

Prenuptial and Postnuptial Contract Law in the USA

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Keywords

agreement, agreements, alimony, antenuptial, contract, contracts, divorce, divorces, freedom, history, law, legal, marital, marriage, Massachusetts, obligation, Pennsylvania, postmarital, postnuptial, premarital, prenuptial, property

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Introduction

When two people are madly in love and planning to become married, the last thing on their mind is legal issues about division of assets at divorce. Yet statistics in the USA show that divorce is not only a possibility, divorce is *likely* to occur.

People in professional life (e.g., managers of businesses, physicians, etc.) or people with large inheritances from wealthy parents who have large assets that are a tempting target for an angry [ex-]spouse and her/his attorney during a divorce. Furthermore, attorneys who specialize in divorce litigation frequently charge more than US\$ 150/hour, and the total legal fees on both sides for a litigated division of marital assets often exceed US\$ 150,000.

To prevent such waste of money, and years of emotional anguish, on a litigated divorce, people should consider having a formal, written contract that is commonly called a *prenuptial agreement* or an *antenuptial agreement*, because these agreements are negotiated and signed *before* the marriage occurs. Such an agreement clearly specifies the assets that each person had prior to the marriage and how they wish their assets to be divided if divorce occurs. A carefully drafted agreement does *not* guarantee that there will be no litigation at divorce, but should expedite the resolution of divorce litigation.

A particularly nasty and complicated legal problem arises at divorce, when one spouse has financed the education of the other spouse, then the marriage ends *before* the supporting spouse can be either rewarded by an increased standard of living during the marriage or compensated by an increased share of the marital assets at divorce. Resolution of such issues might also be included in a prenuptial agreement.

I wrote this essay during August-September 2003, with two purposes: (1) to describe the legal history of prenuptial and postnuptial contracts between spouses and (2) to encourage spouses to have a written prenuptial contract. Since September 2003, I have modified this essay to include links to several of my more recent essays on family law, and to make a few editorial changes.

Because I do not know which word the reader will search to find this webpage, I use *agreement* and *contract* as interchangeable synonyms, so both words will be indexed in search engines. Attorneys commonly call a *prenuptial agreement* by the name *antenuptial agreement*, or, less commonly, *premarital agreement*.

disclaimer

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific, personal problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

If you need advice about the subject of this essay, I urge that you contact a attorney who is licensed to practice in your state and who is experienced in divorce law. Some suggestions on how to find an attorney to draft a prenuptial agreement are given at the end of this essay.

Litigants or their attorneys should *not* rely on this essay for legal research, because this essay is primarily concerned with legal history, because I ignored cases in some states, and because this essay includes only a few cases that were decided after July 2003.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

1. Limits on “Freedom of Contract”

The traditional way to arrange one's affairs is to use written contracts between people. Many business people are familiar with contract law, and accustomed to using contracts in business transactions. Two educated and experienced businessmen can agree to almost anything in a contract, and a court will enforce that contract.

It may come as a shock and surprise to many people that, as a general rule of law in the USA, such broad “freedom of contract” is *not* available to a husband and wife in their relationship with each other.

Postnuptial Contract Not Valid ?

The common law in the USA during most of the 1800s was that a husband and wife could *not* make a legally binding contract between themselves. The reason for this rule is that the identities of two parties (i.e., husband and wife) merged into *one* at the time of the marriage, and the law does not recognize a contract with just one party.¹ Furthermore, a married woman could

¹ *Butterfield v. Stanton*, 1870 WL 2873 at *9 (Miss. Oct Term 1870); *Seals v. Robinson*, 1883 WL 921 at *5 (Ala. Dec Term 1883); but see *Adams v. Adams*, 113 A. 279, 282 (N.H. 1921)(“The unity of person which at common law rendered void all contracts, sealed or otherwise, between husband and wife in this state no longer exists.” [citing a case decided in July 1892]). While some states (e.g., New Hampshire) abolished the unity of husband and wife in the 1800s, other states

not make a valid contract with anyone (including her husband), except regarding her separate property.²

The unity of husband and wife persisted into the 1950s in some states. For example, the New Jersey Supreme Court in 1949 invalidated an employment contract in which a business owned by the wife attempted to hire her husband as an employee:

But a contract of hire between spouses is utterly void and unenforceable at law. The acts empowering a married woman to bind herself by contract as if a feme sole, and to sue and be sued in her own name, apart from her husband, have not so far severed the unity of person and interest of husband and wife in the law as that their contracts inter se are enforceable at law and are no longer the subject of jurisdiction in courts of equity alone.

....

Contracts of husband and wife during coverture are void at common law; and they are void under the statute. [citations omitted]

Bendler v. Bendler, 69 A.2d 302, 305 (N.J. 1949).

Contracts between husband and wife have been deemed objectionable, not only because they are inconsistent with the common-law doctrine of unity of person and interest, “but because they introduce the disturbing influence of bargain and sale into the marriage relation, and induce a separation rather than a unity of interests.” *Wilder v. Brooks*, 10 Minn. 50 (Gil. 32), 88 Am.Dec. 49 [Minn. 1865]. The integrity of the marriage relation is of primary concern to society. That is the principle of the statutory provision that continues the common-law mutual disability of a husband and wife to contract inter se and to sue each other. [citation omitted]

Bendler, 69 A.2d at 307.

Bendler was overruled 31 years later in *Romeo v. Romeo*, 418 A.2d 258 (N.J. 1980).

The majority opinion of a U.S. Supreme Court case in 1960 held that a husband and wife could possibly commit the crime of conspiracy with each other.

For this Court now to act on Hawkins's [citing a case from the year 1365] formulation of the medieval view that husband and wife 'are esteemed but as one Person in Law, and are presumed to have but one Will' would indeed be 'blind imitation of the past.' It would require us to disregard the vast changes in the status of woman--the extension of her rights and correlative duties — whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.

How far removed we were even nearly a century ago when Congress passed the original statute against criminal conspiracy, the Act of March 2, 1867, 14 Stat. 484, from the legal and social climate of eighteenth century common law regarding the status of woman is pithily illustrated by recalling the self-deluding romanticism of Blackstone, whereby he could conscientiously maintain that “even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.” Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765), Bk. I, ch. 15, p. 433. It would be an idle parade of learning to document the statement that these common-

in the USA continued this unity until approximately 1950.

² *Dibble v. Hutton*, 1804 WL 634 (Conn. 1804); *Burton v. Marshall*, 1846 WL 1851 at *5, (Md. Dec Term 1846); *Norris v. Lantz*, 1862 WL 1557 (Md. 1862); *Latimer v. Glenn*, 1866 WL 3566 at *4 (Ky. 1866); *Shaffer v. Kugler*, 17 S.W. 698, 698-99 (Mo. 1891).

law disabilities were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed. Suffice it to say that we cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.

U.S. v. Dege, 364 U.S. 51, 54-55 (1960).

In a dissent to a contract case before the U.S. Supreme Court in 1966 involving the freedom of a married woman in Texas to make contracts with third-parties that bind her separate property without first obtaining permission from a state court, Justice Black concluded:

The Texas law of 'coverture,' which was adopted by its judges and which the State's legislature has now largely abandoned, rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business. I say 'discredited' reflecting on the vast number of women in the United States engaging in the professions of law, medicine, teaching, and so forth, as well as those engaged in plain old business ventures as Mrs. Yazell was. It seems at least unique to me that this Court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States.

U.S. v. Yazell, 382 U.S. 341, 361 (1966)(Black, J., dissenting).

Incidentally, the observation that the husband was "the one" is *not* original with Justice Black; he was referring to a traditional observation amongst attorneys.³

³ For example, see: *Burgan v. Cahoon*, 1881 WL 14458 at *5 (Pa. 1881)("The general rule of law is this: A married woman is unable to go into business on her own account, or to contract debts, the maxim being that 'husband and wife are one,' and that one is the husband, and that contracts of the wife, with the knowledge and consent of the husband, are the contracts of the husband himself."); *Hubbard v. Bugbee*, 1883 WL 6926 (Vt. 1883)("Ch. J. Shaw, speaking of the legal condition of a *femme covert*, under the common law, said 'a man and his wife are *one*, and that *one* is the husband."); *Starr v. Starr*, 1922 WL 2832 at *2 (Pa.Super. 1922)("The trite saying that 'a husband and wife are one, and the husband is that one,' has, today, very little foundation in law and certainly less foundation in fact."); *Donohue v. Skinner*, 234 P. 1000, 1001 (Kan. 1925)("Possibly the testator may have entertained the notion that upon marriage the legal existence of the wife was merged in that of her husband; that in the eyes of the law both are to be regarded as one person; that the husband is the one; and hence he had the right to dispose of her property."); *Commonwealth v. Rutherford*, 169 S.E. 909, 911 (Va. 1933)("... the relation genders unity; that they are one and that one is the husband."); *Bendler v. Bendler*, 69 A.2d 302, 308 (N.J. 1949)("Modern society has progressed a long way since the days when the courts enforced the doctrine that husband and wife were one and that one was the husband.")(Ackerson, J., dissenting); *State v. Caporale*, 108 A.2d 841, 844 (N.J. 1954) ("Citing the ancient common law maxim that husband and wife are one and that one is the husband, the defendant asks").

After the law in the USA finally recognized the general validity of contracts involving a married woman, courts continued to void postnuptial contracts between a husband and wife, because such contracts allegedly encouraged divorce, and therefore were contrary to public policy of the state.⁴ Still further, postnuptial contracts that attempted to release the husband from his legal obligation of supporting his wife were declared void.⁵

To avoid these archaic, anachronistic, and nonsensical rules, a husband and wife need to sign a contract *before* they are married, which is a so-called prenuptial contract.

There are a few enlightened states in the USA where these traditional rules were not accepted. For example, in Pennsylvania the law has for many years permitted a husband and wife to make legally binding contracts with each other. Pennsylvania law is discussed later in this essay, beginning at page 20. However, if one signs a valid postnuptial agreement in an enlightened state like Pennsylvania, one or both spouses could later move to another state, and file for divorce in that state that imposes the traditional rule that postnuptial agreements are *invalid*, which produces a conflict of law problem.

