

Some Provocative Suggestions for Drafting Prenuptial Contracts in the USA

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Introduction

In my previous essay, *Prenuptial and Postnuptial Contract Law in the USA*, at <http://www.rbs2.com/dcontract.pdf> , I reviewed some of the history of these contracts and the limits on their validity.

In this essay, I suggest how some well-established elements of commercial contract drafting *might* be used to improve conventional prenuptial contracts.

In divorce litigation one party often challenges not only the validity of a prenuptial contract, but also the fairness of specific terms in a prenuptial contract, because the prenuptial contract reduces the amount of money they would otherwise receive in a property settlement at divorce. This essay suggests several devices from conventional contract law that could prevent such an attempt at divorce to defeat the prenuptial agreement.

disclaimer

Please understand that **I am *not* advising anyone** to use the provocative ideas in this essay in their prenuptial agreement. I address these provocative suggestions to attorneys, who specialize in family law, to consider in appropriate situations.

If you are not an attorney, and you are contemplating writing your own prenuptial contract, please consult an experienced family law attorney who is licensed to practice in your state. Like surgery, this is *not* a playground for amateurs.

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

The purpose of this essay is to make some provocative suggestions, *not* to present a thorough review of the case law. Therefore, when I wrote this essay in March-April 2004, I only did a few quick searches of the Westlaw ALLSTATES database, but not painstakingly thorough searches.

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

I use the words “agreement” and “contract” as synonyms in this essay. Also, the words “prenuptial”, “antenuptial”, and “premarital” are synonyms. I personally prefer “prenuptial”, while most judges seem to prefer “antenuptial”. Because I do not know which words a reader will use in a search engine query, using a variety of different words increases the probability that a reader will be able to find this essay.

1. Loser Pays Winner’s Legal Fees

It seems wasteful to spend a few tens of thousands of dollars in litigating the validity of the prenuptial agreement during the divorce litigation. As explained below, beginning at page 9, divorce courts have required the party with the larger income at divorce to pay his/her [soon-to-be] ex-spouse’s attorney’s fees, in addition to his/her own attorney’s fees. Can a prenuptial contract avoid this waste of money?

In commercial contracts that I draft, I often include a section that makes the loser pay the winning party’s legal fees in any litigation about the contract. Such a section encourages the parties to be reasonable and to settle their differences through negotiations, rather than use expensive and slow litigation. A typical contract might say:

The parties agree that in any litigated dispute, whether in tort or contract, arising out of this contract, the prevailing party in litigation shall be reimbursed by the losing party for all costs, reasonable expenses of litigation, and all reasonable attorney’s fees that are incurred by the prevailing party.

Following this model of a commercial contract, why not include the following in a prenuptial agreement?

The parties agree that in any litigated dispute about either the validity of this contract or about the interpretation of this contract, the prevailing party in litigation shall be reimbursed by the losing party for both all reasonable attorney’s fees and all reasonable expenses of litigation that are incurred by the prevailing party in litigating the dispute over validity or interpretation of this contract. Such reimbursement includes amounts spent in litigation in both trial courts and appellate courts.

Before the mid-1990s, such ideas *might* be rejected by a judge in divorce court, as overreaching by the party with the larger income at divorce, particularly if the other party can not adequately support herself/himself. However, as discussed below, a few divorce courts have enforced such a clause in a prenuptial contract.

contract litigation *not* involving divorce

In the USA, litigants usually pay their own attorney's fees, but courts will enforce contractual agreements between parties about reimbursement of *reasonable* legal fees. For the convenience of specialists in family law who may not be familiar with commercial contract law, I list some recent decisions in the Northeastern USA about reimbursement of attorney's fees in cases *not* involving divorce.

U.S. Supreme Court *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (U.S. 1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."); *F. D. Rich Co., Inc. v. U. S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 126-31 (U.S. 1974)(discussion of "American Rule"); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-68 (U.S. 1975) (gives detailed history of "American Rule" that requires each party to pay their own legal fees and lists exceptions to American Rule, such as an enforceable contract).

Maryland *Qualified Builders, Inc. v. Equitable Trust Co.*, 331 A.2d 293, 296 (Md. 1975)(dicta that there is no doubt that contract can entitle someone to reimbursement of attorney's fees); *Atlantic Contracting & Material Co., Inc. v. Ulico Cas. Co.*, 2004 WL 443885, *15-*16 (Md. 12 Mar 2004).

Massachusetts *Preferred Mut. Ins. Co. v. Gamache*, 686 N.E.2d 989, 991-92 (Mass. 1997); *Police Commissioner of Boston v. Gows*, 705 N.E.2d 1126, 1128-29 (Mass. 1999).

New Jersey *Community Realty Management, Inc. for Wrightstown Arms Apartments v. Harris*, 714 A.2d 282, 293 (N.J. 1998); *North Bergen Rex Transport, Inc. v. Trailer Leasing Co., a Division of Keller Systems, Inc.*, 730 A.2d 843, 848 (N.J. 1999).

New York *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 904, 549 N.Y.S.2d 365, 366 (N.Y. 1989)("Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule [citations omitted]."), quoted with approval in *Baker v. Health Management Systems, Inc.*, 772 N.E.2d 1099, 1104, 745 N.Y.S.2d 741, 746 (N.Y. 2002).

divorce cases

The following cases are listed in chronological order, to reflect the historical development of what I hope will become a national trend. My most recent search for cases on this topic was on 22 March 2004.

- *Appelbaum v. Appelbaum*, 620 So.2d 1293 (Fla.App. 4 Dist. 1993). Prenuptial agreement waived attorney's fees. Despite the fact that wife's net worth was \$658,000, the trial court ordered her husband to pay \$58,000 of her attorney's fees. The Florida appellate court reversed, saying:

The trial court, impliedly recognizing that this was a case of fee-building, stated:

It is painfully apparent to this Court, after four days of testimony, that the primary reason this case dragged on for that length of time was the attempt by each party to establish either the right to attorney's fees as far as the wife was concerned or the denial of the payment of attorney's fees as far as the husband was concerned.

....

Under these circumstances we think it is an abuse of discretion to award attorney's fees to a wife who with substantial means (and whose means have only grown during the marriage) agreed prior to marriage not to seek fees and costs. This is particularly true when the trial court considered that a substantial portion of this case was litigated just to gain a fee award. *Appelbaum*, 620 So.2d at 1294-95.

- *In re Marriage of Christen*, 899 P.2d 339, 344 (Colo.App. 1995).

In a terse remark, a Colorado appellate court upheld a provision in a postnuptial contract that awarded attorney's fees to the prevailing party.

- *Dimick v. Dimick*, 915 P.2d 254 (Nev. 1996).

The prenuptial agreement in *Dimick* said: "[i]n the event that either party is required to take legal action to enforce the provisions of this agreement, the non-prevailing party shall be responsible for all attorney's fees and costs of suit relating to said action." However, the wife stipulated that the agreement was valid, so the husband could not recover his attorney's fees. Furthermore, the husband had breached the agreement.

- *Matter of Marriage of Bowers*, 922 P.2d 722 (Or.App. 1996).

Majority held that husband was entitled to reimbursement of his legal fees under the following sentence in his premarital agreement.

If any suit, action or other proceeding or any [sic] from a decision therein, is instituted to establish, obtain or enforce any right resulting from this agreement, the prevailing party shall be entitled to recover from the adverse party, in addition to costs and disbursements, an award of reasonable attorney fees to be set by the trial court or appellate court in any such suit, action or proceeding.

