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EQUITY AND THE ANTENUPTIAL AGREEMENT

Courts of equity have consistently failed to enforce antenuptial agreements made in anticipation of a marriage between a Roman Catholic and one not of that faith in a Roman Catholic ceremony. Before the Church¹ will recognize such a marriage, the non-Catholic party must agree in writing (1) to raise all children emanating from the marriage according to the dictates of the Church, and (2) not to interfere with the practice of Catholicism by the other members of the family. Before signing this agreement, the non-Catholic party is fully informed as to its contents and meaning, and voluntarily assumes the obligations set forth. Absent this agreement, the parties would not be permitted to be married in the Church, and the Catholic party would be, according to his religion, living a life of sin. It is an obvious conclusion that such an agreement is a most solemn one since it is not a promise to man alone, but also to God. Some writers, however, in sounding the opinions of some courts have given little or no value to such agreements:

No mere agreement as to the religious education of children between father and mother before or after marriage is binding . . . it is his [the parent's] privilege to inculcate upon his children those religious principles which for the time seem to him best.²

The *mere* agreement forms part of a very strong contract according to Catholic thought, for, "In marrying, a man and a woman voluntarily enter into perpetual society; if this agreement is valid, neither the contracting parties nor any other legal body, can dissolve the contract."³ There seems to be little dispute that the antenuptial agreement is a valid contract. Antenuptial agreements generally have been upheld by the courts, and enforced according to the intention of the parties.⁴ But is marriage of sufficient consideration in exchange for the promise of the non-Catholic? Mr. Williston answers: "Marriage is regarded by the law as a valuable consideration and marriage or promise of marriage is sufficient consideration for a promise."⁵ Proceeding on this basis then, the question is: Why have courts of equity refused to specifically enforce antenuptial contracts between parties to a *mixed*⁶ marriage?

In 1910 the St. Louis Court of Appeals gave three reasons for deciding that an antenuptial contract providing that an offspring should be brought up in the Catholic faith even if the Catholic member of the mixed marriage should die was

¹ The word *Church*, as used here, refers to the Roman Catholic Church.

² Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 Har. L. Rev. 492 (1916).

³ BOURKE, *ETHICS, A TEXTBOOK IN MORAL PHILOSOPHY* (1951).

⁴ *Strebler v. Wolf*, 152 Misc. 589, 273 N.Y. Supp. 653 (1934), *Johnston v. Spicer*, 107 N.Y. 185, 13 N.E. 753 (1887).

⁵ 1 WILLISTON, *CONTRACTS* § 110 (Rev. ed. 1936).

⁶ A "mixed marriage" refers to a marriage between a Catholic and a non-Catholic.

unenforceable in equity: (1) No property rights are involved in such a contract for equity to specifically enforce; (2) Only a moral duty is involved; (3) The welfare of the infant cannot be determined on religious considerations.⁷

The archaic maxim, "Equity protects only property rights," seems to be in almost universal disfavor; and, though the maxim still retains some force, writers recommend that it be abandoned.⁸ Equity courts, struggling under the maxim, have extended their jurisdiction from real and personal property to far more intangible interests.⁹ With this constant evolution, the first reason given by the court for its decision in *Brewer v. Cary*¹⁰ seems inconclusive.

There are several obvious objections to the second reason advanced by the court above. It has already been established that there exists a valid, written contract prior to the mixed marriage. The only objection to bringing an action at law on a strict breach of contract basis is the obvious lack of an adequate remedy. If money damages could be paid in order for the Catholic party to be brought back into the good graces of his church, there would be no problem. There *is*, however, a grave moral duty involved in such an agreement. Nevertheless, the non-Catholic party, in not performing in accordance with the promise made, has committed only a simple breach of contract. If there is any remedy, it must be had in equity. The Catholic party is bargaining for his spiritual existence in an antenuptial agreement. This grave sanction is pointed up in *Ramon v. Ramon*.¹¹

He [the Catholic party] had the right to choose for a spouse one who, though not a Catholic, would at least agree not to interfere in the exercise by him of his solemn religious duties, the most important of which would be to see that his children were brought up in the Catholic Faith, and to see that they would attend Mass, to partake of the Sacraments, and to faithfully undertake and discharge all of the catholic duties, inseparable in a Catholic home. *For it is important to note that it was only by a concurrence with these obligations that the respondent's membership in the Catholic Church could be insured and continued.* (Emphasis added).

Thus it can be seen that the antenuptial contract is the most important contract ever made by the Catholic participant in a mixed marriage. Has not the Catholic a right to have protected the very reason for his existence?

