

1989

Antenuptial Agreements in Pennsylvania: A Drafter's Nightmare?

Marc L. Sternberger

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Marc L. Sternberger, *Antenuptial Agreements in Pennsylvania: A Drafter's Nightmare?*, 27 Duq. L. Rev. 769 (1989).

Available at: <https://dsc.duq.edu/dlr/vol27/iss4/8>

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Antenuptial Agreements in Pennsylvania: A Drafter's Nightmare?

Of course I love you dear . . . Of course our marriage will be forever . . .
But honey, my attorney said that I ought to ask you to sign this agreement
just in case things don't work out . . . I told him it really wasn't necessary,
but you know how lawyers are.

INTRODUCTION

Diamonds may be forever, but marriages are not always quite as resilient.¹ If the hypothetical speaker above is able to convince his bride to sign an antenuptial agreement,² there remains considerable debate as to whether the agreement will be binding upon the parties and govern their respective rights and responsibilities in the event of divorce or separation.

Although antenuptial agreements in contemplation of the death of one of the spouses have long been enforceable in Pennsylvania,³ the enforceability of antenuptial agreements in contemplation of divorce or separation has been the subject of on-going controversy and uncertainty.⁴ The already existing uncertainty surrounding such agreements increased dramatically when the opinion in *Karkaria v. Karkaria*⁵ was rendered by Judge R. Stanton Wettick of the Allegheny County Court of Common Pleas in March, 1988.⁶

1. In 1984, there were 2,477,000 marriages and 1,169,000 divorces in the United States. See *Statistical Abstract of the United States 1988*, U.S. Department of Commerce, Bureau of the Census (108th ed. 1988). The median duration of marriages in 1984 was 6.9 years. *Id.* In Pennsylvania, there were 89,139 marriages and 40,153 divorces in 1985. See *1987 Pennsylvania Statistical Abstract*, Office of Economic Policy, Planning and Research (July 1987).

2. Antenuptial agreements are called "prenuptial agreements" by some courts and commentators. The terms are interchangeable, but for the sake of clarity, and because Pennsylvania courts generally refer to such agreements as antenuptial agreements, this text will refer to such agreements as antenuptial agreements.

3. As early as 1852, the Pennsylvania Supreme Court recognized the validity of an antenuptial agreement. See *Shoch v. Shoch's Executors*, 19 Pa. 252 (1852).

4. See *infra* notes 45-94 and accompanying text.

5. 136 P.L.J. 158 (Pa. C.P. Alleg. 1988)(Wettick, A.J.).

6. *Id.* The uncertainty was aptly expressed by one commentator when she stated that: "[*Karkaria* was] calculated to give family law lawyers heartburn and sleepless nights. This case had all family lawyers who ever drafted a good antenuptial agreement for a client . . . close [to] calling their insurance carriers." Miller, *Karkaria: A New and Uncertain Test for Pennsylvania Antenuptial Agreements*, 12 PA. FAMILY LAW. No. 9 at 29 (June-July 1988)

Karkaria announces a new test to determine the validity of antenuptial agreements⁷ entered into following the effective date of Pennsylvania's 1980 Divorce Code⁸. While the ramifications of Judge Wettick's opinion could be considerable,⁹ it may be some time before Pennsylvania's appellate courts squarely address the issue. Until then, it is likely that the controversy and uncertainty will continue.

The validity of antenuptial agreements which contemplate separation or divorce involves more than a mere academic discussion. It is of practical importance to any attorney who is requested by a client to draft an antenuptial agreement which contains provisions relating to separation or divorce and which is to be enforceable in Pennsylvania. Indeed, it is of extreme importance to those attorneys who have, subsequent to the enactment of the 1980 Divorce Code, drafted antenuptial agreements under the presumption that they had written binding contracts and erroneously assured their clients of as much.

With these practical ramifications in mind, this comment shall review the relevant case law and legislation in Pennsylvania dealing with the validity of antenuptial agreements. The analysis will begin with a discussion of the law relating to the noncontroversial variety of antenuptial agreements—those which provide for and regulate the disposition of property in the event of death. The comment will then shift its focus to the more volatile hybrid: antenuptial agreements which are drafted in contemplation of separation or divorce.

ANTENUPTIAL AGREEMENTS IN CONTEMPLATION OF DEATH

Antenuptial agreements in contemplation of death are contracts between prospective husbands and wives which are entered into before marriage, but in contemplation and in consideration of marriage. Antenuptial agreements usually contain provisions which alter or extinguish the statutory rights of the surviving spouse in the estate of the deceased spouse.¹⁰ In other words, antenuptial agree-

[hereinafter Miller].

7. See *infra* notes 70-88 and accompanying text.

8. Pennsylvania's 1980 Divorce Code, PA. STAT. ANN. tit 23, § 101 (Purdon Supp. 1988), was enacted on April 2, 1980, and became effective ninety days thereafter.

9. One commentator observed that: "Because the opinion is so well-written and well-researched, it is likely to be widely read and highly persuasive to other Pennsylvania trial courts and appellate courts." Miller, *supra* note 6, at 30.

