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Choice of Law Provisions in Prenuptial Agreements

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What is a Prenuptial Agreement?

- A prenuptial agreement or "prenup" is a contract entered into by two prospective spouses before marriage, which sets forth how financial issues will be handled in the event of divorce or death. It supersedes or modifies the default state law.

- Typically, prenups identify what property is subject to division upon divorce, determine whether spousal support will be payable upon divorce, and set forth what rights a party has if the other party predeceases him or her. However, it is also possible to have a single issue prenup (for example, a prenup that only addresses inheritances).

- A prenup does not include provisions for unborn children, such as child custody or child support.

What is a Postnuptial Agreement?

- A postnuptial agreement or "postnup" covers the same subject matter as a prenup but is entered into after a couple has already been married.

- A married couple considering a postnup will share many of the same goals and considerations as prospective spouses considering a prenup.

Legal Requirements for a Prenup

- The legal requirements for a prenup vary widely by state.
- In New York, the only requirements are that a prenup be in writing and signed by the parties before a notary. While it is not expressly required, we also always advise that both sides have counsel and that full and fair financial disclosure is exchanged by the parties.
- Virginia, Illinois, Oregon, Texas and about 20 other states only require a signed writing.
- In Florida, there is the additional requirement of having 2 witnesses sign the agreement (particularly if you have estate provisions).
- In Nevada and Pennsylvania, financial disclosure is a requirement, without which the agreement can easily be set aside. In Colorado, you must have adequate financial disclosure and both parties must have counsel.
- In California, both parties must have counsel and the agreement must be finalized and presented in final form to both parties a full 7 days before signing.

Which law will apply to a divorce?

- Laws governing divorce vary, and can do so widely, from state to state.

- The law governing a divorce is *not* the law of the state in which the couple were married or even necessarily the law of the state where the couple spent most of their marriage; rather, it is the law of the state where the couple (or even one party) live for a prescribed period before filing for divorce, such that they meet the jurisdictional requirements.

- The length of time parties need to live in a state to confer jurisdiction varies. For example, in New York, it is 1-2 years, with one exception. NY Dom Rel Law § 230

Divorce Jurisdiction in New York

- NY Dom Rel Law § 230 - You may file for divorce in New York if you meet one of these residency requirements:
  - Either you or your spouse has lived in the New York for a continuous period of at least two years immediately leading up to the date you file for divorce;
  - Both you and your spouse live in New York at the time you file for divorce and the cause for the divorce occurred in New York; or
  - Either you or your spouse has lived in New York for at least one continuous year immediately leading up to the date you file for divorce and:
    - your marriage took place in New York;
    - you and your spouse lived in New York during your marriage; or
    - the cause ("grounds") for the divorce occurred in New York.

Variations in Matrimonial Law

- A couple's rights and obligations can vary dramatically depending on where they live when one or both parties decide to dissolve their marriage.

- For example, many states, like New York, distinguish between Marital Property (property acquired during the marriage) and Separate Property (pre-marital property, gifts, and inheritance). Only Marital Property is subject to equitable distribution upon a divorce. Separate Property remains the property of the titled party. By contrast, in Connecticut, *all* property – regardless of when or how it was acquired – is subject to division by a court upon a divorce.

Example: New York v. Connecticut

- Hypo: Jane and Brian get married in a civil ceremony in New York without a prenup. They purchase a penthouse on the upper east side (Brian's parents gift him $5,000,000 for the down payment), and the parties live there for 8 years. They have 3 children during this time. Jane stops working so that she can care for the children. Brian earns $400,000/year as a trader. Most of Brian's income is spent on living expenses, but the parties save $800,000 over time. Brian's parents also make annual distributions to him from a family trust. He saves most of this in a separate account in his sole name, and over time accumulates $1,000,000. Eventually, the parties decide to move their family to Connecticut to have more space. They sell the New York penthouse and use the funds from the sale to purchase a home in Greenwich, Connecticut. Two years later, Jane files for divorce.

    - Jane and Brian are in Connecticut, so the Court there will take into account all of the parties' property while crafting a divorce settlement, including the entire value of the parties' home, their $800,000 savings, and even Brian's bank account holding the $1,000,000 in trust distributions from his parents. The Court may not divide all of this property equally, but it could, if that was determined to be the most equitable outcome.

    - Had Jane filed for divorce while the parties were still in New York, there would have been a very different outcome. Brian's trust distributions would remain his Separate Property, and assuming he kept documentation, he would also be entitled to receive back the $5,000,000 down payment that his parents gifted him for the down payment on the penthouse (his Separate Property "credit" in the home). Any appreciation on the home during the marriage would be Marital Property, as would the $800,000 savings account that was accumulated from earnings during the marriage. Only the Marital Property would be equitably divided between the parties.

Prenups and the Migratory Couple

- As more couples enter into prenuptial agreements and then continue to move throughout the United States – and even the world – the enforceability of those agreements becomes increasingly important to both clients and courts.

- Because parties are seeking predictable outcomes with their agreement, it is important to understand what will happen if either party seeks enforcement of the agreement at some future date, in some future jurisdiction. Prenups can help with reducing the uncertainty about what will happen in the event of a divorce, regardless of whether a couple relocates during their marriage.

Choice of Law Clauses

- Choice of law clauses are a critical mechanism for providing certainty as to what will happen in the event of a divorce.
- A well-drafted prenuptial agreement will include a choice of law clause that identifies the law that will be used to interpret the agreement and to govern any disputes about the validity or enforceability of that agreement. This choice of law will control even if the parties reside in a different state at the time of a divorce. The procedural rules and laws of the state which has jurisdiction over the divorce will apply to the divorce proceeding, but any substantive issues will be decided pursuant to the law selected in the choice of law clause.

Choice of Law v. Forum Selection

- What is the difference between a choice of law clause and forum selection clause?
  - A choice of law clause is different than a forum selection clause. A choice of law clause determines what substantive law will apply to the parties. A forum selection clause dictates where an action will be litigated.
  - Forum selection clauses can be included in prenuptial agreements, but their application is limited as courts will not accept a divorce matter over which they do not have jurisdiction, even if a prenuptial agreement specifies that the action should be brought in a certain forum.

Choice of Law: A Two-Part Test

- When drafting a choice of law clause, be mindful of enforceability. For a contractual choice of law clause to be enforceable, it must pass two tests:
  - The Substantial Relationship Test:
    - First, a court will consider whether a substantial relationship existed between the state law identified in the contract and the parties or subject matter of the prenuptial agreement at the time the agreement was entered into.
  - The Public Policy Test:
    - Then, if a court is satisfied there is a substantial relationship to the chosen state law, the court will consider whether the application of the chosen law is contrary to "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." Restatement (2d), section187(2)(b).

Substantial Relationship Test

- For a contractual choice of law clause to be enforceable, a court will look first to find a substantial relationship between the state law identified in the contract and the parties or subject matter of the prenuptial agreement.

- Often this test is satisfied because the residence of both parties is in the state of the chosen law at the time of the signing, making it the natural choice. For example, a New York court enforced a Massachusetts choice of law clause where the prenup was signed when both parties resided in Massachusetts. *See, Lupien v. Lupien*, 891 N.Y.S.2d. 785 (App. Div. 2009) (attached)

Substantial Relationship – Other Factors

- In less straightforward situations, other factors (often in combination) may be sufficient to establish a substantial relationship. These factors include:
    - The residence of one party;
    - The location of real property or business interests subject to the agreement;
    - The place where the agreement was executed; and
    - The location of the marriage ceremony.

Substantial Relationship Test Hypo

- Hypo: Lucy and Hunter are engaged. Lucy lives in Connecticut. She is an artist and collects income from a rental property she owns in New York. Hunter lives in New York. He is a shoe designer and has a store in Soho. He plans to move to Connecticut in the next few years once the business is more firmly established. The wedding will be in Connecticut at Lucy's family home. They decide to enter into a prenuptial agreement and the agreement includes a New York choice of law clause. They get married and Hunter moves to Connecticut a year later. After 10 years of marriage, Hunter files for divorce. Will a Connecticut court enforce the New York choice of law clause?

Substantial Relationship Test Applied

- In the case of *Elger v. Elger*, a Connecticut court enforced a New York choice of law clause in a prenuptial agreement despite both one party being a resident of and the wedding itself taking place in Connecticut. (238 Conn.839 (Conn. 1996))(attached). In *Elger*, the other party was a resident of New York at the time of the signing and both parties had business interests in New York. Both New York and Connecticut likely would have met the Substantial Relationship Test.
- The more factors that point to a connection with the state of the chosen law, the easier it will be to convince a court that the chosen state law is reasonable and appropriate, and that a substantial relationship exists.

New York Code: RV32109-62322

Public Policy Test

- Once a court is convinced of the substantial relationship to the chosen state law, the court will consider whether the application of the chosen law is contrary to "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." See Restatement (2d), section187(2)(b)

- The other state in question is typically the forum state. If the outcome under the chosen law is contrary to a "fundamental policy" of the forum state, the choice of law clause may not be enforced.

Public Policy Test Applied

- In practice, it is exceedingly rare for a court to discard an otherwise valid choice of law clause on public policy grounds.
- For example, in Florida, the public policy interest must be "of paramount importance to warrant application of Florida law," where a prenup dictates another state's law should apply.
  - In *Nicole v. Nicole-Souri (In re Estate of Nicole Santos)*, 648 So.2d 277, 281-83 (Fla. Dist. Ct. App. 1995) (attached), a Florida court reviewing a Puerto Rican prenup determined that the proper law to apply to the agreement was the law of Puerto Rico. While the prenup itself was held to be valid, the waiver of Florida homestead protection for the parties' residence in Florida was found to be unenforceable because it violated a fundamental Florida public policy. The Court found that "A citizen's right to homestead protection under [Florida's] constitution is considered a paramount rule of public policy that would justify our departure from the otherwise applicable rule of comity . . . Protection of homestead from alienation cannot be waived by contract or otherwise."

Public Policy Test Hypo

- Hypo: Jack and Katherine get engaged and execute a prenuptial agreement before their wedding. They live and work in New Jersey and plan to get married there, so they choose New Jersey law to govern the agreement. After the wedding, they try to start a family and end up doing IVF. They end up with four healthy embryos. They do not proceed with implanting any embryos and end up relocating to Arizona for Katherine's job. Shortly thereafter, Katherine files for divorce. As part of the divorce, the parties have to decide what to do with their frozen embryos. Katherine wants to donate the embryos, while Jack wants to destroy them.
  - The Arizona Court sees the New Jersey choice of law clause in the agreement. The Substantial Relationship Test is clearly satisfied as the parties had many connections with New Jersey, but the Public Policy Test is more complicated. Arizona has a law that requires judges to award embryos to the party most likely to give them the chance to develop to birth. New Jersey, on the other hand, prioritizes a party's right to decide not to become a parent. Will the Arizona court decide that applying New Jersey law would violate an important Arizona public policy in this case?

Procedural Formalities

- Assuming both tests are satisfied, the parties to the agreement must also strictly abide by the procedural formalities for execution of the agreement in the chosen state.

- For example, in New York, a prenup must be in writing and notarized in order to be enforceable. The very same procedure will not suffice if the parties choose California law, where parties must not only be represented by counsel but also observe a seven-day waiting period between finalizing and signing the prenup. See California Family Code section 1615(c) (attached). Connecticut, on the other hand, does not require a notary, but allows a lawyer to sign as a "Commissioner of the Superior Court."

Enforceability Standard & the "Second Look"

- When a party challenges a prenuptial agreement, the chosen state's substantive law will come to the forefront, and the forum court will apply the chosen law to determine whether an agreement should be set aside. For example, in New York, an agreement may be set aside if it was procured by overreaching, fraud or duress, or if it is unconscionable. So, if a court in Nevada is presented with a New York prenup which has a valid choice of law clause designating New York law as the law of the contract, the Nevada court will only be able consider the legal arguments that exist under New York's legal regime for setting aside the agreement. There may be additional legal arguments under Nevada law that could be useful for the parties, but these claims will not hold water, because New York law is the law of the contract.

- However, even when an agreement contains a valid choice of law provision and meets the procedural formalities of execution of the chosen state, some states (including Massachusetts, Kentucky, and Connecticut), allow for a "Second Look" upon divorce, which equates to a renewed test for unconscionability under the forum state's law. See, e.g., *Dematteo v. Dematteo*, 436 Mass. 18 (Mass. 2002)(attached); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990)(attached).

The "Second Look"

- In states that utilize a "Second Look," the forum state will consider whether enforcing the agreement would result in an unconscionable outcome under that state's law, which would be contrary to the state's public policy. This creates an additional vulnerability and is one of the reasons it is almost never a good idea to have a completely one-sided prenuptial agreement. Because of the variations in state law, it is important that no matter what state's law you have chosen, the agreement itself be fair and reasonable (and therefore, unlikely to be deemed unconscionable under any state's definition), so that even if a forum state applies a "Second Look" analysis, the agreement will by upheld. The definition of "unconscionable" varies by state. Under New York law, "[a]n unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience…" *McKenna v. McKenna*, 121 A.D.3d 626, 627 (2014) quoting *Morad v. Morad*, 27 A.D.3d 626, 627 (2006)(attached).

- The agreement does not need to mirror the default state law or put the parties on an equal footing, but it should not be completely one-sided and there should be some benefit for each party. An agreement that is fair and reasonable from each party's perspective is unlikely to be deemed unconscionable during a "Second Look."

Waiver of Spousal Support

- The concept of a "Second Look" also applies to spousal support waivers, and in practice, this is the area most vulnerable to adjustment by a forum state's court. Some states will not enforce a complete waiver; other states allow waivers only under certain conditions.

- For example, in New Mexico, a prenup may not adversely affect the right of a child *or spouse* to support. See N.M. Stat. section 40-3A-4(B)(emphasis added)(attached)

- Louisiana prohibits the waiver of interim support as contrary to public policy. See *Hall v. Hall*, 4 So.3d 254 (La. Ct. App. 2009)(attached)

- An Iowa court may award spousal support to a widow, even in the face of an express provision in a prenup waiving that right. See *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998)(attached) *see also* Iowa Code § 596.5(2) ("The right of a spouse or child to support shall not be adversely affected by a premarital agreement.") (attached)

Summary

- A duly executed prenuptial agreement which includes a choice of law clause will likely be enforced so long as the parties have a reasonable basis to choose that law or other sufficient connection to the state of the chosen law.

- Best practice is not to drive an unfair bargain or execute an agreement under conditions that a court might seek to overturn on public policy grounds. If you are including any novel or "extreme" provisions, consider reviewing the law of any states where the parties anticipate they may someday reside, to ensure you will not run afoul of that state's unconscionability rule or public policies.

Questions?

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DEMATTEO v. DEMATTEO

Supreme Judicial Court of Massachusetts,Plymouth.

M. Joseph DEMATTEO v. Susan J. DEMATTEO.

Decided: February 08, 2002

Present (Sitting at Salem): MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ. Jacob M. Atwood, Boston (Mark T. Smith & David E. Cherny with him) for the plaintiff.
Peter F. Zupcofska, Boston (Fiona S. Trevelyan with him) for the defendant.
At issue in this appeal is the validity of a judgment in the Probate and Family Court that an antenuptial agreement is not enforceable. The judge concluded that the agreement was not fair and reasonable either at the time it was executed or when the husband sought its enforcement on commencing a divorce action nearly eight years after the parties were married. The husband appealed and we granted his application for direct appellate review. On appeal he challenges the judge's order as to the enforceability of the antenuptial agreement and her order that he pay the wife's attorney's fees.[1] We hold that the evidence did not warrant a conclusion that the antenuptial agreement is unenforceable, and reverse so much of the judgment to that effect. We affirm so much of the judgment as orders the husband to pay the wife's attorney's fees, but remand the case to the Probate and Family Court for a determination of the amount to be paid.

1. Factual background. The circumstances in which the parties' antenuptial agreement was negotiated and executed were as follows.[2] M. Joseph DeMatteo (husband) and Susan J. DeMatteo (wife) were married on March 23, 1990. At the time the husband was forty-seven years old, and the wife was forty-one years old. They had known each other as adolescents and had dated occasionally in the 1970's. In 1987, they renewed their earlier acquaintance. In 1989, the husband proposed marriage. He did so on condition that the wife sign an antenuptial agreement. She agreed to do so.

This was to be the husband's first marriage, and the wife's second. The wife had a daughter, born in 1983, from her first marriage. Until shortly before her second marriage in 1990, the wife lived with her daughter in a rented two-bedroom house in Dedham. She worked as a secretary earning approximately $25,000 a year, owned no real property, and had few assets. In contrast, the husband was a wealthy individual. He had a substantial ownership interest in his family's construction business; this and other real estate holdings and investments established him as a man of significant net worth, described more fully below. It is undisputed that the wife knew that her future husband was a man of considerable wealth, and that the husband knew that his future wife had few financial assets.

During the fall and winter of 1989-1990, the wife and the husband discussed the terms and necessity of an antenuptial agreement. The judge found that, although he was not "overbearing," the husband was "very clear that such an agreement was necessary." At the husband's urging, the wife retained independent legal counsel-Ann C. Palmer-to represent her in negotiating the agreement. Palmer was recommended to the wife by a friend. The husband was represented by his business counsel, Joel Lewin.

In February and March, 1990, Lewin and Palmer spoke several times and Lewin sent Palmer a draft antenuptial agreement. The draft provided, among other things, that if the marriage terminated by legal proceedings, including separation or divorce, the wife would receive the marital home free of encumbrance, the automobile that she was then driving, and an annual payment from the husband of $25,000 until her death or remarriage. On Palmer's advice, the wife did not accept these terms. Palmer sent a letter to Lewin rejecting the draft; she also requested full disclosure of the husband's assets. In response, Lewin delivered to Palmer the husband's tax returns for 1984 through 1988 and a current financial statement showing the husband's net worth to be between $83 million and $108 million. The husband's interests in his family's construction business comprised a majority of his assets. The wife made no further inquiries regarding the husband's assets and has not claimed that the husband's financial disclosures made before she signed the antenuptial agreement were incomplete, inaccurate, or misleading.[3]

On receipt of the husband's financial disclosures, Palmer consulted further with her client. She then informed Lewin that her client required that the husband increase the annual payments to the wife to $35,000, adjusted annually for increases in the cost of living. She also requested medical insurance, life insurance, and the lesser of twenty per cent of the husband's estate or $5 million. The husband rejected these requests. Further negotiations followed, the details of which are not necessary to describe, except to note that the wife dropped her demand for the lesser of twenty per cent of the husband's estate or $5 million in the event that the marriage was terminated by divorce.

The parties executed the agreement on March 21, 1990. The agreement, fifteen pages long, to which the parties' respective statements of assets were attached and incorporated,[4] contains provisions concerning the disposition of their separate assets on death [5] or if the marriage was "terminated or interrupted by divorce or other legal proceedings" during their lifetimes, disposition of liabilities, and numerous other provisions concerning such issues as breach, modifications, and choice of law. The agreement also contains provisions concerning waiver,[6] "fairness," [7] warranties about legal advice,[8] and child support "if any children shall be born of their marriage." [9]

Concerning termination of the marriage on divorce, the agreement provided that the wife would receive the marital home free of encumbrance,[10] yearly support of $35,000 until her death or remarriage with an annual cost-of-living increase,[11] an automobile, and medical insurance until her death or remarriage. All property jointly acquired during the marriage would be divided between the parties in equal shares.

Both attorneys were present when the parties executed the agreement and the signing was recorded on videotape. The recording shows the husband's attorney reciting the terms of the agreement and the parties communicating their understanding of and consent to those terms. The parties acknowledge they have received advice from counsel of their choice, that they understand their rights in the absence of the agreement, and that they each have read the other's financial disclosures.

2. Procedural background. On March 13, 1998, the husband filed a complaint for divorce under G.L. c. 208, § 1B, alleging that the marriage was irretrievably broken down and seeking enforcement of the antenuptial agreement. The wife denied that the marriage was irretrievably broken down and challenged the enforceability of the agreement. The judge allowed the husband's motion to bifurcate the trial to consider first the validity and enforceability of the agreement. There followed three days of testimony solely on that issue. On February 12, 2001, the judge issued comprehensive findings of fact, conclusions of law, and a judgment that the antenuptial agreement was "not fair and reasonable at the time of its execution and is not fair and reasonable at the present time, and therefore may not be enforced." Because it elucidates our discussion of the issues, we describe in some detail the judge's rulings of law and her supporting analysis; her findings are summarized above.

The judge considered whether the agreement was fair and reasonable. See Osborne v. Osborne, 384 Mass. 591, 599, 428 N.E.2d 810 (1981). Without differentiating between fairness at the time of execution and fairness at the time of the trial, the judge concluded that the agreement was neither fair nor reasonable at either point in time. She based her determination on "the entirety of the financial settlement" to the wife, on what she termed "the lack of substantial negotiations involved before the agreement was executed," the "sophistication of the issues involved," and "the lifestyle of the parties during the marriage and the vast disparity between the parties' ability to acquire future assets and income."

Addressing the claims of the wife, the judge placed no reliance on her assertion that she was incapacitated at the time she executed the agreement. She found that the wife did not suffer from any incapacity due to any health reasons at the time, nor did she lack "education or business acumen to appreciate the significance of what she was doing," as the wife had also claimed. The judge did not credit the wife's contention that she signed the agreement under duress: "If she was under as much duress as she claimed to be, it was not at all apparent" on the video taped recording." [12]

Concerning the negotiations preceding the agreement's execution, the judge found that there was "complete financial disclosure by both parties." She nevertheless pointed to what she characterized as "minimal" negotiations prior to the agreement's execution, noting that "the financial and legal issues involved in this case were quite complex." The judge concluded that the wife "did not fully explore all the options available to her, nor was there any real discussion with her about either the consequences of this agreement or the possible results after a [G.L. c. 208,] § 34 hearing." She gave no weight to the fact that the wife was represented by independent counsel, noting only that the wife did not "discuss with her counsel what she might anticipate in terms of an appropriate financial settlement in the even[t] of a divorce." The judge found that the wife was "aware of the criteria considered by the Court under [§] 34," but that "there was [no] real explanation of its application to her case." [13]

Turning to other factors, the judge also noted that "in view of the fact that this is a ten year marriage which produced two children," the settlement for the wife was "less than modest." She pointed to the "financial holdings" of the husband, the parties' "lifestyle during the marriage," and the husband's "ability to acquire . significant assets" as compared to the wife, whose ability to acquire assets, she termed "vastly inferior" to that of the husband.

In reaching her conclusion the judge explicitly relied on the "fair and reasonable" test as elaborated by the Appeals Court in Dominick v. Dominick, 18 Mass.App.Ct. 85, 463 N.E.2d 564 (1984), a decision concerning the enforceability of a separation agreement. She reviewed the factors listed in that case [14] to conclude that the antenuptial agreement at issue here was

unenforceable. The Dominick case, she noted, permitted her to consider the mandatory and discretionary factors in G.L. c. 208, § 34, which governs the assignment of assets by a judge in divorce proceedings.[15] Thus, the judge pointed to the length of the marriage, station, amount and source of income, employability, estate, and the needs of each party and the opportunity of each for future acquisition of assets and income.