The law of New York State recognizes the validity of postnuptial contracts if three conditions are satisfied:

Domestic Relations Law § 236(B)(3) states that a nuptial agreement made before or during the marriage must satisfy three requirements to be “valid and enforceable in a matrimonial action.” First, the agreement must be in writing. Second, it must be subscribed

⁴ *Cumming v. Cumming*, 102 S.E. 572, 576 (Va. 1920)(dicta); *Fuqua v. Fuqua*, 86 N.Y.S.2d 245, 249 (N.Y.Sup. 1949)(“An agreement the object of which is to promote a divorce is void as against public policy, offensive to the good order of society and the sacred character of the conjugal relation.”); *In re Cooper's Estate*, 403 P.2d 984, 988 (Kan. 1965)(“It is well settled and beyond controversy that a contract between spouses which facilitates or promotes their divorce is invalid and is unenforceable as contrary to public policy.”); *Capps v. Capps*, 219 S.E.2d 901, 903 (Va. 1975)(“However, we have said that it is the policy of the law ‘to foster and protect marriage, to encourage the parties to live together and to prevent separation, marriage being the foundation of the family and of society, without which there would be neither civilization nor progress.’ It is because of this policy that we have held agreements, either antenuptial or postnuptial, between husbands and wives, void when they tend to encourage or facilitate separation or divorce.” [citations omitted]); *Lyle v. Lyle*, 1996 WL 23344 at *5 (Neb.App. 1996)(“A postnuptial contract created between a husband and wife in which one party agrees to waive any right of entitlement to marital property is void because such an agreement encourages divorce rather than reconciliation between married couples.”). See also RESTATEMENT (FIRST) CONTRACTS §§ 584, 586 (1932); RESTATEMENT (SECOND) CONTRACTS § 190(2) (1981).

⁵ *Robbins v. Continental Nat. Bank & Trust Co. of Chicago*, 58 N.E.2d 254, 259 (Ill.App. 1944)(“A contract between husband and wife in which it is attempted to have a wife discharge her husband from his legal obligation to support and maintain her is contrary to public policy and, therefore, void.” [citing 5 cases]). See also RESTATEMENT (FIRST) CONTRACTS § 587 (1932); RESTATEMENT (SECOND) CONTRACTS § 190(1) (1981).

by the parties and third, it must be “acknowledged or proven in the manner required to entitle a deed to be recorded.”

Matisoff v. Dobi, 681 N.E.2d 376, 377, 659 N.Y.S.2d 209, 210 (N.Y. 1997).⁶

New York’s General Obligations Law § 5-311 voids postnuptial contracts between a husband and wife that attempt “to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support[,] and therefore is likely to become a public charge.” See *Bloomfield v. Bloomfield*, 764 N.E.2d 950, 952, 738 N.Y.S.2d 650, 652 (N.Y. 2001).

In Massachusetts, the state statutes were amended in 1963 to permit a married woman to “make ... contracts with her husband.” Massachusetts Statutes, Chapter 209, § 2.

Since about 1985, courts in some states have recognized postnuptial contracts as valid, when those postnuptial contracts satisfy the same tests for validity as a prenuptial contract.⁷

See, for example:

- *Button v. Button*, 388 N.W.2d 546 (Wis., Jun 20, 1986);
- *D'Aston v. D'Aston*, 808 P.2d 111 (Utah App., Jun 14, 1990), approved in *Peirce v. Peirce*, 994 P.2d 193, 199 (Utah, Jan 11, 2000);
- *Fogg v. Fogg*, 567 N.E.2d 921 (Mass., Mar 11, 1991);
- *Flansburg v. Flansburg*, 581 N.E.2d 430 (Ind.App. 3 Dist., Nov 12, 1991);
- *Bronfman v. Bronfman*, 645 N.Y.S.2d 20 (N.Y.A.D. 1 Dept. Jul 11, 1996)(terse);
- *Lipic v. Lipic*, 103 S.W.3d 144, 149 (Mo.App. E.D., Jan 28, 2003).

With the legal unity of husband and wife abolished by either statute or common law in most states of the USA sometime before 1950, there was no continuing good reason to treat postnuptial contracts differently from prenuptial contracts. It is an interesting problem in the history of law in the USA *why* judges waited so many years before beginning to treat pre- and post-nuptial contracts similarly.

Terse History of Prenuptial Contracts in the USA

Traditionally, prenuptial contracts were not legally enforceable, because judges believed that prenuptial contracts “encouraged divorce,” and thus were against public policy.

- *Wyant v. Leshner*, 23 Pa. 338, 1854 WL 6354 at *3-*4, (Pa. 1854) (“Here, however, the contract was *ante-nuptial*; and although made between parties competent to contract, is supposed nevertheless to be against policy, because looking to a future separation, and tending

⁶ In *Matisoff v. Dobi*, both parties acknowledged in open court that their signatures on the postnuptial agreement were genuine. Not only did the parties agree that they had signed this contract, but “neither made any allegations of fraud or duress.” Nonetheless, the court invalidated the contract because it did not comply with technical formalities in the statute. Given that the parties themselves admitted they signed the contract, who did this harsh law protect?

⁷ The tests for validity of a prenuptial contract are briefly mentioned below, at page 13.

to encourage domestic feuds and broils. The idea is, that such a contract gives a wife an interest in disobedience, and renders her more independent by misconduct than by the most strict observance of marriage duties.”)(upholding prenuptial agreement, but noting argument against validity);

- *Cumming v. Cumming*, 102 S.E. 572, 574 (Va. 1920)(“... the specific object and the actual result of the antenuptial contract was to encourage or facilitate a separation after the marriage. Such a contract is illegal and void. Hence it is not binding upon, and cannot be enforced against, either party.”), quoted with approval in *Shelton v. Stewart*, 67 S.E.2d 841, 843 (Va. 1951);
- *Howard v. Adams*, 98 P.2d 1057, 1059 (Cal.App. 1940)(“The marital status is the very basis of the social order and agreements that tend to destroy or impair that status by encouraging divorce will not be enforced.”), *rev’d*, 105 P.2d 971, 973 (Cal. 1940)(“While the law does not countenance any contract ‘having for its object the dissolution of the marriage contract, or facilitating that result’”)[citations omitted];
- *Fricke v. Fricke*, 42 N.W.2d 500, 502 (Wis. 1950)(“At least a majority, if not all of the courts which have considered the matter have held that any antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy and is therefore void. 70 A.L.R. 826. Quite generally the courts have said that the contract itself invites dispute, encourages separation and incites divorce proceedings.”), cited with approval, *Caldwell v. Caldwell*, 92 N.W.2d 356 (Wis. 1958);
- *Cohn v. Cohn*, 121 A.2d 704 (Md. 1956)(“The rule seems to be well established in this country that an antenuptial contract which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage is contrary to public policy, and is therefore void.” [citations omitted]);
- *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn.Ct.App. 1964)(“We are of the opinion such [antenuptial] contract is promotive of divorce and void on grounds of public policy. Such contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited. In other words, a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay.”);
- See also RESTATEMENT (FIRST) CONTRACTS §§ 584, 586 (1932); RESTATEMENT (SECOND) CONTRACTS § 190(2) (1981).

In 1979, an appellate court in Missouri explained *why* earlier judges had believed that prenuptial contracts were against public policy:

In those cases which attempt justification for general opposition to antenuptial agreements contingent on divorce, the reasons most frequently given are (1) contracts are not compatible with and denigrate the status of the marital relation, (2) such agreements tend to facilitate and provide an inducement for divorce, and (3) a contract waiving or minimizing alimony may cast an indigent spouse on public charity. Examples of cases adopting these views are: *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970); *Crouch v. Crouch*, 53 Tenn.App. 594, 385 S.W.2d 288 (1964), and *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950), in which it was stated that such an agreement “invites dispute, encourages separation and incites divorce.”

Ferry v. Ferry, 586 S.W.2d 782, 785 (Mo.App. 1979);
cited with approval in *Brooks v. Brooks*, 733 P.2d 1044, 1049, n. 6 (Alaska 1987).

The third reason appears specious: as the Louisiana Supreme Court noted, “a waiver of permanent alimony would make the spouse incapable of financial independence no more of a burden than he or she was before marriage. Clearly, a waiver of permanent alimony does not deprive a spouse of his or her ability to support herself.”⁸

Other old cases held that *all* marriages had the same legal obligations between husband and wife, and the parties could not alter those obligations by contract, hence premarital contracts were not legally enforceable.

- *In re Duncan's Estate*, 285 P. 757, 757 (Colo. 1930)(“The antenuptial contract was a wicked device to evade the laws applicable to marriage relations, property rights, and divorces, and is clearly against public policy and decency.”);
- *French v. McAnarney*, 195 N.E. 714, 716 (Mass. 1935)(“The interests of society and the public welfare in maintaining unimpaired the integrity of the marriage relation and its essential obligations are superior to the apparent relief gained by the respondent under such a contract. These parties have undertaken to establish a peculiar and restricted marital relationship for a particular purpose, excluding one of the primary incidents of marriage. The failure of this attempted abrogation of the duty of the husband to support the wife does not affect the validity of the marriage. The public interest in the integrity of marriage requires that its underlying rights and obligations be not subject to variation by agreement of the parties such as here shown.”);
- *Eule v. Eule*, 320 N.E.2d 506, 510 (Ill.App. 1974)(“Courts in this state have consistently held void clauses in postnuptial agreements which attempted to avoid the husband's legal duty of support during marriage. [citations omitted] Logic dictates that the same result shall occur when such a clause is included in an antenuptial agreement. [citation omitted] By the very wording of the clause in this case, if either spouse, regardless of fault, separated from the other within seven years of marriage, he or she gave up her statutory right to seek support or temporary alimony. We believe the trial court was correct in refusing to enforce this forfeiture clause in regard to temporary support and alimony.”);
- *In re Marriage of Noghrey*, 215 Cal.Rptr. 153 (Cal.App. 1985);
- See also RESTATEMENT (FIRST) CONTRACTS § 587 (1932);
RESTATEMENT (SECOND) CONTRACTS § 190(1) (1981).

During the 1970s and 1980s, two concurrent developments caused legislatures and courts to change the law, and begin enforcing prenuptial contracts in some circumstances:

1. Recognition that divorce had become epidemic in the USA.
2. Change in statutory law to allow divorce for any reason (so-called “no-fault” divorces).

Some significant state court decisions that recognized the validity of prenuptial agreements:

- *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962);

⁸ *McAlpine v. McAlpine*, 679 So.2d 85, 91 (La. 1996).

- *Hartz v. Hartz*, 234 A.2d 865 (Md. 1967);
- *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), *quashed*, 257 So.2d 530 (Fla. 1972), 315 So.2d 175 (Fla. 1975);
- *In re Broadie's Estate*, 493 P.2d 289 (Kan. 1972);
- *Valid v. Valid*, 286 N.E.2d 42 (Ill.App. 1972);
- *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972);
- *Unander v. Unander*, 506 P.2d 719 (Or. 1973);
- *Parniawski v. Parniawski*, 359 A.2d 719 (Conn.Super. 1976);
- *Rosenberg v. Lipnick*, 389 N.E.2d 385 (Mass. 1979);
- *McHugh v. McHugh*, 436 A.2d 8 (Conn. 1980);
- *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981);
- *Avitzur v. Avitzur*, 446 N.E.2d 136, 459 N.Y.S.2d 572 (N.Y. 1983);
- *MacFarlane v. Rich*, 567 A.2d 585 (N.H. 1989);
- *McAlpine v. McAlpine*, 679 So.2d 85 (La. 1996).

