Enforcing Antenuptial Contracts in Minnesota: A Practice in Search of a Policy Basis in the Wake of McKee-Johnson v. Johnson

William F. Fraatz
Comment

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Lance Johnson, an attorney, and Mary McKee, a nursing education administrator, married on June 14, 1980.¹ Both had been divorced and had children from their previous marriages. Two days before their wedding they executed an antenuptial contract purporting to set forth their rights in their non-marital and marital property.² Minnesota’s antenuptial contract statute,³ enacted in 1979, governed their agreement.⁴

¹. McKee-Johnson v. Johnson, 444 N.W.2d 259, 261 (Minn. 1989) (en banc).
². Id. at 261-63.
³. Minn. Stat. § 519.11 (1990). The statute provides as follows:
Subdivision 1. A man and woman of legal age may enter into an antenuptial contract or settlement prior to solemnization of marriage which shall be valid and enforceable if (a) there is a full and fair disclosure of the earnings and property of each party, and (b) the parties have had an opportunity to consult with legal counsel of their own choice. An antenuptial contract or settlement made in conformity with this section may determine what rights each party has in the nonmarital property, defined in section 518.54, subdivision 5, clauses (a) to (d), upon dissolution of marriage, legal separation or after its termination by death and may bar each other of all rights in the respective estates not so secured to them by their agreement. This section shall not be construed to make invalid or unenforceable any antenuptial agreement or settlement made and executed in conformity with this section because the agreement or settlement covers or includes marital property, if the agreement or settlement would be valid and enforceable without regard to this section.
Subd. 2. Antenuptial contracts or settlements shall be in writing, executed in the presence of two witnesses and acknowledged by the parties, executing the same before any officer or person authorized to administer an oath under the laws of this state. The agreement must be entered into and executed prior to the day of solemnization of marriage.
Subd. 3. An antenuptial contract or settlement which by its terms conveys or determines what rights each has in the other’s real property and sets forth the legal description of the real estate granted or affected by the agreement may be filed or recorded in every county

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Johnson and McKee-Johnson divorced in 1987.\textsuperscript{5} The trial court, relying on dicta in a related Minnesota Court of Appeals decision,\textsuperscript{6} held that the antenuptial contract statute authorized agreements dealing with non-marital property only.\textsuperscript{7} The court further held that the statute prohibited marital property provisions.\textsuperscript{8} On appeal, the Minnesota Court of Appeals upheld the district court, although noting the statute's ambiguity.\textsuperscript{9} The Minnesota Supreme Court granted review, eventually reversing and remanding the case to the trial court.\textsuperscript{10} The supreme court held that the statute applied to non-marital property only.\textsuperscript{11} The court also held, however, that the statute did not prohibit antenuptial contracts respecting marital property.\textsuperscript{12} Such contracts are enforceable under common law, provided that they are procedurally and substantively fair both at execution and enforcement.\textsuperscript{13}

During the past two decades, new statutes and case law regarding antenuptial contracts have significantly altered the family law landscape. In addition, changing societal attitudes

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\item where any real estate so described is situated, in the office of the county recorder for the county or in any public office authorized to receive a deed, assignment or other instrument affecting the real estate, for filing or recording.

Subd. 4. Any antenuptial contract or settlement not recorded in the office of the county recorder or other public office authorized to receive the document, where the real property is located, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any part thereof, whose conveyance is first duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to the property appears of record prior to recording of the conveyance.

Subd. 5. An antenuptial contract or settlement duly acknowledged and attested shall be prima facie proof of the matters acknowledged therein and as to those matters, the burden of proof shall be and rest upon the person contesting the same.

Subd. 6. This section shall apply to all antenuptial contracts and settlements executed on or after August 1, 1979.

Subd. 7. Nothing in sections 519.01 to 519.101, shall be construed to affect antenuptial contracts or settlements.


5. Id. at 690.

6. Id. at 693 (citing Hill v. Hill, 356 N.W.2d 49, 54 (Minn. Ct. App. 1984)).

7. Id.

8. Id.

9. Id. at 693-94.

10. McKee-Johnson v. Johnson, 444 N.W.2d at 268.

11. Id. at 264, 265.

12. Id.

13. Id.
and practices with respect to marriage, divorce, and remarriage have increased the desirability of permitting couples to arrange privately the incidents of a possible dissolution. Parties require definitive statutes and judicial rulings in order to draft agreements on which they can rely when their marriages end. In *McKee-Johnson v. Johnson* the Minnesota Supreme Court provided partial, but inadequate, guidance as to which matters antenuptial contracts may cover, what law applies when an agreement implicates both the statute and the common law, and what standard of review courts should apply when a contract's validity is litigated.

This Comment examines the Minnesota Supreme Court's decision in *McKee-Johnson v. Johnson* and suggests an alternative analysis which courts can use to craft standards to govern review and enforcement of antenuptial contracts. This alternative analysis incorporates the existing family law policy of treating marriage as a partnership. Part I examines Minnesota's recent legislative and judicial approaches toward antenuptial contracts, including the public policy considerations underlying recent changes. Part II discusses the Minnesota Supreme Court's reasoning and holding in *McKee-Johnson*. Part III examines the supreme court's decision, particularly the court's failure to consider the law of antenuptial contracts in terms of the marital dissolution statute's provisions and policies. Part IV proposes legislative changes that would conform antenuptial contract law to the theory of marital partnership underlying present family law policy. This Comment concludes that when properly regulated by judicial review, antenuptial contracts further the policies underlying the marital dissolution statute.