The judge also noted that "[a] divorcing party's needs are to be measured by the standard of living enjoyed during the marriage, not by whether a proposed allocation would enable the party to merely survive or even to live comfortably," citing Rosenblatt v. Kazlow-Rosenblatt, 39 Mass.App.Ct. 297, 301, 655 N.E.2d 640 (1995). In that connection, the judge stated that, "[a]lthough they lived in a manner more frugally than their income required," the parties "lacked no comfort or convenience, and their lifestyle was by choice rather than necessity." She noted that the couple had spent money "on trips, jewelry, home and yard maintenance, outside help and other things that made life easier and actually, more luxurious," and that "[t]here were no limits placed on their personal spending." Finally, the judge concluded that an agreement will be "struck down" if there are countervailing equities to its enforcement or if it contains representations not supported in the record, even if the agreement recites that it was entered into knowingly by the parties, who were advised of their rights by independent counsel, citing to Stansel v. Stansel, 385 Mass. 510, 514-515, 432 N.E.2d 691 (1982); Randall v. Randall, 17 Mass.App.Ct. 24, 31, 455 N.E.2d 995 (1983).

3. Enforceability of the antenuptial agreement. In Osborne v. Osborne, 384 Mass. 591, 598, 428 N.E.2d 810 (1981), we held that it is permissible for parties contemplating marriage to enter into an antenuptial contract settling their alimony or property rights in the event their marriage should prove unsuccessful. Noting that the freedom to limit or waive those rights in the event of divorce is not unrestricted, we set forth "some guidelines to be used in determining the extent to which such agreements should be enforced."[16] Id. at 599, 428 N.E.2d 810. First, a judge must determine whether an antenuptial agreement is valid. Second, "the agreement must be fair and reasonable at the time of entry of the judgment nisi." Id.

As to whether an agreement is valid, we adopted the "fair disclosure" rules announced in Rosenberg v. Lipnick, 377 Mass. 666, 389 N.E.2d 385 (1979), where we considered the validity of an antenuptial agreement settling property rights on the death of a party. Under those rules, a judge must determine whether the agreement:

"(1) . contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth" (footnote omitted).

Id. at 672, 389 N.E.2d 385.[17]

A

We first examine the judge's conclusion that the antenuptial agreement in this case was not valid at the time of execution. The application of the second and third Rosenberg rules to the evidence are disposed of first.[18] It is clear that the wife was "fully informed" of the worth of her prospective husband before she executed the agreement. The judge found that there was "complete financial disclosure" by both parties, and it is undisputed that the wife was apprised that her prospective husband had a net worth between $108 million and $133 million; the

husband gave the wife a detailed statement of his net worth, which he later supplemented. See note 4, supra. He also acceded to her request and provided her with copies of his income tax returns for the most recent five years.

Full and fair disclosure of each party's financial circumstances is a significant aspect of the parties' obligation to deal with each other "fairly and understandingly" because they stand in a confidential relationship with each other. Rosenberg v. Lipnick, supra at 673, 389 N.E.2d 385. While we have not elaborated on the point, it seems clear that it is sufficient that the disclosure be such that a decision by the opposing party may reasonably be made as to whether the agreement should go forward.[19] See, e.g., In re Estate of Lopata, 641 P.2d 952, 955 (Colo.1982) (fair disclosure "is not synonymous with detailed disclosure," but "contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other"); Button v. Button, 131 Wis.2d 84, 95, 388 N.W.2d 546 (1986) (requiring "fair and reasonable disclosure [of] financial status").

The wife claims that the negotiations were compressed in time and that she did not receive disclosure of the husband's assets until two weeks before the parties executed the agreement. There is no evidence that time precluded the wife from exploring her options. The judge found the husband was not "overbearing"; he issued no ultimatum at the last moment.[20] The wife plainly had sufficient knowledge of her future husband's worth to make an informed decision as to whether she wished to consent to the agreement. What the judge characterized as "minimal negotiations" are circumstances insufficient to invalidate the agreement. The parties reached agreement after full disclosure of their respective financial positions and after negotiations during which they exchanged offers and counteroffers. The second Rosenberg rule is satisfied.

As to the third rule, that the agreement set forth a waiver by the contesting party of his or her rights, this agreement did just that, providing a waiver by the wife of all spousal rights, except those specifically provided in the agreement. See note 6, supra. The wife did challenge the agreement's validity, raising defenses of lack of capacity and duress, but the judge did not credit her evidence on those issues. See note 12, supra. The findings on this point are fully supported by the evidence.

Moreover, the parties were each represented by independent counsel. The judge found that the wife's attorney had informed her client that, by signing an antenuptial agreement, "she gave up her right to have the Court make an assignment of property to her."[21] The judge found that the wife "initiated little discussion" with her attorney concerning the agreement, did not "assert herself regarding any changes" to the draft agreements, and "did not discuss" what she "might receive by way of property division from the Court in the event of a divorce." However, the wife selected her own counsel, and she cannot now attack the agreement on the ground that her counsel was not sufficiently sophisticated in matters of antenuptial agreements.[22] Nor can the wife take advantage of her own failure to question her counsel more fully about the legal consequences of signing the antenuptial agreement and thereby avoid the agreement.[23]

Waiver is important because it underscores that each party is exercising a meaningful choice when he or she agrees to give up certain rights in anticipation of marriage. It was therefore correct for the judge to consider such factors as whether each party was represented by independent counsel, the adequacy of the time to review the agreement, the parties' understanding of the terms of the agreement and their effect, and a party's understanding of his or her rights in the absence of an agreement. See Button v. Button, supra at 95-96, 388 N.W.2d 546. See also Rinvelt v. Rinvelt, 190 Mich.App. 372, 376-379, 475 N.W.2d 478 (1991) (agreement must be "entered into voluntarily, with full disclosure, and with the rights of each

party and the extent of the waiver of such rights understood"). But the evidence does not support a conclusion that the wife's waiver of her rights was not meaningful. However minimal her inquiries to her counsel, the failure to explore more fully with her lawyer the effect of signing the agreement is chargeable to her (or her lawyer), not the husband.[24] The wife recognized that marriage conferred certain rights, and that she waived those rights by signing the agreement. The third Rosenberg rule is satisfied.

We turn finally to the first Rosenberg rule, the requirement that an antenuptial agreement contain a "fair and reasonable provision" for the contesting party, measured at the time of execution. The application of this legal standard to the parties' agreement was vigorously contested at trial, as it is on appeal.

In Rosenberg v. Lipnick, supra at 672, 389 N.E.2d 385, we said that it is permissible to consider "the parties' respective worth, the parties' respective ages, the parties' respective intelligence, literacy, and business acumen, and prior family ties or commitments." We noted, however, that "the reasonableness of any monetary provision in an antenuptial contract cannot ultimately be judged in isolation." Id. On the one hand, any examination of the validity of an antenuptial agreement must respect the parties' freedom to contract. The Legislature has recognized that antenuptial agreements settling property rights on marriage serve the useful function of permitting the parties to arrange their financial affairs as they best see fit. See G.L. c. 209, § 25.[25] We recognize those same interests. See Osborne v. Osborne, 384 Mass. 591, 598, 428 N.E.2d 810 (1981) ("There is no reason not to allow persons about to enter into a marriage the freedom to settle their rights in the event their marriage should prove unsuccessful, and thus remove a potential obstacle to their divorce"); Rosenberg v. Lipnick, supra at 673, 389 N.E.2d 385 ("The right to make antenuptial agreements settling property rights in advance of marriage is a valuable personal right which courts should not regulate destructively"). On the other hand, the State has an interest in protecting the financial interests of spouses when they divorce. Marriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise. See French v. McAnarney, 290 Mass. 544, 546, 195 N.E. 714 (1935). See also Button v. Button, supra at 94, 388 N.W.2d 546. It was for this reason that we determined that the freedom to limit or waive legal rights in the event of divorce "is not appropriately left unrestricted." Osborne v. Osborne, supra at 599, 428 N.E.2d 810.

To meet the requirement of "fair and reasonable," at the time of execution an antenuptial agreement need not approximate an alimony award and property division ruling a judge would be required to make under G.L. c. 208, § 34. Judged by those statutory requirements, the parties' right to settle their assets as they wish would be meaningless. The relinquishment of claims to the existing assets of a future spouse, even if those assets are substantial, also does not necessarily render an antenuptial agreement invalid. An antenuptial agreement may be most desired when a wealthy individual contemplating marriage seeks to ensure that, if the marriage is not successful, his or her own assets will not accrue to the spouse. Many valid agreements may be one sided, and a contesting party may have considerably fewer assets and enjoy a far different lifestyle after divorce than he or she may enjoy during the marriage. It is only where the contesting party is essentially stripped of substantially all marital interests that a judge may determine that an antenuptial agreement is not "fair and reasonable" and therefore not valid. Cf. French v. McAnarney, supra at 546-548, 195 N.E. 714.[26] Where there is no evidence that either party engaged in fraud, failed to disclose assets fully and fairly, or in some other way took unfair advantage of the confidential and emotional relationship of the other when the agreement was executed, an agreement will be valid unless its terms essentially vitiate the very status of marriage. Our test of "fair and reasonable" is not the same as the test of "unconscionability"

that has been adopted in other jurisdictions. Upham v. Upham, 36 Mass.App.Ct. 295, 301, 630 N.E.2d 307 1994). We agree with the reasoning of the Appeals Court in Upham that while there may be substantial overlap between the standards, a standard of unconscionability generally "requires a greater showing of inappropriateness." Id., citing 3 Lindey, Separation Agreements and Antenuptial Contracts § 90.07 (1993). See Brash v. Brash, 407 Mass. 101, 106, 551 N.E.2d 523 (1990) (separation agreement deemed "not . fair and reasonable and, in fact, . unconscionable"). A number of States have adopted a test of unconscionability. See, e.g., Scherer v. Scherer, 249 Ga. 635, 641, 292 S.E.2d 662 (1982); Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky.1990); Ferry v. Ferry, 586 S.W.2d 782, 786 (Mo.Ct.App.1979); MacFarlane v. Rich, 132 N.H. 608, 614, 616-617, 567 A.2d 585 (1989).[27] The standard of unconscionability measured at the time of an antenuptial agreement's making was also adopted in the Uniform Premarital Agreement Act.[28] 9C U.L.A. 35 (Master ed. 2001). On the other hand, our "fair and reasonable" test is consonant with the standard recognized in a number of other States. See, e.g., Ex parte Walters, 580 So.2d 1352, 1354 (Ala.1991); Harbom v. Harbom, 134 Md.App. 430, 443, 760 A.2d 272 (2000), quoting Hartz v. Hartz, 248 Md. 47, 63, 234 A.2d 865 (1967) (antenuptial agreement upheld if agreement was "fair and equitable under the circumstances"); McKee-Johnson v. Johnson, 444 N.W.2d 259, 267-268 (Minn.1989) (agreement must be substantively fair at the time of execution and at the time of enforcement); Matter of the Estate of Crawford, 107 Wash.2d 493, 496, 730 P.2d 675 (1986) ("if the agreement makes a fair and reasonable provision for the party not seeking its enforcement, the agreement may be upheld").

We see no reason to replace our standard of "fair and reasonable " when we test the validity of the agreement at the time of execution with a standard of "unconscionability." As noted by the commissioners, the unconscionability standard was adopted in the Uniform Act in part because it "is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprises . and in contract law." 9C U.L.A. 49-50 at comment, quoting Commissioner's Note, Uniform Marriage and Divorce Act § 306, 9A (Part I) U.L.A. 249 (Master ed. 1988). Antenuptial agreements by their nature concern confidential relationships, and a standard for testing the validity of a business agreement seems to us inappropriate in this context.

We turn to examine the judge's analysis in this case of the fairness and reasonableness of the agreement at the time it was executed. In making her determination, the judge considered the factors enumerated in Dominick v. Dominick, 18 Mass.App.Ct. 85, 92, 463 N.E.2d 564 (1984),[29] as well as some of the factors listed in G.L. c. 208, § 34. The judge also emphasized the parties' lifestyle and standard of living during their marriage, relying on Rosenblatt v. Kazlow-Rosenblatt, 39 Mass.App.Ct. 297, 301, 655 N.E.2d 640 (1995). We agree with the husband that the judge applied the incorrect legal standard. The considerations that permit a judge to conclude that a separation agreement is "fair and reasonable" are different from those that permit a judge to conclude that an antenuptial agreement is "fair and reasonable." Parties to a separation agreement are joined in marriage. On termination of their marriage, it is entirely appropriate that the statutory factors that govern the award of property and support should inform, in part, the fairness and reasonableness of a separation agreement. The separation agreement is, after all, a substitute for the independent application by a judge of those same statutory factors. An antenuptial agreement, in contrast, permits the parties to define the material aspects of their relationship before they enter into the status of marriage. If the terms of a proposed antenuptial agreement are unsatisfactory, a party is free not to marry. See C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice § 20.10, at 661 (2d ed. 1996) ("If

antenuptial agreements are to have any standing under which the parties can rely on them as an effective settlement of their financial interests, then it is clear that a trial judge cannot simply base the judgment nisi on the same factors set out in [G.L. c. 208, § 34]").

Applying the correct legal standard, we conclude that the judge's findings do not support a conclusion that the agreement was not fair and reasonable when it was executed. Substantively, the agreement provided that in the event of divorce the husband would continue to provide for the wife's support and her health insurance until her death or remarriage; she would also have housing (the marital home) and transportation. These provisions do not strip the wife of her marital rights. In fact, they leave her in a better economic position than she had before the marriage. The first Rosenberg rule is therefore satisfied. That a judge might have awarded her a significantly larger share of the marital estate under G.L. c. 208, § 34, does not render the agreement unfair and unreasonable at the time of its execution. We recognize that the standard of living the wife will be able to enjoy after any divorce will be significantly lower than the one she enjoyed during her marriage. However, she was free to refuse to sign the antenuptial agreement; she was free to refuse marriage on those terms.

For all of these reasons, we conclude that the antenuptial agreement was valid when it was executed by the parties before their marriage in 1990.

B

By concluding that the antenuptial agreement "was not fair and reasonable at the time of execution," the judge held, in essence, that the agreement was not valid. See Osborne v. Osborne, 384 Mass. 591, 599, 428 N.E.2d 810 (1981) (validity of antenuptial agreements "should be judged by the same 'fair disclosure' rules" as in Rosenberg v. Lipnick, supra). She nevertheless proceeded to consider whether the agreement was "fair and reasonable" at the time of the divorce trial, although a "second look" at the agreement is required only when a judge concludes that an antenuptial agreement is valid. Id. Because we have concluded that the agreement is indeed valid, we are required to consider whether there is any reason not to enforce it.

In Osborne, we suggested that this "second look" at an antenuptial agreement gave the judge the authority to deviate from the terms of an antenuptial agreement "in certain situations, for example, where it is determined that one spouse is or will become a public charge, or where a provision affecting the right of custody of a minor child is not in the best interests of the child." Id.[30] We pointed to Knox v. Remick, 371 Mass. 433, 436-437, 358 N.E.2d 432 (1976), in which we explained:

"If a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement was not the product of fraud or coercion, that it was fair and reasonable at the time of the entry of the judgment nisi, and that the parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced, absent countervailing equities."

We are not persuaded that the parties' agreement is not enforceable now.

Before we explain our conclusion, we pause to comment on the standard applicable to the "second look" a judge must undertake when a party challenges the enforceability of a valid agreement. In Osborne, we described the standard as "fair and reasonable." Osborne v. Osborne, supra. In the twenty years since Osborne was decided, no Massachusetts appellate

court has elaborated on that test, and at least one commentator has suggested that the Osborne second-look test is one of "conscionability." See C.P. Kindregan, Jr., & M.L. Inker, supra at § 20.10, at 661-662.

The nomenclature attached to the standard of review-whether it be "fair and reasonable" or "conscionability"-is but a shorthand descriptor of what is of real moment: the content and meaning behind the label, and the careful analysis required of judges, case by case, of each antenuptial agreement and the circumstances surrounding its enforcement. Indeed, whether termed "unconscionable," "fair and reasonable," "inequitable, " or something else, in jurisdictions that employ a "second-look" analysis, the vast majority direct trial judges to undertake an analysis that is remarkably similar in substance. Compare 1 H.H. Clark, Jr., Domestic Relations in the United States § 1.9, at 52 n. 51 (2d ed. 1987) ("Unconscionability seems to be defined as occurring when enforcement of the agreement would leave the spouse without sufficient property, maintenance, or appropriate employment to support himself"), and MacFarlane v. Rich, 132 N.H. 608, 616-617, 567 A.2d 585 (1989) (defining "unconscionable" when "provisions in an antenuptial agreement may lose their vitality by reason of changed circumstances so far beyond the contemplation of the parties at the time they entered the contract that its enforcement would work an unconscionable hardship"), and Miles v. Werle, 977 S.W.2d 297, 303 (Mo.Ct.App.1998), and cases cited (agreement unenforceable that attempts to "totally take from one of the spouses his or her presumed right to marital property. By contrast, where an antenuptial agreement permits each spouse to retain a share of the marital property, albeit a disproportionately small one, courts are more likely to uphold and enforce the agreement"), with Cladis v. Cladis, 512 So.2d 271, 273 (Fla.Dist.Ct.App.1987) ("a trial court may determine that the agreement . does not adequately provide for the challenging spouse and, consequently, is unreasonable"), and Button v. Button, 131 Wis.2d 84, 98-99, 388 N.W.2d 546 (1986) ("If . there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce").

In Massachusetts, a valid antenuptial agreement is not unenforceable at the time of divorce merely because its enforcement results in property division or an award of support that a judge might not order under G.L. c. 208, § 34, or because it is one sided. Moreover, it is not appropriate for a judge to use the same test of enforceability of an antenuptial agreement as she would for the enforceability of a separation agreement, for the reasons explained earlier.[31] Rather, we follow the majority of courts and require that a judge may not relieve the parties from the provisions of a valid agreement unless, due to circumstances occurring during the course of the marriage, enforcement of the agreement would leave the contesting spouse "without sufficient property, maintenance, or appropriate employment to support" herself. See 1 H.H. Clark, Jr., Domestic Relations in the United States, supra at § 1.9. Such circumstances might include, for example, the unanticipated mental or physical deterioration of the contesting party (here the antenuptial agreement provided for full health insurance for the wife), or the erosion by inflation of agreed-on support payments to such a degree as to nullify the obvious intention of the parties at the time of the agreement's execution (here the support payments agreed to by the parties contained an adjustment for cost of living, which the wife does not claim is inadequate).

The "second look" at an agreement is to ensure that the agreement has the same vitality at the time of the divorce that the parties intended at the time of its execution. See MacFarlane v. Rich, supra at 616-617, 567 A.2d 585.

As we noted above, we will not recognize the validity of an antenuptial agreement that essentially strips the contesting spouse of substantially all of her marital interests. For the same reason-that marriage is a special status from which certain obligations arise-we will not enforce an antenuptial agreement that prevents a spouse from retaining her marital rights, of which maintenance and support, however disproportionately small, are the most critical. See Knox v. Remick, 371 Mass. 433, 436-437, 358 N.E.2d 432 (1976). See also Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky.1990) (agreement enforceable where "the terms of the agreement were not 'manifestly unfair' "; agreement "did not attempt to limit or deny maintenance or support").

We have described the inquiry a judge must undertake when a party contests the enforceability of a valid antenuptial agreement. Our description gives content to, but does not depart from, the standard that has been in effect since Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981). There we described the standard as "fair and reasonable." We now hold that the term "conscionability" is a more appropriate term to describe the standard at the time of enforceability. We trust that this change of nomenclature will be of assistance to judges and members of the bar, and will facilitate the recognition of the distinction between the enforceability of separation agreements and the enforceability of antenuptial agreements.

Applying the standard to the antenuptial agreement at issue here, the judge made no findings, and the wife points to no evidence, that circumstances during the marriage led to any changes of any significance: the wife suffered no debilitating illness and she is not unable to work should she choose to supplement her income. The judge grounded her decision on three postmarriage factors: "the lifestyle of the parties during the marriage," "the vast disparity between the parties' ability to acquire future assets and income," [32] and "the fact that this is a ten year marriage which produced two children." None is sufficient to render the agreement unenforceable. The settlement is, as the judge characterized it, "less than modest, given the financial holdings of the plaintiff." But the wife was fully apprised of the husband's holdings before she agreed to these "less than modest" arrangements.

4. Attorney's fees. The judge ordered the husband to pay the wife's attorney's fees. The husband challenges that aspect of the order on three grounds: (1) that the judge "lack[ed] jurisdiction" to make the order, (2) that the antenuptial agreement provides that the party in breach is liable for the parties' attorney's fees, and (3) that the judge failed to address the reasonableness of the fees. We agree with the husband as to his last claim only.

General Laws c. 208, §§ 17 and 38,[33] permit the judge to make an award of attorney's fees. Such an award is within the sound discretion of the judge and will not ordinarily be disturbed. See, e.g., Kennedy v. Kennedy, 400 Mass. 272, 274, 508 N.E.2d 856 (1987) ("This matter rests in the discretion of the judge"); Ross v. Ross, 385 Mass. 30, 39, 430 N.E.2d 815 (1982), quoting Smith v. Smith, 361 Mass. 733, 738, 282 N.E.2d 412 (1972) ("[T]he award . may be presumed to be right and ordinarily ought not to be disturbed"). See also Kane v. Kane, 13 Mass.App.Ct. 557, 560, 434 N.E.2d 1311 (1982) ("any award made [is] entitled to considerable respect on review"). The factors a judge may consider include the amount of time required to prepare the case and pleadings, the complexity of the issues involved, the value of the marital property, and spouse's ability to pay. See Kane v. Kane, supra at 560-561, 434 N.E.2d 1311. See also Kennedy v. Kennedy, supra at 274, 508 N.E.2d 856 (consideration of award should appropriately take into account important interests at stake and amount of opposition interposed by opposing party); Goldman v. Roderiques, 370 Mass. 435, 437, 349 N.E.2d 335 (1976) (in making award of attorney's fees, "the basic factors of need and relative economic positions of the spouses" must

be considered). The judge was well within her discretion in ordering the husband to pay the wife's attorney's fees during the pendency of the litigation to enable her to defend the action and to contest the validity and enforceability of the antenuptial agreement.

While the order is proper, the judgment provides only that the husband "shall pay the parties' counsel fees." We remand the case to the Probate Court for a determination of the fees for the wife's attorney "not incommensurate with an objective evaluation of the services performed." Ross v. Ross, supra at 38-39, 430 N.E.2d 815.

5. Conclusion. The judgment that the antenuptial agreement is unenforceable is reversed. The judgment that the husband pay the wife's attorney's fees is affirmed. The case is remanded to the Probate and Family Court for a determination of the amount of such fees.

So ordered.

FOOTNOTES

1. The judge denied the husband's motion to stay the divorce hearing and payment of attorney's fees pending the disposition of this appeal. The husband raises no claim in connection with that order.

2. The relevant facts are drawn from the judge's written findings of fact. The husband does not dispute the findings; rather, he argues that the judge's subsidiary and ultimate findings do not support her rulings of law.

3. The wife does complain that the husband divulged the financial information to her only two weeks before the agreement was executed.

4. The husband's revised statement of assets showed his net worth to be between $108 million and $133 million. The wife's financial statement showed assets of less than $5,000 in several bank accounts and ownership of a 1977 Chevrolet Nova automobile. At the time of trial in 2000 on the enforceability of the agreement, the husband's financial statement showed assets of $112 million and liabilities of $2 million.

