

Waiver of Alimony in the USA

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Introduction

This essay describes the recent evolution of the common law in which many — but not all — states in the USA now permit parties to a marriage to waive alimony payments at divorce, by specifying the waiver in a written prenuptial agreement.

Without a prenuptial agreement, divorce will be a financial disaster for the spouse who earned most of the assets during the marriage, because the default legal rules for distribution of marital property and determination of alimony at divorce *assume* that each spouse made an *equal* contribution to the marriage.

definitions

Alimony was the historical word for payments from a man to his ex-wife. Beginning with the divorce reform in the 1960s, many states began using alternative words, such as *support* or *maintenance*. For the purpose of this essay, all of these words are equivalent.

Often family courts order the spouse with a larger income to pay *alimony pendente lite* (APL) — monthly payments between the separation of the parties and the final adjudication of their marriage (i.e., division of marital property, terminating APL, and possibly ordering continuing alimony, etc.). Some states call APL by the name *temporary maintenance* or *temporary support*.

Traditionally, alimony continued until the death or remarriage of the recipient of the alimony payments. This is still true with people who are divorced near retirement age, or during their retirement. Such alimony is sometimes called *permanent alimony*.

However, modern practice for younger recipients in some states — especially Florida — is for the court to award alimony for only a few years, with the intent that the recipient will undertake additional education or vocational training, and then she will become self-supporting. Such alimony for a limited time is commonly called *rehabilitative alimony*.

Because I do not know which word the reader will search to find this webpage, I use *agreement* and *contract* as interchangeable synonyms, so both words will be indexed in search engines. Attorneys commonly call a *prenuptial agreement* by the name *antenuptial agreement*, or, less commonly, *premarital agreement*. A written contract or agreement between married spouses is called a *postnuptial agreement*. In some states, a prenuptial agreement and a postnuptial agreement have the same conditions for validity.

disclaimer

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

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*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

I did most of the legal research for this essay during August 2009. Nonlawyers are cautioned that a correct statement of law for *one* state at *one* time, may not be valid in the future for that same state, and should not be applied to other states. The law of waivers of alimony in prenuptial agreements is not yet firmly settled in many states. Nonlawyers are advised to consult an experienced local attorney who is a specialist in family law.

Litigants or their attorneys should *not* rely on this essay for legal research, because this essay is only concerned with legal history. In researching this essay, I ignored cases in some states and, of course, this essay does not include any cases decided after August 2009.

Overview

Historically, marriage was “until death do us part”. From the late 1800s until the statutory reforms in the 1960s and 1970s, divorce was *only* available if one party had committed some fault (e.g., adultery, cruelty, desertion or abandonment, etc.). If the husband committed the fault, then alimony could be seen as a kind of punishment for that fault, as well as allowing a wronged wife to rely on his promise at marriage of lifetime support. Fault by the wife was generally a bar to her receiving alimony. Alimony allowed an innocent wife to continue living near the lifestyle during the marriage, after divorce caused by the fault of her ex-husband.

Historically, only the wife was eligible to receive alimony in many states. This gender asymmetry was held unconstitutional¹ by the U.S. Supreme Court in March 1979, ending more than a century of discrimination against men. However, such discrimination had little practical importance, because a husband had a greater earning potential than their wife in nearly every marriage, owing to few job opportunities for married women.

Beginning in the 1960s, there was a reform of divorce statutes in the USA that permitted divorce for *any* reason — so-called “no-fault divorce”. However, alimony was continued from old laws, apparently without logically thinking about *why* alimony was legally justified. One can

¹ *Orr v. Orr*, 440 U.S. 268 (U.S. 1979).

imagine a case in which a wife decides to dump her innocent husband, and a court orders the husband to pay alimony to her, although she no longer provides any services to him — a result that I think is shockingly *unjust*.

Concurrently with the reform of divorce statutes in the USA, women began to have careers outside the home. A woman could earn as much as (or more than) a man. Such new career opportunities meant that women were no longer always dependent on men for their income, and removed one of the traditional justifications for alimony.

For more detail on the history of alimony in the USA — and my criticism of alimony — see my essay, *Problems with Division of Marital Property and Alimony in the USA*, at <http://www.rbs2.com/dfault.pdf>. For more detail on the history of pre- and post-nuptial contracts in the USA, see my essay, *Prenuptial and Postnuptial Contract Law in the USA*, at <http://www.rbs2.com/dcontract.pdf>.

The end of marriage “until death do us part” and high frequency of divorces in the USA, beginning in the 1960s, meant that the financially weaker party to a marriage no longer has the reasonable expectation that a marriage implies a legal obligation to support her/him for her/his entire lifetime.

Old Law

Readers who are *not* interested in the old law should skip to page 20.

The traditional rule is that a wife could *not* waive her husband’s legal duty to support her. From my reading of many dozens of old cases, I have gleaned several different reasons for this traditional rule:

- a state statute requires a husband to support his wife, and such a statutory duty was declared by judges to be *not* waivable (usually for *unspecified* reasons, or because of the state’s interest in every marriage).
- waiving alimony would make it easier for the husband to get rid of his wife, and thus is void against public policy because the waiver “encourages divorce”.
- alimony to a needy ex-wife prevents her from being a burden (e.g., welfare or charity) to citizens of the state, by shifting the burden to her ex-husband.
- alimony was a kind of punishment to a husband for his marital fault that caused the marriage to end, while continuing the lifetime expectation of the wife to support (i.e., marriage was “until death do us part” and divorce only granted for serious fault). Such a reason has been repudiated in modern no-fault divorce statutes, but alimony continues.

However, few cases carefully explained *why* such waivers of alimony were against public policy. The better cases simply cited a long list of cases and then concluded that the rule was well accepted everywhere, without explaining *why*. It is easy to argue that these were bad reasons — I simply list the reasons given by judges in old cases, as my condemnation is *not* necessary.

The fact that judges nationwide agreed on the rule, but few judges explained *why* the rule was necessary or desirable, suggests to me that there was some underlying social convention that was obvious to everyone. Here is the social convention: it was the duty of the *every* husband to earn an income, while it was the duty of *every* wife to be a full-time homemaker and mother. This social convention caused far more damage to society than imposing alimony on ex-husbands — this social convention limited employment opportunities for married or divorced women, which explains the absence of women in the learned professions (e.g., physicians, attorneys, research scientists, engineers, etc.) in the USA prior to about 1970.

Some of the early judicial opinions that permitted a waiver of alimony in a prenuptial contract specifically mentioned in the relevant facts of the case that the wife had earned at least a bachelor's degree and she was physically able to earn an income for herself. Such facts in modern cases distinguish these cases from the old law, in which divorced women were viewed as *unable* to earn an income.

1888

Federal courts rarely hear cases involving divorce or alimony,² which are purely state matters. However, there is a U.S. Supreme Court case from the year 1888, which is often quoted in articles on the law of marriages in the USA.

The parties were married in Vermont in 1828. After 22 years of marriage, the husband moved to the territory of Oregon (which was not yet a state) in 1850 and he thereafter failed to support his wife, who remained in Ohio. A legislative act of the territory of Oregon in Dec 1852 purported to dissolve the marriage, *without* notice to the wife, and also without specifying a reason for the divorce. One month after this so-called “divorce”, the husband remarried. The husband died twenty years later, in 1873. The first wife sued in the territorial court in the late 1870s to recover his ownership of land in the territory of Washington. The territorial court held the “divorce” was valid. *Maynard*, 3 P. 195. After the first wife died in 1879, her children continued the case in the territorial court (5 P. 717), and they appealed to the U.S. Supreme Court, which affirmed the territorial court.

For the purposes of this essay, what is important is the U.S. Supreme Court's remarks on marriage. One of the plaintiff's arguments was that the legislative divorce had impaired the contract of marriage, in violation of the U.S. Constitution Art. I, § 10, cl. 1.

It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something

² Standler, Federal Court Jurisdiction in the USA in Family Law Cases, <http://www.rbs2.com/dfederal.pdf>, (May 2004).

more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 210-211 (U.S. 1888).

The Court then quoted state courts in Maine, Kentucky, Rhode Island, New York, and Indiana.

The point is that marriage was a *status* conferred by the government, not a contract that could be altered by the parties.

Maryland 1935

In April 1935, the highest court in Maryland wrote:

The parties to this suit undertook to enter into the antenuptial contract, to which reference has been made, by the terms of which it is provided, in paragraph 5: "In the event that unhappy differences should arise between the parties hereto, resulting in a separation between the parties, no claim or demand shall be asserted or attempted to be asserted by either party hereto as against the other for alimony, counsel fees or the like," etc.

The appellant did not press this question in the Court of Appeals, or, it seems, in the lower court, and suffice it to say such contracts are held to be void as against public policy, and, as this contract has not been asserted as a defense, it requires no further consideration.

Hilbert v. Hilbert, 177 A. 914, 919 (Maryl. 1935). Quoted with approval in *Cohn v. Cohn*, 121 A.2d 704, 706 (Maryl. 1956) ("The statement [in *Hilbert*] is in accord with the great weight of authority."). Apparently, the rule was so widely accepted, that the husband in *Hilbert* did not challenge the rule.

Cohn was overruled in *Frey*, see page 42, below.

Massachusetts 1935

In 1930, two people signed a prenuptial contract in Massachusetts in which wife agreed "to make no claim or demand in any place, or in any way, for any support by' the [husband], or 'for any sum or sums of money whatever.'" A few years later, the wife sued her husband in court for support. The trial court upheld the prenuptial contract and dismissed her case. In May 1935, the Massachusetts Supreme Court reversed the decision of the trial court:

The status of the parties as husband and wife was fixed when the marriage was solemnized. A marriage cannot be avoided or the obligations imposed by law as incident to the relation of husband and wife be relaxed by previous agreement between the parties. Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social institution of the highest importance. The commonwealth has a deep interest that its integrity is not jeopardized. "It is against the policy of the law that the validity of a contract of marriage or its effect upon the status of the parties should be in any way affected by their

preliminary or collateral agreements.” *Franklin v. Franklin*, 154 Mass. 515, 516, 28 N. E. 681, 682, 13 L. R. A. 843, 26 Am. St. Rep. 266 [(Mass. 1891)]; [three other cases omitted] The moment the marriage relation comes into existence, certain rights and duties necessarily incident to that relation spring into being. One of these duties is the obligation imposed by law upon the husband to support his wife. *Fisher v. Drew*, 247 Mass. 178, 182, 141 N. E. 875, 30 A. L. R. 798. The enlarged contractual capacity conferred upon married women by G. L. (Ter. Ed.) c. 209, § 6, does not relieve the husband from this liability. *Thibeault v. Poole*, 283 Mass. 480, 484, 186 N. E. 632. In those cases [involving postnuptial separation agreements] there is always the possibility that the agreement may be terminated by the *resumption* of cohabitation. In all of them alternative, fair, material provision is made for the wife in consideration of the release of the husband’s duty to support. The power of the courts to grant alimony in case of divorce is not hampered by such agreement. *Wilson v. Caswell*, 272 Mass. 297, 172 N. E. 251 [(Mass. 1930) (court has power to modify alimony amount, regardless of contract between parties)]; *Oakes v. Oakes*, 266 Mass. 150, 165 N. E. 17 [(Mass. 1929) (postnuptial agreement about alimony is a “nullity”)]; *Hyman v. Hyman*, [1929] A. C. 601.
French v. McAnarney, 195 N.E. 714, 715-716 (Mass. 1935).

New York 1939

In 1935, two spouses in Rochester, NY signed a written contract that the man would give \$1250/month to his wife in exchange for her release of his legal obligation to “support and maintain” her. The parties were neither separated nor divorced, this postnuptial contract governed the conduct of the parties *during* an intact marriage. Three years later, when the husband failed to pay the monthly amount, the wife sued him in court for enforcement of the contract.

The trial court dismissed her complaint between the contract was void for two reasons: (1) violation of a Domestic Relations Law § 51, which specifies that a husband and wife can not contract to “relieve” (i.e., waive) the husband’s duty to support her, and (2) the contract was against public policy. The intermediate appellate court reversed:

Stated in the simplest terms, the case comes to this: The husband owes the legal duty to support his wife. The law forbids the making of any contract which would relieve him from that duty. Except for that prohibition the husband and wife may contract with each other. Based upon their past experience, husband and wife are best qualified to judge the amount required for the wife’s support. They are at liberty to reduce to a certainty the amount of money which the husband will pay to discharge an obligation which might cost him more or less than what he has agreed to pay.

Garlock v. Garlock, 5 N.Y.S.2d 619, 621 (N.Y.A.D. 1938).

Of the five judges on the intermediate appellate panel, two dissented — without a separate written opinion — on the ground that the contract was void as against public policy. The majority opinion of the intermediate appellate court is remarkably modern. On wife’s motion for rehearing, the intermediate appellate court certified a question to the highest court in New York State. *Garlock*, 7 N.Y.S.2d 232 (N.Y.A.D. 1938). In January 1939, the highest court in New York state unanimously held the contract was void:

By reason of the marriage relation there is imposed on the husband the duty to support and maintain his wife in conformity with his condition and station in life. [citation to three cases omitted] Marriage is frequently referred to as a contract entered into by the parties, but it is more than a contract; it is a relationship established according to law, with certain duties and responsibilities arising out of it which the law itself imposes. The marriage establishes a status which it is the policy of the State to maintain. Out of this relationship, and not by reason of any terms of the marriage contract, the duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life. This works both ways. When he is prosperous, they prosper; when financial misfortune befalls him, the wife and family are also obliged to receive less. The duty of the husband, however, as matter of policy and as an obligation imposed by law, cannot be contracted away. This court, in *Tirrell v. Tirrell*, 232 N.Y. 224, 229, 133 N.E. 569, 570 [(N.Y. 1921)], said:

In the public interest the state has ever deemed it essential that certain obligations should attach to a marriage contract, amongst which is the duty of a husband to support his wife.

Defendant was therefore shorn of power to enter into any arrangement or contract which would relieve him of such obligation.

Section 51 of the Domestic Relations Law enacts that a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.

This contract is void for the reason that it violates this provision which continues what has always been the policy of the law regarding marriage and its incidents. If this be a valid contract it must work both ways; both parties must be bound by it. In this instance the parties, apparently living in affluence, have made ample provision for the support of the wife; but suppose we turn it about, and the husband were trying to enforce such a contract, where the amount provided for the wife was trivial in comparison with his income. Out of the goodness of her heart and in reliance upon his good nature she may have signed such a contract of her own free will, and yet no court would hold her bound by it, especially if she became in need through sickness or other misfortune.³ Such was the *Tirrell* Case, supra. If such contracts as these were held to be legal it would open the door to all kinds of imposition and hardships because a change in the financial circumstances of the husband would not alter the limit of his obligation. The husband is obliged to support his wife in accordance with his condition in life as long as they are living together as husband and wife, and contracts made which place any limitations upon the obligations imposed by law are illegal and of no effect. Where the parties have separated we have a different situation altogether, and contracts similar to this are then held to be legal. [citations to two cases omitted]

Garlock v. Garlock, 18 N.E.2d 521, 522-523 (N.Y. 1939).

Note that husband is under a statutory obligation to support his wife. Further, note that *Garlock* reaffirms *Tirrell*, which holds that *any* contract in which husband attempted to bargain away such a legal duty was *always void*. Note also that the state is *always* a “party” to the so-called marriage contract, in a paternalistic way that limited the freedom of the spouses. These rules are relevant to this essay, because alimony is spousal support after divorce.

³ The court is spewing hyperbole about a hypothetical case when it wrote “sickness or other misfortune”, because the written contract at issue in this case specifically stated: “any and all expenses necessarily incurred by [wife] because of sickness or accident to her person, shall not be included in the sum and/or sums to be paid to her by [husband] and that the same shall remain the obligation of the [husband].”

Section 51 of the New York Domestic Relations Law, enacted in 1896, and mentioned in *Garlock*, says:

A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; **but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.**⁴

New York Domestic Relations Law, § 51, quoted in *Winter v. Winter*, 84 N.E. 382, 384 (N.Y. 1908). See also *Uhler v. Uhler*, 128 N.Y.S. 963 (N.Y.Sup. 1911); *Moore v. Moore*, 59 N.Y.S.2d 22, 23 (N.Y.Sup. 1945).