10. A. MOMJIAN & N. PERLBERGER, PENNSYLVANIA FAMILY LAW § 7.1.1 at 3 (1978) [here-

ments regulate the financial rights and interests of one or both of the parties.¹¹

Historically, the validity of an antenuptial contract has depended primarily upon the presence of *one* of two factors.¹² The agreement must have contained either a reasonable provision for the intended spouse *or* a full and fair disclosure of the other party's worth.¹³ If an antenuptial agreement contained a reasonable provision for the intended spouse, the agreement would be upheld even if there had been less than a full and fair financial disclosure.¹⁴ Conversely, where there had been a full and fair disclosure, antenuptial agreements have been upheld despite the fact that the provision for the intended spouse was unreasonable.¹⁵

inafter MOMJIAN & PERLBERGER].

11. See *Barnhart v. Barnhart*, 376 Pa. 44, 53, 101 A.2d 904 (1954). Some of the reasons for entering into an antenuptial agreement are:

1. To protect preexisting assets from estate claims;
2. To protect income and assets, acquired both before and during the marriage, in case of separation or divorce;
3. To prearrange the personal relationship between the prospective spouses;
4. To protect family businesses, professional practices, and pension benefits;
5. To firmly fix economic rights and obligations after marriage between the prospective spouses (sometimes including the contribution of each spouse to expenses and tax obligations); and
6. To assure fair and equal treatment of children from previous marriages.

Hofstein and Bell, *Preuptial Agreements: Legal Issues Relating to the Enforceability of Antenuptial Agreements*, 1988-453 PENNSYLVANIA BAR INSTITUTE 33, 35 (1988) [hereinafter Hofstein and Bell].

12. See *In re Estate of Geyer*, 516 Pa. 492, 500-01, 533 A.2d 423, 427 (1987); *Friedman Estate*, 483 Pa. 614, 398 A.2d 615 (1979); *In re Hillegass*, 431 Pa. 144, 244 A.2d 672 (1968); *Kaufmann Estate*, 404 Pa. 131, 171 A.2d 48 (1961); *Zeigler Estate*, 381 Pa. 436, 446, 113 A.2d 271, 273 (1955); *Belsky v. Belsky*, 196 Pa. Super. 374, 376-77, 175 A.2d 348, 349-50 (1961); *Emery Estate*, 362 Pa. 142, 146, 66 A.2d 262 (1949); *Groff's Estate*, 341 Pa. 105, 112, 19 A.2d 107, 111 (1941); *Flannery's Estate*, 315 Pa. 576, 580, 173 A.2d 303 (1934). In 1987, the *Geyer* court reaffirmed this principle when it quoted *In re Hillegass* as follows:

Parties to an antenuptial Agreement providing for the disposition of their respective estates do not deal at arm's length, but stand in a relation of mutual confidence and trust that calls for the highest degree of good faith and a reasonable provision for the surviving spouse, or in the absence of such a provision a full and fair disclosure of all pertinent facts and circumstances.

In re Estate of Geyer, 516 Pa. at 501, 533 A.2d at 427 (quoting *In re Hillegass*, 431 Pa. at 149, 244 A.2d at 675). *In re Hillegass* has recently been called "the leading decision in [Pennsylvania] concerning the interpretation of antenuptial agreements". *Simeone v. Simeone*, 551 A.2d 219, 221 (1988).

13. See *supra* note 12 and accompanying text.

14. See, e.g., *Groff's Estate*, 341 Pa. 105, 112, 19 A.2d 107 (1941). The *Groff's* court stated that "[a]n antenuptial agreement will not be declared invalid, even if full information is not given to the wife of the husband's estate, providing that there is a reasonable allowance made for her." *Id.* (quoting *Gorback's Estate*, 96 Pa. Super. 527, 529 (1929)).

15. See, e.g., *Vallish Estate*, 431 Pa. 88, 94, 244 A.2d 745 (1968) ("Under our case law,

The Pennsylvania Supreme Court's 1987 plurality opinion in *In re Estate of Geyer*¹⁶ seems to mandate a third requirement, *i.e.*, any agreement seeking to change the statutory rights of the parties must include a full and fair disclosure of such statutory rights.¹⁷

A. Reasonable Provision for the Intended Spouse

The determination of whether an antenuptial agreement contains a reasonable provision for the intended spouse requires an evaluation of the circumstances existing at the time of the agreement and not by hindsight.¹⁸ Hindsight may not be used to set aside, as being inadequate, the provision for the spouse if such provision was adequate when made.¹⁹ The true test of the adequacy of a provision for an intended spouse is whether the provision is sufficient to enable him/her to live comfortably and in substantially the same or in a better manner than that which he/she enjoyed prior to marriage.²⁰ The reasonableness of a provision depends upon the totality of all the facts and circumstances at the time of the agreement, including the financial worth of each of the parties, the age of the parties, their prior marital status, the number of children each has, the intelligence of the parties, the extent to which each spouse aided in the accumulation of the wealth, and the standard of living the dependent spouse could reasonably expect to have

in view of the obvious absence of any provisions for Mrs. Vallish, unless a full disclosure was made of decedents assets at the time of the agreement, this agreement would be invalid. . .").

