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Family Law - *Volid v. Volid*, Reconsideration of the Role of the Antenuptial Agreement in Illinois

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FAMILY LAW—*Volid v. Volid*, Reconsideration of the Role of the Antenuptial Agreement in Illinois.

The Appellate Court of Illinois has proffered fresh consideration of the scope and effect of antenuptial agreements in the case of *Volid v. Volid*.¹ Peter Volid, an extremely wealthy and established business man, married Rita Wilkes, a long time school teacher, on December 31, 1965. The parties and their representative counsel executed an antenuptial agreement establishing the rights of the Volids in the event of divorce or separation.² In 1969 Peter Volid filed a complaint for divorce alleging mental cruelty on the part of his wife.³ Rita Volid filed a counterclaim for separate maintenance and at the preliminary hearing asked the court for an order allowing temporary alimony and support during the pendency of the litigation.⁴ Mr. Volid asserted that the antenuptial agreement should fix the amount of temporary alimony allowable. The trial court did not consider the antenuptial agreement in setting temporary alimony and Peter Volid appealed from that order. The Appellate Court of Illinois considered the antenuptial agreement, found it controlling, and held that the temporary alimony should be deducted from the lump sum payable pursuant to the agreement.⁵ Additionally, the court found that upon entry of a decree of divorce or separate maintenance the payments of alimony or support should not exceed the amount designated in the antenuptial agreement.⁶ The Supreme Court of Illinois denied Rita Volid's petition for leave to appeal.

The decision of the *Volid* Court has had an unsettling effect upon Illinois family law. For the first time in this jurisdiction it has been held that an antenuptial agreement may regulate alimony and support both before and after the entry of a decree of divorce or separate maintenance. An award of pre-decree and post-decree alimony and support in an amount determined by antenuptial contract is not found

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1. *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).
 2. *Id.* at 387-88, 286 N.E.2d at 43-44. Paragraph four of the agreement is reproduced in relevant part in this article at pp. 502-03 *infra*.
 3. Illinois Divorce Act, ILL. REV. STAT. ch. 40, § 1 (1969).
 4. Illinois Divorce Act, ILL. REV. STAT. ch. 40, § 16 (1969).
 5. 6 Ill. App. 3d at 393, 286 N.E.2d at 48.
 6. *Id.*

in Illinois precedent and was previously considered contrary to public policy. The decision has impact on the status of a number of family law concepts. For example, such issues as the court's discretion to award alimony and support and the common law duty of the husband to support his wife are now subject to reevaluation and new interpretation. The ramifications of the *Valid* opinion are numerous and, as yet, not fully apparent. It should be noted that most antenuptial agreements previously considered in Illinois have concerned the disposition of property and the regulation of marital rights pursuant to the death of a spouse. Recently, agreements such as the one in *Valid* have sought to regulate the spouses' rights in relation to separation or divorce. The majority of courts, albeit public policy considerations which would render the *Valid*-type agreement void, have mainly applied precedent involving the "Death" agreements when construing the "Divorce and Separation" agreements. It is possible that the *Valid* Court sought a more progressive approach to the interpretation of antenuptial agreements in light of the enhanced status of women under the law. In so doing, however, the court found that it had to deal with precedent based upon a dissimilar type of antenuptial agreement and public policy based upon a less enlightened view of the role of the female. The motive of the court was commendable and its interpretation of the law of Illinois and other jurisdictions enabled it to achieve a desirable result. The court in *Valid* created new law in Illinois and advocated a view shared by only two other jurisdictions.⁷ However, the court distinguished established precedent on the facts and closely analyzed the language of the *Valid* antenuptial contract to achieve its decision. Perhaps a more direct and open approach to the fact that the court was significantly altering its view of the purposes of the antenuptial agreement would have clarified the uncertainties attendant to this holding. An evaluation of *Valid* must commence with a review of case law and other writings related to antenuptial agreements in general.

ANTENUPTIAL AGREEMENTS

Under the common law the wife's legal interests merged into those of the husband, thereby eliminating the spouses' capacity to contract between themselves during marriage.⁸ The marriage itself vitiated

7. See *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); and *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

8. 1 LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS (Rev. Ed. 1967), § 3, p. 3-8. (hereinafter cited as LINDEY).

any preexisting agreements between husband and wife.⁹ At common law there were two principal means of enforcing contracts between the spouses. Recourse could be had in equity through specific performance when the husband and wife were the actual parties to the contract,¹⁰ and suits for damages were permitted when trustees were named by the spouses as substitute parties to the agreement.¹¹ Today, due in part to the Enabling Acts of the states,¹² it is settled that antenuptial agreements are not voided by marriage and the common law remedies are no longer necessary.¹³ This is not to say that the law had taken a totally enlightened approach to the antenuptial contract. Indeed, most case law cited as applicable to these agreements originated in a social climate which defined rigid roles of dominance for the male and passivity for the female.¹⁴ The courts have generally taken a paternalistic interest in the rights and welfare of the woman.¹⁵ The *Volid* decision appears to emphasize that the female should not receive special treatment by the courts but should be evaluated on her merits as a functional member of society. This attitude is in line with progressive social thought on the role of the modern woman.

