Conclusion

Given the uncertainty of treatment of postnuptial agreements under both Oklahoma's statutory and common law, it is important to understand what Oklahoma's statutory law covers, Oklahoma's attitude toward marital agreements, and justifications for postnuptial agreements. Spouses increasingly attempt to control their property rights within a marriage, through both pre- and postnuptial agreements.[266] Because of this increase in both forms of marital contracts it is important to understand how Oklahoma law treats both agreements. Although prenuptial agreements are clearly favored under Oklahoma law, the treatment of postnuptial agreements is unclear.

Whether postnuptial agreements are valid under Oklahoma law hinges on the use of the postnuptial agreement: either as a way to modify a prenuptial agreement or as a way to create an entirely new marital contract. Based on Oklahoma's statutes relevant to postnuptial agreement validity, title 84, section 44 and title 43, section 121, both statutes seem to create a gap in legislative intent when a postnuptial agreement is employed as a way to modify a prenuptial agreement ― a gap that must be filled by common law principles.[267] Considering Oklahoma's policy of favoring marital agreements because these agreements allow parties to align their affairs as they please, and help foster marriage and resolve marital disputes privately, it is likely that Oklahoma courts will fill this gap in Oklahoma's postnuptial statutes by holding that a prenuptial agreement can be modified through use of a postnuptial agreement.[268] Additionally, allowing postnuptial agreements to be used in such a way serves the same goals that justify the initial use of prenuptial agreements.

Although postnuptial agreements modifying prenuptial agreements are likely to be valid under Oklahoma law, postnuptial agreements that create entirely new marital agreements are likely prohibited under

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266. *See* Jean Chatzky, *For Richer or Poorer, Unless We Get Divorced* 1 (2006), http://money.cnn.com/magazines/moneymag/moneymag_archive/2006/04/01/8373333/index.htm; Robert DiGiacomo, *Quit Fighting – Get a Postnuptial Agreement* 1 (2008), http://www.cnn.com/2008/LIVING/personal/04/02/postnuptial.agreement/index.html.

267. *See* 43 OKLA. STAT. § 121 (Supp. 2007); 84 OKLA. STAT. § 44 (2001).

268. *See Estate of Burgess*, 1982 OK CIV APP 22, ¶ 13, 646 P.2d 623, 625-26 (Okla. Civ. App. Div. 1 1982); *Leonard v. Prentice*, 1935 OK 427, 43 P.2d 776 (Okla. 1935).

Oklahoma's current statutory scheme. Oklahoma's statutes clearly state that a court's ability to distribute property at the dissolution of a marriage, from divorce or death, is subject only to a valid prenuptial agreement — not a postnuptial agreement.[269] Oklahoma law as it stands likely prohibits using a postnuptial agreement to create a new marital contract; however, this does not reflect Oklahoma's policy toward favoring marital contracts. Oklahoma should amend title 84, section 44 and title 43, section 121 to give spouses the ability to use postnuptial agreements to create new marital agreements. Giving spouses this ability will not only mirror Oklahoma's policy of favoring marital agreements, but it could also offer spouses another way to resolve marital disputes — disputes that might otherwise end in divorce had spouses not been given the ability to control their property.

Stephen T. Gary

269. *See id.*