

## Domestic Relations: Antenuptial Agreement, Effect of Subsequent Misconduct

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### Repository Citation

William Van Vleet, *Domestic Relations: Antenuptial Agreement, Effect of Subsequent Misconduct*, 31 Marq. L. Rev. 252 (1947).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol31/iss3/9>

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**Antenuptial Agreement—Effect of Subsequent Misconduct**—In consideration of their remarriage, the parties entered into an antenuptial contract wherein it was stated that the future husband had made a will providing for a payment of \$300 per month to his intended wife as long as she should live. The contract further provided that the wife should be paid \$1000 per year for five years after his death. The husband was granted a divorce thirteen years later, and died within two years thereafter. *Held*: The judgment denying the wife's claim against the estate affirmed. The parties contemplated that she should remain his wife as long as they lived. Because the wife had failed to fulfill her obligation, there was a want of consideration as to her, and she could not require performance of the contract. *Southern Ohio Savings Bank & Trust Co. v. Burkhardt*, 74 N.E. 2d 67 (Ohio, 1947).

The problem is whether or not an antenuptial contract is affected by subsequent misconduct of the parties so as to prevent the claimant from enforcing the contract.

The settled rule in England is that where a marriage settlement has been agreed upon between the parties, a woman does not forfeit her right thereunder even though she violates the marriage vows. Thus it has been held that where a wife lived in a state of adultery,<sup>1</sup> or deserted her husband<sup>2</sup>, she would not lose her rights under such a contract. The court in the Sidney case<sup>3</sup> regarded the agreement as settling a vested pointure upon the wife, not subject to be divested by her subsequent misconduct. One English Court<sup>4</sup> went so far as to say that *nothing* which occurs after marriage can give the court jurisdiction to alter the rights acquired under a settlement made in consideration of the marriage. The dicta in the Moore case<sup>5</sup> to the effect that subsequent adultery of the wife would entitle the husband to enjoin enforcement of the marriage settlement has not been followed and seems out of harmony with later English cases. Clearly, the English Courts regard the act of entering into the state of marriage as the consideration for the antenuptial agreement.

The American decisions are in conflict with the weight of authority favoring the view that subsequent marital misconduct does not forfeit the rights of a spouse under an antenuptial contract, unless there is fraud in the inception of the transaction.<sup>6</sup> The conflict appears to be in determining whether the consideration is the act of entering into the state of marriage, or the continuance of the marital relationship with performance of the rights and duties involved. Some courts en-

<sup>1</sup> *Seagraves v. Seagraves*, 13 Ves. Jr. 439, 33 Eng. Rep. 358 (1807).

<sup>2</sup> *Moore v. Moore*, 1 Atk. 272, 26 Eng. Rep. 174 (1737).

<sup>3</sup> *Sidney v. Sidney*, 3 P. Wms. 269, 24 Eng. Rep. 1060 (1743).

<sup>4</sup> *Evans v. Carrington*, 1 Johns & H. 598, 70 Eng. Rep. 883 (1859).

<sup>5</sup> *Ibid.*, 26 Eng. Rep. at 176.

<sup>6</sup> For cases see: 29 A.L.R. 199.

deavor to determine the intent of the parties.<sup>7</sup> Other courts have distinguished contracts executed at the time of the marriage ceremony from those dependent on the marital relationship.<sup>8</sup> A Minnesott Court in making this distinction held that where the obligation of the husband, under an antenuptial contract, to make payments of money to his wife has matured and the money has become due, the cause of action so perfected is not defeated by the wife's subsequent desertion of the husband.<sup>9</sup> The court distinguished the case from *York v. Ferner*<sup>10</sup> wherein the contract was dependent on the marital relation. In the latter case the court held that in a contract of marriage the parties always contemplate that they shall live together as husband and wife as long as the marriage relation shall exist, busject, of course, to such absence from one another or separation as may be agreed upon or justified by law. The majority of states follow the rule that misconduct of the spouse after the marriage, or failure to carry out the marital obligations, does not entitle the other spouse to rescind an executed marriage settlement.<sup>11</sup> Estrangement, separation, or divorce will not of itself extinguish an executed marriage settlement.<sup>12</sup>