I. THE TREND TOWARD GENERALLY ENFORCEABLE ANTENUPTIAL CONTRACTS

A. THE TRADITIONAL RESTRICTION OF ANTENUPTIAL CONTRACTS

Couples enter into antenuptial contracts prior to and in consideration of marriage. These agreements set forth eco-

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15. *See infra* notes 133-144 and accompanying text.
16. Courts, commentators, and the general public often refer to antenuptial contracts as “premarital agreements.”
onomic, and occasionally personal\textsuperscript{17} rights and duties that are incidental to a couple's marriage and its dissolution. Such agreements allow the parties to alter privately their statutory and common law economic rights at the death of either partner, or at the dissolution of the marriage.\textsuperscript{18}

The traditional judicial posture toward antenuptial contracts favored their use as an economic regulator at death but disfavored their use at divorce. Minnesota followed this bifurcated approach. The probate statute\textsuperscript{19} and case law\textsuperscript{20} long permitted antenuptial contracts that waived rights in a spouse's estate. Antenuptial contracts regulating a spouse's economic rights at the other spouse's death, "death-focused" agreements, traditionally enjoyed favor because courts regarded them as "conducive to the welfare of the parties and subservient to the best purposes of the marriage relation."\textsuperscript{21} In some instances, one or both parties to a marriage might perceive an obligation to protect the rights or interests of third parties, generally children of a previous marriage whose inheritance a subsequent marriage might jeopardize.\textsuperscript{22} Spousal waiver of all or part of an estate interest, or an alternate settlement of that interest, would allow the marriage to occur without disturbing third-party rights, thereby facilitating marital harmony.\textsuperscript{23}

Courts limited review of death-focused agreements to procedural considerations. Due to the fiduciary relationship between prospective spouses,\textsuperscript{24} enforcement required full disclosure of assets, knowledge of the rights being waived,\textsuperscript{25} access to independent counsel,\textsuperscript{26} and adequate alternative provi-

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  \item [18.] Some jurisdictions recognize antenuptial contracts respecting property settlements but not those respecting spousal maintenance. Among U.P.A.A. jurisdictions, California and South Dakota have eliminated spousal maintenance provisions in the Act. See infra note 123 and accompanying text.
  \item [19.] Minn. Stat. § 524.2-204 (1990).
  \item [20.] E.g. In re Appleby's Estate, 111 N.W. 305, 307 (Minn. 1907). The earliest Minnesota case enforcing an antenuptial contract is Desnoyer v. Jordan, 7 N.W. 140 (Minn. 1880).
  \item [21.] E.g. In re Appleby's Estate, 111 N.W. at 307.
  \item [22.] Estate of Serbus v. Serbus, 324 N.W.2d 381, 383 (Minn. 1982) (en banc). Use of an antenuptial agreement to further charitable purposes is also legitimate. In re Appleby's Estate, 111 N.W. at 312.
  \item [23.] In re Appleby's Estate, 111 N.W. at 308.
  \item [24.] Stanger v. Stanger, 189 N.W. 402, 403 (Minn. 1922).
  \item [25.] Knowledge that the agreement protected the inheritance of children satisfied the requirement. In re Estate of Jeurissen, 161 N.W.2d 324, 326 (Minn. 1968).
  \item [26.] Although the parties did not actually need to consult independent
sion for the party surrendering rights. Courts did not measure the “adequate alternative” factor by the probate statute. Instead, courts examined the actual needs of the party surrendering rights. Inadequate consideration, however, was insufficient to set aside or modify the contract, and instead created a rebuttable presumption of fraud. The person whose property the contract protected carried the burden of establishing compliance with the procedural requirements.

Courts premised the traditional disfavor of antenuptial contracts effective upon divorce, “divorce-focused” agreements, on the assumption that these agreements were antithetical to the marriage contract: husbands must support their wives and wives must serve their husbands. As early as 1907, the Minnesota Supreme Court stated in dicta that “contracts which tend to induce a separation of husband and wife are . . . utterly void and of no force or effect.” Thus Minnesota was solidly aligned with the traditional view that antenuptial contracts that were effective at a time other than death encouraged divorce.

Counsel, such consultation generally served to waive other procedural safeguards. Estate of Serbus, 324 N.W.2d at 383, 385.

27. In re Appleby's Estate, 111 N.W. at 311-312.
28. Id.
29. Estate of Serbus, 324 N.W.2d at 385.
30. Id.
31. Slingerland v. Slingerland, 132 N.W. 326, 328 (Minn. 1911).
32. LENORE J. WEITZMAN, THE MARRIAGE CONTRACT 342 (1981); see also In re Ryan's Estate, 114 N.W. 820, 821 (Wis. 1908) (stating that husband and wife cannot vary personal duties and obligations arising from marriage contract itself); In re Malchow's Estate, 172 N.W. 915, 916 (Minn. 1919) (noting that antenuptial contracts are virtually confined to estate rights upon death).
33. In re Appleby's Estate, 111 N.W. 305, 310 (Minn. 1907).
34. Minnesota case law in this area is very limited, but follows the then-existing common law majority rule. The laws of other jurisdictions are thus a necessary source for understanding Minnesota's judicial climate. The notion that antenuptial agreements effective on divorce would encourage divorce is reflected in the RESTATEMENT OF CONTRACTS § 586 (1932). Courts did not actually analyze this notion (and find it inadequate) until 1972 in Illinois. See Volid v. Volid, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972) (stating that no evidence suggests that antenuptial agreements encourage divorce).

Perhaps more fundamentally, courts saw divorce-focused antenuptial contracts as incompatible with fault-based divorce laws which divided property and fixed alimony on a non-contractual basis. See WEITZMAN, supra note 32, at 353. Furthermore, courts perceived them as possibly encouraging collusion between the parties, allowing one to allege without contest the grounds for divorce in order to gain judicial approval of the provisions in the antenuptial contract. See Allen v. Allen, 150 So. 237, 238 (Fla. 1933) (per curiam); Schulz v. Fox, 345 P.2d 1045, 1050 (Mont. 1959).

In addition, courts felt that wives, as the frequently economically weaker parties, needed the judiciary's protection from overreaching husbands. See Del
B. THE MODERN TREND TOWARD RECOGNIZING ANTENUPTIAL CONTRACTS

1. Common Law Changes

Beginning in the 1960s, the "divorce revolution," which has greatly altered family life and the landscape of family law, undermined the policy bases for disfavoring divorce-focused agreements. For example, changes in marital dissolution law from fault-based grounds to no-fault grounds such as "irretrievable breakdown" reflected new judicial and societal attitudes toward failed marriages. Rather than forcing spouses to endure a situation intolerable to one or both of them, the new attitude sought to discover ways to equitably dissolve marriages with as much efficiency, and as little acrimony, as possible. With only a few exceptions, most states now recognize the vital role antenuptial contracts can play in pursuing these new goals.

Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962); Murdock v. Murdock, 76 N.E. 57, 59 (Ill. 1905); Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964). See generally Simeone v. Simeone, 581 A.2d 162, 166-172 (Pa. 1990) (containing a broad discussion by majority, concurring, and dissenting justices on whether there is a continuing need to protect women's interests in marriage). Similarly, courts feared that an antenuptial contract which deprived a wife of alimony could lead to a husband's unbridled cruelty against his wife, because he need not heed the economic consequences of his acts. See also Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970).

35. WEITZMAN, supra note 32, at 142-43.
37. WEITZMAN, supra note 32, at 150.
40. Nebraska, for example, does not enforce divorce-focused antenuptial contracts. Mulford v. Mulford, 320 N.W.2d 470, 471 (Neb. 1982).
41. Frequently the courts' new posture toward antenuptial agreements preceded legislative adoption of a no-fault statute. See Posner, 233 So. 2d at 384 (noting that the no-fault statute in California indicates a trend in the law, even though the Florida legislature had not enacted such a law by 1970).
Changes in the law of divorce-focused antenuptial contracts began when the courts abandoned the traditional common law hostility to such contracts. The Minnesota Supreme Court first recognized the validity of divorce-focused agreements in 1970.\footnote{Englund v. Englund, 175 N.W.2d 461 (Minn. 1970).} In \textit{Englund v. Englund}, the Minnesota Supreme Court upheld the property settlement provisions\textsuperscript{44} of an antenuptial contract on divorce.\footnote{Id. at 384-85, and premised its new common law approach on the new family law policies implicit in the trend toward no-fault divorce, even though Florida had not yet adopted a no-fault divorce statute. \textit{See} \textit{id.} at 384 (discussing California's "irreconcilable differences" basis for marital dissolution). \textit{Posner} established a threefold test for enforceability of antenuptial agreements. First, an antenuptial agreement must meet a procedural requirement of fairness at inception. The parties must have entered the agreement voluntarily and included a "fair and reasonable provision" for the wife or "full and frank disclosure" of the husband's financial circumstances. \textit{Id.} at 385 (citing \textit{Del Vecchio}, 143 So. 2d at 20). Second, the parties must seek the divorce in "good faith, on proper grounds," as evidence that the agreement itself had not occasioned the divorce. \textit{Posner}, 233 So. 2d at 385. Third, a court could review the agreement for changed circumstances at the time of enforcement under a generally applicable statute allowing trial courts to amend postnuptial agreements as to property and alimony. \textit{Id.}} The court, however, simply applied to divorce-focu-

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cused agreements the same procedural requirements courts used to review death-focused antenuptial contracts. The supreme court did not relate enforcement of antenuptial contracts to prevailing family law policies.

2. Statutory Changes

a. Minnesota

As courts throughout the country adopted new common law rules for antenuptial contracts, many legislatures enacted statutory provisions allowing for divorce-focused agreements. In 1974 the Minnesota legislature adopted the Uniform Marriage and Divorce Act (U.M.D.A.), thereby providing Minnesota's marital dissolution statute with the first legislative recognition of the validity of divorce-focused antenuptial contracts.

The U.M.D.A. property distribution provisions are based on implications of enforcing antenuptial contracts. Similarly, the Posner court continued to assert the priority of the state's interest in a marriage over the interests of the parties involved. 233 So. 2d at 382-83. Furthermore, Posner's "proper grounds" reflected a desire to prevent improper divorces. Id. at 385. The Posner court's analysis of how antenuptial contracts effective on death might also lead to marital disharmony shows how the attitude toward antenuptial contracts remains tied to older family concepts.

Other courts, as if continuing their traditional policies, occasionally speculated that in some circumstances antenuptial agreements promote marriage by removing the risk of disastrous personal economic losses in the event that the marriage fails. The security an antenuptial agreement affords theoretically frees a party to marry without fear that divorce will result in a ruinous redistribution of premarital property or an award of excessive spousal maintenance. Courts have also recognized that antenuptial agreements restricted to the parties' estate interests can also promote divorce. For example, a spouse facing disinheritation or a greatly reduced share might seek a divorce in order to secure a large property settlement and maintenance. See, e.g., Posner, 233 So. 2d at 383-84. Without necessarily articulating a policy supporting the enforcement of antenuptial agreements, courts now frankly admit that antenuptial agreements never demonstrably impeded the policy of promoting marital stability. E.g. Valid v. Valid, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972).

46. *Englund*, 175 N.W.2d at 463 (citing Appleby v. Appleby, 111 N.W. 305, 310 (Minn. 1907)).

47. Id. at 461.

48. One such statute is the widely adopted Uniform Premarital Agreement Act. See infra notes 66-77 and accompanying text.


50. MINN. STAT. § 518.54(5)(e) (1990). Minnesota adopted the original version of U.M.D.A. § 307 (as did Colorado, Illinois, Kentucky and Missouri), but modified it slightly. As promulgated, the U.M.D.A. recognizes any valid agreement between the parties. Minnesota's version, however, does not provide for post-nuptial agreements.
a policy of treating marriage as a partnership.\textsuperscript{51} Thus, Minnesota law establishes a presumption that all property a couple acquires during their marriage is "marital property" and subject to distribution.\textsuperscript{52} In all but short marriages, courts have held that the statute envisions roughly equivalent shares.\textsuperscript{53} Although the U.M.D.A. Prefatory Note makes the point only cursorily,\textsuperscript{54} the parallels between dissolution and partnership law are clear. Absent any provision to the contrary, just as partners share in profits equally,\textsuperscript{55} spouses should have an equal claim to half of their joint property. The marital property presumption is overcome, however, by a showing that specific property is "non-marital" and generally not subject to distribution on dissolution. Inclusion of specific property in an antenuptial contract is one means of making property non-marital.\textsuperscript{56}

Significantly, although the property distribution statute provides that in the event of hardship the court can award up to one-half of one spouse's non-marital property to the other spouse, the hardship provision does not extend to property that an antenuptial contract excludes from distribution.\textsuperscript{57} This exclusion establishes a strong public policy in favor of the inviolability of antenuptial agreements. The dissolution statute established neither explicit procedural requirements for the execution of antenuptial contracts nor standards for judicial re-