16. 516 Pa. 492, 506, 533 A.2d 423, 429-30 (1987).

17. *Id.* The *Geyer* court states as follows:

That public policy, a token of the solemnity of the matrimonial union, requires no less than a condition that any agreement surrendering the right of a spouse to elect against the will must be made under full knowledge of that right. We therefore think it is fair and reasonable, as well as sound judicial policy, to require that any agreement which seeks to change the duly enacted public policy of this Commonwealth must be based on nothing less than full and fair disclosure. Such disclosure must include both the general financial pictures of the parties involved, and evidence that the parties are aware of the statutory rights which they are relinquishing.

Id. at 506, 533 A.2d at 429-30.

18. See *Gula v. Gula*, 551 A.2d 219, 223 (1988); *Geyer*, 516 Pa. at 501, 533 A.2d at 428; *In re Hillegass Estate*, 431 Pa. 144, 244 A.2d 672 (1968); *McCannon v. McCannon*, 241 Pa. Super. 45, 359 A.2d 431 (1976).

19. See *MOMJIAN & PERLBERGER*, *supra* note 10, § 7.1.2(d) at 6 (citing *Kaufmann Estate*, 404 Pa. 131, 171 A.2d 48 (1961); *Emery Estate*, 66 A.2d 262, 362 Pa. 142 (1949)). See also *Geyer Estate*, 516 Pa. at 503, 533 A.2d at 428 (inter vivos gifts received subsequent to the date of the agreement are irrelevant).

20. See *Estate of Geyer*, 338 Pa. Super. 157, 487 A.2d 901 (1985); *McClellan's Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *Emery's Estate*, 362 Pa. 142, 66 A.2d 262 (1949).

during marriage.²¹ The court will also determine whether provision for the spouse was unreasonably disproportionate to the financial wealth of the other spouse at the time of the antenuptial agreement.²²

B. Full and Fair Financial Disclosure

In the alternative, a spouse may make a full and fair disclosure of his or her financial status.²³ The duty of disclosure in antenuptial agreements requires disclosure of all material circumstances which bear upon the prospective agreement.²⁴ Although the financial disclosure need not be exact,²⁵ a mere description of assets without disclosing the value of such assets has been held to be insufficient to satisfy the full and fair disclosure requirement.²⁶ The prudent draftsman will probably avoid costly litigation relative

21. See *In re Hillegass*, 431 Pa. at 150, 244 A.2d at 676; see also *Geyer*, 516 Pa. at 500-01, 533 A.2d at 427 (quoting *In re Hillegass* with favor); *Gula*, 551 A.2d at 223 (quoting *Hillegass* and *Geyer*) ; *Vallish's Estate*, 431 Pa. 88, 244 A.2d 745 (1968)(parties were both married previously and each had children from previous marriages); *Gelb's Estate*, 425 Pa. 117, 228 A.2d 367 (1967)(quoting *Kaufmann Estate*, 404 Pa. 131, 171 A.2d 48 (1961), which lists five factors to be considered when determining reasonableness); *McCready's Estate*, 316 Pa. 246, 175 A. 554 (1934)(parties were "advanced" in age, had separate children and separate estates).

22. See, e.g., *Gelb Estate*, 425 Pa. 117, 228 A.2d 367 (1967); *McClellan Estate*, 365 Pa. 401, 75 A.2d 595 (1950).

23. See *supra* notes 12-14 and accompanying text.

24. See *Vallish's Estate*, 431 Pa. 88, 244 A.2d 745 (1968). *Vallish* quotes *Shea's Appeal*, 121 Pa. 302, 15 A. 629 (1888) with approval as follows:

In *Shea's Appeal* 121 Pa. 302, 318, 319, 15 A. 629 (1888), this Court said: "The relation [between betrothed persons] is one of such extreme mutual confidence that a special duty of full disclosure arises which has no place in the ordinary contractual relation. Thus, in the case of *Kline v. Kline*, 57 Pa. 120, we said: 'There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. . . To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arms' length, we think is a mistake. Surely when a man and woman are on the eve of marriage, and it is proposed between them, as in this instance, to enter into an antenuptial contract upon the subject of the enjoyment and disposition of their respective estates, it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement.' We held that the relation existing between betrothed persons was one of the confidential relations which require *uberrima fides* in all transactions between them.

Vallish, 431 Pa. at 93, 244 A.2d at 747-48.

25. *Hofstein and Bell*, *supra* note 11, at ____ (citing *In re Estate of Geyer*, 516 Pa. 492, 533 A.2d 427 (1987)("[d]isclosure may be imprecise only to the extent that it does not obscure the general financial resources of the parties.")). See also *Gula v. Gula*, 551 A.2d 324 (1988).