Prenuptial Contract May *Encourage* Marriage

Several courts have remarked on the importance of freedom of contract in allowing people to design a marriage that they want to live, instead of having the government (i.e., the law) impose a one-size-fits-all concept of marriage on everyone. And enforcing unconventional prenuptial contracts might encourage marriage by people who would otherwise be reluctant to marry.

The Colorado Supreme Court said:

The State of Colorado has an interest in marriage, and marriage is favored over less formalized relationships which exist without the benefit of marriage. [citations omitted] Undeniably, some marriages would not come about if antenuptial agreements were not available. This may be increasingly true due to the frequency of marriage dissolutions in our society, and the fact that many people marry more than once.

Newman v. Newman, 653 P.2d 728, 731 (Colo. 1982).

The West Virginia Supreme Court said of a prenuptial contract between Larry and Elana Gant:

Newer law granting contract validity to prenuptial agreements that establish property rights *at the time of divorce* is related to the fact that such agreements may, indeed, encourage rather than discourage marriage in the 1980s. The case before us now is a good example of how a prenuptial agreement may encourage marriage: Larry and Elana were living together in a joint household for a year before they married, and given Larry's previous bad luck with domestic life he may not have been willing to risk marriage again without a contractual limitation on his economic liability in the event of divorce. In fact, Larry and Elana's situation is hardly unique; nationwide figures show that at the last census there were 1,988,000 cohabiting, unmarried couples of the opposite sex in America. [*Statistical Abstract of the United States, supra* note 4, at 40.] This figure alone demonstrates that there are now few impediments to establishing joint households without benefit of formal marriage among people of opposite sex. Thirty years ago, on the other hand, employers, apartment owners, and even neighbors were likely to discriminate against cohabiting, unmarried adults of opposite sex by firing them, refusing to rent to them, or socially ostracizing them.

The institution of marriage still confers substantial benefits on both the couple involved and society as a whole, however. Therefore the legal system must continue to encourage marriage even if that means honoring prenuptial agreements that are not to judges' personal liking. Social security, employer pension and health benefits, inheritance rights, and rights in real property are all tied to marital relationships. [footnote omitted] The reason for this has less to do with what was once inscribed on stone tablets than with what is currently entered on actuarial tables. Cohabiting couples cannot be given the benefits of social programs or rights of intestate succession designed for married couples because of lack of statistical precision and great uncertainty in anticipating or proving such relationships.

Gant v. Gant, 329 S.E.2d 106, 112-13 (W.Va. 1985).

In the field of prenuptial agreements, firm rules favoring enforceability inevitably further the public policy of encouraging middle aged, cohabiting couples to regularize their relationships by getting married.

Furthermore, these rules are unlikely to have any untoward consequences among those marrying for the first time and contemplating children because experience instructs us that it is a rare, starey-eyed couple in their early twenties who enter into an elaborate prenuptial agreement; after all, among the young, marriage is an exercise in optimism. Such optimism, however, is less likely among those who have been divorced one or more times, and it is an understandable pessimism, based upon the national statistics cited above, that cause many middle aged individuals--particularly those with property or income to protect--to prefer unmarried cohabitation to formal marriage. Although courts have a high regard for their own wisdom, not everyone has unreserved enthusiasm for the proposition that at divorce time his or her future economic well-being is entirely "within the sound discretion of the trial court judge." *Zirkle v. Zirkle*, W.Va., 304 S.E.2d 664 (1983).

Accordingly, we hold today that in West Virginia prenuptial agreements that establish property settlements and support obligations at the time of *divorce* are presumptively valid. *Gant*, 329 S.E.2d at 115-16.

The Alaska Supreme Court said in 1987:

As the authorities above attest [sic], the idea that prenuptial agreements induce divorce is anachronistic. Today, divorce is a "common-place fact of life." [FN13] *Posner*, 233 So.2d at 384. As a result there is a concurrent increase in second and third marriages -- often of mature people with substantial means and separate families from earlier marriages. The conflicts that naturally inhere in such relationships make the litigation that follows even more uncertain, unpleasant and costly. Consequently, people with previous "bad luck" with domestic life may not be willing to risk marriage again without the ability to safeguard their financial interests. In other words, without the ability to order their own affairs as they wish, many people may simply forgo marriage for more "informal" relationships. [FN14]

FN13. "This society's staggering divorce rate can only place any reasonable person on notice that divorce is as likely an outcome of any marriage as a permanent relationship." *Gant*, 329 S.E.2d at 113.

FN14. Few impediments--economic or social--now exist to establishing joint households without the benefit of formal marriage. In fact, nationwide figures show that at the last census there were nearly two million (1,988,000) "cohabitating" unmarried couples of the opposite sex in America. U.S. Bureau of the Census, Statistical Abstract of the United States; 1985 (105 Edition) Washington D.C. 1984 at 40.

Prenuptial agreements, on the other hand, provide such people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. [FN15] Moreover, allowing couples to think through the financial aspects of their marriage beforehand can only foster strength and permanency in that relationship. In this day and age, judicial recognition of prenuptial agreements most likely “encourages rather than discourages marriage.” *Gant*, 329 S.E.2d at 112-13.

FN15. Although courts have a high regard for their own wisdom, not everyone has unreserved enthusiasm for the fact that upon divorce his or her assets, property and even future income are subject to division entirely within the broad discretion of the trial court.

In sum, both the realities of our society and policy reasons favor judicial recognition of prenuptial agreements. Rather than inducing divorce, such agreements simply acknowledge its ordinariness. With divorce as likely an outcome of marriage as permanence, we see no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs. Therefore, we join those courts [footnote citing 21 cases omitted] that have recognized that prenuptial agreements legally procured and ostensibly fair in result are valid and can be enforced. [See Uniform Premarital Agreement Act § 6, 9A U.L.A. at 383-84.] “The reasoning that once found them contrary to public policy has no place in today’s matrimonial law.” *Marschall*, 477 A.2d at 839. *Brooks v. Brooks*, 733 P.2d 1044, 1050-51 (Alaska 1987). quoted with approval in *Rinvelt v. Rinvelt*, 475 N.W.2d 478, 482-83 (Mich.App. 1991); *Kuziemko v. Kuziemko*, 2001 WL 1545706 at *4 (Mich.App. 2001).

Appellate courts in California have made a similar observation:

As the law is starting to recognize, premarital agreements may in fact encourage rather than discourage marriage. As more than one court has noted, society’s current acceptance of cohabitation without marriage offers an attractive alternative to a wealthy man or woman who cannot marry without relinquishing the right to limit his or her spousal support obligation in the event of divorce. [footnote omitted] This reasoning suggests that the result we reach today does in fact preserve rather than defeat the sanctity of marriage. (*Brooks v. Brooks*, *supra*, 733 P.2d at p. 1050; *Gant v. Gant*, *supra*, 329 S.E.2d at p. 113; *Unander v. Unander*, *supra*, 506 P.2d at pp. 719-721.)

In re Marriage of Pendleton, 72 Cal.Rptr.2d 840, 848 (Cal.App. 2 Dist. 1998), *In re Marriage of Pendleton and Fireman*, 5 P.3d 839, 848, 99 Cal.Rptr.2d 278, 288-89 (Cal., 2000)(“As the Court of Appeal recognized, today the availability of an enforceable premarital agreement “may in fact encourage rather than discourage marriage.” We agree with the Court of Appeal, therefore, that, when entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy.”)

An appellate court in Ohio noted:

Regarding the third prong of *Gross*, [464 N.E.2d 500, 506 (Ohio 1984)] the Ohio Supreme Court has recognized that “these types of agreements tend to promote or facilitate marriage, rather than encourage divorce.” Here, there is nothing in the record to support the conclusion that this prenuptial agreement promoted or encouraged divorce or profiteering by divorce. In fact, if anything, the opposite is true in this case: Norman testified that he would not have married Dianne without a prenuptial agreement, and therefore the agreement

facilitated their marriage; further, the terms of the prenuptial agreement would not have encouraged Dianne to get a divorce and in fact prevented her from profiteering from this decision.

Millstein v. Millstein, 2002 WL 31031676 at *11, ¶ 86 (Ohio App. 2002), *appeal not accepted for review*, 783 N.E.2d 521 (Ohio 2003).

There can be no doubt that many wealthy people would be reluctant to marry a person with a considerably smaller earning capacity, knowing that at divorce their ex-spouse could capture approximately half of their earnings. A carefully crafted prenuptial contract may permit such marriages from being a financial exploitation of the spouse who earns most of the income in the marriage. In other situations, two people may be fiercely independent, *intolerant* of sharing their assets, or resentful of supervision by anyone else — for them a prenuptial contract that establishes separate finances for each party during a marriage allows them to be married without fighting over money during the marriage.

Tests for Validity of Prenuptial Contracts

Courts in each state have established a number of criteria for deciding the validity or enforceability of prenuptial contracts. I do *not* want to review that law here, because there are significant differences amongst the states and the law is evolving with time in each state. In general, judges will scrutinize the contract for:

- absence of fraud/deceit,
- voluntariness in signing (e.g., no undue influence, no duress, etc.),
- full disclosure of each party's assets and income at the time of the contract (i.e., neither misrepresentation nor material nondisclosure),
- fairness or reasonableness (i.e., no unconscionability) at time contract was signed — and sometimes also at the time of divorce,
- and a few courts have held that a party can validly waive rights *only if* the party knew and understood what she/he was doing at the time the agreement was signed. This requirement is satisfied if the party is represented by an attorney who explains the law to the party, even if the party signs the agreement against the advice of her/his attorney.

Some judges have remarked that such requirements are ordinary contract law, applicable to *all* contracts, not just to prenuptial contracts.⁹ These judges are correct that these rules are found in the

⁹ *Buettner v. Buettner*, 505 P.2d 600, 604 (Nev. 1973) (“We have given careful consideration to whether antenuptial contracts settling alimony and property rights upon divorce are to be viewed in this state as void because contrary to public policy, and hold that they are not. Nevertheless, as with all contracts, courts of this state shall retain power to refuse to enforce a particular antenuptial contract if it is found that it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress.”); *McHugh v. McHugh*, 436 A.2d 8, 12 (Conn. 1980s) (“An antenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law.”); *Gant v. Gant*, 329 S.E.2d 106, 112 (W.Va. 1985) (“Obviously, general contract law governs prenuptial agreements,”); *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (“Traditional principles of contract law provide perfectly adequate remedies where [prenuptial] contracts are procured through

RESTATEMENTS OF CONTRACTS. But it is also clear that the amount of judicial scrutiny of prenuptial contracts in most states is much greater¹⁰ than the scrutiny given to contracts between two corporations that “deal at arm’s length” and that involve sophisticated businessmen. Such increased scrutiny may be explained as a desire to protect the weaker party in a marriage from overreaching or exploitation by the stronger party. Such increased scrutiny may also be a paternalistic interference in the private affairs of two people who had an *unconventional* marriage. Below, beginning at page 22, I discuss the enlightened law in the *Simeone* case in Pennsylvania.