5. The parties negotiated and made provisions in the final agreement for property division and support should their marriage be terminated by the death of either one of them. Those negotiations and the terms of the final agreement on this point-substantially more favorable to the wife than the provisions concerning termination of the marriage by divorce-are not relevant to this action.

6. The parties acknowledged that they were informed of their rights, had considered the effect of the agreement on their estates, and freely and willingly waived rights that "may well have great value" in exchange for the provisions of the agreement.

7. A section entitled "Fairness Considerations" provided that the husband and the wife "acknowledge that they have considered the fairness of this Agreement in light of the present size and character of his and her estate as disclosed in [the Agreement and that] . [a]fter consideration of their respective disclosures as to their respective financial circumstances . each party deems it to be in his or her best interest to execute this Agreement."

8. The husband and the wife acknowledged that they had legal advice of their own choosing, and that with the advice of counsel each had considered carefully the financial disclosures appended to the agreement.

9. The wife and the husband had two children during their marriage. The agreement provided for a judicial resolution of all matters concerning any children of the marriage, including child support, custody, and visitation. The agreement made no provision for the wife's only child of her first marriage. At the time of entry of judgment, the husband continued to support the wife's daughter, as he had done since the parties began living together.

10. At the time of the execution of the agreement, the parties lived with the wife's child in the husband's Hyannis condominium. The agreement provides that the wife would receive the Hyannis property, or a residential property "of substantially equal value" if the Hyannis property were sold.The judge found that, after they were married, the parties continued to live in Hyannis, but that, in 1992, they purchased the "marital" home in Norwell, and spent their summers at the Hyannis property. After the parties separated the husband purchased a second home in Norwell where he now resides.

11. The cost of living increase covered the period between the date of the parties' marriage and the time of the initiation of any divorce action only. There would be no further cost of living increases from the commencement of a divorce action to the time of the wife's death or remarriage.

12. The wife testified that she did not want to sign the agreement and felt ill and nauseous on the day of execution. The judge found that the wife did not so inform the husband and showed no reluctance in signing it. The judge also found that the videotape recording showed no indication that the wife appeared "distressed, distracted, resistant, uncooperative, or otherwise unwilling" to sign the agreement.

13. In her findings of fact, the judge noted that the wife's counsel had been a member of the bar since 1979, and that sixty to seventy-five per cent of her practice was devoted to family law. The judge found that this was the attorney's "first case involving a premarital agreement, and her first case involving assets over one million dollars." The judge did not find that the attorney was not qualified to represent the wife or that she had failed to represent her adequately.

14. Dominick v. Dominick, 18 Mass.App.Ct. 85, 463 N.E.2d 564 (1984), lists eight factors for assessing whether a separation agreement is fair and reasonable. These factors are "(1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208, § 34" (footnotes omitted). Id. at 92, 463 N.E.2d 564. That the Dominick case involved a separation agreement, rather than an antenuptial agreement-as is at issue in this case-is discussed infra.

15. General Laws c. 208, § 34, provides that: "In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future

needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

16. An antenuptial agreement must also, of course, comport with the rules governing the formation of all contracts, for example, the necessity of consideration and the absence of fraud, misrepresentation, and duress. See Rosenberg v. Lipnick, 377 Mass. 666, 673, 389 N.E.2d 385 (1979).

17. We also noted in Rosenberg v. Lipnick, supra at 673, 389 N.E.2d 385, that "antenuptial agreements must be so construed as to give full effect to the parties' intentions, but we are concerned that such agreements be executed fairly and understandingly and be free from fraud, imposition, deception, or over-reaching."

18. The judge correctly noted that she was to test the enforceability of the agreement under the disclosure rules of Rosenberg v. Lipnick, supra at 672-673, 389 N.E.2d 385, although she did not examine each rule separately.

19. A leading treatise has described the test this way: "The issue is whether an intelligent, competent person did have or should have had a general, adequate and sufficient knowledge of the other's worth to make an informed decision as to whether they wished to consent to the terms of the proposed premarital agreement." C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice § 20.8, at 654 (2d ed. 1996).

20. Other courts have held that the lack of negotiations or insufficient notice, standing alone, is seldom enough to invalidate an antenuptial agreement. See, e.g., Liebelt v. Liebelt, 118 Idaho 845, 848, 801 P.2d 52 (Ct.App.1990); Howell v. Landry, 96 N.C.App. 516, 528, 386 S.E.2d 610 (1989). Courts generally have treated such a claim as one of duress, and have found such a defense inapplicable where, as here, the party contesting the agreement had notice of the agreement. See, e.g., Rose v. Rose, 526 N.E.2d 231, 235-236 (Ind.Ct.App.1988) (parties discussed necessity of agreement several times before wedding, and husband told wife he would not marry her if she did not sign agreement); Matter of the Marriage of Adams, 240 Kan. 315, 319-320, 729 P.2d 1151 (1986) (husband approached wife morning of wedding and asked her to sign agreement; agreement was identical to one wife reviewed with her attorney); Taylor v. Taylor, 832 P.2d 429, 431 (Okla.Ct.App.1991) (wife in possession of the agreement for three months prior to its execution); Shepherd v. Shepherd, 876 P.2d 429, 432 (Utah Ct.App.1994) (parties discussed agreement for months prior to marriage and each had opportunity to review and make changes to it).

21. Counsel's letter states in part: "When you sign a pre-marital contract, you give up the opportunity of having the Court make an independent assignment of marital property, and accept the terms of the contract instead."

22. To the extent there was any inadequacy of representation by the wife's attorney, that is a claim of the wife against her lawyer, not a basis for voiding the antenuptial agreement.

23. The evidence is undisputed that the wife's attorney wrote to her before the execution of the agreement, enclosed a copy of G.L. c. 208, § 34, and instructed the wife to read it carefully, "so that you can evaluate properly the terms of the Pre-Marital Agreement that we are negotiating." Her attorney further told her that they would go over the statute when they met at the attorney's office the following Monday, March 19. The judge found that the wife's attorney had advised her client that the agreement in its final form was fair and reasonable.

24. The wife did not claim or prove that her counsel was incompetent. Cf. Cladis v. Cladis, 512 So.2d 271, 274 (Fla.Dist.Ct.App.1987) (trial judge's finding that wife did not have competent assistance of counsel no basis for setting aside valid property settlement agreement).

25. General Laws c. 209, § 25, provides that: "At any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party may be seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract. Such contract may limit to the husband or wife an estate in fee or for life in the whole or any part of the property, and may designate any other lawful limitations. All such limitations shall take effect at the time of the marriage in like manner as if they had been contained in a deed conveying the property limited."

26. See also C.P. Kindregan, Jr., & M.L. Inker, supra at § 20.8, at 652.

27. See also 2 A. Lindey & L.I. Parley, Separation Agreements and Antenuptial Contracts § 110.66[2], at 110-59 (2d ed. 1999).

28. See Uniform Premarital Agreement Act § 6(a)(2). 9C U.L.A. 48-49 (Master ed. 2001) The Act, first approved in 1983, has been substantially adopted in at least twenty-eight States and the District of Columbia: Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. Legislation to adopt the Act has been introduced in the South Carolina General Assembly, but has not passed. See Hardee v. Hardee, 348 S.C. 84, 94, n. 6, 558 S.E.2d 264, ----, n. 6 (S.C.App. Dec.10, 2001).

29. See note 14, supra.

30. Custody and the support of the parties' minor children are not at issue in this case.

31. In this aspect of her ruling, the judge also incorrectly relied on the factors identified in Dominick v. Dominick, supra, including those enumerated in G.L. c. 208, § 34.

32. The judge noted that, during their ten years of marriage, the wife was "completely dependent on [the husband] for her financial security."

33. General Laws c. 208, § 17, provides: "The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action."General Laws c. 208, § 38, provides: "In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them."

MARSHALL, C.J.

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238 Conn. 839
Supreme Court of Connecticut.

Pamela F. ELGAR
v.
Eric M. ELGAR, Administrator
(Estate of George P. Elgar).

No. 15272.
|
Argued March 27, 1996.
|
Decided Aug. 13, 1996.

Synopsis

Surviving spouse claimed right to statutory share of deceased's estate, notwithstanding antenuptial agreement. The Superior Court, Stamford-Norwalk Judicial District, Lewis, J., determined that antenuptial agreement was valid, in accordance with recommendation of Howard B. Kaplan, State Trial Referee. Surviving spouse appealed and matter was transferred. The Supreme Court, Norcott, J., held that: (1) choice of law provision of antenuptial agreement, selecting New York law, was not obtained by improper means; (2) New York had substantial relationship to parties and Connecticut did not have materially greater interest; and (3) allegations that coercion or undue influence did not rebut presumption that antenuptial agreement was valid.

Affirmed.

West Headnotes (6)

[1] **Contracts** Agreements relating to actions and other proceedings in general

New York choice of law provision of antenuptial agreement applied to claim for statutory share by surviving spouse in probate dispute, absent evidence of misrepresentation, fraud, or undue influence concerning the choice of law; choice of law in agreement was explicit, both parties were experienced business people, and drafting attorney briefly explained agreement before survivor signed it.

32 Cases that cite this headnote

[2] **Contracts** Agreements relating to actions and other proceedings in general

Express choice of law by parties to contract is given effect, provided that choice was made in good faith.

38 Cases that cite this headnote

[3] **Contracts** Agreements relating to actions and other proceedings in general

Parties of contract generally are allowed to select law that will govern contract unless either: chosen state has no substantial relationship to parties of transaction and there is no other reasonable basis for parties' choice, or application of law of chosen state would be contrary to fundamental policy of state which has materially greater interest than chosen state in determination of particular issue and which would be state of applicable law in absence of effective choice of law by parties. Restatement (Second) of Conflict of Laws §§ 187, 188.

80 Cases that cite this headnote

[4] **Contracts** Agreements relating to actions and other proceedings in general

"Substantial relationship" between New York and parties, required for choice of law provision of antenuptial agreement to apply to surviving spouse's claim for statutory share, was established by showing that survivor was always a New York resident and conducted any affairs in New York, deceased spent weekdays in New York and maintained business in New York, and agreement was executed in a New York attorney's office. Restatement (Second) of Conflict of Laws § 187.

17 Cases that cite this headnote

[5] **Contracts** Agreements relating to actions and other proceedings in general

Significant contacts with Connecticut, including fact that marriage took place in Connecticut,

deceased spouse was resident, and estate was probated in Connecticut, were not materially greater than numerous contacts with New York and, thus, choice of New York law in antenuptial agreement was enforceable in suit by survivor for statutory share of decedent's estate. Restatement (Second) of Conflict of Laws § 187.

25 Cases that cite this headnote

[6] **Contracts** Agreements relating to actions and other proceedings in general

Surviving spouse failed to demonstrate coercion or undue influence, required to rebut presumption that duly executed antenuptial agreement was valid under New York law and required to make claim for statutory share against deceased spouse's estate; both parties were experienced business people, drafting attorney informed surviving spouse of scope of agreement, agreement incorporated full financial disclosure by parties, and survivor decided prior to meeting that she would sign agreement regardless of what it said.

Attorneys and Law Firms

****938** ***840** Miles F. McDonald, Jr., Greenwich, with whom was Donat C. Marchand, for appellant (plaintiff).

A. Reynolds Gordon, Bridgeport, with whom was Amy J. Greenberg, Stamford, for appellee (defendant).

Before PETERS, C.J., and CALLAHAN, BERDON, NORCOTT and KATZ, JJ.

Opinion

NORCOTT, Justice.

The principal issue in this appeal is whether an antenuptial agreement between the plaintiff, Pamela F. Elgar, and her husband, George P. Elgar (decedent), which contains a New York choice of law provision, is valid and enforceable. The plaintiff appeals from a judgment of the trial court wherein the court concluded that the antenuptial agreement: (1) contained a valid choice of law provision specifying that the agreement was to be interpreted according to New York law; and (2) is valid and enforceable under New York law. We affirm the judgment of the trial court.

****939** The relevant factual and procedural history is as follows. The plaintiff and the decedent were married in 1988. Prior to their marriage, they had executed an antenuptial agreement wherein each party had waived his or her rights to the other's property in the event of death or divorce.[1] In 1990, the decedent died intestate. ***841** There were no children of the marriage. The decedent was survived by two adult children from a prior marriage, Marie Elgar Hopper and Eric Elgar, the defendant in the present action. The Westport Probate Court appointed the defendant as the administrator of his father's estate. Subsequently the antenuptial agreement was admitted to and approved by the Probate Court,[2] and the plaintiff, pursuant to the agreement, was divested of her statutory share of the decedent's estate.[3] Thereafter, the plaintiff appealed the decree of the Probate Court to the Superior Court pursuant to General Statutes § 45a–186.[4]

The case was referred to an attorney trial referee[5] who conducted a trial de novo. The referee made the following findings of fact and recommended judgment for the defendants. The plaintiff and the decedent were married in Westport on September 25, 1988, after having ***842** lived together for the previous four years. Both were experienced business people. During the month of July prior to their marriage, the decedent had told the plaintiff that he would require her to sign an antenuptial agreement before they could be married, to which she had responded "[f]orget about it."

On the morning of September 22, 1988, after the wedding date had been set for September 25, the invitations had been sent, and the acceptances had been received, the decedent informed the plaintiff that she was to sign an antenuptial agreement on the following day at the New York office of his lawyer, Stephen J. Corriss.

On September 23, 1988, the plaintiff saw the antenuptial agreement for the first time. Due to her immediate impending marriage and other events in her life, it was a busy day for the plaintiff and she had a lot on her mind. When she arrived at Corriss' office, however, she had already determined that she was going to sign the agreement and that she did not intend to read it. She testified that she understood the agreement to apply only in the event of divorce and had not considered that it would apply in the event of the decedent's death. Moreover, she believed that her refusal to sign the agreement

would put her impending marriage in jeopardy. **940 Furthermore, she testified that she would have signed the agreement regardless of its provisions. The night before she signed the agreement, two of the plaintiff's friends had told her that they did not like the fact that she was signing an agreement that she had not read, but she, nonetheless, simply flipped through the agreement quickly, stared at the pages rather than reading them, and signed the agreement.

Corriss hastily reviewed the agreement with the parties before they signed it and pointed out that it referred to events that would occur in the event of divorce, provided for waivers of rights against one another's *843 estates, and contained a choice of law provision specifying that the agreement was being made pursuant to New York law and would be interpreted accordingly. Immediately before the agreement was signed, the parties wrote out financial disclosures, which were annexed to the agreement.

At the time the agreement was executed, the plaintiff was a lawful resident and domiciliary of New York and remained so following the marriage. Except for holidays, weekends, and summers in Westport, she resided in New York and educated her daughter from a previous marriage at a school in New York. The plaintiff had a New York driver's license and voted, filed tax returns and patronized a dentist in New York. She also owned a business in New York until 1990. Additionally, the plaintiff had bank accounts, credit cards and store charge cards, which she maintained at her New York address. Despite requests from the decedent, she did not wish to relocate herself and her daughter from New York to Connecticut.

The decedent considered himself to be a lawful resident and domiciliary of Connecticut, although he spent weekdays with the plaintiff in an apartment in New York and purchased an apartment in New York after their marriage in the name of a trust in order not to jeopardize his Connecticut residency for tax purposes. He also owned a business in New York and managed both his business and his personal affairs using a New York law firm.

All discussions between the decedent and his attorneys, and the limited discussions between the decedent and the plaintiff in connection with the antenuptial agreement, took place in New York. The antenuptial agreement was negotiated, discussed and executed in New York.

*844 The trial referee found that in connection with the agreement, the plaintiff had not been represented by an attorney and that the opportunity provided to her to procure an attorney, one day during a busy time in her life, was not reasonable. The plaintiff saw the agreement for the first time in Corriss' office and, for all practical purposes, she did not read it. Although she had told Corriss that she had read it, despite having not done so, under the circumstances, Corriss knew that she was not represented by counsel and should have known that she had not carefully studied the agreement. Corriss knew that the manner in which the agreement was signed was not in conformity with the normal practices of his own office and, in fact, he had received a note from a colleague in which the colleague had stated that he was "distressed by the combination of no counsel and no financial disclosure."

The referee, however, further found that no false representations had been made to the plaintiff with regard to the contents of the agreement and that there was no proof of fraud, duress or undue influence in connection with its execution.[6] While the parties were neglectful in their rush to sign the agreement, the plaintiff had nevertheless wished to sign the agreement and to get on with her wedding and life regardless of what the agreement said. The plaintiff had told her friends that she had decided in advance to sign the agreement because it was what the decedent wanted, and she wanted to sign **941 it to please him. In fact, the plaintiff produced no evidence that she would not have signed *845 the agreement if she had realized that it had included disposition of the parties' estates upon their deaths.

On the basis of his factual findings, the referee concluded that under §§ 187 and 201 of the Restatement (Second) of Conflict of Laws (1971),[7] the parties' express choice of New York law was valid and, furthermore, that under New York law, the agreement was enforceable because the plaintiff had not met her burden of proving that the agreement had been the product of fraud. See *In the Matter of Sunshine,* 51 A.D.2d 326, 327–28, 381 N.Y.S.2d 260, aff'd, 40 N.Y.2d 875, 357 N.E.2d 999, 389 N.Y.S.2d 344 (1976) (New York rule places no special burden on party seeking to sustain antenuptial agreement). The referee submitted his report to the trial court and the trial court, having determined that the referee's findings of fact were supported by the evidence and that the conclusions drawn therefrom were legally and logically correct, accepted the *846 recommendation and rendered judgment in favor of the defendant. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and

General Statutes § 51–199(c). We affirm the judgment of the trial court.

The plaintiff makes the following claims on appeal: (1) the New York choice of law provision contained in the antenuptial agreement should not have been given effect because (a) it had been obtained by improper means and, alternatively, (b) to give effect to the provision would contravene a fundamental policy of the state that has a materially greater interest in the determination of the issue, namely, Connecticut; see 1 Restatement (Second), supra, § 187; (2) in the absence of an express choice of law by the parties, an application of the test set forth in the § 188 of the Restatement,[8] and the principles set forth in *O'Connor v. O'Connor,* 201 Conn. 632, 638, 519 A.2d 13 (1986), compels the conclusion that, because Connecticut has the most significant relationship to the parties and the antenuptial agreement, the agreement must be interpreted in accordance with Connecticut law, under which it is unenforceable; and (3) even if the New York choice of law provision is valid, the antenuptial agreement ****942** is ***847** unenforceable under New York law. We are not persuaded that the referee's finding that the parties' choice of New York law was valid is not supported by the record.[9] Furthermore, we agree with the referee and the trial court that, under New York law, the agreement is enforceable and that, therefore, pursuant to the agreement, the plaintiff was not entitled to her statutory share of her husband's estate.

I

Before addressing the validity of the antenuptial agreement, we must first determine under the law of which state the agreement should be assessed. The plaintiff makes two arguments in support of her contention that the New York choice of law provision contained in the agreement was improperly determined to be valid. First, she argues that it is invalid because it was obtained by improper means. See 1 Restatement (Second), supra, § 187, comment (b); see footnote 7. Specifically, the plaintiff argues that she could not have knowingly and voluntarily elected the choice of law provision because she did not, pursuant to the standards governing Connecticut antenuptial agreements, knowingly and voluntarily enter into the agreement. Second, the plaintiff argues that even if she knowingly had agreed to the New York choice of law provision, an application of the parties' choice of New York law in the present case "would be contrary to a fundamental policy of [Connecticut] which has a materially greater interest than [New York] in the determination of the particular issue"; see 1 Restatement (Second), supra, § 187(2)(b); and, therefore, may not be given effect. We disagree with both of the plaintiff's contentions.

A

[1] [2] ***848** The plaintiff's first argument puts the cart before the horse. If the agreement itself must be valid under Connecticut law in order for the choice of New York law to be valid, any choice of law provision specifying that the agreement must be interpreted according to the law of another forum would be rendered meaningless. In evaluating a choice of law provision, we conclude, in accordance with comment (c) to § 201 of the Restatement, that "[t]he fact that a contract was entered into by reason of misrepresentation, undue influence or mistake does not necessarily mean that a choice-of-law provision contained therein will be denied effect. This will only be done if the misrepresentation, undue influence or mistake was responsible for the complainant's adherence to the provision (see § 187, Comment [b] and Illustrations 1 and 2). Otherwise, the choice-of-law provision will be given effect provided that it meets the requirements of § 187." See footnote 7. Our conclusion is consistent with our prior case law in which we have given effect to an express choice of law by the parties to a contract provided that it was made in good faith. *International Union v. General Electric Co.,* 148 Conn. 693, 699, 174 A.2d 298 (1961); *Pollak v. Danbury Mfg. Co.,* 103 Conn. 553, 557, 131 A. 426 (1925); see also *Economu v. Borg–Warner Corp.,* 652 F.Sup. 1242, 1248 (D.Conn.1987).

In the present case, the referee found that there was no evidence of misrepresentation, fraud or undue influence underlying the parties' choice of New York law. "A reviewing authority may not substitute its findings for those of the trier of the facts. This principle applies no matter whether the reviewing authority is the Supreme Court ... the Appellate Court ... or the Superior Court reviewing the findings of ... attorney trial referees. See Practice Book § 443; ***849** *Rostenberg–Doern Co. v. Weiner,* 17 Conn.App. 294, 299, 552 A.2d 827 (1989). This court has articulated that attorney trial referees and factfinders share the same function ... whose determination of the facts is reviewable in accordance with well established procedures prior to the rendition of judgment by the court." (Citations omitted; internal quotation marks omitted.) *Wilcox Trucking, Inc. v. Mansour Builders, Inc.,* 20

Conn.App. 420, 423–24, 567 A.2d 1250 (1989), ****943** cert. denied, 214 Conn. 804, 573 A.2d 318 (1990).

"The factual findings of a [trial referee] on any issue are reversible only if they are clearly erroneous.... [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses.... *Holy Trinity Church of God in Christ v. Aetna Casualty & Surety Co.,* 214 Conn. 216, 223, 571 A.2d 107 (1990). *Rosick v. Equipment Maintenance & Service, Inc.,* 33 Conn.App. 25, 40–41, 632 A.2d 1134 (1993). A finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Farrell v. Farrell,* 36 Conn.App. 305, 309, 650 A.2d 608 (1994).

Our review of the record convinces us that the referee was not clearly erroneous in his finding that the choice of law provision had not been obtained by improper means. See *Campisano v. Nardi,* 212 Conn. 282, 285, 562 A.2d 1 (1989). The antenuptial agreement contains an explicit "Governing Law" provision that states that "[a]ll matters affecting the interpretation of this Agreement and the rights of the parties shall be governed by the law of the State of New York." Both parties were experienced business people. The referee found that Corriss had reviewed the agreement with the plaintiff briefly before she signed it and had explained that the agreement was created pursuant to New York law ***850** and would be interpreted accordingly. Finally, the referee found that the plaintiff had been prepared to sign the agreement regardless of what it said. Such findings adequately support the referee's conclusion that the choice of law provision had not been obtained by fraud or undue influence.

B

The plaintiff's second argument in connection with the choice of law provision is based on § 187 of the Restatement. The plaintiff contends that an application of New York law in the present case would be contrary to a fundamental policy of Connecticut concerning the validity of antenuptial agreements and, therefore, may not be given effect. We are not persuaded.

[3] We conclude, in accordance with § 187 of the Restatement, that parties to a contract generally are allowed to select the law that will govern their contract, unless either: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."[10] Applying this test to the facts of the presentcase, ***851** we conclude that the parties' choice of New York law was valid and, therefore, was properly given effect.

