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# Wright or Wrong? Post-Nuptial Agreements in Michigan's Modern Marriages after *Wright v. Wright*

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***WRIGHT OR WRONG?***  
**POST-NUPTIAL AGREEMENTS IN MICHIGAN'S MODERN**  
**MARRIAGES AFTER *WRIGHT V WRIGHT***  
*by*  
*Lesley Anne M. Durant*

*Submitted in partial fulfillment of the requirements of the*  
*King Scholar Program*  
*Michigan State University College of Law*  
*Under the direction of*  
*Professor Stephanie Crino*  
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## INTRODUCTION

Imagine that you are happily married. You and your spouse decide that in order to keep your marriage happy, you both should sit down and mutually decide what should happen in the event that someday you might divorce. You both agree that this will help preserve your marriage and will prevent future litigation and acrimonious bickering. You both are willing to sign an agreement to effectuate your decisions that you both wish to be fully enforceable in the event that you may divorce in the future. There is one small problem. The Michigan Court of Appeals has already decided that you can't.

In April of 2008, the Michigan Court of Appeals decided *Wright v. Wright*<sup>1</sup>, a divorce case on appeal that addressed the issue of post-nuptial agreements. In *Wright*, the Michigan Court of Appeals held that agreements made between couples in an intact marriage that contemplate a future divorce are void as against public policy.<sup>2</sup> This decision, when read together with other case law regarding marital agreements, appears to take an anomalous position regarding the ability of married couples to contract between themselves, and the analysis the court will conduct in looking at the validity of such agreements. As opposed to relying on previous precedent that calls for a formulated analysis of marital agreements, *Wright* holds that no such analysis is necessary, because these agreements are invalid on their face.<sup>3</sup> This note will analyze the factual background and procedural history of *Wright* in order to show that the facts and circumstances of this particular case dictated that the Michigan Court of Appeals had to void the agreement, and the court needed to develop a rationale for its decision. Also, this note will explore the other options that were available to the court that would have allowed for the same

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<sup>1</sup> 279 Mich. App. 291 (Mich. Ct. App. 2008) (per curiam).

<sup>2</sup> *Id.* at 297-98.

<sup>3</sup> *Id.*

result without creating a bright line rule on the grounds of public policy, as well as how the court seemingly ignored recent case law in favor of older, outdated case law. This note will also analyze the law of other jurisdictions that uphold the validity of such agreements, and apply the law of those jurisdictions to the facts of this case to determine if a different outcome would result. Finally, this note will briefly explore the Michigan Supreme Court's decision not to grant leave to hear this case.

#### FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF *WRIGHT V WRIGHT*

The background and history of the parties was crucial to the Court's understanding of both the formation of the agreement, as well as its determination that the agreement in the case was void. The Court found that Monica and Charles Wright met when Monica was a seventeen-year-old single mother of two working in a fast food restaurant.<sup>4</sup> Charles was ten years older than Monica and was a corrections officer for a local state prison.<sup>5</sup> Charles had been married once before, owed a house, had a solid career and did not have any children.<sup>6</sup> Monica moved in with Charles when she turned eighteen, and gave birth to Charles' son, Tyler, shortly thereafter, in March of 1996.<sup>7</sup> Charles and Monica married later that year.<sup>8</sup> The parties purchased a home together in 1998 and Charles then adopted Monica's daughter, Janae, who was around four-years-old at the time.<sup>9</sup> The parties had one more child together, Emma, who was born in 2003.<sup>10</sup>

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<sup>4</sup> *Id.* at 292.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 292-93.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 294.

Monica's oldest child, Anthony, who was five when the parties married, also lived with the family, although he was not adopted by Charles.<sup>11</sup> Charles had a contentious relationship with Anthony, who was older, more defiant, and retained ties to his biological father and paternal side of the family.<sup>12</sup> Charles was the family breadwinner, and, while Monica did eventually obtain her GED and open a daycare business in the family home, Charles was clearly in charge of the family financially.<sup>13</sup>

The marriage began to suffer beginning in 2002.<sup>14</sup> At that time, eleven-year-old Anthony confessed to Monica that he had been inappropriately touching eight-year-old Janae.<sup>15</sup> While Monica thought it may be best to report the incident so the children could get therapy, the parties eventually decided to strictly supervise the children and not involve the authorities in the matter.<sup>16</sup> Tensions began mounting in the house between Anthony and Charles, and, in 2004, Charles gave Monica the option of reporting Anthony's conduct to child protective services or sending Anthony to live with his biological father.<sup>17</sup> Monica chose the latter and Anthony left the home in July of 2004, although this did not cure the problems in the marriage. Charles also complained about Monica's spending and what he perceived to be her lack of motivation in her at-home business, as well as in her classes at nursing school.<sup>18</sup> In 2005, Charles contacted an attorney to draft a postnuptial agreement for the parties to sign.<sup>19</sup>

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<sup>11</sup> *Id.* at 293.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 293.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 294.

<sup>18</sup> Record at Vol. I, 258; Vol. II, 43, *Wright* (No. 06-800-DM).

<sup>19</sup> *Wright*, 279 Mich. App. at 294.

The agreement was unequivocally one-sided.<sup>20</sup> It provided that, “[e]ach party is desirous of preserving all, or a substantial portion, of his or her wealth to dispose of as each desires, free of any claim by the other party.”<sup>21</sup> Specifically, it protected all of Charles’ rights to his premarital property, including all retirement accounts, savings accounts and his state pension.<sup>22</sup> It also provided that Charles would keep the marital home and “every other article of marital property requiring a substantial financial investment from [Charles].”<sup>23</sup> The agreement also waived any spousal support or attorney fees in the event of a divorce, and essentially left Monica with a minivan and a television.<sup>24</sup>

The formation of the agreement is compelling and ultimately is crucial to the fact that the Court could have easily invalidated it under other theories regarding marital agreements, as opposed to invalidating it outright as a matter of public policy. The signing of the agreement was Charles’ idea, who brought up the topic to Monica while they were watching an episode of *Desperate Housewives*.<sup>25</sup> It is not clear whether Charles had already had the agreement drafted at the time that he mentioned the idea to Monica, but, within a few weeks he presented a draft to her for her review.<sup>26</sup> Monica kept the agreement for several months and even had an attorney review the agreement (who naturally advised her not to sign it).<sup>27</sup> According to Monica, Charles threatened her into signing the agreement, and she did so under duress.<sup>28</sup> Both parties agree that

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<sup>20</sup> *Id.* at 294, 297.

<sup>21</sup> See attached “Charles & Monica Wright, Post Nuptial Agreement” (hereinafter “Agreement”) originally found at Exhibit A of Defendant’s Brief in Support of Motion for Declaratory Relief, *Wright* (No. 06-800-DM).

<sup>22</sup> *Wright* 279 Mich. App. at 294.

<sup>23</sup> *Id.*

<sup>24</sup> Defendant’s Brief in Support of Motion for Declaratory Relief at 5-6; *Wright* (No. 06-800).

<sup>25</sup> Appellant’s Brief on Appeal at 1, *Wright* (No. 281918).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Defendant’s Brief in Support of Motion for Declaratory Relief at Exhibit F, *Wright* (No. 06-800).