Statutory Limits

Most states have statutes that:

- establish a legal obligation of both parents to financially support their children, until the children are at least 18 years old. (I say “at least”, because some state courts have held that parents have a duty to pay for their child's undergraduate college education up to age 23 years, and a *few* state courts have held that parents have a duty to pay for their child's education in medical school or law school.¹¹)
- establish a legal obligation of both spouses to support each other during the marriage (which is most commonly interpreted that the husband has a legal duty to financially support his wife).
- specify how assets are to be divided at divorce.
- after separation or divorce, establish a legal obligation for the spouse with the greater income to continue to support his ex-wife (or her ex-husband), which payments are called “alimony” or “maintenance”. The traditional purpose of alimony was to allow the ex-spouse to live at approximately the same standard as during the marriage, and not become indigent. The traditional alimony continued until the dependent spouse either remarried or died. A more modern kind of alimony is the so-called “rehabilitative alimony”: monthly payments for a limited time (typically not more than 5 years) to allow their ex-spouse to attend college or vocational school and increase her/his earning potential and achieve economic self-sufficiency.

In addition to such statutes, there is an large number of judicial opinions in each state that interpret these statutes.

fraud, misrepresentation, or duress.”).

¹⁰ *MacFarlane v. Rich*, 567 A.2d 585, 589 (N.H 1989)(“Courts uniformly agree that antenuptial agreements are subject to ordinary principles of contract law. However, the State has a special interest in the subject matter of antenuptial agreements, and as a result, courts tend to scrutinize these agreements more closely than ordinary commercial contracts. [citation omitted]”).

¹¹ Ronald B. Standler, *Legal Duty of Parent in USA to Pay for Child’s College Education*, http://www.rbs2.com/son_edu.pdf (Aug 2003).

It is generally *not* possible for a valid, legally binding prenuptial agreement to excuse someone from their obligations under state statute. One might believe that such statutes are paternalistic, archaic, and an *unwelcome* intrusion on one's personal freedom, however these statutes *are* the law, and it is generally not possible to avoid statutory obligations in a contract. See, e.g., RESTATEMENT (SECOND) CONTRACTS §§ 178-79, 190 (1981). However, it *is* possible to make a knowing, voluntary, and intelligent waiver of rights created by statute.

Waiver of Alimony

A few enlightened states have allowed a wife to waive or to limit her legal right to alimony in an prenuptial agreement. About six years after I wrote this essay, I wrote a more detailed discussion of the law of waiver of alimony, which I posted at: <http://www.rbs2.com/dwaiver.pdf> (Aug 2009). Accordingly, I have deleted the list of cases that was here in early versions of this essay.

Freedom of Contract

The following paragraphs quote from a few significant court cases in the USA that have retreated from the traditional paternalistic role and recognized a limited “freedom of contract” in the context of premarital agreements. For example, an appellate court in Illinois in 1972 said:

In cases from other jurisdictions which we have reviewed at length, antenuptial agreements which totally eliminated the right to support or which made inadequate provision for support have been held to violate public policy. [citations omitted]

The reasons given in these cases for holding as void provisions eliminating the obligation of support upon divorce are (1) that the state's interest in the preservation of the marriage relationship could be defeated by agreements which provide for, facilitate, or tend to induce a separation or divorce of the parties after marriage and (2) that the state has an interest in seeing that a divorced woman has adequate support so that she will not become a charge of the state. The assumptions on which these reasons are based should be examined. It is often declared that the state has a vital interest in the maintenance of the family, but this interest does not require that persons, once married, must live together forever without regard to the breakdown of their relationship. The necessity of granting divorces is recognized, and the grounds upon which one can be granted are expanding. Where no minor children are involved, as here, and where the husband and wife can function in society separately and independently, the interest of the state in the continuance of the marriage is small.

The most frequent argument made for holding agreements limiting alimony invalid is that such agreements encourage or incite divorce or separation. There is little empirical evidence to show that this assertion is well founded. It is true that a person may be reluctant to obtain a divorce if he knows that a great financial sacrifice may be entailed, but it does not follow from this that a person who finds his marriage otherwise satisfactory will terminate the marital relationship simply because it will not involve a financial sacrifice. It may be equally cogently argued that a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability. See: dissent *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500.

Many cases state categorically that a husband has a duty to support his wife. This is unquestionably true when the wife is in need of such support. However, when a marriage breaks down and the husband and wife are divorced, the wealth and income of the wife are always considered in determining whether an alimony award should be made and if so in what amount. *Byerly v. Byerly*, 363 Ill. 517, 2 N.E.2d 898; *Gilbert v. Gilbert*, 305 Ill. 216, 137 N.E. 99.

When the rules regarding the husband's duty of support were first enunciated, the roles of a husband and wife were more rigid and defined. The husband worked and brought income into the family while the wife maintained and managed the household. The woman generally did not seek outside employment partly, because 'her place was in the home', and partly because few opportunities for meaningful employment were available. Married women nowadays are increasingly developing career skills and successfully entering the employment market. Where a woman is trained, healthy, and employable, and where a woman's efforts have not contributed to her husband's wealth or earning potential, the necessity for an alimony award upon breakup of the marriage is not great.

The reasons given to justify the invalidation of all antenuptial agreements which limit the obligation of support upon divorce do not warrant the condemnation of all such agreements in the name of public policy. The law gives certain rights to both spouses upon marriage, but these rights may be waived or terminated upon divorce.

Valid v. Valid, 286 N.E.2d 42, 46-47 (Ill.App. 1972).

The Florida Supreme Court in 1972, speaking of a prenuptial contract, said:

We reiterate that inadequate and disproportionate provision for the wife, even to the extent evidenced in the instant case, will not vitiate an antenuptial agreement. If the prospective wife has full knowledge of her rights, and in the absence of willful or unintentional fraud, or the withholding of material facts, she will be it she would be entitled to a greater share of her husband's wealth.

Freedom to contract includes freedom to make a bad bargain. But freedom to contract is not always absolute. The public interest requires that antenuptial agreements be executed under conditions of candor and fairness. As stated in *Del Vecchio*:

The relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

143 So.2d 17, 21 (Fla. 1962).

Posner v. Posner, 257 So.2d 530, 534-35 (Fla. 1972).

The Florida Supreme Court in 1987 said:

... the fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement. The critical test in determining the validity of marital agreements is whether there was fraud or overreaching on one side, or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the marital property and income of the parties at the time the agreement was reached. A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. There may be a desire to leave the marriage for reasons unrelated to the parties' fiscal position. If an agreement that is unreasonable is freely entered into, it is enforceable. Courts, however, must recognize that parties to a marriage are not dealing at arm's length, and, consequently, trial

judges must carefully examine the circumstances to determine the validity of these agreements. *Casto v. Casto*, 508 So.2d 330, 334 (Fla. 1987).

The Iowa Supreme Court in 1996 held that a prenuptial contract was enforceable.

Our liberal test of substantive fairness combined with the requirement of a knowing and voluntary waiver strikes a proper balance between the two competing interests at stake. First we are sensitive to the traditional desire to protect the party waiving valuable property rights from doing so without a full knowledge and understanding of the import of his or her actions. On the other hand, we must respect the right of competent persons to contract as they wish. Under the test stated above, Iowa courts will not be called upon to judge the moral fairness of the agreement and in doing so, assume the role of guardian for one of the parties.

In re Marriage of Spiegel, 553 N.W.2d 309, 316 (Iowa 1996).

And in February 2003, the Mississippi Supreme Court held:

The chancellor also acknowledged that Julie's estate is smaller than Ray's and that she gave up her rights to alimony in the agreement. [footnote omitted] However, the chancellor determined that Julie freely negotiated the agreement, and the chancery court would not relieve her of the obligation even if it was a bad bargain. The claim that the estates of the parties are so disparate that it questions fundamental fairness is of no consequence. An antenuptial agreement is as enforceable as any other contract in Mississippi. *Smith*, 656 So.2d at 1147. Of course, there must be fairness in the execution and full disclosure in an antenuptial agreement in Mississippi. *Id.* Both Julie and Ray signed a valid agreement. Had the tables been turned and Julie's estate increased in value while Ray's estate decreased in value from the time of the agreement, Julie would presumably want this Court to uphold the agreement to her benefit. The parties made this agreement to protect their assets. The fact that over time one party had the fortune of increasing their assets is not a reason to abolish or invalidate the agreement. At the time the agreement was made the parties wanted to protect premarital and inheritance assets, the agreement has done exactly what it was intended to do. All contracts involve some type of risk; this agreement was no different.

Mabus v. Mabus, 890 So.2d 806, 821, ¶ 64 (Miss., 2003).

Division of Marital Assets at Divorce

All property acquired during a marriage is known as “marital assets” or “marital property”. Such property includes both tangible and intangible assets. Tangible assets include a house, automobile(s), books, tools, etc. Intangible assets include the money in financial accounts in the name of one or both spouses (e.g., bank accounts, mutual funds, stocks, bonds, annuities, retirement pensions, etc.).

Incidentally, inheritances and gifts from anyone other than the spouse, and received during the marriage, are initially separate property, *not* marital property. However, if such initially separate property is deposited into an account that also contains marital property (e.g., salary earned during the marriage), then that separate property has been *commingled* with marital property and the law treats the initially separate property as a gift to the marriage, which makes it marital property. Therefore, to maintain this separate property, gifts and inheritances should be deposited in a

personal bank account or mutual fund account that both: (a) is in the name of the beneficiary alone (not a joint account) and (b) contains no marital assets.

In a few states (known in law as “community property” states), each spouse owns exactly half of the marital assets. At divorce, the assets are divided so that each ex-spouse receives half.

In most states, a judge follows principles of equity in dividing the assets acquired during marriage, according to a statute that has a long list of issues to consider. In practice, the judge nearly always awards *approximately half* of the marital assets to each ex-spouse. “Approximately half” means that a division that is more unequal than 60%/40% is rare.

Keeping this law in mind, a valid, legally enforceable prenuptial agreement in many states may be *unlikely* to significantly alter the fact that each ex-spouse will receive approximately half of the assets earned or accumulated during the marriage.