****944** **[4]** The first requirement that must be met in order to satisfy § 187 of the Restatement is that the state whose law is selected must have a substantial relationship to the parties or the transaction, or that there be some reasonable basis for the parties' choice. On the basis of the referee's factual findings, the trial court concluded that New York has a substantial relationship to the parties. We agree with the trial court. The plaintiff was at all times a New York resident and conducted many of her affairs in New York. The decedent spent weekdays in New York and maintained a business in New York. Furthermore, the agreement was executed at the decedent's attorney's office, which is located in New York.

The second requirement is that the application of the law of the chosen state must not violate a fundamental policy of the state that (1) has a greater material interest in the determination of the issue, and (2) is the state whose law would be applied in the absence of a choice by the parties. Thus, we need consider the relative policy interests only if Connecticut has a materially greater interest than New York in deciding the validity of the antenuptial agreement.

[5] In light of the referee's findings, the trial court determined that Connecticut did not have a materially greater ***852** interest than New York, so as to trigger an inquiry into the relative policy interests. We agree. Although there were significant contacts with Connecticut, including the facts that the marriage took place in Connecticut, that the decedent was a Connecticut resident, and that his estate is in probate in Connecticut, these contacts are not "materially greater" than the contacts with New York. In view of the numerous contacts, as set forth earlier in this opinion, between the parties, the agreement and the state of New York, we conclude that Connecticut does not have a materially greater interest in the enforceability of the agreement than New York.

Accordingly, we conclude that the trial court properly upheld the parties' choice of New York law.

II

Having determined that the agreement must be interpreted in accordance with the law of New York, we now turn to the plaintiff's claim that even if we were to assume that New York law applies, the trial court improperly concluded that the agreement was valid. Specifically, the plaintiff contends that New York recognizes that the parties to an antenuptial agreement stand in a confidential relationship to each other and that, therefore, once some evidence indicating unfairness has been introduced, the burden of proving the validity of the agreement shifts to the party seeking its enforcement, who must show that it was entered into knowingly and in good faith. We disagree.

The law in New York with regard to the enforcement of antenuptial agreements is clear. "Under prevailing law and public policy, a duly executed antenuptial agreement is given the same presumption of legality as any other contract, commercial or otherwise. It is presumed to be valid in the absence of fraud.... A party seeking to attack the validity of the agreement has the burden of coming forward with the evidence ***853** showing fraud.... Where an antenuptial agreement becomes the subject of litigation the courts will exercise rigid scrutiny in exploring the circumstances within which such agreement was made ... [b]ut, in the absence of proof of facts from which concealment or imposition may reasonably be inferred, fraud will not be presumed.... Such a presumption must have as its basis evidence of overreaching —the concealment of facts, misrepresentation or some other form of deception." (Citations omitted; internal quotation marks omitted.) *In the Matter of Sunshine,* supra, 51 A.D.2d at 327–28, 381 N.Y.S.2d 260.

[6] The referee found that there was nothing in the record "to supply any evidence of coercion or undue influence by either [the decedent] or his attorney," and that the plaintiff had not established fraud or overreaching. These findings are supported by the record and are not, therefore, clearly erroneous. The parties were both experienced business people; Corriss informed the plaintiff of the scope of the agreement; the agreement incorporated full financial disclosure by the parties; and the plaintiff had decided prior to the meeting that she would ****945** sign the agreement regardless of what it said. Thus, because there was no evidence of fraud or overreaching, we agree with the trial court that the agreement is enforceable as a valid contract under New York law.

The plaintiff relies on two cases, both of which were decided in New York prior to 1900; *Graham v. Graham,* 143 N.Y. 573, 38 N.E. 722 (1894); *Pierce v. Pierce,* 71 N.Y. 154 (1877); in support of her argument that a confidential relationship exists between the parties to an antenuptial agreement, which shifts the burden of proving its validity to the party seeking its enforcement. As the referee concluded, however, these cases are no longer the current law of the state of New York.

***854** The Appellate Division of the Supreme Court of New York addressed an argument similar to that raised by the plaintiff in the present case with regard to the burden of proving the validity of an antenuptial agreement. See *In the Matter of Liberman,* 4 A.D.2d 512, 516–17, 167 N.Y.S.2d 158 (1957), aff'd, 5 N.Y.2d 719, 152 N.E.2d 665, 177 N.Y.S.2d 707 (1958). In that case, the court stated: "In the absence of proof by petitioner that she was induced to execute the waiver because of fraud or overreaching on the part of the decedent, the waiver must be held valid (*Matter of Phillips,* 293 N.Y. 483 [58 N.E.2d 504 (1944)])].... Petitioner relies on *Pierce v. Pierce,* [supra, 71 N.Y. 154] but in that case there was conclusive proof of fraud and deception on the part of the decedent which had induced the wife to enter into the prenuptial agreement. It should be noted that at the time the *Pierce* case was decided (1877), antenuptial agreements were presumed to be invalid unless proven otherwise. Now, however, in view of the expression of public policy by the Legislature in amending section 18 of the Decedent Estate Law ... that presumption no longer exists and a prenuptial agreement is presumed to be valid in the absence of proof of fraud, concealment or imposition...." (Citations omitted; internal quotation marks omitted.) *In the Matter of Liberman,* supra, 4 A.D.2d at 516–17, 167 N.Y.S.2d 158. It is clear that the present state of the law in New York is reflected in *Sunshine* and that, therefore, the trial court's determination that the antenuptial agreement was valid was proper.

The judgment is affirmed.

In this opinion the other Justices concurred.

All Citations

238 Conn. 839, 679 A.2d 937

Footnotes

1 The antenuptial agreement was executed in the presence of a witness and acknowledged before a notary public. It provides that each party can own, hold and freely dispose of all real and personal property owned at the time of the agreement or acquired thereafter by gift, free from all rights of the other; that each party can dispose of all real and personal property upon death by will, testamentary substitute, or any other arrangement as if the parties had never been married; that each party waived, released and renounced all interest in the other party's estate; and that neither party would contest the will of the other. Further, the agreement provides that the plaintiff waived the right to legal counsel and acknowledged that, in light of the voluntary and knowledgeable nature of the waiver, she would not claim that the agreement was void and unenforceable. Finally, the agreement provides that both parties acknowledge that the agreement was fair, equitable, and entered into voluntarily, not as a result of duress or undue influence.

2 The Probate Court determined that the agreement was valid and enforceable and that, therefore, in accordance with General Statutes § 45a–436(f), which provides that the statutory share of a spouse's estate may be waived by a written agreement, the plaintiff had no right to share in the decedent's estate.

3 See General Statutes § 45a–437, which provides in relevant part: "Intestate succession. Distribution to spouse. (a) If there is no will, or if any part of the property, real or personal, legally or equitably owned by the decedent at the time of his or her death, is not effectively disposed of by the will or codicil of the decedent, the portion of the intestate estate of the decedent ... which the surviving spouse shall take is ...

"(4) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the intestate estate absolutely."

4 General Statutes § 45a–186 provides in relevant part: "Appeals from probate. Any person aggrieved by any order, denial or decree of a court of probate in any matter ... may appeal therefrom to the superior court for the judicial district in which such court of probate is held...."

5 See General Statutes § 52–434.

6 Simultaneously with the signing of the agreement, the plaintiff was presented with a letter that stated that on several occasions she had been told that she should retain independent counsel but had freely elected not to do so. The referee found that the contents of this letter were untrue and rejected the letter as an effective waiver of anything. The referee further concluded, however, that the letter did not rise to the level of fraud because it had induced nothing and had been neither believed nor relied upon by the parties.

7 Section 187 of the Restatement (Second) of Conflict of Laws (1971), provides in relevant part: "Law of the State Chosen by the Parties ...

"(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

"(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

"(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

Comment (b) to § 187 of the Restatement (Second) provides: "Impropriety or mistake. A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake."

Section 201 of the Restatement (Second) of Conflict of Laws (1971), provides: "Misrepresentation, Duress, Undue Influence and Mistake

"The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187–188."

8 Section 188 of 1 Restatement (Second) of Conflict of Laws (1971), provides in relevant part: "Law Governing in Absence of Effective Choice by the Parties....

"(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

"(a) the place of contracting,

"(b) the place of negotiation of the contract,

"(c) the place of performance,

"(d) the location of the subject matter of the contract, and

"(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

"These contacts are to be evaluated according to their relative importance with respect to the particular issue."

9 Because we conclude that the New York choice of law provision was valid, we need not reach the plaintiff's claims in connection with the validity of the antenuptial agreement under Connecticut law.

10 Many other jurisdictions have adopted § 187 of the Restatement. See, e.g., *Moore v. Subaru of America,* 891 F.2d 1445, 1449 (10th Cir.1989); *Uniwest Mortgage Co. v. Dadecor Condominiums, Inc.,* 877 F.2d 431, 435–36 (5th Cir.1989); *Tele–Save Merchandising Co. v. Consumers Distributing Co., Ltd.,* 814 F.2d 1120, 1122–25 (6th Cir.1987); *Woodling v. Garrett Corp.,* 813 F.2d 543, 551 (2d Cir.1987); *Shipley Co. v. Clark,* 728 F.Sup. 818, 825 (D.Mass.1990); *Economu v. Borg–Warner Corp.,* supra, 652 F.Supp. at 1248; *Cherry, Bekaert & Holland v. Brown,* 582 So.2d 502, 507 (Ala.1991); *In re Estate of Levine,* 145 Ariz. 185, 189, 700 P.2d 883 (App.1985); *Sekeres v. Arbaugh,* 31 Ohio St.3d 24, 25, 508 N.E.2d 941 (1987).

Such a rule is supported by the rationale set forth in comment (e) to § 187 of the Restatement, which provides: "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations."

State of California

FAMILY CODE

Section 1615

1615. (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. The advisement to seek independent legal counsel shall be made at least seven calendar days before the final agreement is signed.

(2) One of the following:

(A) For an agreement executed between January 1, 2002, and January 1, 2020, the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the final agreement and advised to seek independent legal counsel and the time the agreement was signed. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

(B) For an agreement executed on or after January 1, 2020, the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the final agreement and the time the agreement was signed, regardless of whether the party is represented by legal counsel. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations the party was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that the party received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

(Amended by Stats. 2019, Ch. 193, Sec. 1. (AB 1380) Effective January 1, 2020.)

798 S.W.2d 928 (1990)

Kathryn R. GENTRY, Movant,
v.
Thomas E. GENTRY, Respondent.
Thomas E. GENTRY, Cross-Movant,
v.
Kathryn R. GENTRY, Natalie S. Wilson and Gess, Mattingly, Saunier and Atchison, Cross-Respondents.

Nos. 89-SC-501-DG, 89-SC-726-DG.

Supreme Court of Kentucky.

November 8, 1990.

930 *930 Walter R. Morris, Jr. and Natalie S. Wilson, Gess, Mattingly, Saunier & Atchison, Lexington, for movant, cross-respondents.

Glen S. Bagby, Brock, Brock & Bagby, Lexington, for respondent, cross-movant.

JAMES G. SHEEHAN, Jr., Special Justice.

Kathryn R. Gentry and Thomas E. Gentry were married February 26, 1975. It was the second marriage for both. Each had two children at the time they married. Both Tom and Kathy had been through protracted divorce proceedings and Kathy was aware that Tom's divorce and property settlement had been particularly bitter.

A few days before their wedding, Tom and Kathy executed a document titled "ANTENUPTIAL AGREEMENT", the preamble to which recited as follows:

> Whereas Tom and Kathy contemplate entering into marriage and each are [sic] possessed of property in his and her own right, and each has children by a former marriage, and
>
> Whereas, it is desired by Tom and Kathy that their marriage shall not in any way change their legal property rights or the rights of their children or heirs at law to the property of each of them as they presently are before the marriage of Tom and Kathy, or their rights to bequeath property by their last will and testament as they see fit.

The agreement disclosed the nature and value of Tom's and Kathy's respective assets. Tom's net worth was approximately 1,500,000.00. Kathy's was nominal. The essential, or operative, terms of the agreement were reciprocal releases:

> 3. Tom hereby renounces and releases to Kathy, her heirs and assigns, any and all right, title and interest or right of dower and courtesy [sic] to any property both real and personal of which Kathy may now be seized [sic] or that she may hereafter acquire. Tom further specifically renounces and releases to Kathy's heirs-at-law, next of kin, legatees and devisees under her Last Will and Testament should Kathy predecease him, any and all right, title, interest and right of dower and courtesy [sic] of which Tom may have or be entitled, both real and personal. Tom further agrees to make no claim to any part of Kathy's estate as surviving spouse with respect to the estate owned by Kathy prior to the time of their marriage or with respect to any property, real or personal acquired by her subsequent to said marriage. However, in no event shall Kathy be prevented from bequeathing property to Tom in her Last Will and Testament as she determines at her sole discretion.

931 *931 4. Kathy hereby renounces and releases to Tom, his heirs and assigns, any and all right, title and interest or right of dower and courtesy [sic] to any property, both real and personal, of which Tom may now be seized [sic] or that he may hereafter acquire. Kathy further specifically renounces and releases to Tom's heirs-at-law, next of kin, legatees and devisees under his Last Will and Testament should Tom predecease

her, any and all right, title, interest and right of dower and courtesy [sic] of which Kathy may have or be entitled, both real and personal. Kathy further agrees to make no claim to any part of Tom's estate as surviving spouse with respect to the estate owned by Tom prior to the time of their marriage or with respect to any property, real or personal, acquired by him subsequent to said marriage. However, in no event shall Tom be prevented from bequeathing property to Kathy in his last will and testament as he determines at his sole discretion.

The final paragraph of the agreement recited that the agreement was made in contemplation of their impending marriage, that it was entered into "freely, willingly and without duress" and further, that it was made for the purpose of insuring to each Tom and Kathy "that they will not claim any interest in the estate of the other upon his or her death, except as each may designate in his or her respective last will and testament."

The agreement was drawn by an attorney and mutual friend, who testified that it was duly executed February 21, 1975. The trial court found the agreement to have been executed freely, knowingly and voluntarily by both parties.

Although Tom and Kathy enjoyed a very high standard of living while they were married, the marriage was stormy. According to Kathy, she "very early on" knew there were problems. The parties separated several times, the first time in 1978. No children were born of the marriage.

Kathy was not employed outside the home after the marriage, although she had been a school teacher before she and Tom married. The Gentrys' income was derived chiefly from Tom Gentry Farms, a thoroughbred breeding enterprise of which Tom was the principal operator. Kathy does not claim to have been actively involved with the thoroughbred horses or with the day to day farm operations. The evidence indicated that her skills in decorating, advertising, and entertaining contributed to the success of the annual yearling sale. The trial court found, and Kathy conceded, however, that her efforts were far less significant than Tom's to the sales which funded the accumulation of property during the marriage.

While they were married, the parties maintained separate bank accounts. Virtually all assets acquired during the marriage were purchased with funds from Tom's farm account. All income from the enterprise apparently went into Tom's farm account, over which only Tom had signature authority. From that account, Kathy received a sum of money each month. In addition, the evidence showed she was frequently reimbursed for purchases and expenditures. At the time of the separation, Kathy had banking accounts in her own name, including an account with MerrillLynch, worth approximately $42,000.00.

Tom made several significant gifts and transfers of personal property, including jewelry, to Kathy during the marriage. He gave her a Steinway piano for her birthday. Frequently, jewelry and gifts were chosen by or delivered to Kathy shortly after the summer yearling sales, from which Tom Gentry Farms derived most of its annual income.

Kathy's name does not appear upon the documents evidencing title to any assets acquired during the marriage, with the exception of the bank accounts in her name and a parcel of real estate in California which was purchased in joint names during the marriage. Kathy apparently lived primarily in the California house during the last two years of the marriage.

932 A decree of divorce was entered July 1, 1986. After multiple hearings and a trial, the Fayette Circuit Court held that the *932 antenuptial agreement had been freely and voluntarily entered into by both Tom and Kathy, that each had made full disclosure to the other of their respective assets at the time the agreement was made, and that the intent of the parties was to provide for the disposition of all property in the event of termination of the marriage by either death or divorce. The circuit court further held that the agreement did not violate public policy and was not unconscionable.

The trial court found Tom's net worth to have declined significantly and to be between $650,000.00 and $750,000.00 as of the time Kathy filed for divorce, in January, 1986. The court found the parties had kept their property separate and awarded to Tom all property titled in his name and to Kathy all property titled in her name, except the California house, which, title notwithstanding, the court awarded to Tom as his separate property. Kathy was awarded all items of jewelry which had been given her, as well as the Steinway piano. Two silver pieces were found to be jointly owned and the court awarded one to each party. All other personalty was found to be separately owned. Most of it was awarded to Tom.

The circuit court awarded maintenance to Kathy in decreasing amounts over a seven year period. It also ordered Tom to pay the sum of $100,000.00 toward Kathy's attorneys fees to cross-respondents Natalie S. Wilson and Gess, Mattingly,

Saunier and Atchison and, in addition, to reimburse Kathy for the costs of this action. At that time, costs exceeded $50,000.00.

Kathy appealed to the Kentucky Court of Appeals, which affirmed the trial court. She then filed a motion for discretionary review; Tom filed a cross motion as to the award of attorneys fees and costs. Both motions were granted.

We remand the Case to the Fayette Circuit Court with directions to award one-half the equity in the California house to Kathy Gentry. In all other respects, on both appeal and cross-appeal we affirm the result reached by the circuit court and the Court of Appeals.

I. THE ANTENUPTIAL AGREEMENT BETWEEN TOM AND KATHY GENTRY WAS INTENDED TO CONTROL THE DISPOSITION OF ALL PROPERTY OF THE PARTIES UPON TERMINATION OF THE MARRIAGE, WHETHER BY DEATH OR BY DIVORCE.

The Court of Appeals held the Gentry antenuptial agreement was ambiguous. We disagree; but we conclude, as did the Court of Appeals, that the agreement is a valid and controlling contract for the disposition of all Tom and Kathy's property upon termination of their marriage by divorce.

The preamble of the agreement states that both parties desire that their marriage "shall not in any way change *their* legal property rights *or* the rights of their children or heirs at law to the property of each of them as they presently are before the marriage...." (emphasis added). The final paragraph states that the agreement is made for the purposes of insuring neither party will claim an interest in the estate of the other.

Tom argues that the preamble is clear and controlling and the concluding paragraph is nothing more than an effort to steer clear of the prohibition of *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916) against agreements "providing for, and looking to, future separation after marriage." Kathy cites the concluding paragraph of the agreement as evidence the parties intended the agreement to take effect only in the event of termination of the marriage by death. In the alternative, Kathy argues that the final paragraph, expressing a more limited purpose than the preamble, creates an ambiguity which must be resolved in Kathy's favor.

By the operative terms of the antenuptial agreement, Tom and Kathy renounced and released to each other, as well as to
933 each other's heirs and assigns, any and all interest in property of which the other was then seized or which the other *933 might thereafter acquire.[1] In unambiguous terms, then, the parties agreed that upon termination of the marriage each would relinquish to the other, or the other's heirs, as the case might be, all rights in property which the other owned at the time of the marriage or which the other might own at dissolution of the marriage. In view of the clear and unambiguous provisions in the reciprocal renunciation and release, there is no need to address any arguable inconsistency in the preliminary and concluding purpose statements. They are not essential parts of the contract *City of Elizabethtown v. Cralle*, Ky., 317 S.W.2d 184 (1958); *Jones v. City of Paducah*, 283 Ky. 628, 142 S.W.2d 365 (1940); 17 Am. Jur.2d *Contracts* § 268, and serve only to aid construction if the contract is unclear. It is not. The operative provisions must therefore be given effect: Tom and Kathy each relinquished unto the other, in the event of their divorce, all property which the other owned at their marriage and which each might own at the termination of their marriage, regardless of any legal rights which might otherwise have accrued to either spouse as a result of the marriage.

II. THE AGREEMENT DOES NOT VIOLATE PUBLIC POLICY.

Kathy argues that if the agreement was intended to apply in the event of divorce then it violates public policy as expressed in *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916) and is void. *Stratton* recognized that antenuptial property settlements intended to take effect on death are valid and even favored by law (see also *Lipski v. Lipski*, Ky., 510 S.W.2d 6 (1974); *Collins v. Bauman*, 125 Ky. 846, 102 S.W. 815 (1907); and *Forwood v. Forwood*, 86 Ky. 114, 5 S.W. 361 (1887), but held that any provisions of an antenuptial agreement "providing for, and looking to, future separation after marriage" were against public policy and void.

The *Stratton* court explained the policy underlying the rule in that case:

> The rule so announced is but a manifestation of a long-settled policy of the law to the effect that it is beneficial to society that the marital relation should not be disturbed or its happiness marred, but that it should be upheld and encouraged, and that the parties to it should not be led into the breaking of its vows by the allurments (sic) of any stipulations which they may enter into before marriage. 170 Ky. 61, 185 S.W. 522, 525.

Most jurisdictions which have recently considered the question before us have recognized a change in public policy relative to divorce and have enforced antenuptial agreements in divorce situations. In *In re Marriage of Ingels,* 42 Colo.App. 245, 596 P.2d 1211 (1979), for example, the Colorado court rejected the notion that providing for the possibility of divorce necessarily promotes or encourages divorce:

> Wife first argues that the antenuptial agreement is void as against public policy, because it is not limited to adjusting the parties' rights on death, and thus impermissibly "encourages" dissolution. We disagree.
>
> . . . .
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> Courts have increasingly recognized that spouses-to-be have the right to enter into realistic antenuptial agreements which contemplate the possibility of dissolution, and have accordingly de-emphasized the traditional public policy argument that such agreements "promote" or "encourage" dissolution.... 596 P.2d 1211, 1213.

In *In re Marriage of Dawley,* 17 Cal.3d 342, 131 Cal.Rptr. 3, 551 P.2d 323 (1976), the California Court recognized that the possibility of dissolution is significant enough that the parties to a marriage might prudently consider it at the time the marriage is entered into:

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> *934 A man and woman entering into marriage may pledge their faith "till death do us part," but the unromantic statistics show that many marriages end in separation or dissolution. Spouses who enter into an antenuptial agreement cannot forecast the future; they must, as a realistic matter, take into account both the possibility of lifelong marriage and the possibility of dissolution. [131 Cal.Rptr. 3, 9] 551 P.2d 323, 329.

And in *Posner v. Posner,* Fla., 233 So.2d 381 (1970), the Florida court questioned the validity of the premise that divorce is to be discouraged in all circumstances:

> We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptial agreements of the parties relating to divorce is clearly discernible. 233 So.2d at 381, 384.

In Kentucky, subsequent cases have eroded the prohibition of *Stratton.* For example, in *Sousley v. Sousley,* Ky., 614 S.W.2d 942 (1981), this Court acknowledged doubts about the continued validity of the policy enunciated in *Stratton.* In *Jackson v. Jackson,* Ky., 626 S.W.2d 630 (1981), we distinguished *Stratton* and upheld the application of an antenuptial contract in a divorce situation because the obligation imposed by contract (that the husband would furnish the wife a "decent support" during his life) commenced on or before marriage, and had only an "incidental relationship" with a possible future dissolution.

Whatever public policy may have been in 1916, when *Stratton* was decided, we believe it must be reexamined in light of changes in society and the law since the opinion was written. The "unromantic statistics" show that many marriages in Kentucky end in divorce. The Stratton court, in 1916, wrote in the context of "fault based" divorce laws and a society in which divorce was uncommon, if not unthinkable.