Charles even told Monica that, if she did not sign the agreement, he would divorce her.<sup>29</sup>

Thinking that she was saving her marriage, on July 29, 2005, Monica signed the agreement.<sup>30</sup>

Eight months later, Charles filed for divorce.<sup>31</sup>

The words acrimonious and highly litigious only begin to describe the events that unfolded next during the course of the divorce proceedings. When Charles filed for divorce, he did not move out of the home or even inform Monica that he had filed.<sup>32</sup> Monica learned of the proceedings not through Charles, or even by being served with paperwork, but through a solicitation letter she received from a local attorney who learned of the case from the court records.<sup>33</sup> When Monica hired an attorney who made it clear through his interrogatories that Monica was going to challenge the validity of the agreement, Charles embarked on a course of action that was ultimately his undoing. While the exact details of the lengths that Charles went to throughout this matter are simply too voluminous to mention here, the court record is replete with evidence of his harassing behavior and conduct, his refusal to abide by court orders, his delay of the proceedings by not complying with discovery and deposition requests, his filing of grievances against Monica's attorney, his filing of complaints against court staff, and his numerous, unfounded attacks and allegations against Monica to daycare licensing officials and child protective services.<sup>34</sup>

By the time the trial court heard argument on the issue of the validity of the post-nuptial agreement, the case had already been pending for nine months.<sup>35</sup> When the trial court found the

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<sup>29</sup> *Id.* at Exhibit C and Exhibit F.

<sup>30</sup> Appellant's Brief on Appeal at Exhibit 3, pgs. 24-29, *Wright* (No. 281918).

<sup>31</sup> *Wright* 279 Mich. App. at 294.

<sup>32</sup> *Id.* at 294-95.

<sup>33</sup> *Id.* at 295.

<sup>34</sup> Record at 61, 63-64, 72-76, 83-84, 149-150, 162, 164, 166, 170-172, 276-277, 352-353, *Wright* (No. 06-800).

<sup>35</sup> Civil action docket, *Wright* (No. 06-800-DM).

agreement unenforceable, it amended the scheduling order and ordered the parties to mediation, presumably thinking that, since it invalidated the agreement, the parties may be able to reach a settlement.<sup>36</sup> However, at mediation, Charles refused to consider any alternative to the property distribution in the agreement, and the case proceeded to trial.<sup>37</sup>

After two days of testimony, the trial court issued its decision on September 19, 2007.<sup>38</sup> The property settlement was a fairly typical distribution for an eleven year marriage, with Monica receiving one-half of the value of the marital home and Charles' retirement. The trial court gave the parties the option of buying out the other's interest in the home; however, it imposed a strict timetable to do so, where if neither party had done so within fourteen days of the decision, the home would be listed for sale, Monica would have exclusive use and possession of the home, and Charles would pay a minimal monthly spousal support amount to Monica, as well as one-half of the taxes and insurance on the home, until it was sold.<sup>39</sup> Charles then filed a timely appeal, and the matter proceeded to the Michigan Court of Appeals.<sup>40</sup>

#### EQUITY DEMANDED THE INVALIDATION OF THE *WRIGHT* AGREEMENT

The Michigan Court of Appeals was now faced with a decision on the validity of the post-nuptial agreement. On the one hand, if the Court decided that the agreement is enforceable, a clearly inequitable result would occur, and the Court would be rewarding Charles for his actions during the proceedings. On the other hand, if the Court decided that the agreement is not enforceable, an equitable outcome occurs in this matter and the parties are no

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<sup>36</sup> Amended Scheduling Order, *Wright* (No. 06-800-DM).

<sup>37</sup> Decision and Order on Plaintiff's Motions for Rehearing/Reconsideration and for Stay of Proceedings to Enforce Judgment, *Wright* (No. 06-800-DM).

<sup>38</sup> Civil action docket, *Wright* (No. 06-800-DM).

<sup>39</sup> Judgment of Divorce at 9-11, *Wright* (No. 06-800-DM).

<sup>40</sup> Civil action docket, *Wright* (No. 06-800-DM).



worse off than they would have been had the contract never been made. The true decision for the Court then is not *if* the agreement is unenforceable, but *how* the agreement is unenforceable.

While courts in divorce are bound by statute, they are essentially courts in equity and they still have equitable powers.<sup>41</sup> Divorce matters have historically been heard in equity, and ultimately, divorce courts realize that their job is to determine the equitable result in property disputes.<sup>42</sup> In Michigan, the goal in any divorce is to reach a fair and equitable division of the marital property in light of all the circumstances.<sup>43</sup> The idea of “equity” is pervasive in family law cases, and, while the courts remain bound by statute, many frequently use their inherent equitable powers to grant relief that comfortably fits within the unique facts and circumstances of the particular family’s situation.<sup>44</sup>

In reviewing property awards in domestic relations actions, The Michigan Court of Appeals has held the idea of equity at the forefront of its decisions by stating that, so long as the trial court did not abuse its discretion in its findings of fact, “the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts.”<sup>45</sup> Equity is also a clear component in an appellate court’s review because decisions “should be affirmed unless the appellate court is left with the firm conviction that the [decision] was inequitable.”<sup>46</sup>

With these notions of equity in mind, it is clear that the Court could not possibly have wanted to reward Charles for his actions in this matter. An enforceable agreement not only would have done this, but it also would have left Monica without any financial resources at her

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<sup>41</sup> See, e.g., MICH. COMP. LAWS § 552.12; *Kasper v. Metropolitan Life Ins. Co.*, 313 N.W.2d 904, 917 (Mich. 1981) (Kavanagh, J., dissenting).

<sup>42</sup> See, e.g., *Sands v Sands*, 497 N.W.2d 493 (Mich. 1993); *McDougal v McDougal*, 545 N.W.2d 357 (Mich. 1996); *Sparks v Sparks*, 485 N.W.2d 893 (Mich. 1992); *Wiand v Wiand*, 443 N.W.2d 464 (Mich. Ct. App. 1989); *Schaeffer v Schaeffer*, 308 N.W.2d 226 (Mich. Ct. App. 1981); *Draggoo v Draggoo*, 566 N.W.2d 642 (Mich. Ct. App. 1997).

<sup>43</sup> *Sparks*, 485 N.W.2d at 901.

<sup>44</sup> *Draggoo*, 566 N.W.2d at 648.

<sup>45</sup> *Sparks*, 485 N.W.2d at 898.

<sup>46</sup> *Id.*

disposal after Charles financially crippled her during the divorce's litigation and appellate actions. In order to comport with the idea of an equitable result, the Court had to find the agreement unenforceable. Therefore, the only question that remained was how to go about it, and how to balance Michigan public policy in favor of marriage against the freedom of individuals to contract and their right to have those contracts enforced.

#### MICHIGAN'S PUBLIC POLICY IN FAVOR OF MARRIAGE

Michigan's public policy clearly favors the marriage relationship. Therefore, it should come as no surprise that Michigan courts have carefully scrutinized contracts formed between married or soon-to-be married persons.<sup>47</sup> This public policy is deeply entrenched in Michigan law, and, from as early as 1901, in an unbroken series of cases, it has repeatedly been affirmed as the policy of the state.<sup>48</sup> The abolition of the common law marriage and the implementation of the statutory waiting periods for divorce demonstrate this principle by placing restrictions the parties' ability both to claim a marriage relationship, as well as terminate a marriage relationship.<sup>49</sup> Recently, the Michigan Supreme Court stated that “[m]arriage is inherently a unique relationship.... As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children.”<sup>50</sup> Even the voters of the state supported this idea with the passage of an amendment to Michigan's Constitution in order “to

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<sup>47</sup> *McCready v Hoffius*, 459 Mich. 131, 140 (Mich. 1998), *vacated in part on other grounds* 459 Mich. 1235; 593 N.W.2d 545 (Mich. 1999); *see, also, Van v Zahorik*, 597 N.W.2d 15 (Mich. 1999).

<sup>48</sup> *See, e.g., Wagoner v Wagoner*, 87 N.W. 898 (1901); *May v Meade*, 210 N.W. 305 (1926).

<sup>49</sup> *See* MICH. COMP. LAWS § 551.2; MICH. COMP. LAWS § 552.9f, and MICH. CT. R. 3.210(A).