The Supreme Court of Florida in *Del Vecchio v. Del Vecchio*¹⁶ explained the general criteria for determining the validity of antenuptial agreements contemplating a distribution of property after death.¹⁷ The court said that the agreement must contain a fair and reasonable provision for the wife coupled with an honest disclosure of the husband's assets.¹⁸ If such a fair and reasonable disclosure is absent, the court stated that there must have been a showing by the husband that the wife possessed a general knowledge of his worth before the contract can be condoned.¹⁹

The courts have consistently found those agreements which attempt

9. 2 LINDEY, § 90, p. 90-24.

10. Warner v. Warner, 235 Ill. 448, 85 N.E. 630 (1908).

11. See, e.g., Note, 15 HARV. L. REV. 638 (1902).

12. ILL. REV. STAT. ch. 68, § 6 (1971). Originally, The Enabling Act of 1874, R.S. STAT. 1874, p. 576, as amended in Laws 1921, p. 473, § 1 (1921). The statute allows a wife to make contracts and incur liability as if she were unmarried. The statute has been construed to apply to contracts between husband and wife. See, e.g., Heiser v. Sutter, 195 Ill. 378, 73 N.E. 269 (1905).

13. 2 LINDEY, § 90, p. 90-24.

14. *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 21 (Fla. 1962). See also Cathey, *Antenuptial Agreements in Arkansas—A Drafter's Problem*, 24 ARK. L. REV. 275 (1970).

15. See, e.g., Boyer, *Equal Opportunity for Women—In Our Time*, 56 WOMEN'S L.J. 5 (1970); Seidenburg, *Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970).

16. 143 So.2d at 20.

17. See 2 LINDEY, § 90.

18. *Id.*

19. *Id.*

to regulate the parties' rights concomitant with divorce or separation void as against public policy.²⁰ Exemplary of the types of agreements determined void *ab initio* by the nation's judiciary are those providing for waiver of support by the parties upon separation or divorce,²¹ waiver of the alimony privilege,²² and pre-determination of the elements of alimony or support payments.²³ The rationale for these nearly uncompromising rejections of agreements in contemplation of marital dissolution, mentioned in the *Valid*²⁴ opinion, has been that the contracts tend to encourage divorce or separation,²⁵ and also allow the husband to relieve himself of the duty to support his wife²⁶ with the resulting possibility that the wife will become a charge of the state.²⁷ This reasoning has been accepted by the majority of those courts considering antenuptial agreements.²⁸

Recently, however, the rigid acceptance of this rationale has been subject to modification in some jurisdictions.²⁹ The more flexible approach to the pre-marital contract may be related to judicial recognition of the ascending status of women.³⁰ Not only has this reasoning been accepted by the Illinois Appellate Court in *Valid*,³¹ but also in another progressive Illinois family law case, *Tan v. Tan*.³² The encouragement of female equality is laudable, but a court desiring to facilitate this goal cannot be unresponsive to accepted principles of domestic law and contract interpretation. The *Valid* decision has al-

20. *E.g.*, *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950); *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961); *Watson v. Watson*, 37 Ind. App. 548, 77 N.E. 355 (1906). *Contra*, *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

21. Note, 3 RUTGERS-CAMDEN L.J. 175 (1971), citing *e.g.*, *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (Dist. Ct. App. 1956).

22. *Id.* at 176, citing *e.g.*, *Benjamin v. Benjamin*, 302 N.Y. 560, 96 N.E.2d 618, 97 N.Y.S.2d 196 (1951).

23. *Id.*, citing *e.g.*, *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916); *Werlien v. Werlien*, 27 Wis. 2d 237, 133 N.W.2d 820 (1965); Annot., 70 A.L.R. 826 (1931).

24. *Valid v. Valid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

25. *Watson v. Watson*, 37 Ind. App. at 550, 77 N.E. at 356. *See also* Annot., 57 A.L.R.2d 943 (1958).

26. *E.g.*, *Warner v. Warner*, 235 Ill. 448, 85 N.E. 630 (1908); *Sobel v. Sobel*, 92 N.J. Eq. 376, 132 A. 603 (E & A 1926).

27. *Laleman v. Crombez*, 6 Ill. 2d 194, 199, 127 N.E.2d 489, 491 (1955).

28. 2 LINDEY, § 90.