It has been argued that, in KRS 403.190(2)(d), the legislature intended to codify a public policy which approves of antenuptial contracts fixing the rights of the parties in the event of their divorce. A majority of this Court does not find that statute to be a clear statement of intent specifically to authorize such agreements. We do, however, believe that when the Kentucky General Assembly in 1972 enacted this and other portions of the Uniform Dissolution of Marriage Act, it was responding to significant changes in the expectations of parties to the marital contract and in the attitude of society toward

divorce. In light of such changes, we believe the opinions of the Florida, Colorado and California courts, quoted above, more accurately reflect public policy toward divorce and antenuptial contracts today than does *Stratton.*

To the extent *Stratton* would preclude on public policy grounds a premarital contract between two competent parties, providing for the disposition of their property in the event of their divorce, *Stratton* is hereby overruled. We hold that a husband and wife in Kentucky may define by agreement their rights in each other's property, regardless of any rights which would otherwise have been excluded or conferred by KRS 403.190. Such agreements, provided they are otherwise valid contracts, are entitled to enforcement upon dissolution of the marriage.

The rule against antenuptial contracts which fix the parties' rights in the event of divorce also, of course, protects the public's interest in insuring that divorce does not leave one spouse destitute or dependent upon the state for support. In the Gentry antenuptial agreement, we are not confronted with a contract purporting to waive any claim to both marital property and maintenance, although we believe the trial court's broad discretion to review antenuptial agreements for unconscionability should adequately protect this interest.

The Gentry agreement, freely and voluntarily executed by the parties after full disclosure of their respective assets and marital property rights, and with the intent of providing for disposition of property in the event of divorce as well as in the
935 event of death, does not violate public policy in *935 Kentucky. To the extent of any inconsistency with this holding, prior cases are overruled.

III. THE GENTRYS WAIVED, BY AGREEMENT, ANY CLAIM BY EACH OF THEM TO PROPERTY OWNED BY THE OTHER AT THE TERMINATION OF THE MARRIAGE, REGARDLESS OF HOW SUCH PROPERTY MIGHT OTHERWISE HAVE BEEN DISTRIBUTED OR DIVIDED UNDER KRS 403.190. EACH IS THEREFORE ENTITLED TO THE PROPERTY HELD IN HIS OR HER NAME AT THE TIME OF DIVORCE.

Kathy argued on appeal that even if the antenuptial agreement applies to the disposition of the Gentrys' premarital property in the event of their divorce, it could not affect the disposition of their "marital property." The Court of Appeals considered this argument and held as follows:

> We do not disagree with this premise. The difficulty would seem to have been in determining precisely what their marital property was. The property which each acquired after the marriage and maintained as his or her separate property was not marital property by virtue of their agreement and KRS 403.190(2)(d).

The record substantiates the trial court's finding that Tom and Kathy, for the most part, maintained their premarital property separately and allocated to separate ownership the property acquired after the marriage. The effect of the agreement and the separate ownership of most assets was to obviate the necessity of the court's becoming involved in dividing property acquired during the marriage. By their agreement and their allocation of assets between them, the parties excluded such assets from the definition of "marital property" under KRS 403.190.

Kathy argues that even if the circuit court was correct in upholding the agreement, it nevertheless applied the agreement incorrectly as to one asset — the California house. All real estate except the California house was held solely in Tom's name and was awarded to Tom. Notwithstanding the fact that title was taken and held by Tom and Kathy jointly, the trial court found the California house was a business asset and awarded it to Tom. This was error. It is true the record establishes that the house was purchased from the Tom Gentry farm account, but just as Kathy may not argue that her contribution to the marriage and the enterprise is not accurately reflected in the ownership of assets, Tom is likewise precluded from arguing that the house is his sole and separate property. By virtue of the antenuptial agreement, property in Tom's name at the time of dissolution was Tom's; property in Kathy's name at the time of dissolution was Kathy's.

The Gentrys gave effect to their agreement by keeping their premarital property separate and by allocating between them property which would otherwise be subject to division by the court under KRS 403.190. In consideration of Kathy's reciprocal release, Tom renounced and released unto Kathy any property which she might own at the termination of the

marriage. Having upheld the agreement, the court must give it effect. At the time of dissolution, Kathy had acquired, within the meaning of the agreement, and was seised of, a one-half undivided interest in the California real estate. We therefore remand to the trial court with instructions to award one-half the equity in the California real estate to Kathy Gentry, in accordance with the antenuptial agreement and the deed.

IV. THE RECORD DOES NOT REVEAL THE AGREEMENT TO BE UNCONSCIONABLE.

The trial court found the agreement was not unconscionable either at the time it was entered into or at the time it was enforced. Kathy argues this was error.

Although antenuptial agreements providing for the disposition of property on divorce are permitted, it is, of course, possible that a particular agreement may be invalid or even void when measured by appropriate standards:

936 *936 ... the trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable? *Scherer v. Scherer*, [249 Ga. 635] 292 S.E.2d 662 (1982).

The Fayette Circuit Court found that the Gentry agreement was executed freely, knowingly and voluntarily. He rejected all claims of fraud, duress, mistake, misrepresentation and non-disclosure. There was no evidence which compelled a contrary finding.

The trial court also held the agreement was not unconscionable when it was executed. The contract applied equally to Tom and Kathy, although their respective financial conditions were disparate. The terms of the agreement were not manifestly unfair. It did not attempt to limit or deny maintenance or support. We find no reason to disturb the finding that the agreement was not unconscionable at the time of its execution.

The focus of Kathy's unconscionability argument on appeal is the third requirement set out in the *Scherer* opinion. Kathy argues, and we agree, that antenuptial agreements must be examined at the time enforcement is sought. An antenuptial agreement will not be enforced if facts and circumstances have changed so as to make its enforcement unconscionable. See also *Posner v. Posner*, Fla., 233 So.2d 381 (1970).

We note that the legislature, in KRS 403.180(2), has provided that property settlement agreements between divorce contestants will be reviewed by the court at the time of divorce in order to insure that the agreement is not unconscionable. In a property settlement agreement, the parties are dealing at arm's length in contemplation of imminent divorce and division of property. Parties entering into marriage, on the other hand, are not likely to exercise the same degree of vigilance in protecting their respective interests. Often there will be many years between the execution of an antenuptial agreement and the time of its enforcement. It is, therefore, appropriate that the court review such agreements at the time of termination of the marriage, whether by death or by divorce, to insure that facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable.

Examining the facts and circumstances in which the Gentry agreement was sought to be enforced, the Fayette Circuit Court held:

> today the time when the agreement is to apply, there is no evidence that this agreement is unconscionable. Clues as to what the evidence may be is not sufficient. Evidence should establish what exists at this time.

In deciding that enforcement of the Gentry agreement was not unconscionable, the circuit court properly considered the parties' respective financial conditions at the time of termination. It found Tom Gentry's financial condition had declined significantly during the marriage. The court also considered the extent to which each party contributed to the accumulation of property and rejected Kathy's claim that the allocation of property pursuant to the agreement was manifestly unfair in light of her efforts. Upon the record before us, we affirm the circuit court's finding that facts and circumstances at the time of dissolution had not changed so as to make enforcement of the Gentry agreement unconscionable as to Kathy Gentry.

V. THE RECORD DOES NOT REVEAL THAT THE MAINTENANCE AWARDED WAS INADEQUATE IN AMOUNT OR DURATION.

Before awarding maintenance to either party to the dissolution, the trial court must find that the party:

937 (a) lacks sufficient property, including marital property apportioned to him, to *937 provide for his reasonable needs; and (b) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. KRS 403.200(1).

The Fayette Circuit Court determined that Kathy Gentry was entitled to maintenance under KRS 403.200(1). It awarded her maintenance in decreasing amounts over a period of seven years. Kathy argues that the award was insufficient in amount and duration. In setting the amount and duration of maintenance, the trial court must consider the factors set out in KRS 403.200(2):

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> (2) the maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
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> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
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> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
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> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;
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> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
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> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The record shows the Fayette Circuit Court considered all the statutory factors. It found Kathy Gentry had been awarded very little property, pursuant to the agreement, and that Tom's financial resources were also severely diminished. Further, although the parties had established a very high standard of living during the marriage, neither Tom nor Kathy would be able to maintain that standard after dissolution. The court found Kathy was forty-six years old, in good physical and mental health, and, although unable presently to find appropriate employment, she would, with some training, be able to return to the job market. Until her return to work, the court found that Kathy would be able to support herself in a reasonable manner with the maintenance awarded.

The trial court properly considered all factors and the record. Although the application of the statutory factors to the facts might support a larger award, the award of maintenance is left to the trial court's sound discretion. KRS 403.200(2). We cannot say the Fayette Circuit Court abused its discretion in fixing the amount and duration of maintenance, particularly in view of Tom's net worth and financial condition as that court found it. We therefore affirm the award of maintenance.

VI. ATTORNEYS FEES AND COSTS

On cross-appeal, Tom Gentry argues it was error for the trial court to have awarded attorneys fees and costs to Kathy. His arguments are without merit. KRS 403.220 provides:

> *403.220 Costs of Action and Attorney's Fees* The Court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal

> services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

In assessing costs, including attorneys' fees, against Tom, the trial court found disparity in the financial resources of Tom
938 and Kathy. Under the statute, no more is required. KRS 403.220; *Bishir v. Bishir*, Ky., 698 S.W.2d 823 (1985). Clearly *938 the trial court had authority to award reasonable costs and attorney fees to Kathy. And although the amount awarded is extraordinary, in this case it is not unreasonable.

The circuit court found that a significant portion of the attorneys fees was incurred as a result of Tom Gentry's obstructive tactics and refusal to cooperate in the proceedings. The record amply supports the trial court's finding:

> . . . the petitioner's attorney had to expend a great deal of time, just in preparation for the trial. They had to find out what the respondent's net worth was, what assets he owned, what liabilities were actually owed by him. And so, the first thing is the cost, and I don't have any problems with the costs in this case, because I feel that Mr. Gentry was an obstacle to the plaintiff's attorneys in trying to discover what his true financial picture was in this case, or what was his true financial picture. And they — they had to expend all this cost in time and effort just to overcome his resistance, and this is more than just a natural resistance. They had to bring his books up to date, and they had to prove whether or not certain assets were owned by him or someone else, and whether or not certain liabilities were, in fact, true liabilities. And, the record will bear all this out, that they did, in fact, do that. That he has attempted to conceal his assets, and overstate his liabilities. And they had to overcome this, and he's made it difficult. And so, the attorneys fees that are awarded in here are not really reflective of what would be the normal case, because this was not the normal case. Not simply because of the amount involved, because I've tried cases with a lot more involved than this, with a lot less cost and attorneys fees being incurred, because of not so much the cooperative of the parties involved, but the parties themselves not putting up obstacles because of additional work on the part of the attorneys in the case.

The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.

Tom argues that a great amount of the attorneys' fees were unnecessary. He claims that when the antenuptial agreement was upheld by the trial court, Kathy's subsequent efforts to discover Tom's net worth and identify his assets were superfluous to the proceedings. We disagree. The trial court was required to consider all Tom's assets and liabilities when it fixed the amount of maintenance. KRS 403.200(2)(f); see also *Budig v. Budig*, Ky., 481 S.W.2d 95 (1972). In addition, Tom's true net worth at the time of dissolution was material to the question of unconscionability or changed circumstances. The effort expended by Kathy's attorneys was appropriate to the issues in the case and to the difficulties encountered in uncovering the facts material to those issues.

We agree that many of the costs and fees were unnecessary in the sense that a good deal of the court's time and a substantial part of the costs and fees assessed could have been avoided by candor and cooperation. Under such circumstances, there is no abuse of discretion nor any inequity in requiring the party whose conduct caused the unnecessary expense to pay it. CR 37.01.

In *Bishir v. Bishir*, Ky., 698 S.W.2d 823 (1985), this court specifically held it was proper to award fees incurred by the wife in a post judgment CR 60.02 proceeding, even though, in that case, the wife's motion was overruled. The disparity of financial resources was sufficient grounds. In this instance, financial inequality justifies the award, KRS 403.220. Tom's obstructive tactics and conduct, which multiplied the record and the proceedings, justify both the fact and the amount of the award. KRS 403.220, CR 37.01.

Finally, Tom claims that the expert witness fees should not have been reimbursed to Kathy as costs because Kathy failed to
939 *939 secure the approval of the trial court prior to employing the experts. He also claims that certain of the experts were biased against him.

While this Court has held, in *Justice v. Justice*, Ky., 421 S.W.2d 868 (1967) that it is better practice for a party to secure the permission of the trial court prior to incurring expenses which will be claimed as costs, the failure to secure prior approval

does not preclude recovery. There is no evidence that the appraisals and expert opinions were unnecessary and the record reveals no basis for Tom's argument that the experts' opinions were unreliable or their testimony inaccurate as a result of sympathy for Kathy or alleged antipathy toward Tom.

The amount of attorneys' fees and costs awarded in this case is extraordinary; however, the record is replete with evidence which supports the trial court's decision. The Fayette Circuit Court's order that Tom Gentry pay the costs of this action, including attorneys' fees of $100,000.00 to Kathy's attorneys, is affirmed.

STEPHENS, C.J., not sitting.

GANT and LAMBERT, JJ., concur.

COMBS, J., concurs by separate opinion.

LEIBSON, J., concurs by separate opinion in which JAMES G. SHEEHAN, Jr., Special Justice, joins.

VANCE, J., dissents by separate opinion in which WINTERSHEIMER, J., joins.

COMBS, Justice, concurring.

I believe that in enacting the divorce code, particularly KRS 403.110 and 403.180, the General Assembly intended to effect some change in Kentucky divorce law, and not merely to codify selected elements of the common law. To me, the legislation represents a conscious departure from the policy reflected in the decision of *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916).

The *Stratton* holding deplored antenuptial agreements contemplating the possibility of divorce and providing advance arrangements for alimony or maintenance. There was nothing, however, to prevent postnuptial agreements contingent on divorce and addressing not only the question of maintenance, but that of property distribution as well. I do not believe that KRS 403.180 was intended to leave the "antenuptial rule" of *Stratton* intact but uncodified, while making statutory the established "postnuptial rule."

KRS 403.110 mandates liberal construction and application of the chapter with the aim of promoting its underlying purposes, which are to:

> (1) Strengthen and preserve the integrity of marriage and safeguard family relationships;
>
> (2) Promote the amicable settlement of disputes that have arisen between parties to a marriage;
>
> (3) Mitigate the potential harm to the spouses and their children caused by the process of legal distribution of marriage;
>
> (4) Makes [sic] reasonable provision for spouse and minor children during and after litigation; and
>
> (5) Make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis for its dissolution.

KRS 403.110(1)-(5).

It is evident that the legislature considered the *modern* "realities of matrimonial experience," one of which is the real possibility of "no-fault" divorce. The integrity of marriage is no more eroded by a contingency agreement made on the eve of marriage than by one made after the ceremony. The ends of amicable settlement of disputes, mitigation of harm, and reasonable provision of maintenance may all be subserved by a prior agreement. Indeed, a clear mutual understanding with respect to these issues before marriage may well foster a strong, enduring relationship — by allaying suspicions as to matrimonial motivation, for example.

940 KRS 403.180, when read in light of KRS 403.110, requires enforcement of antenuptial *940 property and maintenance agreements not unconscionable:

> (1) To promote amicable settlement of *disputes* between parties to a marriage *attendant* upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement

containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

(2) In a proceeding for dissolution of marriage or for a legal separation, the terms of the separation agreement, except those providing for the custody, support and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties, and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

KRS 403.180(1)-(2). [Emphasis added.]

The "parties to a marriage" are the same parties prior to marriage; subsection (1) does not exclude agreements between persons contemplating marriage. Disputes attendant upon separation may well be settled more amicably, more expeditiously, and more fairly when they are addressed by a pre-existing agreement. The statute does not require that the agreement be one made *after* separation or dissolution.

In my view, the *Stratton* approach has been overruled by the General Assembly.

LEIBSON, Justice, concurring.

I concur in the Majority Opinion as written.

The Majority Opinion states on p. 934:

"A majority of this Court does not find [KRS 403.190(2)(d)] to be a clear statement of intent specifically to authorize such agreements."

I am part of the minority who believes this statute intends to authorize prenuptial agreements.

KRS 403.190(2) provides:

"For the purpose of this chapter, `marital property' means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) *Property excluded by valid agreement of the parties;* and

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage. [Emphasis added.]

Sub-paragraph (d) of the above statute, incorporated from the Uniform Dissolution of Marriage Act, has been accepted by courts of other jurisdictions as a statement of significant public policy change permitting antenuptial agreements to provide for the disposition of property upon dissolution of the marriage:

"Persons competent to contract may execute a valid antenuptial agreement. Although the law prescribes the rights of a husband and wife in the property of each other, persons may, by agreement, exclude the operation of the law and determine for themselves what rights they will have in each other's property during the marriage. (*Volid v. Volid*, (1972) 6 Ill.App.3d 386, 286 N.E.2d 42). In addition to property owned prior to the marriage, the parties may also define their rights to property acquired by a spouse later in the marriage." *In re Marriage of Burgess*, 123 Ill.App.3d 487, 78 Ill.Dec. 345, 462 N.E.2d 203 (1984).

By virtue of KRS 403.190(2)(d), a husband and wife in Kentucky may define by agreement their rights in each other's property, regardless of any rights which would otherwise have been excluded or conferred by KRS 403.190. Such
941 agreements, provided they are otherwise valid contracts, are *941 entitled to enforcement upon dissolution of the marriage.

JAMES G. SHEEHAN, Jr., Special Justice, joins this concurring opinion.

VANCE, Justice, dissenting.

I dissent for the reasons expressed in my dissenting opinion in *Edwardson v. Edwardson*, Ky., 798 S.W.2d 941 (1990), rendered on this date. As I indicated therein, the long-established public policy of this state forbids enforcement of antenuptial agreements which look to future separation and divorce. This policy, if it is to be changed, should be changed by the General Assembly and not this court. The majority opinion recognizes that the General Assembly by enacting K.R.S. 403.190(2)(d) has not legislatively changed the long-established public policy which prohibits antenuptial agreements which look to the division of property in the event of a future divorce.

It expressed a belief, however, that the General Assembly was responding to significant changes in the expectations of the parties to the marital contract and in the attitude of society toward divorce, and therefore the opinions of Florida, California, and Colorado courts cited more accurately reflect public policy toward divorce and antenuptial contracts today than does *Stratton v. Wilson*, 170 Ky. 61, 185 S.W. 522 (1916).

The opinions of the courts in Florida, California, and Colorado reflect the public policy of those states, but they reflect the public policy of Kentucky not one bit. The public policy of this state is determined by the General Assembly and, in any given case, if the General Assembly has not declared a public policy, it is left to the court to do so. Once a public policy has been declared by the court, it should remain in effect until the legislature declares otherwise. Of course, the judiciary has the raw power to reverse public policy previously declared by it, but it should be reluctant to do so in cases of judicially declared policy which has become long-established precedent.

In any case, the majority opinion recognizes that K.R.S. 403.190(2)(d) does not overrule the public policy established by *Stratton v. Wilson, supra*. In my opinion, K.R.S. 403.190(2)(d) does not have the slightest bearing upon *Stratton v. Wilson*. It merely provides that marital property means all property acquired by either spouse subsequent to the marriage except,

> "(d) property excluded by *valid* agreement of the parties."

The act is effective only as to conditions which existed at the time it was enacted and thereafter. It was not given retroactive effect. When K.R.S. 403.190(2)(d) was enacted, an antenuptial agreement looking forward to divorce or separation was not a *valid* agreement, and therefore subsection (d) would not apply to it.

Furthermore, subsection (d) of the act only applies to property and has no application at all to maintenance which is often the subject of antenuptial agreements.

I, therefore, believe that K.R.S. 403.190(2)(d) has no application at all to antenuptial agreements which look toward divorce or separation and that it does not at all reflect any change in the public policy created by *Stratton v. Wilson, supra*.

WINTERSHEIMER, J., joins in this dissent.

[1] We perceive no distinction between the terms "seised of" and "acquired" as used in the Gentry agreement. The intent was that Tom and Kathy would each be the owner of property to which he or she was vested with title or other indicia of ownership at termination of the marriage, without inquiry into the means by which the property was acquired and without regard to the statutory rights of spouses in marital property.

4 So.3d 254 (2009)

Kent W. HALL, Sr.

v.

Tina Williams HALL.

No. 08-CA-706.

Court of Appeal of Louisiana, Fifth Circuit.

February 10, 2009.
Rehearing Denied March 9, 2009.

256 *256 Pat M. Franz, Michael Baham, Attorneys at Law, Metairie, LA, for Plaintiff/Appellant.

Andrew A. Lemmon, Irma L. Netting, Attorneys at Law, Hahnville, LA, and Paula C. Haydel, Attorney at Law, Metairie, LA, for Defendant/Appellee.

Panel composed of Judges SUSAN M. CHEHARDY, WALTER J. ROTHSCHILD, and FREDERICKA HOMBERG WICKER.

WALTER J. ROTHSCHILD, Judge.

Plaintiff, Kent Hall, Sr., appeals from the August 28, 2007 trial court judgment on the issues of interim spousal support[1] and calculation of child support. For the following reasons, we affirm.

Kent Hall, Sr. ("Kent") and Tina Williams Hall ("Tina") were married on May 18, 1997. Prior to the parties' marriage, on April 23, 1997, Kent and Tina executed a matrimonial agreement that provided for a separate property regime and contained a waiver of interim and final spousal support, among other things. On May 29, 2000, the parties' son, Kyle Hall, was born. No other children were born of this marriage. On September 28, 2005, Kent filed a Petition for Divorce, and a Judgment of Divorce was rendered on May 3, 2006.

Thereafter, on July 30 and 31, 2007, and August 1, 2, and 24, 2007, trial was held on the issues of child custody, child support, spousal support, and numerous other ancillary matters.[2] On August 28, 2007, the trial judge rendered a judgment, along with written reasons. In this judgment, the trial judge awarded joint and equally shared custody of the minor child to the parties and set forth a detailed custody plan, set past and current child support at $2,700 per month to be paid by Kent to Tina, with Kent to maintain health insurance for the child and to pay 90% of uncovered medical expenses, set interim spousal support at $5,800 per month from November 2005 until November 2006, and denied Tina's claim for final spousal support because it was waived in the parties' matrimonial agreement. The trial court addressed several other issues in the judgment as well. Kent appeals from this judgment.

LAW AND DISCUSSION

On appeal, in his first assignment of error, Kent asserts that the trial court erred in awarding interim spousal support to Tina, notwithstanding the waiver of interim spousal support in the matrimonial agreement. He cites LSA-C.C. art. 2329, which
257 provides that spouses may enter into a matrimonial agreement as to all matters that are not prohibited by public *257 policy, but he asserts that there is no statutory codification of the matters currently prohibited by public policy. He argues that although the Louisiana Supreme Court in *Holliday v. Holliday,* 358 So.2d 618 (La.1978) found a prenuptial waiver of interim spousal support, or alimony *pendente lite,* was void as being contrary to public policy, in that case the Court cited former Louisiana Civil Code articles that were gender-based and would be constitutionally infirm today.

