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ALL GOOD THINGS MIGHT COME TO AN END: POSTNUPTIAL AGREEMENTS IN CONNECTICUT

BERNARDO G. CUADRA*

INTRODUCTION

Postnuptial agreements¹ made headlines in late 2010 when a Los Angeles County judge ruled that the postnuptial agreement between Frank McCourt and his wife, Jamie McCourt, was invalid and thus did not control their property division at divorce.² Frank and Jamie, who had initiated divorce proceedings in California in 2009, vehemently disputed ownership over the Los Angeles Dodgers, the franchise Frank had purchased for \$421 million in 2004.³ At the center of that dispute was a postnuptial agreement, multiple copies of which the couple had signed in Massachusetts and California in 2004.⁴ Incredibly, the copies signed in California were substantively

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1. A postnuptial agreement is “[a]n agreement entered into during marriage to define each spouse’s property rights in the event of death or divorce. The term commonly refers to an agreement between spouses during the marriage at a time when separation or divorce is not imminent.” BLACK’S LAW DICTIONARY 1286 (9th ed. 2009). Postnuptial agreements are sometimes referred to as “marital agreements;” see PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01 (1)(b) (2002); and “mid-marriage agreements;” see *Pacelli v. Pacelli*, 725 A.2d 56, 57-58 (N.J. Super. Ct. App. Div. 1999).

A particular subset of postnuptial agreements are “reconciliation agreements,” which are “contract[s] between spouses who have had marital difficulties but who now wish to save the marital relationship, [usually] by specifying certain economic actions that might ameliorate pressures on the marriage.” BLACK’S LAW DICTIONARY 1387 (9th ed. 2009); see, e.g., *Hanner v. Hanner*, 388 P.2d 239, 241 (Ariz. 1964) (“The law encourages the resumption of marital relations. Since the purpose of a reconciliation agreement is to restore marital relations, it harmonizes with public policy and will be upheld.”).

2. *McCourt v. McCourt*, No. BD514309, 2010 WL 5092780, slip op. at 4-5 (Cal. Super. Ct. Dec. 7, 2010); Greg Risling, Associated Press, *McCourt Marital Pact on Dodgers Ruled Invalid* (Dec. 7, 2010), available at http://www.boston.com/sports/other_sports/articles/2010/12/07/spokesman_mccourt_deal_on_dodgers_invalid/.

3. *McCourt*, 2010 WL 5092780, slip op. at 15.

4. *Id.* at 1, 7, 12.

different from those signed in Massachusetts; the Massachusetts copies contained an attachment that *included* the Los Angeles Dodgers and other significant assets as Frank's separate property, while the California copies expressly *excluded* those assets from Frank's separate property.⁵

The judge's ruling, in addition to accelerating the Los Angeles Dodgers' financial turmoil,⁶ directed attention to the existence of postnuptial agreements and the procedures attendant to their drafting and execution. Although the judge decided the case based in part on the absence of mutual assent,⁷ the McCourts' postnuptial agreement was doomed at the outset. First, both husband and wife were represented by the same lawyer.⁸ Second, the parties had signed two substantively different versions of the agreement.⁹ Finally, the McCourts expressly acknowledged that they had not carefully read the agreements, if at all.¹⁰

The McCourts' marital dispute is, of course, unusual because it involved the ownership of a Major League Baseball team. But disputes over the validity or enforceability of a postnuptial agreement are not unique. Although a relatively recent creature,¹¹ postnuptial agreements have received increased media attention as of late,¹² and many states have conclusively declared them to be valid, albeit with varying restrictions.¹³

Recently, in *Bedrick v. Bedrick*, the Connecticut Supreme Court addressed for the first time the validity and enforceability of

5. *Id.* at 7-8.

6. See Bill Shaikin, *In Filing for Bankruptcy, Dodgers Will Ask Judge to Override MLB Rules*, L.A. TIMES (June 27, 2011), available at <http://articles.latimes.com/2011/jun/27/sports/la-sp-dodgers-bankruptcy-20110628>.

7. *McCourt*, 2010 WL 5092780, slip op. at 67.

8. *Id.* at 10.

9. *Id.* at 13-14.

10. *Id.* at 12, 62.

11. Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 829; Linda Ravdin, *Marital Agreements*, Tax Management (BNA) No. 849, § I(G), at A-3 (2003) ("Postmarital agreements not incident to marital separation are of more recent vintage.").

12. See, e.g., Robert DiGiacomo, *Quit Fighting—Get a Postnuptial Agreement*, CNN.COM (Apr. 2, 2008), http://articles.cnn.com/2008-04-02/living/postnuptial_agreement_1_prenuptial-postnuptial-agreements-inheritance-money?_s=PM:LIVING; Susan Pease Gadoua, *The Legal Alternative Every Couple Should Know About Before Going to Divorce Court*, HUFFINGTON POST (Sept. 8, 2011), http://www.huffingtonpost.com/susan-pease-gadoua/the-legal-alternative-eve_b_948865.html.

13. Williams, *supra* note 11, at 881.

postnuptial agreements.¹⁴ The court concluded that postnuptial agreements are consistent with public policy and thus enforceable if a particular agreement “complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution.”¹⁵ Although the opinion sets forth substantial guidance for practitioners seeking to draft valid postnuptial agreements, at least three important questions remain: (1) does the promise to forgo divorce and remain married serve as adequate consideration for the agreement; (2) what does the unconscionability test actually require; and (3) who carries the burden of proof, the proponent of or the challenger to the agreement?

This Article identifies and analyzes this open space left by *Bedrick*. Part I briefly reviews the state of the law governing prenuptial agreements in Connecticut and the factual background to *Bedrick*. Part II examines the *Bedrick* standard for reviewing postnuptial agreements and highlights the areas where the *Bedrick* court may have fallen short. Part III reviews relevant law from Connecticut and other jurisdictions and proposes potential solutions to the questions left unresolved by *Bedrick*.

I. THE *BEDRICK* BACKDROP

Bedrick v. Bedrick came to the Connecticut Supreme Court on the husband’s appeal from the trial court’s judgment declaring the postnuptial agreement invalid.¹⁶ On appeal, the husband, relying on Connecticut case law addressing prenuptial agreements, argued, inter alia, that the trial court improperly declined to apply principles of contract law in evaluating the enforceability of the parties’ postnuptial agreement.¹⁷ This Part accordingly reviews the relevant law on prenuptial agreements and then sets forth the factual basis for the husband’s appeal.

A. *Standards for Prenuptial Agreements in Connecticut*

Connecticut has two different standards for determining the enforceability of prenuptial agreements. The date of the execution

14. *Bedrick v. Bedrick*, 17 A.3d 17, 21 (Conn. 2011). In 2010, the Massachusetts Supreme Judicial Court also addressed postnuptial agreements for the first time and upheld their validity. *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961 (Mass. 2010).

15. *Bedrick*, 17 A.3d at 24, 27.

16. *Id.* at 22.

17. *Id.* at 23.

of the agreement determines which standard applies. Agreements signed before October 1, 1995, must comply with the standard set forth in *McHugh v. McHugh*.¹⁸ In *McHugh*, the Connecticut Supreme Court stated that a prenuptial agreement is enforceable if

(1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice.¹⁹

McHugh specified that a prenuptial agreement's validity at execution is governed by ordinary principles of contract law, and thus, each party must knowingly and voluntarily enter into the agreement and, absent independent knowledge by the other party, fully disclose all assets.²⁰ Some ambiguity existed, however, regarding who carried the burden of proof²¹ and what standard of review applied to the contract terms at the time of execution, if any.²²

The Connecticut Premarital Agreement Act (Premarital Agreement Act), enacted in 1995, cleared up this ambiguity. For prenuptial agreements executed on or after October 1, 1995, the Premarital Agreement Act governs enforceability.²³ That statute principally provides that a prenuptial agreement is enforceable only if it was entered into voluntarily, it was not unconscionable at the time of execution or enforcement, and both parties provided full

18. *Id.* at 25.