29. *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); *Compare* *Reiling v. Reiling*, — Ore. —, 474 P.2d 327 (1970). In *Posner* the Court found that an antenuptial agreement which regulated alimony was permissible if it conformed to strict standards of fairness. 233 So.2d at 385. In *Hudson* the Oklahoma Supreme Court upheld an antenuptial agreement in which the parties waive alimony rights. 350 P.2d at 598.

30. *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 21 (Fla. 1962). *See* note 14 *supra*.

31. *Valid v. Valid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

32. *Tan v. Tan*, 3 Ill. App. 3d 671, 279 N.E.2d 486 (1972). In this case which allowed termination of alimony due to a demonstrable change of circumstances by the husband, the court said, ". . . [W]e take judicial notice of the recent emancipation of women socially and economically, and particularly in the area of employment." *Id.* at 674, 279 N.E.2d at 488.

tered the acknowledged standards of Illinois family law and previous judicial interpretation of public policy in search of more progressive law.³³

The Illinois Supreme Court set forth the general rules concerning the regulation of marital rights at death by antenuptial agreement in *Seuss v. Schukat*:³⁴

Persons competent to contract may execute a valid antenuptial agreement. . . . Although the law prescribes the rights of a husband and a wife in the property of each other, persons possessing the requisite legal capacity may, by such agreement made in contemplation of marriage exclude the operation of the law and determine for themselves what rights they will have in each other's property during the marriage and after its termination by death. . . . Antenuptial agreements are not against public policy but, on the contrary, if freely and intelligently made, are regarded as generally conducive to marital tranquility and the avoidance of disputes concerning property.³⁵

The general caveats to an antenuptial agreement were reiterated by the Illinois Supreme Court in *Warner v. Warner*.³⁶ The *Warner* case involved an antenuptial agreement which provided for both the disposition of property rights upon death and a specific amount of support for the wife during the marriage. The court said that there must be an adequate provision for the wife and a full and fair disclosure of the husband's worth, or, if the disclosure is insufficient, a demonstration that the wife had a substantial knowledge of the husband's assets.³⁷ The *Warner* court concluded that the husband cannot contract away his duty to support his wife during the marriage.³⁸ Illinois had not ruled on whether an antenuptial agreement could regulate post-decree support or alimony until the *Volid* opinion. In order to evaluate the *Volid* court's use of Illinois and foreign precedent, the antenuptial agreement which provoked the decision should be examined on the basis of general rules of contract construction.

THE ANTENUPTIAL AGREEMENT IN *Volid* *Contract Interpretation*

Parties competent to contract may execute a valid antenuptial agreement concerning the disposition of property at death in Illinois.³⁹ In

33. See generally Hayes, *What Every Lawyer Should Know About Antenuptial Agreements*, 42 ILL. BAR J. 212 (1953).

34. *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934).

35. *Id.* at 33-4, 192 N.E. at 671.

36. *Warner v. Warner*, 235 Ill. 448, 85 N.E. 630 (1908).

37. *Id.* at 469, 85 N.E. at 636 citing *e.g.*, *Murdock v. Murdock*, 219 Ill. 123, 76 N.E. 57 (1905). See also *Van Koten v. Van Koten*, 323 Ill. 323, 154 N.E. 146 (1926).

38. 235 Ill. at 470, 85 N.E. at 638.

39. *Seuss v. Schukat*, 358 Ill. 27, 33, 192 N.E. 668, 671 (1934).

*Genung v. Hageman*⁴⁰ the Illinois Appellate Court stated that the rules of contract construction and interpretation applied with equal force to antenuptial agreements.⁴¹ In *Genung* the court reviewed the language of an antenuptial agreement to see if the document served to waive certain marital rights. The court stated that the agreement should be viewed in its entirety, with regard to its scope and attendant circumstances in order to ascertain the intention of the parties.⁴² An antenuptial contract will affect the marital rights of the parties only if it is clear that the parties intended the agreement to have that result.⁴³ A right in a spouse's estate can be renounced, without specific language to that effect, so long as the wording of the agreement is sufficient to demonstrate the intention of the parties to relinquish that right.⁴⁴ Furthermore, the courts have held that the marriage or the waiver of marital rights are equally valuable and sufficient consideration for the antenuptial agreement.⁴⁵

The *Volid* court determined that payments of temporary alimony should be deducted from the amount of settlement specified by the antenuptial agreement.⁴⁶ The court thereby held that temporary alimony fell within the purview of the contract. It is difficult to understand the holding of the court in view of the contract language set forth in paragraph four of the *Volid* agreement. The relevant terms of paragraph four state:

The parties hereto agree that *in the event that a Decree of Divorce or Separate Maintenance shall be entered* in a proceeding between them, First Party (Peter Volid) may have an obligation under such decree to pay reasonable alimony or support to Second Party (Rita Volid). *In the event a Decree so provides* it is agreed that the First Party shall pay to Second Party as and for equitable lump sum settlement in lieu of all rights to alimony or support, and in lieu of all property rights, if any, and in settlement of her rights, if any, of dower, homestead, inheritance, and all and every other such right which may have arisen as a result of their marriage . . . the sum of FIFTY THOUSAND DOLLARS (\$50,000.00)

[I]f such Decree shall be entered within three (3) years from the date hereof; *if such Decree shall be entered* on a date more than three (3) years from the date hereof, then First Party shall pay to

40. 103 Ill. App. 2d 409, 414, 242 N.E.2d 790, 793 (1968).