The majority opinion of this en banc decision explains why such a legal fee reimbursement in a premarital contract is *not* contrary to public policy.

- *Darr v. Darr*, 950 S.W.2d 867, 872 (Mo.App. E.D. 1997).

While *Darr* presents a prenuptial contract where the parties agreed to the American Rule about paying for attorney's fees, *Darr* is important because the appellate court ordered the trial court on remand to consider whether such an agreement was fair at the time of the divorce litigation, not at the time the agreement was signed. The complete text of the appellate court's opinion on this issue is:

In his sole point on appeal husband contends the trial court erred in holding that a provision in a prenuptial agreement, which precludes effective assistance of counsel for one spouse in the event of a contested divorce is void as against public policy.

In reviewing the court's order we find the court held there is nothing inconsistent with public policy in a prenuptial agreement that provides for a husband and wife to pay their respective attorney's fees. However, the court concluded that when the facts and circumstances "at the *execution of the agreement* demonstrate that one party is unable to pay reasonable attorney's fees the waiver is void."

The general rule in awarding attorney's fees in Missouri is that each party bears his or her own litigation expenses. *Kovacs v. Kovacs*, 869 S.W.2d 789 (Mo.App. W.D. 1994).

In order to deviate from this general rule, "very unusual circumstances" must exist. *Id.*

We observe in the instant action an agreement exists providing that each party agreed to pay their own legal fees, thus acknowledging the application of the general rule. Such provision "... may not be lightly brushed aside." *McQuate v. White*, 389 S.W.2d 206, 212 (Mo. 1965).

"The financial inability to pay for an attorney, and thus the inability to acquire adequate, legal representation, may constitute a very unusual circumstance." *Lyles v. Lyles*, 710 S.W.2d 440, 444 (Mo.App. 1986). In order to determine whether a party has such a condition, it is necessary to examine the complaining party's financial resources as they exist at the time of the dissolution. In fact, where the trial court considers awarding reasonable attorney's fees, this court mandates the trial court inquire into each party's financial status. *See Rupnik v. Rupnik*, 891 S.W.2d 548, 549 (Mo.App. E.D. 1995).

The question presented before this court is the per se ruling of the trial court which found that a clause which waives attorney's fees is against public policy when the facts and circumstances at the time of the execution of the agreement manifest one party would be unable to pay reasonable attorney's fees in the event of a later contested divorce.

Wife understood that she waived her right to attorney's fees. However, public policy and case law provide the clause be fair and reasonable. Therefore if the court, after hearing, finds this clause to be unfair and unreasonable, it must make its decision based upon the economic facts and circumstances at the time of the dissolution and should not consider the economic station of the parties at the time of the execution of the agreement. Economic conditions may have changed for better or worse since the execution of the waiver.

Therefore, we find the trial court erred in its identity of the time at which the facts and circumstances determine whether the waiver clause is voidable.

There is no further opinion in Westlaw for *Darr*, so the final result is not known.

- *Pond v. Pond*, 700 N.E.2d 1130 (Ind. 1998).

The Indiana Supreme Court upheld a paragraph of a property settlement agreement (an agreement made while the parties were still married, but the final draft was signed after the husband had filed for divorce) that required the loser to pay the winner's attorney's fees. Paragraph 25 of that agreement said:

In the event an attack by one party as to the validity of this agreement is unsuccessful, the party initiating such action shall be responsible for all attorney's fees and costs incurred by both parties in the prosecution or defense of such action.

Pond, 700 N.E.2d at 1135-36.

Note that this paragraph *only* refers to attorney's fees for an attack on the validity of the agreement, and "it does not apply to attorney fees relating to the resolution of property division, maintenance, custody, visitation, support, or other issues often incidental to dissolution proceedings."

Pond at 1137.

As previously noted, the trial court, intentionally disregarding Paragraph 25, determined that the husband should pay \$69,000.00 of the \$89,262.25 attorney fees claimed by the wife. [footnote omitted] On remand, the trial court shall give full force and effect to this provision by determining the amount of reasonable attorney fees and costs that the parties incurred directly from the challenge to the validity of the parties' settlement agreement, and shall reduce its prior award of attorney fees accordingly.

Pond, 700 N.E.2d at 1137.

The Indiana Supreme Court noted in dicta that:

As a general rule, valid agreements entered into in contemplation of marriage (often referred to as prenuptial, premarital, or antenuptial agreements) must be enforced as written, but the approval of settlement agreements entered into as a consequence of dissolution proceedings (post-nuptial agreements) is governed by the Indiana Dissolution of Marriage Act and is subject to the trial court's discretion. [footnote and citations omitted]

Pond, 700 N.E.2d at 1132.

This dicta would seem to make valid and enforceable a similar fee-shifting section in a prenuptial contract.

- *Kantor v. Kantor*, 8 P.3d 825, 830-31 (Nev. 2000).

Prenuptial agreement specified that, if either party challenged the validity of the agreement, then the prevailing party would have their attorney's fees reimbursed by other party. Court ordered wife to pay \$19,580 of her husband's attorney's fees.

- *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 813-14 (Mass. 2002).

Massachusetts statute that permits judges to award attorney's fees trumps an antenuptial contract that says the breaching party will pay the other party's attorney's fees.

- *In re Marriage of Van Horn*, 2002 WL 1428491 (Iowa App. 2002).

Valid antenuptial agreement waived attorney's fees in divorce litigation.

- *Hardee v. Hardee*, 585 S.E.2d 501 (S.C. 2003).

Prenuptial agreement, in which each party waived alimony and attorney's fees from the other, was valid and enforceable.

- *Lashkajani v. Lashkajani*, 855 So.2d 87 (Fla.App. 2 Dist. 13 June 2003) (Appellate court held that provision in prenuptial contract for prevailing party to have their attorney's fees reimbursed is *unenforceable*, "[b]ecause the obligation to pay spousal support during the term of the marriage cannot be contracted away...."), cited with approval in *Simmers v. Simmers*, 851 So.2d 778 (Fla.App. 2 Dist. 9 Jul 2003).¹

On the other hand, an intermediate appellate court in another judicial district of Florida unanimously held the opposite position, saying that a party to a pre- or post-nuptial agreement could waive attorney's fees:

In *Casto v. Casto*, 508 So.2d 330 (Fla. 1987), the court held that "[i]f [a prenuptial] agreement that is unreasonable is freely entered into, it is enforceable." [FN1] *Casto* was a landmark case that "clarified" the legal landscape on nuptial agreements. *Casto* established the quaint notion that contracting parties to marital agreements will be held to their bargains — even if the bargain is a harsh one — so long as the agreement is free and voluntary and not tainted by fraud or overreaching. Under *Casto*, a marital partner may freely and voluntarily give up any claim to the other's money or property, which presumably includes money for attorney's fees.

[FN1] As *Casto* itself recognized both prenuptial and postnuptial agreements are governed by the same rules. 508 So.2d at 333. I shall therefore refer to both kinds as "nuptial" agreements.

....

.... Hence if one can waive rights to property and alimony, surely one can equally waive rights to attorney's fees. I see nothing unique about attorney's fees suggesting a need for a different rule. Prenuptial agreements exist primarily to avoid litigation in the event of divorce. We should not make it easier to undermine the essential purpose of a valid prenuptial agreement by funding the very litigation the parties strove thereby to avoid.