Different Types of Pre- and Post-Nuptial Contracts

The observations in this paragraph may make it easier to understand old cases. There are three distinct types of postnuptial contracts in the USA:

1. contracts that assign property at the *death* of one spouse, thus formally waiving the right of the surviving spouse to take property under a will or under a statute specifying inheritance.
2. separation agreements that settle divorce litigation and avoid a trial, by specifying a division of marital assets, child custody, alimony payments, etc. Separation agreements are often included in (i.e., merged into) the divorce court’s final order. Separation agreements are technically a species of postnuptial contract, but separation agreements do not violate public policy about “encouraging divorce”, because the marriage had already disintegrated when a separation agreement was negotiated and signed.
3. contracts that attempt to affect rights at a future *divorce*:
 - limit or waive alimony at a future divorce, *or*
 - make part of the assets accumulated during the marriage into separate property.

Despite the general rule in most states in the USA that postnuptial contracts are not valid, courts in many states routinely enforced the first two types of postnuptial contracts, and courts in most states routinely voided the third type of postnuptial contract during the 20th Century, without clearly distinguishing amongst the three different types of postnuptial contracts. Further, the first and third types of postnuptial contracts are also found in prenuptial contracts.

no judicial intervention in intact marriage

A fourth type of pre- or post-nuptial contract is possible: one which specifies the duties, responsibilities, obligations, etc. of each spouse *during* the marriage. A prominent sociologist¹² has advocated this type of contract.

A respected legal treatise on family law in the USA suggests that judges may be unwilling to enforce such contracts because of “the traditional reluctance of the courts to adjudicate disputes arising in an unbroken family.”¹³ There are remarkably few reported appellate court opinions that clearly state the rule that a court will not intervene in an intact marriage, but my research has found:

- *Miller v. Miller*, 42 N.W. 641, 642 (Iowa 1889) (“... judicial inquiry into matters of that character, between husband and wife, would be fraught with irreparable mischief, and forbidden by sound considerations of public policy. [¶] ... matters pertaining so directly and exclusively to the home, ... are not to become matters of public concern or inquiry.”);
- *Graham v. Graham*, 33 F.Supp. 936, 939 (D.Mich. 1940) (“There is no reason, of course, why the wife cannot voluntarily pay her husband a monthly sum or the husband by mutual understanding quit his job and travel with his wife. The objection is to putting such conduct into a binding contract, tying the parties' hands in the future and inviting controversy and litigation between them.”);
- *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (“The living standards of a family are a matter of concern to the household, and not for the courts to determine, Public policy requires such a holding.”);
- *Austin v. Austin*, 124 N.Y.S.2d 900, 902 (N.Y.A.D. 1953) (“Instead of litigating the issues between them in court at the cost of time, expense and harassment to both, the parties, still living together as man and wife, should recall the solemn vows and promises mutually made and amicably compose relatively trivial differences.”);
- *Kilgrow v. Kilgrow*, 107 So.2d 885, 889 (Ala. 1959) (“... intervention [by a court of equity], rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire.”).

I suggest that this rule is best justified by constitutional privacy: the government, including courts, will not intrude in an intact marriage. Disputes arising within the marriage would best be resolved by the parties themselves, *not* a judge. If the parties desire assistance in resolving their disputes, they can seek advice from a psychologist, clergy, mediator, or anyone else whom they respect. Litigation is slow, expensive, adversarial, and ruins relationships — all reasons *not* to

¹² Lenore J. Weitzman, *THE MARRIAGE CONTRACT*, 536 pp., The Free Press (1981).

¹³ Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 1.9, p. 61 of Vol. 1, West Publishing (second edition, 1987). See also, anonymous, “Litigation Between Husband and Wife,” 79 *HARVARD LAW REVIEW* 1650 (June 1966).

litigate disputes involving an intact marriage. If the parties are unable to resolve their dispute during their marriage, then they might go to divorce court, but *only* to settle financial matters and child custody, because the reason that a marriage failed is irrelevant under modern divorce statutes. Even if this fourth type of contract is not legally enforceable in court, such a prenuptial contract can still be a useful device to help people consider and resolve issues in a contemplated marriage, and such a postnuptial contract might settle some discord during the marriage.

2. Pennsylvania Law

As mentioned above, the general rule in the USA before the year 1970 was that prenuptial contracts were not enforced. And the general rule in the USA before the year 1985 was that postnuptial contracts were not enforced. Pennsylvania was a notable exception to both general rules. For that reason, I provide the following citations, in chronological order, to a few of the many cases in Pennsylvania on this topic.

- *Appeal of Burkholder*, 105 Pa. 31, 1884 WL 13024 (Pa. 1884)(postnuptial contract);
- *In re Fennell's Estate*, 56 A. 875 (Pa. 1904)(postnuptial agreement);
- *In re Singer's Estate*, 81 A. 898 (Pa. 1911)(postnuptial agreement);
- *In re Haendler's Estate*, 81 Pa.Super. 168, 1923 WL 3611 (Pa.Super. 1923)(postnuptial);
- *Makowski v. Makowski*, 62 A.2d 71, 72-73 (Pa.Super. 1948)(postnuptial agreement: “Where they desire to settle and determine their respective property rights finally and for all time it should be construed as a postnuptial agreement. Such agreements are recognized where they are reasonable and there is no concealment or coercion.”);
- *In re Emery's Estate*, 66 A.2d 262 (Pa. 1949)(upholds prenuptial agreement about property division at death);
- *In re Kaufmann's Estate*, 171 A.2d 48 (Pa. 1961)(upholds prenuptial agreement);
- *In re Gelb's Estate*, 228 A.2d 367 (Pa. 1967)(misrepresentation about assets at time prenuptial contract was signed invalidates the contract).
- *In re Hillegass' Estate*, 244 A.2d 672, 675 (Pa. 1968)(“An Antenuptial Agreement is presumptively valid and binding upon the parties thereto.”);
- *In re Ratony's Estate*, 277 A.2d 791 (Pa. 1971)(separation agreement. at 793: “... we are of the opinion that the principles applicable to antenuptial agreements, even though the consideration and the circumstances may sometimes differ slightly, are equally applicable to postnuptial agreements.” at 794: “An antenuptial or postnuptial agreement is presumed to be valid and binding upon the parties thereto and the party seeking to avoid or nullify or circumvent the agreement has, without any doubt, the burden of proving the invalidity of the agreement by clear and convincing evidence.”);

- *White v. White*, 313 A.2d 776, 779 (Pa.Super. 1973)(“This Court has held that a postnuptial agreement, if supported by adequate consideration and if full disclosure of the assets of the parties are disclosed prior to execution, and if there be no fraud, coercion or unlawful purpose in the execution, may be fully enforced. There is no public policy or legal reason why an adult spouse may not, under the proper circumstances, waive her right to future support. [citations omitted]”);
- *Kay v. Kay*, 334 A.2d 585, 587 (Pa. 1975)(“Such contracts are also not void as against public policy where the agreement is not conducive to divorce. [citations omitted] Here, the obligations undertaken are not conditioned on the grant of a decree of divorce and the agreement specifically allows the appellant to contest any divorce prosecuted by the appellee. Clearly, by its own terms, the agreement does not impel either party to seek a divorce.”);
- *McGannon v. McGannon*, 359 A.2d 431, 433 (Pa.Super. 1976)(“... the separation agreement herein was clearly supported by consideration. As the previously quoted language from *Ratony Estate, supra*, points out, the promises exchanged by the parties are sufficient, of themselves, to make the agreement legally binding. Here, both parties bargained for complete personal and economic freedom from one another.”);
- *In re Kester's Estate*, 405 A.2d 1244 (Pa. 1979);
- *Wolfe v. Wolfe*, 491 A.2d 281 (Pa.Super. 1985)(Parties signed postnuptial contract in 1979; the following year the divorce statute in Pennsylvania was rewritten. The court held that the postnuptial contract was completely valid, even where the contract waived rights that the wife did not have in 1979, but would have had under the new statute.)
- *Laub v. Laub*, 505 A.2d 290, 293 (Pa.Super. 1986)(“The fact that the instant case involved a pre-marital agreement rather than a post-nuptial agreement is of no material consequence. the parties gave up any and all rights to alimony and support.”);
- *Geyer v. Geyer*, 533 A.2d 423 (Pa. 1987)(Plurality of Pennsylvania Supreme Court justices issued a somewhat confusing opinion on the validity of a prenuptial contract. Part of *Geyer* was clarified three years later in *Simeone*. Part of *Geyer* required a judge to consider whether the terms of a prenuptial agreement the “reasonable” at the time the agreement was signed – a requirement overturned in *Simeone*. The opinions in *Geyer* are now only of historical interest.)
- *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990)(landmark case quoted below, prenuptial agreement waived alimony *pendente lite*);
- *Laudig v. Laudig*, 624 A.2d 651, 653 (Pa.Super. 1993)(“The determination of marital property rights through prenuptial, post-nuptial and settlement agreements has long been permitted, and even encouraged. [citations omitted]”);
- *In re Estate of Hess*, 624 A.2d 1073 (Pa.Super. 1993);
- *Hertzog v. Hertzog*, 1995 WL 847617, 25 Pa. D. & C.4th 214 (Pa.Com.Pl. 1995)(separation agreement waived both alimony and alimony *pendente lite*);
- *Musko v. Musko*, 697 A.2d 255 (Pa. 1997)(prenuptial agreement waived both alimony *pendente lite* and alimony/support after divorce);

- *Vaccarello v. Vaccarello*, 757 A.2d 909, 911 (Pa. 2000)(Explains that “a separation agreement terminates by a subsequent reconciliation of the parties.” *In re Ray’s Estate*, 156 A.2d 64 (Pa. 1931), while a postnuptial agreement expresses a desire to determine the parties property rights “finally and for all time”. *Makowski v. Makowski*, 62 A.2d 71, 72 (Pa.Super. 1948).)
- *Stoner v. Stoner*, 819 A.2d 529, 533 (Pa. 2003)(no requirement to inform party of statutory rights that they were relinquishing in a pre- or postnuptial contract).

Simeone

In *Simeone*, the Pennsylvania Supreme Court in 1990 made a number of important rulings and explained why broad freedom of contract was permitted in a prenuptial contract. First, we consider that court’s reasoning about stereotyped gender roles in this landmark case:

... there is need for a reexamination of the foundations upon which *Geyer* and earlier decisions rested, and a need for clarification of the standards by which the validity of prenuptial agreements will be judged.

There is no longer validity in the implicit presumption that supplied the basis for *Geyer* and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

Accordingly, the law has advanced to recognize the equal status of men and women in our society. See, e.g., Pa. Const. art. 1, 28 (constitutional prohibition of sex discrimination in laws of the Commonwealth). Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. See *Geyer*, 516 Pa. at 509-14, 533 A.2d at 431-33 (dissenting opinion of Mr. Chief Justice Nix setting forth detailed history of case law evidencing a shift away from the former paternalistic approach of protecting women towards a newer approach of equal treatment). It would be inconsistent, therefore, to perpetuate the standards governing prenuptial agreements that were described in *Geyer* and similar decisions, as these reflected a paternalistic approach that is now insupportable.