<sup>50</sup> *Rohde v Ann Arbor Pub. Sch.*, 737 N.W.2d 158, 160 (Mich. 2007); *see, also, MICH. COMP. LAWS § 551.1*

secure and preserve the benefits of marriage for our society and for future generations of children.”<sup>51</sup>

Within this history of case law regarding the public policy in favor of marriage, ante-nuptial agreements and post-nuptial agreements have been authorized for quite some time to govern the disposition of property on the death of a spouse.<sup>52</sup> These agreements were mostly upheld so long as the formation of the agreement was sound and the agreement itself did not promote or encourage divorce.<sup>53</sup> However, marital agreements that attempted to govern property division in the event of a divorce were held void as against public policy as the courts took the position that such agreements tended to promote divorce.<sup>54</sup>

Throughout the 1980’s, ante-nuptial (also called pre-nuptial) agreements became increasingly popular in other jurisdictions as divorce rates rose and second marriages became more common. Couples began to use ante-nuptial agreements not to just define their respective property rights on the death of a spouse and to protect inheritance rights of children from previous marriages, but also to preclude a divorcing spouse’s potential claim to property the other spouse brought to the marriage, and to avoid controversy should a divorce occur.<sup>55</sup> Michigan appeared to finally change its position on marital agreements in 1991 when the Michigan Court of Appeals decided *Rinvelt v Rinvelt*.<sup>56</sup> In that case, the court stated that:

Prenuptial Agreements provide people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. Moreover, allowing couples to think through the financial aspects of their marriage

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<sup>51</sup> MICH. CONST. of 1963, art I, § 25.

<sup>52</sup> See MICH. COMP. LAWS § 700.2205.

<sup>53</sup> See, e.g., *In re Muxlow’s Estate*, 116 N.W.2d 43 (Mich. 1962).

<sup>54</sup> See *Scherba v Scherba*, 65 N.W.2d 758 (Mich. 1954).

<sup>55</sup> Diana Raimi, *A Beginner’s Guide to Pre- and Post-Nuptial Agreements*, 2nd Annual Family Law Institute, (INST. OF CONT. LEGAL EDUC., Ann Arbor, MI), Nov. 17, 2003, at 9-2, 9-3.

<sup>56</sup> 475 N.W.2d 478 (Mich. App. 1991).

beforehand can only foster strength and permanency in that relationship. In this day and age, judicial recognition of Prenuptial Agreements most likely encourages rather than discourages marriage. In sum, both the realities of our society and policy reasons favor judicial recognition of Prenuptial Agreements. [W]e see no logical or compelling reason why a public policy should not allow two mature adults to handle their own financial affairs. Therefore, we join those courts that have recognized that Prenuptial Agreements legally procured and ostensibly fair in result are valid and can be enforced. The reasoning that once found them contrary to public policy has no place in today's matrimonial law.<sup>57</sup>

The court reviewed the historical treatment of marital agreements, specifically agreements that were held unenforceable due to the fact that they contemplated property distribution upon divorce and concluded that “the outdated policy concerns that once led courts to refuse to enforce antenuptial agreements are no longer compelling.”<sup>58</sup> The court further stated that “[t]oday, divorce is a common-place fact of life.”<sup>59</sup> The court held that ante-nuptial agreements that contemplated a future divorce were enforceable so long as certain requirements were met.<sup>60</sup> The court stated that there are three specific factors it will analyze in ante-nuptial agreements in order to determine their enforceability; namely, whether (1) it was obtained through fraud, duress, mistake or misrepresentation, or through non-disclosure of a material fact; (2) it was unconscionable when it was executed; or (3) the facts and circumstances since the agreement was executed are so changed that its enforcement would be unfair and unreasonable.<sup>61</sup>

Subsequent case law interpreting *Rinvelt* has refined additional criteria for the court to analyze in determining whether or not an ante-nuptial agreement is valid. For example, ante-nuptial agreements, by their nature, give rise to a special duty of financial disclosure not required

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<sup>57</sup> *Rinvelt*, 475 N.W.2d at 483, quoting *Brooks v Brooks*, 733 P.2d 1044 (Alaska 1987).

<sup>58</sup> *Rinvelt*, 475 N.W.2d at 482.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 483.

<sup>61</sup> *Id.* at 482.

in ordinary contract relationships, requiring that the parties have been fully informed of each other's financial condition, as well as their respective rights, before they enter into such an agreement.<sup>62</sup> Also, because ante-nuptial agreements, like other written contracts, are matters of agreement by the parties, the courts' role is to define what the agreement is and to enforce it.<sup>63</sup> Essentially, the Michigan Court of Appeals determined that grown adults should be free to govern their personal affairs and it is not the role of the state to interfere with that freedom so long as "weaker" parties are protected and basic contract construction principles are met.

While the court in *Rinvelt* was focused on ante-nuptial agreements entered into prior to the marriage, there is little distinction between ante-nuptial agreements and post-nuptial agreements. With the exception of separation agreements discussed below, the only difference between ante-nuptial agreements and post-nuptial agreements is that the parties did not get around to, or did not feel the need to, enter into the agreement until after they gave their marriage vows. It is not surprising then that, prior to *Rinvelt*, post-nuptial agreements were interpreted according to the same standard as ante-nuptial agreements where all marital agreements were generally held to be enforceable in the contemplation of property inheritance determinations upon the death of the spouse. These agreements also had to be fair and equitable, supported by sufficient consideration, and could not be made in contemplation of divorce or separation.<sup>64</sup> *Rinvelt* was a turning point in the courts' position on marital agreements because the language of the decision indicates that a properly formed marital agreement actually encourages marriages by

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<sup>62</sup> *Schinkle v Schinkle*, 663 N.W.2d 481, 484 (Mich. Ct. App. 2003).

<sup>63</sup> *Reed v Reed*, 693 N.W.2d 825, 835 (Mich. Ct. App. 2005) quoting *Kuziemko v Kuziemko*, No. 212377, 2001 Mich. App. LEXIS 278 (Mich. Ct. App. Dec. 4, 2001).

<sup>64</sup> *Rockwell v Estate of Rockwell*, 180 N.W.2d 498 (Mich. Ct. App. 1970); *Ransford v Yens*, 132 N.W.2d 150 (Mich. 1965).

allowing parties to address concerns that may otherwise have prevented them from marrying in the first place.

*Rinvelt* made no distinction in the holding or in the dicta that indicates that the timing of the agreement was essential to its validity, and that somehow the agreement no longer encouraged the continuation of the marriage relationship once the proverbial clock struck twelve when the parties exchanged their marriage vows. A careful reading of the language in *Rinvelt* seems to indicate that a post-nuptial agreement made under similar circumstances to the hypothetical situation mentioned at the opening of this note could also be enforceable because such an agreement encourages the continuation of the marriage. However, the appellate courts of this state were not faced with such facts and, up until the *Wright* case, had not been called upon to address the issue.

Instead, the cases that came before Michigan appellate courts after *Rinvelt* demonstrated that there are two distinct sets of situations where a post-nuptial agreement will arise. The courts were commonly faced, not with the validity of agreements made between happy spouses who are now, years later, divorcing, but with the validity of agreements made between separating parties, where there has already been a breakdown in the marriage. Naturally, the courts approached these agreements from a much different perspective.

Parties who are separated, or who are contemplating an imminent divorce, may enter into separation agreements in an attempt to settle their pending or imminent litigation.<sup>65</sup> These agreements, signed in contemplation of separation or divorce, are enforceable and, in fact, have long been favored by the courts, as they further the public policy of settlement over litigation.<sup>66</sup>

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<sup>65</sup> See, e.g., *Randall v Randall*, 37 Mich. 563 (1877); *In re Berner's Estate*, 187 N.W. 377 (Mich. 1922).