Balazs v. Balazs, 817 So.2d 1004, 1004-05 (Fla.App. 4 Dist. 2002)(Farmer, J., concurring specially).

- *In re Marriage of Carpenter*, 2004 WL 293774 (Cal.App. 2 Dist. 17 Feb 2004). In this unpublished opinion that is not citable in California, the unanimous decision of a three-judge panel in a California appellate court ordered a wife to pay the husband \$12,677 for his attorney's fees for an appeal, pursuant to the following in a premarital agreement:

In the event of any litigation or arbitration between the parties to enforce any provisions of this Agreement or any right of any party hereunder, the unsuccessful party to such litigation or arbitration shall pay the successful party's costs and expenses, including reasonable attorneys' fees, incurred therein.

The appeal that created the \$12,677 debt was reported at *In re Marriage of Carpenter*, 122 Cal.Rptr.2d 526 (Cal.App. 2 Dist. 2002), where wife's litigation was financed by ordering husband to pay wife \$10,000 in alimony pendente lite, which amount was *not* reimbursed. Ironically, in the first appeal, the husband paid for his wife's legal fees via alimony pendente lite and his wife eventually paid for his legal fees.

¹ After this essay was written, the Florida Supreme Court reversed the intermediate appellate court. *Lashkajani*, 911 So.2d 1154 (Fla. 2005).

remarks about fee shifting in conventional divorce litigation

In the absence of a written contract about reimbursement of attorney's fees, one might expect judges to simply apply the American Rule that makes each party responsible for paying for their own legal fees. However, such a Rule is said to be *unjust* when one spouse has much larger income than the other, so divorce courts in some states routinely make the party with a larger income pay at least part of the attorney's fees incurred by their [soon-to-be] ex-spouse, in addition to all of their own legal expenses. A court could order the wealthier spouse to pay alimony pendente lite (APL) to the poorer spouse, or a court could order that the wealthier spouse specifically pay money for the poorer spouse's attorney's fees, as either interim fees or in the final order in the case.

Quotations from some reported court opinions shows the reasoning of some judges in divorce courts. First, consider a case in California in 1985:

Where the wife is as financially disadvantaged as compared to the husband as is true here, "The obligation to provide for the wife is not subordinate to those owed other persons. If necessary the husband must invade his investments to provide the wife with the sinews to conduct her litigation with him." (*Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 298, 17 Cal.Rptr. 186 [191].) Money is the mother's milk of more than politics.

In re Marriage of Hatch, 215 Cal.Rptr. 789, 794 (Cal.App. 1 Dist. 1985).

A case in Pennsylvania in 1991 said tersely:

APL is based on the need of one party to have equal financial resources to pursue a divorce proceeding when, in theory, the other party has major assets which are the financial sinews of domestic warfare.

DeMasi v. DeMasi, 597 A.2d 101, 104 (Pa.Super. 1991), *appeal denied*, 629 A.2d 1380 (Pa. 1993). Quoted with approval in:

- *Spink v. Spink*, 619 A.2d 277, 279 (Pa.Super. 1992);
- *Nemoto v. Nemoto*, 620 A.2d 1216, 1221 (Pa.Super. 1993);
- *Musko v. Musko*, 668 A.2d 561, 565 (Pa.Super. 1995) ("The purpose of alimony pendente lite is to preserve economic equality between the parties pending the resolution of equitable division, thereby allowing the dependent spouse to maintain or defend the divorce action."), *rev'd*, 697 A.2d 255 (Pa. 1997) ("antenuptial agreement which states that a spouse 'shall not be entitled to receive any money or property or alimony or support' in the event of divorce or separation precludes the award of alimony pendente lite (APL)");
- *Litmans v. Litmans*, 673 A.2d 382, 388 (Pa.Super. 1996);
- *Gerlach v. Gerlach*, 2000 WL 1616819, 46 Pa. D. & C.4th 109 (Pa.Com.Pl. 18 Feb 2000) (Trial court followed Pennsylvania Supreme Court in *Musko*: because wife had signed antenuptial agreement that waived "all claims for alimony and support", wife was not entitled to alimony pendente lite.).

The traditional view is expressed by a Minnesota appellate court:

The husband also contests the award of \$5,000 attorney's fees to allow the wife to pursue this appeal. Although the antenuptial agreement includes a waiver of attorney's fees, we find that the trial court's award was necessary to ensure substantial justice. Had the trial court not awarded attorney's fees for appeal, the wife would have been financially foreclosed from appealing the trial court's decision on the validity and coverage of the agreement.

Such difficult and close questions should be decided on the merits, not by the parties' finances. *Hill v. Hill*, 356 N.W.2d 49, 58 (Minn.App. 1984).

More recently, the highest court in New York State explained a statute authorizing courts to order one party in divorce litigation to pay the other party's attorney's fees.

Recognizing that the financial strength of matrimonial litigants is often unequal — working most typically against the wife — the Legislature invested Trial Judges with the discretion to make the more affluent spouse pay for legal expenses [footnote omitted] of the needier one. The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.

O'Shea v. O'Shea, 711 N.E.2d 193, 195 (N.Y. 1999).

The phrase “domestic warfare”, used by the court in the above-cited *DeMasi* case in Pennsylvania, is not hyperbole: the pettiness and unreasonableness of much divorce litigation is truly appalling, and a colossal waste of money.² I believe it is outrageously unfair when courts order the wealthier victim of such litigation to pay for opposing counsel to attack his/her assets *and*, of course, the wealthier victim *also* pays for his/her attorney to defend his/her assets. This unfairness is increased when the poorer party attempts to use litigation to avoid her/his responsibilities under a written pre- or post-marital agreement. *After* receiving the benefit of a bargain, a party should not complain about the alleged *unfairness* of that bargain. Instead of viewing counsel fees as necessary to justice and fairness, I believe that counsel fees are food for the Hydra of litigation — a monster who deserves to be starved.

One of the justifications for ordering the wealthier party (traditionally: H) in divorce litigation to pay the poorer party's (traditionally: W's) legal expenses is that married parties have a legal duty to support each other. But *after* the parties are separated, W no longer provides any services to H, so one must ask why it is reasonable for H to continue to pay money to W, instead of W becoming employed and earning an income. I suggest that, if H has any obligation to pay for both parties' attorney's fees, such fees ought to be limited to an uncontested divorce, including drafting a property settlement agreement that follows the terms in the prenuptial agreement.