19. *McHugh v. McHugh*, 436 A.2d 8, 11 (Conn. 1980).

20. *Id.* at 11. The court also noted other factors to be considered, including "which party drafted the agreement . . . and whether the parties were represented by counsel." *Id.* at 12. Although the court did not directly address consideration, quoting *Sacksell v. Barrett*, the court stated that "there appears to be no good reason why such an agreement, if fairly made and entered into, by a [person] of full age, for adequate consideration received, should not be binding upon [him]." *Id.* (quoting *Sacksell v. Barrett*, 43 A.2d 79, 81 (1945)) (alteration in original).

21. The confusion over the burden of proof permeated the lower courts. *Compare* *Lord v. Lord*, No. 10 11 97, 1995 WL 17356, at *7 (Conn. Super. Ct. Jan. 9, 1995) (noting "the proponent of the enforceability of the antenuptial agreement . . . bears the burden of proof on the issue"), *with* *Baumgartner v. Baumgartner*, No. FA 960155390S, 1998 WL 811565, at *7 (Conn. Super. Ct. Nov. 9, 1998) (noting that the challenger did not meet her burden of proof for establishing inadequate disclosure, duress, or undue influence). The Connecticut Appellate and Supreme Courts later confirmed that the challenger carries this burden in *Winchester v. McCue*, 882 A.2d 143, 149 (Conn. App. Ct. 2005) and *Crews v. Crews*, 989 A.2d 1060, 1069 (Conn. 2010), respectively. *See also* Louis Parley, *Premarital Agreements in Connecticut Where We Are and Where We Are Going*, 69 CONN. B.J. 495, 505 (1995).

22. *See* Parley, *supra* note 21, at 507.

23. CONN. GEN. STAT. §§ 46b-36a to -36j (2011).

financial disclosure and had a reasonable opportunity to consult with independent counsel prior to signing.²⁴ Significantly, the spouse who challenges enforcement of the agreement bears the burden of establishing that the agreement is invalid.²⁵ In addition, consideration is not a requirement for enforcement.²⁶

In contrast to Connecticut's established body of law on prenuptial agreements, there had not been any law governing the enforceability of postnuptial agreements before the Connecticut Supreme Court decided *Bedrick*. Connecticut Superior Courts attempted to fill this void by turning to analogous statutory law, contract law, and principles of fairness.²⁷ In 2011, however, *Bedrick* presented this question of first impression for the Connecticut Supreme Court to resolve.

B. *Background on Bedrick*

Bruce and Deborah Bedrick married in 1976²⁸ and subsequently executed a postnuptial agreement on December 10, 1977.²⁹ During the early years of their marriage, the Bedricks updated their postnuptial agreement five times, executing the latest addendum in May of 1989.³⁰ In relevant part, the postnuptial agreement and its addendums provided that, upon dissolution of the marriage: (1) both parties waived any claim to alimony or to any part of the other spouse's estate; (2) Bruce released Deborah from liability for outstanding business loans on his car wash business; and (3) Bruce would pay Deborah a cash settlement of \$75,000.³¹

The personal and financial circumstances of the Bedricks were not extraordinary. The Bedricks married at age twenty-five, neither with a college degree.³² At the time that they married, the Bedricks

24. CONN. GEN. STAT. § 46b-36g. Notably, the requirement of an opportunity to consult with independent counsel departs from *McHugh*'s inclusion of that opportunity as a factor to consider. *McHugh*, 436 A.2d at 11; see Parley, *supra* note 21, at 505, 509. *Contra* *Bedrick v. Bedrick*, 17 A.3d 17, 28 n.6 (Conn. 2011) (stating that "opportunity to confer with independent [legal] counsel" should be considered when courts evaluate whether agreement was fair and reasonable at execution).

25. CONN. GEN. STAT. § 46b-36g(a).

26. CONN. GEN. STAT. § 46b-36c.

27. *Bedrick v. Bedrick*, No. FA074007533, 2009 WL 1335100, at *2 (Conn. Super. Ct. Apr. 24, 2009).

28. *Bedrick*, 2009 WL 1335100, at *3.

29. *Bedrick*, 17 A.3d at 22. The Bedricks' postnuptial agreement is reproduced in the appendix to this article. See *infra* Appendix.

30. *Id.*

31. *Id.*; *Bedrick*, 2009 WL 1335100, at *3.

32. *Bedrick*, 2009 WL 1335100, at *3.

worked at Mr. Auto Wash, the Bedrick family car wash business.³³ In 1986, after ten years of marriage, Bruce purchased the family business from his parents for \$320,000 and, in 1994, he purchased the real estate upon which it was located for \$280,000.³⁴ The Bedricks both worked in the family car wash business throughout their marriage.³⁵ Their only son was born in 1991.³⁶

In 2007, after thirty-two years of marriage, Deborah filed for dissolution, and Bruce subsequently filed a cross-complaint to enforce their postnuptial agreement.³⁷ At that time, the parties' combined marital assets totaled \$927,123.00³⁸ After trial, the trial court concluded that the postnuptial agreement was neither fair and equitable nor supported by adequate consideration, and further, that the parties' financial circumstances "had changed dramatically since . . . 1989."³⁹ Accordingly, the trial court declined to enforce the postnuptial agreement.⁴⁰

II. THE *BEDRICK* STANDARD

In *Bedrick v. Bedrick*, the Connecticut Supreme Court outlined the standard to be applied when determining whether a postnuptial agreement is enforceable.⁴¹ In doing so, the court explicitly stated that a stricter standard of review was required than that applied to prenuptial agreements, based on the nature of the relationship between spouses.⁴² The court concluded that, although postnuptial agreements were consistent with public policy and thus valid in Connecticut, the parties' agreement ultimately was not enforceable because its terms were unconscionable at the time of dissolution.⁴³

In reaching its decision, the court articulated the following standard for enforceability of postnuptial agreements: "In applying special scrutiny, a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at *4.

37. *Bedrick v. Bedrick*, 17 A.3d 17, 21-22 (Conn. 2011).

38. *Id.* at 22.

39. *Id.*

40. *Id.*

41. *Id.* at 27-28.

42. *Id.* at 27.

43. *Id.* at 24, 29.

and not unconscionable at the time of dissolution.”⁴⁴ Although the court specifically stated that this standard called for greater scrutiny, it did not explain what exactly it meant by “stricter scrutiny.”⁴⁵ This Part reviews the *Bedrick* test and identifies its potential shortcomings.

A. *Contract Principles*

The court first briefly noted that contract principles would apply to postnuptial agreements.⁴⁶ In a footnote, however, the court made clear that, in contrast to prenuptial agreements, postnuptial agreements *do* require adequate consideration to be enforceable.⁴⁷ Further, the court stated that “[a] release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration.”⁴⁸ Significantly, the court determined that, in the case of the *Bedricks*, adequate consideration was furnished in the form of mutual releases and waivers: the wife had waived her right to alimony and any interest in the husband’s assets, including the car wash business, and, in return, the husband had waived his right to alimony and any interest in the wife’s assets and also had released the wife from any liability relative to the husband’s business.⁴⁹

Notwithstanding the court’s clear pronouncement that consideration is a requirement for postnuptial agreements, *Bedrick* left for another day the issue of whether a spouse’s promise to remain married—i.e., the promise not to divorce—may be sufficient consideration for a postnuptial agreement.⁵⁰ “Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made,”⁵¹ and may take the form of “forbearance from action that [a] party would otherwise have been

44. *Id.* at 27.