As to evecutory contracts where there is subsequent misconduct, separation, or divorce there is also a division of authority. The majority of courts hold that mere separation without fault does not result in a forfeiture<sup>13</sup> or right of rescission, there being at most only a partial failure of consideration, and equity generally will not rescind an antenuptial contract forpartial failure of consideration.<sup>14</sup> The opposite view is that such separation or desertion not due to acts of the other party which would be grounds for divorce does forfeit one's rights under an antenuptial contract.<sup>15</sup> A Georgia Court cited *Bishop on Marriage and Divorce* as stating that where the divorce is obtained for some act, such as adultery, the marriage settlement would remain unaffected.<sup>16</sup> The court criticized the above statement cltiming that the authorities cited from Bishop are wrong in principle.<sup>17</sup>

<sup>7</sup> *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516 (1915); *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934).

<sup>8</sup> *Cryar v. Cryar*, 243 Ala. 318, 10 So. (2d) 11 (1942); *Johnston v. Johnston*, 182 Iowa 481, 166 N.W. 65 (1918); 29 A.L.R. 202-203.

<sup>9</sup> *Sparrow v. Sparrow*, 172 Minn. 91, 214 N.W. 791 (1927).

<sup>10</sup> *York v. Ferner*, 59 Iowa 487, 13 N.W. 630 (1882).

<sup>11</sup> 26 Am. Jur., Sec. 303, P. 903.

<sup>12</sup> *Johnston v. Johnston*, 182 Iowa 481, 166 N.W. 65 (1918); *Ibid*, 26 Am. Jur., Sec. 303, p. 903.

<sup>13</sup> *Schnepfe v. Schnepfe*, 124 Md. 330, 92 Atl. 891 (1914).

<sup>14</sup> *Jackson v. Jackson*, 222 Ill. 46, 78 N.E. 19 (1906).

<sup>15</sup> *Veeder v. Veeder*, 195 Iowa 587, 192 N.W. 409 (1923).

<sup>16</sup> *Barclay v. Waring*, 58 Ga. 86 at 93 (1877).

<sup>17</sup> The court in the Barclay case, *ibid.*, stated at page 94: "In every case where either party violated the contract of marriage so as to annul it, that party so guilty of breach of contract as to cause it to be set aside, ought to forfeit all rights under it, and should be put where he was before the marriage."

New Jersey, representing the minority view, has held that where the parties entered into an executory antenuptial contract and were married in New York, and the wife subsequently divorced the husband in Missouri for a cause not recognized in New York, she was not entitled to enforce the antenuptial agreement as she was bound to remain his wife unless justified in divorcing him under the laws of New York.<sup>18</sup> This case has been cited by many courts in following the minority view. The supreme Court of Illinois has stated in a comparatively recent case that divorce cuts off the relationship of the parties and terminates the antenuptial agreement which was dependent on the marriage.<sup>19</sup>

The trend of the more recent decisions appears to be toward the latter view, which seems based on better reasoning. This is especially true where there has been a final decree of divorce based upon the fault of the party claiming the benefits of the antenuptial agreement. It would seem reasonable to assume the usual intent of the parties to be that the consideration for the antenuptial agreement is the fulfillment of the duties of the marital relation, and the living together as husband and wife, and *not* entering into the state of marriage alone.

W. B. VAN VLEET JR.

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<sup>18</sup> New Jersey Title Guarantee & Trust Co. v. Parker, 85 N.J. Eq. 557, 96 Atl. 574 (1916), noted and criticized in 29 Harvard Law Review 881 (1916).

<sup>19</sup> Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934), in which case the parties were divorced and later remarried, with no mention of the antenuptial agreement to the first marriage. The court held that the parties remarried as strangers, and the antenuptial agreement was of no force or effect.