41. *Id.*, citing *Guhl v. Guhl*, 376 Ill. 100, 33 N.E.2d 185 (1941); *Van Cura v. Drangelis*, 43 Ill. App. 2d 205, 193 N.E.2d 201 (1963).

42. *Id.*

43. *Id.*, citing *Baugham v. Baugham*, 283 Ill. 55, 119 N.E. 59 (1918).

44. *Id.*, citing *Collins v. Phillips*, 259 Ill. 405, 102 N.E. 796 (1913).

45. *E.g.*, *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934); *Kroell v. Kroell*, 219 Ill. 105, 76 N.E. 63 (1905).

46. 6 Ill. App. 3d at 393, 286 N.E.2d at 48.

Second Party as and for a lump sum settlement in lieu of the rights referred to above, the sum of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) payable at the rate of SIX HUNDRED DOLLARS (\$600.00) per month for One Hundred Twenty-five (125) successive months, *commencing one (1) month after the entry of such Decree. . . .*

The parties further agree that the purpose of this paragraph 4 are to promote marital harmony and to discourage either party from obtaining monetary benefits by breach of the marital relationship and the institution of a legal proceedings for separation or divorce.⁴⁷

The plain meaning of the agreement is that the alimony or support payments were to be made subsequent to a decree of divorce or separate maintenance. Nevertheless, the *Valid* court chose to base its interpretation of the agreement on the last paragraph of paragraph four. The court seized upon this final statement of purpose to assert that an award of temporary alimony in excess of the contract amount would unjustly enrich Rita Valid.⁴⁸ The determination of the court rested upon two assumptions. First, it assumed that the parties intended that this contract would apply to temporary alimony. Second, it assumed that an antenuptial agreement is a valid means to regulate temporary alimony or support.

The court's first assumption is initially weakened by the specific language in the agreement calling for post-decree support only. The design of the purpose statement was simply "to discourage either party from obtaining monetary benefits by a breach of the marital relationship". However, the court found that this language indicated that the payments of alimony, either temporary or permanent, were not meant to exceed the lump sum amount granted in the agreement.

Application of the rules of contract construction listed earlier makes the foregoing interpretation dubious. In order to ascertain the intention of the parties, the agreement must be viewed in its entirety.⁴⁹ Such an examination reveals a contrast between the specificity of the language in the bulk of paragraph four and the vagueness and generality of the purpose statement. As previously noted an antenuptial agreement will affect the marital rights of the parties only if it is their

47. 6 Ill. App. 3d at 387-88, 286 N.E.2d at 43-44 [emphasis added]. It is interesting that neither the court nor the respective litigants mentioned the language of the agreement which provided that the lump sum settlement would be "in lieu of all rights to alimony or support, and in lieu of all property rights, if any, and in settlement of her rights, if any, of dower, homestead, inheritance, and all and every other such right which may have arisen as a result of their marriage. . . ." This catch-all phraseology may have lent support to the court's interpretation of the contract.

48. 6 Ill. App. 3d at 389, 286 N.E.2d at 45.

49. See note 42 *supra*.

clear intention that the agreement do so.⁵⁰ This rule militates against the court's interpretation that the purpose statement shows intent to regulate temporary alimony. A right in a spouse's estate may be renounced so long as the wording of the agreement is sufficient to demonstrate the intention of the parties to relinquish that right.⁵¹ This standard, however, offers little support to the court's interpretation, because the right to temporary alimony or support is not a common law right of the spouse's estate, but is a right granted by statute.⁵² Furthermore, the wording of the purpose statement does not demonstrate the Volid's clear intention that the right to temporary alimony or support, which has always been controlled by the courts,⁵³ was to be replaced by the terms of the antenuptial agreement.