45. *Id.*

46. *Id.*

47. *Id.* at 27 n.5. Interestingly, a premarital agreement later amended after marriage does *not* require consideration. CONN. GEN. STAT. § 46b-36f (2011).

48. *Bedrick*, 17 A.3d at 27 n.5.

49. *Id.*

50. *Id.* The court understandably avoided the issue because the defendant did not press it. *Id.*; see also *Sequenzia v. Guerrieri Masonry Inc.*, 9 A.3d 322, 324 (Conn. 2010) (noting that appellate courts should not decide issues not properly before it). In any event, the court did not address “whether a spouse’s forbearance from bringing a claimed dissolution action and the continuation of the marriage provides adequate consideration for a postnuptial agreement.” *Bedrick*, 17 A.3d at 27 n.5.

51. *Bedrick*, 17 A.3d at 27 n.5.

entitled to take.”⁵² Thus, a party who forbears from filing for divorce has given up a right to which he was entitled. Courts, however, have come out both ways on the issue of whether such forbearance serves as adequate consideration to support a postnuptial agreement.⁵³ Although *Bedrick* does not state where Connecticut may fall, the court’s increased scrutiny of postnuptial agreements suggests that something more than the promise not to divorce will be required to support the agreement.

B. *Fair and Equitable at Execution*

The court spent considerably more time discussing the requirement that a postnuptial agreement’s terms be fair and equitable at the time of execution. The court initially focused on the procedural requirements at the time of execution:

We further hold that the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse.⁵⁴

The court then set forth a totality of the circumstances analysis that takes into consideration several “factors, including the nature and complexity of the agreement’s terms, the extent of and disparity in assets brought to the marriage by each spouse, . . . traits potentially affecting the ability [of the parties] to read and understand an agreement’s provisions, and the” time available to each party to review the agreement’s terms and consult with independent counsel.⁵⁵ These considerations are identical to those embodied in the Premarital Agreement Act, which provides in part that a premarital agreement is enforceable if it was executed voluntarily and if the opponent to the agreement was “provided a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party.”⁵⁶

52. Ravdin, *supra* note 11, at A-41 n.515.

53. *Compare In re Marriage of Tabassum & Younis*, 881 N.E.2d 396, 407 (Ill. App. Ct. 2007) (forbearance from bringing divorce is adequate consideration), *with* *Bratton v. Bratton*, 136 S.W.3d 595, 603 (Tenn. 2006) (holding that a “promise not to leave [your spouse] is clearly not consideration for the agreement”).

54. *Bedrick*, 17 A.3d at 27.

55. *Id.* at 28 (internal quotation marks omitted).

56. CONN. GEN. STAT. § 46b-36g(a)(1) & (3) (2011).

Although the second *Bedrick* prong bears substantial similarities with the Premarital Agreement Act, several differences warrant attention. First, consistent with the court's statement that postnuptial agreements require heightened scrutiny, the court imposed a more rigorous "fair and reasonable" standard on the postnuptial agreement's terms at the time of execution.⁵⁷ This fair and reasonable standard sets a higher threshold for enforceability than the unconscionability standard because it is easier for the challenger to establish that an agreement was not fair and reasonable at the time of execution than it is to prove that it was unconscionable at that time.⁵⁸ Indeed, the court recognized this distinction by noting that "[u]nfairness or inequality alone does not render a postnuptial agreement unconscionable."⁵⁹ Thus, the court's imposition of this standard ultimately decreases the overall likelihood that a postnuptial agreement will be enforced.⁶⁰

Second, the court did not indicate whether the opponent carries the burden of establishing that the terms of the agreement were fair and reasonable at the time of execution, as is statutorily required for premarital agreements in Connecticut,⁶¹ or whether the proponent would carry that burden. Although the court's imposition of heightened scrutiny for postnuptial agreements suggests that the proponent carries the burden, both parties to the agreement should anticipate the possibility of future litigation.

57. *Bedrick*, 17 A.3d at 27.

58. See *Upham v. Upham*, 630 N.E.2d 307, 311 (Mass. App. Ct. 1994) ("Although there may be substantial overlap between the [conscionability and fair and reasonable] standards, a standard of conscionability generally 'requires a greater showing of inappropriateness.'" (quoting 3 ALEXANDER LINDEY & LOUIS I. PARLEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90.07 (2d ed. 2011))); *Lounsbury v. Lounsbury*, 752 N.Y.S.2d 103, 107 (App. Div. 2002) ("[A] separation agreement is not per se unconscionable simply because marital assets are divided unequally . . . , because one spouse gave away more than [that spouse] might have been legally required to do . . . , or because the spouse's decision to approve the agreement might be characterized as unwise." (citations and internal quotation marks omitted) (second alteration in original)); 2 ALEXANDER LINDEY & LOUIS I. PARLEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 120.55[2] (2d ed. 2011) ("[Unconscionability] is a higher standard for the assailant to overcome" (emphasis added)).

59. *Bedrick*, 17 A.3d at 28.

60. See David M. Cotter, *Substantive Sufficiency of Marital Agreements: Unconscionability and Unfairness*, 17 DIVORCE LITIG. 173, 180 (Nov. 2005) ("[I]t is generally more difficult to set aside a marital agreement on the ground of unconscionability.").

61. CONN. GEN. STAT. § 46b-36g(a) (placing burden on "the party against whom enforcement is sought").

Finally, the court did not require that each party have a reasonable opportunity to consult with counsel.⁶² Instead, the court merely stated that courts, “in evaluating the circumstances surrounding a particular agreement, . . . should examine . . . whether [the parties] had a reasonable opportunity to confer with independent counsel.”⁶³ By delegating this question to the totality-of-the-circumstances analysis, the court effectively *lowered* the threshold for establishing the validity of the postnuptial agreement; recall that the opportunity to consult with counsel is a statutory requirement for applicable prenuptial agreements.⁶⁴ Here, the court departed from its mandate to increase judicial scrutiny applied to postnuptial agreements. Indeed, at least one jurisdiction—Minnesota—similarly seeking to increase scrutiny on postnuptial agreements has legislatively taken the opposite approach of the *Bedrick* court by mandating that each party to a prenuptial agreement have the opportunity to meet with legal counsel while requiring that parties to a postnuptial agreement each have separate counsel at the time of execution.⁶⁵ Notwithstanding the ambiguity present in *Bedrick*, lawyers should remain vigilant and ensure that the opposing party is represented by counsel.⁶⁶

C. *Not Unconscionable at Enforcement*

Finally, the court reviewed the unconscionability prong, upon which it decided the case. The court first indicated that a postnuptial agreement that produces an unfair or unequal result does not reach the threshold of unconscionability: “Instead, the question of whether enforcement of an agreement would be unconscionable is analogous to determining whether enforcement of an agreement would work an injustice.”⁶⁷ Here, the court drew an important connection to Connecticut jurisprudence on the enforceability of pre-

62. *Bedrick*, 17 A.3d at 28 n.6.