The third reason given in the *Brewer* case is the overriding basis for the weight of authority at the present time; namely, the welfare of the child is the primary consideration to which all other questions must yield. Thus, in *Butcher's* case, the court felt that it must consider spiritual and temporal welfare, further training, education, morals and the ability of the proposed guardian to take care of the child.¹² And in a recent Maine decision, *Dumais v. Dumais*,¹³ the court said, "The welfare of the child is the controlling fact in determining care and custody." The *welfare of the child*, then, is the *label* attached to the mechanism used by the equity courts in failing to enforce prenuptial agreements. In order to achieve this objective, *i.e.*, the welfare of the child, the courts have seen fit to

⁷ *Brewer v. Cary*, 148 Mo. App. 193, 127 S.W. 685 (1910).

⁸ Note, 37 IOWA L. REV. 268 (1952).

⁹ Chafee, *The Progress of the Law*, 34 Harv. L. Rev. 388 (1921).

¹⁰ *Brewer v. Cary*, 148 Mo. App. 193, 127 S.W. 685 (1910).

¹¹ *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

¹² *In Re Butcher's Estate*, 266 Pa. 479, 109 Atl. 683 (1920).

delve into the conduct of the non-Catholic party in order to determine whether or not that party's conduct was unconscionable. In *Boerger v. Boerger*,¹⁴ a wife, after not only agreeing to the terms of the prenuptial agreement, but taking a much greater step in converting to Catholicism, decided to return to her original religious preference because the Catholic religion was ". . . too demanding and rigorous." The court felt that such conduct was *not* unconscionable. In *Denton v. James*,¹⁵ the court felt that in a dispute relating to custody religious views afford no ground for depriving a parent of custody *who is otherwise qualified*.

Thus, it appears that after making a solemn promise in exchange for the valid consideration of marriage, the non-Catholic party can then renounce this promise and be awarded the custody of the children to the mixed marriage, having the right to raise these children in accordance with a new belief. Is not *this* unconscionable conduct which should evoke the power of equity? Further, the non-Catholic party is well informed of the gravity of the promise and duty which he undertakes. The non-Catholic party signs before a minister of God, normally in a place reserved for spiritual matters, and also in the presence of the Catholic member of the partnership who, as the non-Catholic knows, would not have gone through with the proposed marriage without a seemingly sincere and valid agreement in accordance with the demands of his religion. Subsequently, the non-Catholic party repudiates this contract upon which the Catholic party has wagered his whole future. Is *this* not such unconscionable conduct that the powers of equity courts are called forth to prevent irreparable injury to the Catholic party? Indeed, unconscionable seems to be too mild a word; such affairs smack of fraud and deceit. If the breach of a simple monetary transaction based upon a valid contract is deemed unconscionable by the equity courts so as to be specifically enforceable when it threatens irreparable injury, how can these same courts declare that the breach of a valid prenuptial contract, upon which the very existence of one of the parties may depend, is not unconscionable nor specifically enforceable? Nevertheless, the courts have consistently failed to enforce such contracts.

Other cases have taken a broader and more reasonable view as to what really constitutes the ultimate welfare of the child. In *Commissioner ex rel Stack v. Stack*,¹⁶ the opinion states, "Undoubtedly proper religious training is an important matter and should be taken into consideration by the courts in determining the question of custody." A question immediately comes to mind. Should the important aspect of a child's welfare, religious training, be left to one who would change religions as often as husbands? While it is true that the courts have seen fit not to delve into spiritual matters in order to maintain the free exercise of religion, and that this attitude of the courts toward religion has resulted in the concept that all religions are equal, still, in the Catholic mixed-marriage contract, the Catholic insists upon the superiority of his religion over any other, at least as far

¹³ *Dumais v. Dumais*, 122 A.2d 322 (Maine 1956).

¹⁴ *Boerger v. Boerger*, 26 N.J.Super. 90, 97 A.2d 419 (1953).

¹⁵ *Denton v. James*, 107 Kan. 729, 193 Pac. 307 (1920).

¹⁶ *Com. ex rel Stack v. Stack*, 141 Pa. Super. 147, 15 A.2d 76 (1940).

as the rearing of any children is concerned. This bent of the Catholic's mind is neither prejudice nor intolerance but, rather, the quite proper regard that a man of any religion places upon that religion.

The antithesis, then, in suits over prenuptial agreements, is between a party who believes deeply in the truths of his own religion and who is insisting on the performance of a solemn promise in regard to these religious beliefs and a non-Catholic party who has changed his mind and has decided either to revert to his old religious belief or to cull out a novel one from the appeal that it manifests at this particular time and, in addition, to repudiate the terms of a solemn contract voluntarily entered upon. It might be wondered whether the latter party is capable of prescribing the religious practices of children.

The failure of equity in regard to prenuptial agreements is probably a combination of historical accident and failure to comprehend the true nature of the problem. An analysis of historical accident in this regard is little more than the vindication of the obvious, arising out of the somewhat battered notion that equity will enforce only property rights. As to the latter point much has already been said. Perhaps as clear and concise a statement as possible is contained in *Shearer v. Shearer*,¹⁷ where it was said that:

The question [of the religious upbringing of the children] was recognized of such extraordinary importance that a prenuptial agreement was entered into . . . It is a matter of such dignity and structure that, where the parents cannot agree, the court has the duty of stepping into the breach.