One must wonder about judges in divorce courts who order the wealthier party to pay the other party's legal expenses, in the absence of a pre- or post-nuptial agreement to that effect. While judges in divorce courts justify such orders on the basis of “fairness”, such a concept of fairness is *not* found in litigation in tort and contract law in the USA. For example, when an

² Standler, Litigated Divorce in the USA As a Waste of Assets, <http://www.rbs2.com/waste.pdf> (July 2008).

individual (e.g., injured consumer or ex-employee) sues a large corporation: the corporation tends to bury the little guy in motions, the large corporation is uncooperative in discovery³, and the corporation tries to exhaust the little guy's litigation budget. Large corporations often infringe patents belonging to individuals, knowing that the individual can not afford to sue the corporation for patent infringement. If it is truly *unjust* when one party in litigation has much larger financial resources than the other, why doesn't a legislature pass a statute requiring employers who are being sued for wrongful discharge pay for their ex-employee's attorney's fees, even if the ex-employee loses in court? In my opinion, the rules for ordering one party to pay for the other party's attorney's fees should be the same in *all* kinds of litigation, instead of separate rules for divorce litigation.⁴

No one would want to see a wealthy husband mistreat his wife during the marriage — knowing that the wife can not afford divorce litigation — and, after divorce is filed by one party, the husband uses his ample income to pound his impecunious wife into oblivion in the courts. However, it is *also* abhorrent for a perfidious [soon-to-be] ex-wife to drag her [soon-to-be] ex-husband through expensive, prolonged, and petty divorce litigation, and it adds injury to insult when she demands that he pay for her attorney to attack him. To anyone except divorce attorneys and judges in divorce court, spending many tens of thousands of dollars on a litigated divorce would be considered dissipation of marital assets.⁵

A prenuptial agreement might prevent the waste of money on divorce litigation, if it specifies either (a) the loser pay the winner's legal expenses or (b) during a separation or after a divorce, neither party is entitled to financial support⁶ — including attorney's fees — from the other.

³ When the little guy wins a motion to compel discovery, the big corporation often sends more than 10,000 pages of paper in response to a discovery request, knowing that the little guy's attorney will not be able to carefully read and consider all of that paper.

⁴ A socialist's solution might be to have all litigators for individuals paid by the state, so that *all* individuals have meaningful access to the courts, regardless of whether they sue their former spouse, another person, a corporation, or the government. Such a program would parallel states paying for physicians to treat all sick and injured people. See Justice Black's dissent to denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, n. 1 (1971) ("Persons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes. Consistent with the Equal Protection Clause of the Constitution, special favors cannot and should not be accorded to divorce litigants.").

⁵ See, e.g., Standler, *Litigated Divorce in the USA As a Waste of Assets*, <http://www.rbs2.com/waste.pdf>, 33 pp., 6 July 2008.

⁶ This latter option is currently only available in a few states, such as Pennsylvania after *Musko*, 697 A.2d 255 (Pa. 1997).

On 30 June 2005, 14 months after I posted the first version of this essay at my website, the Florida Supreme Court held that a valid prenuptial contract can award attorney's fees to the prevailing party in litigation to enforce the terms of the prenuptial contract. *Lashkajani v. Lashkajani*, 911 So.2d 1154, 1160 (Fla. 2005) (“... we hold that prenuptial agreement provisions awarding attorney’s fees and costs to the prevailing party in litigation regarding the validity and enforceability of a prenuptial agreement are enforceable.”). The contract in issue in that case said:

ATTORNEY’S FEES AND COSTS. Should any party retain counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement, including, but not limited to, by instituting any action or proceeding to enforce any provision hereof, for damages by reason of any alleged breach of any provision, for a declaration of such party’s rights or obligations or any other judicial remedy, then the prevailing party shall be entitled to reimbursement from the losing party for all reasonable costs and expenses incurred, including, but not limited to reasonable attorney’s fees and costs for the services rendered to the prevailing party.

Lashkajani, 911 So.2d at 1156.

My search on 14 Aug 2009 of Westlaw databases for judicial opinions in all fifty states showed that no court outside of Florida has cited *Lashkajani*. This is still controversial law in the year 2009.

My August 2009 essay on waivers of alimony in prenuptial contracts at <http://www.rbs2.com/dwaiver.pdf> also mentions a few cases in which waiver of attorney’s fees (often together with a waiver of alimony pendente lite) was allowed.

1.A. Another Attorney’s Fees Proposal

If it is anticipated that one party will have a much larger income or assets than the other (e.g., marriage of a physician and an unemployed homemaker; marriage of an heir to a large fortune), one might consider including the following in a prenuptial agreement.

Whereas the parties are aware that many people waste tens of thousands of dollars in attorney’s fees at divorce and prolong the agony of divorce by several years;

Whereas the parties desire, if the marriage is irretrievably broken, to have a simple, quick, inexpensive, and uncontested divorce and property division, according to the terms of this prenuptial agreement, and then promptly continue with their separate lives;

....

- (A) If, at the time of divorce, one party’s income [or separate assets] is more than three times the amount of the other party’s income [or separate assets], the wealthier party agrees to pay the reasonable attorneys’ fees for each party, provided that the other party pursues an uncontested divorce according

to the terms of this prenuptial contract. Such payment of the other party's attorney's fees includes drafting and negotiating a property settlement agreement that follows exactly the terms in this prenuptial contract, as modified by any written postnuptial contract that is signed by both parties.

- (B) If the wealthier party files with a court any challenge to the validity of this prenuptial contract, or begins to litigate any dispute arising from the marriage, then the wealthier party shall pay *all* reasonable attorney's fees of the other party in connection with the dissolution of the marriage, including any litigation.
- (C) However, if the other party files with a court any challenge to the validity of this prenuptial contract, or begins to litigate any dispute arising from the marriage, then the contractual duty of the wealthier party to pay any attorney fees incurred by the other party shall immediately cease.

Paragraph B makes clear that this is *not* a one-sided attempt by the wealthier party to minimize his/her attorney's fees, but is instead an attempt to honor the terms of the prenuptial contract and to have an uncontested divorce.

2. Integrated Agreement

In conventional commercial contracts, one sometimes includes a section known to attorneys as an “integration clause”, examples of which are:

This written contract represents the entire agreement⁷ between the parties, and all preliminary and contemporaneous negotiations are merged into and incorporated in this written contract.⁸

or

This agreement constitutes the entire agreement of the parties in relation to the subject matter hereof and there are no promises, representations, conditions, provisions or terms related to the subject hereof other than those set forth in this Agreement. This Agreement supersedes all previous understandings, agreements, and representations between the parties regarding the subject matter hereof.⁹

At any litigation concerning the contract, the presence of an integration clause will invoke the parol evidence rule, which prohibits admission of evidence for the purpose of altering or contradicting the terms of the written contract.¹⁰ The excluded evidence includes both (a) oral testimony in court and (b) written evidence, such as e-mails, memoranda, notes, and letters.

I emphasize that an integration clause should *not* be used in any hastily drafted contract, that might not be an accurate expression of the intent of the parties. However, in a carefully drafted contract, which is negotiated over a period of months and which goes through perhaps at least four written drafts, each of which are discussed by both parties and their attorneys, an integration clause might be appropriate. Before including an integration clause, both parties should be certain that the written contract is a *complete* recitation of *all* of their promises and agreements.

As the marital relationship evolves with experience, the parties can negotiate a written postnuptial contract that amends or supplements their prenuptial contract. Because the unity of husband and wife, which formerly prevented the validity of postnuptial contracts in many states,

⁷ Alternatively, “entire agreement” might be replaced with “full and complete understanding”.

⁸ Alternatively, the merger clause might be replaced with “this written contract supersedes all prior negotiations, representations, promises, and statements.”

⁹ Quoted from contract in *Lubin & Meyer, P.C. v. Lubin*, 693 N.E.2d 136, 138 (Mass. 1998).

¹⁰ Restatement Second Contracts § 215 (1981). The parol evidence rule does not apply where the contract was procured by fraud, duress, or mutual mistake, or if the contract is an illegal bargain. Restatement Second Contracts § 214 (1981).

has been abolished, the modern trend is to treat prenuptial and postnuptial contracts in the same way.¹¹

The advantage of an integration clause is that litigation about the contract is less likely to involve whining by one party who now wishes that she/he had not signed the original contract, or who now wishes that the original contract had been written differently.

contract litigation *not* involving divorce

For the convenience of specialists in family law who may not be familiar with commercial contract law, I list some recent decisions in the Northeastern USA about integrated contracts in cases *not* involving divorce.