What is really wrong with this statute — and also wrong with *Garlock* — is that the statute views *all* people in terms of their status (i.e., married or unmarried) and gender (i.e., husband or wife), instead of treating people as individuals with a unique set of facts and personal values. The state imposed on *every* marriage a legal obligation that can *not* be bargained away by contract, thus interfering with freedom of contract.

Perhaps *Garlock* is best understood as refusal of courts to be involved with contractual disputes between spouses during a marriage. Moreover, the highest court in New York State made the mistake of confusing (1) a waiver of support with (2) a contract for a specific amount of support.

The absolute prohibition against waivers of alimony continued for many years in New York State:

- *McMains v. McMains*, 206 N.E.2d 185, 187 (N.Y. 1965) (“Furthermore, since the husband's obligation to support his wife continues after divorce[,] any separation agreement relieving him of his obligation or construed or applied so to relieve him is void under former section 51 of the Domestic Relations Law (*Kyff* [35 N.E.2d 655 (N.Y. 1941)] and *Jackson* [49 N.E.2d 988 (N.Y. 1943)] decision[s]; also *Haas v. Haas*, 298 N.Y. 69, 80 N.E.2d 337).”);
- *Slocum v. Slocum*, 345 N.Y.S.2d 188 (N.Y.A.D. 1973) (Wife waived alimony in a postnuptial separation agreement. The appellate court held the waiver was void, because the husband had a statutory obligation to support his wife.);
- *Henderson v. Henderson*, 365 N.Y.S.2d 96 (N.Y.A.D. 1975) (Wife accepted a lump-sum payment in exchange for waiving continuing support in a postnuptial separation agreement. The appellate court held the waiver was void, because the husband had a statutory obligation to support his wife.).

The paternalistic law expressed in *Garlock*, 70 years ago, remains influential in New York State today, as explained below, beginning at page 59.

⁴ Boldface added by Standler.

The two sentences from *Tirrell* were quoted in by North Carolina Supreme Court in 1961, in a case holding that a prenuptial contract was void because it attempted to relieve husband from his legal duty to support his wife. *Motley v. Motley*, 120 S.E.2d 422, 424 (N.C. 1961).

Wisconsin 1950

In May 1950, the Wisconsin Supreme Court held that a prenuptial contract that specified alimony was void.

There are three parties to a marriage contract—the husband, the wife, and the state. The husband and wife are presumed to have, and the state unquestionably has an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization. That unusual conditions have caused a marked increase in the divorce rate does not require us to change our attitude toward the marital relation and its obligations, nor should it encourage the growth of a tendency to treat it as a bargain made with as little concern and dignity as is given to the ordinary contract. Consideration of only material matters, as distinguished from those which concern its religious and moral aspects, demands that the state keep its hand upon the obligation of the husband to maintain and support his wife. The court should not look with favor upon an agreement which may tend to permit a reservation in the mind of the husband when he assumes the responsibility of maintaining his spouse in such comfort as he is able to provide and until his death or the law relieves him of it.

Fricke v. Fricke, 42 N.W.2d 500, 501 (Wis. 1950).

The court continued:

At least a majority, if not all of the courts which have considered the matter have held that any antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy and is therefore void.

70 A.L.R. 826. Quite generally the courts have said that the contract itself invites dispute, encourages separation and incites divorce proceedings.

Fricke, 42 N.W.2d at 502.

The court in *Fricke* quoted an earlier opinion from the same court:

The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. Schouler, DOMESTIC RELATIONS (5th Ed.) § 171; 21 Cyc. 1242.

Ryan v. Dockery, 114 N.W. 820, 821 (Wis. 1908), quoted in *Fricke*, 42 N.W.2d at 502.

We conclude that an antenuptial contract which purports to limit the husband's liability in the event of separation or divorce, regardless of the circumstances motivating its adoption or those attending its execution is void as against public policy. *Fricke*, 42 N.W.2d at 502.

One judge dissented in *Fricke*, and he argued that the rule automatically voiding *all* prenuptial contracts that attempted to limit support by husband — “no matter how generous” — was too rigid.

Iowa 1970-1973

In February 1970, the Iowa Supreme Court heard a case involving an alleged waiver of spousal support. Husband filed for divorce after four years of marriage. A trial court had ordered husband to pay spousal support from the date of separation, but the court did not grant a divorce. Husband appealed, and he claimed that his wife had, in a prenuptial contract, waived support if there were “domestic discord”.

However, the authorities are in general accord that provisions similar to this one are void as against public policy. *Williams v. Williams* (1926), 29 Ariz. 538, 243 P. 402; *Watson v. Watson* (1906), 37 Ind.App. 548, 77 N.E. 355; *Neddo v. Neddo* (1896), 56 Kan. 507, 44 P. 1; *Lindsay v. Lindsay* (1964, Fla.App.), 163 So.2d 336, 338-339; *Cohn v. Cohn* (1956), 209 Md. 470, 121 A.2d 704, 706; *In Re Appleby's Estate* (1907), 100 Minn. 408, 111 N.W. 305, 310, 10 L.R.A.,N.S., 590; *Motley v. Motley* (1961), 255 N.C. 190, 120 S.E.2d 422, 424; *Sanders v. Sanders* (1955), 40 Tenn.App. 20, 288 S.W.2d 473, 57 A.L.R.2d 932, 939; *Werlein v. Werlein* (1965), 27 Wis.2d 237, 133 N.W.2d 820, 822; *Caldwell v. Caldwell* (1958), 5 Wis.2d 146, 92 N.W.2d 356, 361; *Fricke v. Fricke* (1950), 257 Wis. 124, 42 N.W.2d 500, 502; RESTATEMENT, CONTRACTS, Section 584(1), Illustration 2, page 945; 24 AM.JUR.2D 187, Divorce and Separation, § 12; 57 A.L.R.2d 942.

The Iowa Supreme Court has not passed upon this question but dictum in *Kalsem v. Froland* (1928), 207 Iowa 994, 999, 222 N.W. 3, indicates we would follow the general rule.

The reason most frequently given is that the state's interest in preserving the marriage relationship makes any provision which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage contrary to public policy and void. *Neddo v. Neddo*, supra; *Cohn v. Cohn*, supra; *In Re Appleby's Estate*, supra; *Fricke v. Fricke*, supra; RESTATEMENT, CONTRACTS, § 584, page 1095; 24 AM.JUR.2D 187, Divorce and Separation, § 12; 57 A.L.R.2D 942, 943.

It is also against public policy to place an innocent party in a position where he or she would be forced to endure conduct which would constitute grounds for divorce because of fear that the commencement of an action for divorce would deprive the person of contracted property rights and means of support. *Sanders v. Sanders*.

Public policy has declared that certain obligations attach to a marriage contract including the duty of the husband to support his wife. It is against the public interest to permit the parties to enter into an antenuptial agreement relieving him of this duty. *Cohn v. Cohn*, supra; *Lindsay v. Lindsay*, supra; *Motley v. Motley*, supra; *Werlein v. Werlein*, supra; *Caldwell v. Caldwell*, supra; *Fricke v. Fricke*, supra; *Ryan v. Dockery* (1908), 134 Wis. 431, 434, 114 N.W. 820, 821, 15 L.R.A.,N.S., 491, 126 Am.St.Rep. 1025. *Norris v. Norris*, 174 N.W.2d 368, 369-370 (Iowa 1970).

In *Norris*, husband was 64 y old and wife was 67 y old. The husband had two previous marriages, and the wife had one previous marriage, each spouse had children by previous marriages. As a result of this marriage, which only lasted four years, wife apparently has a lifetime entitlement to spousal support, while wife has no obligation to husband, and wife provides no services to husband. However, the Iowa Supreme Court notes that the wife was “an innocent party, who, if the provision of the antenuptial contract were enforced, would be deprived of the right to separate maintenance because the husband refused to live with her.” *Norris*, 174 N.W.2d at 371. Under modern law, the husband would be granted a divorce on grounds of irreconcilable differences, and then there would be a dispute about alimony. However, in 1970 in Iowa divorces were only granted for specific reasons, and the trial judge found that the husband was *not* entitled to a divorce (i.e., “separation was without just cause”), so this case is about spousal support during a presumed permanent separation of the spouses.

Three years after *Norris*, the Iowa Supreme Court heard a case involving alimony after a divorce, in which an prenuptial contract allegedly waived alimony. The Iowa Supreme Court affirmed the trial court’s award of alimony, and reaffirmed *Norris*:

We hold that provisions of antenuptial agreements which prohibit alimony are contrary to public policy and void.

The rule has two principal bases. One is that such a provision may tend to facilitate or induce dissolution of the marriage. Walter argues it did not have that effect in this marriage. The policy which invalidates antenuptial prohibitions of alimony does not depend upon the result in a given case. It operates *ab initio* to void such provisions in every case.

The other basis for the rule is the principle that the interspousal support obligation is imposed by law and cannot be contracted away. *Norris v. Norris*, supra, at 370, and citations; *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (1939); [Iowa] § 598.21, The Code. The policy involved is that conditions which affect alimony entitlement cannot accurately be foreseen at the time antenuptial agreements are entered, and public interest in enforcement of the legal obligation to support overrides a premarital anticipatory forfeiture of alimony. *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327, 328 (1970).

This case illustrates the wisdom of the rule. Respondent (Hattie) was 66 at the time of trial with a life expectancy of more than 12 years. If she did not receive alimony she would leave the marriage with about \$10,000 in savings, \$64 monthly social security and no reasonable prospect of employment. She would be at the mercy of the uncertainties and vicissitudes of life. Walter, a 63 year-old farmer at the time of trial, would leave the marriage with a net worth of about \$150,000. He had revoked his will leaving Hattie a life estate in his farm.

At trial Hattie estimated her modest monthly needs at \$250. She could not reasonably meet them without alimony.

In re Gudenkauf’s Marriage, 204 N.W.2d 586, 587-588 (Iowa 1973).

I am particularly troubled by the last two paragraphs quoted above. The Iowa courts appear to believe that the marriage, which lasted only 13 years, entitled the wife to lifetime support (i.e., at least another 12 years of life expectancy) from her ex-husband. The ex-husband will need to pay alimony from either (1) assets he earned before the marriage, (2) *his* share of the marital assets

(i.e., the divorce court presumedly fairly divided the marital assets), or (3) his income after divorce. This is unfair to husband, since his ex-wife has no obligations to him, and she provides neither services nor benefits to him.

In August 2009, Iowa continues to automatically void any prenuptial contract that attempts to waive alimony, as explained at page 61, below.

California 1973

In December 1973, the California Supreme Court heard a complicated case in which the parties had signed a prenuptial contract in 1969, in which each renounced “any and all right for contribution to the support, maintenance and expenses of the other party”. Two weeks after the marriage, the wealthy wife then petitioned a court to be declared mentally incompetent and her petition was granted. In 1971, wife’s guardian ad litem filed for divorce, and the unemployed husband sought APL and payment of his medical expenses. The trial court denied the husband’s request for APL and husband appealed. The California Supreme Court noted the widespread legal rule that a prenuptial contract could *not* relieve a spouse of duty of financially supporting the other spouse:

In a note at 54 HARVARD LAW REVIEW 473 (1941) at page 478, it was said, with respect to contracts involving marital obligations: ‘(T)he most frequently litigated incident of the marital status is the duty of the husband to support his wife in accordance with his financial and social position. Any attempt by the parties to diminish or waive this obligation in an antenuptial agreement is unenforceable.’

This is the majority rule, as laid down in the following cases, among many others: *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422, 423-424; *Hillman v. Hillman*, 69 N.Y.S.2d 134, affirmed 273 App.Div. 960, 79 N.Y.S.2d 325; *Kershner v. Kershner*, 244 App.Div. 34, 278 N.Y.S. 501, 503-504, affirmed 269 N.Y. 655, 200 N.E. 43; *French v. McAnarney*, 290 Mass. 544, 195 N.E. 714, 715; *Warner v. Warner*, 235 Ill. 448, 85 N.E. 630, 638; *Ryan v. Dockery*, 134 Wis. 431, 114 N.W.2d 820, 821; cf. *Parker v. Commissioner of Internal Revenue* (9th Cir. 1948) 166 F.2d 364, 368; *Graham v. Graham* (D.C.E.D.Mich.N.D. 1940) 33 F.Supp. 936, 938-939; *Belcher v. Belcher* (Fla.) 271 So.2d 7, 9; *Reiling v. Reiling*, 1 Or.App. 571, 463 P.2d 591, 592; *Volid v. Volid*, 6 Ill.App.3d 386, 286 N.E.2d 42, 47; *Norris v. Norris* (Iowa) 174 N.W.2d 368, 370(4); *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521, 522-523.

As stated in *Ryan v. Dockery*, supra, 114 N.W. 820, 821: ‘Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself.’

In re Marriage of Higgason, 516 P.2d 289, 295-296 (Cal. 1973).

The California Supreme Court directed the trial court to award husband APL and to order wife to pay husband’s medical expenses. This decision is no longer good law in California, and is quoted here only to show the extensive list of authorities for the old rule of law.

South Dakota 1978

In 1978, the South Dakota Supreme Court summarized the old law, which continues to be valid in South Dakota:

At one time, it was the rule that any attempt by the parties to a marriage to diminish or waive by way of an antenuptial agreement a husband's duty to support his wife by way of alimony was unenforceable as being contrary to public policy. See *In re Marriage of Higgason*, 10 Cal.3d 476, 110 Cal.Rptr. 897, 516 P.2d 289, and cases cited therein. A concise statement of the bases for the rule is found in *In re Marriage of Gudenkauf*, Iowa, 204 N.W.2d 586, 587:

The rule has two principal bases. One is that such a provision may tend to facilitate or induce dissolution of the marriage. . . . The policy which invalidates antenuptial prohibitions of alimony does not depend upon the result in a given case. It operates *ab initio* to void such provisions in every case.

The other basis for the rule is the principle that the interspousal support obligation is imposed by law and cannot be contracted away. *Norris v. Norris*, (Iowa, 174 N.W.2d 368 (1970)) at 370, and citations; *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (N.Y. 1939); [Iowa Code] § 598.21, The Code. The policy involved is that conditions which affect alimony entitlement cannot accurately be foreseen at the time antenuptial agreements are entered, and public interest in enforcement of the legal obligation to support overrides a premarital anticipatory forfeiture of alimony. *Reiling v. Reiling*, 256 Or. 448, 474 P.2d 327, 328 (1970).

Connolly v. Connolly, 270 N.W.2d 44, 46 (S.Dak. 1978).

The next paragraph of *Connolly* concedes that *Reiling* was expressed overruled by *Unander v. Unander*, 506 P.2d 719, 720 (Or. 1973) (“We have concluded that we were incorrect in our decision in *Reiling*”) and also cites *Posner* (Fla. 1970) and *Volid* (Ill.App. 1972). I discuss these three modern cases later in this essay.

In August 2009, South Dakota continues to automatically void any prenuptial contract that attempts to waive alimony, as explained at page 62, below.

Louisiana 1978-1996

I normally ignore Louisiana in my nationwide searches for cases, because Louisiana civil law is derived from French law, unlike the other 49 states in the USA. However, Louisiana has some interesting cases on the waiver of alimony, and judges in Louisiana — unlike judges in most states — have carefully explained *why* waivers of alimony were not valid.

In 1963, a bride signed a prenuptial contract that waived “alimony, sustenance, alimony, support, maintenance or funds for any reason” from her husband. After she sued him for divorce in 1976, she sought an award of alimony pendente lite (APL). The trial court awarded her

\$400/month in APL. Husband appealed, but the Louisiana Supreme Court held that the prenuptial contract was void, as against public policy. The Louisiana Supreme Court cited two state statutes:

The husband and wife owe to each other mutually, fidelity, support and assistance.
Louisiana Civil Code, Article 119.

The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

Louisiana Civil Code, Article 120.

Holliday v. Holliday, 358 So.2d 618, 619-620 (La. 1978).

Notice that statute 120 is gender asymmetrical, with the husband as Lord & Master <grin> determining where both spouses shall live, and the husband solely obligated to support his wife.

The Louisiana Supreme Court voided the waiver of APL:

The right of the wife to seek alimony pendente lite does not depend at all upon the merits of the suit for separation from bed and board, or for divorce, or upon the actual or prospective outcome of the suit. The reason for this is that an order to pay alimony pendente lite is merely an enforcement of the obligation of the husband to support his wife as it exists under La.Civil Code art. 120, which continues during the pendency of a suit for separation from bed and board or for divorce and does not terminate until the marriage is dissolved either by death or by divorce. *Murphy v. Murphy*, 229 La. 849, 87 So.2d 4 (1956); *Messersmith v. Messersmith*, 229 La. 495, 86 So.2d 169 (1956); *Hillard v. Hillard*, [73 So.2d 442 (La. 1954)]; *Eals v. Swan*, 221 La. 329, 59 So.2d 409 (1952).