Simeone, 581 A.2d at 165.

The long¹⁴ dissenting opinion of Chief Justice Nix in *Geyer* says, in part:

In my view it is time that we apply the traditional rules of contract to these agreements and therefore not only discard the consideration of the adequacy of the agreement but also recognize that the traditional arm’s length bargaining principle of contract law is diametrically opposed to the disclosure requirement. These agreements are nothing more than contracts and should be treated as such.

....

¹⁴ The reader who is in a hurry can skip to page 25 of this essay, the end of this dissent in *Geyer*.

I.

The law relating to antenuptial agreements initially developed at a time when the societal norm was a marriage in which the husband had a duty to provide the economic mainstay of the family while the wife was usually relegated to the management of the home and the raising of the children. Upon the death of the husband, the surviving wife traditionally was dependent upon the assets which were left by her husband for her maintenance and support. Courts, reflecting the state interest in the protection of widows from public welfare, predicated the validity of antenuptial agreements upon the adequacy of the provision made for "... the wife's future security and financial protection...." *Barnhart v. Barnhart*, 376 Pa. 44, 53, 101 A.2d 904, 908 (1954).

This protective role for the future well-being of the surviving widow caused courts to proceed upon the implicit "... realization that between persons in the premarital state there is a mystical, confidential relationship which anesthetizes the senses of the female partner." *Gamble, The Antenuptial Contract*, 26 U.Miami L.Rev. 692, 719 (1971-72). The court intervened as the protector of the "weaker" female and required the husband to make a full disclosure of his assets in view of such a "confidential relationship." *Id.* at 720. Consistent with this view, this Court held: "The validity of antenuptial agreements was dependent upon the presence of one of two factors: (a) a reasonable provision for the wife, or (b) in the absence of such provision, a full and fair disclosure to the wife of the husband's worth." *In re Flannery's Estate*, 315 Pa. 576, 580, 173 A. 303, 304 (1934).

The solicitous concern for the financial security of the surviving widow was evident from the language of the earlier decisions.

... [A] duty arises having no place in the ordinary contractual relationship to be frank and unreserved in the disclosure of all circumstances materially bearing upon the contemplated agreement. While such an agreement will not be invalidated by reason of the mere fact that the wife does not receive as much as she would be legally entitled to receive in the absence of the agreement, since the only purpose of such contracts is to change the provision he makes for her, it must be taken to be well settled that where no provision is made for the wife, or the provision made for her is unreasonably disproportionate to the then means of the intended husband, it raises a presumption of designed concealment and throws the burden on those alleging the validity of the agreement to show that it was fairly made: [citations omitted] ... 'The true test of the adequacy of the consideration in an antenuptial agreement ... is whether the provision for the intended wife is sufficient to enable her to live comfortably after [the husband's] death, in substantially the same way as, considering all the circumstances, she had previously lived.' (footnote omitted) (emphasis added) *In re Groff's Estate*, 341 Pa. 105, 110, 19 A.2d 107, 109-110 (1941).

The obvious intention of the earlier decisions was to protect the intended wife from having her financial situation eroded by a deceiving suitor. *In re Estate of Gelb*, 425 Pa. 117, 228 A.2d 367 (1967); *In re Zeigler's Estate*, 381 Pa. 436, 113 A.2d 271 (1955); *In re McClellan's Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *In re Emery's Estate*, 362 Pa. 142, 66 A.2d 262 (1949); *In re Groff's Estate, supra*; *In re Flannery's Estate, supra*. This concern is further evident in our decision in *Barnhart v. Barnhart, supra* at 53, 101 A.2d at 908:

In most cases of antenuptial agreements the parties to the contract are ordinarily concerned with the wife's future security and financial protection,.... A majority of cases litigated are instances where the wife alleges that she has been deceived concerning the extent of her husband's resources. This Court has consistently decided that the validity of such agreements requires the utmost of good faith between the parties, a reasonable provision made, or a full and fair disclosure of worth. (citations omitted)

The clear underlying assumption reflected in these decisions was that the intended wife was in an inferior bargaining position and therefore incapable of participating in arm's length bargaining with her future husband. Thus, when an objection was made to an antenuptial agreement the court would first look to whether there was a reasonable provision made for the intended wife. *See, e.g., Kaufmann Estate*, 404 Pa. 131, 137, 171 A.2d 48, 51 (1961). While the more recent formulations have used more sexually neutral language in describing the test to be employed in determining the validity of these agreements, [FN1] *see, e.g., In re Hillegass*, 431 Pa. 144, 244 A.2d 672 (1968), most of these cases in this area relate to the *surviving widow's* right of election. [FN2]

FN1. The Act of April 8, 1833, P.L. 249 11 (repealed), specifically conferred the right to elect to take against the will on the surviving widow. Subsequently, the statute has been modified to permit either surviving spouse to have that election, 20 Pa.C.S. 2203.

FN2. *In re Estate of Cummings*, 493 Pa. 11, 425 A.2d 340 (1981) (surviving wife could not elect against decedent's will where there was an inconsequential deviation not affecting the rights of the parties or altering the agreement); *Estate of Friedman*, 483 Pa. 614, 398 A.2d 615 (1978) (widow was barred by the terms of the antenuptial agreement from claiming half of the estate where decedent's will was changed by operation of law and neither existence of oral contract nor waiver of the Dead Man's Act were shown); *In re Estate of Ratony*, 443 Pa. 454, 277 A.2d 791 (1971) (surviving wife could not elect to take against decedent's inter vivos conveyances 27 years after signing a valid postnuptial separation agreement which divided net proceeds from the sale of entireties property); *In re Estate of Rosciolo*, 434 Pa. 461, 258 A.2d 623 (1969) (widow barred from electing against decedent's will by the terms of a valid antenuptial agreement expressly precluding such election); *In re Estate of Vallish*, 431 Pa. 88, 244 A.2d 745 (1968) (surviving widow could elect to take against decedent's will where no provision was made for her in the antenuptial agreement). Although in a number of these cases the result precluded the election to take against the will, this conclusion was reached only after the Court had been satisfied that the surviving widow had been "fairly" treated.

II.

Under traditional contract law the adequacy of consideration is not a factor to be considered in determining the validity and enforceability of a contract. *Thomas v. Thomas Flexible Coupling Co.*, 353 Pa. 591, 46 A.2d 212 (1946); *Hillcrest Foundation Inc. v. McFeaters*, 332 Pa. 497, 2 A.2d 775 (1939); see generally 1 S. Williston on Contracts, 115 (3d Ed. 1957). It is also true that a requirement of "full and fair" disclosure is at odds with the arm's length bargaining concept which is accepted under traditional contract law. *Brown v. Hall*, 495 Pa. 635, 435 A.2d 859 (1981); *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412 (1981); *Young v. Kaye*, 443 Pa. 335, 279 A.2d 759 (1971); *Carrier v. William Penn Broadcasting Co.*, 426 Pa. 427, 233 A.2d 519 (1967). As noted, the doctrine of full and fair disclosure originated at a time when it was assumed that the woman was necessarily in an inferior bargaining position and required solicitous concern. For this reason the law also provided special rights to a surviving widow that were not given to the surviving widower. Act of April 8, 1833, P.L. 249, 11 (repealed). It therefore followed that enhanced scrutiny was properly given to any contractual arrangement whereby the surviving wife may compromise that protection which the law had afforded.

The societal changes that have occurred during the second half of this century warrant reconsideration of the principles that initially governed these antenuptial agreements designed to determine the intended wife's share to be given in the event of the prospective groom's death. The wife is no longer necessarily the homemaker and the husband the breadwinner. Quite frequently both spouses are wage earners and there are instances where the wife's income or earning capacity exceeds that of the husband. Although, unfortunately, we have as yet to reach sexual equality in the market place, there are compelling forces moving in that direction and hopefully the objective will be obtained in the near future. Additionally, there is now a strong public policy of constitutional dimension in this Commonwealth prohibiting any sexual discrimination in our laws. Pa. Const. art. 1, 28; *DiFlorido v. DiFlorido*, 459 Pa. 641, 650-51, 331 A.2d 174, 179 (1975); *Henderson v. Henderson*, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974). That policy has already impacted upon the law insofar as it has occasioned a change in the former provision that provided for the widow's election to take against the will, which now is the election of a spouse regardless of sex. 20 Pa.C.S. 2203. These sociological changes have brought about many adjustments in former common law concepts. See, e.g., *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977) (plurality opinion) ("tender years doctrine" employed in child custody cases is offensive to constitutional principle of equality of the sexes); *Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975) (doctrine of "coverture" requiring presumption that wife who commits crimes in husband's presence was coerced by husband discarded); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974) (support of children is equal responsibility of both mother and father); Married Women's Property Act, Act of July 17, 1957, P.L. 969, No. 417, 1, 48 P.S. 32.1 (repealed 1985) (allowing express contracts between husband and wife and permitting married women to own property).

The prior stereotyped concept of individuals which presumed gender inferiority has given way to constitutional mandate and public policy which require gender neutrality. I would be the first to acknowledge that we have yet to achieve the stated goal of gender neutrality. Equally regrettable is that

there is still a significant element in our society who appear to be determined to perpetuate former discriminatory practices against the female sex. However, we do not serve the cause of true equality by creating legal fictions, even when those fictions are designed to protect against some of these inequities. Moreover, I am not satisfied that the suggested scheme would serve the purpose that Mr. Justice McDermott [author of the Opinion of the Court] envisions or that the need perceived by him actually exists.

As to the latter, antenuptial agreements are normally employed by more sophisticated parties who are well aware of the effect of such an agreement. These are individuals who, sometimes as a result of prior marriages or other relationships, acquired certain property and have definite plans for its disposition after their death--plans which they do not want interfered with as a result of the new relationship. The facts of this case provide the clearest example of parties who were, in fact, aware that their impending marriage would affect their rights in the subsequent disposition of their respective property and for that reason entered into the agreement to effectuate their plans for the disposition of the property in question.

It is quite true that there is a strong policy against one spouse attempting to disinherit the other spouse after that relationship has soured. This, of course, is the reason that the surviving spouse has been given the right to elect to take against a will providing for a testamentary disposition less favorable than that provided under the intestate laws. However, it has never been suggested that the surviving spouse cannot agree to accept a share less than the statutory provision nor is it against public policy for parties to an impending marriage to make such a condition for entering into that marriage. Indeed, the Opinion Announcing the Judgment of the Court ignores that in this very case the antenuptial agreement was initiated to satisfy the prospective wife who otherwise would have been reluctant to enter into that relationship. The purposes of such antenuptial agreements are unquestionably proper and it is the duty of courts to protect those commitments. The only legitimate issue raised in this appeal was whether or not the alleged breach of the agreement was in fact a material breach so as to nullify the agreement. In resolving this question clearly the normal rules of contract would adequately protect all the parties involved. [footnote omitted] Unfortunately, the Opinion Announcing the Judgment of the Court failed to address that question.