26. See *MOMJIAN & PERLBERGER*, *supra* note 10, § 7.1.2(e) at 7 (citing *Warner's Estate*, 210 Pa. 431, 59 A. 1113 (1904)).

to disclosure by appending to the agreement a complete copy of his client's financial statement and incorporating it by reference thereto. Any material misrepresentation, whether intentional or not, will cause the disclosure to fall short of the requirement.²⁷

When drafting antenuptial agreements, many attorneys have tried to avoid these pitfalls by including clauses which, in one form or another, state that each party has entered into the agreement with full knowledge of, and after complete disclosure of, the nature and value of the estate of the other.²⁸ While it has been generally held that such a recital is prima facie evidence of full and fair disclosure,²⁹ it is a presumption which may be rebutted by extrinsic evidence to the contrary.³⁰ In any event, there is generally no duty on the part of an intended spouse to inquire into the assets of the other since he or she has a right to believe in the truth of the other's representations.³¹

C. Disclosure of Statutory Rights

As aforementioned, the opinion of the Pennsylvania Supreme Court in *In re Estate of Geyer*³² seems to mandate what can be characterized either as a third requirement or as an augmentation of the already existing disclosure requirement.³³ According to the *Geyer* court, any agreement seeking to change the statutory rights of the parties must include a full and fair disclosure of the statutory rights to be affected.³⁴ For example, it may be necessary to disclose that there is a statutory right for a spouse to elect against the other spouse's will if, by the terms of the antenuptial agreement, one or both of the parties waive that right.³⁵

27. See *McClellan Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *Harris Estate*, 431 Pa. 293, 245 A.2d 647 (1968), cert. denied, 393 U.S. 1065 (1969).

28. See *MOMJIAN & PERLBERGER*, supra note 10, § 7.1.2(e) at 7.

29. *Id.* See also *Vallish's Estate*, 431 Pa. 88, 244 A.2d 745 (1968); *Harris Estate*, 431 Pa. 293, 245 A.2d 647 (1968); *Gelb Estate*, 425 Pa. 117, 228 A.2d 367 (1967); *McClellan Estate*, 365 Pa. 401, 75 A.2d 595 (1950). But see *Geyer v. Geyer*, 516 Pa. 492, 506 n.10, 533 A.2d 423, 428 n.10 (1987) ("We think the Superior Court's reliance on the documents self serving statement regarding full and fair disclosure was misplaced. When the facts prove that a person has been misled that person's contemporaneous recorded belief that she was not misled is of no value.").

30. See supra note 29 and accompanying text.

31. See *MOMJIAN & PERLBERGER*, supra note 10, § 7.1.2(b) at 4 (citing *Flannery's Estate*, 315 Pa. 576, 173 A. 303 (1934); *Warner's Estate*, 210 Pa. 431, 59 A. 1113 (1904)).

32. 516 Pa. 492, 506, 533 A.2d 423, 429-30 (1987).

33. See supra notes 16-17 and accompanying text.

34. *Geyer*, 516 Pa. at 506, 533 A.2d at 429-30.

35. *Id.*

It remains unclear, however, whether such a third requirement really exists. The Pennsylvania Superior Court has declined to interpret *Geyer* as requiring disclosure of statutory rights in every antenuptial agreement.³⁶ Instead, the superior court has interpreted *Geyer* as meaning that the disclosure of statutory rights is mandatory only to enforce an agreement in which the provisions for the spouse are unreasonable.³⁷ Despite the superior court's interpretation, the prudent draftsman should probably avoid the risk of having an antenuptial invalidated by including a "Disclosure of Statutory Rights" section which clearly sets forth all statutory rights that are either waived or modified by the agreement.

D. *Not an Arm's Length Transaction*

An antenuptial agreement is presumptively binding on both parties and can only be avoided by a litigant based upon clear and convincing evidence that there is no provision for the dependent spouse or that the provision was inadequate when the agreement was entered into.³⁸ However, since the relationship of prospective spouses is one of "extreme mutual confidence,"³⁹ antenuptial agreements require the utmost good faith and a high degree of fairness.⁴⁰ When the relationship between the parties to an agreement is one of trust and confidence, the normal arm's length bargaining is not assumed,⁴¹ and overreaching by the dominant party for his or her benefit permits the aggrieved party to rescind the transaction.⁴²

Where a confidential relationship is proven to have existed, the

36. See *Simeone v. Simeone*, 551 A.2d 219, 221 (1988).

37. In *Simeone*, the superior court interpreted the holding in *In re Estate of Geyer* as: "(1) the concept of 'full and fair disclosure' was expanded to include the disclosure of statutory rights; and (2) the *Hillegass* holding that antenuptial agreements are valid in the presence of either full and fair disclosure or a reasonable provision for the intended spouse remains unchanged." *Id.* at 221.

38. See *Slight Estate*, 467 Pa. 619, 359 A.2d 773 (1976); *Hillegass Estate*, 431 Pa. 144, 244 A.2d 672 (1968); *Vallish Estate*, 431 Pa. 88, 244 A.2d 745 (1968); *Kaufmann Estate*, 404 Pa. 131, 171 A.2d 48 (1961); *Barnhart v. Barnhart*, 376 Pa. 44, 101 A.2d 904 (1954).