63. *Id.*

64. CONN. GEN. STAT. § 46b-36g(a)(4); see *Friezo v. Friezo*, 914 A.2d 533, 557 (Conn. 2007).

65. See MINN. STAT. ANN. § 519.11 (1), (1a) (West Supp. 2011).

66. Jurisdictions come out differently on the requirement of representation or the reasonable opportunity to obtain counsel. Compare *Stoner v. Stoner*, 819 A.2d 529, 532, 533 n.5 (Pa. 2003) (“[D]eclin[ing] to impose a *per se* requirement that parties had to obtain independent legal counsel . . .”), and *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963 (Mass. 2010) (judge should consider if the parties “had an opportunity to obtain separate legal counsel of [their] own choosing . . .”), with MINN. STAT. ANN. § 519.11 (1a)(c) (independent counsel required for each party).

67. *Bedrick*, 17 A.3d at 28.

nuptial agreements, a body of law that should be helpful in evaluating postnuptial agreements. The court also noted that the occurrence of unforeseen events, “such as having a child, loss of employment or moving to another state . . .” could render the enforcement of a postnuptial agreement unconscionable.⁶⁸ The court ultimately concluded that the Bedricks’ postnuptial agreement was invalid because it was unconscionable. Specifically, the court focused on the changed financial picture of the husband’s car wash business and upheld the trial court’s determination “that enforcement of the postnuptial agreement would have worked [an] injustice.”⁶⁹

Although the court’s conclusion is a useful starting point, its guidance is incomplete.⁷⁰ First, the court did not explain the unconscionability standard in the context of postnuptial agreements; it merely asked whether enforcement of the postnuptial agreement would work an injustice.⁷¹ The court then passed on the opportunity to establish a workable test by applying that standard to the facts in *Bedrick*. Although the court reviewed the basic provisions of the postnuptial agreement, as well as the Bedricks’ employment history and then-current financial circumstances, it did not examine the intent of the parties at the time that they signed the agreement or whether the circumstances at dissolution were consistent with the parties’ expectations.⁷² In other words, the court did not determine whether the parties had contemplated their eventual financial or familial positions. Instead, the court disregarded any guidance it could have taken from *Crews* and sidestepped the examination of foreseeability. The result was the court’s conclusion that “[t]he facts and circumstances of the present case clearly support the findings of the trial court that, as a matter of law, enforcement of the agreement would be unconscionable.”⁷³ At the very least, such a dismissive conclusion is unfair to the litigants and potentially inconsistent with the court’s own guidance in *Crews*.

68. *Id.*

69. *Id.* at 29 (internal quotation marks omitted).

70. Again, the court did not identify which party bears the burden of establishing the unconscionability of the agreement.

71. *Bedrick*, 17 A.3d at 28.

72. *Id.* at 29. This “mixed question[] of fact and law, which require[d] the application of a legal standard to the historical-fact determinations, . . . [called for] plenary review by [the] court unfettered by the clearly erroneous standard” *Crews v. Crews*, 989 A.2d 1060, 1066 (Conn. 2010) (quoting *Friezo v. Friezo*, 914 A.2d 533, 544 (Conn. 2007)).

73. *Bedrick*, 17 A.3d at 29.

Moreover, the court's suggestion that the birth of a child during marriage may be an unforeseeable circumstance is independently puzzling.⁷⁴ Certainly, if a married couple had taken steps to prevent a pregnancy, or were so far beyond the age when pregnancy is considered a potential outcome warranting consideration, the subsequent birth of a child could be considered unforeseeable. But, in an otherwise healthy marriage, the birth of a child is the result of consensual sexual intercourse or the use of artificial reproductive technology—conscious decisions made by adults who know the potential outcomes of those actions. Thus, unless the opponent to a postnuptial agreement can demonstrate that the couple was actively seeking to prevent pregnancy or otherwise was under the medical impression that the potential for pregnancy was highly unlikely,⁷⁵ the birth of a child should not be considered an unforeseeable circumstance when evaluating the enforceability of a postnuptial agreement.⁷⁶

74. *Id.* at 28 (“Unforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable.”).

75. Here, the plaintiff presented no evidence suggesting that the birth of their son was not contemplated, and indeed, that point was not advanced by the wife on appeal. *See generally* Brief of the Plaintiff-Appellee, *Bedrick*, 17 A.3d 17 (No. SC 18568). The plaintiff did, however, make that argument to the trial court. *See Bedrick v. Bedrick*, No. FA074007533, 2009 WL 1335100, at *2 (Conn. Super. Ct. Apr. 24, 2009) (“[T]he plaintiff argues that the agreement is unenforceable because the financial circumstances of the parties and their assets have changed significantly since the last modification, in particular the parties had a child . . .”). However, while the court was in agreement with the trial court's conclusion that “[t]he economic circumstances of the parties had changed dramatically since the execution of the agreement,” the court also took care to mention that the last addendum to the postnuptial agreement was executed before “the birth of the parties' son in 1991.” *Bedrick*, 17 A.3d at 29 (internal quotation marks omitted). In addition to the court's unusual conclusion that the birth of a child is an unforeseeable circumstance to consider in the unconscionability calculus, the court also may have neglected to apply its own standard: the language of the parties' postnuptial agreement, by virtue of its reference to “child support,” demonstrates that they actually contemplated the possibility of having children. Brief of the Defendant-Appellant at A5, *Bedrick*, 17 A.3d 17 (No. SC 18568). Thus, to the extent that the court considered the birth of the child an unforeseen circumstance, the court may have been in error.

76. The Pennsylvania Supreme Court took this position during its review of a contested prenuptial agreement:

[E]veryone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. *Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable.* If parties choose not to address such matters in their prenuptial agreements,

This is not to say that a child's well-being should be disregarded when evaluating an agreement's unconscionability at enforcement. The American Law Institute (ALI) *Principles of the Law of Family Dissolution* includes the birth or adoption of a child as a factor to consider when evaluating whether enforcement of a postnuptial agreement would work a substantial injustice.⁷⁷ Specifically, the ALI notes that a couple's inherent optimism toward marriage may handicap each partner's ability to accurately anticipate marriage outcomes.⁷⁸ The ALI also notes that because the post-separation family unit may include children living with one primary caregiver an agreement's financial provisions may have a detrimental effect on those children.⁷⁹

The ALI's concerns over children are couched, however, in terms of identifying agreements subject to scrutiny in the first instance. Thus, a court does not conduct the substantial-injustice inquiry unless the challenger to the agreement shows that, since execution, a fixed number of years have passed, a child was born or adopted, or that there has been an unforeseeable change of circumstances.⁸⁰ Further, when such a circumstance exists, the challenger to the agreement bears the burden of proving that enforcement of

they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.

Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) (emphasis added); *cf.* *Larsen v. Scholl*, 296 N.W.2d 785, 790 (Iowa 1980) (“[A] direct, foreseeable cause and effect relationship exists between defendant’s Iowa contacts involving sexual intercourse and the resulting child born in Iowa to an Iowa mother.”); *McKenna v. Bennett*, 558 P.2d 1281, 1283 (Or. 1977) (“The birth of the child in Oregon for whom the parent would have a legal obligation of support is a foreseeable consequence of an act of sexual intercourse in Oregon.”). *But see* *Townley v. Townley*, No. FA89-0102083 S, 1991 WL 27269, at *1 (Conn. Super. Ct. Jan. 2, 1991) (noting that birth of a child was a “changed circumstance[] . . . that [was] not contemplated in the [prenuptial] agreement”).

77. Section 7.05 provides, in relevant part, that

[a] court should consider whether enforcement of an agreement would work a substantial injustice if, and only if, the party resisting its enforcement shows that one or more of the following have occurred since the time of the agreement’s execution: . . . (b) a child was born to, or adopted by, the parties, who at the time of execution had no children. . . .