It is the public policy of this state as expressed in the provisions of La.Civil Code arts. 119, 120 and 148 that a husband should support and assist his wife during the existence of the marriage. It is against the public interest to permit the parties to enter into an antenuptial agreement relieving him of this duty imposed by law.[FN5] The policy involved is that conditions which affect entitlement to alimony pendente lite cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in enforcement of the legal obligation to support overrides the premarital anticipatory waiver of alimony.

FN5. The great weight of authority is in general accord. *Williams v. Williams*, 29 Ariz. 538, 243 P. 402 (1926); *Eule v. Eule*, 24 Ill.App.3d 83, 320 N.E.2d 506 (1974); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970); *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956); *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961); *Caldwell v. Caldwell*, 5 Wis.2d 146, 92 N.W.2d 356 (1958).

We, therefore, conclude that the provision of the antenuptial agreement in which plaintiff-wife waived her right to alimony pendente lite in the event of a judicial separation from bed and board is null and void as against public policy.[FN6] Hence, the court of appeal erred in recognizing the validity of the waiver as a bar to plaintiff's right to alimony pendente lite.

FN6. We express no opinion at this time regarding the validity of the clause in respect to its attempt to waive permanent alimony. This issue is not before us.
Holliday v. Holliday, 358 So.2d 618, 620 (La. 1978).

Justice Calogero dissented in an eloquent opinion, joined by Justice Summers, that said:

Neither am I persuaded by [wife's] contention and the majority's inference that alimony pendente lite is, in the public interest, essential to avoid a wife's becoming a social burden and/or ward of the state. This attitude is a demeaning one which is inconsistent with the realities of the day. It is simply not correct to assume that all, or most, women are incapable of financial independence but must, instead, be wholly dependent upon either their husbands or the state.

Furthermore, in this case, as in almost all marriages where the spouses have entered into an antenuptial agreement, there is no community of acquets and gains. The wife thus has the same control over her property between separation and divorce as she had prior to separation and prior to marriage. An antenuptial waiver by the wife of alimony pendente lite would make the wife no more of a burden on the state than she was prior to marriage. I therefore view alimony pendente lite as a right which is provided for the benefit of the individual and not for the protection of public order and good morals.

Holliday v. Holliday, 358 So.2d 618, 622 (La. 1978) (Calogero, J., dissenting).

McAlpine (La. 1996)

In 1989, both parties signed a prenuptial contract that waived both APL and permanent alimony. A trial court granted a divorce in 1992, and wife appealed, seeking permanent alimony in violation of her prenuptial contract. On initial hearing, the Louisiana Supreme Court voided the prenuptial contract:

Accordingly, it is against the public interest to permit the parties to a marriage contract to enter into an antenuptial agreement relieving them of any obligation to pay alimony after divorce. Conditions which affect entitlement to permanent alimony cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in preventing needy former spouses from having to seek public assistance overrides the premarital anticipatory waiver of alimony. See *Holliday v. Holliday*, 358 So.2d 618 (La. 1978) (Holding that a waiver of alimony pendente lite in an antenuptial matrimonial agreement was against public policy for similar reasons.) We therefore conclude that the provision of the antenuptial agreement in which Jonnie Fox McAlpine waived her right to alimony after divorce is null and void as in derogation of a law enacted to protect the public interest.

McAlpine v. McAlpine, 650 So.2d 1142, 1145-46 (La. 1995) (withdrawn), part quoted in 679 So.2d 85, 87 (La. 1996) (on rehearing).

On rehearing, the Louisiana Supreme Court rejected its initial opinion:

We now conclude that permanent alimony was not enacted to protect the *public* interest, but for the benefit of *individuals*. Further, we conclude that if protection of the public interest was ever a proper consideration for permanent alimony, that day has long since passed.

McAlpine v. McAlpine, 679 So.2d 85, 87 (La. 1996).

Moreover, the Louisiana Supreme Court quoted with approval the 1978 dissent by Justice Calogero in *Holliday. McAlpine*, 679 So.2d at 90-91 (“In today’s world, more women than ever are in the workforce and are capable of financial independence. Further, a waiver of permanent alimony would make the spouse incapable of financial independence no more of a burden than he or she was before marriage.”).

husband’s absolute duty of support

The duty of a husband to support his wife was an absolute requirement, which was *not* dependent on the wife providing services to her husband, unless wife had abandoned husband. A separate statute required the wife to provide services to the husband, and to live in the domicile chosen by husband.

While each state had a statute requiring the husband to support his wife, courts apparently did *not* enforce this statute in an intact marriage. The Pennsylvania Supreme Court dismissed a criminal prosecution of a husband for allegedly failing to support his wife.⁵ In a famous case, the Nebraska Supreme Court dismissed a wife’s complaint that her husband was too frugal.⁶ More citations to support the rule that courts will not intervene in an intact marriage are given in my essay at <http://www.rbs2.com/dcontract.pdf> .

If the statute requiring a husband to support his wife was not enforced during an intact marriage, one wonders what was the purpose of the statute. The answer seems to be that the statute expressed “a symbolized ideal of marriage”.⁷ As seen in *Garlock*, the statute also prevented private contracts between spouses on matters of financial support.

⁵ *Pennsylvania v. George*, 56 A.2d 228, 231 (Pa. 1948) (“The arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of a husband shall be expended where he has neither deserted his wife without cause nor neglected to support her and their children.”).

⁶ *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (“The living standards of a family are a matter of concern to the household, and not for the courts to determine, Public policy requires such a holding.”).

⁷ Gregg Temple, “Freedom of Contract and Intimate Relationships,” 8 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 121, 123 (Winter 1985) (citing Mary Ann Glendon, STATE, LAW AND FAMILY at 322).

mystical disability of women

Prof. Gamble, writing in 1972 about prenuptial contracts, said:

In viewing antenuptial contracts which provide for the settlement of property rights upon death, courts invariably have begun with the realization that between persons in the premarital state there is a mystical, confidential relationship which anesthetizes the senses of the female partner. Having recognized the mental frailty of the infatuated woman, the courts have become her self-proclaimed protector whenever a prospective husband has attempted to alter her property rights.

Charles W. Gamble. "The Antenuptial Contract," 26 UNIV. OF MIAMI LAW REVIEW 692, 719-720 (Summer 1972).

... the idea of a confidential relationship in which the prospective husband had hypnotic power over his future wife is an unrealistic picture of today's premarital relationship.

Ibid. at 723.

I agree with Prof. Gamble about discarding the mystical presumption that a woman is somehow incapable of negotiating contract rights with her future husband. However, in many cases,⁸ the husband is a middle-aged man with substantial business experience (including negotiating contracts), but the wife has no business experience. While I am a vigorous proponent of pre- and post-nuptial contracts, I think it is quite reasonable to impose affirmative duties of disclosure on the parties, so that one party does not take advantage of the ignorance of the other party.

A few judges have given this mystical disability the name "prehymeneal ardor". Frankly, I am aghast at judges who use sexual anatomy to characterize a woman's state of mind, but the history is clear:

- *Rocker v. Rocker*, 232 N.E.2d 445, 456 (Ohio Prob. 1967) ("Where it appears from the surrounding circumstances that the marriage contemplated by parties entering into an antenuptial property settlement is primarily one of convenience, so that the business judgment of the parties is unlikely to be clouded by the prehymeneal ardor and tenderness ordinarily assumed by the courts to be characteristic of those about to embark upon the matrimonial seas, the confidential relationship ordinarily found to exist may be found wanting and the courts may refuse to recognize any duty to disclose the nature and extent of the parties' property interests." Quoted from 27 A.L.R.2d 883, 889-890.);
- *In re Broadie's Estate*, 493 P.2d 289, 294 (Kan. 1972) ("These courts reason that the business judgments of the parties are not subject to being clouded by the prehymeneal ardor and tenderness which ordinarily is assumed to be present when a man and woman are about to embark upon matrimonial seas." 27 A.L.R.2d 883, 889 cited);

⁸ Prof. Gamble made a survey of all prenuptial contract cases reported during the years 1956 to 1966 and found that 80% of the cases "involved men who had been previously married." The men's ages were mentioned in about half of the cases, and in those cases 91% were over 50 y old. Charles W. Gamble. "The Antenuptial Contract," 26 UNIV. OF MIAMI LAW REVIEW 692, 730-733 (1972).

- *Lutgert v. Lutgert*, 338 So.2d 1111, 1116 (Fla.App. 1976) (“... therefore, it can hardly be said that she was mesmerized by pre-hymeneal ardor when she entered into the agreement.” No citation.);
- *Faiman v. Faiman*, Not Reported in A.2d, 2008 WL 5481382 at *9 (Conn.Super. 2008) (“... the court doubts she was mesmerized by pre-hymeneal ardor, but ...” Citation to *Lutgert* later in same paragraph.).

Rocker cites an article in AMERICAN LAW REPORTS (A.L.R.) without giving the author, title, or year. The full citation is: F. G. Madara, “Setting Aside Antenuptial Contract or Marriage Settlement on Ground of Failure to Make Proper Disclosure of Property Owned,” 27 A.L.R.2d 883, 889-890 (1953). The context of Madara’s remark is distinguishing “marriages of convenience” from marriages motivated by love. On 9 Sep 2009, I searched *The Making of the Modern Law*, an online collection of American law books published between the years 1800 and 1926, but I did *not* find the word “pre-hymeneal”. To the best of my knowledge, Madara’s article is the original source of this word.

General Remarks About Law

contract law

Contract law, even in the context of commercial transactions between two merchants, has long refused to enforce terms in a contract that are either unconscionable or contrary to public policy.

A contract is said to be unconscionable if a term is so unfair that no reasonable person would agree to it.⁹ If two people, each advised by an independent attorney, consider a prenuptial agreement and sign that agreement, then it is highly unlikely that the agreement is unconscionable in the sense that word is used in commercial contract law. In many cases, signing the prenuptial contract was a condition for the marriage to occur. The financially stronger party relied on the promise of the other party to honor the prenuptial contract. At divorce, when the financially weaker party challenges the validity of the prenuptial contract, or asks the judge to ignore a waiver of alimony in the prenuptial contract, that party has received the benefit of the bargain during the marriage, and then — at divorce — selfishly asks for more than what they agreed to accept in the prenuptial contract.

The public policy exception to enforcement of contracts is more nebulous. Judicial opinions in divorce cases during the 1900s often contained vague sentences about the interest of the state government in preserving marriages. The RESTATEMENT SECOND OF CONTRACTS, § 190, holds that a promise in a prenuptial or postnuptial contract “is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.” This RESTATEMENT codifies the common law that

⁹ RESTATEMENT SECOND OF CONTRACTS, § 208 (1981).

existed during the 1960s and 1970s, when this RESTATEMENT was written. Reading the RESTATEMENT makes it appear that the state government is paternalistically defining what *all* marriages *should* be (i.e., “some essential incident of the martial relationship”) and forbidding individuals from departing from that standard definition of a marriage. It is difficult to imagine something more private than a marital relationship, and therefore difficult to imagine something less appropriate for government regulation. Nonetheless, the public — and the legislature — has a long history of meddling in people’s marriages, as we are reminded by the current controversy over whether homosexuals should be permitted to have a same-gender marriage.¹⁰

¹⁰ In my opinion, the whole issue of same-gender marriage is very simple: homosexuals are *people*, and — as genuine people — they are entitled to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution. See, e.g., *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384, 76 Cal.Rptr.3d 683 (Cal. 15 May 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 3 Apr 2009). Therefore, a state *must not* discriminate between heterosexuals and homosexuals in any way, including issuing marriage licenses.

fiduciary relationship

The common law in most states has long held that a fiduciary relationship (sometimes called a “confidential relationship”) exists after betrothal, so a prenuptial contract is negotiated between parties who are in a fiduciary relationship to each other.¹¹ It is well known that married couples are in a fiduciary relationship to each other. Therefore, the fiduciary relationship begins at betrothal and continues throughout the marriage.

A contract negotiated between parties who are in a fiduciary relationship to each other requires more disclosure than in a typical contract between merchants, who deal at arm’s length. The presence of a fiduciary relationship for both the parties to prenuptial contracts and the parties to postnuptial contracts suggests that both prenuptial and postnuptial contracts should use the same rules for validity. My legal research¹² shows that courts in both Pennsylvania and Florida have explicitly stated that the same rules apply to both prenuptial and postnuptial contracts. I have not taken the time to research this issue for other states, but my reading of law review articles and one treatise has *not* suggested the existence of any state with different rules for prenuptial and postnuptial contracts.

¹¹ *Pierce v. Pierce*, 71 N.Y. 154, 158 (N.Y. 1877) (“The relationship of parties who are about to enter into the married state, is one of mutual confidence, and far different from that of those who are dealing with each other at arms length.”); *Juhasz v. Juhasz*, 16 N.E.2d 328, 331 (Ohio 1938) (“The rule supported by the weight of authority may be stated thus: An engagement to marry creates a confidential relation between the contracting parties and an antenuptial contract entered into after the engagement and during its pendency must be attended by the utmost good faith;....”); *Weeks v. Weeks*, 197 So. 393, 395 (Fla. 1940); *Levy v. Sherman*, 43 A.2d 25, 29-30 (Maryl. 1945) (“We think when an antenuptial contract is entered into in contemplation of marriage, whether the parties are engaged to marry at the time or not, it is required of each to make a frank, full, and truthful disclosure of their respective worth in real as well as personal property.”); *Cannon v. Cannon*, 865 A.2d 563, 573-574 (Maryl. 2005); *In re Kaufmann's Estate*, 171 A.2d 48, 50 (Pa. 1961) (“... an antenuptial agreement — even though the parties occupy toward each other a relationship of trust and confidence — is *presumptively* valid and binding upon the parties; while the law requires that each party to the agreement act with the utmost good faith and candor toward the other party,....”) [*Kaufmann* is cited with approval in *In re Hillegass' Estate*, 244 A.2d 672, 675 (Pa. 1968). See also *In re Kline's Estate*, 64 Pa. 122 (Pa. 1870).]; *Friedlander v. Friedlander*, 494 P.2d 208, 213 (Wash. 1972) (“It is well recognized that even an engagement to marry creates a confidential relationship. [citations omitted] Parties to a pre-nuptial agreement do not deal with each other at arm's length.”); *Rosenberg v. Lipnick*, 389 N.E.2d 385, 388 (Mass. 1979) (“... the parties [to an antenuptial contract] by definition occupy a confidential relationship and that the burden of disclosure rests upon both of them.”); *McHugh v. McHugh*, 436 A.2d 8, 12 (Conn. 1980).

But in California and New York states, betrothed parties to a prenuptial contract are *not* in a confidential relationship. *In re Marriage of Dawley*, 551 P.2d 323, 331 (Cal. 1976); *Eckstein v. Eckstein*, 514 N.Y.S.2d 47, 48-49 (N.Y.A.D. 1987); *Panossian v. Panossian*, 569 N.Y.S.2d 182, 184 (N.Y.A.D. 1991). In such states, it would be logical to subject a postnuptial contract to more stringent tests than a prenuptial contract.

¹² See pages 51 and 59, below.

voluntary, knowing, and intelligent waiver

A “voluntary, knowing, and intelligent waiver” standard is used in criminal law for a suspect to waive his/her constitutional rights. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 573-574 (1987); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Because legal rights under the U.S. Constitution are of a higher order than a legal right to alimony under state statute or state common law, I think satisfying the conditions for waiver of a constitutional right *should* be more than adequate for validly waiving alimony.