In re Estate of Geyer, 533 A.2d 423, 431-433 (Pa. 1987)(Nix, C.J., dissenting);
cited with approval in *Simeone*, 581 A.2d at 165 (Pa. 1990).

In *Simeone*, the Pennsylvania Supreme Court made an important observation about the importance of courts not interfering with the right of people to make their own choices in contracts.

We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what *they* regard as an acceptable distribution scheme for their property. A court should not ignore the parties' expressed intent by proceeding to determine whether a prenuptial agreement was, in the court's view, reasonable at the time of its inception or the time of divorce. These are exactly the sorts of judicial determinations that such agreements are designed to avoid. Rare indeed is the agreement that is beyond possible challenge when reasonableness is placed at issue. Parties can routinely assert some lack of fairness relating to the inception of the agreement, thereby placing the validity of the agreement at risk. And if reasonableness at the time of divorce were to be taken into account an additional problem would arise. Virtually nonexistent is the marriage in which there has been absolutely no change in the circumstances of either spouse during the course of the marriage. Every change in circumstance, foreseeable or not, and substantial or not, might be asserted as a basis for finding that an agreement is no longer reasonable.

Simeone, 581 A.2d at 166.

The Pennsylvania Supreme Court asserted that traditional contract law is wholly adequate for prenuptial agreements.

Further, *Geyer* and its predecessors embodied substantial departures from traditional rules of contract law, to the extent that they allowed consideration of the knowledge of the contracting parties and reasonableness of their bargain as factors governing whether to uphold

an agreement. Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. Consideration of other factors, such as the knowledge of the parties and the reasonableness of their bargain, is inappropriate. [citation omitted] Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. See *Geyer*, 516 Pa. at 508, 533 A.2d at 431 ("These agreements are nothing more than contracts and should be treated as such." (Nix, C.J. dissenting)). Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.

Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. See *Standard Venetian Blind Co. v. American Empire Insurance Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983) (failure to read a contract does not warrant avoidance or nullification of its provisions); *Estate of Brant*, 463 Pa. 230, 235, 344 A.2d 806, 809 (1975); *Bollinger v. Central Pennsylvania Quarry Stripping & Construction Co.*, 425 Pa. 430, 432, 229 A.2d 741, 742 (1967) ("Once a person enters into a written agreement he builds around himself a stone wall, from which he cannot escape by merely asserting he had not understood what he was signing."); *Montgomery v. Levy*, 406 Pa. 547, 550, 177 A.2d 448, 450 (1962) (one is legally bound to know the terms of the contract entered). Based upon these principles, the terms of the present prenuptial agreement must be regarded as binding, without regard to whether the terms were fully understood by appellant. *Ignorantia non excusat.*

Simeone, 581 A.2d at 165-166.

The Pennsylvania Supreme Court held that there are two requirements for a valid prenuptial contract:

1. the usual rules of contract law about invalidating contracts for fraud, misrepresentation, or duress. 581 A.2d at 165.
2. "a full and fair disclosure of the financial positions of the parties is required." The court justified this required disclosure because the parties "do not quite deal at arm's length", but instead "stand in a relation of mutual confidence and trust". 581 A.2d at 167.

Many courts in the USA evaluate the fairness of a prenuptial agreement at the time the agreement was signed and refuse to enforce agreements that are unfair. Some divorce courts in the USA *also* evaluate the fairness of a prenuptial agreement at the time of divorce and refuse to enforce terms that are unfair. In *Simeone*, the Pennsylvania Supreme Court did neither:

Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. *Geyer* and earlier decisions required that, at least where there had been an inadequate disclosure made by the parties, the bargain must have been reasonable at its inception. See *Geyer*, 516 Pa. at 503, 533 A.2d at 428. Some have even suggested that prenuptial agreements should be examined with regard to whether their terms remain reasonable at the time of dissolution of the parties' marriage.

By invoking inquiries into reasonableness, however, the functioning and reliability of prenuptial agreements is severely undermined. Parties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced. If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed

from later trying to evade its terms by asserting that it was not in fact reasonable. Pertinently, the present agreement contained a clause reciting that "each of the parties considers this agreement fair, just and reasonable...."

Simeone, 581 A.2d at 166.

Texas has similar law.¹⁵ Fairness is a matter for the parties to the contract to decide – no one should sign a contract that is unfair to him/her when they have an opportunity to avoid alleged unfairness during negotiations and revisions to the contract. And, *after* receiving the benefit of his/her bargain, a party should not complain about alleged unfairness.

The Pennsylvania Supreme Court also mentioned several items that are *not* requirements for a valid prenuptial contract:

1. A party need not read and understand the contract before signing. 581 A.2d at 165-66.
2. A party need not have the advice of an attorney: "To impose a *per se* requirement that parties entering a prenuptial agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties' freedom to enter contracts." 581 A.2d at 166.
3. A valid premarital contract need not consider every foreseeable contingency (e.g. "... everyone 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, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.") 581 A.2d at 166.

Such rules might lead to harsh results that might seem unfair, particularly in situations in which one party is less well educated (e.g., a housewife with a high school diploma as her highest educational credential) and the other party is not only better educated, but also sophisticated about business or law. In contracts between a consumer and a business, state statutes often provide considerable protection for the consumer. However, two parties who are negotiating a prenuptial agreement really are negotiating as equals, unlike the situation in which a consumer agrees to an adhesion contract presented by a corporation without any negotiation of terms in the contract. Therefore, in my opinion, *Simeone* is correct to prevent a judge from paternalistically interfering in attempts of people to design a marriage that they want to live, because one of the parties agreed to what the judge believes is a bad bargain.

¹⁵ *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex.App. 1989) ("Parties should be free to execute agreements as they see fit and whether they are 'fair' is not material to their validity. We find the agreement is valid and enforceable."), *writ of appeal denied* (1990).

In summary, I like the law expressed in *Simeone*. When faced with the likelihood of a mettlesome and paternalistic judge in divorce court who imposes his/her values on parties in the guise of protecting the allegedly weaker party, I favor allowing freedom of contract and holding people to their written contractual obligations. Freedom of contract allows people to design *unconventional* relationships and have divorce courts respect and enforce the choices made in a prenuptial contract, without having the law impose a one-size-fits-all version of marital obligations on the parties.

3. Reasons to Write a Prenuptial Agreement

Because postnuptial contracts may not be enforceable, people with substantial wealth to protect often enter into prenuptial agreements with their prospective spouse a few weeks *before* they are married, because that time was their final opportunity to make arrangements to avoid the harsh distribution of property by a divorce court.

People who are not attorneys may find the concept of a prenuptial agreement offensive. People who are contemplating marriage trust their future spouse and are anticipating a lifetime of pleasant experiences together. In such a context, contemplation of divorce is not only *unromantic*, but distinctly *unpleasant*. However, there are many good reasons to have a prenuptial agreement:

- During the mid-1990s, first marriages in the USA had a median duration of 6.6 years from marriage to separation.¹⁶ If one considers friends and colleagues who are between forty and sixty years old, many of them have been married two or more times. Therefore, the reality is that marriages are *not* forever, and that divorce is inevitable for most married people.
- One of the lessons learned from the study of law is that people change with time, and written contracts can provide protection from some adverse consequences of changed opinions, changed desires, and faulty memories.
- In the absence of a prenuptial agreement, the spouses can (and commonly do) fight over every detail of the distribution of their marital assets. Moreover, a litigated divorce with extensive discovery, many motions, attempts to settle the case, and a trial in court can easily take three to five years of anguish and agony by both parties. Such litigation can be exorbitantly expensive: the total attorney's fees for both parties often exceeds US\$ 30,000 and can exceed US\$ 150,000. Given such expensive legal fees for divorce, spending a few thousand dollars on legal advice for a prenuptial agreement can be a good investment, which saves money later

¹⁶ U.S. Census Bureau, *Number, Timing, and Duration of Marriages and Divorces 1996*, <http://www.census.gov/prod/2002pubs/p70-80.pdf> (Feb 2002).

at divorce. At the end of this section, I cite several egregious divorce cases in which the litigation continued for more than ten years.

- A prenuptial agreement may also be reasonable because of the magnitude of the transaction. After a few years of marriage involving a highly-paid professional, the marital assets (e.g., house, investments, pension and annuity funds) can easily exceed a million dollars.
- In the absence of a valid prenuptial agreement, the marital assets will be distributed according to the personal opinion of the judge who presides over the case, with guidance from state statutes and the common law. A prenuptial agreement is a way for parties to retain some control over their own affairs, and to express their own personal values, which may be unconventional. However, as mentioned above, there are limits to what can be included in a valid prenuptial agreement.

Some Divorce Cases Continue for Many Years

Finally, it is a sad fact that some divorce cases continue for *many* years. The parties to a divorce need to end a dispute and get on with their lives, instead of being locked in a perpetual feud. Anyone who has been personally involved in litigation understands the emotional turmoil of litigation, and how it intrudes into one's personal and professional life. In reading court cases, I occasionally see divorce litigation that took more than ten years from the filing of the initial complaint to the final appeal or remand that ended the case. As particularly egregious examples, consider the following divorce cases in the USA:

- *Kennedy v. Kennedy*, 406 N.E.2d 409 (Mass.App.Ct. 1980s), ... *aff'd*, 508 N.E.2d 856 (Mass. 1987)(Married in 1956, husband deserted wife in 1972 and Massachusetts court awarded wife support in 1972, case ended 15 years later.).
- *Schetter v. Hanley*, 618 So.2d 780, 781 (Fl.App. 1993) (This divorce litigation was originally filed in 1969. "These proceedings have lasted over a quarter of a century. There have been innumerable proceedings in the trial court, consuming large amounts of judicial and lawyer time, including three appeals to this court. Enough is enough! It is time to end this matter once and for all." The court file in this case filled 25 volumes.).
- *McKay v. McKay*, 1997 WL 33345042 (Mich.App. 1997)("The irony is that the litigation lasted nearly twice as long as the marriage."), *appeal denied*, 586 N.W.2d 926 (Mich. 1998).
- *Spalding v. Coulson*, 1998 WL 564054, *1-*2 (Ohio App. 1998)(Parties married in 1963, separated in 1975, more than 12 years of litigation during 1975-87, another appeal in 1998.), *cause dismissed*, 766 N.E.2d 1000 (Ohio 2002).
- *In re Marriage of Schaffer*, 81 Cal.Rptr.2d 797 (Cal.App. 1999)(Parties married in 1952, separated in 1976, divorced in 1980s, wife "managed to extend her two years of support to fifteen by a series of six post-judgment hearings for modification.").