The burden of proving the validity and application of the pre-marital contract rests upon the party who asserts it.⁵⁴ Further, the contract is construed most strictly against the party who drafts it.⁵⁵ The court accepted the interpretation of Peter Volid, whose counsel drafted⁵⁶ the agreement; it did so in spite of the rules of contract interpretation to the contrary. The court held that an award of temporary alimony or support in addition to the lump sum contract amount would grant Rita Volid more than the amount agreed upon by the parties. This reasoning begs the question of whether the antenuptial agreement is the proper means to regulate temporary alimony or support.⁵⁷ The issue is, in fact, whether the parties intended the agreement to apply to temporary alimony. The wording, however, would seem to indicate that the parties did not so intend. Therefore, Mrs. Volid could receive temporary alimony or support and still be entitled to the total amount granted as a lump sum by the antenuptial agreement.⁵⁸

The analysis of the *Volid* contract's language was insufficient in itself to support the holding of the court but is demonstrative of the court's desire to achieve what it deems a fair and proper result. In review of the contractual construction of the antenuptial agreement, the second assumption—that a pre-marital contract was a valid instru-

50. See note 43, *supra*.

51. See note 44, *supra*.

52. Illinois Divorce Act, ILL. REV. STAT. ch. 40, § 16 (1971).

53. *Id.*

54. *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934); *Dean v. Dean*, 286 Ill. 23, 121 N.E. 234 (1918).

55. *E.g.*, *Cedar Park Cemetery v. Village of Calumet Park*, 398 Ill. 324, 333, 75 N.E.2d 874, 879 (1947).

56. Petitioner's Brief for Rehearing at 14, *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

57. *Id.* at 15.

58. *Id.*

ment for the disposition of temporary alimony and support—was critical to the court's position. The validity of such an agreement could not have been easily assumed in light of established precedent. The court's ready desire to make the assumption indicates a desire to move beyond the boundaries of previous case law rather than merely distinguish them on their facts. A study of Illinois and foreign precedent is necessary to test the court's premise.

Validity of the Agreement—Temporary Alimony

The *Volid* court stated that there was little doubt as to the voluntary nature of the transaction.⁵⁹ The agreement states in the preamble and in paragraph eight that the parties were represented by counsel and were aware of the relevant rights and facts at issue.⁶⁰ In the *Volid* antenuptial contract the standards set forth in *Del Vecchio v. Del Vecchio*,⁶¹ have been satisfied⁶², i.e., a fair and reasonable provision for the wife; a complete and honest disclosure of the husband's worth; or an implied knowledge of the husband's property by the wife.⁶³ Antenuptial agreements which comply with these standards are, generally, in harmony with public policy.⁶⁴

The contested issue was whether an antenuptial agreement is valid to control temporary alimony or support. The court noted Rita Volid's contention that antenuptial agreements which limit temporary alimony or support have never been enforced in Illinois.⁶⁵ The court, nonetheless, distinguished Mrs. Volid's precedents—*Van Koten v. Van Koten*, *Berge v. Berge*, and *Threw v. Threw*⁶⁶—on two grounds.

59. 6 Ill. App. 3d at 389, 286 N.E.2d at 44.

60. Brief of Appellant at 13. *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972). The brief reprints the terms of the antenuptial agreement in relevant part:

WHEREAS, both parties hereto have been advised by legal counsel concerning this Agreement, their respective rights hereunder, and their prospective rights and obligations as husband and wife under the law;" and further provides in paragraph eight, "Each of the parties hereto has made a full and complete disclosure to the other of the assets owned by such party at the present time, and the waiver, release, and relinquishment of the rights of each party, as herein above set forth, has been made with full knowledge of the extent of wealth of the other party. A schedule of all of the properties, real, personal, and mixed, now owned by First Party (Peter Volid) and the estimated values thereof and a statement of his income have been examined by the Second Party (Rita Volid) and her Attorney.

61. *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 21 (Fla. 1962).

62. While a full disclosure of Peter Volid's wealth is suggested here, a large number of Illinois cases hold that such knowledge may be attributed to the wife from the relevant factual situation. See, e.g., *Megginson v. Megginson*, 367 Ill. 168, 10 N.E.2d 815 (1937).

63. See generally Note, 3 RUTGERS-CAMDEN L.J. 175 (1971).

64. *Seuss v. Schukat*, 358 Ill. 27, 33-34, 192 N.E. 668, 671 (1934).

65. 6 Ill. App. 3d at 389, 286 N.E.2d at 45.

66. *Van Koten v. Van Koten*, 323 Ill. 323, 154 N.E. 146 (1926); *Berge v. Berge*, 366 Ill. 228, 8 N.E.2d 623 (1937); *Threw v. Threw*, 410 Ill. 107, 101 N.E.2d 515 (1957).