Connecticut

The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. [citation omitted] These recognized exceptions are, of course, only examples of situations where the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated; or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud. [three citations omitted]

Because we hold that the absolute pollution exclusions are unambiguous as applied to the facts of this case, the parol evidence rule bars the introduction of any extrinsic evidence to vary or contradict the plain meaning of the term "pollutant" as it is used in those exclusions. *Heyman Associates No. 1 v. Insurance Co. of State of Pa.*, 653 A.2d 122, 135 (Conn. 1995). quoted in *HLO Land Ownership Associates Ltd. Partnership v. City of Hartford*, 727 A.2d 1260, 1265 (Conn. 1999); *Schilberg Integrated Metals Corp. v. Continental Casualty Co.*, 819 A.2d 773, 794 (Conn. 2003).

It is true that extrinsic evidence may be introduced to *clarify* the meaning of terms in an integrated contract. Such evidence may not be used, however, once the terms are found to have a clear and unambiguous meaning, as we have found to be the case here. [citations omitted] *Buell Industries, Inc. v. Greater New York Mut. Ins. Co.*, 791 A.2d 489, 501, n. 17 (Conn. 2002).

¹¹ See, for example, Ronald B. Standler, *Prenuptial and Postnuptial Contract Law in the USA*, August 2003, <http://www.rbs2.com/dcontract.pdf>.

Massachusetts

In dicta, the Massachusetts Supreme Judicial Court wrote:

He relies on the principle that when in a written contract is a stipulation that the contract recites all the inducements to its execution, that no representation not embodied therein shall be binding and no agent has power to modify or waive any of its terms, evidence extraneous and contradictory to its terms is not admissible. [five citations omitted] That principle rests upon the policy of the law that contracts in writing freely made by intelligent and competent persons ought to stand and be enforced.

Brown v. Grow, 144 N.E. 403, 404 (Mass. 1924).

New York

Courts and commentators addressing the substantive and procedural aspects of New York commercial litigation agree that the purpose of a general merger provision, typically containing the language found in the clause of the parties' 1995 Agreement that it "represents the entire understanding between the parties," is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing (*see, Citibank v. Plapinger*, 66 N.Y.2d 90, 94-95, 495 N.Y.S.2d 309, 485 N.E.2d 974; *Judnick Realty Corp. v. 32 W. 32nd St. Corp.*, 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; S. Kaye, *The Parol Evidence Rule Generally*, in 3 *Commercial Litigation in New York State Courts* § 36.3, at 390, n 82 [Haig, *et al.*, eds. 1995]). The merger clause accomplishes this objective by establishing the parties' intent that the Agreement is to be considered a completely integrated writing (*see, Fogelson v. Rackfay Constr. Co.*, 300 N.Y. 334, 340, 90 N.E.2d 881, *rearg. denied* 301 N.Y. 552, 93 N.E.2d 349; Restatement [Second] of Contracts § 216, comment *c*; 3 Corbin, *Contracts* § 578, at 411; 2 Farnsworth, *Contracts* § 7.3, at 205). A completely integrated contract precludes extrinsic proof to add to or vary its terms (*W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639).

Matter of Primex Intl. Corp. v. Wal-Mart Stores, 679 N.E.2d 624, 627 (N.Y. 1997), cited in *Jarecki v. Shung Moo Louie*, 745 N.E.2d 1006, 1009, 722 N.Y.S.2d 784, 786 (N.Y. 2001) ("The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing. The merger clause accomplishes this purpose by evincing the parties' intent that the agreement 'is to be considered a completely integrated writing'." [citations omitted]).

divorce cases

There are only a few reported divorce cases on this topic. The following are all of the divorce cases that mentioned the existence of an integrated agreement that I found in quick searches of Westlaw on 24-25 March 2004.

An old Wisconsin Supreme Court case held that the existence of a written antenuptial contract prevented admission of testimony about a prior oral agreement that contradicted the written contract. *In re Paulson's Will*, 31 N.W.2d 182, 184 (Wis. 1948).

An appellate court in Ohio wrote:

All parties accept the contractual validity of antenuptial agreements in Ohio. *Troha v. Sneller* (1959), 169 Ohio St. 397, 159 N.E.2d 899. Accordingly, we will apply general contract principles relative to extrinsic evidence as affecting the written agreement. Where the parties have deliberately put their entire agreement into writing, and the writing is clear and unambiguous, courts will refuse to permit parol evidence to vary the terms. The principle is that the writing itself is more reliable evidence of the parties' intention than their memories. The objection to the use of such evidence is not that it may be oral, but that it goes beyond the four corners of the agreement and thus would be used to show something which is not a term of the agreement. 30 Am. Jur 2d 149, Evidence, Section 1016.

However, contracts may rest partially in writing and partially in parol. The rule of partial integration is a well-established exception to the parol evidence rule and is invoked where the entire agreement has not been reduced to writing. Where a contract is partly written and partly oral, parol evidence is admissible to prove the oral terms. 21 O. Jur. 2d 680, Evidence, Section 660.

Hunter v. Conner, 1981 WL 5223 at *2 (Ohio App. 12 Dist. 21 Oct 1981).

And an appellate court in Indiana wrote:

However, if on remand, the trial court, upon consideration of the proper standard regarding unconscionability, enforces the antenuptial agreement, the terms of the agreement will preclude the award of rehabilitative maintenance and findings will be unnecessary.

The integration clause of the agreement provides:

§ 12. *Entire Agreement.* This Antenuptial Agreement contains the entire understanding and agreement of the Parties. No representations, warranties, promises, covenants or undertakings, oral or otherwise, other than those expressly stated herein, have been made. This agreement shall not apply to matters of spousal maintenance or claims premised upon a mental or physical impairment that materially affects the ability of the impaired person to provide for himself or herself. Such matters, if they should arise, shall remain at issue and shall be determined by a court of competent jurisdiction having due regard for the provisions made hereunder for each spouse.

(Record, 43.) The agreement precludes an award for anything other than "spousal maintenance or claims premised on physical or mental impairment." Because there is no question of impairment in this case, the issue is whether the term "spousal maintenance" includes rehabilitative maintenance.

Justus v. Justus, 581 N.E.2d 1265, 1277 (Ind.App. 5 Dist. 1991).

The Arkansas Supreme Court held that the daughter from father's first marriage, who was not a party to her father's antenuptial contract with his second wife, could not give testimony about the contract.

Because the extrinsic evidence proposed by appellant [i.e., daughter] does not concern independent, collateral agreements, it must be offered to alter the antenuptial agreement. As such, the evidence is excluded by the parol evidence rule. Under that rule, all prior and contemporaneous proposals and agreements merge into the written agreement, which cannot be added to or varied by parol evidence. *City of Crossett v. Riles*, 261 Ark. 522, 549 S.W.2d 800 (1977). This rule applies only to documents that the parties intended as a final and complete expression of their agreement. See *Farmers Coop. Ass'n, Inc. v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970). In the present case, the antenuptial agreement contains

what is termed a "merger clause." The clause reads, "The provisions contained in this agreement represent the entire understanding between prospective husband and prospective wife pertaining to their respective property and marital property rights."