\textsuperscript{51} UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. at 149.
\textsuperscript{52} MINN. STAT. § 518.54(5) (1990).
\textsuperscript{53} See, e.g., Nardini v. Nardini, 414 N.W.2d 184, 195, 198 (Minn. 1987) (en banc).
\textsuperscript{54} UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. at 148.
\textsuperscript{55} UNIF. PARTNERSHIP ACT § 18(a), 6 U.L.A. 213 (1969) (adopted in Minnesota through MINN. STAT. §§ 323.01-.43 (1990)).
\textsuperscript{56} MINN. STAT. § 518.54(5)(e) (1990). Other types of non-marital property include gifts, bequests, and inheritance received by one spouse but not the other, property owned prior to the marriage, and the increased value of both of these types of property.
\textsuperscript{57} The statute provides:
If the court finds that either spouse's resources or property, including the spouse's portion of the marital property as defined in MINN. STAT. § 518.54, subdivision 5, are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half of the property otherwise excluded under § 518.54, subdivision 5, clauses (a) to (d), to prevent the unfair hardship.
MINN. STAT. § 518.58(2) (1990).
This provision deliberately omits the possibility of the court distributing property included in an antenuptial contract:
"Nonmarital property" means property real or personal, acquired by
Thus, common law principles continued to govern these aspects of antenuptial contracts in their newly recognized role. In 1979, the Minnesota legislature enacted specific provisions regulating both death-focused and divorce-focused antenuptial contracts. The statute contains several important features. First, it codifies common law procedural prerequisites for making agreements valid. Second, the statute facially applies only to agreements covering property which the distribution statute had already excluded from distribution as non-marital property, even without an antenuptial contract. Third, it makes no provision for substantive review. Fourth, the statute contains an ambiguous provision stating that otherwise valid contracts as to marital property would not render an antenuptial contract as to non-marital property invalid or unenforceable. Finally, the statute does not address spousal maintenance.

b. The Uniform Premarital Agreement Act

The Uniform Premarital Agreement Act (U.P.A.A.) represents the current trend in antenuptial contract law. Promul-
gated in 1983, eighteen states have since adopted the Act. The U.P.A.A. provides procedural guidelines, an illustrative list of the subjects properly considered in an antenuptial agreement, and criteria for enforcement. There is no requirement that parties have access to independent counsel.

In terms of substantive review, the enforcement provisions of the U.P.A.A. seek to uphold agreements as executed. First, the Act assigns the burden of proof to the party opposing en-

Due to the long history of judicial disfavor, as well as the nonuniformity of state laws, which is attributable to the piecemeal, "spasmodic" resolution of issues at different times, the drafters deemed a uniform act necessary to address problems of uncertain enforcement. The mobility of modern American life exacerbates these problems. The U.P.A.A. was promulgated as "legislation conforming to modern social policy . . . provid[ing] both certainty and sufficient flexibility to accommodate different circumstances." Even in jurisdictions where the legislature has not adopted the U.P.A.A., courts have considered its provisions and policies in reaching their own common law decisions. See McKee-Johnson v. Johnson, 444 N.W.2d 259, 287 (Minn. 1989) (en banc).

Procedurally, the parties must enter the agreement voluntarily. The Act explicitly precludes any agreement between the parties that would adversely affect child support. The Act explicitly precludes any agreement between the parties that would adversely affect child support. The Act explicitly precludes any agreement between the parties that would adversely affect child support. The Act explicitly precludes any agreement between the parties that would adversely affect child support. The Act explicitly precludes any agreement between the parties that would adversely affect child support. The Act explicitly precludes any agreement between the parties that would adversely affect child support.

Professor Judith Younger's representation of the U.P.A.A. as providing for substantive fairness review at the time of execution as well as enforcement is misleading. See Judith T. Younger, Perspectives on Antenuptial Agreements, 40 Rutgers L. Rev. 1059, 1082 (1988). The U.P.A.A. decidedly discourages such review unless there are procedural grounds for it. Further, the Act measures unconscionability at the time of execution, not enforcement. The public assistance exception for spousal maintenance, see infra notes 77 and 123, would be unavailable to an agreeing party concerned only with property distribution. See Unif. Premarital Agreement Act § 6(a), 9B U.L.A. 376


The Act assigns the burden of proof to the party opposing enforcement. The Act assigns the burden of proof to the party opposing enforcement. The Act assigns the burden of proof to the party opposing enforcement. The Act assigns the burden of proof to the party opposing enforcement. The Act assigns the burden of proof to the party opposing enforcement.
Second, the U.P.A.A. contains only two grounds for setting aside the agreement: either failure to meet the procedural requirement of voluntariness, or unconscionability at the time of execution, coupled with the lack of knowledge of the proponent’s financial circumstances at the time of execution. Despite this opposition to substantive review at the time of enforcement, a court, under limited circumstances, may require spousal support at a level necessary to prevent a spouse from becoming eligible for public assistance.

Although promulgated after Minnesota’s marital dissolution and antenuptial contract statutes, the U.P.A.A. has affected their judicial interpretation when the Minnesota Supreme Court has turned to it for an indication of the direc-

(1987). Furthermore, the provision of welfare assistance levels of maintenance is a far cry from a consideration of all of the facts of the parties’ finances.

72. Id. Some jurisdictions place the burden of proof on the opponent of the agreement. See, e.g., Linker v. Linker, 470 P.2d 921, 923 (Colo. Ct. App. 1970). But the burden of proof could be placed on the proponent. See Hartz v. Hartz, 234 A.2d 865, 871 (Md. 1967). Other courts automatically shift the burden of proof to the proponent when the opponent presents evidence of imbalance in the provisions of the agreement. See, e.g., Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962); Hartz, 234 A.2d at 865.