First, the agreements in these cases were made during marriage, and, second, the husbands attempted to avoid the duty of support.⁶⁷ The court emphasized that the *Valid* agreement was made before marriage and that Peter *Valid* in no way attempted to avoid the duty to support his wife.⁶⁸

The *Van Koten* and *Threw* cases concerned situations in which the husband and wife contracted for a lump sum provision for the wife to be payable during the marriage in abrogation of all other support.⁶⁹ This contractual arrangement is analogous to the *Valid* agreement in that the *Valid* contract controls temporary alimony which constitutes Rita *Valid*'s complete support while the parties are still married during the litigation period. The *Valid* court inaccurately distinguished these cases as exemplary of avoidance of support compared with the adequate support provided by the agreement before it. The amount of support to be given by the husband has never been the controlling factor; the central issue has always been that a contract between the spouses has attempted to control support during marriage as the Supreme Court of Illinois in *Van Koten* pointed out:

[H]usband and wife may contract with each other as to their mutual property rights [inheritance and dower], but the husband cannot by contract, either before or after marriage, relieve himself of the obligation imposed upon him by the law to support his wife, and a contract between husband and wife one of the material provisions of which is that the husband shall be relieved of the obligation imposed upon him by law to support his wife is illegal and void as being contrary to public policy. . . .⁷⁰

The decision of the Illinois Supreme Court in *Warner v. Warner*,⁷¹ wherein an antenuptial agreement providing for a definite amount of support during marriage was construed, indicates further infirmity in the court's position. The relationship of *Warner* to *Valid* is based upon the premise that support during marriage is in no way different from payment of temporary alimony or support *pendente lite*. The *Warner* court stated that in so far as a husband would attempt to bind himself to a specific amount of support during marriage, he took upon himself an obligation that was unenforceable at law.⁷² In *Valid* the agreement was found controlling of the amount of temporary ali-

67. *Valid v. Valid*, 6 Ill. App. 3d at 390, 286 N.E.2d at 45.

68. *Id.*

69. *Van Koten v. Van Koten*, 323 Ill. 323, 154 N.E. 668 (1926), *Threw v. Threw*, 410 Ill. 107, 101 N.E.2d 515 (1957).

70. 323 Ill. at 326-27, 154 N.E. at 147.

71. *Warner v. Warner*, 235 Ill. 448, 85 N.E. 630 (1908).

72. *Id.* at 469, 85 N.E. at 636.

mony to be paid as distinguished from an amount established at the discretion of the court. Prior to *Valid*, the law cast a duty of support upon the husband, and a contract providing for the regulation of support was clearly void as against public policy under *Warner*.⁷³

The *Valid* court attempted to distinguish the marital situation in *Warner* from the situation before it. The *Valid* court termed the *Warner* marital relation a "functioning family" wherein an antenuptial agreement would not be applicable.⁷⁴ In *Valid* the court viewed the parties as having reached "a time when the marital relationship has broken down", hence making an antenuptial agreement permissible.⁷⁵ Clearly, Peter and Rita Valid were still married at the time the court sought to apply the agreement. Consequently, any agreement which modifies the duty to support the wife while the parties are awaiting the entry of a final decree of divorce or separate maintenance is support during marriage and void under the language of *Warner*.⁷⁶ The approach taken by the *Valid* court to demonstrate that an antenuptial agreement may regulate temporary alimony and support did not emphasize the full impact of the *Warner* decision. It was, however, consistent with the progressive theme of sexual equality in domestic law prevalent in the opinion.

Validity of the Agreement—Permanent Alimony

There is no Illinois law on this specific issue, for as noted earlier most antenuptial agreements construed by courts involved disposition of property and marital rights upon the death of a spouse. The court, therefore, looked to authority from other jurisdictions and noted that contracts between spouses which attempted to limit or eliminate support after the entry of a divorce or separate maintenance decree are generally disapproved.⁷⁷ The *Valid* court reviewed the reasons given for such holdings. First, the state has an interest in preserving the marriage and would not approve of contracts which tend to facilitate or induce separation or divorce.⁷⁸ Second, the state has an interest in seeing that a married woman does not become a charge of the state after divorce or separation due to a lack of support.⁷⁹

73. *Id.*

74. 6 Ill. App. 3d at 390, 286 N.E.2d at 46.

75. *Id.*

76. *Warner v. Warner*, 235 Ill. 448, 85 N.E. 630 (1908).

77. 6 Ill. App. 3d at 390, 286 N.E.2d at 46. *See, e.g., Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950).

78. *E.g., Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W. 2d 288 (1964).

79. *E.g., Laleman v. Crombez*, 6 Ill. 2d 194, 127 N.E.2d 489 (1955).