39. *Groff's Estate*, 341 Pa. 105, 19 A.2d 107 (1941).

40. See *In re Estate of Geyer*, 338 Pa. Super. 157, 487 A.2d 901, 905 (1987); *Barnhart v. Barnhart*, 376 Pa. 44, 101 A.2d 904 (1954); *Hillegass' Estate*, 431 Pa. 144, 244 A.2d 672 (1968); *Kline v. Kline*, 57 Pa. 120, 98 A. 202 (1868).

41. See *Bierer's Appeal*, 92 Pa. 265 (1879); *Kline v. Kline*, 57 Pa. 120, 98 A. 202 (1868); *Vallish's Estate*, 431 Pa. 88, 244 A.2d 745 (1968).

42. See *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416 (1981). This is so because the presence of a confidential relationship negates the assumption that each party is acting in their own best interest. *Id.*

party desiring to enforce the terms of an agreement has the burden of proving that there has not been a breach of the trust inherent in such a relationship.⁴³ In fact, it has been held that in a marital relationship, the slightest trace of undue influence or unfair advantage will be sufficient for the court to grant relief to the injured party.⁴⁴ Therefore, a prudent lawyer who represents the financially secure party ought to advise his client that if his or her intended spouse is not represented by counsel, the client ought to recommend to the intended spouse that he or she should consult with counsel before signing the antenuptial agreement. If each party has consulted with their own counsel, the agreement should state that fact.

ANTENUPTIAL AGREEMENTS IN CONTEMPLATION OF SEPARATION OR DIVORCE

"Historically, the courts of this country have treated antenuptial agreements drafted in contemplation of separation or divorce quite differently from those drafted in contemplation of the death of one of the spouses."⁴⁵ Until modified by the 1970 landmark case of *Posner v. Posner*,⁴⁶ the common law rule had been that agreements made in contemplation of divorce were virtually always invalid because such agreements were against the public policy of not encouraging divorce.⁴⁷ The post-1970 case law reflects the states' change of policy⁴⁸ whereby the states are not concerned with pre-

43. *Id.* at 144, 425 A.2d at 417 (citing *Scott Estate*, 455 Pa. 429, 316 A.2d 883 (1974); *Ruggieri v. West Forum Corp.*, 444 Pa. 175, 282 A.2d 304 (1971); *McClatchy's Estate*, 433 Pa. 232, 249 A.2d 325 (1969); *Kees v. Green*, 365 Pa. 368, 75 A.2d 602 (1950); *Brooks v. Conston*, 356 Pa. 69, 51 A.2d 684 (1947)).

44. *Shapiro v. Shapiro*, 424 Pa. 120, 128-29, 224 A.2d 164 (1966). The court held as follows:

A transaction between persons so situated as wife and husband is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party . . . Owing to the near connection between the parties . . . , the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it, to show that he had taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious.

Id. See also *supra* notes 16-17 and accompanying text.

45. See *Karkaria v. Karkaria*, 136 P.L.J. 158, 161 (Pa. C.P. Alleg. 1988)(Wettick, A.J.).

46. 233 So. 2d 381 (Fla. 1970), *reversed on other grounds*, 257 So. 2d 530 (Fla. 1972).

47. See *Hofstein and Bell*, *supra* note 11, at 47.

48. The change of policy in Pennsylvania became statutory as well as judicial when the Pennsylvania legislature included § 401(e)(2) in the 1980 Divorce Code wherein "[p]roperty excluded by valid agreement of the parties entered into before during or after the marriage" is excluded from the definition of marital property. See PA. CONS. STAT. ANN.

serving a marriage if the relationship is irretrievably broken.⁴⁹

In Pennsylvania, the courts have upheld the validity of antenuptial agreements in contemplation of divorce in numerous cases decided during the 1980's.⁵⁰ In addition, the Pennsylvania legislature specifically recognized the validity of antenuptial agreements⁵¹ when it enacted the 1980 Divorce Code.⁵² Thus, both case law and statutory law⁵³ provide ample authority in support of the validity of antenuptial agreements in contemplation of divorce.

According to *Karkaria*, the state's concern for the financial well-being of divorced spouses has become the "critical factor." This is true because the "public policy consideration" with respect to not encouraging divorce is no longer considered a viable rationale for invalidating antenuptial agreements in contemplation of divorce.⁵⁴ Although the financial security of divorced spouses had been a second public policy consideration in many pre-1970 cases in sister states,⁵⁵ the removal of the "encouragement of divorce" issue brought the "financial security" issue to the forefront of the debate surrounding the enforceability of antenuptial agreements in contemplation of divorce.⁵⁶ In the words of Judge Wettick in *Karkaria*:

The issue is usually framed in terms of whether an agreement waiving rights upon divorce or separation will be enforced so long as it meets the standards that have traditionally governed antenuptial agreements in contemplation of death—full disclosure of financial worth and no showing of fraud, duress, or undue influence in the procurement of the agreement—or whether the public policy considerations for providing equitable distribu-

tit. 23, § 401(e)(2) (Purdon Supp. 1988).