<sup>66</sup> *Id.*

In 2006, the Michigan Court of Appeals clarified the scrutiny that a court should apply to these types of post-nuptial agreements in the case of *Lentz v Lentz*.<sup>67</sup> The plaintiff in *Lentz* sought to have the court apply to separation agreements the same standard it uses for ante-nuptial agreements and, therefore, invalidate a separation/settlement agreement under the *Rinvelt* standards.<sup>68</sup> The court rejected that argument and held that, in situations where an agreement is entered into as a settlement of a separation or divorce, the “fair and equitable” standard does not apply; rather, general contract principles apply as in all settlement agreements, and the agreement is enforceable unless it resulted from fraud, duress, or mutual mistake.<sup>69</sup> The court made a distinction between post-nuptial agreements made for the purpose of determining property rights upon one spouse’s death, and post-nuptial agreements made for purposes of settlement after a separation has occurred or a divorce is pending or imminent.<sup>70</sup>

Curiously absent from the *Lentz* court’s discussion of the different types of post-nuptial agreements is any mention of a post-nuptial agreement that contemplates a future divorce that is made during an intact marriage, where the couple desires to preserve the marriage and continue to live as husband and wife. In fact, until *Wright v Wright*, there had not been a post-*Rinvelt* discussion in Michigan case law dealing with the validity of post-nuptial agreements where parties intend to remain married. Even by 2006, it does not appear that the court was even contemplating post-nuptial agreements made by couples who wanted to stay married but preserve their rights to property in the event of a divorce because the court had yet to be faced with such a situation. Then, along came Monica and Charles Wright.

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<sup>67</sup> 721 N.W.2d 861 (Mich. Ct. App. 2006)

<sup>68</sup> *Id.* at 865.

<sup>69</sup> *Id.* at 869.

<sup>70</sup> *Id.*

## CHARLES' DECISIONS REGARDING HIS APPEAL

*Lentz* was decided in April of 2006, coincidentally the same month that Charles filed for divorce. When Monica challenged the post-nuptial agreement, Charles attempted to use *Lentz* to supplement his claim that the agreement should be enforced, arguing that Monica had asked him for a divorce several times, and that the agreement was in fact a separation agreement.<sup>71</sup> The trial court disagreed and held that, because Monica entered into the agreement in order to *prevent* divorce, the agreement could not have had divorce or separation as its purpose, and, furthermore, the agreement did not mention divorce or separation as a reason for the agreement's formation, nor as consideration for any of the provisions within it.<sup>72</sup> The trial court found the agreement void and unenforceable because it could not find any case law in Michigan that accepted post-nuptial agreements made during an intact marriage for enforcement in a subsequent divorce proceeding.<sup>73</sup> As discussed above, the lack of precedent regarding these types of agreements stems from the fact that there had not been a post-*Rinvelt* case before the Michigan Court of Appeals on the issue; therefore, the only precedent available to the court was pre-*Rinvelt* case law where *all* marital agreements that contemplated divorce were void as against public policy.

After the trial court rendered its decision, Charles chose not to file an interlocutory appeal on the issue, and instead raised the issue when he brought his appeal as of right on the entire judgment of divorce. This decision was quite possibly to his detriment. At the time of the trial court's decision on the post-nuptial agreement, Charles had only engaged in a few of the many egregious acts mentioned by the Court of Appeals in its decision. Also, there had not been any testimony taken in court. The trial transcript in this matter preserved the unlikable nature of

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<sup>71</sup> Appellant's Brief on Appeal at 2, 8-9, *Wright* (No. 281918).

<sup>72</sup> Order Granting Defendant's Motion for Declaratory Relief, January 16, 2007, *Wright* (No. 06-800-DM).

<sup>73</sup> *Id.*



Charles' responses to questioning and his overall contempt for his wife, her attorneys and the trial court. The trial court's oral decision on the outcome of the divorce trial also reflected poorly on Charles, as the trial court made its findings related to the child custody "best interest" factors which analyzed Charles' behavior and actions. If Charles had appealed the decision on the post-nuptial agreement at the time it was made, the Court of Appeals may not have been so outcome driven in the rendering of its decision and its analysis of the agreement.

Another poor decision on Charles' part was his reliance on *Lentz* for his argument that that the agreement should be upheld. Instead of arguing that *Lentz* should apply to his case, as clearly the facts in this case contradict that this agreement was even remotely close to a separation agreement between divorcing spouses, Charles should have sought to analogize this agreement to ante-nuptial agreements under *Rinvelt*. *Rinvelt* was undoubtedly a significant change in Michigan's public policy regarding marital agreements and it signified the court's focus on the freedom of parties to contract. *Rinvelt* focused on the idea of individuals being able to ensure predictability, plan their futures with more security, and, most importantly, decide their own destinies.<sup>74</sup> Using *Rinvelt*, Charles could have used the court's strong language about the freedom of parties to contract to bolster his claim for the validity of the agreement.

For example, there is little difference between the situation in *Rinvelt*, where couples want to decide their destinies *before* they marry, and in our hypothetical where you and your spouse want to decide your destinies, or perhaps alter your destinies, *after* you marry. The theory that couples should only think through the financial aspects of their marriage beforehand to foster strength and permanency in their relationship is downright silly when placed in any practical application. The Michigan Court of Appeals would be hard pressed to find a single

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<sup>74</sup> *Rinvelt*, 475 N.W.2d at 483.

married couple that does not think through the financial aspects of their marriage on a regular basis, often having to change and alter the plans that they may have originally conceived at the marriage's outset due to the natural life changes that occur throughout the parties' lives.

In hindsight, Charles' failure to file the interlocutory appeal, and the failure to argue for the application of *Rinvelt* instead of *Lentz*, may have led to the Court of Appeals' finding that married couples are not free to enter into agreements that anticipate and encourage future separation or divorce. In support of its holding in *Wright*, the Court of Appeals cited case law from 1923 and 1877.<sup>75</sup> Due to *Rinvelt*, this case law was outdated and arguably obsolete. The obviousness of the court's desire to ensure an equitable result in this case has led to a situation where bad facts appear to have made bad law. However, the Court of Appeals could have reached its desired outcome through the application of the standards set forth in *Rinvelt* and its progeny of cases, as opposed to pigeonholing non-separation, post-nuptial agreements as the only form of marital agreement not recognized as valid by any means under Michigan law.

#### BASIC CONTRACT PRINCIPLES AND APPLICATION OF THE *RINVELT* TEST

With *Rinvelt* and subsequent case law on ante-nuptial agreements, Michigan courts developed a three factor test to be used in conjunction with basic contract principles, to determine the enforceability of ante-nuptial agreements.<sup>76</sup> These three factors are: (1) whether the agreement was obtained through fraud, duress, mistake or misrepresentation, or through non-disclosure of a material fact; (2) whether the agreement was unconscionable when it was executed; or (3) whether the facts and circumstances since the agreement was executed are so

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<sup>75</sup> *Wright*, 279 Mich App at 297 (“Under Michigan law, a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates, and encourages a future separation or divorce.” *Day v Chamberlain*, 193 N.W. 824 (Mich. 1923); “Articles calculated to favor a separation which has not yet taken place will not be supported.” *Randall v Randall*, 37 Mich 563, 571 (Mich. 1877)).

<sup>76</sup> *Rinvelt*, 475 N.W.2d at 482.

changed that its enforcement would be unfair and unreasonable.<sup>77</sup> This last prong is better described as the foreseeability of the agreement.<sup>78</sup> Using this analysis, the Court of Appeals could have reached its desired outcome of invalidating the agreement; however, it would not have had to create a bright line rule that does not fit well within the context of modern marriages.