74. The comment to § 6 relates the definition of unconscionability to UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 216 (1987). Unconscionability is a commercial law doctrine, providing protection from onessidedness, oppression, unfair surprise, overreaching, concealment of assets, and sharp dealing. This attempt to coordinate the Uniform Laws, however, has unfortunately confused rather than clarified the issue. In commercial law, unconscionability applies to contracts at the time of formation rather than the time of enforcement. Cf. UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 15 (1989). The U.M.D.A. and U.P.A.A. use unconscionability in the former sense. The U.M.D.A., however, defines circumstances at execution which render the agreement unconscionable in terms of the life of a marriage, which is equivalent to a court analyzing unconscionability at the time of enforcement. Hence, doctrinal confusion exists if a court finds an antenuptial agreement unconscionable at the time of enforcement. The Prefatory Note of the U.P.A.A., however, makes clear that its drafters did not intend a court to review the unconscionability of changed circumstances at the time of enforcement. UNIF. PREMARITAL AGREEMENT ACT prefatory note, 9B U.L.A. 370 (1987). Furthermore, in adopting the U.P.A.A., two states modified § 6 to permit modification of agreements the court finds unconscionable at the time of enforcement. See N.D. CENT. CODE § 14-03.1-07 (1985); N.J. STAT. ANN. § 37:2-32 (West 1988). New Jersey adds a standard of living criterion to measure unconscionability.


76. A party can obtain this knowledge in any of three ways: fair and reasonable disclosure; written waiver of disclosure; or actual knowledge. UNIF. PREMARITAL AGREEMENT ACT §§ 6(a)(2)(i)-(iii), 9B U.L.A. 376 (1987).

77. Id. at § 6(b), 9B U.L.A. at 376.
tion of antenuptial contract law. Nevertheless, for a decade, a patchwork of provisions derived from two recent statutes and new case law governed Minnesota’s enforcement of antenuptial contracts. Minnesota courts failed to reconcile these competing and potentially contradictory provisions until the dissolution of Lance Johnson and Mary McKee-Johnson’s marriage.

II. CASE DESCRIPTION

In McKee-Johnson v. Johnson the Minnesota Supreme Court revisited the law of antenuptial contracts and for the first time addressed the validity of such an agreement under the antenuptial contract statute. The parties executed an antenuptial contract involving both non-marital and marital property. At trial, Mary McKee-Johnson contested the validity of the agreement on both procedural and substantive grounds. The trial court resolved the procedural issues in favor of Lance Johnson, but held that the statute invalidated the provisions dealing with marital property. The trial court therefore severed these disallowed marital property provisions from the rest of the agreement, which it then enforced. The court of appeals affirmed the district court. On further appeal, the Minnesota Supreme Court addressed three significant issues: the scope of the antenuptial contract statute, the proper standard of procedural review, and the time reference and standard of substantive review.

78. See, e.g., McKee-Johnson v. Johnson, 444 N.W.2d 259, 267 (Minn. 1989) (en banc) (relying on the U.P.A.A. for a definition of “unconscionability”).
80. The antenuptial contract statute applies only to agreements executed after the effective date of August 1, 1979. MINN. STAT. § 519.11(6) (1980). Johnson and McKee-Johnson executed their agreement in 1980. McKee-Johnson, 444 N.W.2d at 262.
81. McKee-Johnson, 444 N.W.2d at 261.
82. Mary McKee-Johnson alleged that she lacked independent counsel. Id. at 266. The trial court found that McKee-Johnson had voluntarily waived her right to independent counsel, after advice to seek such. Id.
83. McKee-Johnson argued that the agreement was unconscionable due to changed circumstances. Id. at 267.
84. Id. at 266.
86. Id. at 693.
87. Id. at 689.
Characterizing it as the primary issue, the supreme court first clarified the permissible scope of antenuptial contracts respecting property distribution in the event of marital dissolution. Although the supreme court noted the statute's ambiguity, it vacated the court of appeals' decision. Reviewing the relevant legislative history, the court concluded that the legislature intended the statute to be neutral as to marital property. The court reasoned that the statute's failure to address marital property was not evidence that the legislature intended to prohibit antenuptial contracts containing such provisions, so long as such contracts met existing common law and other statutory requirements. Given such compliance, the court concluded that the statute positively recognizes the validity of such agreements.

The court next analyzed procedural and substantive standards of review for antenuptial contracts. For procedural fairness, the court decided that the statute codified the existing common law standards, which required full financial disclosure and the opportunity to consult with independent counsel. Thus the common law understanding of procedural fairness governed both non-marital and marital property aspects of antenuptial contracts, the former through the statute and the latter through the continuing application of the common law. Although the statute placed the burden of demonstrating procedural fairness on the opponent of an agreement, the court held that the inclusion of marital property in the in-

88. McKee-Johnson v. Johnson, 444 N.W.2d at 261.
89. The court noted the ambiguity of the statute, which on one hand facially applies only to antenuptial contracts respecting non-marital property but on the other hand provides that otherwise enforceable contracts respecting marital property would not render an antenuptial contract invalid or unenforceable. Id. at 263-65.
90. Id. at 267-68.
91. Id. at 264.
92. Id. (noting in particular MINN. STAT. § 518.54(5)(e) (1988)).
93. Id. at 265. In dictum, the court also recognized the validity of antenuptial contracts respecting spousal maintenance. Id. at 267.
94. Id. at 263.
95. Id. at 264-65. In the instant case the parties attached financial schedules to the agreement. Id. at 262.
96. Id. at 264-65. The court also determined that both parties were sufficiently sophisticated in financial matters to comprehend the nature of their agreement. Id. at 261. Further, the court addressed the question of whether one attorney could adequately represent both parties to an antenuptial agreement. It held that joint representation is not improper per se, provided the opportunity to consult independent counsel exists. Id. at 266.
stant case placed the burden on the husband-proponent, because that is where it would lie under common law.98

Regarding substantive fairness, the court addressed the appropriate time frame and standard for review. The court first noted that jurisdictions disagree on the proper temporal reference for review of the substantive fairness of antenuptial contracts. Some jurisdictions focus on the time of execution, others on the time of enforcement, and still others on both.99 The court recognized that Minnesota common law previously considered the circumstances of the parties only at the time of execution.100 The court, however, found "no reason" to disregard changed circumstances at the time of enforcement in its review of substantive fairness,101 persuaded apparently by a U.P.A.A. provision102 and a court of appeals decision103 which mandated substantive review of maintenance provisions in antenuptial agreements from the time of dissolution. The court reasoned that drastically changed circumstances might so violate the reasonable expectations of the parties that enforcement would be oppressive and unconscionable.104