49. See *Karkaria*, 136 P.L.J. at 161 (citing *Frey v. Frey*, 471 A.2d 705 (Md. 1984); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984); *Brooks v. Brooks*, 733 P.2d 1044 (Alaska 1987); *Marshall v. Marshall*, 477 A.2d 833 (N.J.Ch. 1987); *Ferry v. Ferry*, 586 S.W.2d 782 (Ind. 1985); and *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981)).

50. See *Gula v. Gula*, 551 A.2d 324 (1988); *Simeone v. Simeone*, 551 A.2d 219 (1988); *Laub v. Laub*, 351 Pa. Super. 110, 505 A.2d 290 (1986); *Fox v. Fox*, 114 Mont. Co. L.R. 145 (1985).

51. See PA. STAT. ANN. tit. 23, § 401(e)(2)(Purdon Supp. 1988), which excludes from the definition of marital property all "property excluded by valid agreement of the parties entered into *before*, during or after the marriage." *Id.* (emphasis added).

52. PA. STAT. ANN. tit. 23, § 101 *et. seq.* (Purdon Supp. 1988).

53. The Pennsylvania Divorce Code does not contain any similar provisions relating to a waiver of alimony, alimony *pendente lite* or spousal support. Recent appellate cases make no distinction between a waiver of property rights and a waiver of alimony *pendente lite*, spousal support or alimony. See *Hofstein & Bell*, *supra* note 11, at 49 (citing *Laub*, 351 Pa. Super at 115, 505 A.2d at 293; *Fox v. Fox*, 114 Mont. Co. L.R. 145 (1985)).

54. *Karkaria v. Karkaria*, 136 P.L.J. 158, 161 (Pa. C.P. Alleg. 1988).

55. *Id.*

56. *Id.*

tion and support will bar the enforcement of the agreement.⁵⁷

Some courts, citing this public policy consideration, have refused to enforce a provision in an antenuptial agreement whereby a spouse has waived alimony or alimony pendente lite.⁵⁸ Other courts have been willing to enforce provisions wherein a spouse has waived a statutory right to support provided that certain substantive fairness standards have been observed.⁵⁹ For example, the Colorado Supreme Court opined that even if a maintenance provision contained in an antenuptial agreement was perfectly reasonable at the time it was drafted, the purpose of the Colorado Divorce Code, which is to mitigate potential harm to a spouse caused by the dissolution of marriage,⁶⁰ militates against the enforcement of such a provision if its terms have become unconscionable at the time of the dissolution of the marriage.⁶¹ That court viewed as unconscionable a maintenance agreement which rendered the spouse without the means of reasonable support.⁶² The *Karkaria* court concluded

57. *Id.*

58. *Id.* (citing *In re Marriage of Winegard*, 278 N.W.2d 44 (S.D. 1979); *In re Marriage of Higgason*, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978); *Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978)).

59. *Id.* at 162 (citing *Newman v. Newman*, 653 P.2d 728 (Colo. 1982)(public policy expressed in Divorce Code bars enforcement of antenuptial agreement which would produce unconscionable result)).

60. See *Newman v. Newman*, 653 P.2d 728 (Colo. 1982). See a similar provision contained in Pennsylvania's Divorce Code, PA. STAT. ANN. tit. 23, § 102(a)(4)(Purdon Supp. 1988), wherein it is stated that the policy of the Commonwealth is to "[m]itigate the harm to the spouses and their children caused by the legal dissolution of the marriage." *Id.*

61. *Newman*, 653 P.2d at 734.

62. *Id.* Other cases and parenthetical comments relating to the conscionability of maintenance provisions were set forth by the court in *Karkaria*, including the following: *Hill v. Hill*, 356 N.W.2d 49 (Minnesota Court of Appeals, 1984)(the Court said that in "weighing the public policy interest in the welfare of a spouse against the rights of parties to freely contract, we conclude that there must be reserved to the court at the time of a marriage dissolution the power to review maintenance provisions of an antenuptial agreement to determine the conscionability of those provisions" p. 57"); *Posner v. Posner*, *supra* (the Florida Supreme Court held that antenuptial agreements governing alimony would be subject to modification upon a showing of changed circumstances); *Marschall v. Marschall*, *supra* (the New Jersey Supreme Court in refusing to enforce an antenuptial agreement governing alimony proposed a "fairness" test that would take into account the standard of living during the marriage, the standard of living prior to the marriage, and other factors such as the length of the marriage, and whether the marriage produced children); *McHugh v. McHugh*, 436 A.2d 8 (Connecticut Supreme Court, 1980)(antenuptial agreement would not be enforced where "the circumstances of the parties at the time of the dissolution are so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice" p. 112); *Button v. Button*, 388 N.W.2d 546 (Wisconsin Supreme Court, 1986)(agreement "should in some manner appropriate to

that "antenuptial agreements waiving support rights are carefully scrutinized in order to preserve the strong public policy in favor of protecting a divorced spouse who lacks sufficient property or job skills to provide for his or her needs."⁶³