### Basic Principles of Contract Construction

First, the court could have used basic principles of contract construction as a reason for setting aside the agreement. In Michigan, the general principles surrounding contract formation are competent parties, proper subject matter, legal consideration, mutuality of agreement, mutuality of obligation, and offer and acceptance.<sup>79</sup> While legal consideration is an essential element in a contract claim,<sup>80</sup> the law will generally not inquire into the adequacy of consideration so long as the consideration is otherwise valid to support the promise.<sup>81</sup> In other words, so long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant.<sup>82</sup> Therefore, anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised.<sup>83</sup> In ante-nuptial or pre-nuptial agreements, the marriage alone is sufficient consideration for the agreement, and it need not be recited in the

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<sup>77</sup> *Id.*

<sup>78</sup> See *Kuziemko v Kuziemko*, No. 212377, 2001 Mich. App. LEXIS 278, (Mich. Ct. App. Dec. 4, 2001); See, also, *Gant v Gant*, 329 SE2d 106 (W Va 1985) (“The concept of fairness as it pertains to the enforcement of contract agreements has been equated to foreseeability”); for an excellent analysis of the foreseeability prong of the *Rinvelt* test, see George F. Bearup, *Drafting Prenuptial Agreements in Light of Reed and Lentz*, 16th Annual Drafting Estate Planning Documents Seminar, (INST. OF CONT. LEGAL EDUC., Ann Arbor, MI), January 18, 2007, at 5-8.

<sup>79</sup> *Thomas v Leja*, 468 N.W.2d 58 (Mich Ct. App. 1991).

<sup>80</sup> *Yerkovich v AAA*, 610 N.W.2d 542 (Mich. 2000).

<sup>81</sup> 3 WILLISTON, CONTRACTS § 7:21, 383-386 (4<sup>th</sup> ed.), see, also, *GMC v Dep't of Treasury*, 644 N.W.2d 734, 739 (Mich. 2002).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

agreement.<sup>84</sup> However, in post-nuptial agreements, something more is required as the marriage has already taken place.<sup>85</sup> It has long been held that “a release by a wife of an interest which was within her own option to release or not--as, for example, a right of dower--is a valuable consideration, which will support a post nuptial settlement, and therefore will suffice for any other purpose.”<sup>86</sup> For example, mutual promises of a husband and wife to release to each other all right in and control over the other's property are sufficient consideration for post-nuptial agreements.<sup>87</sup>

There is some argument that Monica and Charles’ agreement lacked adequate consideration due to the fact that Charles did not relinquish any of his rights. The recitals of the *Wright* post-nuptial agreement simply state that the agreement is “in consideration of the mutual promises in this agreement.”<sup>88</sup> In terms of releasing rights to separate property, the agreement stated that each party would retain control and ownership over the property listed in the attached exhibits, “without any claim by the other party.”<sup>89</sup> Due to the fact that the exhibits list only Charles’ property, and state that Monica does not own any property, there is an argument that Charles failed to give any consideration because he did not release any rights as to Monica’s property. However, Charles did release his right to Monica’s estate in the event of her death.<sup>90</sup> Therefore, due to the fact that courts rarely want to question the adequacy of consideration, the lack of adequate consideration may not be a strong argument. In the context of a post-nuptial agreement, it appears that the fact that Monica willingly gave up her rights to Charles’ property,

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<sup>84</sup> See *Richard v Detroit Trust Co*, 257 N.W. 725 (Mich. 1934); *In re Estate of Benker*, 331 N.W.2d 193 (Mich. 1982); *Kennett v McKay*, 57 N.W.2d 316 (Mich. 1953).

<sup>85</sup> *Rockwell v Estate of Rockwell*, 180 N.W.2d 498 (Mich. Ct. App. 1970).

<sup>86</sup> *Farwell v Johnston*, 34 Mich. 342, 344 (Mich. 1876).

<sup>87</sup> *Rockwell*, 180 N.W.2d 498.

<sup>88</sup> See attached Agreement originally found at Exhibit A of Defendant’s Brief in Support of Motion for Declaratory Relief, *Wright* (No. 06-800-DM).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

and Charles in turn willingly released his interest in Monica's estate, that a necessary, albeit minimal, amount of consideration was in fact present.

A better argument under theories of contract construction appears to lie in the lack of mutuality of agreement. When construing a contract, the first goal of a court is to determine, and then enforce, the parties' intent based on the plain language of the agreement.<sup>91</sup> Where mutual assent, or a meeting of the minds on all the essential terms, does not exist, a contract does not exist.<sup>92</sup> In order to form a valid contract, there also must be a meeting of the minds on all the material facts.<sup>93</sup> A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.<sup>94</sup>

In the *Wright* agreement, it does not appear that there was a meeting of the minds regarding the purpose or intent of the agreement. Monica's actions clearly indicate that she thought that she was saving her marriage by signing the agreement.<sup>95</sup> To the contrary, Charles argued in his appellate brief that he believed that a separation or divorce was imminent, and therefore, his intent was that this agreement was in fact a separation agreement under *Lentz*.<sup>96</sup> The parties' disparate interpretations of agreement's purpose are essential to the intent of the parties in its formation. This disparity could have been considered a "material fact" or an "essential term" surrounding the formation of the agreement, and the court could have used this disparity as a means to invalidate the agreement.

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<sup>91</sup> *Harbor Park Market, Inc v Gronda*, 743 N.W.2d 585 (Mich. Ct. App. 2007).

<sup>92</sup> *Quality Prods & Concepts Co v Nagel Precision, Inc*, 666 N.W.2d 251, 258 (2003); *Burkhardt v Bailey*, 680 N.W.2d 453, 463 (Mich. Ct. App. 2004).

<sup>93</sup> *Kamalnath v Mercy Mem Hosp Corp*, 487 N.W.2d 499, 503 (Mich. Ct. App. 1992).

<sup>94</sup> *Stanton v Dacheille*, 463 N.W.2d 479, 483 (Mich. Ct. App. 1990), citing *Heritage Broadcasting Co v Wilson Communications, Inc*, 428 N.W.2d 784, 787 (Mich. Ct. App. 1988).

<sup>95</sup> Appellee's Brief in Response at 18-19, *Wright* (No. 281918).

<sup>96</sup> Appellant's Brief on Appeal at 2, 8-9, *Wright* (No. 281918).

## The *Rinvelt* Analysis

While the Court of Appeals could have invalidated the agreement under the contract construction principles of lack of consideration and mutuality of agreement, a more appropriate approach would have been to apply the *Rinvelt* test. The *Rinvelt* factors were specifically developed because of the unique nature of the marriage relationship.<sup>97</sup> The test seeks to ensure that “weaker” parties are protected, and therefore imposes a higher burden on a party seeking to uphold the validity of the agreement in dispute.<sup>98</sup>

First, the Court of Appeals could have used the first factor of fraud, duress, mistake, misrepresentation, or non-disclosure of a material fact as a reason for setting aside the agreement. Fraud exists when there has been 1) a material representation made; 2) the representation was false; 3) the individual who made the representation knew that it was false at the time it was made, or made it recklessly, without any knowledge of its truth and as a positive assertion; 4) the individual who made the representation made the representation with the intention that it should be acted upon by the other party; 5) the other party acted in reliance upon it; and 6) the other party thereby suffered injury.<sup>99</sup>

The parties obviously had different intents in signing the agreement. Monica testified that she felt that the only way to preserve her marriage was to sign the agreement, because Charles had told her that he would divorce her if she didn't.<sup>100</sup> Charles admits that he told Monica that he would divorce her if she didn't sign the agreement, and also told her that they

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<sup>97</sup> See *Rinvelt*, 475 N.W.2d at 482.

<sup>98</sup> *Id.*

<sup>99</sup> See *Cooper v Auto Club Ins. Ass'n*, 751 N.W.2d 443 (Mich. 2008); *Hi-Way Motor Co v Int'l Harvester Co*, 247 N.W.2d 813 (Mich. 1976), *Candler v Heigho*, 175 N.W. 141 (Mich. 1919).