All three conditions for waiver (i.e., voluntary, knowing, and intelligent) are rarely mentioned in divorce cases, but I have found the following reported court cases that mention these three conditions:

- *Buettner v. Buettner*, 505 P.2d 600, 605 (Nev. 1973) (“In summary, we hold that the antenuptial contract should be enforced. It is not void as against public policy, and it was fair and reasonable in its provisions, understandably and intelligently entered into, and not obtained by fraud, misrepresentation or nondisclosure on the part of the wife.”);
- *McHugh v. McHugh*, 436 A.2d 8, 11 (Conn. 1980) (“To determine whether an antenuptial agreement relating to property was valid when made, courts will inquire whether any waiver of statutory or common-law rights, or the right to a judicial determination in any matter, was voluntary and knowing. only by requiring full disclosure of the amount, character, and value of the parties’ respective assets that courts can ensure intelligent waiver of the statutory rights involved.”);
- *Ryan v. Ryan*, 659 N.E.2d 1088, 1095 (Ind.App. 1995) (“... in order for a waiver of interest to be valid, the waiver must have been made knowingly, voluntarily and intelligently. *Marriage of Boren* (1985), Ind., 475 N.E.2d 690, 693.”). My reading of *Boren* did not find any of the three magic words.
- *Harbom v. Harbom*, 760 A.2d 272, 281 (Maryl.App. 2000) (“Regarding the actions of husband and wife after the marriage as tending to show whether the agreement was voluntarily and understandingly made, all of [wife’s] protestations that she was unaware of [husband’s] assets and that she did not knowingly and intelligently execute the antenuptial agreement, are contradicted by the circumstances leading to the execution of the agreement.”);
- *Austin v. Austin*, 839 N.E.2d 837, 840 (Mass. 2005) (remarking that the trial judge “found that the wife’s ‘waiver of alimony at that time was a knowing, voluntary and intelligent waiver’ ”.)

More commonly, two conditions (i.e., voluntary and knowing) are mentioned in connection with a prenuptial contract:

- *Hartz v. Hartz*, 234 A.2d 865, 871 (Maryl. 1967) (Party seeking to enforce prenuptial agreement must prove that the agreement was signed “... voluntarily, freely and with full knowledge of its meaning and effect.”);

- *Cary v. Cary*, 937 S.W.2d 777, 778 (Tenn. 1996) (“We have determined that a voluntary and knowing waiver or limitation of alimony in an antenuptial agreement is not void and unenforceable as contrary to public policy. Such provisions will be fully enforced unless enforcement will render the spouse deprived of alimony a public charge.”
At 782: “We conclude that a voluntary and knowing waiver or limitation of alimony in an antenuptial agreement is not per se void and unenforceable as contrary to public policy.”);
- *In re Marriage of Spiegel*, 553 N.W.2d 309, 315 (Iowa 1996) (“Our procedural fairness test — “fairly, freely and understandingly entered into” — reflects the usual concern that any waiver of rights be knowing and voluntary. See *In re Marriage of Smith*, 537 N.W.2d 678, 681 (Iowa 1995) (“Waiver is the ‘intentional or voluntary relinquishment of a known right.’ ”); *Anderson v. Low Rent Hous. Comm'n*, 304 N.W.2d 239, 249 (Iowa 1981) (Lavorato, J., dissenting) (“Waiver is generally defined as the voluntary and intentional relinquishment of a known right.”). Consistent with principles of waiver, we have always required a full disclosure or independent knowledge of the nature and extent of the parties' assets to ensure the agreement was fairly procured.”). Current Iowa statute only requires voluntariness, see *In re Marriage of Shanks*, 758 N.W.2d 506, 512 (Iowa 2008).
- *In re Marriage of Bonds*, 5 P.3d 815, 822-823 (Calif. 2000) (California Family Code §1615(a):) “A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:
 - (1) That party did not execute the agreement voluntarily.
 - [or]
 - (2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:
 - (A) That party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.
 - (B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
 - [and]
 - (C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.”)

The Uniform Premarital Agreement Act only requires: (1) knowledge of other party's assets *and* (2) voluntarily assent to agreement. See, e.g.:

- *Hoag v. Dick*, 799 A.2d 391, 393, n.1, 2002 ME 92, ¶8 (Maine 2002).
Also see: *In re Estate of Martin*, 938 A.2d 812, 819, 2008 ME 7, ¶16 (Maine 2008).
- *Marsocci v. Marsocci*, 911 A.2d 690, 696 (R.I. 2006);
- *Friezo v. Friezo*, 914 A.2d 533, 546, n.22 (Conn. 2007).

At divorce, an attorney often challenges the validity of a prenuptial agreement. Negotiating the agreement so that each party makes a voluntary, knowing, and intelligent waiver of legal rights gives the highest level of assurance that a judge at a divorce will enforce the literal terms of the agreement.

A waiver is *voluntary* if it is free from fraud, deceit, misrepresentation, coercion, duress, and undue influence. Each of these six defects interferes with free will in voluntarily agreeing to the contract. The established rules in contract law set a very difficult burden for a party who seeks to void a contract because of alleged coercion, duress, or undue influence.¹³

There are two kinds of *knowledge* in a waiver of alimony: (1) one must know the other party's wealth that could be used to pay alimony, and (2) one should know that there is a legal right to alimony.

In regard to the second kind of knowledge, the legal right of the financially weaker spouse to alimony is neither automatic nor absolute. Without a valid pre- or post-nuptial agreement, a judge will use a list of factors in a statute to determine *if* alimony should be awarded, as well as to determine the amount of alimony. A pre- or post-nuptial agreement specifying or waiving alimony may give the spouses the ability to contract out of the default rules established in the alimony statute.

In a criminal suspect's waiver of his/her constitutional rights, a so-called "intelligent waiver" refers to the suspect's mental capacity for understanding the significance or consequences of his/her waiver.¹⁴ The concept of an "intelligent waiver" is meant to protect children¹⁵ or idiots,¹⁶

¹³ See, e.g., Standler, Voluntary Consent in Prenuptial Contracts in the USA, <http://www.rbs2.com/dcontract3.pdf> (Sep 2009).

¹⁴ See, e.g., the U.S. Supreme Court's statements:
... the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
Moran v. Burbine, 475 U.S. 412, 421 (U.S. 1986).

As a general matter, ... an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U.S., at 479, 86 S.Ct., at 1630, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.
Patterson v. Illinois, 487 U.S. 285, 296 (U.S. 1988).
Quoted in *Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (U.S. 2009).

¹⁵ See, e.g., *Gilbert v. Merchant*, 488 F.3d 780, 791-792 (7thCir. 2007) ("Without some adult protection against this inequality [interrogation by adult policemen], a fourteen-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.... [*Gallegos v. Colorado*,] 370 U.S. 49, 54, 82 S.Ct. 1209, 1212-13, 8 L.Ed.2d 325 (U.S. 1962); see also *A.M. v. Butler*, 360 F.3d 787,

from a meaningless waiver of their rights. I suggest that the “intelligent waiver” requirement is likely to be critical in *very few* cases involving a prenuptial contract, because children can not marry, and because mentally retarded adults are not likely to marry people with substantial assets who want a prenuptial contract. Therefore, most people signing a prenuptial contract will be intelligent enough to satisfy the “intelligent waiver” requirement.

child support *not* waivable

There is one area of family life in which waivers of legal rights are *not* appropriate in prenuptial agreements. That forbidden area involves the legal right of children to support from their parents. The legal right to support belongs to the child, *not* to the parents, so the parents can *not* limit child support payments by contract between the parents. From the viewpoint of contract law, a child can *not* waive support, because children have the option of voiding any contract they sign, and thus a child can avoid legally binding obligations.¹⁷ In many situations, the child may not have been born when the parties negotiate and sign a prenuptial contract. My quick search of Westlaw found the following reported cases that explicitly state the *inability* of parents to contractually limit child support:

- *Knox v. Remick*, 358 N.E.2d 432, 436 (Mass. 1976) (“Parents may not bargain away the rights of their children to support from either one of them.”), cited in *Wilcox v. Trautz*, 693 N.E.2d 141, 147, n.7 (Mass. 1998);
- *In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986) (“Parents cannot lightly contract away or otherwise modify child support obligations; the court will give effect to such agreements only if they do not adversely affect the best interests of affected minor children.”).

In 1990, an intermediate appellate court in Colorado explicitly stated what is well-settled law nationwide:

Statutory provisions may not be modified by agreement of the parties if doing so would violate a public policy expressed in the statute or would affect the rights of the child which the statute was designed to protect. The law and policy of this state is that the needs of the

800-01 & nn. 10-11 (7th Cir. 2004); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis. L.Rev. 431, 432-33, 434-44 (noting the complexity of a decision to waive one's rights and explaining why, given the way in which an adolescent develops psycho-socially and his brain matures, a juvenile is ill-equipped to make a knowing and intelligent waiver without adult assistance.); *In re Patrick W.*, 163 Cal.Rptr. 848 (Cal.App. 1980) (13 y old boy who murdered his father had a right to speak with his grandparents prior to police interrogation).

¹⁶ See, e.g., *Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981) (A criminal suspect with a “subnormal intelligence” or in an “educable mental retardate category” requires an attorney present during questioning by police, in order to make an intelligent waiver of rights.).

¹⁷ RESTATEMENT SECOND OF CONTRACTS § 12, § 14 (1981).

children are of paramount importance and cannot be altered by the parties. A child has a legal right to support from both parents and both parents have a duty to provide reasonable support for the child. [citations omitted] we conclude that the parties may not preclude or limit the court's authority concerning child support.

In re Marriage of Miller, 790 P.2d 890, 892-893 (Colo.App. 1990).

- *Ort v. Schage*, 580 N.E.2d 335, 336 (Ind.App. 1991) (“An agreement to forego child support is unenforceable because the parent has no right to contract away the child’s support benefits.”);
- *In re Marriage of Pendleton and Fireman*, 5 P.3d 839 (Calif. 2000) (quoting California Family Code §1612(b): “The right of a child to support may not be adversely affected by a premarital agreement.”). This statute was copied from the Uniform Premarital Agreement Act of 1983, § 3(b), which was adopted in California in 1985.
- *Harvey v. Marshall*, 884 A.2d 1171, 1194, n.21 (Maryl. 2005) (citing *Duvall v. McGee*, 826 A.2d 416, 426 (Maryl. 2003): “the obligation of the father to support [his child], imposed by law, cannot be bargained away or waived.”). *Duvall* cites *Zouck v. Zouck*, 104 A.2d 573, 579 (Maryl. 1954).

In April 2006, the Florida Supreme Court wrote:

Florida public policy and law is unequivocal in its declaration that adult parents cannot barter away the best interests of their children or exclude the courts from reviewing terms or conditions of custody, visitation, or support. See, e.g., *Dorsett v. Dorsett*, 902 So.2d 947, 951 (Fla. 4th DCA 2005) (“It is incumbent upon the trial court to ensure that any purported agreement or arrangement between a child's parents does not shortchange the child's interests.”); *Knipe v. Knipe*, 840 So.2d 335, 340 (Fla. 4th DCA 2003) (stating that a trial court is not precluded from fine tuning a final judgment of dissolution in order to improve the children's lives); *Budnick v. Silverman*, 805 So.2d 1112, 1113 (Fla. 4th DCA 2002) (“The rights of support and meaningful relationship belong to the child, not the parent; therefore, neither parent can bargain away those rights.”); *Casbar v. Dicanio*, 666 So.2d 1028, 1030 (Fla. 4th DCA 1996) (stating that when parents attempt to contract away the rights of a child, such contracts are “void and unenforceable as contrary to public policy”); *Robinson v. State Dep't of Health & Rehab. Servs.*, 473 So.2d 228, 229 (Fla. 5th DCA 1985) (citing *Lee v. Lee*, 157 Fla. 439, 26 So.2d 177 (1946)) (“It is clear that parents may not contract away the rights of their children to support; nor may they waive a child's right to support by acquiescing in the obligated parent's nonpayment of support.”).

Morris v. Morris, 932 So.2d 1007, 1008 (Fla. 2006).

It is conventional for parties settling divorce litigation to include child support obligations in a written *postnuptial* agreement, but that agreement must be approved by a judge before it is legally enforceable. Note that such *postnuptial* settlement agreements are distinguishable from *prenuptial* agreements, and also distinguishable from *postnuptial* agreements about either marital assets or alimony, because the marriage has already disintegrated when a settlement agreement is signed.

Evolution of the Common Law

In the citations that follow, I mention some of the major court cases in the USA in which state courts ruled that parties could waive alimony in a prenuptial contract. However, be aware that holding that the waiver does not offend public policy does not imply that the judge in a divorce court will enforce the waiver. In most states, a judge can still award alimony to the financially weaker party if the judge believes that the waiver of alimony would either be *unconscionable* or make the weaker party indigent.

In Aug 2009, I searched the Westlaw database for all state courts. I have chosen to include only cases from the major states (California, New York, Florida, Pennsylvania), my state of Massachusetts, as well as a few other states that have a historically important case. I emphasize that the following text is *not* a complete list of *all* of the cases in state courts on this topic. (I would be pleased to undertake legal research for attorneys in any state(s), if I am paid for my time.)

Kentucky 1934

In an obscure case in the year 1934, an intermediate appellate court in Kentucky upheld a prenuptial contract limiting alimony to \$5000. After wife was granted a divorce for “abandonment and cruel and inhuman treatment” by husband, husband appealed the award of \$5000 in permanent alimony.

... the chancellor fixed the permanent alimony at the sum agreed on by the parties in lieu of dower, alimony, and separate maintenance, and in view of the relations of the parties, the great difference in their ages, and the fact that she was not altogether without fault, we are not prepared to say that appellee should have been allowed more than she agreed to accept, and expected to receive, when the marriage was consummated.

Smith v. Smith, 75 S.W.2d 351, 352-353 (Ky.App. 1934).

The opinion of the appellate court did *not* discuss the law of either prenuptial contracts or alimony. This prenuptial contract case has been ignored by subsequent courts, even in Kentucky. I mention this case to show that occasionally courts did uphold prenuptial contracts that waived or limited alimony, despite the general rule that such contracts were void.

Oklahoma 1960

In March 1960, the Oklahoma Supreme Court made an early holding that alimony could be waived in a prenuptial agreement. In that case, the prenuptial contract said:

It is further agreed by each of the parties hereto that in event of divorce that each will not assert any right or claim against the other for alimony or other property division and will seek or claim no right, title or interest to any property that the other spouse may have owned at the time of said marriage and will only claim an interest in such property as may have been accumulated during their married life.

And the court tersely held:

We have held that an antenuptial contract entered into between a man and woman in contemplation of their marriage that is just and reasonable will be upheld by the courts. *Talley v. Harris*, 199 Okl. 47, 182 P.2d 765; *Pence v. Cole*, 85 Okl. 69, 205 P. 172, and *Clark v. Clark*, 201 Okl. 134, 202 P.2d 990.

Hudson v. Hudson, 350 P.2d 596, 597 (Okl. 1960). It is not clear from reading the opinion that the justices of the Oklahoma Supreme Court recognized that they were making a revolutionary new common law.

Ten years after *Hudson*, the Iowa Supreme Court commented on *Hudson*:

The result reached in *Hudson v. Hudson* (1960), Okl., 350 P.2d 596, is contrary to the result reached here, but was decided on the general rule that a just and reasonable antenuptial contract will be upheld. There was no rejection of the public policy argument advanced here.

Norris v. Norris, 174 N.W.2d 368, 371 (Iowa 1970). In his review of antenuptial contract cases, Prof. Gamble said that the court in *Hudson* “ignored” the public policy argument against prenuptial contracts that waived alimony.¹⁸

Ten years after *Hudson*, the Florida Supreme Court, in the landmark case of *Posner*, commented on *Hudson*:

We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptial agreements of the parties relating to divorce is clearly discernible. Thus, in *Hudson v. Hudson*, Okl. 1960, 350 P.2d 596, the court simply applied to an antenuptial contract respecting alimony the rule applicable to antenuptial contracts settling property rights upon the death of a spouse and thus tacitly, if not expressly, discarded the contrary-to-public-policy rule.

Posner v. Posner, 233 So.2d 381, 384 (Fla. 1970).

Twenty-one years after *Hudson*, the Massachusetts Supreme Court commented tersely on *Hudson*:

One pre-1970 case, *Hudson v. Hudson*, 350 P.2d 596 (Okl. 1960), upheld an antenuptial contract in which each spouse waived alimony rights upon divorce; however, the decision met with virtual nonacceptance by other courts. See Gamble, *The Antenuptial Contract*, 26 U. MIAMI L.REV. 692, 715 (1972).

Osborne v. Osborne, 428 N.E.2d 810, 815, n.6 (Mass. 1981). *Osborne* seems to regard *Hudson* as a quirky decision that is out of the mainstream of American law, which it was in 1960.