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05(2)(b) (2002).

78. “Even childless parties who anticipate having children are often unable to anticipate the impact that children will have on their values and life plans. Once they are parents, the effect of the terms they earlier agreed upon are [sic] therefore likely to seem quite different than they expected when childless.” *Id.* § 7.05 comment b; *see also id.* § 7.05 reporter’s notes on comment b (discussing couples’ over-optimism towards marriage outcomes).

79. *Id.* § 7.05 comment c.

80. *Id.* § 7.05(2).

the agreement will cause a substantial injustice.⁸¹ Accordingly, the ALI's consideration of whether a child was born after execution is a more robust and balanced analysis than the *Bedrick* court's examination, which seems to suggest that the birth of a child may be *per se* unforeseeable.⁸²

III. THE *BEDRICK* DILEMMAS

With its decision in *Bedrick*, the Connecticut Supreme Court joined the majority of states that have concluded, legislatively or judicially, that postnuptial agreements are valid and enforceable.⁸³ In addition, the court also joined the majority of states that have applied stricter scrutiny to postnuptial agreements as compared to prenuptial agreements.⁸⁴ What the court did not do, however, was clearly explain how the heightened level of scrutiny would be applied. Moreover, the court did not decide whether the promise to remain married constitutes adequate consideration, how the unconscionability standard is applied, and which party carries the burden. This Part searches for answers within and outside of Connecticut.

A. *Continued Marriage as Consideration*

Courts in some states have held that the continuation of the marriage, in certain circumstances, is sufficient consideration. In New York, for example, if a marriage is on the verge of collapse, the continuation of the marriage itself can be sufficient consideration.⁸⁵ In *Zagari v. Zagari*, the parties had clearly been experiencing marital discord; four years into the marriage, the wife left for Germany and lived there for four months.⁸⁶ She subsequently moved back to New York but remained out of the marital home for another two months.⁸⁷ Under these facts, the New York Supreme Court concluded that “the continuation of the marriage may have been very valuable consideration on the part of the wife.”⁸⁸

81. *Id.* § 7.05(3).

82. *Bedrick v. Bedrick*, 17 A.3d 17, 28 (Conn. 2011).

83. *See Williams, supra* note 11, at 881.

84. *Id.*

85. *See, e.g., Zagari v. Zagari*, 746 N.Y.S.2d 235, 238 (Sup. Ct. 2002); *cf.* 45 N.Y. JURISPRUDENCE 2D, DOMESTIC RELATIONS § 168 (2007) (“When required, courts have generally held that the marriage itself may be sufficient consideration for an antenuptial or prenuptial agreement.”).

86. *Zagari*, 746 N.Y.S.2d at 236.

87. *Id.*

88. *Id.* at 238 (internal quotation marks omitted).

In contrast, in *Whitmore v. Whitmore*, the Appellate Division held that the continuation of the marriage was *not* sufficient consideration.⁸⁹ There, the spouses had signed their postnuptial agreement three months after their marriage.⁹⁰ The court rejected the husband's contention that the continuation of the marriage was adequate consideration and concluded that, in the absence of any other promises or releases by the husband, the postnuptial agreement was unenforceable for lack of consideration.⁹¹ Although the court did not explain why the continuation of the marriage was inadequate, the court restricted its conclusion to "the circumstances of this case," which presumably referred to the absence of marital discord.⁹²

Some states have recognized the continuation of the marriage, or the promise not to divorce, as adequate consideration without a prerequisite of marital discord. For example, in *In re Marriage of Tabassum and Younis*, the Illinois Appellate Court concluded that "[f]orbearance of bringing or prosecuting a divorce action has been directly recognized as consideration in other states, and we find no compelling reason to deviate from these authorities."⁹³ Other states accept the promise not to divorce, coupled with marital discord, as adequate consideration in the context of reconciliation agreements.⁹⁴ Note that the requirement of some degree of marital discord is consistent with the principle that "past consideration cannot support a current promise."⁹⁵ Moreover, the promise to recon-

89. *Whitmore v. Whitmore*, 778 N.Y.S.2d 73, 75 (App. Div. 2004).

90. *Id.* at 74.

91. *Id.* at 75.

92. *Id.* The court also cited *Zagari*, which involved not only clear allegations of marital discord but also the execution of a postnuptial contract over four years into the marriage. *Zagari*, 746 N.Y.S.2d at 238. *Contra Whitmore*, 778 N.Y.S.2d at 74 (noting three months between marriage and contract execution).

93. *In re Marriage of Tabassum & Younis*, 881 N.E.2d 396, 407 (Ill. App. Ct. 2007).

94. *See Flansburg v. Flansburg*, 581 N.E.2d 430, 434 (Ind. Ct. App. 1991) ("[E]xtension of a marriage that would have otherwise been dissolved but for the execution of an agreement to reconcile has been deemed adequate consideration."); *Pacelli v. Pacelli*, 725 A.2d 56, 59 (N.J. App. Div. 1999) ("A prerequisite to enforcement [of a reconciliation agreement] is a requirement that 'the marital relationship has deteriorated at least to the brink of an indefinite separation or a suit for divorce.'" (quoting *Nicholson v. Nicholson*, 489 A.2d 1247, 1251 (N.J. Super. Ct. App. Div. 1985))); *Bratton v. Bratton*, 136 S.W.3d 595, 603 (Tenn. 2004) (noting that "this was not a reconciliation agreement where separation or divorce was imminent, making the wife's promise to remain in the marriage a meaningful act").

95. *Id.* at 600; *see also Simmons v. Simmons*, 249 S.W.3d 843, 846-47 (Ark. Ct. App. 2007).

cile and continue the marriage must be genuine and made in good faith, i.e., it must not be illusory.⁹⁶ Finally, some states have avoided the issue by simply eliminating consideration as a requirement for enforcement of a postnuptial agreement.⁹⁷

The *Bedrick* court made clear that consideration is a required element of a valid postnuptial agreement. The only open question remaining is what will constitute adequate consideration. Under *Bedrick*'s heightened scrutiny, the likely answer is that promises to remain in the marriage or not to divorce will cause an agreement to fail for lack of consideration. Attorneys drafting postnuptial agreements should draft accordingly and consider mutual waiver provisions that release some right to or interest in the other spouse's property, such as a release of alimony or a claim to the other spouse's property at death.⁹⁸

Notwithstanding the court's clear position on this issue, there remains the question of whether the requirement of consideration actually protects against the "greater potential for one spouse to take advantage of the other."⁹⁹ Consideration does not need to be substantial,¹⁰⁰ and parties can likely supply adequate consideration through nominal transfers of separate property.¹⁰¹ Thus, "a crafty lawyer can draft a valid postnuptial agreement without ever addressing the court's core concern: the potentially 'unjust advantage' that one spouse may have in the negotiation process."¹⁰²

B. *Unconscionable at the Time of Enforcement*

1. Connecticut

Bedrick provides an initial glimpse into what circumstances might lead a court to conclude that enforcement of an agreement

96. See *Fogg v. Fogg*, 567 N.E.2d 921, 923 (Mass. 1991) (holding unenforceable a postnuptial agreement where the agreement "was signed as a result of the wife's implied fraudulent promise that she would attempt to preserve the marriage"); *Marshall v. Marshall*, 273 S.E.2d 360, 363 (W. Va. 1980) (noting that the husband's promise not to divorce was inadequate consideration where he filed for divorce after receiving benefit of the postnuptial agreement).