After giving brief recognition to these reasons, the court re-emphasized the changes occurring in contemporary attitudes toward the marital relationship and in family law generally. The court reasoned that state interest did not require the continuation of a broken marriage⁸⁰ and that the grounds for divorce were becoming more expansive.⁸¹ Furthermore, the court said that where the parties are independent and established the interest of the state in the continuation of the marriage is small.⁸² The reasoning of the dissenting Justice in the Wisconsin case of *Fricke v. Fricke*⁸³ was favorably received by the *Valid* court. In that opinion the dissent stated that an antenuptial agreement should not be considered discordant to the marital relationship; on the contrary, such contracts serve to add predictability and stability to the marriage as do contracts in other areas of human activity.⁸⁴

The court in *Valid* continued its rationale of a more enlightened approach to antenuptial agreements by recognizing that some marital rights may be relinquished by agreement before or after the wedding,⁸⁵ and that the right to support can be terminated after a divorce decree.⁸⁶ Therefore, the court stated that it would be anomalous to argue that the parties could not provide a plan within an antenuptial agreement which would anticipate divorce or separation and allocate the respective rights of the spouses accordingly.⁸⁷

Since the court resorts to the extension of more limited case law and statutory authority to achieve its progressive approach, it concedes that the issue of regulation of permanent alimony or support by antenuptial contract has not been previously determined by Illinois courts. It is true that some rights of the spouses in each other's property may be waived by antenuptial agreement.⁸⁸ However, any attempt to regulate alimony or support by such agreement has been rejected by the majority of other jurisdictions.⁸⁹ Furthermore, that aspect of the

80. 6 Ill. App. 3d at 391, 286 N.E.2d at 46.

81. See, e.g., Goldstein and Gilter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75 (1969).

82. 6 Ill. App. 3d at 391, 286 N.E.2d at 46. But cf. *Reynolds v. Reynolds* 217 Ga. 234, 123 S.E.2d 115 (1961).

83. *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950) (dissenting opinion).

84. *Id.*

85. See *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934), concerning the waiver of dower and inheritance rights. And see *Laleman v. Crombez*, 6 Ill. 2d 194, 127 N.E.2d 489 (1955), concerning the waiver of property rights in a separation agreement.

86. Illinois Divorce Act, ILL. REV. STAT. ch. 40 § 19 (1971). And see *Canady v. Canady*, 30 Ill. 2d 440, 197 N.E.2d 42 (1964), which discusses the type of settlement proposed under the statute.

87. 6 Ill. App. 3d at 392, 286 N.E.2d at 47.

88. See note 85, *supra*.

89. See note 77, *supra*.

court's reasoning concerned with the power to terminate support after a decree or divorce was inappropriate here. Such power is statutory in Illinois and is for use by the courts in their equitable discretion.⁹⁰ The matter is not left for private parties to determine by contract.

There are, nonetheless, recent cases from other jurisdictions which support the *Valid* court's conclusion that an antenuptial agreement entered into freely and without fraud may regulate the rights of the parties upon entry of a decree of divorce or separate maintenance.⁹¹ *Hudson v. Hudson*⁹² is an Oklahoma case in which a woman challenged the validity of an antenuptial contract upon divorce. The Oklahoma Supreme Court held that a just and reasonable antenuptial agreement in which the parties waived the right to alimony in the event of divorce was valid.⁹³ In like manner, the Supreme Court of Florida held in *Posner v. Posner*⁹⁴ that an antenuptial agreement setting property rights and alimony would be valid if it conformed to the stringent rules prescribed for such agreements.⁹⁵ Furthermore, the *Posner* court emphasized that the antenuptial contract is subject to review and modification by the court as authorized by Florida statute.⁹⁶

These decisions supported the *Valid* court's rationale for a more enlightened approach to the validity of all antenuptial agreements. In truth, these decisions represent a distinct minority view of the jurisdictions dealing with such agreements. In addition, the *Valid* decision is more expansive than either *Hudson* or *Posner*. *Hudson*, while upholding the novel concept of determination of post-decree alimony by antenuptial agreement, did not consider the important *Valid* issue of temporary alimony.⁹⁷ *Posner* provided strict standards by which to judge the validity of the proposed agreement and allowed future review and modification by the court.⁹⁸ *Valid* implied neither of the important conditions set forth in *Posner*. Further, a recent Florida case indicates that *Posner* does not support the *Valid* court's contention that an antenuptial contract may control temporary alimony. The Supreme Court of Florida said in *Belcher v. Belcher*,⁹⁹ a case in which

90. See note 86, *supra*.

91. See note 29, *supra*.

92. 350 P.2d 596 (Okla. 1960).

93. *Id.* at 597.

94. 233 So.2d 381 (Fla. 1970).

95. See note 21, *supra*.

96. 233 So.2d at 386, citing FLA. STAT. § 61.14 (1965).

97. 350 P.2d 596 (Okla. 1960).

98. 233 So.2d 381 (Fla. 1970).

99. 271 So.2d 7 (Fla. 1972).

a husband sought to validate an antenuptial agreement determining temporary alimony, "[that] until there is a decree of dissolution of the marriage, thus ending her role as wife, the wife's support remains within the long established guidelines of support by the husband which cannot be supplanted by his advance summary disposition agreement."¹⁰⁰ It is apparent, then, that the weight of authority militates against the *Valid* court's progressive formulation of the antenuptial agreement as it applies to both temporary and permanent alimony or support. Nonetheless, the enlightened approach of the *Valid* court has great merit. The making of new law quite naturally conflicts with the accepted law and upsets the status quo.