- *Jameson v. Jameson*, 600 N.W.2d 577, 579 (S.Dak. 1999)(Twenty-year marriage, nearly thirty years of divorce litigation, including three trips to the South Dakota Supreme Court.).
- *Kittredge v. Kittredge*, 803 N.E.2d 306, 318 (Mass. 2004) (“This extremely contentious divorce proceeding has been ongoing for over twelve years....”),

If a prenuptial agreement can reduce some of this protracted litigation, then that prenuptial agreement would be very desirable.

4. General Advice About Prenuptial Agreements

A judge in a divorce court will carefully examine a prenuptial agreement before deciding whether or not to enforce the agreement. This is not the place to review the complicated law of prenuptial agreements, which depends on state law and which changes with time. However, I mention the following general rules that give the parties the maximum protection against a judge later declaring part (or all) of the prenuptial contract *unenforceable*:

- Each party to a prenuptial agreement should be represented by an attorney who is familiar with divorce law. It is *not* appropriate for one attorney to advise both parties, as that would be a conflict of interest. (It is possible for the party with the larger assets at the beginning of the marriage to pay for an attorney to represent the other party in the drafting of the prenuptial agreement, but that attorney must be loyal to the actual client, *not* loyal to the person who pays the attorney's fees.) The attorney will advise his/her client of legal rights that they are waiving in the prenuptial agreement.
- There *must* be full disclosure in writing by each party of the value of *all* of their assets and incomes at the beginning of the marriage, typically arranged as an Appendix to the prenuptial agreement.
- The contract *must* be in writing and *must* be signed by each party.
- The agreement must be fair to both parties at the time the agreement is signed. Any attempt by the party with the larger earning potential to protect all of his/her assets that are earned during the marriage may be voided by a judge in a divorce court. Divorce courts are especially protective of the “weaker” party.
- The agreement should be negotiated over a period of weeks or months, and *not* presented to the other party on the day before the wedding is scheduled. There must be neither duress, undue influence, nor coercion in getting the other party to sign the prenuptial agreement.

I emphasize that a court *might* enforce a prenuptial agreement if some of the above “rules” are not satisfied. However, the rules requiring a full disclosure and a written, signed document are generally absolute requirements.

I have written a separate essay, which is posted at <http://www.rbs2.com/dcontract2.pdf>, that mentions some provocative ideas on how clauses from commercial contract law might be used in prenuptial and postnuptial agreements. That separate essay mentions how a prenuptial agreement might prevent the party with the larger income at divorce from paying the other party’s attorney’s fees, how one might use an integration clause in a prenuptial agreement to reduce whining during divorce litigation, and several other possibilities.

Problems With Prenuptial Contracts

Prenuptial agreements are not perfect. The parties could sign a prenuptial agreement that is presumed valid in state X at a particular time. (I say “presumedly”, because the only way to test for validity is to have a court consider enforcing the agreement. Such a test for a prenuptial agreement can only come at divorce.) Then the parties divorce at a later time. There are three foreseeable problems:

1. The law in state X may change, so that part of the prenuptial agreement is no longer enforceable. Because the law in this area is evolving, it is not possible to predict what a legislature or court would do many years in the future. (Because the general trend in many states since about 1985 is to allow increasing amounts of freedom of contract in prenuptial agreements, the law seems more likely to become more permissive, not more restrictive.)
2. One (or both) of the parties may move to state Y, file for divorce in state Y, then find that the law in state Y is different than the law in state X, so that part of their prenuptial agreement is not enforceable in state Y.
3. Some unexpected event will occur during the marriage that changes the relationship in a way that may invalidate part of the prenuptial agreement. For example, the parties *before* marriage may intend that each will have a career and approximately the same income, then — during the marriage — one party is seriously injured, unable to work, and totally dependent on the other party for living expenses. Ordinary contract law is capable of resolving such contingencies if they are omitted from the contract. Careful thought during drafting of a contract can anticipate many potential problems, if the parties are willing to accept a long, comprehensive contract.

Despite such uncertainties, a prenuptial agreement represents the best way for the parties to a marriage to control the division of their assets at divorce.

5. Reimbursement of Educational Expenses at Divorce

In the typical case, the wife works to finance the husband's education in either medical, law, or dental school. Soon after the husband graduates, he files for divorce. The outraged [ex-]wife finds an attorney to fight to obtain a refund of "her" money for his education. (I put *her* inside quotation marks, because, while she earned the money, her income during the marriage was a marital asset, [approximately] half of which belongs to her husband.)

It is clear that *only* academic degrees that lead to enhanced earning potential can be reimbursed at divorce. If an investment banker with a large salary takes a sabbatical of a few years, and earns a doctoral degree in history, fine arts, archeology, etc., then there is no increase in earning potential. In such cases, there is little prospect of equitable reimbursement for educational expenses at divorce.

On the other hand, when the supported spouse goes from a bachelor's degree in biology to an M.D. degree, there has been perhaps a five-fold increase in earning potential. Because of this significant increase in earning potential, it would be unjust enrichment to allow the supported spouse to walk away from the marriage without some form of reimbursement to the supporting spouse who paid for at least part of the education.

In the specific context of divorces involving reimbursement of educational expenses, the parties often married immediately after graduating from high school or married during undergraduate college. Later, the supporting spouse (who has only a high school diploma or bachelor's degree) is seen as poorly educated or inarticulate by the supported spouse (who finally earns a doctoral degree). The supported spouse then discards the supporting spouse and often plans to marry a better educated person, who they met in graduate school or in a medical residency program. The fact that the supporting spouse was used and then discarded by the supported spouse is generally irrelevant in modern divorce law, in which:

1. Which party files for divorce is irrelevant to the distribution of marital assets.
2. The reason for the divorce is irrelevant to the distribution of marital assets.

Prenuptial contracts are typically used when one of the parties already has substantial property or assets. However, young people, at least one of whom is preparing for a career with well-above-average earning potential, are also candidates for prenuptial contracts. And a prenuptial contract would be particularly useful if the marriage ends before the supporting spouse is rewarded by an increased standard of living from the supported spouse's career. It is possible that a prenuptial agreement could contain a provision for the supported spouse to reimburse educational expenses contributed by the supporting spouse during the marriage.

If either (A) the prenuptial agreement makes no provision for extensive educational expenses and the parties are already married, or (B) there was no prenuptial agreement, then there is the possibility of writing a postnuptial agreement. Such agreements are enforceable only in some states. But even if the postnuptial contract is not legally binding, it might still serve as evidence at a divorce trial of the parties intentions.

Gifts from Parents of Supporting Spouse

Any money contributed by the supporting spouse's parents to the supported spouse's education should be in the form of conditional gifts, documented by a *written* contract that is signed by the donor parent(s) and the supported spouse. If the supported spouse continues to be married to the supporting spouse, then the money need not be repaid. However, divorce triggers an obligation for the supported spouse to repay the parents of the supporting spouse with interest from the date the supported spouse received the money.

More Information About Reimbursement of Educational Expenses at Divorce

I have written a 47-page essay on the subject of equitable reimbursement of educational expenses at divorce, which summarizes the applicable law in the USA, argues that the living expenses of the supported spouse should also be reimbursed as part of the cost of his/her education, and contains a critical review of a few early cases. This essay is posted at http://www.rbs2.com/ed_reimb.pdf . Because this topic is an evolving area of law, the details of when and how to order reimbursement are still uncertain.

6. Judges in Divorce Courts Are *Not* Scientists

During the divorce proceedings, each party presents a list of marital assets to be divided by the judge. Sometimes the parties can agree on one list, other times the judge must make one list from the evidence presented at trial. Such a list of marital assets is incredibly detailed, and often has three or four significant digits (e.g., a list that totals \$ 250,000 will include individual items as small as \$ 100, and the amount in financial accounts is rounded to the nearest dollar.). After this precise accounting, one might *expect* the judge also to be precise in deciding what fraction is distributed to each party. I was astounded to find in reading divorce cases that the trial judge could say, for example,

I have considered all of the statutory factors and I find that the husband is entitled to 45%, and the wife to 55%, of the marital property.
without any explanation of the source of the 45% or 55% numbers.

When I did legal research during 1994 for a divorce case in Pennsylvania, I could find *no* reported case in Pennsylvania in which the trial judge had made an accounting of the dollar amount of each statutory factor to be considered in making the equitable division of marital assets.

The trial judge simply uttered the talismanic chant “I have considered all of the statutory factors” and then presented the final numerical result (e.g., the 45% to husband), without any calculation mentioned by the trial judge to support his/her numerical result. Worse, appellate courts routinely accepted this kind of judicial declaration.

When I mentioned my horror to attorneys, they reminded me that divorce court judges have a background in liberal arts, not science, not engineering, not accounting, not economics. People in liberal arts do not make a quantitative accounting, they think in words, not numbers. My personal opinion is that such arbitrary partitioning of marital property is *not* proper. But my opinion is clearly against the vast weight of the law and the routine operation of courts. For further discussion of this topic, see my later essay, *Problems with Division of Marital Property and Alimony in the USA*, at <http://www.rbs2.com/dfault.pdf>, in the section titled “Modern Statutes Give Unpredictable Results”.

I earned a Ph.D. in physics, was a professor of electrical engineering for ten years, and I worked as an employee of, or consultant to, manufacturers for seven years, before attending law school and becoming an attorney. Any scientist or engineer who just pulled numbers “out of a hat”, without any factual support, would be considered *incompetent*, and also perhaps insane. But judges in divorce courts are neither scientists nor engineers. I believe that it is futile to argue in court for a precise numerical accounting by divorce courts — any change in law needs to come from the legislature.

If you want to avoid this kind of nonsense from judges, then make a reasonable prenuptial agreement that is likely to be accepted by a judge in a divorce court.

7. Conclusion

One of the most common types of disputes between spouses concerns money. If each spouse has an adequate source of income, such arguments can be prevented by a pre- or post-nuptial contract that agrees to establish separate financial accounts for each spouse, and specifies how the parties will contribute to joint expenses, such as their house and food. In this way, a businesslike contract may actually promote marital harmony, by removing a source of disagreement between spouses.

Similarly, at divorce the major disputes concern the custody of children and the division of property, including financial accounts. Such rancorous disputes over property, and expensive divorce litigation, may be avoided by a carefully crafted pre- or post-nuptial contract that specifies how the marital assets are to be divided at divorce.

If you need advice about the subject of this essay, I urge that you contact a attorney who is licensed to practice in your state and who is experienced in divorce law (often called “family law”). See my webpage at <http://www.rbs2.com/findatty.htm> for some hints about how to find an attorney in the USA.

This document is at **www.rbs2.com/dcontract.pdf**

My last search for cases on this topic was in August 2003.

first posted 7 Aug 2003, revised 15 Sep 2003, minor revision 12 Sep 2009

Go to my webpage at <http://www.rbs2.com/famlaw.htm> that lists my other essays about family law.

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