97. See, e.g., COLO. REV. STAT. §§ 14-2-302(1), -303 (2005); WIS. STAT. § 766.58 (2001); *Laudig v. Laudig*, 624 A.2d 651, 654-55 (Pa. Super. Ct. 1993); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01 (4) (2002).

98. *Bedrick v. Bedrick*, 17 A.3d 17, 27 n.5 (Conn. 2011); *Bratton*, 136 S.W.3d at 604 n.2.

99. *Bedrick*, 17 A.3d at 27.

100. *Ravdin*, *supra* note 11, at § I(K)(4), A-41 (2003).

101. *Williams*, *supra* note 11, at 841.

102. *Id.*

would be unconscionable. That said, the court's analysis was brief and, based on its conclusion that the question of "unconscionab[ility] is analogous to determining whether enforcement of an agreement would work an injustice,"¹⁰³ potentially creates some tension with previous decisions that have considered whether the enforcement of a prenuptial agreement would work an injustice. Although the court did not apply the existing case law on prenuptial agreements to the facts of *Bedrick*, those decisions provide instruction on what factual findings might lead a court to conclude that enforcement of an agreement would be unconscionable.

In *Crews v. Crews*, the Connecticut Supreme Court, in addition to emphasizing the challenger's "heavy burden"¹⁰⁴ when challenging the validity of a prenuptial agreement, also addressed for the first time the analysis required under the third prong of *McHugh*.¹⁰⁵

To render unenforceable an otherwise valid ante-nuptial agreement, a court must determine: (1) the parties' intent and circumstances when they signed the antenuptial agreement; (2) the circumstances of the parties at the time of the dissolution of the marriage; (3) whether those circumstances are "so far beyond" the contemplation of the parties at the time of execution; and (4) if the circumstances are beyond the parties' initial contemplation, whether enforcement would cause an injustice.¹⁰⁶

On review, the court agreed with the defendant "that there [was] insufficient evidence in the record to demonstrate that the change in the circumstances between the parties at the time of dissolution was not contemplated."¹⁰⁷ The facts were as follows. After a sixteen year marriage, the wife had filed for divorce. At the time of trial, she had an annual net income of \$69,056, and her husband, \$98,540.¹⁰⁸ The husband owned the marital home along with investment and retirement assets, while the wife owned a business valued at \$96,000.¹⁰⁹ Through the prenuptial agreement, the wife had

103. *Bedrick*, 17 A.3d at 28.

104. *Crews v. Crews*, 989 A.2d 1060, 1069 (Conn. 2010).

105. The wife had challenged the validity of the prenuptial agreement based on the injustice that would result from its enforcement, an argument that implicated *McHugh*'s third prong. *McHugh v. McHugh*, 436 A.2d 8, 11 (Conn. 1980). The *Crews* prenuptial agreement had been executed in 1988 and thus was subject to the *McHugh* common law test. *Crews*, 989 A.2d at 1063.

106. *Crews*, 989 A.2d at 1069.

107. *Id.* at 1067.

108. *Id.* at 1062-63.

109. *Id.*

waived her right to, inter alia, alimony and any share in the husband's assets or marital home.¹¹⁰

The court faulted the wife, who had challenged the prenuptial agreement, for her failure to establish that there was a dramatic, unforeseeable change in circumstances between the time of execution and the time of dissolution.¹¹¹ Although the trial court had concluded that during that interval, "the parties' financial circumstances had changed dramatically,"¹¹² the court determined that the financial circumstances at divorce were foreseeable and consistent with what was contemplated at the time they executed the prenuptial agreement.¹¹³ In fact, the court found that the prenuptial agreement itself provided evidence of the parties' intentions and expectations, and militated against a finding that enforcement would work an injustice.¹¹⁴

Similarly, in *Winchester v. McCue*, the Connecticut Appellate Court upheld the enforcement of a prenuptial agreement that the wife had challenged as unconscionable under the third prong of *McHugh*.¹¹⁵ There, the husband's financial assets had increased substantially¹¹⁶ but, according to the court, not so much as to warrant a finding that enforcement of the agreement would be unconscionable.¹¹⁷ Similar to *Crews*, the court emphasized that the wife had failed to demonstrate that the changed financial circumstances were extraordinary and unforeseeable, stating "that the threshold for finding such a dramatic change is high."¹¹⁸

Given this precedent, it is unclear why the *Bedrick* court declined to evaluate the circumstances of the parties pursuant to the unconscionability test set forth in *Crews*. Notwithstanding the obvious distinction between *Crews* and *Bedrick*—namely, the review of a prenuptial agreement in the former and a postnuptial in the latter—the underlying question of whether enforcement of the agree-

110. *Id.* at 1063.

111. *Id.* at 1069.

112. *Id.* at 1068 (internal quotation marks omitted).

113. *Id.* at 1070.

114. *Id.* at 1070-71.

115. *Winchester v. McCue*, 882 A.2d 143, 148-49 (Conn. App. Ct. 2005).

116. The wife had alleged that the husband's financial assets had increased by 430%. *Id.* at 149. In addition, she argued that the trial court should have considered the husband's pension, which he valued at \$200,000, as asset of his estate. *Id.* at 149 n.4. The court concluded, however, that even including the husband's pension in his estate "would not have increased [the estate] to the dramatic degree contemplated in the third prong of *McHugh*." *Id.*

117. *Id.* at 149.

118. *Id.*

ment would work an injustice is the same in both cases.¹¹⁹ Accordingly, the *Bedrick* court may have missed an opportunity to create a consistent body of law in the arena of pre- and postnuptial agreements. Nevertheless, a subsequent determination on the allocation of the burden may resolve this tension.

2. Guidance from Other Jurisdictions Evaluating Agreements at Enforcement

In Massachusetts, a disproportionate distribution of assets alone will not invalidate a postnuptial agreement, even under the agreement-hostile fair and reasonable standard. In *Ansin v. Craven-Ansin*, the Massachusetts Supreme Judicial Court recently held that postnuptial agreements were valid and enforceable, and concluded that among the requirements for enforcement was the requirement that the terms at the time of dissolution must be fair and reasonable to be enforceable.¹²⁰ The postnuptial agreement in *Ansin* provided that the wife disclaimed any interest in the husband's separately held real estate and would receive, inter alia, \$5 million from the husband in the event of divorce.¹²¹ The court rejected the wife's argument that she was receiving "a disproportionately small percentage of the couple's marital assets" and affirmed the lower court's decision that the agreement was fair and reasonable.¹²² In so doing, the court noted that "[t]he wife points to no material change between the time she, on the advice of counsel, executed the marital agreement and the husband's petition for divorce in 2006."¹²³

Decisions evaluating conscionability and fairness in the context of prenuptial agreements are particularly instructive. In *Blue v. Blue*, the Kentucky Court of Appeals, in reviewing the terms of a prenuptial agreement at the time of enforcement "to ensure that

119. *Bedrick v. Bedrick*, 17 A.3d 17, 29 (Conn. 2011) (reviewing "question of unconscionability"); *Crews*, 989 A.2d at 1064 n.2 (reviewing question of whether enforcement of prenuptial agreement would work an injustice). In both *Crews* and *Bedrick*, the courts made clear that the question of "[w]hether enforcement of an agreement would work an injustice is analogous to determining whether enforcement of an agreement would be unconscionable." *Id.* at 1066; *see also Bedrick*, 17 A.3d at 29 ("Thus, the trial court's finding that enforcement of the postnuptial agreement would work an injustice was tantamount to a finding that the agreement was unconscionable at the time the defendant sought to enforce it.").

120. *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961, 963-64 (Mass. 2010).

121. *Id.* at 960-61.

122. *Id.* at 969.