However, forty years after *Hudson*, most states had accepted that prenuptial contracts could waive alimony.

¹⁸ Charles W. Gamble. “The Antenuptial Contract,” 26 UNIV. OF MIAMI LAW REVIEW 692, 715, n. 93 (Summer 1972).

There are at least two reasons why *Hudson* was not influential in persuading courts in other states to permit waivers of alimony in prenuptial contracts. First, the court in Oklahoma did *not* provide a detailed explanation of *why* it permitted the waiver of alimony. A result without a reason is *not* convincing. Second, Oklahoma is a state with a small population that is far from — and generally ignored by courts — in the Eastern USA.

Colorado 1966

In May 1966, the Colorado Supreme Court held that a wife had validly waived both alimony and attorney's fees in a *postnuptial* settlement contract. *Newey v. Newey*, 421 P.2d 464 (Colo. 1966). Note that the wife in *Newey* was a pharmacist who had accumulated some wealth, and husband paid her \$50,000 in exchange for waiving alimony and releasing other claims against husband — this is *not* a case involving an impecunious wife. *Newey* cites *International Trust Co. v. Liebhardt*, 139 P.2d 264, 267 (Colo. 1943) (“Alimony may be waived. The right to seek alimony may be surrendered for a valuable consideration.”). The court in *Newey* simply enforced the *postnuptial* contract in a straightforward way.

Postnuptial settlement contracts are distinguishable from *prenuptial* contracts that attempt to waive alimony, in that the marriage has already disintegrated when the settlement contract is signed, thus the settlement contract does not encourage divorce. There is no discussion in *Newey* about the nationwide rule that waivers of alimony are prohibited in *prenuptial* contracts.

Florida 1970

In March 1970, the Florida Supreme Court issued a landmark decision that influenced many other states to accept *prenuptial* contracts.

We have given careful consideration to the question of whether the change in public policy towards divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void *ab initio* as ‘contrary to public policy.’ If such an agreement is valid when tested by the stringent rules prescribed in *Del Vecchio v. Del Vecchio*, supra, 143 So.2d 17 [(Fla. 1962)], for ante- and post-nuptial agreements settling the property rights of the spouses in the estate of the other upon death, and if, in addition, it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that, under the rules applicable to *postnuptial* alimony and property settlement agreements referred to above, it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to conditions existing at the time the agreement was made. *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970).

However, the Florida Supreme Court in 1970 held that the alimony specified in the prenuptial agreement could be modified at divorce, to reflect “changed circumstances” (e.g., needs of wife, wealth of husband, health of parties, inflation, economic depression, etc.), as specified in a state statute enacted in 1935.

In *Posner*, the Florida Supreme Court remarked on the changed view of marriage:

Antenuptial or so-called ‘marriage settlement’ contracts by which the parties agree upon and fix the property rights which either spouse will have in the estate of the other upon his or her death have, however, long been recognized as being conducive to marital tranquility and thus in harmony with public policy. See *Del Vecchio v. Del Vecchio*, Fla. 1962, 143 So.2d 17, in which we prescribed the rules by which the validity of such antenuptial or postnuptial property settlement agreements should be tested. Such an agreement has been upheld after the death of the spouse even though it contained also a provision settling their property rights in the event of divorce or separation—the court concluding that it could not be said this provision ‘facilitated or tended to induce a separation or divorce.’ See *In re Muxlow's Estate*, 1962, 367 Mich. 133, 116 N.W.2d 43.

In this view of an antenuptial agreement that settles the right of the parties in the event of divorce as well as upon death, it is not inconceivable that a dissatisfied wife — secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her, but that she would be bound by the provisions limiting or waiving her property rights in the estate of her husband — might provoke her husband into divorcing her in order to collect a large alimony check every month, or a lump-sum award (since, in this State, a wife is entitled to alimony, if needed, even though the divorce is awarded to the husband) rather than take her chances on being remembered generously in her husband's will. In this situation, a valid antenuptial agreement limiting property rights upon death would have the same meretricious effect, insofar as the public policy in question is concerned, as would an antenuptial divorce provision in the circumstances hypothesized in *Crouch v. Crouch*, supra, 385 S.W.2d 288 [(Tenn.App. 1964)].

There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the ‘sanctity’ of a marriage — as being practically indissoluble, once entered into — held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no ‘guilty’ party—is being advocated by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for dissolution of a marriage upon pleading and proof of ‘irreconcilable differences’ between the parties, without assessing the fault for the failure of the marriage against either party.

With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.
Posner v. Posner, 233 So.2d 381, 383-384 (Fla. 1970).

The Florida Supreme Court then briefly reviewed cases in Oklahoma, Tennessee, Arkansas, Michigan, Wisconsin, and Montana during the years 1955-1967, of which only a few mentioned alimony in a prenuptial agreement.

Several commentators¹⁹ have noted that the Florida Supreme Court's decision in *Posner* was a landmark case that was highly influential to courts in other states. This conclusion is clear from reading subsequent cases in other states, nearly all of which cite *Posner*.

Illinois 1972

In June 1972, an intermediate appellate court in Illinois issued a widely cited opinion about prenuptial agreement. In this case, the wealthy husband was 60 y old and had three previous marriages when he was married to a 40 y old woman in 1965. They signed a prenuptial agreement three days before their marriage that provided a lump sum payment in lieu of alimony or separate maintenance and also in lieu of rights to marital property. Husband filed for divorce after almost four years of marriage, alleging "mental cruelty" by wife. The trial court awarded wife temporary alimony in excess of the amount specified in the prenuptial agreement and husband appealed. The appellate court reviewed decisions from other states that held that a prenuptial agreement could *not* limit alimony.

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

The most frequent argument made for holding agreements limiting alimony invalid is that such agreements encourage or incite divorce or separation. There is little empirical evidence to show that this assertion is well founded. It is true that a person may be reluctant to obtain a divorce if he knows that a great financial sacrifice may be entailed, but it does not follow from this that a person who finds his marriage otherwise satisfactory will terminate the marital relationship simply because it will not involve a financial sacrifice. It may be equally

¹⁹ *Brooks v. Brooks*, 733 P.2d 1044, 1049, n.7 (Alaska 1987) ("The case generally considered to mark the judicial watershed on prenuptial agreements is *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), ..."); *In re Marriage of Bonds*, 5 P.3d 815, 822 (Cal. 2000) (Says *Posner* "often cited as the seminal opinion on this issue"); Judith T. Younger, "Perspectives on Antenuptial Agreements," 40 RUTGERS LAW REVIEW 1059, 1069, n. 52 (Summer 1988); Allison A. Marston, Note, "Planning for Love: The Politics of Prenuptial Agreements," 49 STANFORD LAW REVIEW 887, 897 (April 1997); Brian Bix, "Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage," 40 WILLIAM & MARY LAW REVIEW 145, 151, n. 20 (Oct 1998).

cogently argued that a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability. See: dissent *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500.

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

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

The reasons given to justify the invalidation of all antenuptial agreements which limit the obligation of support upon divorce do not warrant the condemnation of all such agreements in the name of public policy. The law gives certain rights to both spouses upon marriage, but these rights may be waived or terminated upon divorce. Upon marriage, a spouse receives inchoate rights to dower and inheritance, but these rights may be waived or limited by contract. The general rule was set forth in *Seuss v. Schukat*, 358 Ill. 27, 33-34, 192 N.E. 668, 671 [(Ill. 1934)]:

Persons competent to contract may execute a valid antenuptial agreement. *Kuhnen v. Kuhnen*, 351 Ill. 591, 184 N.E. 874; *Kroell v. Kroell*, 219 Ill. 105, 76 N.E. 63, 4 Ann.Cas. 801. Although the law prescribes the rights of a husband and a wife in the property of each other, persons possessing the requisite legal capacity may, by such an agreement made in contemplation of marriage, exclude the operation of the law and determine for themselves what rights they will have in each other's property during the marriage and after its termination by death. *Wetsel v. Firebaugh*, 258 Ill. 404, 101 N.E. 602; *Becker v. Becker*, 241 Ill. 423, 89 N.E. 737, 26 L.R.A.(N.S.) 858; *Kroell v. Kroell*, supra. Antenuptial agreements are not against public policy but, on the contrary, if freely and intelligently made, are regarded as generally conducive to marital tranquility and the avoidance of disputes concerning property.

It is likewise well settled that a husband and wife may make a valid separation agreement by which one or each of them releases all his rights in the other's property, including inchoate rights to dower and inheritance. *Laleman v. Crombez*, 6 Ill.2d 194, 127 N.E.2d 489.

The law also imposes a duty of support upon a husband, but this may be terminated in a divorce decree. Section 18 of the Divorce Act (Ill.Rev.Stat. 1969, Ch. 40, par. 19), *Canady v. Canady*, 30 Ill.2d 440, 197 N.E.2d 42.

Once it appears (1) that some marital rights may be waived before the wedding and (2) that the right to support can be terminated upon divorce, it would be anomalous to hold that the parties cannot plan and agree on a course of action in the event that the marriage is unsuccessful and ends in divorce. Particularly is this true where the parties are older and where there is little danger that either party would be without support. The incidence of divorce in this country is increasing, and consequently more persons with families and established wealth are in a position to consider the possibility of a marriage later in life. Public

policy is not violated by permitting these persons prior to marriage to anticipate the possibility of divorce and to establish their rights by contract in such an event as long as the contract is entered with full knowledge and without fraud, duress or coercion. See: *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Hudson v. Hudson*, 350 P.2d 596 (Okl. 1960).

Peter Volid agreed to pay and Rita Volid agreed to receive the sum of \$600 per month for 125 successive months in lieu of all rights to alimony or support. It is not our province to make contracts, but to construe them. Courts cannot make for the parties better agreements than they themselves have been satisfied to make. *Green County, Kentucky v. Quinlan*, 211 U.S. 582, [596] ... [(U.S. 1909)].
Volid v. Volid, 286 N.E.2d 42, 46-47 (Ill.App. 1972).

Oregon 1973

In February 1973, the Oregon Supreme Court held that a prenuptial contract could limit alimony. The Court stated the facts of the case:

The parties can be classified as middleaged. Both had been married before. The husband had children by his previous marriage and was making substantial alimony and support payments. He was a man of property. There were no children of the present marriage. The wife had a well-paying position which she relinquished shortly after marriage.

The husband suggested before marriage that they enter an agreement. There was some negotiation between the parties' attorneys over the terms. As executed, it provided that in the event of divorce, the husband was to pay the wife \$500 per month alimony, provide a \$25,000 life insurance policy, and pay wife's medical expense. The property they each had upon entering marriage was to remain their separate property.

The husband filed for divorce about nine months after the marriage and the wife counterclaimed for divorce. The court found both parties were at fault, but the wife was least at fault and was awarded the divorce. The trial court awarded alimony per the agreement and observed that except for the agreement, alimony would not be appropriate because of the short existence of the marriage.

Unander v. Unander, 506 P.2d 719, 720 (Oregon 1973).

The Oregon Supreme Court then overruled its precedent in *Reiling*, which was decided only 18 months earlier:

Our decision in *Reiling* was based upon two premises: (1) agreements providing no alimony is to be paid encourage divorce because the husband is apt to treat his wife without the consideration he may have if he had foreseen that he may have been required to pay her alimony in the event of a divorce; and (2) "the state has a paramount interest in the adequate support of its citizens, and, therefore, the husband's duty of support, either before or after divorce, should not be left to private control." [*Reiling*,] 256 Or. at 450, 474 P.2d at 328 [(Or. 1970) (holding invalid an antenuptial agreement which provided that the wife would be paid no alimony)].

Upon further reflection we are now of the opinion that the first premise, that such agreements encourage divorce, is of extremely doubtful validity.

A recurring picture painted in many of the decisions holding such agreements void is of a wrong-doing husband attempting to escape liability for alimony to an innocent wife. At the time we decided *Reiling* divorce in Oregon, ostensibly, could only be awarded against one guilty of fault or greater fault. In practice this was not true and the legislature recognized the situation and provided for 'no fault' divorce. Oregon Laws 1971, ch. 280, p. 387. Now

evidence of 'fault' will ordinarily not be admissible and cannot be the basis of dividing property or awarding alimony. ORS 107.036.

The adoption of the 'no fault' concept of divorce is indicative of the state's policy, as exhibited by legislation, that marriage between spouses who 'can't get along' is not worth preserving. We believe a marriage preserved only because good behavior by the husband is enforced by the threat of having to pay alimony is also not worth preserving, particularly between spouses who typically are middleaged and have no children in the home.

If such marriages are regarded as worth preserving, as pointed out in *Reiling*, the provision for no alimony may work to preserve a marriage as much as to destroy it. The wife may 'bear with her husband's foibles because she knows she will receive no support in the event of divorce.' 256 Or. at 449, 474 P.2d at 328.

As we observed in *Railing*, the legislature has expressly approved antenuptial agreements concerning the spouses' respective personal property. ORS 108.140. We also observed that antenuptial agreements concerning the disposition of real property had been upheld. *Moore v. Schermerhorn*, 210 Or. 23, 307 P.2d 483, 308 P.2d 180, 65 A.L.R.2d 715 (1957). We decided they were not analogous to agreements foregoing alimony because they did not interfere with the interest of the state in the wife's welfare and with the right of the wife to receive adequate support from a former husband. Leaving aside that contention for the moment, such agreements can be a cause of divorce as much as an agreement on alimony. In *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), a wife was attacking an antenuptial agreement whereby she would receive \$500 per month alimony and surrender any claim to other property. The court held the provision valid. Pointing out the inconsistencies of the traditional view, the court observed that antenuptial agreements dividing property can be an incentive to divorce though such agreements have been favored in law. A spouse could wisely decide that she could better herself monetarily by obtaining a divorce with a lucrative alimony provision rather than waiting for her spouse to die and receive an impecunious testamentary disposition.[footnote to discussion of *Posner* in 4 CREIGHTON L.REV. 180 (1971).]

The second ground for our decision in *Reiling* was the more important; that is, that the state has an interest in the support of its citizens and one spouse's duty to support the other cannot be nullified by private agreement. We continue to regard this as a valid premise. Such a principle, however, does not necessarily lead to the conclusion that all antenuptial agreements concerning alimony are invalid.

We have now come to the conclusion that antenuptial agreements concerning alimony should be enforced unless enforcement deprives a spouse of support that he or she cannot otherwise secure.[FN2] A provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support.

FN2. The antenuptial agreement, of course, must be valid in other respects, particularly it must have been fairly entered into by spouses who have a fiduciary duty to each other which includes a duty of full disclosure of assets. *Newton v. Pickell*, 206 Or. 225, 230, 269 P.2d 508 (1954).

If the circumstances of the parties change, the court can modify the decree just as it can modify a decree based upon an agreement made in contemplation of divorce which has a provision regarding payment of support. *Warrington v. Warrington*, 160 Or. 77, 83 P.2d 479 (1938); *Prime v. Prime*, 172 Or. 34, 41-50, 139 P.2d 550 (1943); *Ross v. Ross*, 240 Or. 561, 564-566, 403 P.2d 19 (1965). [footnote omitted]

This solution has the merit of according the parties to the antenuptial bargain the same freedom of contract that other parties are accorded but preserving to the state the right to invalidate the contract when required to insure adequate support for one of its citizens.[FN4]

FN4. The Court of Appeals in *Reiling* noted that alimony was not necessary for the support of the wife; if it had been the court indicated the contract ‘would have to give way to that extent.’ 1 Or.App. 571, 463 P.2d 591, 592.

We were accurate in stating in *Reiling* that the great weight of authority held alimony provisions in antenuptial agreements were invalid. However, the very recent judicial trend is to the contrary. *Posner v. Posner*, supra (238 So.2d 381); *Valid v. Valid*, 6 Ill.App.3d 386, 286 N.E.2d 42 (1972).

We believe it necessary to depart from the principle of stare decisis primarily because we have become convinced that it is important to a large number of citizens, as typified by the parties to this case, that they be able to freely enter into antenuptial agreements in the knowledge that their bargain is as inviolate as any other except when it must be voided to provide support.

Unander v. Unander, 506 P.2d 719, 720-722 (Oregon 1973).

For later cases in Oregon, see *Simmons v. Simmons*, 728 P.2d 921 (Or.App. 1986) (does not cite *Unander*); *In re Marriage of McInnis*, 110 P.3d 639 (Or.App. 2005).