CONCLUSION

The state of family law in Illinois has been unsettled by the *Valid* decision. In large part the uncertainty caused by the decision is due to the court's indirect approach to the creation of a new policy regarding antenuptial agreements. The *Valid* court distinguished precedent and relied on the vagaries of contract language to reach its decision rather than directly declaring its intention to create new law in this area. In summary, the appellate court held that any amounts to be paid to a wife for temporary alimony or support pending entry of a decree of divorce or separate maintenance must be deducted from the lump sum settlement agreed to by the parties in an antenuptial contract.¹⁰¹ The court also held that the agreement may control the determination of permanent alimony or support after the entry of a decree.¹⁰²

It was previously assumed in Illinois that antenuptial agreements were valid only to convey property or determine limited marital rights upon the death of a spouse; contracts regulating rights of the parties upon termination of the marriage in the courts were considered void as against public policy.¹⁰³ Therefore, the *Valid* court's holding with respect to the application of antenuptial contracts to temporary alimony appears contrary to the duty imposed upon the husband to support the wife.¹⁰⁴ Also, the court's application of the rules of contract interpretation is questionable because the antenuptial agreement entered into by the *Valid*s did not specifically indicate that the parties

100. *Id.* at 11.

101. 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

102. *Id.*

103. See note 33, *supra*.

104. *E.g.*, Warner v. Warner, 235 Ill. 448, 85 N.E. 630 (1908).

intended it to apply to temporary alimony or support.¹⁰⁵ And, although the court relied upon the *Hudson* and *Posner* cases to hold that an award of permanent alimony or support may be governed by an antenuptial contract, this position is contrary to the strong majority view of courts construing antenuptial agreements.¹⁰⁶ Perhaps if the *Valid* court had openly stated its desire to go beyond traditional precedent the decision would not have appeared so closely related to that prior case law. Nevertheless, the decision in *Valid* should not be noted for its reliance on small factual distinctions in established precedent for its validity but rather should stand apart as a clear statement of progressive legal opinion. The dicta of the court in *Valid* showed most clearly the interest in a progressive approach to the interpretation of antenuptial agreements. By so reasoning, the court acknowledged the contemporary standards of sexual equality and the enhanced status of women.¹⁰⁷ This rationale, however, is strictured by the court's employment of traditional case precedent and statutory authority.

Consequently, the exact ramifications of the *Valid* opinion are not readily apparent. It is obvious, however, that antenuptial agreements which attempt to regulate the rights and duties of spouses pursuant to the dissolution of marriage may no longer be considered void *ab initio* as against public policy. The benefits to be gained from the abandonment of the "contrary to public policy" rule are numerous. For example, the courts may now recognize that the concept that women are wholly dependent upon their husbands is antiquated and simplistic; that the inflexible application of the rule defeats its objectives of promotion and protection of marriage; and that greater freedom of contract will exist to better effectuate the desires of the parties to such contracts.¹⁰⁸ Therefore, future decisions in this area will be obligated to review such concepts as the lack of state interest in the continuation of the broken marriage, the stability and predictability of the marriage pursuant to antenuptial contracts, the independence and employability of the contemporary woman, and the frequency and availability of divorce in our society. The recent trend toward more expansive grounds for divorce is indicative of the changing attitude toward the modern marital relationship. The *Valid* decision is a part of this progressive trend in domestic law.

Yet, *Valid* also created several uncertainties in this field of law. It

105. See note 53, *supra*.

106. See note 20, *supra*.

107. 6 Ill. App. 3d at 391, 286 N.E.2d at 46-47.

108. See Note, 3 RUTGERS-CAMDEN L.J. 175 (1971).

is questionable if a *Valid* type agreement would be upheld in a situation where a material change of circumstances during the period between the drafting and the application of the document has taken place. It is possible that such a change (e.g., a serious illness or an extreme financial reverse) would render a previously fair and reasonable contract unconscionable. Also, the exact dimensions of the husband's duty to support his wife are made unclear by the opinion. The impact of the *Valid* decision has modified the previous Illinois rule that the husband has a duty to support his wife after separation and before the legal termination of the relationship. Furthermore, *Valid* has affected the discretionary ability of the trial courts to award both temporary and permanent alimony and to review the award at a later time. Lastly, since the *Valid* decision arose from a preliminary hearing and order in the lower court, none of the matters unsettled by this case will be finally clarified until disposition of the case at the trial level. Therefore, it would be unwise at this time for the practicing attorney to completely rely upon the *Valid* rationale when drafting antenuptial contracts. The decision of the appellate court, although enlightened and welcome, has left unresolved important questions of law which will have a significant effect upon Illinois domestic relations policies.

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