As to the controlling basis, the welfare of the children, the same court states:¹⁸

I see no danger to their physical, mental or spiritual welfare in upholding the agreement as to their religious upbringing.

Resorting to fundamentals, the opinion states:¹⁹

I am firmly of the opinion that the agreement relating to the religious training of the children . . . was an inducing cause of this marriage and is an enforceable contract which, in and of itself, should be upheld. (Emphasis added.)

We come, once again, to the *Dumais* case,²⁰ a 1956 Maine decision. The *welfare* argument is the thread winding its way through the case law, and the *Dumais* case adds another stitch or two. It says nothing new; it comprehends no more; it is cognizant of nothing more. This case interestingly compares with a 1918 Pennsylvania decision in which the court felt that the father had broken his prenuptial agreement, but it refused to enforce the agreement, both parents having died and the suit having been brought years later by a volunteer, because the children had become solidified in another religion.²¹ The reasonability of that decision is far more apparent than in the *Dumais* case.

The maxims of equity, say some scribes, are obsolete and inaccurate. But let equity keep one maxim—*Equity is a Court of Conscience*. Let equity, then, look to the essence of the prenuptial contract, to the true nature of the agreement, and

¹⁷ *Shearer v. Shearer*, 73 N.Y.S.2d 337 (Sup. Ct. 1947).

¹⁸ *Id.* at 359.

¹⁹ *Id.* at 359.

²⁰ *Dumais v. Dumais*, 122 A.2d 322 (Maine 1956).

²¹ *Com. v. McClelland*, 70 Pa. Super. 273 (1918).

to the essential requirement of a child's welfare. Let equity look to these things, and then determine whether or not prenuptial agreements ought to be enforced.

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RECENT CASES

CONFLICT OF LAWS—MARRIAGE AND DIVORCE—COURT MAY CHARGE FORMER HUSBAND'S ESTATE FOR WIFE'S MAINTENANCE IN SPITE OF EARLIER EX PARTE DECREE IN ANOTHER STATE ON HUSBAND'S SUIT FOR DIVORCE—Plaintiff and defendant were married in Connecticut in 1948. Shortly after the marriage, they set up domicile in California where they resided until 1952, at which time they separated. Defendant returned to Nevada where he had been previously domiciled and procured a decree of absolute divorce. This decree was *ex parte*, the plaintiff not making an appearance or answer. Ten months later, the plaintiff, who had during this time taken up residence in New York, brought an action for separation and maintenance serving the defendant by publication. By order of the court, the defendant's assets in the State of New York were seized and placed in the hands of a receiver. The defendant appeared specially to challenge the jurisdiction of the court. Held: Although the court was obliged to give full faith and credit to the Nevada decree, it was unenforceable insofar as it attempted to determine the property rights of the wife. *Vanderbilt v. Vanderbilt*, 1 N.Y.2d 342, 135 N.E.2d 553 (1956), *cert. granted*, 352 U.S. 820 (1956).

It is well settled that a sister state can be required to give full faith and credit to an *ex parte* divorce decree obtained in another state so long as the party obtaining the divorce is properly a domiciliary of the state granting the divorce. *Williams v. North Carolina*, 317 U.S. 287 (1942); see *Gray v. Gray*, 320 Mich. 49, 30 N.W.2d 426 (1948), *Rice v. Rice*, 134 Conn. 440, 58 A.2d 523 (1948), *Marshall v. Marshall*, 69 Cal. App.2d 20, 157 P.2d 854 (1945), *Evans v. Evans*, 149 F.2d 831 (D.C. Cir. 1945), *cert. denied*, 326 U.S. 738 (1945), *Marchman v. Marchman*, 198 Ga. 739, 32 S.E.2d 790 (1945), *Koscove v. Koscove*, 113 Colo. 317, 156 P.2d 696 (1945). Whether this means that full faith and credit must be given to the foreign decree in its entirety or only to the extent that it adjudicates the marital res and marital status of the parties is the subject of much dispute. It has been argued by some that because of the holding in the *Pennoyer* case [*Pennoyer v. Neff*, 95 U.S. 714 (1877)], the wife may bring an action for maintenance or support when the divorce decree was obtained without personal service upon the wife. This reasoning has led the courts to apply the concept of "divisible divorce." See Morris, *Divisible Divorce*, 64 Harv. L. Rev. 1287 (1951).

The doctrine of "divisible divorce" was invoked by the Court in the *Estin* case [*Estin v. Estin*, 334 U.S. 541 (1948)] and applied to a factual situation much like the one in the instant case. An action had been brought by the wife for maintenance, and, subsequent to this, the husband obtained an *ex parte* divorce