The trial judge ordered Kent to pay Tina $5,800 per month for interim spousal support from November 2005 to November 2006. LSA-C.C. art. 98 provides that married persons owe each other fidelity, support, and assistance. A spouse's right to claim interim spousal support is based on this statutorily-imposed duty of spouses to support each other during marriage. LSA-C.C. art. 98; *McAlpine v. McAlpine,* 94-1594 (La.9/5/96), 679 So.2d 85, 90. Comment (e) to LSA-C.C. art. 98 explains

that the spouses' duties under this article, as a general rule, are matters of public order from which they may not derogate by contract.

Interim spousal support is designed to assist the claimant in sustaining the same style or standard of living that he or she enjoyed while residing with the other spouse, pending the litigation of the divorce. *Speight v. Speight*, 03-1152, p. 2 (La.App. 3 Cir. 2/4/04), 866 So.2d 344, 346. The purpose of interim spousal support is to maintain the status quo without unnecessary economic dislocation until a final determination of support can be made and until a period of time for adjustment elapses that does not exceed, as a general rule, 180 days after the judgment of divorce. *Id.* The court may award an interim spousal support allowance to a spouse based on the needs of that spouse, the ability of the other spouse to pay, and the standard of living of the spouses during the marriage. LSA-C.C. arts. 111 and 113; *Loftice v. Loftice*, 07-1741, p. 4 (La.App. 1 Cir. 3/26/08), 985 So.2d 204, 207.

In *Holliday v. Holliday*, 358 So.2d 618, 620 (La.1978), the Louisiana Supreme Court held that prenuptial waivers of alimony *pendente lite* are void as contrary to public policy. Although the former Louisiana Civil Code articles cited by the *Holliday* Court referred only to a husband's duty to support his wife, the current law providing that each spouse has a duty to support the other spouse does not conflict with or invalidate the holding of the *Holliday* case. Rather, the current law simply extends the benefits of interim spousal support to either spouse.

See *Loftice v. Loftice*, 07-1741 at 11, 985 So.2d at 211, in which the First Circuit discussed the *Holliday* case and the current law regarding interim spousal support, and it found that a waiver of interim spousal support in a prenuptial agreement would be void as against public policy. See also *McAlpine v. McAlpine*, in which the Louisiana Supreme Court discussed the *Holliday* case and the public policy considerations involved in waivers of alimony *pendente lite* versus permanent alimony.

Based on the applicable statutory law and the jurisprudence, we agree with the trial court that the waiver of interim spousal support in the matrimonial agreement executed by Kent and Tina is invalid as against public policy. Accordingly, this assignment of error is without merit.

In his second assignment of error, Kent argues that, in the alternative, the trial court erred in awarding an amount of interim
258 spousal support greater than the amount stipulated in the matrimonial *258 agreement. The parties' matrimonial agreement provides in pertinent part:

> Should this waiver of alimony *pendente lite* be deemed invalid for any reason whatever, then the parties stipulate and agree that Kent W. Hall shall pay to Tina Marie Williams the sum of $1,000.00 per month as alimony *pendente lite* ....

As stated in the previous assignment of error, interim spousal support is designed to assist the claimant in sustaining the same style or standard of living that he or she enjoyed while residing with the other spouse, pending the litigation of the divorce. Interim support preserves parity in the levels of maintenance and support and avoids unnecessary financial dislocation until a final determination of support can be made. *Loftice,* 07-1741 at 4, 985 So.2d at 207; *Lambert v. Lambert*, 06-2399, p. 10 (La.App. 1 Cir. 3/23/07), 960 So.2d 921, 928. The trial court is vested with much discretion in determining an award of interim spousal support, and such a determination will not be disturbed absent a clear abuse of discretion. *Kirkpatrick v. Kirkpatrick*, 41,851, p. 4 (La.App. 2 Cir. 1/24/07), 948 So.2d 390, 393.

We find that the same public policy considerations that prohibit waivers of interim spousal support in prenuptial agreements also prohibit the parties from setting an amount of interim spousal support that is insufficient, based on the needs of that spouse, the ability of the other spouse to pay, and the standard of living of the spouses during the marriage. Therefore, we find no error in the trial court's award of interim spousal support greater than the amount set forth in the matrimonial agreement. This assignment of error is without merit.

In his third assignment of error, Kent contends that the award of interim spousal support should terminate as of the date of the divorce, not 180 days after the judgment of divorce, because Tina previously waived final spousal support. We disagree.

LSA-C.C. art. 113 provides in pertinent part:

> ....If a claim for final spousal support is pending at the time of the rendition of the judgment of divorce, the interim spousal support award shall thereafter terminate upon rendition of a judgment awarding or denying final spousal support or one hundred eighty days from the rendition of judgment of divorce, whichever occurs first.....

In the present case, at the time of the rendition of the judgment of divorce, Tina's claim for final spousal support was pending, and it was not denied until more than 180 days after the rendition of the judgment of divorce. Thus, under LSA-C.C. art. 113, Tina was entitled to interim spousal support for 180 days after the May 3, 2006 judgment of divorce.

Although Kent argues that Tina was not entitled to interim spousal support after the judgment of divorce because her claim for final spousal support was frivolous, the trial judge did not make such a determination and we cannot say that her claim was frivolous. Based on the record before us and the applicable law, we find no error in the trial court's decision to award Tina interim spousal support until November 2006, approximately 180 days following the May 3, 2006 divorce. Accordingly, this assignment of error is without merit.

In his fourth and final assignment of error, Kent asserts that the trial court erred in its calculation of child support. In the trial
259 judge's reasons for judgment, he found that Kent's gross monthly income was approximately $19,000 and that Tina *259 was able to earn approximately $1,700 to $2,000 per month as a pediatric dental assistant. The trial court ordered that Kent pay $2,700 per month to Tina for child support for both the past and current child support amount. Kent asserts that the trial judge should have set his child support obligation at $1,766.81 from the date of judicial demand, November 7, 2005, to the August 28, 2007 judgment, during which time Tina had physical custody of the child the majority of the time, based on Worksheet A in LSA-R.S. 9:315.20. He contends that, based on LSA-R.S. 9:315.9 and Worksheet B, his child support obligation should have been reduced and set at $1,181.43 from the date of the August 28, 2007 judgment and thereafter, because as of the date of this judgment, the parties commenced equally shared custody. He further claims that the trial judge should have provided reasons for his deviation from the child support guidelines.

At the time of the request for child support and at the time of trial, the child support guidelines set forth in LSA-R.S. 9:315.19 provided for a maximum combined adjusted monthly gross income of $20,000 per month. Kent and Tina's monthly gross income, as found by the trial judge, exceeded this amount. LSA-R.S. 9:315.13(B) provided:

> If the combined adjusted gross income of the parties exceeds the highest level specified in the schedule contained in R.S. 9:315.19, the court shall use its discretion in setting the amount of the basic child support obligation in accordance with the best interest of the child and the circumstances of each parent as provided in Civil Code Article 141, but in no event shall it be less than the highest amount set forth in the schedule.

In the August 28, 2007 judgment, the trial judge specifically found that a reduction for the current equal shared custody plan was not justified under the facts and circumstances of this case, because he found that it was not in the child's best interest. In his reasons for judgment, the trial judge stated in pertinent part:

> Since the combined gross incomes of the parties exceed the highest LRS 9:315.19 schedule levels I've used my discretion in setting child support; my reasons for the child support award follow. Following the parties' separation Tina Hall exercised primary domiciliary custody of the parties' seven year old son; during this period his monthly expenses were approximately $2,400 to $3,000 per month based upon exhibits marked Tina Hall 15, 17 and 18. These amounts are reasonable and consistent with the parties' lifestyle and Kent Hall, Sr.'s income while married. Accordingly, child support for this period is set at $2,700 per month which amount is also awarded as current child support. The court will not reduce this award under the current circumstances of the equal sharing custody plan implemented in this court's judgment since a reduction is not in Kyle's best interests. Tina Hall can earn approximately $1,700 to $2,000 per month as a pediatric dental assistant. Since this income, alone, is insufficient to sustain Kyle during his custody periods with his mother, the above child support combined with her income can reasonably support him at his mother's home. Kent Hall, Sr. is financially able to pay this support.

A trial court's order of child support is entitled to great weight and will not be disturbed absent clear abuse of discretion. *Carmouche v. Carmouche*, 03-1106 (La.App. 5 Cir. 2/23/04), 869 So.2d 224, 226; *Green v. Green*, 95-307, p. 8 (La.App. 3 Cir. 10/4/95), 663 So.2d 277, 281. Considering the record before us, including the trial court's reasons, and the applicable
260 *260 law, we cannot say that the trial judge abused his discretion in ordering Kent to pay $2,700 per month in child support from the date of judicial demand to August 28, 2007 and thereafter. This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the August 28, 2007 judgment of the trial court.

AFFIRMED.

[1] Interim spousal support was formerly known as alimony *pendente lite.* Because the term alimony *pendente lite* is used in the matrimonial agreement between the parties, this term is used interchangeably with interim spousal support in this opinion.

[2] Other issues between the parties were heard and addressed prior to trial, but they are not at issue in this appeal.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Williams-Paris v. Joseph, Fla.App. 4 Dist., November 17, 2021

648 So.2d 277
District Court of Appeal of Florida,
Fourth District.

In re ESTATE OF Luis Joaquin NICOLE SANTOS, Deceased.
Lourdes S. NICOLE, Appellant,
v.
Katherine NICOLE–SAURI, Isabel Nicole–Sauri and Eugenie Nicole–Sauri, Appellees.

No. 93–1163.
|
Jan. 4, 1995.

Synopsis

Decedent's children from former marriage petitioned to surcharge surviving spouse for breach of fiduciary duty while spouse acted as personal representative of estate. The Circuit Court, Broward County, John A. Miller, J., upheld prenuptial agreement executed in Puerto Rico and required spouse to return all property transferred during marriage. Spouse appealed. The District Court of Appeal, Polen, J., held that: (1) law of Puerto Rico applied to prenuptial agreement; (2) remand was required for determination of whether Florida homestead law controlled; (3) abandonment or modification of agreement were not defenses under laws of Puerto Rico; and (4) children were not estopped from challenging transfers made during marriage.

Affirmed in part, reversed in part, remanded and question certified.

Warner, J., dissented and filed opinion.

West Headnotes (11)

[1] **Contracts** What law governs

Forum court must initially apply its own conflict of law rule with respect to contract in order to determine the law it must apply.

3 Cases that cite this headnote

[2] **Contracts** What law governs

Contracts What law governs

Conflict of law rules for contract require that laws of place in which contract is made governs matters of execution, interpretation and validity when place of making and performing contract are not the same.

6 Cases that cite this headnote

[3] **Contracts** What law governs

Knowledge that contract will be governed by laws of place contract is made is imputed to contracting parties unless contract provides to the contrary.

[4] **Real Property Conveyances** What law governs

Laws of situs of real and personal property generally govern the property's transfer, alienation and descent as well as parties' capacities to contract with regard to that property.

[5] **Marriage and Cohabitation** Particular Cases and Contexts

Puerto Rico law applied when interpreting antenuptial agreement following husband's death given that agreement was executed in Puerto Rico, even though husband resided in Florida and owned personal property in Florida at his death.

3 Cases that cite this headnote

[6] **Courts** Comity between courts of different states

Florida's courts may depart from rule of comity where necessary to protect its citizens or to enforce some paramount rules of public policy.

5 Cases that cite this headnote

[7] **Homestead** Loss or relinquishment of right in general

Homestead Contracts waiving right in general

Protection of homestead from alienation cannot be waived by contract or otherwise. West's F.S.A. Const. Art. 10, § 4.

1 Cases that cite this headnote

[8] **Homestead** What law governs

Citizen's right to homestead protection is paramount rule of public policy that may justify Florida court's departure from otherwise applicable rule of comity. West's F.S.A. Const. Art. 10, § 4.

5 Cases that cite this headnote

[9] **Appeal and Error** Particular Issues

Remand was required for determination of whether surviving spouse's Florida home was homestead property, the disposition of which is governed by Florida law, notwithstanding prenuptial agreement which was governed by law of Puerto Rico. West's F.S.A. Const. Art. 10, § 4.

4 Cases that cite this headnote

[10] **Marriage and Cohabitation** Modification

Neither abandonment nor modification are defenses under Puerto Rico law to prenuptial agreement and, thus, defenses did not apply to agreement executed in Puerto Rico despite fact that now deceased husband resided in Florida at death and Florida law recognized disputed defenses to agreement.

6 Cases that cite this headnote

[11] **Estoppel** Knowledge of facts

Wife of deceased had actual knowledge that laws of Puerto Rico applied to antenuptial agreement and distribution of property following husband's death and, thus, children from husband's previous marriage were not estopped from challenging transfers of property to wife made during marriage, in violation of law of Puerto Rico.

1 Cases that cite this headnote

Attorneys and Law Firms

***278** Eduardo N. Colon and Robert W. Crawford, Fort Lauderdale, for appellant.

Linda Ann Wells and William J. Palmer of Fine Jacobson Schwartz Nash & Block, Miami, for appellees.

Opinion

POLEN, Judge.

Lourdes S. Nicole, wife of the decedent and personal representative of decedent's estate, appeals from a partial summary judgment entered in favor of appellees, Katherine Nicole–Sauri, Isabel Nicole–Sauri and Eugenie Nicole–Sauri. Appellees petitioned below to surcharge appellant for breach of fiduciary duty in connection with decedent's estate. The court held that a prenuptial agreement that appellant and the decedent spouse executed in Puerto Rico determining her rights to certain assets accumulated during the marriage would be subject to interpretation under Puerto Rican law. This ruling had the effect of requiring appellant to return to the decedent's estate all assets transferred from decedent to her during the marriage and left for further determination only the identification and nature of the assets.[1] We affirm in part, reverse in part and remand.

The decedent, Dr. Luis Joaquin Nicole Santos and appellant (respondent below), Lourdes Santiago Santos, were married in Ponce, Puerto Rico, on January 4, 1969, while they were residents of Puerto Rico. Prior to their marriage, the parties entered into a prenuptial agreement. At that time, the decedent was 66 years old and recently divorced from his first wife, by whom he had three children, Katherine, Isabel and Eugenie Nicole–Sauri, appellees. The decedent was an optometrist, farmer and merchant and possessed substantial assets at the time the parties married. Appellant, on the other hand, was a secretary who possessed no assets. After the marriage, the parties continued to live in Puerto Rico until 1981, at which

time they moved to Florida. In 1985, however, they returned to Puerto Rico until 1988.

Decedent's Last Will and Testament, dated April 19, 1988, was executed in Puerto Rico in accordance with the Civil Code of Puerto Rico.[2] The decedent devised one-third of his ***279** estate to be equally divided between the six children of his two marriages (or equally between all of his children, should additional children be declared by court decree), one-third of his estate to be equally divided between the three children of his second marriage, and the remaining discretionary one-third as provided in "c," above, to appellant herein. Appellant's one-third was to go to her after providing two club ownerships to his son by his second marriage (valued at approximately $500 total), as well as a house and lot valued at $65,000 to appellant. Four months after executing his Last Will and Testament, Santos executed a power of attorney to appellant. The following month, appellant and the decedent returned to Florida where they resided until decedent's death on May 20, 1989, at age 86.

On July 19, 1989, the Will was admitted to probate in Puerto Rico, after appellant petitioned for its administration. On September 7, 1989, the Will was also admitted to probate in Broward County. Letters of administration were entered in both jurisdictions appointing appellant, Lourdes S. Nicole, as Personal Representative. At the time of his death, Dr. Nicole's probate estate consisted of real property in Puerto Rico with an approximate value of $240,000, and personal property in Florida with an approximate value of $8,000, according to appellant's listing of the decedent's assets. Appellant listed no assets transferred directly to her by the decedent during their marriage, nor did she list assets transferred indirectly by virtue of her exercise of the power of attorney.

From the commencement of the marriage, the parties' joint assets consisted of social security benefits which they commingled and which the decedent invested along with other monies, including $400,000 the parties won as a result of a lottery ticket they purchased jointly in March, 1977. The house to which appellees/petitioners referred to in the Petition to Surcharge was titled to appellant.

Appellees alleged in their petition to surcharge that appellant had violated the prenuptial agreement. The agreement provided that the parties' property, whenever or however acquired, would be kept separate and apart. Appellees alleged that appellant had failed to do this when she transferred certain property to her name during the marriage prior to decedent's death. The petition further alleged that said transfer violated not only the prenuptial agreement, but also violated the Civil Code of the Commonwealth of Puerto Rico.[3] As personal representative of the estate, appellant had breached her duty to take possession of all the property or assets belonging to the estate and her duty to maintain an action to recover possession of said property if the holder refused to relinquish same. The petition further stated that appellant personally had possession of property belonging to the estate and had failed to relinquish the property. As such, appellees also claimed that appellant had acted in bad faith.

In her response to the Petition for Surcharge, appellant admitted that she executed the prenuptial agreement, but raised several affirmative defenses, all of which were stricken by the trial court by orders dated January 7, 1992, and June 9, 1992. Pursuant to requests from both appellant and appellees, the trial court took judicial notice of certain portions of the Civil Code of Puerto Rico. The trial court found that the prenuptial agreement was governed by the laws of Puerto Rico and that appellant's affirmative defense of abandonment (i.e., that she and the decedent had abandoned the prenuptial agreement prior to his death) was not available under Puerto Rican law. The second order struck appellant's defense of estoppel (appellant claimed in her response that petitioners ***280** /appellees could not seek any relief which would not be available to the decedent and were therefore barred by the doctrine of estoppel).

Pursuant to appellees' subsequent Motion for Partial Summary Judgment, the trial court, in granting same, found in pertinent part:

> 1. There are no genuine triable issues of material fact with respect to the matters raised in Petitioner's Motion for Partial Summary Judgment.
>
> 2. It is undisputed that Decedent and Respondent entered into the antenuptial agreement at issue in Puerto Rico.
>
> 3. It is undisputed that, as of the date of the antenuptial agreement, Respondent had no money or property of any kind.
>
> 4. It is undisputed that Decedent and Respondent never entered into a subsequent agreement affecting the antenuptial agreement.

The court noted that it had previously ruled that the laws of Puerto Rico governed the antenuptial agreement and, under Puerto Rican law, the agreement could not be changed or

abandoned by the decedent and appellant. As a result, all of appellant's transfers of property that was properly part of the decedent's estate were null and void, except for "moderate gifts bestowed on festive days for the family." The trial court entered partial summary judgment for appellees and ordered that all assets or the fruits its thereof in appellant's possession which in any way originated from the decedent's assets be returned to the estate to allow them to pass pursuant to the decedent's Last Will and Testament. The court also ordered that the nature and amount of the assets to be returned by appellant to the estate would be determined at a subsequent hearing, after which judgment concerning those issues would be entered.

[1] **[2]** **[3]** The forum court must initially apply its own conflict of law rule with respect to a contract in order to determine the law it must apply. *See Jemco, Inc. v. United Parcel Service,* 400 So.2d 499 (Fla. 3d DCA 1981), *rev. denied,* 412 So.2d 466 (Fla.1982). In the case of contract, Florida follows the conflicts of laws rule that the United States Supreme Court established in *Scudder v. Union Nat'l Bank,* 91 U.S. 406, 23 L.Ed. 245 (1876), which holds that in cases where the place of making the contract and performing it are not the same, then the laws of the place in which it was made shall govern matters of execution, interpretation and validity. *Id.* at 411. The Florida Supreme Court follows this rule. *See Sturiano v. Brooks,* 523 So.2d 1126, 1129–1130 (Fla.1988). The *Sturiano* Court recognized that the *lex loci contractus* rule is inflexible, but stated that the inflexibility was necessary to ensure stability in contracts. Under *Sturiano,* the knowledge that their contract will be governed by the laws of the place the contract is made, is imputed to the contracting parties, unless the contract provides to the contrary. The court reasoned that parties have a right to know what their agreement provides and reaffirmed that *lex loci contractus* is not an outdated doctrine. *Id.* at 1129–1130.

[4] **[5]** Appellant relies on cases that involve real property principles to avoid application of *Sturiano* and hence, to avoid application of Puerto Rican laws. However, appellant provides no authority to require a different result. It is well-settled that the laws of the situs of real and personal property generally govern the property's transfer, alienation and descent as well as the parties' capacities to contract with regard to that property. *See Kyle v. Kyle,* 128 So.2d 427 (Fla. 2d DCA 1961), *cert. discharged,* 139 So.2d 885 (Fla.1962). As a result, it follows that contracts involving the transfer of real property, or that attempt to create, transfer or somehow affect title to real property would be governed by the laws of the place where the property is situated. This is distinguishable from the instant scenario, however, where the antenuptial contract regulates the parties' interests in each others' properties. *Kyle* makes this distinction clear.[4] Because in the instant case the ante ***281** nuptial agreement determined the parties' rights in certain property, that contract must be governed by the laws of Puerto Rico.

We further hold that the fact of property being brought to Florida from Puerto Rico does not affect the outcome of this "conflicts of law" issue. *See Quintana v. Ordono,* 195 So.2d 577 (Fla. 3d DCA 1967), *cert. discharged,* 202 So.2d 178 (Fla.1967); *In re Siegel's Estate,* 350 So.2d 89 (Fla. 4th DCA 1977), *writ discharged,* 366 So.2d 425 (Fla.1978).[5] The *Quintana* Court held that the law of the situs controls the property within its borders, but "one spouse's interests in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired." *Id.* at 579–580. The court held that this rule applied where the money used to purchase the movables was earned from services rendered in a place other than the place of domicile. Otherwise, there would be no logical method of determining marital interest in movables.

In *Siegel,* the court needed to determine ownership of a note and mortgage, where the husband sold a parcel of property he owned alone and took back a purchase money mortgage in both his name and his wife's. The property was located in New York, where the couple lived at the time. They later moved to Florida, where Mr. Siegel died. Under Florida law, where a note and mortgage is titled under the names of a husband and wife, a tenancy by the entireties is created and it becomes the wife's property upon the husband's death. In New York, however, the same facts would lead to one-half passing to the wife and one-half passing to the husband's estate. The issue before this court was therefore whether ownership of a promissory note and mortgage, held in an estate by the entireties by spouses residing and domiciled in Florida at the time of the husband's death, was determined by the laws of Florida, or by New York law, the latter being where the property was located and the note and mortgage were executed. The *Siegel* court determined that to answer the question, it must first decide whether the promissory note and mortgage were "movables," which would render them personal property. Personal property follows the owner to and is governed by the state of the owner's domicile. On the other hand, an "immovable" is governed by the laws of the state in which the immovable is situated. The court resolved the question as follows:

> [w]hile it is obvious that the only relationship between the note and mortgage and the State of Florida is the fact that the holder died domiciled in this state, and that **any litigation concerning construction of these interests would be pursuant to New York law,** it is the opinion of this Court that the property is a "movable" and would pass under the law of the State of Florida.

350 So.2d at 91 (emphasis added) Thus, the result the trial court reached in the instant case is consistent with the reasoning in *Siegel*.