Rainey v. Travis, 850 S.W.2d 839, 841 (Ark. 1993).

An unpublished opinion of a Wisconsin appellate court said:

The Supreme Court of Wisconsin has explained the parol evidence rule:

When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

Federal Deposit Ins. Corp. v. First Mortgage Investors, 76 Wis.2d 151, 156, 250 N.W.2d 362, 365 (Wis. 1980).

In its written memorandum, the trial court referenced the following clauses declaring the intent of the parties in the premarital agreement:

[I]t is the intention of both Mr. Becker and Mrs. Portnoy that their respective rights in each other's property and estate, accruing by law or otherwise, during their marriage and upon the termination of their marriage by the death of one or both of the parties hereto, or by divorce, annulment or legal separation, *shall be determined and fixed solely and entirely by this Agreement*;

....

... This Agreement represents the entire agreement and understanding between Mr. Becker and Mrs. Portnoy in respect to their property rights and obligations with respect to each other, and this Agreement (including this provision against oral modification or waiver) shall not be modified or waived except in writing duly subscribed and acknowledged by the parties hereto. [footnote omitted]

[Emphasis added by Wisconsin Appellate Court]

The trial court concluded that the language of the pre-marital agreement made clear that the agreement was to be the sole document to be considered when determining the rights and obligations between the two parties during and after the marriage. The trial court further stated: "It cannot be argued that the August note does not relate to the same subject matter as the pre-marital agreement." Thus, the trial court refused to enforce the provisions of the August note.

We conclude that the trial court correctly determined that the pre-marital agreement contained express language indicating that no other agreement was to govern the rights and obligations of the parties. Thus, we affirm the judgment of the trial court.

Portnoy v. Becker, 1994 WL 32061 at *2-3 (Wis.App. 8 Feb 1994).

An Ohio appellate court said:

Moreover, when the agreement of the parties is integrated into an unambiguous, written contract, courts should give effect to the plain meaning of the parties' expressed intentions. [citation omitted] Intentions not expressed in the writing are "deemed to have no existence" and may not be shown by parol evidence. [citation omitted]

In the instant case, the substance of the alleged oral agreement between appellant and appellee was clearly within the scope of the integrated separation agreement. The separation agreement related to all aspects of appellant's and appellee's property. If an oral agreement had been made before the marriage, and appellee relied on the oral promise, then she should have included the terms of that promise in the written separation agreement, instead of absconding with appellant's money two years after the dissolution of the marriage.

Morgan v. Morgan, 711 N.E.2d 1059, 1064 (Ohio App. 7 Dist. 1998)

An unpublished opinion of a Virginia appellate court said:

The general rule in Virginia is that parol evidence is inadmissible to vary, contradict, or explain the terms of a complete, unambiguous, unconditional written contract.

[citation omitted] The prenuptial agreement in this case is unambiguous, and, therefore, parol evidence is not admissible. Additionally, the agreement includes an integration clause in paragraph 8, which supports the inadmissibility of parol evidence.

Golembiewski v. Golembiewski, 2003 WL 22290032 at *5 (Va.App. 7 Oct 2003).

The premarital contract in *Golembiewski* established that each party could continue to acquire separate property, which would not be considered marital assets subject to distribution at divorce.

3. Validity of Prenuptial Contract a Condition for Marriage?

Some people want to have an unconventional marriage, for example they may want to keep their earned income in separate accounts and accumulate no jointly-titled property. For example, one spouse might pay the mortgage, real estate taxes, and own the house, while the other spouse pays for all utilities, food, and consumable household items. At divorce, a judge may look at their prenuptial agreement and consider invalidating it as contrary to public policy, because the marriage described in the prenuptial agreement is so unconventional.

I make the provocative suggestion of including words in such an unconventional prenuptial contract that the parties have carefully contemplated the decisions reflected in this contract, and each party agrees that they would *choose not to be married unless* their marriage and possible divorce is conducted according to the terms memorialized in this contract. That makes the validity of the prenuptial contract a condition precedent to the marriage.

It would be nice if declaring such a prenuptial contract unenforceable would also automatically void or annul the marriage — however parties to a marriage do *not* have the contractual freedom to void their own marriage.

divorce cases mentioning condition precedent

There is little reported case law on this topic. The following are all that I could find in my quick searches of Westlaw on 22 March 2004 and 29 August 2009.

An unreported case in Iowa in 1999 said:

While Myra was separated from her third husband, the parties met and began a romantic relationship. They began living together in the late fall of 1990. Approximately six months before they married, the parties began discussing an antenuptial agreement. It was clearly understood by both parties that an antenuptial contract was a condition precedent to their marriage. The antenuptial agreement was negotiated for a six month period.

In re Marriage of Siems, 1999 WL 668764 at *1 (Iowa App. 27 Aug 1999).

In this unreported opinion, the court held that the antenuptial agreement was valid and binding. *Id.* at *3.

In January 2003, an unreported appellate decision in Ohio remarked:

The trial court noted that [husband] made it clear to Mrs. Grimm that signing the agreement was a condition precedent to the marriage, and that [husband's] lawyer prepared the document at [husband's] request.

Grimm v. Grimm, Not Reported in N.E.2d, 2003 WL 103429, ¶12 (Ohio App. 13 Jan 2003).

An unreported opinion in Connecticut also mentioned a prenuptial contract as a condition precedent for the marriage.

Based on the evidence presented, the court finds that the defendant advised the plaintiff, sometime during 1998, that he wanted her to sign a prenuptial contract as a condition precedent to marriage.

Intravia v. Intravia, 2003 WL 22480690 at *2 (Conn.Super. 15 Oct 2003).

The judge found that the contract was not unconscionable, either at the time it was signed or at the time of divorce, and the judge ruled the contract was enforceable.

An unreported trial court opinion in Connecticut mentioned:

The evidence is clear and uncontroverted that the issue of such an agreement was raised by the husband at least one year prior to the wedding (in the bathtub to be precise), and that he made a condition precedent to the wedding itself. He referred to the agreement as an "absolute requirement," later telling her, "No agreement; no wedding!"

Crews v. Crews, Not Reported in A.2d, 2005 WL 2208546 at *4 (Conn.Super. 2005).

The court made the finding:

... other than the usual pre-wedding stresses and pressures, there was no coercion or duress imposed upon the wife"

Ibid. at *7.

Wife did not appeal this finding. *Crews v. Crews*, 945 A.2d 502, 509 (Conn.App. 2008) ("The court found that other than the usual stress of a wedding, there was no coercion or duress imposed on the plaintiff.").

In each of these judicial opinions, there was only an isolated mention that the prenuptial contract was a condition precedent to the marriage, and the judge did *not* infer any legal significance to the fact. Divorce or annulment can be granted only by a judge for reason(s) specified in statute — and not automatically by voiding a condition precedent in a prenuptial contract.

4. Severability or Savings Clauses

If some of the above ideas (or any other ideas that might be unconventional or controversial) are included in a pre- or post-nuptial contract, it might also be a good idea to include a section on severability, so that the contract remains valid if the judge strikes one or more sections. A typical severability provision, sometimes called a “savings clause”, is:

If any one or more section(s) of this contract is held to be illegal, invalid, void, or unenforceable, then all remaining sections shall continue in full force and effect.