<sup>100</sup> Appellant's Brief on Appeal at Exhibit 3, pgs. 24-29, *Wright* (No. 281918).

could “start anew,” have a “fresh start,” and a “clean slate.”<sup>101</sup> However, this runs contrary to his argument that the parties were contemplating divorce and divorce was the purpose of the agreement.<sup>102</sup> The Court of Appeals highlighted this discrepancy when it mentioned that Charles “filed for divorce roughly eight months after defendant signed the agreement.”<sup>103</sup> Charles’ representation to Monica about the preservation of the marriage was either false when he made it, or was made recklessly, with Charles not realizing that the agreement put him “in a much more favorable position to abandon the marriage.”<sup>104</sup> Either way, Monica relied upon this representation to her detriment by signing the agreement, and, even if this does not rise to the level of fraud, it could easily rise to the level of misrepresentation or mistake, both of which could null the agreement under the *Rinvelt* standard.

There is also an argument that Charles failed to disclose material facts, and the Court of Appeals could have used this as a basis for rendering the agreement unenforceable under *Rinvelt*. The agreement contained no information about the value of any of the assets and liabilities listed in the exhibits.<sup>105</sup> The agreement also failed to mention facts about the parties such as their individual incomes, education levels, and their mental and physical health.<sup>106</sup> While *Reed* and *Lentz* have both inferred that a full, detailed accounting of marital financial information is not

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<sup>101</sup> Appellant’s Brief on Appeal at 1-2, *Wright* (No. 281918).

<sup>102</sup> Compare Appellant’s Brief on Appeal at 2, 8-9, *Wright* (No. 281918) (Charles argues that Monica asked for a divorce and the parties separated during the marriage) with Appellant’s Brief on Appeal at 1, 9 *Wright* (No. 281918) (Charles states that he told Monica she would be forgiven if she signed the agreement and they could have a “clean slate” and “start anew”) and Defendant’s Brief in Support of Motion for Declaratory Relief at 14, *Wright* (No. 06-800-DM) (quoting Charles’ testimony from his deposition as to the fact that the post nuptial agreement was entered into in order to correct Monica’s behavior, not as a separation agreement).

<sup>103</sup> *Wright*, 279 Mich. App. at 294-95.

<sup>104</sup> *Id.* at 297.

<sup>105</sup> See attached Agreement, originally found at Exhibit A of Defendant’s Brief in Support of Motion for Declaratory Relief, *Wright* (No. 06-800-DM).

<sup>106</sup> *Id.*

required to have a valid ante-nuptial agreement,<sup>107</sup> in this case, Monica testified that she had absolutely no knowledge of the marital finances, or of Charles' income and assets from his private investigation business.<sup>108</sup> Charles also testified that he had the financial information sent to a P.O. Box as opposed to the marital home, and that he destroyed the documents after receiving them.<sup>109</sup>

The second prong of the *Rinvelt* test, which asks the court to determine if the agreement was unconscionable, probably offers the best means by which the Court of Appeals could have invalidated the agreement, without making a blanket statement that invalidated all non-separation, post-nuptial agreements contemplating divorce. A conclusory statement that an ante-nuptial agreement is unconscionable without further development of facts or an explanation of circumstances surrounding its execution will not constitute a basis upon which to set aside the validity of an ante-nuptial agreement, and instead there must be sufficient facts to demonstrate unconscionability.<sup>110</sup> An interesting discussion on the finding of unconscionability in a marital agreement context is the unpublished case of *Corning v Corning*.<sup>111</sup> In its discussion with regard to unconscionability in *Corning*, the Michigan Court of Appeals noted that the examination of a contract or a specific provision for unconscionability involves both a procedural and a substantive inquiry and both procedural and substantive unconscionability must be present for the agreement to be set aside.<sup>112</sup>

Procedural unconscionability deals with the real and voluntary meeting of minds of the parties when the contract was executed; it considers factors such as: (i) relative bargaining

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<sup>107</sup> See *Lentz*, 721 N.W.2d at 866, n4, citing *Reed v Reed*, 693 N.W.2d 825 (Mich. Ct. App. 2005).

<sup>108</sup> Defendant's Brief in Support of Motion for Declaratory Relief at 11-12, *Wright* (No. 06-800-DM).

<sup>109</sup> *Id.*

<sup>110</sup> *Butcher v Butcher*, No. 235671, 2003 Mich. App. LEXIS 325, at\*4 (Mich. Ct. App. Feb. 11, 2003).

<sup>111</sup> No. 229683, 2003 Mich. App. LEXIS 3 (Mich. Ct. App. Jan. 3, 2003).

<sup>112</sup> *Id.*, at \*4, citing *Northwest Acceptance Corp v Almont Gravel Inc*, 412 N.W.2d 719, 723 (Mich. Ct. App. 1987).



power; (ii) age; (iii) education; (iv) intelligence; (v) business savvy and experience; (vi) the drafter of the contract; and (vii) whether the terms were explained to the weaker party.<sup>113</sup> The focus of substantive unconscionability is solely upon whether the contract or disputed term is reasonable or “fair.”<sup>114</sup> In this case, the agreement in *Wright* fails both tests.

First, there was no “meeting of the minds” in this case as the parties had differing intents in the formation of the agreement. Also, there was a distinct difference between Monica and Charles in bargaining power, age, education, and business savvy. Monica was a high school drop-out with a GED and a few community college course credits. She was ten years younger than Charles, and had considerably less experience dealing with business matters, as she had been an unwed teenage mother working for minimum wage when she entered into her relationship with Charles. There was ample testimony that Charles was in charge of the family finances and made the majority of the decisions. Charles had an MBA, a career in the state department of corrections, was ten years older and had been married previously. Also, Charles sought out the attorney to draft the agreement. The record contained more than enough evidence to show procedural unconscionability.

The substantive unconscionability of the agreement is also clear. Substantive unconscionability allows the inherent unfairness of the agreement to be used as a reason to invalidate it. In estimating the value of the marital estate, Monica’s attorneys determined the estate to be worth approximately \$400,000.00 at the time of the execution of the agreement.<sup>115</sup> Of this, the value of the property Monica was to receive under the agreement was about \$10,000.00; in addition, Monica waived any right to petition for spousal support. Therefore,

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<sup>113</sup> *Corning*, 2003 Mich. App. LEXIS 3, at \*4, citing *Johnson v Mobil Oil Corporation*, 415 F.Supp. 264, 266-267 (E.D. Mich. 1976).

<sup>114</sup> See *Corning*, 2003 Mich. App. LEXIS 3.

<sup>115</sup> Defendant’s Brief in Support of Motion for Declaratory Relief at 2-5, *Wright* (No. 06-800-DM).

coupled with the procedural unconscionability mentioned above, the agreement was inherently unreasonable and unfair and was thereby substantively unconscionable as well.

While the third prong of the *Rinvelt* test is inapplicable in this situation, using the first two *Rinvelt* factors, the *Wright* agreement could have easily been invalidated. *Rinvelt* adopted these factors in order to protect spouses from exactly the kind of behavior demonstrated by Charles Wright. The Court of Appeals should not have been afraid of invalidating an agreement according to these principles when presented with a situation that so clearly falls within those principles' parameters. While perhaps worried about creating a precedent that would make it easier to invalidate future agreements<sup>116</sup>, the Court of Appeals was misdirected in choosing a public policy basis for its decision in *Wright*.