[6] Appellant challenges the trial court's ruling on public policy grounds. We agree that Florida courts may depart from the rule of comity where necessary to protect its citizens or to enforce some paramount rules of public policy. *See e.g., Kellogg–Citizens Nat'l Bank v. Felton,* 145 Fla. 68, 199 So. 50 (1940). However, it has also been held that just because the law differs between Florida and another jurisdiction does not in itself bar application of foreign law. *See* ***282** *Warner v. Florida Bank & Trust Co.,* 160 F.2d 766, 772 (5th Cir.1974). In fact, in *Continental Mortgage Investors v. Sailboat Key,* 395 So.2d 507, 509 (Fla.1981), the court held that contracts charging interest rates that were usurious under Florida law, where executed in another state, did not sufficiently offend Florida public policy to warrant applying Florida law. Similarly, in *Herron v. Passailaigue,* 92 Fla. 818, 110 So. 539, 542 (1926), the court held that the public policy interest must be of paramount importance to warrant application of Florida law. In the *Sturiano* case, the supreme court applied New York law, notwithstanding that said law precluded one spouse's recovery in an action against the other spouse unless the insurance policy expressly provided for the claim, and Florida law did not have that limitation. 523 So.2d 1126. *Compare, Gillen v. United Servs. Auto. Ass'n,* 300 So.2d 3 (Fla.1974). In that case, the Florida Supreme Court refused to apply New Hampshire law because New Hampshire permitted an insurer to refuse coverage under a policy where the claimant possessed other insurance coverage. Florida law expressly prohibited this provision, which is not the same as a mere difference or silence by the legislature on the matter. The Florida Legislature unequivocally prohibited what New Hampshire allowed.

[7] **[8]** **[9]** We find merit in appellant's public policy argument as it may apply to the parties' home in Plantation, Florida. A citizen's right to homestead protection under our constitution is considered a paramount rule of public policy that would justify our departure from the otherwise applicable rule of comity. *See Sherbill v. Miller Manufacturing Co.,* 89 So.2d 28 (Fla.1956). Protection of homestead from alienation cannot be waived by contract or otherwise. *Id.* at 31; *see* art. X, Sec. 4, Fla. Const.[6] That home was titled in appellant's name and she resided therein whenever the parties were in Plantation, Florida. On remand, we direct the trial court to determine whether the Plantation, Florida home is homestead property.

[10] Appellant's argument that the prenuptial agreement was abandoned or modified prior to the decedent's death is without merit. Neither party disputes that Puerto Rico does not recognize those defenses under the circumstances. Having held that Puerto Rican law applies on this issue, we find that appellant's Florida cases do not control.

[11] We also reject appellant's argument that appellees were estopped from obtaining relief below that the decedent himself could not have obtained under Puerto Rican law. Appellant did not plead estoppel with sufficient specificity. *See Florida Dept. of Transportation v. Dardashti Properties,* 605 So.2d 120 (Fla. 4th DCA 1992), *rev. denied,* 617 So.2d 318 (Fla.1993), and *Southeast Grove Management v. McKiness,* 578 So.2d 883, 886 (Fla. 1st DCA 1991). Further, had appellant sufficiently pled estoppel, she also could not have prevailed on the merits. Contrary to what appellant argues, she, as personal representative of the estate, and not appellees, stands in the decedent's shoes. Thus, estoppel would not and could not apply to appellees in the manner in which appellant claims it does in this case. In any event, appellant could not legitimately raise the affirmative defense of estoppel because she had actual or constructive knowledge at the time a transfer was made that such a transfer was flawed. *See e.g. Schueler v. Franke,* 522 So.2d 904 (Fla. 2d DCA 1988), *rev. denied,* 534 So.2d 399 (Fla.1988). Appellant was a party to the antenuptial agreement and therefore had actual knowledge that the agreement required that property distribution would be subject to the laws of Puerto Rico. *Sturiano,* 523 So.2d at 1129–1130.

Lastly, we disagree with appellant that reversal and remand is required for the trial court to determine whether she acted in bad faith, which she contends must be done before ***283** she can be found to have breached her fiduciary duty as personal representative. No one disputes that such a determination is irrelevant under the laws of Puerto Rico.

Accordingly, we reverse and remand to the trial court with directions to determine whether appellant's Plantation, Florida home is homestead property under the Florida

Constitution.[7] *Sherbill.* The partial summary judgment is affirmed in all other respects.

In light of Judge Warner's dissent, we also certify the following question to the supreme court as being of great public importance:

> DOES THE DOCTRINE OF *LEX LOCI CONTRACTUS* GOVERN THE RIGHTS AND LIABILITIES OF THE PARTIES IN DETERMINING THE APPLICABLE LAW ON AN ISSUE OF THE VALIDITY OF AN ANTENUPTIAL CONTRACT PRECLUDING CONSIDERATION OF THE SIGNIFICANT RELATIONSHIPS OF THE PARTIES TO FLORIDA OR THE SUBJECT MATTER OF THE CONTRACT?

GLICKSTEIN, J., concurs.

WARNER, J., dissents with opinion.

WARNER, Judge, dissenting with opinion.

The majority's opinion is premised on its conclusion that Florida follows the doctrine of *lex loci contractus* in all contract conflicts of law questions. It cites *Sturiano v. Brooks,* 523 So.2d 1126 (Fla.1988) for that proposition. However, *Sturiano* involved an automobile insurance policy and the question certified to the court was:

> DOES THE *LEX LOCI CONTRACUS* RULE GOVERN THE RIGHTS AND LIABILITIES OF THE PARTIES IN DETERMINING THE APPLICABLE LAW ON AN ISSUE OF INSURANCE COVERAGE, PRECLUDING CONSIDERATION BY THE FLORIDA COURTS OF OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION?

Id. at 1128. The decision of the supreme court was limited in its application to automobile insurance policies:

> For these reasons, we answer the certified question concerning conflict of laws in the affirmative, *limiting that answer to situations involving automobile insurance policies.* (emphasis supplied)

Id. at 1130. In concurring with the result, Justice Grimes expressed his inclination to adopt the significant relationship test with respect to most contracts, although he noted that even under the significant relationship test the automobile policy in question in *Sturiano* would be construed in accordance with the law of the place of contracting.

In *Shapiro v. Associated Intern. Ins. Co.,* 899 F.2d 1116 (11th Cir.1990), the Eleventh Circuit, construing what it believed the law of Florida to be, applied the significant relationship test to the contract before it. That court recognized that *Sturiano* was limited to automobile insurance policies and did not generally apply the *lex loci contractus* doctrine to conflicts questions involving other types of contracts. The Third District has also distinguished the holding of *Sturiano* in *Gordon v. Russell,* 561 So.2d 603 (Fla. 3d DCA 1990), and applied the law of Florida in construing a contract, notwithstanding the fact that the contract was entered into in New Jersey.

I would adopt the significant relationship test which is, as Justice Grimes stated in *Sturiano,* the emerging consensus of courts and legal scholars. *Id.* at 1130. *See* Section 188, Restatement (Second) of Conflict of Laws (1971).

I would also expand the majority's public policy argument and apply it to the entire interpretation of the antenuptial agreement. Florida has a strong public policy of fairness in the dealings between spouses. Both our case decisions and statutes bear this out. Certainly if Florida's strong public policy of protection of its citizens from inequitable insurance arrangements can avoid the application ***284** of a foreign state's law, as was found in *Gillen v. United Services Auto Ass'n,* 300 So.2d 3 (Fla.1974), then I would contend we have an even greater interest in the protection of our residents concerning the domestic agreements they enter into.

A similar case to the present one is found in *Gustafson v. Jensen,* 515 So.2d 1298 (Fla. 3d DCA 1987). In *Gustafson* an antenuptial agreement was executed in Denmark similar to the one at issue here. The agreement contained no provision for the wife. The parties moved to Florida where they resided until they divorced. During the marriage the husband tore up the agreement but contended in the later dissolution action that it was error not to uphold the agreement executed in Denmark. The trial court ruled that Florida law applied. The Third District held that the trial court was correct because under a principle of choice-of-laws doctrine, absent proof that foreign law is different from the law of Florida, the court is entitled to presume it is the same. In *Gustafson* the husband had failed to establish that Danish law was different from the law of Florida.

However, the court went on to state:

> It should be remembered that the laws of other nations are enforced by Florida courts only to the extent called for under principles of comity. Where the foreign sovereign has no significant interest in the issue being adjudicated, there is no basis for the invocation of comity. The Florida Supreme Court has expressly held that the principles of comity will not apply where the state in which the contract in dispute was entered into has little or no interest in the matter or controversy. *Gillen v. United Services Auto. Ass'n,* 300 So.2d 3 (Fla.1974). Nor will comity be recognized where to do so would bring harm to a Florida citizen or would frustrate an established public policy of this state.

Id. at 1300. In the instant case, the antenuptial agreement appears extremely unfair to the widow. Given the strong public policy of the state to be fair in relationships between husband and wife, it is incumbent on the Florida courts to evaluate this agreement under its laws regarding the enforcement of prenuptial agreements.

I have not analyzed the facts of this case as to whether the significant relationship test would result in the application of Florida law or that of Puerto Rico. The trial court did not engage in that analysis, and the record is not sufficiently developed on the necessary predicates to apply the doctrine. I would hold that the trial court should have applied the significant relationship test and the public policy test rather than the doctrine of *lex loci contractus* to determine whether Florida law should apply. I would remand to the trial court to make these determinations.

All Citations

648 So.2d 277, 20 Fla. L. Weekly D114

Footnotes

1 We have jurisdiction under F.R.P. 5.100; *see also* *Estate of Bierman,* 587 So.2d 1163 (Fla. 4th DCA 1991) (Rule 5.100 has been consistently interpreted to allow appeals from non-final orders that determine the substantial right of a party to pursue a claim in the estate).

2 The Code requires that a Will provide:

> a. One-third of the estate to be divided in equal shares among all of the decedent's children;
>
> b. One-third of the estate to any or all of the decedent's children;
>
> c. The remaining one-third in any manner the testator desires.

3 The prenuptial agreement was executed in Puerto Rico. Under the agreement's terms, the Civil Code of Puerto Rico would govern the agreement. The Code provided, in pertinent part, that “[a]ll gifts between spouses bestowed during the marriage shall be void” and that any property or securities received by an heir, such as a surviving spouse, from the deceased during the decedent's life, must be brought into the estate after death.

4 In *Kyle,* the parties executed an antenuptial agreement while residing in Canada that contained a waiver of dower rights. When the husband thereafter attempted to transfer to his corporation a parcel of real property located in Florida titled in his name only, the court held that the antenuptial agreement itself did not substitute for a waiver of dower rights because it had not been executed as required by Florida law. *Id.* at 430. However, as appellees correctly indicate, this determination would not affect the husband's ability to bring suit to compel the wife to execute a document to satisfy Florida's requirements (in that case, the antenuptial agreement, under Florida law, needed to be subscribed to by two witnesses) in order to give full effect to his rights under the antenuptial agreement.

5 Appellee correctly indicates that appellant miscites this case. She quotes from the opinion but identifies the case as *Nelson v. Winter Park Memorial Hosp. Ass'n,* 350 So.2d 91 (Fla. 4th DCA 1977). That opinion appears at page 91 of the same Southern Reporter volume, but appellant is actually citing to *Siegel,* which begins on page 89.

6 Exemptions under section 4 inure to the surviving spouse or heirs of the owner. Art. X, 4(b). In this case, the home is titled in appellant's name. However, given the relative financial circumstances of decedent and appellant, the funds used to purchase the home may be traceable to decedent. While the antenuptial agreement and Puerto Rico's laws would require appellant to return the home to decedent's estate, we hold that section 4(c) prevents application of the rule of comity.

That section provides, in pertinent part, that "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child."

7 We recognize that the trial court has yet to complete additional judicial labor to determine the nature and number of specific assets which must be returned to the decedent's estate.

CHAPTER 596

PREMARITAL AGREEMENTS

Chapter applies to premarital agreements executed on or after January 1, 1992; agreements entered into prior to that date not affected; §596.12

596.1 Definitions.

As used in this chapter:

1. *"Premarital agreement"* means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

2. *"Property"* means an interest, present or future, legal or equitable, vested or contingent, in real or personal property.

91 Acts, ch 77, §1

596.2 Construction and application.

This chapter shall be construed and applied to effectuate its general purpose to make uniform the law with respect to premarital agreements.

91 Acts, ch 77, §2

596.3 Short title.

This chapter may be cited as the *"Iowa Uniform Premarital Agreement Act"*.

91 Acts, ch 77, §3

596.4 Formalities.

A premarital agreement must be in writing and signed by both prospective spouses. It is enforceable without consideration other than the marriage. Both parties to the agreement shall execute all documents necessary to enforce the agreement.

91 Acts, ch 77, §4

596.5 Content.

1. Parties to a premarital agreement may contract with respect to the following:

a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

c. The disposition of property upon separation, dissolution of the marriage, death, or the occurrence or nonoccurrence of any other event.

d. The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

e. The ownership rights in and disposition of the death benefit from a life insurance policy.

f. The choice of law governing the construction of the agreement.

g. Any other matter, including the personal rights and obligations of the parties, not in violation of public policy or a statute imposing a criminal penalty.

2. The right of a spouse or child to support shall not be adversely affected by a premarital agreement.

91 Acts, ch 77, §5

596.6 Effective date of agreement.

A premarital agreement becomes effective upon the marriage of the parties.

91 Acts, ch 77, §6

596.7 Revocation.

After marriage, a premarital agreement may be revoked only as follows:

1. By a written agreement signed by both spouses. The revocation is enforceable without consideration.

2. To revoke a premarital agreement without the consent of the other spouse, the person seeking revocation must prove one or more of the following:

a. The person did not execute the agreement voluntarily.

b. The agreement was unconscionable when it was executed.

c. Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse.

91 Acts, ch 77, §7

596.8 Enforcement.

1. A premarital agreement is not enforceable if the person against whom enforcement is sought proves any of the following:

a. The person did not execute the agreement voluntarily.

b. The agreement was unconscionable when it was executed.

c. Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse.

2. If a provision of the agreement or the application of the provision to a party is found by the court to be unenforceable, the provision shall be severed from the remainder of the agreement and shall not affect the provisions, or application, of the agreement which can be given effect without the unenforceable provision.

91 Acts, ch 77, §8; 2013 Acts, ch 30, §261

596.9 Unconscionability.

In any action under this chapter to revoke or enforce a premarital agreement the issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

91 Acts, ch 77, §9

596.10 Enforcement — void marriage.

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

91 Acts, ch 77, §10

596.11 Limitation of actions.

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

91 Acts, ch 77, §11

596.12 Effective date.

This chapter takes effect on January 1, 1992, and applies to any premarital agreement executed on or after that date. This chapter does not affect the validity under Iowa law of any premarital agreement entered into prior to January 1, 1992.

91 Acts, ch 77, §12

68 A.D.3d 1807
Supreme Court, Appellate Division,
Fourth Department, New York.

Kristin LUPIEN, Plaintiff–Appellant,

v.

Gordon LUPIEN, Jr., Defendant–Respondent.

Dec. 30, 2009.

Synopsis

Background: Wife filed petition for divorce. The Supreme Court, Monroe County, Joanne M. Winslow, J., denied her motion seeking an order determining that the parties' premarital agreement was not valid and enforceable as an opting out agreement. Wife appealed.

Holding: The Supreme Court, Appellate Division, held that agreement was valid and enforceable.

Affirmed.

West Headnotes (1)

[1] Marriage and Cohabitation Validity and Enforceability

Premarital agreement was valid and enforceable as an opting-out agreement, absent reason to disregard parties' intent to apply law of Massachusetts, where both parties signed agreement while residing in Massachusetts and agreement contained a choice of law clause providing Massachusetts law governed validity and construction. McKinney's DRL § 236(B)(3).

9 Cases that cite this headnote

Attorneys and Law Firms

****785** Schell & Schell, P.C., Fairport (George A. Schell of Counsel), for Plaintiff–Appellant.

Karen Smith Callanan, Rochester, for Defendant–Respondent.

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

Opinion

MEMORANDUM:

***1808** Supreme Court properly denied plaintiff's motion in this divorce action seeking an order determining that the parties' premarital agreement is not valid and enforceable as an opting out agreement pursuant to Domestic Relations Law § 236(B)(3). The premarital agreement, which was signed by the parties in Massachusetts at a time when both parties resided there, contains a choice of law clause providing that "[t]he validity and construction of this Agreement shall be determined in accordance with the laws of the Commonwealth of Massachusetts." It is well settled that courts will enforce a choice of law clause " 'so long as the chosen law bears a reasonable ****786** relationship to the parties or the transaction' " (*Friedman v. Roman,* 65 A.D.3d 1187, 1188, 885 N.Y.S.2d 740, quoting *Welsbach Elec. Corp. v. MasTec N. Am., Inc.,* 7 N.Y.3d 624, 629, 825 N.Y.S.2d 692, 859 N.E.2d 498). " [G]iven the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v. Van Kipnis,* 11 N.Y.3d 573, 577, 872 N.Y.S.2d 426, 900 N.E.2d 977, quoting *Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [internal quotation marks omitted]), we see no reason to disregard the parties' intent to apply the law of Massachusetts, the state in which the parties resided when they signed the agreement and the state in which they signed it (*see Friedman,* 65 A.D.3d at 1188, 885 N.Y.S.2d 740; *see generally Lederman v. Lederman,* 203 A.D.2d 182, 612 N.Y.S.2d 851). Finally, insofar as the statement of the court "that the terms of the agreement seem clear and reasonable" may be deemed to be a determination that the terms of the agreement "were fair and reasonable at the time of the making of the agreement and are not unconscionable" (Domestic Relations Law § 236[B][3]), we note that the statute expressly provides that such a determination is to be made "at the time of entry of final judgment" (*id.*), and thus such a determination is not to be made at this juncture of the litigation.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

891 N.Y.S.2d 785, 2009 N.Y. Slip Op. 09923

All Citations

68 A.D.3d 1807, 891 N.Y.S.2d 785, 2009 N.Y. Slip Op. 09923

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IN RE: the ESTATE OF Loyd D. SPURGEON

Supreme Court of Iowa.

IN RE: the ESTATE OF Loyd D. SPURGEON, Deceased. Grace M. SPURGEON, Appellant, v. Loyd R. SPURGEON, Executor, Appellee.

No. 96-784.

Decided: January 21, 1998

Considered by HARRIS, P.J., and NEUMAN, SNELL, ANDREASEN, and TERNUS, JJ. John A. Pabst of Pabst Law Firm, Albia, for appellant. Kenneth L. Keith of Keith Law Firm, P.C., Ottumwa, for appellee.

This dispute arises over the effect of an antenuptial agreement. The widow of Loyd D. Spurgeon, Grace M. Spurgeon, sought personal property, a spousal allowance and payment of a bequest under Loyd's will from the estate. The district court denied all claims. The court of appeals affirmed on the issue of personal property disposition, and reversed the district court on the other issues. On further review, we now vacate the decision of the court of appeals and affirm the judgment of the district court.

I. Background Facts and Proceedings

Prior to their marriage, the second for both parties, Grace and Loyd Spurgeon signed an antenuptial agreement which provided that in the event of death neither party would be entitled to a claim against the estate of the other. During the marriage, Grace was well provided for. She kept all her farm income, securities, and social security. Loyd died on September 5, 1994. At the time of his death, Grace's income totaled $25,000 per year. After Loyd's death, Grace's social security payments increased from $529 per month to $1362 per month. Loyd's will contained a bequest to Grace for $15,000. Following Loyd's death, Grace moved from the marital home and took with her several items of personal property purchased during the marriage.

Grace closed out a joint checking account in the amount of $10,834.43 and deposited this amount in her account. The estate filed a counterclaim seeking the return of the funds on the grounds she was not entitled to them because her name was on the account only for convenience purposes. The district court ruled Grace was entitled to the proceeds from the joint account. The estate did not appeal this ruling.

Grace next decided to file an election to take against the will, and filed a motion for adjudication of law points to determine whether she had the right to follow such a course. Judge Richard Vogel ruled that although the antenuptial agreement was valid, Grace was not barred from electing to take against the will. Grace subsequently filed for a spousal allowance in the amount of $900 per month. The estate resisted this request and filed a counterclaim, seeking the return of the various items of personal property taken by Grace.

Following a hearing on the issue of whether Grace was entitled to a spousal allowance, the district court ruled that she was not. Judge James Jenkins ruled that due to the terms of the antenuptial agreement, Grace was entitled to nothing as the surviving spouse of the decedent. The court lastly ruled that the various items of personal property taken by Grace belonged to the estate and should be returned.

Grace subsequently filed a motion under Iowa Rule of Civil Procedure 179(b), claiming that the district court order effectively overruled Judge Vogel's prior ruling, and that the rulings were therefore inconsistent. Judge Jenkins denied the motion, holding that Judge Vogel did not rule on the effect Grace's election would have. Grace appealed.

II. Issues on Appeal

Grace argues that under Iowa Code section 633.236 (1995), she had a right to elect to take against the will. She claims that although she may have given up her share of the real property due to her waiver of her right to dower under the terms of the antenuptial agreement, she was still entitled to a portion of the estate based on the provisions of sections 633.238(2)-(3).

Grace next argues the district court should have awarded her a spousal allowance. She maintains an antenuptial agreement does not prevent an award of spousal allowance, but merely makes it discretionary. Grace asserts she should be awarded $900 per month for one year to bring her up to what she and Loyd were making together. Grace additionally argues that if Judge Vogel's decision was in error, she should not be barred from now claiming her $15,000 bequest. She lastly claims she should be allowed to keep the items of personal property she took with her because they were purchased with joint marital funds.

The court of appeals affirmed in part and reversed in part, holding that Grace was entitled to a spousal allowance. The court additionally held that even though Grace contracted away her right to take a statutory share, she was entitled to the $15,000 bequest because she had no rights under Iowa Code section 633.246.

III. Scope of Review

This proceeding in probate involves claims by Grace Spurgeon against the estate. Since these are claims tried in equity, and the parties agree, our scope of review is de novo. Iowa Code § 633.33; In re Conservatorship of Peters, 447 N.W.2d 412, 414 (Iowa App.1989).

IV. Statutory Law

The relevant statutes involved in this matter are as follows:

633.236 Right of surviving spouse to elect to take against will.

When a married person dies testate as to any part of the person's estate, the surviving spouse shall have the right to elect to take against the will under the provisions of sections 633.237 to 633.246. If the surviving spouse has a conservator, the court may authorize or direct the

conservator to elect to take under or against the will as the court deems appropriate under the circumstances.

633.238 Share of surviving spouse who elects to take against will.

If the surviving spouse elects to take against the will, the share of such surviving spouse will be:

1. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of right.

2. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.

3. One-third of all other personal property of the decedent that is not necessary for the payment of debts and charges.

633.246 Election not subject to change.

An election by or on behalf of a surviving spouse to take the share provided in either section 633.236 or 633.240 or 633.244 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

633.374 Allowance to surviving spouse.

The court shall, upon application, set off and order paid to the surviving spouse, as part of the costs of administration, sufficient of the decedent's property as it deems reasonable for the proper support of the surviving spouse for the period of twelve months following the death of the decedent. When said application is not made by the personal representative, notice of hearing upon the application shall be given to the personal representative. The court shall take into consideration the station in life of the surviving spouse and the assets and condition of the estate. The allowance shall also include such additional amount as the court deems reasonable for the proper support, during such period, of dependents of the decedent who reside with the surviving spouse. Such allowance to the surviving spouse shall not abate upon the death or remarriage of such spouse.

V. Resolution

A. Grace asserts that notwithstanding the provisions of the antenuptial agreement, she has a right under Iowa Code section 633.236 to take against the will. Grace filed an election; the estate did not contest her right to make this election. Having elected against the will, the estate asserts she is barred under Iowa Code section 633.246 from receiving the $15,000 bequest under the will. This is so, the estate argues, even though Grace is prevented by the antenuptial agreement from claiming a share of Loyd's estate.