123. *Id.*

facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable,” upheld the agreement as not unconscionable.¹²⁴ The court noted that “the parties’ financial situations were already disparate when they entered into the agreement” and that the challenger needed to do more than establish that the proponent had improved his position financially: “She must also show that her position has suffered in a manner which was beyond the contemplation of the parties when they signed the agreement. In the alternative, [the challenger] must establish that the agreement is oppressive or manifestly unfair to her at the time of dissolution.”¹²⁵

In *Gant v. Gant*, the West Virginia Supreme Court noted that courts reviewing the terms of an agreement at the time of enforcement are primarily examining the foreseeability of the parties’ circumstances at that time.¹²⁶ The court also noted the likelihood that the parties were not on equal financial footing at the outset:

[W]e are loath to apply a vague and entirely subjective standard of “fairness.” Throughout all of contract law there is the recurring problem of disparity of bargaining power; thus if mere disparate bargaining power alone is grounds for invalidating contracts, contracts between rich and poor or between strong and weak will always be of questionable validity. Such, however, is not the rule elsewhere in contract law, and we see no policy reasons to make it so in the law of prenuptial agreements.

The term “fair,” without some further elaboration, gives no guidance whatsoever concerning which agreements will be binding and which agreements will be struck down. Furthermore, candor compels us to raise to a conscious level the fact that, as in this case, prenuptial agreements will almost always be entered into between people with property or an income potential to protect on one side and people who are impecunious on the other. Measuring an agreement by an undefined judicial standard of fairness is an invitation to the very wealth redistribution that these agreements are designed to prevent.¹²⁷

These cases stand for the proposition that parties to prenuptial and postnuptial agreements, while maybe in confidential relationships to each other, should be afforded the freedom to contract,

124. *Blue v. Blue*, 60 S.W.3d 585, 589, 591 (Ky. Ct. App. 2001).

125. *Id.* at 590-91.

126. *Gant v. Gant*, 329 S.E.2d 106, 114-15 (W. Va. 1985), *overruled on other grounds* by *Ware v. Ware*, 687 S.E.2d 382, 390-91 (W. Va. 2009).

127. *Id.* at 114.

regardless of the financial detriment to one of the bargaining parties. Moreover, any disparity in bargaining power that exists may not only be similar to that seen in standard business contracts, and thus should be subject to similar treatment, but also will be mitigated by the advice of independent counsel. Accordingly, judicial review of the terms of a postnuptial agreement at the time of enforcement should be skeptical of claims of unconscionability, especially when all procedural standards have been met.

Indeed, this approach is embodied by the standard in *Crews v. Crews*, and thus should be adopted for postnuptial agreements. The court in *Bedrick*, though it struck down the postnuptial agreement because enforcement would have caused an injustice, stopped short of announcing a true standard of unconscionability at the time of dissolution. Without creating tension with *Bedrick*, then, future cases can adopt and apply the *Crews* standard.

C. *Whose Burden is it Anyway?*

With respect to prenuptial agreements, Connecticut's position is clear for both common law and statutory review: the challenger bears the burden of establishing the agreement's invalidity.¹²⁸ However, the *Bedrick* court did not indicate who would bear that burden of establishing a postnuptial agreement's validity or invalidity.

Many jurisdictions place the burden on the proponent of the postnuptial agreement. In *Ansin v. Craven-Ansin*, the Massachusetts Supreme Judicial Court definitively held that, "[w]here one spouse challenges the enforceability of the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria."¹²⁹ Arizona has done the same.¹³⁰ In California, the courts have more narrowly placed that burden on the party who gained the advantage from the postnuptial agreement, but only after the court determines that the agreement was unfair.¹³¹ The ALI *Principles of the Law of Family Dissolution* does not provide for a fairness review of a postnuptial agreement's terms at the time of execution, but it does provide for a review of the procedural re-

128. CONN. GEN. STAT. § 46b-36g(a) (2011); *Crews v. Crews*, 989 A.2d 1060, 1069 (Conn. 2010).

129. *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 964 (Mass. 2010).

130. *In re Estate of Harber*, 449 P.2d 7, 16 (Ariz. 1969).

131. See *In re Marriage of Burkle*, 43 Cal. Rptr. 3d 181, 197, 201-02 (Ct. App. 2006); *McCourt v. McCourt*, No. BD514309, 2010 WL 5092780, slip op. at 44-45 (Cal. Super. Ct. Dec. 7, 2010).

quirements at that time, placing the burden on the proponent of the agreement.¹³²

Other jurisdictions place the burden on the challenger. By statute in Colorado, “the party against whom enforcement is sought” must prove the invalidity of the postnuptial agreement.¹³³ Indeed, pre- and postnuptial agreements in Colorado are treated identically.¹³⁴ Texas and Wisconsin take the same legislative approach.¹³⁵ Additionally, in contrast to its position relative to procedural requirements, the ALI *Principles of the Law of Family Dissolution* places the burden on the challenger to establish that enforcement of the agreement would work a substantial injustice.¹³⁶

Connecticut may consider a hybrid, burden-shifting approach, similar to the ALI’s approach, which would be consistent with its requirement of heightened scrutiny of postnuptial agreements. Pursuant to that heightened scrutiny and *Bedrick*’s application of the fair and reasonable standard at the time of execution, the proponent of the postnuptial agreement could be required to establish that, at the time of execution, the terms were fair and reasonable, full disclosure was made, and the parties entered into the agreement knowingly and voluntarily, “without any undue influence, fraud, coercion, duress or similar defect.”¹³⁷ If the proponent successfully established that the terms of the agreement were fair and reasonable, then the burden would shift to the challenger to show that enforcement of the agreement would cause an injustice. Here the application of the *Crews* test for unconscionability would be the logical solution and would help create a consistent body of law.

CONCLUSION

Knowing the contours of *Bedrick v. Bedrick* is only half the battle. Clearly, those attorneys drafting postnuptial agreements need to take extra care to ensure that the requirements identified in *Bedrick* are properly addressed. Drafters should assume, however, that their clients will one day be required to prove the validity of

132. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.04 (2002).

133. COLO. REV. STAT. ANN. § 14-2-307 (West 2005).

134. COLO. REV. STAT. ANN. § 14-2-302.

135. TEX. FAM. CODE ANN. § 4.105 (West 2006); WIS. STAT. ANN. § 766.88(6) (West 2009); *Nesmith v. Berger*, 64 S.W.3d 110, 114-15 (Tex. App. Ct. 2001).

136. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (2002).

137. *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011).

the agreement, rather than merely defend against it. Accordingly, in addition to drafting a *substantively* fair agreement and executing the agreement without any *procedural* defects that could be fatal if later challenged, that agreement should incorporate provisions that reflect the couple's contemplation of potential future events. To guard against claims of inadequate consideration, each spouse should waive some interest to which he or she would be entitled in the event of divorce or death, such as alimony or estate distributions. Finally, the agreement should be revisited periodically and reaffirmed, minimizing challenges to the terms of the agreement at the time of dissolution. These steps, with careful and competent drafting, will help guard any postnuptial agreement against later challenges.

APPENDIX¹³⁸

Bruce Bedrick, in his brief to the Connecticut Supreme Court, submitted the various postnuptial agreements and addendums signed by him and his wife. Those agreements are reproduced in this Appendix just as they appeared in the Defendant-Appellant’s brief, with the exception of the bracketed text.