Provisions of antenuptial agreements which govern property rights upon divorce have received more favorable treatment by the courts than those which modify or waive support rights.⁶⁴ This is particularly so where the agreement seeks to protect only that property which the spouse brought into the marriage or acquired by gift or inheritance.⁶⁵ Public policy is concerned with property that was acquired through the contribution of either spouse during the course of the marriage,⁶⁶ not separate property. It is possible, however, that provisions of antenuptial agreements excluding property acquired during the marriage are subject to "a higher standard of scrutiny."⁶⁷

Until October, 1988, no Pennsylvania appellate court had addressed the validity of an antenuptial agreement in contemplation of divorce entered into subsequent to the enactment of Pennsylvania's 1980 Divorce Code.⁶⁸ Accordingly, the *Karkaria* court stated

the circumstances of the parties take into account that each spouse contributes to the prosperity of the marriage by his or her efforts" p. 551); *Frey v. Frey*, *supra* (Maryland Court of Appeals requires that the agreement be fair and equitable); *Gross v. Gross*, *supra* (Ohio Supreme Court requires that the agreement be conscionable and reasonable—"The trial court, in the determination of the issue of conscionability and reasonableness of the provision for sustenance and maintenance of a spouse at the time of divorce, shall utilize the same factors that govern the allowance of alimony . . ." p. 509-10); *Huck v. Huck*, 734 P.2d 417 (Utah Supreme Court, 1986)(provisions eliminating alimony are not binding on a court but serve "only as a recommendation" p. 419); *Osborne v. Osborne*, *supra* (Massachusetts Supreme Court held that the agreement must be fair and reasonable at the time of the court proceeding); and *Lewis v. Lewis*, 14 Family Law Rptr. 1161 (Hawaii Supreme Court, 1988)(agreement may not permit a post-divorce economic situation that is unjustly disproportionate—this determination may be made only by considering all relevant factors and circumstances at the time of the divorce).

Karkaria, 136 P.L.J. at 162-63.

63. *Id.* at 163.

64. *Id. See, e.g., Brooks v. Brooks*, 733 P.2d 1044 (Alaska 1987); *In the Matter of the Estate of Crawford*, 730 P.2d 675 (Wash. 1986); *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Huck v. Huck*, 734 P.2d 417 (Utah 1986).

65. *See supra* note 64.

66. *Id.*

67. *Karkaria*, 136 P.L.J. at 163.

68. *See Simeone v. Simeone*, 551 A.2d 219 (1988). Pennsylvania's Divorce Code may be found at PA. STAT. ANN. tit. 23, § 101 *et. seq.* (Purdon Supp. 1988). *Karkaria* distinguished the holdings in *Laub v. Laub*, 351 Pa. Super. 110, 505 A.2d 290 (1986) and *Wolfe v. Wolfe*, 341 Pa. Super. 313, 491 A.2d 281 (1985), as only addressing the impact of antenuptial

that the case law offered no guidance as to the validity of the provisions of an antenuptial agreement entered into after enactment of the Divorce Code.⁶⁹ Without higher court precedent, Judge Wettick proceeded to announce the standards by which such agreements will be judged, at least in Allegheny County, Pennsylvania. First, the judge concluded that antenuptial agreements that do not encourage divorce unless the marriage is irretrievably broken do not violate the public policy favoring marriage.⁷⁰ Second, Judge Wettick concluded "that antenuptial agreements, affecting property and support rights upon divorce, will be subject to the same procedural standards of fairness that govern antenuptial agreements affecting rights upon death."⁷¹ Judge Wettick's third conclusion was his most dramatic pronouncement and the one which has caused the most controversy among Pennsylvania's family law practitioners. He stated as follows:

The remaining issue is whether Pennsylvania will require that antenuptial agreements governing property and support rights be substantively fair. We conclude that Pennsylvania should follow the case law of other jurisdictions that most carefully scrutinizes these agreements, because an important purpose of "divorce reform" within Pennsylvania was to confer financial benefits on divorced spouses who require support or whose noneconomic contributions contributed to the parties accumulation of assets.⁷²

In support of his conclusion, Judge Wettick reviewed the prior law in Pennsylvania, which mandated that the division of property acquired during marriage be based entirely on title,⁷³ and which precluded a homemaker from receiving alimony following the dissolution of a marriage.⁷⁴ However, under the prior law, the dependant spouse did have the comfort of knowing that he or she would

agreements that were entered into prior to the enactment of the Divorce Code.

69. *Karkaria*, 136 P.L.J. at 167.

70. *Id.*

71. *Id.* "The statutory rights governing support and the distribution of property in the Divorce Code are at least as significant as those statutory rights governing inheritance, so the same procedural safeguards should be applied." *Id.*

72. *Id.*

73. *Id.* at 168. Judge Wettick explained further:

If the property was titled only in the name of one spouse, upon divorce the other spouse had no claim to the property in the absence of a showing that his or her funds were used to acquire the property. Thus, upon divorce, a homemaker and primary caretaker of the children frequently had no claim to substantial assets acquired during the marriage because the other spouse, as the primary wage earner, used his or her earnings to acquire assets which this spouse placed in his or her name alone.