When a severability provision is included, the drafter of the contract must be very careful with the architecture of the contract, so that each section contains one *quid pro quo*, i.e., each section must contain both benefits and obligations of each party. Otherwise, if one section is stricken by a judge, one might have an unfair bargain in which one party gets most of the benefits and other party gets most of the obligations, contrary to the agreed intentions of the parties.

divorce cases on severability

There is little reported divorce case law on this topic. The following are all that I could find in a quick search of Westlaw on 26 March 2004.

An early case from the District of Columbia mentioned in passing a severability clause in a property settlement agreement:

The Agreement expressly provided for the severability of any 'unenforceable' provision. As a general rule, courts have enforced, where possible, the provisions of separation agreements settling property rights between husband and wife which are severable from other clauses in such agreements, see, e. g., *Adler v. Nicholas*, 381 F.2d 168, 172 (5th Cir. 1967); *Prime v. Prime*, 172 Or. 34, 139 P.2d 550 (1943); *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1 (1943); 2 A. Lindey, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 33-6 (1967). Indeed, we have encouraged parties to settle their property rights and claims by agreement rather than leave the task to the courts. *Davis v. Davis*, [268 A.2d 515]; *Le Bert-Francis v. Le Bert-Francis*, D.C.App., 194 A.2d 662, 663 (1963). *Willcher v. Willcher*, 294 A.2d 486, 488-89 (D.C. 1972).

The highest court in New York State honored a severability clause in a separation agreement. *Christian v. Christian*, 365 N.E.2d 849, 856 (N.Y. 1977).

Frey v. Sargent's Estate, 533 S.W.2d 142, 143 (Tex.Civ.App.-Amarillo 1976) tersely mentions the presence of a “savings clause” in a prenuptial agreement.

Tennessee courts honored a severability clause in an antenuptial contract.

Because the Court of Appeals’ decision voided only the waiver of alimony provision, and because the antenuptial agreement contained a severability clause, other provisions of the antenuptial agreement, such as those governing the division of marital property, are not at issue in this appeal.

Cary v. Cary, 937 S.W.2d 777, 778, n. 1 (Tenn. 1996).

The majority opinion in an unpublished Missouri appellate court opinion remarked in passing:

The dissent claims that the majority ignored the severability clause in the antenuptial agreement in finding that the whole agreement was unconscionable. Its reliance on *McGilley v. McGilley*, 951 S.W.2d 632 (Mo.App. 1997), to save other provisions of the agreement is, however, misplaced. In *McGilley*, the trial court found an antenuptial agreement to be void due to its ambiguity, not its unconscionability. *Id.* at 637. The Western District found that the intent of the parties was clear and, therefore, the trial court erred in voiding the entire agreement. *Id.* at 638. In this case, the antenuptial agreement and, specifically, the provision defining and dividing marital property was unconscionable. Other provisions of the agreement, including the maintenance provision, were also unconscionable when read together.

Delong v. Delong, 1998 WL 15536, n. 6 (Mo.App. W.D. 20 Jan 1998).

An unpublished California appellate court opinion honored a severability clause in an antenuptial contract:

The trial court was correct in finding said provision unenforceable in the instant agreement, and thereafter severing it from the body of the contract through its severability clause.

In re Marriage of Sullinger, 2002 WL 31794153, at *4 (Cal.App. 4 Dist. 13 Dec 2002).

5. Choice of Law

In contract cases involving commercial contracts, courts traditionally¹² choose the law of one of the following states in resolving the dispute:

1. In issues of validity of the contract, chose *lex loci contractus* — the law of the state where the contract was made.
2. In issues of performance, chose the law of the state where the contract was performed.

Modern courts¹³ choose the law from the choices in the following menu:

- Use the law of the state specified in a “choice of law” clause in the contract, provided that state has a “substantial relationship to the parties or the transaction”. (A valid choice of law clause takes precedence over the following alternative choices.)
- The law of the state where the contract was negotiated.
- The law of the state where the contract was made.
- The law of the state where the contract was performed.
- The law of the state where the subject matter of the contract (e.g., the land in a contract for purchase of land) is located.
- The law of the location (e.g., state of incorporation or residence) of the parties.

In the context of commercial contracts for the sale of goods, this choice of law may not be significant, because of the uniformity of law amongst the states, owing to the Uniform Commercial Code.

In the context of pre- and post-nuptial contracts, the choice of law is critical, because of the variation amongst the states in the USA. The SECOND RESTATEMENT OF CONFLICT OF LAWS, which was published in 1971, does not mention prenuptial contracts, perhaps because such contracts were infrequently interpreted by courts when that book was written and no consensus had yet emerged.

To reduce the amount of *unpaid* time that I spend writing this section on choice of law clauses, I have chosen to cite only a few recent cases from the Northeastern USA, plus a few historically important cases nationwide. These cited cases are the result of my quick search of the Westlaw databases on 12-14 April 2004.

¹² Restatement (First) Conflict of Laws, §§ 311, 332, 355, 358, 370 (1934).

¹³ Restatement (Second) Conflict of Laws §§ 186-88 (1971).

general rule

Courts usually interpret a prenuptial contract only in the context of either divorce or death of one spouse. The general rule seems to be that, in the absence of a choice of law clause in the contract, courts will apply the law of the state where the prenuptial contract was made, *unless* that law offends the public policy of the state where the divorce court is located.¹⁴ The contract is “made” in the state where it was signed by the parties, which is probably also the state in which at least one party was living immediately prior to the marriage.

- **Connecticut:** *Elgar v. Elgar*, 679 A.2d 937 (Conn. 1996) (Wife signed prenuptial agreement without reading it. Court honored agreement’s choice of law clause for New York law, although parties were married in Connecticut, and husband remained a resident of Connecticut, but wife lived in New York.); *Mehtar v. Mehtar*, 1997 WL 576540 (Conn.Super. 1997) (Court applied South African law to prenuptial agreement negotiated there.); *Montoya v. Montoya*, 2003 WL 1090696 at *2-3, 34 Conn. L. Rptr. 266 (Conn.Super. 2003) (Court honored agreement’s choice of law clause for New York law, although parties were married in Connecticut and lived in Connecticut).
- **Delaware:** *Hill v. Hill*, 262 A.2d 661 (Del.Ch. 1970), *aff’d*, 269 A.2d 212 (Del.Supr. 1970) (“where the parties had signed a prenuptial agreement in the state of Maryland, the applicable law in determining the validity of the agreement was Maryland law, despite the fact that the property contemplated in the agreement was located in Pennsylvania and Delaware.”¹⁵).
- **Florida:** *Robbat v. Robbat*, 643 So.2d 1153 (Fla.App. 4 Dist. 1994), *review denied*, 651 So.2d 1195 (Fla. 1995) (Court applied Massachusetts law at the time of the signing of the contract to a prenuptial contract signed in Massachusetts in 1978, although the parties moved to Florida in 1985, where they divorced in 1991.); *In re Estate of Nicole Santos*, 648 So.2d 277, 284 (Fla.App. 4 Dist. 1995) (Parties executed prenuptial contract in Puerto Rico, where they were married and lived for the first 12 years of the marriage. Court applied law of the place where the prenuptial contract was made. One dissenting judge says at page 284: antenuptial agreement was “extremely unfair to the widow”, and he believed that public policy required application of Florida law.).
- **New Jersey:** *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J.Super.A.D. 1978), *certification denied*, 395 A.2d 204 (N.J. 1978) (Parties signed a prenuptial agreement in Pakistan, were married in Pakistan, lived in Pakistan. Husband then moved to New Jersey, while wife remained in Pakistan, and husband obtained a divorce in Pakistan. Wife later sued

¹⁴ Alexander Lindey & Louis I. Parley, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS, § 110.74, Matthew Bender, October 2003.