The court acknowledged that its remand failed "to articulate any precise rules or guidelines to aid trial courts in making such a review."105 The court, however, proposed that trial courts test antenuptial contracts against a standard of unforeseeable change in circumstances.106 One possible consideration would be the birth of a child to the parties.107 In addition, the court cautioned trial courts not to assume that a conscionable antenuptial contract must meet the provisions of either the probate court code or the marital dissolution statute.108 Such a requirement would have the practical effect of depriving the parties to an antenuptial agreement of the right to enter freely into a meaningful contract.109 With that caveat, the supreme

98. McKee-Johnson, 444 N.W.2d at 265 (citing Estate of Serbus, 324 N.W.2d 381, 385 (Minn. 1982)).
99. Id. at 266-67.
100. Id. at 267.
101. Id.
103. Id. at 267 n.7. (citing Hill v. Hill, 356 N.W.2d 49, 57 (Minn. Ct. App. 1984)).
104. Id. at 267.
105. Id.
106. Id.
107. Id.
108. Id. at 268 n.8.
109. Id.
court gave trial courts broad discretion to review antenuptial agreements on a case-by-case basis.\(^{110}\)

### III. ANALYSIS

In *McKee-Johnson v. Johnson* the Minnesota Supreme Court saved the law of antenuptial contracts from the narrowing effects of the court of appeals holding,\(^{111}\) which had unnecessarily restricted the range of enforceable agreements. The decision is still inadequate, however, for two reasons: first, the court altered the standards of procedural and substantive review without adequately discussing the basis of enforcement and, second, the court failed to relate the new law of antenuptial contracts to existing Minnesota family law policies.

#### A. SUBSTANTIVE REVIEW OF ANTENUPTIAL CONTRACTS

In *McKee-Johnson* the Minnesota Supreme Court fundamentally altered the nature of judicial review in enforcing antenuptial contracts.\(^{112}\) Previously, Minnesota reviewed antenuptial contracts only for procedural fairness at the time of execution. *McKee-Johnson* abandoned that practice by adding a requirement of substantive fairness at the time of enforcement.\(^{113}\) The combined shift in both the relevant time frame and the nature of review came without any real guidance to aid trial courts in conducting their reviews.

The court’s decision as to substantive review is inadequate for several reasons. First, the court failed to provide a sustainable, reasoned basis for its decision. The court’s decision appears to be based on the following three factors: its interpretation of the U.P.A.A., a court of appeals holding that courts should review maintenance provisions in antenuptial contracts at the time of enforcement, and the doctrine of unforeseeability as grounds to modify a contract.\(^{114}\)

The court read the enforcement provisions of the U.P.A.A.

\(^{110}\) *Id.* at 267.


\(^{112}\) The supreme court’s dictum regarding maintenance clauses in antenuptial agreements also sent a much-needed signal that the court will enforce such provisions, thereby allowing parties to provide their own resolution to this matter. *McKee-Johnson*, 444 N.W.2d at 267.

\(^{113}\) *Id.* The court claimed that it traditionally reviewed premarital agreements for substantive as well as procedural fairness, *id.* at 265, but the opinion offers no authority for this assertion.

\(^{114}\) *See id.* at 266-68.
to allow for substantive review at the time of enforcement.\textsuperscript{115} In fact, the U.P.A.A. provides for nonenforcement of property arrangements only when the agreement was unconscionable when executed and when disclosure was inadequate.\textsuperscript{116} Thus, one of the main supports for the court’s decision collapses. Far from following the U.P.A.A., McKee-Johnson sets Minnesota law on an uncertain course.\textsuperscript{117}

The supreme court also relied on \textit{Hill v. Hill}, a court of appeals decision which held that courts should review maintenance provisions in an antenuptial contract for substantive fairness at the time of enforcement.\textsuperscript{118} In accepting this principle, the supreme court failed to consider the fundamental difference between the dissolution statute’s property distribution and spousal maintenance provisions. Unlike property division, maintenance is linked directly to the parties’ needs and their potential incomes.\textsuperscript{119} Thus current circumstances are especially relevant. Furthermore, a trial court can modify maintenance in the light of changed circumstances.\textsuperscript{120} Because inadequacy of support constitutes grounds for future modification,\textsuperscript{121} a court may modify an antenuptial contract provision as to maintenance when enforcement is initially sought.

Trial courts lack similar latitude to modify property allocation agreements. The property distribution statute limits a trial court’s ability to allocate property that an antenuptial contract

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{115} \textit{Id.} at 267 n.7. Professor Judith Younger, who wrote an \textit{amicus} brief in this case at the court’s request, has proffered this interpretation of the U.P.A.A. See Younger, \textit{supra} note 71, at 1082 n.122. The text of the U.P.A.A., however, does not support this interpretation. The court misinterpreted the Comment to U.P.A.A. § 6, which defines “unconscionability” by reference to U.M.D.A. § 306. See \textit{UNIF. PREMARITAL AGREEMENT ACT} § 6 comment, 9B U.L.A. 376 (1987). Unconscionability in the U.M.D.A. refers to separation agreements, rather than antenuptial contracts. \textit{UNIF. MARRIAGE AND DIVORCE ACT} § 306, 9B U.L.A. 216 (1987). Unlike the case of an antenuptial agreement activated by a divorce, the time frame of a dissolution agreement is simultaneously that of the execution of the agreement and the termination of the marriage.
\item\textsuperscript{116} \textit{UNIF. PREMARITAL AGREEMENT ACT} § 6(a)(2), 9B U.L.A. 376 (1987).
\item\textsuperscript{117} The court acknowledged that its decision ran counter to the general state of the law of antenuptial contracts. \textit{McKee-Johnson}, 444 N.W.2d at 267 (“Many jurisdictions, perhaps a majority, have opted for a time of execution review, prompted, undoubtedly, by concerns relative to freedom of contract between consenting adults.”).
\item\textsuperscript{118} \textit{Id.} at 267 n.7 (citing \textit{Hill v. Hill}, 356 N.W.2d 49 (Minn. Ct. App. 1984)).
\item\textsuperscript{119} \textit{MINN. STAT.} § 518.58 (Supp. 1991).
\item\textsuperscript{120} \textit{Id.}
\item\textsuperscript{121} \textit{Id.}
\end{enumerate}
\end{footnotesize}
A trial court also has jurisdiction over property distribution. The policy behind this distinction between maintenance and property distribution recognizes that individuals often use antenuptial agreements to protect the interests of third parties. If courts set aside or modify property provisions, they could negatively affect those interests the parties to the antenuptial contract sought to protect. Furthermore, the legislature has statutorily deprived courts of the right to alter the property provisions of procedurally fair antenuptial contracts, but has not enacted similar legislation with respect to maintenance. Thus, courts should distinguish review of maintenance provisions from review of property settlements.