Unander has similar facts to *Valid* — both cases involved men who had been previously divorced, had children from previous marriages, and were at least “middle aged”. Such facts were important to judges who made new common law in the 1970s, but are no longer important facts.

Nevada 1973

In February 1973, the Nevada Supreme Court reviewed a prenuptial contract that limited alimony to \$500/month for five years. The Nevada Court considered *Hudson* in Oklahoma, *Posner* in Florida, and several other cases.

We have given careful consideration to whether antenuptial contracts settling alimony and property rights upon divorce are to be viewed in this state as void because contrary to public policy, and hold that they are not. Nevertheless, as with all contracts, courts of this state shall retain power to refuse to enforce a particular antenuptial contract if it is found that it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress. *Buettner v. Buettner*, 505 P.2d 600, 604 (Nev. 1973).

The Nevada Court concluded:

In summary, we hold that the antenuptial contract should be enforced. It is not void as against public policy, and it was fair and reasonable in its provisions, understandably and intelligently entered into, and not obtained by fraud, misrepresentation or nondisclosure on the part of the wife.

Buettner v. Buettner, 505 P.2d 600, 605 (Nev. 1973).

Connecticut 1976

In March 1976, an intermediate appellate court in Connecticut upheld a prenuptial agreement that waived alimony. At divorce, wife argued that the “antenuptial agreement that the wife should receive no alimony is void as contrary to public policy and that it cannot supersede the statutory power of the Superior Court to award alimony....” In the past, the wife had a good argument. However, the court noted that the law had evolved, and so the prenuptial contract was *not* void for offending public policy.

In view of the relatively equal status of women to men under the law, as it is now evolving, married couples should not be deprived of the right by contract to divide their property as they please. *In re Estate of Harbor*, 104 Ariz. 79, 449 P.2d 7 [, 15 (Ariz. 1969)].

‘By an antenuptial settlement or agreement the parties may define their property rights in property existing or after-acquired, and they may vary substantially property rights that would otherwise arise on their marriage by operation of law, superseding, in a sense, statutes on that subject. . . . Such agreements or settlements are favored by public policy as conducive to the welfare of the parties and the best purpose of the marriage relationship, and to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property, thus tending to remove one of the frequent causes of family disputes-contentions about property and allowances to the wife. What is law for the wife is also law for and governs the husband's rights in such cases. They stand on an equality, and if the terms of the contract would be valid as to the wife, they are equally so as to the husband.’

41 AM.JUR.2D, Husband and Wife, § 283.

While there is validity to the Madison Avenue pronouncement that ‘you've come a long way, baby,’ it is equally true that the former complete protective role of the court regarding alimony is no longer necessary in the light of social changes. The new concept of divorce, now euphemistically referred to as dissolution, in which there is no ‘guilty’ party, has added many new considerations involved in the award of alimony and also includes the right of the husband to obtain alimony as against his wife. General Statutes § 46-52. In her desire to come a long way, however, a woman has taken on correlative duties by operation of law.[footnote omitted]

With the fact that the ratio of marriages to divorce has reached a disturbing rate in many states and ‘(w)ith divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider . . .-and agree upon, if possible-the disposition of their property and the alimony rights of the wife (or of the husband) in the event their marriage, despite their best efforts, should fail.’ *Posner v. Posner*, 233 So.2d 381, 384 (Fla.).

Suffice it to say that there is nothing in the present agreement, taking into consideration the many social changes that have developed with reference to women's rights since the promulgation of the Married Women's Act, that offends the public policy of this state as enunciated in legislation and judicial decisions relative to the legal rights and duties of husband and wife.

Parniawski v. Parniawski, 359 A.2d 719, 721-722 (Conn.Super. 1976).

Strangely, *Parniawski* has *not* been cited in any subsequent Connecticut case in the Westlaw database on 17 Aug 2009.

Massachusetts 1981

In November 1981, the Massachusetts Supreme Court held that alimony could be waived in a prenuptial contract.

We conclude that we shall follow the reasoning of the *Posner* case [233 So.2d 381 (Fla. 1970)] and its progeny and uphold the contract. While the matter is not free from dispute, it is apparent that the significant changes in public policy during the last decade in the area of domestic relations warrant a tolerant approach to the use of antenuptial contracts as vehicles for settling the property rights of the parties in the event of divorce. In recent years the Legislature has abolished the doctrine of recrimination and recognized irretrievable breakdown as a ground for divorce. G.L. c. 208, § 1, as appearing in St. 1975, c. 698, § 1. The Legislature itself has thus removed significant obstacles to unhappy couples wishing to obtain a divorce. There is no reason not to allow persons about to enter into a marriage the freedom to settle their rights in the event their marriage should prove unsuccessful, and thus remove a potential obstacle to their divorce. We therefore hold that an antenuptial contract settling the alimony or property rights of the parties upon divorce is not per se against public policy and may be specifically enforced. We express no opinion on the validity of antenuptial contracts that purport to limit the duty of each spouse to support the other during the marriage. *Osborne v. Osborne*, 428 N.E.2d 810, 815-816 (Mass. 1981). Part quoted with approval in *Austin v. Austin*, 839 N.E.2d 837, 840 (Mass. 2005).

Colorado 1982

In November 1982, the Colorado Supreme Court considered a prenuptial contract that “allowed the wife no maintenance or other property division, unless she were at the time of the divorce disabled, in which case she would be entitled to receive payment of \$500 per month from the husband.” At divorce wife requested maintenance (i.e., alimony), but the trial court denied the request, because of the prenuptial contract. An intermediate appellate court reversed, holding the prenuptial contract was void as against public policy. The Colorado Supreme Court held the contract was valid and reinstated the trial court’s denial of maintenance.

There is no statutory proscription against contracting for maintenance in an antenuptial agreement. The same strict tests for full disclosure and absence of fraud and overreaching determine the basic validity of such provisions. However, such provisions may lose their legal vitality by reason of changing circumstances which render the antenuptial provisions for maintenance to be unconscionable at the time of the marriage dissolution. We hold that, even though an antenuptial agreement is entered into in good faith, with full disclosure and without any element of fraud or overreaching, the maintenance provisions thereof may become voidable for unconscionability occasioned by circumstances existing at the time of the marriage dissolution.

We arrive at this conclusion by considering, among other things, the public policy expressed and implicit in the Uniform Dissolution of Marriage Act. [Colorado Revised Statutes] Section 14-10-102 provides

One of the purposes of the Act is to mitigate potential harm to a spouse caused by the dissolution of marriage. This purpose militates against the strict enforcement of an antenuptial provision for maintenance which, while drafted with meticulous care and utmost good faith and perfectly reasonable at the time of the execution of the agreement, has since become unconscionable in terms of its application to the spouse at the time of the marriage dissolution. The policy to mitigate against potential harm is consistent with the legitimate governmental interest of the state generally to protect the health and welfare of its citizens. It is not unrealistic to recognize that the health and employability of the spouse may have so deteriorated during a marriage that to enforce the maintenance provisions of an antenuptial agreement would result in the spouse becoming a public charge. Thus, we do not subscribe to the view that the antenuptial agreement, even though entered into in accordance with the strict tests heretofore alluded to, is strictly enforceable regardless of intervening events which have rendered it in effect unconscionable.

Reinforcing our view are the provisions of the Act relating to court ordered disposition of property, section 14-10-113, and to maintenance, section 14-10-114. Section 113 authorizes a court to divide the marital property, except property excluded by a valid agreement of the parties. On the other hand, section 114 authorizes the court to order maintenance in accordance with the relevant factors therein specified, but this section does not make any exception to exclude valid prior agreements relating to maintenance. Separation agreements, as contrasted to antenuptial agreements, are subject to the tests of unconscionability both as to property and as to maintenance. Section 14-10-112. We view the absence of an exception in section 114, providing for maintenance, as evidence of a legislative intent not to preclude examination of antenuptial maintenance agreements for conscionability.

Having thus concluded that an antenuptial maintenance agreement is subject to judicial scrutiny for conscionability, we next examine the concept of unconscionability. Although the term unconscionability is not defined in the Act, we find guidance in the criteria expressed in 14-10-114, which define and circumscribe the court's authority to grant maintenance. That section provides:

"14-10-114. Maintenance. (1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of marriage by a court, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

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

In our view, unconscionability in the context of the Act as applied to a maintenance agreement exists when enforcement of the terms of the agreement results in a spouse having insufficient property to provide for his reasonable needs and who is otherwise unable to support himself through appropriate employment. See *In Re Lowery*, 39 Colo.App. 413, 568 P.2d 103 (1977), *aff'd*, 195 Colo. 86, 575 P.2d 430 (1978); *In re Wigner*, 40 Colo.App. 253, 572 P.2d 495 (1977); *In Re the Marriage of Eller*, 38 Colo.App. 74, 552 P.2d 30 (1976); see also *In Re Marriage of Higgason*, 10 Cal.3d 476, 110 Cal.Rptr. 897, 516 P.2d 289 (1973); *Marriage of Winegard*, 278 N.W.2d 505 (Iowa 1979).

“We have now come to the conclusion that antenuptial agreements concerning alimony should be enforced unless enforcement deprives a spouse of support that he or she cannot otherwise secure. A provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support.” *Unander v. Unander*, 265 Or. 102, 506 P.2d 719, 721 (1973); see also *Parniawski v. Parniawski*, 33 Conn.Sup. 44, 359 A.2d 719 (1976); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Volid v. Volid*, 6 Ill.App.3d 386, 286 N.E.2d 42 (1972); *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Hudson v. Hudson*, 350 P.2d 596 (Okl. 1960).

Thus, one who claims that an antenuptial maintenance agreement is unconscionable must prove that at the time of the marriage dissolution the maintenance agreement rendered the spouse without a means of reasonable support, either because of a lack of property resources or a condition of unemployment. [FN8]

FN8. We are aware that subjecting an antenuptial agreement providing for maintenance to a review by the court as to unconscionability diminishes the right of every person to contract in his own perceived best interests. However, the public policy considerations, in our view, override the liberty interest of persons to enter into contractual arrangements in the context of a proposed marriage relationship.

III.

In the present case the trial court found no fraud or overreaching in the making of the antenuptial agreement, and found that the wife had knowingly agreed to execute an antenuptial agreement which fixed her rights in the event of divorce. It is apparent that the wife was sufficiently concerned with her future support that the antenuptial agreement included a provision that if she were to become disabled and unable to work for her own support, her husband would pay her \$500 per month. The parties agreed at the time of the execution of the antenuptial agreement that the wife would continue her education with an intent to work for her own support, and she has made no showing that she is unable to do so. It appears from the record that in accordance with the mutual plan of the parties at the time of the execution of the agreement, the wife completed her college education during the marriage and at the time of the hearing on dissolution was employed as an accountant earning over \$1,500 per month.

Applying the statutory criteria to the undisputed facts for the purpose of determining whether the antenuptial maintenance agreement is conscionable in relation to the reasonable needs of the wife as of the date of dissolution, we conclude that no unconscionability exists. The parties have no children. The wife has completed her education, is self-supporting, and earning \$1,500 per month as an accountant. We further conclude that no reason exists to set aside the maintenance terms of the antenuptial agreement.

Newman v. Newman, 653 P.2d 728, 734-736 (Colo. 1982).

Uniform Premarital Agreement Act 1983

The Uniform Premarital Agreement Act (UPAA) of 1983 specifically says:

Parties to a premarital agreement may contract with respect to: the modification or elimination of spousal support;

Uniform Premarital Agreement Act, § 3(a)(4). Quoted from UNIFORM LAWS ANNOTATED, Vol. 9C, p. 43 (2001 edition). California, in 1985, was the first state to adopt this Uniform Act. By the year 2003, 26 states and the District of Columbia had adopted this Uniform Act, although a few states omitted the waiver of spousal support.²⁰ In states that have adopted the Uniform Act, or something similar, there is now a statutory basis for waiving alimony in a prenuptial agreement.

Interestingly, the real significance of the UPAA to the waiver of alimony is *not* in what is permitted in prenuptial contracts, but in specifying how prenuptial contracts are to be enforced at divorce:

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

Uniform Premarital Agreement Act, § 6(b). Quoted from UNIFORM LAWS ANNOTATED, Vol. 9C, p. 49 (2001 edition).

The legal standard for a waiver of constitutional rights is “voluntary, knowing, and intelligent”²¹ The UPAA does *not* require a party to know what legal rights that are being waived in the contract.²² I have not seen an explanation for why the UPAA has this omission. Requiring representation of each party by an attorney is the best way to inform the parties of legal rights that are waived in the contract. My guess is that the authors of the UPAA did not want to depart from the American rule that parties can assent to contracts without legal advice from an attorney.

There is another controversial feature of the UPAA, in which a prenuptial contract is *not* enforceable if it is *both* (1) unconscionable when signed, *and* (2) the financially weaker party did *not* make a knowing waiver of rights. Uniform Premarital Agreement Act, § 6(a)(2). This is a departure from ordinary contract law, in which unconscionability alone makes a contract

²⁰ Susan Wolfson, “Premarital Waiver of Alimony,” 38 FAMILY LAW QUARTERLY 141, 145, 154 (Spring 2004).

²¹ See discussion beginning at page 23, above.

²² Barbara Ann Atwood, “Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act,” 19 JOURNAL OF LEGISLATION 127, 144, 149 (1993).

unenforceable. Several law professors have criticized the UPAA on this ground.²³ On the other hand, if judges can use unconscionability alone to void a contract, then the judges can use their personal opinion of the fairness of the contract to void the bargain that the spouses made. Making it easier for judges to void prenuptial contracts makes those contracts an *uncertain* and *unreliable* device for financial planning.²⁴ It also allows the financially weaker party to obtain the benefit of the bargain during the marriage, and then, at divorce, obtain benefits that she/he had previously agreed to waive or relinquish — a result that is unfair to the financially stronger party. I agree with *Simeone* in Pennsylvania²⁵ that judges should not be evaluating prenuptial contracts for fairness or reasonableness — just enforce the contract.

Maryland 1984

In February 1984, the highest state court in Maryland held that alimony could be waived in a prenuptial agreement, thus overruling *Cohn*, 121 A.2d 704 (Maryl. 1956):

In reviewing the caselaw we find that a majority of the jurisdictions that have considered the question [i.e., “whether a provision in an antenuptial agreement that contemplates separation or dissolution of a marriage, by which a spouse waives alimony, is per se void as contrary to public policy.” *Frey*, 471 A.2d at 707.] in recent years no longer find the policy reasons that were relied upon in *Cohn* to be valid, and they have abandoned the view that such antenuptial provisions are void automatically as a matter of public policy. *Newman v. Newman*, Colo., 653 P.2d 728 (1982) (en banc); *Burtoff v. Burtoff*, 418 A.2d 1085 (D.C. 1980); *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Valid v. Valid*, 6 Ill.App.3d 386, 286 N.E.2d 42 (1972); *Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629 (1978); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981); *Ferry v. Ferry*, 586 S.W.2d 782 (Mo.App. 1979); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Hudson v. Hudson*, 350 P.2d 596 (Okl. 1960); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973). Cf. *Holliday v. Holliday*, 358 So.2d 618 (La. 1978) (waiver of alimony pendente lite is against public policy; not decide question of permanent alimony); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978) (not void per se, but court has ultimate authority). **Contra** *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973); *Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982); *Duncan v. Duncan*, 652 S.W.2d 913 (Tenn.App. 1983). We find this authority persuasive, and we now reject the rule that a waiver of alimony provision in an

²³ Barbara Ann Atwood, “Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act,” 19 JOURNAL OF LEGISLATION 127, 146 (1993); Gail Frommer Brod, “Premarital Agreements and Gender Justice,” 6 YALE JOURNAL LAW & FEMINISM 229, 275-278 (Summer 1994); Brian Bix, “Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage,” 40 WILLIAM & MARY LAW REVIEW 145, 155-156 (Oct 1998).

²⁴ Writing in 2001, approximately thirty years after prenuptial contracts began to be accepted by courts, a law professor said in her survey of prenuptial contracts:

As one reads through the cases[,] one is still struck by the uncertainty of enforcement of these agreements and the lack of uniformity in result, not only from jurisdiction to jurisdiction, but among trial and appellate courts ruling on the same facts in the same case and in the same state. Judith T. Younger, “Antenuptial Agreements,” 28 WILLIAM MITCHELL LAW REVIEW 697, 717 (2001).