#### THE MICHIGAN COURT OF APPEALS INVALIDATES THE *WRIGHT* AGREEMENT ON PUBLIC POLICY GROUNDS

*Rinvelt* upholds certain aspects of the prior public policy regarding marital agreements that the court could have used to invalidate the agreement in *Wright*. First, *Rinvelt* upheld the idea that marital agreements “are not enforceable if they provide for, facilitate, or tend to induce a separation or divorce.”<sup>117</sup> Also, “the agreement must be fair, equitable, and reasonable under the circumstances, and must be entered into voluntarily, with full disclosure, and with the rights of each party and the extent of the waiver of such rights understood.”<sup>118</sup> In its decision, the Michigan Court of Appeals appeared to use that idea of fairness for its reasoning that Monica and Charles' agreement was void as against public policy. The court stated that the “contract plainly had, as one of its primary goals, defendant's total divestment of all marital property in the

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<sup>116</sup> The majority of all ante-nuptial agreements presented to the Court of Appeals in post-*Rinvelt* cases have been upheld.

<sup>117</sup> *Rinvelt*, 475 N.W.2d at 481, citing *In re Muxlow Estate*, 116 N.W.2d 43 (Mich. 1962).

<sup>118</sup> *Rinvelt*, 475 N.W.2d at 481, citing *In re Benker Estate*, 331 N.W.2d 193 (Mich. 1982); See also *In re Halmaghi Estate*, 457 N.W.2d 356 (Mich. Ct. App. 1990).

event of a divorce.”<sup>119</sup> The court cited *Randall v Randall*<sup>120</sup>, an 1877 case, which held that “[i]t is not the policy of the law to encourage such separations, or to favor them by supporting such arrangement as are calculated to bring them about. It has accordingly been decided that articles calculated to favor a separation which has not yet taken place will not be supported.”<sup>121</sup> The problem with the court’s analysis is that it did not stop there. Had it, the court would not have simply added an additional factor to the *Rinvelt* analysis, that being whether or not the agreement encouraged a separation.

The problem with the *Wright* analysis is that the court also cited *Day v Chamberlain*,<sup>122</sup> a 1923 case, which held that a couple maintaining a marital relationship may not enter into an enforceable contract that *anticipates* or *contemplates* a future separation or divorce.<sup>123</sup> With the inclusion of the *Day* analysis in its holding, the *Wright* decision essentially voids any agreement that would be enforceable under *Rinvelt*, but due to the fact that the agreement was entered into after the marriage had taken place, is now unenforceable. *Wright* thus creates an anomalous category among marital agreements where post-nuptial agreements formed during an intact marriage in contemplation of future divorce are the only form of marital agreement not recognized as valid in Michigan. This anomaly appears to be unique to Michigan, as many other jurisdictions recognize post-nuptial agreements and will uphold them under the same analysis that the jurisdiction applies to ante-nuptial agreements.

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<sup>119</sup> *Wright*, 279 Mich. App. at 297.

<sup>120</sup> 37 Mich. 563 (Mich. 1877).

<sup>121</sup> *Wright*, 279 Mich. App. at 297, citing *Randall*, 37 Mich. at 571.

<sup>122</sup> 193 N.W. 824 (Mich. 1923).

<sup>123</sup> *Wright*, 279 Mich. App. at 297, citing *Day*, 193 N.W. 824; note that while the *Wright* court summarized the holding in *Day* by stating that agreements that “anticipate and encourage” divorce or separation are void, the decision in *Day* was only concerned with agreements that anticipate or contemplate divorce; there was no real emphasis given to whether the agreement actually encourages divorce, see *Day*, 193 N.W. at 825.

## THE VALIDITY OF POST-NUPTIAL AGREEMENTS IN OTHER JURISDICTIONS

There are many other jurisdictions that will enforce post-nuptial agreements made in contemplation of divorce. Tennessee, for example, applies the same theory to post-nuptial agreements as Michigan does to ante-nuptial agreements, that being the idea that such agreements foster the marriage relationship as opposed to encouraging divorce and are actually favored by public policy.<sup>124</sup> Tennessee recognizes two different kinds of post-nuptial agreements.

First, Tennessee identifies “reconciliation” agreements as agreements made between spouses subsequent to a separation and reconciliation.<sup>125</sup> These agreements are recognized and will be enforced under “appropriate circumstances.”<sup>126</sup> In general terms, reconciliation agreements in Tennessee are interpreted in a manner similar to the approach utilized by that state’s courts in construing ante-nuptial agreements; that being general contract principles.<sup>127</sup> Reconciliation agreements are distinguishable in the fact that a reconciliation agreement is executed following a separation during a marriage and its purpose, “everything else being equal, is to bring the parties together.”<sup>128</sup> In analyzing reconciliation agreements, the courts will look to the reasonableness of the length of time between the signing of the agreement and the subsequent divorce; however this is not dispositive of the outcome whether or not the agreement will be upheld and enforced.<sup>129</sup>

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<sup>124</sup> See *Bratton v Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004) citing *Hoyt v Hoyt*, 372 S.W.2d 300 (Tenn. 1963) and *Minor v Minor*, 863 S.W.2d 51 (Tenn. Ct. App. 1993).

<sup>125</sup> See *Hoyt*, 372 S.W.2d at 303-304; see, also, *Atkins*, 105 S.W.3d 591 (Tenn. Ct. App. 2002) and TENN. CODE ANN. § 36-3-501 (2001).

<sup>126</sup> *Atkins*, 105 S.W.3d at 594, citing *Hoyt*, 372 S.W.2d at 301, 303-04.

<sup>127</sup> *Atkins*, 105 S.W.3d at 594, citing *Minor*, 863 S.W.2d at 54.

<sup>128</sup> *Hoyt*, 372 S.W.2d at 304.

<sup>129</sup> In *Minor*, 863 S.W.2d at 55, where a reconciliation agreement contained no express period of time for performance, the Tennessee Supreme Court held that such an agreement is effective only for a reasonable period of time under the circumstances. Cf. *Boone v. Boone*, No. 02 A01-9507-CH-00144, 1997 Tenn. App. LEXIS 215, at

Secondly, Tennessee also recognizes post-nuptial agreements like the one put forth in our hypothetical, where no separation has taken place prior to the signing of the agreement; these agreements differ from reconciliation agreements in that they are entered into before marital problems arise.<sup>130</sup> In *Bratton v Bratton*<sup>131</sup>, the Tennessee Supreme Court analyzed such an agreement and upheld its validity stating that “spouses may divide their property presently and prospectively by a postnuptial agreement, even without it being incident to a contemplated separation or divorce, provided that the agreement is free from fraud, coercion or undue influence, that the parties acted with full knowledge of the property involved and their rights herein, and that the settlement was fair and equitable.”<sup>132</sup> The *Bratton* court went on to find that “marital partners may validly contract to divide property or set support in the event of a divorce by postnuptial agreement, even without it being incident to a contemplated separation or divorce.”<sup>133</sup> The *Bratton* court’s reasoning was strikingly simple in its logic. If we let married couples contract away their property and rights as they see fit before they get married, after they reconcile, or when a divorce is pending or imminent, why should it be any different if the parties are happily married and wish to remain so.<sup>134</sup>

The *Bratton* court further reasoned that, because of the confidential relationship which exists between a husband and wife, postnuptial agreements are likewise subjected to close

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\*16-\*18 (Tenn. Ct. App. WS, filed Mar. 27, 1997) (construing an antenuptial agreement and finding it valid despite the passage of time and the *Minor* decision), citing *Perkinson v Perkinson*, 802 S.W.2d 600, 603 (Tenn. 1990) (construing an antenuptial agreement and stating that the length of the marriage is not relevant to the fairness of an antenuptial agreement and will not be a basis for setting it aside).

<sup>130</sup> *Bratton*, 136 S.W.3d at 599.

<sup>131</sup> 136 S.W.3d 595.

<sup>132</sup> *Id.*; see, also 41 Am Jur 2d *Husband and Wife* §134 (1995).

<sup>133</sup> *Bratton*, 136 S.W.3d at 600.