A second inadequacy of the McKee-Johnson decision is the court's refusal to establish a stable standard of review. The court excused itself from the task of providing real guidance, urging trial courts to balance the values of freedom of contract and fairness. The court did mention unforeseeably changed circumstances as relevant to determining conscionability and fairness. The nature of the marriage relationship, however, is inherently one of changing circumstances. This standard of review, therefore, is particularly inappropriate as applied to antenuptial contracts.

The court's one explicit criterion for unforeseeability is the birth of children. This occurrence, however, is so commonplace as to make the court's test for unforeseeability meaningless.

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123. The U.P.A.A. reflects the distinction between maintenance and property settlements. See Unif. Premarital Agreements Act § 6(b), 9B U.L.A. 376 (1987). Although a general challenge to a premarital agreement is virtually impossible, the U.P.A.A. allows amendment at the time of enforcement of an antenuptial contract modifying or waiving spousal maintenance when the party contesting the agreement is made eligible for public assistance by its provisions. Id. But even then, court-ordered modification of the agreement is limited to providing sufficient support to make the party ineligible for public assistance. Id.
125. Id. at 267.
126. Id. As a rule, the parties cannot bargain away the interests of their children in an antenuptial agreement. See Unif. Premarital Agreement Act § 3(b), 9B U.L.A. 373 (1987).
less and invites unbridled judicial discretionary review of antenuptial contracts. For most couples the possibilities of having children or not having children are both within the range of genuinely foreseeable circumstances. Analogizing to business associations, when owners of shares in closely held corporations in good faith seek to protect their interests through an agreement, they can reasonably foresee both tremendous growth and the total collapse of the business. Future spouses who waive their interests in such financial matters can also foresee the possibility of great prosperity and complete failure. These changes should not provide the basis for undoing the parties' reliance when, as here, the legislature has articulated a policy of protecting these interests from judicial interference.\textsuperscript{127}

The inadequate guidance of the \textit{McKee-Johnson} decision will have two major negative consequences. First, attorneys and their clients will lack assurance that they are drafting and executing antenuptial contracts that will withstand a future challenge. Uncertainty and confusion will almost inevitably result. Second, because abuse of discretion will presumably be the standard of appellate review,\textsuperscript{128} inconsistency among trial courts may result.

Finally, substantive review at the time of enforcement undermines the ability of parties to rely on their contracts by introducing the potential for instability in the law.\textsuperscript{129} Stability is essential if people are to order their affairs today with any confidence that their legitimate contracts will be enforced in the future. This is especially true when people make major life decisions, such as whether to marry. It is essential to bear in mind that when a court reviews an antenuptial contract, the very existence of the parties' marriage is predicated on their willingness to execute the agreement.\textsuperscript{130} Parties who otherwise would not marry without the protections of an antenuptial agreement should not have their reliance undone by a court that lacks guidelines. Neither should courts force parties to lit-

\textsuperscript{127} See Minn. Stat. § 518.54(e) (1990).


\textsuperscript{129} The policy of \textit{stare decisis} also militates against review at the time of enforcement. Minnesota courts have traditionally focused substantive review only on the time of execution. Courts maintained this standard even when the law restricted antenuptial contracts to estate rights. The supreme court should not justify altering established legal norms by simply asking "why not?"

\textsuperscript{130} See supra note 74 and accompanying text (discussing unconscionability in the U.C.C.).
igate an agreement they reasonably believed had been settled and which formed the basis of later personal and economic arrangements. Fairness requires courts to protect the parties' reasonable reliance on a voluntarily undertaken obligation or waiver. The supreme court's test, balancing freedom of contract and fairness, invites broad judicial discretion which can only work against the policy of allowing the parties the freedom to settle their own affairs.

B. ANTENUPTIAL CONTRACTS AND FAMILY LAW POLICIES

Perhaps even more significant than the particular problems of substantive review at the time of enforcement is the McKee-Johnson court's failure to discuss the policy basis of the new law of antenuptial contracts. The decision compromises existing state policies in several ways. First, review for fairness at the time of enforcement will decrease efficiency and increase acrimony in the dissolution process, thus defeating two principal policies underlying both the dissolution and antenuptial contract statutes. The dissolution process is made more efficient by the antenuptial contract statute's provision that the agreement is prima facie evidence of the matters contained therein. Substantive review at trial will mitigate this provision's effect by requiring an investigation of the parties' original expectations, evidence of which will depend primarily on memories dimmed by the passage of time and clouded by the bitterness of the dissolution itself. Quite naturally, self-interest and selectivity will guide the parties' understanding of what rights they waived and those they retained. New opportunities for review and modification will result in increased litigation.

Second, fairness review at the time of enforcement runs counter to the marriage as partnership policy which underlies Minnesota's dissolution statute and case law. Rational family law jurisprudence should integrate the policy bases of

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134. See, e.g., Nardini v. Nardini, 414 N.W.2d 184, 192 (Minn. 1987) (adopting the position that the increase in the value of a business during the marriage is the product of the contributions of both spouses and therefore belongs to the marital partnership).
the various laws governing marriage. Because the dissolution statute both relies on partnership law as its rationale and recognizes the vital role of antenuptial agreements, the law governing antenuptial contracts should reflect partnership principles unless there is a compelling reason to do otherwise.

Like family law, partnership law involves the nexus of statutes, common law, and private contracts. Indeed, the Uniform Partnership Act (U.P.A.) provides a useful analogy for marriage and dissolution law. In partnership law, the statute is a “gap filler,” adequate for the needs of many partnerships. Yet the parties are free to alter their statutory rights and obligations toward each other, but not toward third parties, without judicial interference. For example, profits need not be split evenly. If marriage is also a partnership, a rational policy must allow the parties to arrange their own affairs, preserving their individual economic interests as they desire.