²⁵ See page 49, below.

antenuptial agreement is void per se as contrary to public policy. We agree with the Supreme Judicial Court of Massachusetts' holding in *Osborne*, "that an antenuptial contract settling the alimony or property rights of the parties upon divorce is not per se against public policy and may be specifically enforced." 428 N.E.2d at 816. "The common law is ... subject to modification by judicial decision in light of changing conditions or increased knowledge where this Court finds that it is a vestige of the past, no longer suitable to the circumstances of our people." *Felder v. Butler*, 292 Md. 174, 182, 438 A.2d 494, 499 (1981) (citations omitted). We hold the policy reasons supporting *Cohn* are no longer suitable today. *Frey v. Frey*, 471 A.2d 705, 710 (Maryl. 1984) [boldface added by Standler].

The court in *Frey* specifically noted changing social conditions motivated the change in public policy, so that antenuptial contracts would now be allowed to waive alimony. *Frey*, 471 A.2d at 707-710.

Indiana 1985

In March 1985, the Indiana Supreme Court upheld a prenuptial contract that wife "would limit her claim against her husband" to a lump-sum payment of \$5000. The Indiana Supreme Court endorsed the Maryland Supreme Court decision in *Frey*.

In the past, in some cases, policy considerations have dictated that antenuptial agreements providing for property settlement upon divorce are not binding upon the court. See Annot., 57 A.L.R.2d 942 and *Watson v. Watson*, (1906) 37 Ind.App. 548, 77 N.E. 355. However, policy considerations regarding marriage and antenuptial agreements which address themselves to property settlements in the event of divorce have changed significantly as the institution of marriage and marriage laws have changed.

Two of the significant changes in the institution of marriage and marriage laws in recent years are the increase in the number of divorces and the implementation of "no-fault" divorce laws. A natural consequence of the increased number of divorces is the increased incidence of subsequent marriages. As more and more persons, especially those who are older and have children from previous marriages, enter into subsequent marriages, they may wish to protect their property interests for the benefit of themselves and/or their children. Such agreements can only promote or facilitate marital stability by settling the expectations and responsibilities of the parties. *Frey v. Frey*, 471 A.2d at 709 [(Maryl. 1984)] [footnote omitted] *In re Marriage of Boren*, 475 N.E.2d 690, 693-694 (Ind. 1985).

West Virginia 1985

In April 1985, the West Virginia Supreme Court held that alimony could be waived in a prenuptial agreement. *Gant v. Gant*, 329 S.E.2d 106 (W.Va. 1985).

Pennsylvania 1986-1990

See page 48, below.

Tennessee 1996

In June 1996, the Tennessee Supreme Court held that alimony could be waived in a prenuptial agreement. *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996) (“We conclude that a voluntary and knowing waiver or limitation of alimony in an antenuptial agreement is not per se void and unenforceable as contrary to public policy.”).

Louisiana 1996

In September 1996, the Louisiana Supreme Court held that prenuptial contracts that waived alimony were no longer void as against public policy. *McAlpine v. McAlpine*, 679 So.2d 85 (La. 1996), which is mentioned at page 17, above.

California 2000

In 1985, California adopted the Uniform Premarital Agreement Act (UPAA),²⁶ but omitted the subsection in the UPAA that allowed a premarital agreement to either modify or eliminate spousal support.

In August 2000, the California Supreme Court noted the change in law, owing to the modern view that marriage was no longer always “until death do us part”:

At one time, a premarital agreement that was not made in contemplation that the parties would remain married until death was considered to be against public policy in California and other jurisdictions (see *In re Marriage of Higgason* (1973) 10 Cal.3d 476, 485, 110 Cal.Rptr. 897, 516 P.2d 289; see also *Brooks v. Brooks*, supra, 733 P.2d [1044,] at pp. 1048-1049, fn. 4, and cases cited [(Alaska 1987)]), but this court concluded in 1976 that the validity of a premarital agreement “does not turn on whether the parties contemplated a lifelong marriage.” (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 352, 131 Cal.Rptr. 3, 551 P.2d 323.) The latter opinion was in conformity with the emerging view in other jurisdictions that a premarital agreement concerning the disposition of property upon the dissolution of a marriage was not against public policy. (See *Posner v. Posner* (Fla. 1970) 233 So.2d 381, 385 [often cited as the seminal opinion on this issue].) *In re Marriage of Bonds*, 5 P.3d 815, 822 (Cal. 2000).

In a different case, also decided in August 2000, the California Supreme Court held that alimony could be waived in a prenuptial agreement. First, the court reviewed the law in other states:

Some 41 jurisdictions have already abandoned the common law restrictions on premarital waivers of spousal support. In 21 jurisdictions, premarital waivers of spousal support are authorized by statutes that either adopt all or substantially all of the provisions of the Uniform Act.[FN9] One jurisdiction (New York) had other statutory authorization for such waivers,

²⁶ See page 41, above.

[FN10] and in another 18 the right to enforce a premarital waiver of spousal support exists pursuant to judicial decision.[FN11]

FN9. Arizona (Ariz.Rev.Stat. § 25-203); Arkansas (Ark.Code Ann. § 9-11-403); Connecticut (Conn.Gen.Stat. Ann. § 46b-36d); Delaware (Del.Code Ann. tit. 13, § 323); District of Columbia (D.C.Code Ann. § 30-143 (1981)); Hawaii (Haw.Rev.Stat. § 572 D-3); Idaho (Idaho Code § 32-923); Illinois (750 Ill. Comp. Stat. 10/4); Kansas (Kans.Stat. Ann. § 23-804); Maine (Me.Rev.Stat. Ann. tit. 19-A, § 604); Montana (Mont.Code Ann. § 40-2-605); Nebraska (Neb.Rev.Stat. § 42-1004); Nevada (Nev.Rev.Stat. § 123A.050); New Jersey (N.J.Stat. Ann. § 37:2-34); North Carolina (N.C. Gen. Stat. § 52B-4); North Dakota (N.D. Cent.Code § 14-03.1-03); Oregon (Or.Rev.Stat. § 108.710); Rhode Island (R.I. Gen. Laws § 15-17-3); Texas (Tex. Fam.Code Ann. § 4.003); Utah (Utah Code Ann. § 30-8-4); and Virginia (Va.Code Ann. § 20-150). An Indiana statute is similar to the Uniform Act. (Ind.Code § 31-11-3-5.)

FN10. New York (N.Y. Dom. Rel. Law § 236, pt. B, 3).

FN11. **Alabama** (*Ex parte Walters* (Ala. 1991) 580 So.2d 1352, 1354 [enforceable if “[1] ... the consideration was adequate and ... the entire transaction was fair, just and equitable from the other person's point of view, or [2] ... the agreement was freely and voluntarily entered into by the other party with competent independent advice and full knowledge of her interest in the estate and its approximate value’ ”]); **Alaska** (*Brooks v. Brooks* (Alaska 1987) 733 P.2d 1044, 1050-1051 [“prenuptial agreements legally procured and ostensibly fair in result are valid and can be enforced”]); **Colorado** (*Newman v. Newman* (Colo. 1982) 653 P.2d 728, 731-734 [parties have fiduciary relationship and must act in good faith with high degree of fairness and disclosure of all material circumstances]); **Florida** (*Snedaker v. Snedaker* (Fla. Dist. Ct. App. 1995) 660 So.2d 1070, 1072 [agreement must be fair and reasonable; not necessary to demonstrate disclosure or knowledge of extent of property]); **Georgia** (*Scherer v. Scherer* (1982) 249 Ga. 635, 640-641 [292 S.E.2d 662] [not enforceable if unconscionable, procured through fraud, duress or mistake, or nondisclosure of material facts, or changed circumstances make enforcement unfair and unreasonable]); **Kentucky** (*Edwardson v. Edwardson* (Ky. 1990) 798 S.W.2d 941, 946 [full disclosure required and will not be enforced if unconscionable at time enforcement sought]); **Louisiana** (*McAlpine v. McAlpine* (La. 1996) 679 So.2d 85, 93 [Civil Code provisions applicable to contracts generally apply]); **Maryland** (*Frey v. Frey* (1984) 298 Md. 552 [471 A.2d 705] [enforceable if fair and equitable in procurement and result, with full disclosure of assets and entered into voluntarily with full knowledge of meaning and effect]); **Minnesota** (*Hill v. Hill* (Minn. Ct. App. 1984) 356 N.W.2d 49, 55 [court will review for unconscionability at time enforcement sought]); **Missouri** (*Gould v. Rafaeli* (Mo. Ct. App. 1991) 822 S.W.2d 494, 497 [enforceable if “ ‘entered into freely, fairly, knowingly, understandingly and in good faith and with full disclosure’ ”]); **New Hampshire** (*MacFarlane v. Rich* (1989) 132 N.H. 608, 613-614 [567 A.2d 585, 588] [enforceable if not obtained through fraud, duress, mistake, misrepresentation or nondisclosure of material fact, if not unconscionable, and circumstances have not changed]); **Ohio** (*Gross v. Gross* (1984) 11 Ohio St.3d 99, 105 [464 N.E.2d 500, 506] [enforceable if entered into freely without fraud, duress, coercion or overreaching, with full disclosure or knowledge and understanding of the party's property, and if terms do not promote or encourage divorce]); **Oklahoma** (*Hudson v. Hudson* (Okla. 1960) 350 P.2d 596); **Pennsylvania** (*Simeone v. Simeone* (1990) 525 Pa. 392 [581 A.2d 162]

[enforceable if just and reasonable]); **South Carolina** (*Gilley v. Gilley* (1997) 327 S.C. 8 [488 S.E.2d 310, 312]); **Tennessee** (*Cary v. Cary* (Tenn. 1996) 937 S.W.2d 777 [enforceable if entered into freely and knowledgeably, with disclosure, absent undue influence or overreaching, but not if spouse will become public charge]); **West Virginia** (*Gant v. Gant* (1985) 174 W.Va. 740 [329 S.E.2d 106, 112 [agreement must be entered into voluntarily and knowledgeably]); and **Wisconsin** (*Hengel v. Hengel* (1985) 122 Wis.2d 737, 365 N.W.2d 16). **South Dakota**, like California, has adopted the Uniform Act without section 3, subdivision (a)(4) and section 6, subdivision (b), and case law does not permit enforcement. (S.D. Codified Laws §§ 25-2-18, 25-2-24; *Connolly v. Connolly* (S.D. 1978) 270 N.W.2d 44, 46).

In re Marriage of Pendleton and Fireman, 5 P.3d 839, 845-846 (Calif. 2000) [boldface added by Standler].

The California Supreme Court concluded:

We agree with the Court of Appeal [*In re Marriage of Pendleton*, 72 Cal.Rptr.2d 840 (Cal.App. 2Dist. 1998)], therefore, that, when entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy. Such agreements are, therefore, permitted under [California Family Code] section 1612, subdivision (a)(7), which authorizes the parties to contract in a premarital agreement regarding “[a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”

We need not decide here whether circumstances existing at the time enforcement of a waiver of spousal support is sought might make enforcement unjust.[footnote omitted] It is enough to conclude here that no public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver. Such a waiver does not violate public policy and is not per se unenforceable as the trial court believed.

In re Marriage of Pendleton and Fireman, 5 P.3d 839, 848-849 (Calif. 2000).

Note the court specifically mentioned “intelligent, well-educated persons”. Note that these parties in this case were both educated professionals, although the husband had a higher income:

Candace, who had two children from a prior marriage, held a master’s degree and was an aspiring writer [with a net monthly income of \$4,233]. Barry, who held a doctorate in pharmacology and a law degree, was a businessman with ownership interests in numerous companies and business ventures.

In re Marriage of Pendleton and Fireman, 5 P.3d 839, 840 (Calif. 2000).

The California state legislature responded to *Pendleton* by amending the statute, to add the following subsection to California’s version of the Uniform Premarital Agreement Act:

Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

California Family Code § 1612(c) (enacted Sep 2001, current Aug 2009).

South Carolina 2003

In August 2003, the South Carolina Supreme Court held that a prenuptial contract could validly waive both alimony and attorney's fees for divorce. The contract in this case stated:

That each party, in the event of separation or divorce, shall have no right against the other by way of claims for support, alimony, attorney's fees, cost, or division of property, except as specifically stated hereinafter.

At divorce, the trial court awarded wife \$4250/month in alimony, plus ordered husband to pay attorney's fees (including accounting costs) of \$100,000. Husband appealed and the intermediate appellate court reversed the alimony and attorney's fees. The South Carolina Supreme Court affirmed the appellate court below, and noted the evolution of the law:

As noted by the Court of Appeals in this case, "[t]he current trend and majority rule allows parties to prospectively contract to limit or eliminate spousal support." [*Hardee*,] 348 S.C. at 94, 558 S.E.2d 264 at 269 [(S.C.App. 2001)], citing *Pendleton v. Fireman*, 24 Cal.4th 39, 99 Cal.Rptr.2d 278, 5 P.3d 839, 845-46 (2000); Allison A. Marston, Planning for Love: The Politics of Premarital Agreements, 49 STAN. L. REV. 887, 897-99 (1997). As noted in Richard A. Lord, 5 WILLISTON ON CONTRACTS § 11:8 (4th ed.) (May 2003):

In the past two decades ... the courts have reconsidered ... public policy in light of societal changes, and today, premarital agreements, so long as they do not promote divorce or otherwise offend public policy, are generally favored as conducive to the welfare of the parties and the marriage relationship as they tend to prevent strife, secure peace, and adjust, settle, and generally dispose of rights in property.

Accord *Cary v. Cary*, 937 S.W.2d 777, 782 (Tenn. 1996) (declaring agreements waiving or limiting alimony enforceable, "so long as the antenuptial agreement was entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching"); Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law, 116 HARV. L. REV. 2075 (May 2003) (noting that states have shifted from holding antenuptial agreements per se invalid as contrary to public policy to holding them judicially enforceable). We concur with the majority of jurisdictions which hold that prenuptial agreements waiving alimony, support and attorney's fees are not per se unconscionable, nor are they contrary to the public policy of this state.FN3

FN3. Wife cites *Towles v. Towles*, 256 S.C. 307, 182 S.E.2d 53 (1971) for the proposition that a contractual waiver of spousal support or alimony is against public policy and void. *Towles* involved a reconciliation agreement entered into subsequent to the marriage; it is therefore distinguishable from the present case. In any event, we take this opportunity to overrule *Towles* in light of its outdated views concerning women. There, we invalidated a reconciliation agreement finding it "tantamount to a release of the husband of his duty to perform his essential marital obligations and ... therefore, void as against public policy." *Id.* at 311, 182 S.E.2d at 54. We went on to state, "Among the essential incidents to marriage is the **duty of the husband to support his wife**. 41 AM.JUR. 2D, Husband and Wife, Sections 329 and 330; *State v. Bagwell*, 125 S.C. 401, 118 S.E. 767. An agreement whereby the **husband is relieved of this obligation to support his wife**, as a condition of the marital relationship, is against public policy and void." *Id.* at 312, 182 S.E.2d at 55. [emphasis in *Hardee*].

We find *Towles* represents an outdated and unwarranted generalization of the sexes which is no longer warranted in today's society. See e.g. *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)(gender classifications should not be used as they once were to create or perpetuate the legal, social, and economic inferiority of women; cautioning reviewing courts to closely scrutinize generalizations or tendencies of the sexes). As we have done in other cases, we find the distinction between men and women is based upon "old notions" that females should be afforded special protection. Accord *In the Interest of Joseph T*, 312 S.C. 15, 430 S.E.2d 523 (1993); *Richland Mem'l Hosp. v. Burton*, 282 S.C. 159, 318 S.E.2d 12 (1984). Accordingly, we overrule *Towles* to the extent it relies upon outdated notions which are violative of equal protection.

Hardee v. Hardee, 585 S.E.2d 501, 503-504 (S.C. 2003).

Note that *Hardee* permits waiver of both alimony *and* attorney's fees.

Pennsylvania

Before 1970, family courts in most states in the USA took a paternalistic view of the need to protect women during separation and after divorce. The paternalistic view meant that courts could impose duties of spousal support on *all* marriages. Pennsylvania was the outstanding exception, in that Pennsylvania law has long recognized the validity of both prenuptial and postnuptial contracts, which might allow spouses to opt out of statutory or common law provisions for alimony. I have quoted extensively from Pennsylvania cases in my earlier essay at <http://www.rbs2.com/dcontract.pdf>, so there is no need to repeat those quotations here.