[Initial Agreement]¹³⁹

THIS AGREEMENT made by and between DEBORAH E. BEDRICK, a resident of the Town of Stafford Springs, County of Tolland and State of Connecticut (hereinafter called “Deborah”) and BRUCE BEDRICK, a resident of the Town of Stafford Springs, County of Tolland and State of Connecticut, (hereinafter called “Bruce”);

W I T N E S S E T H :

The parties hereto are married to each other. Each is possessed of property of value. This Agreement is executed by the parties for the purpose of fixing and defining their several property rights as between themselves.

NOW, THEREFORE, in consideration of the mutual promises and undertakings hereinafter set forth, the parties agree as follows:

1. Each party shall, during his or her lifetime, keep and retain sole ownership, control and enjoyment of all property, real or personal, now owned or hereafter acquired by him or her, free and clear of any claim by the other.

2. Bruce, for himself, his heirs, executors, administrators and assigns, forever releases, waives and relinquishes all rights, claims or interest which he otherwise might have upon the death of Deborah subsequent to her marriage to him in or to her estate under any statute of succession or any other law now or hereafter adopted, expressly including but not limited to giving Bruce any rights of homestead, dower, curtesy, right of election to take against the Will, or other interest or rights in or to the estate or any part or asset of the estate of Deborah, or any right to receive any family allowance or any other allowance for maintenance or support from said estate, and Bruce forever waives all right to act as administrator or an administrator with Will annexed of the estate of Deborah.

138. Brief of the Defendant-Appellant at A1-A9, *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2010) (No. SC 18568).

139. The text below, and the eleven numbered paragraphs that follow, were typewritten.

3. Deborah, for herself, her heirs, executors, administrators and assigns, forever releases, waives and relinquishes all rights, claims or interest which she otherwise might have upon the death of Bruce subsequent to her marriage to him in or to his estate under any statute of succession or any other law now or hereafter adopted, expressly including but not limited to giving Deborah any rights of homestead, dower, curtesy, right of election to take against the Will, or other interest or right in or to the estate or any part of asset of the estate of Bruce or any right to receive any family allowance for maintenance or support from said estate, and Deborah forever waives all rights to act as administrator or an administrator with Will annexed to the estate of Bruce, or to any allowance for support or alimony in the event of a divorce or dissolution of marriage.

4. This agreement shall become effective immediately upon execution by the parties hereto.

5. Each party shall, upon the other's request, take any and all steps to execute, acknowledge and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this agreement.

6. Deborah and Bruce hereby acknowledge to the other that each has fully acquainted the other with their respective means and resources; and that each has informed the other that each respectfully has income; that each of them has ascertained and weighed all the facts, conditions and circumstances likely to influence their judgment herein; that all matters embodied herein as well as all questions pertaining thereto have been fully and satisfactorily explained to them; that they understand and consent to all of the provisions hereof; and that they are entering into this agreement freely and voluntarily and with full knowledge.

7. This agreement shall in no way restrict either or both of the parties from holding property as joint tenants, with or without rights of survivorship or as tenants by the entireties, and shall in no way restrict either from providing for the other by way of gift or bequest.

8. Each party was advised by their respective attorneys as to their legal rights and this agreement is being executed in accordance therewith.

9. This agreement contains the entire understanding of the parties. There are no representations, warranties, promises, covenants or undertakings, oral or otherwise, other than those expressly set forth herein.

10. This agreement shall inure to the benefit of and shall be binding upon the heirs, executors and administrators of the parties.

11. If any one or more of the agreements herein contained are held by the final judgment of a court of competent jurisdiction to be unlawful, void or unenforceable for any reason whatsoever, every other agreement contained in this agreement shall nevertheless remain valid, subsisting and effective.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 10th day of December, 1977.

[Signed Deborah Bedrick; Bruce Bedrick]

The following is a settlement agreement between Deborah and Bruce Bedrick.¹⁴⁰

1. In the event of dissolution of the marriage, Deborah will be allowed to stay in the primary home, if there is one, for a period of not more than six months. During that time, she will pay half the rent or mortgage, and all the utilities.

2. In the event of dissolution of the marriage, Deborah will remain an employee of Mr. Auto Wash for a period of not more than six months.

3. In the event of dissolution of the marriage, Deborah will be entitled to a cash settlement. The amount of this settlement will be reviewed from time to time.

4. In the event that dissolution of the marriage is caused by infidelity on the part of Deborah, there will be no cash settlement. Infidelity by Bruce will result in a doubling of the cash settlement.

5. The marriage may be dissolved at any time for any reason at no fault to either party, providing there is no infidelity.

6. This document will be reviewed from time to time, and pertinent additions to it may be made at these times.

[Signed Deborah Bedrick; Bruce Bedrick]

[Untitled Paragraph]¹⁴¹

In the case of separation or divorce, it is our desire to be independent of each other. As a result, neither Deb nor Bruce will be responsible to pay any alimony or other monies outside the settlement and child support agreed upon in this document.

[Signed Deborah Bedrick; Bruce Bedrick]

* * *

140. This text, and the following six numbered paragraphs, was handwritten. This text appeared directly below the typed portion reproduced above.

141. This paragraph was handwritten and undated.

[First Addendum]¹⁴²

ADDENDUM TO AGREEMENT OF 12/10/77

Dissolution of marriage will result in a cash settlement to Deborah of \$20,000. It will also relieve her of any joint liabilities, specifically the mortgage on 23 Bay Road, East Hampton, CT. She also waives any rights to any financial asset from this house.

[Dated: 5/1/80; signed: Deborah Bedrick, Bruce Bedrick]

* * *

[Second Addendum]

ADDENDUM TO AGREEMENT OF 12/10/77

Cash settlement as noted in 1980 will increase to \$40,000. Deborah is also, upon receiving settlement, relieved of any liability for mortgages on house and waives any claim to these assets.

[Dated: 5/15/83; signed: Deborah Bedrick, Bruce Bedrick]

* * *

[Third Addendum]

ADDENDUM TO AGREEMENT OF 12/10/77

Money in individual IRA accounts shall remain, and not be affected by dissolution of the marriage.

[Dated: 5/10/84; signed: Deborah Bedrick, Bruce Bedrick]

* * *

[Fourth Addendum]

ADDENDUM TO AGREEMENT OF 12/10/77

1. Cash settlement increased to \$55,000. All other prior conditions remain.

2. The companies Mr. Auto Wash and related companies belong solely to Bruce. Deborah waives any claim to any assets of any of these companies.

[Dated: 5/20/86; signed: Deborah Bedrick, Bruce Bedrick]

* * *

[Fifth Addendum]

ADDENDUM TO AGREEMENT OF 12/10/77

1. Cash settlement is increased to \$75,000. Half the amount is payable when Deborah leaves the primary home. The second half is payable within 12 months of the first payment.

2. In addition to prior conditions, Deborah is relieved of any liability for loans made by Bruce Bedrick or Bruce Bedrick En-

142. This addendum was handwritten, as were all that follow.

terprises for business purposes, specifically the mortgage at 650 New Park Ave., West Hartford, CT. She also waives any claim to the assets of this property.

[Dated: 5/18/89; signed: Deborah Bedrick, Bruce Bedrick]

* * *

[Untitled text]¹⁴³

It is my desire that if I die before Bruce, while married, that all my assets go to him, and that our children remain with him.

Secondly, it is my desire that if we should die simultaneously, that Bonnie Bauer will accept custody of our children until they are 21 years of age. I desire that my assets are put into a trust for the children's care and education. I would prefer that Bonnie execute this trust, under the supervision of M. Jackson Webber to ensure that the trust is used solely for this purpose.

My assets at the time of my death will be formulated using the separation agreement formula.

143. This text may have been Deborah Bedrick's attempt at a will.