<sup>134</sup> *Id.*

scrutiny by the courts to ensure that they are fair and equitable.<sup>135</sup> It developed an analysis for these types of agreements that is very similar to the test applied to ante-nuptial agreements as set forth in *Rinvelt*. Comparing the overall approach of the two jurisdictions to marital agreements, Michigan's refusal to acknowledge post-nuptial agreements made during an intact marriage appears illogical next to Tennessee's application of uniform standards. Whether intentional or not, the Court of Appeals in *Wright* eliminated the ability of married couples to freely contract between themselves. Had it applied an analysis similar to the Tennessee Supreme Court's in *Bratton*, it could have reached its desired equitable result, without having to declare such an extreme position.

Florida also recognizes post-nuptial agreements and will enforce them in dissolution proceedings.<sup>136</sup> There are, however, two separate grounds by which either spouse may challenge such an agreement and have it vacated or modified; first, a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.<sup>137</sup> This is similar to the first prong of the *Rinvelt* test in Michigan. As has been explored above, Monica and Charles' agreement had elements of all of these claims in its formation. The idea of overreaching, an element not specifically mentioned in the *Rinvelt* test, is particularly applicable to Monica and Charles' agreement, considering the extremely one-sided property settlement.

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<sup>135</sup> *Id.* at 601; See also, e.g., *Peirce v Peirce*, 994 P.2d 193 (Utah 2000); *In re Estate of Gab*, 364 N.W.2d 924 (S.D. 1985); *In re Estate of Harber*, 449 P.2d 7 (Ariz. 1969); see, also, 41 C.J.S. *Husband & Wife* § 87 (1991) ("Since a husband and wife do not deal at arm's length, a fiduciary duty of the highest degree is imposed in transactions between them.").

<sup>136</sup> See *Casto v Casto*, 508 So.2d 330 (Fla. 1987).

<sup>137</sup> *Id.*; see also *Masilotti v Masilotti*, 29 So.2d 872 (Fla. 1947) and *Del Vecchio v Del Vecchio*, 143 So.2d 17 (Fla. 1962) superseded on other grounds by FLA. STAT. § 732.702 (2008) as stated by *Critchlow v Williamson*, 450 So.2d 1153 (Fla. 1984).

The second ground to vacate a post-nuptial agreement under Florida law contains multiple elements.<sup>138</sup> Initially, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.<sup>139</sup> To establish that an agreement is unreasonable, the challenging spouse must present evidence of the parties' relative situations, including their respective ages, health, education, and financial status.<sup>140</sup> With this basic information, a trial court may determine that the agreement, on its face, does not adequately provide for the challenging spouse and, consequently, is unreasonable.<sup>141</sup> In making this determination, the trial court must find that the agreement is "disproportionate to the means" of the defending spouse.<sup>142</sup> This finding requires some evidence in the record to establish a defending spouse's financial means. Additional evidence other than the basic financial information may be necessary to establish the unreasonableness of the agreement.<sup>143</sup>

Once the claiming spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached.<sup>144</sup> The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a

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<sup>138</sup> See *Casto*, 508 So.2d 330.

<sup>139</sup> *Del Vecchio*, 143 So.2d at 20.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Casto*, 508 So.2d at 333.

<sup>144</sup> *Id.*

value by reasonable means, as well as a general knowledge of the income of the parties.<sup>145</sup> The test in this regard is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether the challenging spouse is prejudiced by the lack of information.<sup>146</sup>

The first part of this ground for invalidation is similar to the procedural unconscionability examination that Michigan courts use for ante-nuptial agreements under the second prong of the *Rinvelt* test. Florida's examination goes two steps further in that Florida courts will also examine whether or not the challenging spouse can be adequately provided for considering the means of the defending spouse, and then create a rebuttable presumption that the defending spouse must disprove in order to prevail. This unique test would certainly have rendered Monica and Charles' agreement invalid. As previously mentioned, the *Wright* agreement allocated approximately \$10,000.00 worth of the \$400,000.00 marital estate to Monica; essentially a 98/2 division. The facts and circumstances of the case would have made it easy for a Florida court to find that the property distribution under the agreement was disproportionate. The question then becomes whether Charles would be able to prove that there was a full, frank disclosure, prior to the signing of the agreement, relative to the value of all the marital property and the parties' incomes, or that Monica had a general and approximate knowledge of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties.

Under the laws of other jurisdictions, it seems that the *Wright* agreement would not have been upheld. The overall unfairness of the property distribution and the problems with the parties' intents in the formation of the agreement create several avenues by which the agreement

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<sup>145</sup> *Id.*

<sup>146</sup> See *Belcher v Belcher*, 271 So. 2d 7 (Fla. 1972).



could have been invalidated without creating the strange precedent regarding non-separation, post-nuptial agreements. Curiously, the Michigan Supreme Court did not seem interested in correcting the anomaly created by the Court of Appeals in this case.

#### THE MICHIGAN SUPREME COURT DECLINES TO HEAR THE ISSUE

It is unclear why the Michigan Supreme Court did not want to take up this issue. In its decision on Charles' application for leave, the Court stated that "we are not persuaded that the questions presented should be reviewed by this Court."<sup>147</sup> This vague statement fails to indicate if the court agrees or disagrees with the public policy analysis used by the Michigan Court of Appeals. Generally, Michigan's highest court prefers to leave social policy making to the legislature.<sup>148</sup> It is also possible that the Supreme Court did not recognize the extent of the anomaly that was created, as Charles' application only briefly hints at this idea.<sup>149</sup>

Some insight as to the Michigan Supreme Court's decision not to hear the case may be gleaned from recent statements made by Justice Marilyn Kelly regarding the *Wright* decision. At a presentation on recent updates on family law cases, Justice Kelly spoke of the *Wright* case and highlighted the language used by the court regarding the idea the agreements that induce and encourage divorce cannot be upheld. Justice Kelly noted that because the *Wright* agreement left Charles in such a favorable position, and because he filed for divorce merely eight months after

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<sup>147</sup> *Wright v Wright*, 752 N.W.2d 47 (Mich. 2008).

<sup>148</sup> See *In re Kurzyniec Estate*, 526 N.W.2d 191 (Mich. Ct. App. 1994) (As a general rule, making social policy is a job for the Legislature, not the courts); *Van v Zahorik*, 597 N.W.2d 15 (Mich. 1999) ("we leave to the Legislature the task of creating substantive rights, subject to any constitutional restraints, if it finds that public policy so requires."); *O'Donnell v State Farm Mut Automobile Ins Co*, 273 N.W.2d 829 (1979) ("The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's.").

<sup>149</sup> See Appellant's Application for Leave to Appeal at 5, *Wright* (No. 136576), "It is not the parties who are encouraging divorce, but Michigan law, as the only way that married couples may enter into an agreement dividing their property is to *get a divorce!* (emphasis in original)."

its execution, the agreement could not be upheld.<sup>150</sup> Justice Kelly's statements indicate that the Court was indeed focused on Charles' conduct, and therefore did not want to take up the issue under such facts and circumstances. Perhaps the Michigan Supreme Court is waiting for a case with a better fact pattern that will allow it to address the problems created by the Court of Appeals' decision in *Wright*.

## CONCLUSION

It appears from this analysis that both appellate courts were focused on Charles' behavior, and not on the precedent that was used to invalidate the agreement. Unfortunately, while the "right" result was reached, this case has now created a "wrong" precedent for family law practitioners. The anomaly that has been created in the law of marital agreements is unfortunate for couples seeking legal counsel about their respective property rights. While bad facts may have made bad law in the *Wright* case, couples must now be left to wonder if indeed they will have the ability freely contract together once they are married. Likewise, practitioners must be left to wonder if they are drafting enforceable marital agreements for their clients. Whether intentional or not, the *Wright* case will have a chilling effect on the ability of parties to freely contract until such time as Michigan courts reexamine the issue.

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<sup>150</sup> Justice Marilyn Kelly, Address at ICLE Family Law Seminar (Nov. 20, 2008).