¹⁵ Quotation from *Tarburton v. Tarburton*, 1997 WL 878411 at *4 (Del.Fam.Ct. 1997).

husband for alimony in New Jersey court. Court held that Pakistan law applied to prenuptial agreement.).

- **Pennsylvania:** *Sabad v. Fessenden*, 825 A.2d 682, 687-88 (Pa.Super. 2003), *appeal denied*, 836 A.2d 122 (Pa. 2003) (Court applied law of New York to prenuptial agreement, because agreement was negotiated and signed in New York and parties were married in New York, where they lived for first seven years of the marriage.).
- **Vermont:** *Padova v. Padova*, 183 A.2d 227, 230 (Vt. 1962) (“It is the law of this State [i.e., Vermont] that a contract entered into without the State [e.g., Connecticut], if valid where made, will be interpreted here according to the law of the state where made, so long as its enforcement does not contravene the public policy of Vermont.”).

The same general rule was expressed in an unpublished opinion of the U.S. Court of Appeals in Oklahoma:

“Federal courts sitting in diversity must apply the substantive law, including choice of law rules, of the state in which they sit.” [citations omitted] In Oklahoma, which is the forum state, the general rule is that validity and interpretation of a contract is governed by the law where the contract is made. [citations omitted] The Gants signed their antenuptial agreement in Oklahoma, so under the general rule, Oklahoma law applies. Since neither party argues otherwise, we will not consider whether an exception to the general rule is warranted by the fact that the Gants lived in Texas the entire time they were married.

Gant v. Gant, 1994 WL 410633, n. 4 (10th Cir. 1994).

alternatively:
use the law of the place of the divorce

Sometimes courts avoid using the law of the state where the prenuptial contract was made, and simply apply the law of the state where the divorce court is located (i.e., the place of the performance of the contract). This is easy for the judge, who is most familiar with the local law in his/her state.

- **Connecticut:** *Lakin v. Lakin*, 1999 WL 1320464 at *19 (Conn.Super. 1999) (Prenuptial agreement was signed in California, parties spent first four years of their marriage living in California, but court applied Connecticut law, because parties had lived in Connecticut for past 15 years).
- **Florida** *Gordon v. Russell*, 561 So.2d 603, 604 (Fla.App. 3 Dist. 1990) (Applied Florida law to prenuptial agreement that was signed in New Jersey in 1980.), *review dismissed*, 570 So.2d 1304 (Fla. 1990).
- **Georgia:** *Scherer v. Scherer*, 292 S.E.2d 662, 664 (Ga. 1982) (Parties were residents of Michigan when they signed an antenuptial agreement and then married in 1976. The parties moved to Georgia in 1979, where they filed for divorce in 1980. Although there was a choice

of law clause in the antenuptial agreement for Michigan law, at divorce the parties agreed to apply Georgia law. Court found agreement was valid.).

- **Hawaii:** *Lewis v. Lewis*, 748 P.2d 1362, 1365 (Hawai'i 1988) (Parties were residents of New York when they signed a premarital agreement and then married in 1970. The parties moved to Hawaii, where they were divorced in 1985. Court applied Hawaii law.).
- **Missouri:** *Rivers v. Rivers*, 21 S.W.3d 117, 121-22 (Mo.App. W.D. 2000) (Parties signed a premarital agreement in Louisiana in 1977 and were married in Louisiana the following day; parties subsequently moved to Missouri, where Wife filed for divorce in 1999. There was no choice of law clause in the agreement. Court applied Missouri law to the premarital agreement, which invalidated it. Court noted that it would have honored a choice of law clause, if one had been in the agreement: "In the absence of an effective choice of law, Missouri uses the criteria found in § 188, The Restatement (Second) of Conflicts of Law (1971)...").

suggestions for prenuptial contracts

Each prenuptial contract should contain a choice of law clause, because that clause is likely to simplify the legal issues at divorce. Such a clause probably would choose the state where the parties lived at the time the prenuptial contract was negotiated and where the parties signed the prenuptial contract.

It would be wise if the attorney representing a client in negotiating and drafting a prenuptial contract would make a paper copy of the current state statute(s) about prenuptial contracts in the choice of law state. One copy should be put in the attorney's files, in case the attorney is called to testify as a witness in a future divorce case involving that prenuptial contract. Another copy should be given to the attorney's client, along with a cover letter explaining that these are the statutes for use in interpreting the validity of the client's prenuptial contract. I make this suggestion because, at the time of divorce many years after the prenuptial agreement was written, it can be a bother to find the state statutes that were in effect many years ago. The difficulty is increased if the parties divorce in a state that is geographically distant from the state in the choice of law clause, so that local law libraries will not have the old state statutes in the choice of law state.

choosing another state's law?

Can parties residing in state X could include in their prenuptial contract a choice of law clause that specifies that the contract will be interpreted according to the law of Pennsylvania? (Pennsylvania law gives parties great freedom to avoid marital property, waive alimony pendente lite, waive alimony, etc.) The answer is NO, unless the parties have a "substantial relationship" to Pennsylvania (e.g., at least one party is living in Pennsylvania at the time the prenuptial contract was negotiated and signed). It is an apparently *unanswered* question if the parties could live and negotiate a prenuptial contract in state X, but specify Pennsylvania law in their prenuptial contract, based on their intent that the parties would live in Pennsylvania immediately after their marriage *and* they actually did live in Pennsylvania soon after the prenuptial agreement was signed and soon after they were married.

6. Risk Allocation

Good contract drafting in a commercial context involves allocation of risks. The same approach can be used in prenuptial contracts to anticipate a situation at divorce in which one party is then unable to earn a living (e.g., as a result of an accident or chronic disease that occurred during marriage) and, therefore, (1) a prenuptial contract that did not provide for such contingency might be considered unfair by a divorce court and (2) the disabled spouse would be conventionally deserving of a larger share of marital assets. The prenuptial agreement might require that each spouse during marriage shall have:

1. disability income insurance policy in the amount of 60% of their earned income or \$60,000/year, whichever is the lesser amount. Policy shall include a cost of living adjustment and a 90-day waiting period.
2. long-term care insurance (i.e., to pay expenses of nursing home or alternatives)
3. \$250,000 dismemberment insurance (i.e., to compensate for loss of sight, hearing, or speech, or amputation of hand or foot)

The agreement should also explicitly state that each party agrees to accept these amounts of insurance as adequate support in the event of divorce or separation, if they are unable to earn a living.

Conclusion

Conventional contract law offers many opportunities to help people avoid expensive divorce litigation, and to structure marriages according to the values and desires of individual people. This essay sketches some examples of how commercial contract law might be used in prenuptial agreements.

A prenuptial agreement might prevent the waste of money on divorce litigation, if it specifies either (a) the loser pay the winner's legal expenses or (b) during a separation or after a divorce, neither party is entitled to financial support — including attorney's fees — from the other.

Attorneys drafting a prenuptial agreement should consider inserting an integration clause, as suggested on page 14 of this essay.

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This document is at **www.rbs2.com/dcontract2.pdf**

My most recent search for court cases on this topic was in March-April 2004.
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