The validity of the antenuptial agreement was not questioned and its provisions were broad. It provided that the survivor of either party shall make no claims of any kind against the estate of the other “for dower, statutory right, right of support, right of inheritance, and homestead right.”

Grace argues that she is entitled to a share of the estate's personal property under her election because the terms dower and homestead in the antenuptial agreement embrace real property only. We find this claim fails because the terms “statutory right” and “right of inheritance”

include the personal property. In addition, we agree with the court of appeals and district court that the property at issue was purchased with Loyd's money. Therefore, we affirm the district court and court of appeals' decisions ordering the return of this property to the estate.

B. The court of appeals found that since the antenuptial agreement barred Grace from taking any property via her election against the will, she should not thereby be barred from taking the $15,000 bequest under the will. The logic is that her election having no effect, it was a nullity. We need not speculate as to the motive for Grace's election; numerous reasons are possible for her action. However that may be, the effect of her election is clear under the statute and our case law.

In In re Campbell, 319 N.W.2d 275 (Iowa 1982), we said:

By claiming a share as one of the heirs at law under the remainder clause in the will, the widow necessarily claims that she is a devisee in the will. When testator died and his will was admitted to probate, the widow, like surviving spouses of testators generally, had to make a choice: whether to accept the will and forego a statutory share, or to reject the will and take a statutory share instead. A surviving spouse does not have a third choice-to take some of both-except in the unusual case in which a will clearly and explicitly gives the surviving spouse that choice, which this will does not.

.

The authorities are clear as to the effect of an election by a surviving spouse: a choice to take against the will is a genuine election which nullifies gifts to the surviving spouse in the will but leaves the will to be carried out as to the other devisees as nearly as may be done. Hahn v. Dunn, 211 Iowa 678, 686, 234 N.W. 247, 252 (1931) ("Kathern M. Hahn, who did not elect to take under her husband's will, received the statutory distributive share and nothing more or less." (Emphasis added.)); Rench v. Rench, 184 Iowa 1372, 1376, 169 N.W. 667, 668 (1918) ("The widow having rejected the will, its provisions in her behalf must be wholly disregarded.").

In re Campbell, 319 N.W.2d at 277 (emphasis in original omitted). The provisions of Iowa Code section 633.246 make this election by Grace conclusive.

In his ruling on plaintiff's 179(b) motion, Judge Jenkins aptly observed:

If the Decedent had left no Will at all and had died intestate, plaintiff concedes she would have been entitled to nothing because of the antenuptial agreement. It is absurd to believe that simply because the decedent decided to make a Will, its mere execution abrogated the parties' prenuptial agreement and clothed plaintiff with inheritance rights she had not before held.

. Plaintiff rejected a $15,000 bequest when she elected to take against the Will. She asks this court to restore her bequest.

This court has no authority to undo that which plaintiff herself did. It was plaintiff who knowingly rejected her bequest. The fact that she may have now changed her mind does not alter her rejection.

We find that Judge Jenkins' analysis is correct. Grace forfeited her right to take under the will by her election against the will. On this issue, the court of appeals' decision is vacated and the district court's judgment is affirmed.

C. On the issue of the surviving spouse's allowance, the parties agree that if under the facts it was appropriate, under the law it could be ordered. The trial court declined to order it; the court of appeals found the trial court abused its discretion, reversed and ordered a new trial.

Iowa Code section 633.374 provides for spousal support for twelve months following the death of a decedent as part of the costs of administration. The statute provides that the court shall take into consideration the station in life of the surviving spouse and the assets and condition of the estate.

An antenuptial agreement providing that spousal support is waived and no claim may be made for it does not prevent its being awarded, but rather makes its award discretionary. O'Dell v. O'Dell, 238 Iowa 434, 464, 26 N.W.2d 401, 416 (1947); Caldwell v. Caldwell, 192 Iowa 1157, 1159, 186 N.W. 58, 59 (1922); Johnson v. Johnson, 154 Iowa 118, 121, 134 N.W. 553, 554 (1912); In re Estate of Uker, 154 Iowa 428, 434, 134 N.W. 1061, 1063-64 (1912); see also Iowa Code § 596.5(2) ("The right of a spouse or child to support shall not be adversely affected by a premarital agreement.").

When Loyd died, Grace's personal annual income was about $25,000. After Loyd's death, Grace's social security payments increased from $529 a month to $1362 a month. Grace maintains she should be awarded $900 per month for one year to bring her up to what she and Loyd were making together.

The estate computed that with social security, Grace's annual income would rise to $35,000, and argues that Grace failed to prove any need for a spousal allowance. The trial court found that Grace had funds available to her through her first marriage, social security benefits, and about $11,000 from the joint tenancy bank account. Since Grace was not required to rely on the decedent for support, and had ample funds, the trial court held she was not entitled to spousal support.

Pursuant to a change in the probate code, we held that a showing of necessity is not necessary to the granting of support to a surviving spouse. In re Estate of DeVries, 203 N.W.2d 308, 311 (Iowa 1972). While this is true, it is appropriate to consider the assets of the surviving spouse when considering the spouse's station in life. Also to be considered are the assets and condition of the estate. Iowa Code § 633.374.

The circumstances presented do not establish an abuse of discretion by the trial court in refusing to order an allowance to Grace as surviving spouse. See In re Estate of Tollefsrud, 275 N.W.2d 412, 415 (Iowa 1979) (utilizing abuse of discretion standard to determine whether trial court properly ordered allowance for surviving spouse). If there is a basis in the record for the district court's decision, we will not find an abuse of discretion. Id. We cannot say that the trial court's decision had no basis in the record, the lack of which would constitute an abuse of discretion. Therefore, on this issue, we vacate the decision of the court of appeals and affirm the judgment of the district court.

Costs are assessed to plaintiff-appellant.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

SNELL, Justice.

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Distinguished by Anonymous v. Anonymous, N.Y.A.D. 1 Dept., March 22, 2016

121 A.D.3d 864
Supreme Court, Appellate Division,
Second Department, New York.

Alexander McKENNA, respondent,
v.
Ann Marie McKENNA, appellant.

Oct. 15, 2014.

Synopsis

Background: Husband brought action for divorce and ancillary relief. the Supreme Court, Nassau County, Reilly, J., denied wife's motion to vacate the parties' prenuptial agreement and for an award of pendente lite maintenance and counsel fees, and granted husband's cross motion for summary judgment declaring the parties' prenuptial agreement to be valid and enforceable. Wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] husband demonstrated his prima facie entitlement to judgment as a matter of law on claim prenuptial agreement was valid; but

[2] triable issues of fact with regard to agreement's fairness precluded summary judgment; and

[3] agreement did not bar temporary relief to wife, including pendente lite maintenance and attorney fees.

Affirmed as modified, and remitted.

West Headnotes (6)

[1] Marriage and Cohabitation Requisites and validity

An agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of unconscionability, or fraud, duress, overreaching, or other inequitable conduct.

10 Cases that cite this headnote

[2] Contracts Unconscionable Contracts

An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense.

7 Cases that cite this headnote

[3] Judgment Domestic relations

Husband, in support of summary judgment on his claim that prenuptial agreement was valid and enforceable, demonstrated his prima facie entitlement to judgment as a matter of law by submitting, inter alia, the agreement, which appeared fair on its face and set forth express representations stating that, among other things, it was not a product of fraud or duress, each party had made full disclosure to the other and was represented by independent counsel, and they had fully discussed and understood its terms.

5 Cases that cite this headnote

[4] Judgment Domestic relations

Triable issues of fact with regard to the fairness of prenuptial agreement, the circumstances surrounding its negotiation and execution, and whether husband had disclosed the value of his assets, precluded summary judgment on husband's claim that the agreement, which provided that each party waived the right to the other's separate property, including property acquired from the proceeds of separate property acquired during marriage, that wife waived any interest in the marital home and any interest in husband's annual bonus and retirement account, and limited husband's maintenance obligation to a lump sum payment, was valid and enforceable.

[5] **Judgment** Domestic relations

Husband's purported financial disclosure to wife during the five years the parties lived together prior to the execution of their prenuptial agreement was, pursuant to the merger clause in the agreement, precluded from consideration on husband's motion for summary judgment on his claim that the agreement was valid and enforceable, since husband's representations were not included in and were extrinsic to the agreement.

2 Cases that cite this headnote

[6] **Marriage and Cohabitation** Particular Cases and Contexts

Although the parties' prenuptial agreement limited wife's rights to obtain spousal support and waived her rights to attorney fees, it did not bar temporary relief, including pendente lite maintenance and attorney fees during the pendency of divorce litigation.

3 Cases that cite this headnote

Attorneys and Law Firms

****382** Clifford J. Petroske, P.C., Bohemia, N.Y. (Michael Meyers of counsel), for appellant.

Rand P. Schwartz, Massapequa, N.Y., for respondent.

REINALDO E. RIVERA, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, and JOSEPH J. MALTESE, JJ.

Opinion

***864** In an action for a divorce and ancillary relief, the defendant appeals from an order of the Supreme Court, Nassau County (Reilly, J.), dated November 29, 2012, which denied her motion to vacate the parties' prenuptial agreement and for an award of pendente lite maintenance and counsel fees, and granted the plaintiff's cross motion for summary judgment declaring the parties' prenuptial agreement to be valid and enforceable.

ORDERED that the order is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provision thereof granting the plaintiff's cross motion for summary judgment declaring the parties' prenuptial agreement to be valid and enforceable, and substituting therefor a provision denying the cross motion, and (2) by deleting the provision thereof denying those branches of the defendant's motion which were for an award of pendente lite maintenance and counsel fees; as so modified, the order is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for a new determination of the those branches of the defendant's motion which were for an award of pendente lite maintenance and counsel fees.

The parties were married on February 14, 1997. Shortly before their marriage, on February 4, 1997, they entered into a ***865** prenuptial agreement. The agreement provided, inter alia, that, in the event of separation or divorce, each party waived the right to the other's separate property, including property acquired from the proceeds of separate property acquired during marriage; the defendant waived any interest in the marital home, which had been owned by the plaintiff before the marriage, as well as any interest in the plaintiff's annual bonus and retirement account; and the plaintiff's maintenance obligation would be limited to a lump sum payment of between $5,000 and $25,000, depending on the length of the marriage. The agreement further provided that the plaintiff would pay the defendant's reasonable counsel fees in any matrimonial action, unless the defendant challenged the agreement.

In December 2011, the plaintiff commenced this action for a divorce and ancillary relief. The defendant moved to vacate the prenuptial agreement on the basis that it was unenforceable on the ground, among others, that the plaintiff never disclosed the value of his assets, and for an award of pendente lite maintenance and counsel fees. The plaintiff cross-moved for summary judgment declaring that the prenuptial agreement was valid and enforceable. The Supreme Court denied the defendant's motion, and granted the plaintiff's cross motion.

In determining a motion for summary judgment, the court must view the evidence ****383** in a light most favorable to the nonmoving party (*see Stukas v. Streiter,* 83 A.D.3d 18, 23, 918 N.Y.S.2d 176) and afford such party the benefit of every favorable inference (*see Ruiz v. Griffin,* 71 A.D.3d 1112, 1115, 898 N.Y.S.2d 590; *Franklin v. 2 Guys From Long Pond, Inc.,* 50 A.D.3d 846, 858 N.Y.S.2d 186). A "motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from

the evidence, or where there are issues of credibility' " (*Ruiz v. Griffin,* 71 A.D.3d at 1115, 898 N.Y.S.2d 590, quoting *Scott v. Long Island Power Auth.,* 294 A.D.2d 348, 348, 741 N.Y.S.2d 708).

[1] **[2]** An agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of unconscionability, or fraud, duress, overreaching, or other inequitable conduct (*see Christian v. Christian,* 42 N.Y.2d 63, 73, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Petracca v. Petracca,* 101 A.D.3d 695, 697–698, 956 N.Y.S.2d 77; *Rabinovich v. Shevchenko,* 93 A.D.3d 774, 775, 941 N.Y.S.2d 173). "An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Morad v. Morad,* 27 A.D.3d 626, 627, 812 N.Y.S.2d 126; *see Cioffi–Petrakis v. Petrakis,* 72 A.D.3d 868, 868–869, 898 N.Y.S.2d 861).

[3] ***866** Here, the plaintiff demonstrated his prima facie entitlement to judgment as a matter of law by submitting, inter alia, the agreement, which appeared fair on its face and set forth express representations stating that, among other things, it was not a product of fraud or duress, each party had made full disclosure to the other and was represented by independent counsel, and they had fully discussed and understood its terms (*see Cioffi–Petrakis v. Petrakis,* 72 A.D.3d at 869, 898 N.Y.S.2d 861; *Schultz v. Schultz,* 58 A.D.3d 616, 617, 871 N.Y.S.2d 636; *Katz v. Katz,* 37 A.D.3d 544, 830 N.Y.S.2d 268; *Rubin v. Rubin,* 33 A.D.3d 983, 984, 823 N.Y.S.2d 218).

[4] In opposition, the defendant raised triable issues of fact with regard to, inter alia, the fairness of the agreement, the circumstances surrounding the negotiation and execution of the agreement, and the absence of any meaningful financial disclosure by the plaintiff (*see Cioffi–Petrakis v. Petrakis,* 72 A.D.3d at 869, 898 N.Y.S.2d 861; *Katz v. Katz,* 37 A.D.3d at 545, 830 N.Y.S.2d 268; *Rubin v. Rubin,* 33 A.D.3d at 985, 823 N.Y.S.2d 218). The record demonstrates that the defendant waived substantial rights to equitable distribution and spousal support. However, it is not possible to evaluate the fairness of the prenuptial agreement on its face, inasmuch as the plaintiff provided no financial disclosure as part of the agreement. Neither the plaintiff's disclosure made in support of his motion nor the support he provided to the defendant and her son from a prior marriage during the course of this marriage is sufficient to enable the Court to determine the fairness of the agreement at the time of its execution. Thus, notwithstanding that the agreement recited that there had been "full disclosure" and that it is "a fair Agreement" which "is not the result of any fraud, duress or undue influence," triable issues of fact exist.

[5] In addition, the plaintiff's purported financial disclosure to the defendant during the five years the parties lived together prior to the execution of the prenuptial agreement is precluded from consideration pursuant to the merger clause in the agreement, since the representations are not included in and are extrinsic to the agreement (*see Schron v. Troutman* ****384** *Sanders LLP,* 20 N.Y.3d 430, 433–434, 963 N.Y.S.2d 613, 986 N.E.2d 430; *Matter of Primex Intl. Corp. v. Wal–Mart Stores,* 89 N.Y.2d 594, 599, 657 N.Y.S.2d 385, 679 N.E.2d 624).

Further, the defendant's attorney at that time was selected by the plaintiff and paid by him, and, according to the defendant, met with her only a short time before the execution of the agreement and failed to advise her of the legal consequences of the terms of agreement. Given the parties' conflicting claims as to the negotiation and execution of the prenuptial agreement, at this juncture, summary judgment in favor of either party on the issue of the validity of the prenuptial agreement is unwarranted.

[6] ***867** Notwithstanding that the prenuptial agreement contains a waiver of maintenance and equitable distribution, there is no provision for the waiver of pendente lite maintenance during the pendency of this litigation. While the parties' premarital agreement limits the defendant's rights to obtain spousal support and waives her rights to counsel fees, it does not bar temporary relief, including pendente lite maintenance and counsel fees (*see Abramson v. Gavares,* 109 A.D.3d 849, 850, 971 N.Y.S.2d 538; *Vinik v. Lee,* 96 A.D.3d 522, 522–523, 947 N.Y.S.2d 424; *Solomon v. Solomon,* 224 A.D.2d 331, 331, 637 N.Y.S.2d 728). In granting the plaintiff's motion for summary judgment, the Supreme Court, without explanation, improvidently denied those branches of the defendant's motion which were for pendente lite maintenance and counsel fees. Accordingly, we remit the matter to the Supreme Court, Nassau County, for a new determination of those branches of the defendant's motion.

All Citations

121 A.D.3d 864, 994 N.Y.S.2d 381, 2014 N.Y. Slip Op. 06951

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2021 New Mexico Statutes
Chapter 40 - Domestic Affairs
Article 3A - Uniform Premarital Agreement
Section 40-3A-4 - Content.

Universal Citation: NM Stat § 40-3A-4 (2021)

A. Parties to a premarital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(5) the ownership rights in and disposition of the death benefit from a life insurance policy;

(6) the choice of law governing the construction of the agreement; and

(7) any other matter not in violation of public policy.

B. A premarital agreement may not adversely affect the right of a child or spouse to support, a party's right to child custody or visitation, a party's choice of abode or a party's freedom to pursue career opportunities.

History: Laws 1995, ch. 61, § 4.

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Choice of Law Provisions in Prenuptial Agreements

By Alyssa A. Rower, Karina VanHouten and Margaret Sarratt

Laws governing divorce vary—often wildly—from state to state. Contrary to popular belief, the law governing a couples' divorce is *not* the law of the state in which the couple were married or even necessarily the law of the state where the couple spent most of their marriage; rather, it is the state law where the couple (or even one party) live for a prescribed period before filing for divorce.

The length of time parties need to live in a state to confer jurisdiction varies (e.g., in New York, it is 1-2 years). This is important because a couple's rights and obligations can vary dramatically depending on geography. For example, many states like New York only divide assets acquired during the marriage and exclude assets received by inheritance or gift, while if a couple moves only a few miles north to Connecticut, *all* property—regardless of when or how it was acquired—will be divided in a divorce.

Avoiding Uncertainty

A validly executed prenuptial agreement (a "prenup") or postnuptial agreement (a "postnup") however, protects a couple regardless of where they live as the agreement—and not the default state law—will govern what is divided upon divorce and whether spousal support will be payable. A prenup is a contract between prospective spouses made in contemplation of marriage that determines financial rights and obligations upon divorce or death. A postnup governs the same subjects as prenups, but is executed *after* the marriage. As more couples enter into agreements and continue to move throughout the United States—and even the world—the enforceability of those agreements becomes increasingly important to both couples and courts.

Credit: Elena Abrazhevich/Shutterstock

Choice of Law Provisions

Because couples are seeking predictable outcomes in their agreement, it is important to understand what will happen if either party seeks enforcement at some future date, in some future jurisdiction. First, a well-drafted agreement will include a choice of law clause that identifies the law that will govern any dispute about the validity or enforceability of the agreement.

For a contractual choice of law clause to be enforceable, a court will look first to find a substantial relationship between the state of the chosen law and the parties or contract. In the context of prenups, one connection may be

residence of both parties in the state of the chosen law at the time of signing. In *Lupien v. Lupien*, a New York court enforced a Massachusetts choice of law clause where the prenup was signed in Massachusetts when both parties resided there. 891 N.Y.S.2d. 785 (App. Div. 2009).

Other factors that may be sufficient to establish a substantial connection include the residence of one party, the location of real property or business interests subject to the agreement, the place of execution of the agreement or the place of marriage. The more factors that point to a state of the chosen law, the easier it will be to convince a court that the state of the chosen law is reasonable.

In *Elgar v. Elgar*, a Connecticut court enforced a New York choice of law clause in a prenup signed in New York where the wife was a resident of New York at the time of signing and both parties had business interests in New York, even though her late husband was a resident of Connecticut and the wedding took place in Connecticut. 238 Conn. 839 (Conn. 1996).

The second requirement a court will consider when deciding whether to enforce a choice of law clause is whether the application of the chosen law is contrary to "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." See Restatement (2d), §187(2)(b). If the outcome under the chosen law is contrary to a "fundamental policy" of the forum state, the choice of law clause might not be enforced. In practice, this very rarely happens. For example, a Florida court held that while a prenup under Puerto Rican law was valid, the waiver of Florida homestead protection was unenforceable because it violated a fundamental Florida public policy. *Nicole v. Nicole-Souri (In re Estate of Nicole Santos)*, 648 So. 2d 271, 281-83 (Fla. Dist. Ct. App. 1995).

The choice of law is important because the parties to the agreement must abide by the procedural formalities for execution of the agreement in that state. For example, New York law mandates that a prenup must be in writing and notarized to be enforceable. The very same procedure, however, will not suffice if the parties choose California law, where the parties must not only be represented by counsel but also observe a seven-day waiting period between finalizing and signing the prenup. See California Family Code §1615(c). It also means that a court evaluating whether an agreement should be set aside will consider the applicable standards of the chosen state (e.g., in New York, an agreement may be set aside if it was procured by fraud or duress or deemed unconscionable).

When There Is No Choice of Law Provision

New York law aligns with the Restatement Second of Conflict of Laws, which says that where there is no choice of law in a contract, the law of the state with "the most significant relationship to the transaction and the parties" governs. If a choice of law clause is not enforceable or not included in the agreement, a court with jurisdiction will apply its own state law. In *Rivers v. Rivers*, where a Missouri court considered a prenup executed in Louisiana without a choice-of-law provision, the court applied Missouri law and rendered the agreement invalid. 21 SW3d 117 (Mo. Ct. App., 2000).

When Couples Move During Marriage

Assuming an agreement includes a New York choice of law clause, the question of how the agreement will be treated in another state is important to

couples planning their lives together. With a valid choice of law clause, a state court will only evaluate whether an agreement is enforceable under the state law that expressly governs the contract. For example, if a prenup is prepared and executed in New York with a valid New York choice of law provision and the parties later divorce in California, it matters not that parties have failed to meet California requirements for executing the agreement provided New York requirements have been met.

Even when an agreement contains a valid choice of law provision and meets the procedural formalities of execution, some states, such as Massachusetts, Kentucky Connecticut, and Florida, allow for a "second look" upon divorce approximating a test for unconscionability. See, e.g., *Dematteo v. Dematteo*, 436 Mass. 18 (Mass. 2002); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). For example, a court may ask whether the circumstances have changed so dramatically that no reasonable person would enter such a contract.

Because of these variations, it is important, no matter what choice of law or what state you are in, that the agreement be fair and not unconscionable. "Fair," however, does not meant that the agreement must mirror the default state law or put spouses on equal footing; it means only that there needs to be something in the agreement for each side. Under New York law, "[a]n unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience …" *McKenna v. McKenna*, 121 A.D.3d 864, 865 (2014) quoting *Morad v. Morad*, 27 A.D.3d 626, 627 (2006)

The "second look" also often applies to spousal support waivers. For example, some states will not enforce a complete waiver, and other states allow waivers only under certain specific conditions. For example, in New Mexico, a prenup may not adversely affect the right of a child *or spouse* to support. See N.M. Stat. §40-3A-4(B) (emphasis added). Louisiana prohibits the waiver of interim support as contrary to public policy. See *Hall v. Hall* 4 So. 3d 254 (La. Ct. App. 2009).

An Iowa court similarly found that spousal allowance could be awarded to a widow, even in the face of express provision in a prenuptial agreement waiving that right. See *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998). The variation among states regarding the enforceability of agreements can be confounding.

Considering the Second Restatement's goal of preserving justified expectations, a duly executed prenuptial agreement which includes a choice of law clause will likely be enforced. It's important to ensure that the parties have a reasonable basis to choose or other sufficient connection to the state of the chosen law. A more cautious approach will also be mindful not to drive an unfair bargain or execute an agreement under conditions that a court might seek to overturn on public policy grounds.

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