Id.

74. *Id.*

always be entitled to support as long as that spouse had done nothing which would constitute a ground for the other spouse to seek a divorce based on fault.⁷⁵ This gave tremendous leverage to the spouse who was not seeking to remarry.⁷⁶ The spouse who wanted to remarry had to offer a property settlement which was agreeable to the other spouse.⁷⁷

This system proved to be inequitable to both parties. Neither could remarry despite an irretrievable breakdown of the marriage.⁷⁸ The dependent spouse, even if the victim of emotional or physical abuse, could not terminate the marriage without forfeiting support rights and all interest in any property which was titled in the other spouse's name.⁷⁹ The Divorce Code of 1980 sought to correct these inequities by granting divorces regardless of fault, instituting a system of equitable distribution and allowing alimony when necessary for the support of a dependent spouse.⁸⁰ The legislative intent was, *inter alia*, to mitigate the harm to the spouses and their children caused by the dissolution of the marriage⁸¹ and to "effectuate economic justice between the parties."⁸²

According to Judge Wettick, parties, as a general rule, "may not waive statutory protections unless there are significant policy considerations favoring these waivers."⁸³ Finding no such significant policy considerations,⁸⁴ the *Karkaria* court chose to follow the line of cases which carefully scrutinizes the provisions of antenuptial agreements governing support and alimony rights upon divorce.⁸⁵ In so doing, the court held that the agreement must be fair and reasonable at the time of the proceeding at which alimony is sought.⁸⁶ In addition, the court held that a conscionability standard⁸⁷ must be applied with respect to equitable distribution, *i.e.*,

75. *Id.* "[U]nder prior law, no party could obtain a divorce except upon a showing of fault and so long as the parties were married, a financially dependent spouse was entitled to support." *Id.*

76. *Id.*

77. *Id.*

78. *Id.* "[T]he cost of protecting [the dependent spouse] was high." *Id.*

79. *Id.*

80. *Id.*

81. *See* PA. STAT. ANN. tit. 23, § 102(a)(4) (Purdon Supp. 1988).

82. *See id.* § 102(a)(6).

83. *Karkaria*, 136 P.L.J. at 169 (citing *Mayhugh v. Coon*, 460 Pa. 128, 331 A.2d 452 (1975); *Resolute Ins. Co. v. Pennington*, 423 Pa. 472, 224 A.2d 757 (1966)).

84. *Id.* at 170.

85. *Id.* *See supra* notes 60-63 and accompanying text.

86. *Karkaria*, 136 P.L.J. at 170.

87. The *Karkaria* court adopted the conscionability standard set forth in *Button v. Button*, 388 N.W.2d 546, 551-52 (Wis. 1986) (agreement should in some manner appropriate

it "must be fair, in light of the circumstances, at the time of execution [and] at the time of the proceedings at which equitable distribution is sought, the agreement must not provide a result which was beyond the expectations of the parties at the time the agreement was made."⁸⁸

The *Karkaria* decision was not appealed.⁸⁹ Since the date of the *Karkaria* holding, one appellate decision, *Simeone v. Simeone*,⁹⁰ has been rendered relating to antenuptial agreement in contemplation of divorce.⁹¹ Interestingly, the *Simeone* court did not recognize Judge Wettick's opinion in *Karkaria*. Instead, *Simeone* merely made the usual inquiry into the reasonableness of the provision for the dependent spouse,⁹² determined that the husband had made reasonable provision for the wife because the provision was reasonable *at the time the agreement was made*,⁹³ and, accordingly, held that the agreement was valid.⁹⁴

III. CONCLUSION

Until *Karkaria* is either unquestionably rejected or adopted, the drafting of a binding antenuptial agreement in contemplation of divorce or separation will be a guessing game in Pennsylvania. The drafter of such an agreement has good reason to feel apprehensive about future validity. Perhaps the only safe position is to draft the agreement in accordance with the highly restrictive standards set forth in *Karkaria*. However, if taken literally, *Karkaria* demands that the draftsman have a crystal ball in order to foresee circumstances as they will exist when the parties seek to dissolve their marriage and enforce the agreement. The impact of *Karkaria* upon antenuptial agreements in Pennsylvania clearly remains unclear.

Marc L. Sternberger

to the circumstances of the parties take into account that each spouse contributes to the prosperity of the marriage).

88. *Karkaria*, 136 P.L.J. at 170.

89. See Hofstein & Bell, *supra* note 11, at 50.

90. 551 A.2d 219 (1988).

91. The opinion in *Karkaria* was rendered on March 18, 1988, and the decision in *Simeone* was filed seven months later on October 26, 1988.

92. *Simeone*, 551 A.2d at 223-24.

93. *Id.* at 222-24 (emphasis added)(relying on the plurality opinion in *In re Estate of Geyer*, 516 Pa. 492, 503, 533 A.2d 423, 428 (1987)).

94. *Id.* at 225.