More basically, partnership law provides a realistic analogy to marriage. Both in partnerships and in marriages the parties form a fiduciary relationship. Although they may enter their relationship equipped with different assets and abilities, parties are expected to expend their efforts on their joint enterprise. The state can dissolve both partnerships and marriages without allocation of fault. Partnership law provides a holis-

135. UNIF. PARTNERSHIP ACT, 6 U.L.A. 1 (1969). Minnesota has adopted a similar partnership act which is codified at MINN. STAT. §§ 323.01-.43 (1990).

136. The Uniform Partnership Act provides that partners may agree between themselves to any distribution of assets they see fit, but they cannot alter the priority of third party creditors. UNIF. PARTNERSHIP ACT § 40(b), 6 U.L.A. 469 (1969). Similarly, the Uniform Premarital Agreement Act provides that although the parties may determine their individual rights, they cannot adversely affect a child's right to support. UNIF. PREMARITAL AGREEMENT ACT § 3(b), 9B U.L.A. 373 (1987).


138. Older common law specifically rejected this analogy. See WEITZMAN, supra note 32, at 342. Courts and commentators have consistently overlooked the possibility of viewing antenuptial contracts in terms of new analogies. Even the U.P.A.A. fails to expand its policy basis to include the partnership law analogy discussed in the U.M.D.A. The U.P.A.A. explicitly aligns itself with the U.M.D.A. in several contexts. See UNIF. PREMARITAL AGREEMENT ACT § 6 comment, 9B U.L.A. 376-77 (1987) (explaining that the test of unconscionability under the U.P.A.A. is derived from § 306 of the U.M.D.A.) Given the nexus between the two acts, it seems logical that the U.P.A.A. would adopt the U.M.D.A.'s partnership analogy.


tic and positive policy basis for contemporary marriage. Beyond strict legal considerations, the idea of marriage as a partnership comports well with the understanding and expectations of most people entering marriages today.

In terms of property distribution upon dissolution, both Minnesota's partnership laws and marriage laws presume equal sharing. In business partnerships, the parties are free to decide otherwise and courts will enforce an agreement executed before the partnership's formation. Until McKee-Johnson, Minnesota's marriage dissolution law appeared to allow parties the same freedom: courts could not distribute property protected by a procedurally valid antenuptial agreement. The institution of fairness review at the time of enforcement upsets this otherwise stable practice, introduces uncertainty, and undermines the partnership policy basis of contemporary marriage.

IV. PROPOSED LEGISLATIVE CHANGES

The Minnesota legislature should clarify the muddied law of antenuptial contract enforcement. At the simplest level the legislature could amend the antenuptial contract statute to establish explicitly the time reference and standards of review. The legislature should indicate that the time frame for

causes for the dissolution of a partnership) with UNIF. MARRIAGE AND DIVORCE ACT § 301, 9A U.L.A. 179 (1987) (explaining that marriage dissolution or legal separation is not an award to one party, but rather an alteration of a legal relationship).

141. As with most analogies, the similarities between partnership law and marriage law has limitations. For example, personal interests are implicit in marriage, marriage may create continuing obligations to children as third parties, and fault-based rights in partnership dissolution still exist. More fundamentally, the terms of business partnerships should not govern basic familial relationships.


143. UNIF. PARTNERSHIP ACT § 18, 6 U.L.A. 213 (1969); see supra note 137 and accompanying text.

144. See supra note 57 and accompanying text.


146. The legislature should also amend the statute to recognize explicitly the right to waive or to modify spousal maintenance in an antenuptial agreement. Such a provision might be worded as follows:

Antenuptial contracts which determine the rights of the parties to spousal maintenance under MINN. STAT. § 514.552 are enforceable, provided that if a party becomes eligible to receive public assistance
fairness review is that of execution, and therefore maintain the stringent procedural safeguards now in effect. Such an amendment might read as follows:

An antenuptial contract which complies with the procedural requirements set forth herein shall be enforceable to the extent that it was not unconscionable when executed.

This amendment would offer several advantages. It would make the law of antenuptial contracts consistent with the policies underlying the present marital dissolution statute. A standard which reviews antenuptial contracts for unconscionability only at the time of execution reduces the incentive to litigate. This in turn effectuates the policies of increasing efficiency and discouraging public acrimony. Such an amendment would also restore the policy in favor of protecting antenuptial contracts from trial court discretion in property distribution.

By explicitly endorsing limited review, the legislature will provide greater protection for many people entering antenuptial agreements. Substantive review of antenuptial contracts at the time of enforcement will discourage people from marrying. To the extent that those people will nevertheless cohabit for a long period of time, without marriage's legal protections, one party might suffer serious economic harm when the relationship ends by death or a parting of ways. Ultimately, the court's desire to protect spousal interests may cause some people to act in ways outside the courts' purview.

As an alternative and more sweeping reform, the legislature could adopt the U.P.A.A. to replace Minnesota's current statute. This alternative would more clearly align Minnesota with the current general direction of the law of antenuptial contracts and allow Minnesota law to evolve in conjunction with other jurisdictions. This would increase the likelihood that Minnesota couples could execute agreements that would be valid in other states and it would simplify the enforcement in Minnesota of antenuptial agreements entered into elsewhere. Because the U.P.A.A.'s provisions are consistent with Minnesota's established family law policies of increasing efficiency, decreasing acrimony, and regarding marriage as a partnership, a coherent law of antenuptial contracts would result.

CONCLUSION

In recent years, American society has undergone a dra-by operation of such a determination, the court may modify the contract to the extent necessary to avoid such eligibility.
matic change in patterns of marriage and divorce. Additionally, in a growing number of marriages, both parties have significant independent economic interests. Following the direction of the law throughout the United States, the trend of Minnesota statutory and common law over the past two decades was toward allowing couples to make reasonable preparations to preserve their economic interests in the event of divorce. In McKee-Johnson v. Johnson the Minnesota Supreme Court partially reversed this trend. The court issued a vague decision which upset the current law, but did not provide trial courts with adequate guidance for future decisions. This Comment proposes that the legislature correct both the court’s misreading of the antenuptial agreement statute and its unwarranted alterations of the common law. The legislature must facilitate adoption of a coherent partnership-based policy for marital law. This policy more accurately reflects contemporary attitudes and behavior, and better serves as a basis for future developments in the law and family life.