In 1986, an intermediate appellate court in Pennsylvania heard a case involving a divorce in which the wife claimed alimony, although she had waived such a claim in a written prenuptial contract signed in 1969. The trial court denied alimony and the appellate court affirmed:

The appellant contends that the ante-nuptial agreements are without ambiguity and the release clauses do not refer to future property or alimony rights. When the words of a contract are clear and unambiguous, the intent of the parties is to be discovered from the express language of the agreement. In interpreting a contract, the intention of the parties must be ascertained from the complete writing and each and every part of it must be taken into consideration and given effect if reasonably possible. The agreements, read as a whole, manifested an intent that neither party was to have an interest in any property belonging to the other, whether the interest in the property, or the property itself, existed at the time of the agreement or was acquired at some time in the future. We would have to ignore the agreement of the parties to allow equitable distribution of the parties' property under the Divorce Code. Similarly, the parties gave up any and all rights to alimony and support. *Laub v. Laub*, 505 A.2d 290, 293 (Pa.Super. 1986) [citations omitted].

The court in *Laub* did not cite any precedent for permitting a waiver of alimony, and the court did not explain *why* it was reasonable to enforce a waiver of alimony. Apparently, parties to a marriage have full freedom of contract in Pennsylvania, without interference from paternalistic judges. Incidentally, the contract in *Laub* also waived APL and attorney's fees in divorce litigation.

In 1988, an intermediate appellate court in Pennsylvania wrote:

The law is clear in Pennsylvania; parties may, through an ante-nuptial or post-nuptial agreement, contract away their statutory rights to alimony and support. *Simeone v. Simeone*, 551 A.2d 219 (Pa.Super. 1988); *Nigro v. Nigro*, 538 A.2d 910 (Pa.Super. 1988); *Nitkiewicz v. Nitkiewicz*, 535 A.2d 664 (Pa.Super. 1988); *Laub v. Laub*, 505 A.2d 290 (Pa.Super. 1986).

Gula v. Gula, 551 A.2d 324, 327 (Pa.Super. 1988) [“supra” replaced with a citation].

Simeone was later affirmed on appeal to the Pennsylvania Supreme Court, as discussed in the following paragraphs.

The prenuptial agreement in the landmark case of *Simeone* limited support, including alimony pendente lite (APL), to \$200/week, and a maximum total of \$25,000. After the parties separated, husband paid the maximum amount. Wife then filed a petition in court for APL, which the trial court denied, because of the prenuptial agreement. Wife appealed, arguing that she was unaware of her statutory right to APL that she had allegedly waived in that prenuptial contract. The intermediate appellate court affirmed the trial court. *Simeone v. Simeone*, 551 A.2d 219 (Pa.Super. 1988). Wife appealed again, and the Pennsylvania Supreme Court also affirmed.

There is no longer validity in the implicit presumption that supplied the basis for *Geyer* [*In re Estate of Geyer*, 533 A.2d 423 (Pa. 1987)] and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the “weaker” party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

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

Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

The Pennsylvania Supreme Court ended judicial review of prenuptial contracts for fairness or reasonableness:

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

By invoking inquiries into reasonableness, however, the functioning and reliability of prenuptial agreements is severely undermined. Parties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced. If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable. Pertinently, the present agreement contained a clause reciting that “each of the parties considers this agreement fair, just and reasonable....”

Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990).

Soon after *Simeone*, an intermediate appellate court in Pennsylvania enforced a prenuptial contract that denied both alimony and alimony pendente lite to wife. *Hamilton v. Hamilton*, 591 A.2d 720 (Pa.Super. 1991).

APL waivable in Pennsylvania

In 1962, an intermediate appellate court in Pennsylvania held in *Belsky v. Belsky*, 175 A.2d 348 (Pa.Super. 1962), that a waiver of alimony in a prenuptial agreement did *not* prevent a court from awarding APL to wife. The contract was signed in 1958 and said in relevant part:

In consideration of the relinquishment of any rights that Nathan may have in her income, Helen hereby waives, relinquishes, and releases any and all rights, claims or demands for maintenance and support that she may have under the law against Nathan in the event that she shall cease to live together with Nathan as husband and wife. Helen further acknowledges that the income from her separate property is sufficient to maintain and support her and that this Agreement shall be a complete and legal defense to any claim for support that she may assert against Nathan.

Wife filed for divorce in 1959 and sought alimony pendente lite (APL), which a trial court awarded. Husband appealed. The appellate court distinguished “maintenance and support” (i.e., expenses for room, food, clothing, etc.) from APL, which was to allow the financially weaker party to engage in divorce litigation. The court in *Belsky* explained: “One of the important purposes of an award of counsel fee and alimony pendente lite is to prevent such a denial of justice. Cf. *Shuman v. Shuman*, ... 170 A.2d 602 [(Pa.Super. 1961)].”

But *Shuman* only mentions the phrase APL once in the entire opinion — *Shuman* is really about ordering the financially stronger party to pay for the attorney’s fees of the weaker party in divorce litigation. It seems obvious that APL is maintenance and support during the divorce litigation, while a separate issue of attorney’s fees might allow the weaker party to meaningfully defend her legal rights in court. However, the court in *Belsky* seems to include the purpose of attorney’s fees in APL, which confuses two distinct issues.

At the final paragraph of the *Belsky* opinion, there is a strange remark that if the parties had wished to waive APL, they should have explicitly mentioned APL in their written contract. I find the remark to be strange, because the court in the same opinion had said that APL was necessary

“to prevent ... a denial of justice”, so waiving APL means that justice can be waived in Pennsylvania. After reading *Belsky*, one is confused about the purpose of APL and whether APL can be waived in a prenuptial contract.

One hopes that the kind of nonsense in *Belsky* was ended by the Pennsylvania Supreme Court’s decision in *Musko v. Musko*, 697 A.2d 255 (Pa. 1997), which declared that waiver of alimony or support in a prenuptial agreement absolutely prohibited a judge from awarding alimony pendente lite (APL). This is a landmark case, because APL is spousal support *during* the marriage (i.e., prior to divorce), but after filing for divorce. The prenuptial agreement in this case said, in part:

In the event of a divorce or separation, ... [wife] shall make no claim to and she shall not be entitled to receive any money or property or alimony or support because of the divorce or separation of the parties hereto

The Pennsylvania Supreme Court tersely wrote:

APL is defined in the Divorce Code as: “An order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding.” 23 Pa.C.S. § 3103. Clearly, since the agreement bars [wife] from receiving “money or property or alimony or support” because of a divorce or separation, she is barred from receiving APL, which is merely a type of support awarded in divorce cases.

Musko v. Musko, 697 A.2d 255, 256 (Penn. 1997).

postnuptial same as prenuptial

In Pennsylvania, both pre-nuptial agreements and post-nuptial agreements are subject to the same legal rules. By the year 1986, it was well established law in Pennsylvania that prenuptial and postnuptial contracts were tested in the same way and could be equally valid.

- *Laub v. Laub*, 505 A.2d 290, 293 (Pa.Super. 1986) (“The fact that the instant case involved a pre-marital agreement rather than a post-nuptial agreement is of no material consequence.”);
- *Nitkiewicz v. Nitkiewicz*, 535 A.2d 664, 667, n.2 (Pa.Super. 1988) (“The fact that *Laub* deals with an antenuptial agreement, whereas instantly, we are concerned with a postnuptial agreement, is of no consequence with regard to our decision. Principles applicable to antenuptial agreements, even though consideration and circumstances may sometimes differ slightly, are equally applicable to postnuptial agreements. *In re Ratony's Estate*, 443 Pa. 454, 277 A.2d 791 (1971).”);
- *Gula v. Gula*, 551 A.2d 324, 328 (Pa.Super. 1988) (“The fact that the instant case involved a pre-marital agreement rather than a post-nuptial agreement is of no material consequence. *Laub v. Laub*, 505 A.2d at 292-293.”).

In 1993, an intermediate appellate court in Pennsylvania wrote:

The determination of marital property rights through prenuptial, post-nuptial and settlement agreements has long been permitted, and even encouraged. *Karkaria v. Karkaria*, 592 A.2d 64, 68 (Pa.Super. 1991). In *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990), the Supreme Court recognized that prenuptial agreements are contracts, and as such, are governed by contract law. Similarly, contract principles apply to antenuptial and post-nuptial agreements. *Adams v. Adams*, 607 A.2d 1116, 1118 (Pa.Super. 1992); *Nitkiewicz v. Nitkiewicz*, 535 A.2d 664, 667, n. 2, alloc. denied, 551 A.2d 216 (Pa. 1988); *Magee v. Magee*, 519 A.2d 994, 995 (Pa.Super. 1987).

Laudig v. Laudig, 624 A.2d 651, 653 (Pa.Super. 1993) [citations to Pennsylvania state reporters omitted]. *Laudig* and its progeny continue to be valid. *Stackhouse v. Zaretsky*, 900 A.2d 383, 386, ¶8 (Pa.Super. 2006) (“Both premarital and post-nuptial agreements are contracts and are governed by contract law.”), quoting *Holz v. Holz*, 850 A.2d 751, 757, ¶10 (Pa.Super. 2004), *appeal denied*, 871 A.2d 192 (Pa. 2005). *Holz* cites *Laudig v. Laudig*, 624 A.2d 651, 653 (Pa.Super. 1993).

The legal rule that both prenuptial and postnuptial contracts must satisfy the same conditions and tests is still good law when I searched for Pennsylvania cases in August 2009. In 2003, the Pennsylvania Supreme Court reiterated the rule that prenuptial and postnuptial contracts are tested by the same rules for validity:

Simeone involved a prenuptial, rather than a postnuptial, agreement. However, the principles applicable to antenuptial agreements are equally applicable to postnuptial agreements, although the circumstances may slightly differ. *In re Ratony's Estate*, 277 A.2d 791, 793 (Pa. 1971).

Stoner v. Stoner, 819 A.2d 529, 533, n.5 (Pa. 2003).

Cited in *Stackhouse v. Zaretsky*, 900 A.2d 383, 386, ¶9 (Pa.Super. 2006); *In re O'Brien*, 898 A.2d 1075, 1080, ¶15 (Pa.Super. 2006) (“The applicable standard for assessing prenuptial agreements applies equally to postnuptial agreements.”); *Paroly v. Paroly*, 876 A.2d 1061, 1063, ¶4 (Pa.Super. 2005).

The Pennsylvania Supreme Court's citation in *Stoner* to *Ratony's Estate* is a bit troubling. The issue in *Ratony's Estate* was a postnuptial separation agreement that was signed in the year 1941. The parties were never divorced. After the husband died in 1968, the wife then challenged the postnuptial agreement for the first time. Such a postnuptial agreement, signed *after* the marriage had already disintegrated, is arguably distinguishable from typical prenuptial or postnuptial agreements about property or alimony at a future, hypothetical divorce.

Florida

APL *not* waivable

Florida allows a prenuptial agreement to waive alimony, however Florida does *not* allow a prenuptial agreement to waive alimony pendente lite (APL), which is called “temporary support” in Florida. The distinction is that alimony is support *after* divorce, while APL or “temporary support” is support *during* the marriage (i.e., prior to divorce).

In August 1972, the Florida Supreme Court refused to allow a prenuptial contract to waive alimony pendente lite. In this case, there was no filing for divorce. Husband separated from wife after a 16-month marriage, and wife filed in court an “action for separate maintenance” that husband pay her alimony pendente lite.

... we now hold further that before and pending dissolution of the marriage a husband's obligation of support while still married continues under the historical principle supported by an unbroken line of cases since shortly after Florida became a state in 1845 [*Ponder, Executor v. Graham*, 4 Fla. 23, 30 (1851); *Thompson v. Thompson*, 86 Fla. 515, 98 So. 589 (1923); *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936); *Astor v. Astor*, 89 So.2d 645 (Fla. 1956)], which we decline to reverse, as would be necessary in order to accept the husband's contention here that his agreement extends as controlling to the period while his marriage continues. This provision of such an agreement is a factor to be considered but not the sole factor, nor conclusive, in a determination of support pendente lite.

For temporary support, suit money and temporary attorney's fees, the State remains an interested party and cannot be excluded by contract during this period of continuance of the legal relationship of husband and wife. Contracts are made in legal contemplation of existing, applicable statutes[footnote omitted] and so it is that marriage contracts[footnote omitted] and any ante- or post-nuptial contracts are entered into subject to then existing law, including the law of this state that makes a husband responsible for the support of his wife while she is married to him.

Belcher v. Belcher, 271 So.2d 7, 9 (Fla. 1972).

The Florida Supreme Court continued:

The measure of adequate care is the historical need of the wife, ability of the husband to pay and their standard of living. The husband cannot cut her adrift without further obligation when he pleases, if “when he pleases,” her circumstances during coverture while they remain man and wife are such, despite earlier considerations paid (though this is a factor), she is not at this critical time of separation before any dissolution of marriage, adequately cared for, consistent with her needs, their standard of living and his ability to pay at this time. These criteria may substantially differ between the date of the antenuptial agreement and the time for its application at separation. Thus in attempting to “settle in advance” continuing marital obligation, the husband must remain subject to his legal obligation while still married. The State still imposes upon marriage contracts the obligation that the wife shall not become dependent upon welfare or others; it requires that an able husband support a needy wife during coverture. To be borne in mind is the basic fact that the parties are still husband and wife which remains the predicate for support of the wife by the husband so long as they are still married.

Provision for “permanent” settlement *after* dissolution of the marriage is another matter; fair provisions thereon will be recognized as a matter of contract; indeed *post*-nuptial settlement agreements are regularly approved upon meeting proper requirements of disclosure and fairness.

Belcher, 271 So.2d at 10. [three footnotes deleted]

Two judges dissented in *Belcher*:

I discern no distinction between a “waiver” by the wife upon adequate consideration under an antenuptial agreement, of dower, inheritance or other claims against the estate of the husband, as well as for permanent alimony after divorce which meets the standards as have been expressed by this Court in *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962) of fairness and full disclosure; and the waiver claimed in the instant case of all alimony, suit money, or other maintenance during the lifetime of the husband.

Here, the parties in an arm's length transaction contracted to eliminate the wife's right to alimony and petitioner willingly accepted all of the benefits of the contract.

....

An argument of public policy has been employed by the majority to conjure up an artificial distinction between waiver of alimony during marriage and waiver of alimony after divorce. No such distinction is justified.

....

The right to contract is fundamental and is one of the most valuable rights of a citizen. *State ex rel. Fulton v. Ives*, 123 Fla. 401, 17 So. 394 (1936). Continuing strides in the area of women's rights, particularly in this area of right to contract, have been made since the Married Woman's Emancipation Act of 1943.

....

Being unable to find any rational distinction between a validly entered into antenuptial agreement waiving alimony subsequent to marriage which agreements have been upheld by this Court, and a validly entered into agreement which contains a paragraph providing for waiver of alimony before consummation of dissolution of the marriage, I must respectfully dissent.

Belcher, 271 So.2d at 17-18 (Carlton, J., dissenting; J. Adkins, concurs with dissent.).

My search of Florida cases on 14 Aug 2009 shows that Justice Carlton's dissenting opinion has been ignored.

Twenty-eight years after *Belcher*, an intermediate appellate court in Florida wrote:

... counsel for both parties, as well as the trial judge, recognized that according to established precedent, temporary attorney's fees and support and attorney's fees up to the point of the dissolution judgment cannot be waived in a prenuptial agreement. See *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972); *Blanton v. Blanton*, 654 So.2d 1240 (Fla. 2d DCA 1995); *Veiga v. Veiga*, 563 So.2d 1089 (Fla. 5th DCA 1990); *Fechtel v. Fechtel*, 556 So.2d 520 (Fla. 5th DCA 1990).

Hartman v. Hartman, 761 So.2d 429, 430 (Fla.App. 5Dist. 2000).

In June 2005, the Florida Supreme Court summarized the history of the law in Florida:

In 1970, however, the law began to cautiously evolve towards enforcement of these agreements. In *Posner I*, we held that antenuptial agreements “should no longer be held to be void ab initio” on public policy grounds. 233 So.2d at 385. We based our decision on the changing societal views towards marriage: “With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners ... might want to consider and discuss ... —and agree upon, if possible — the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.” Id. at 384. Therefore, we allowed couples contractually to limit post-dissolution alimony payments. In the follow-up case of *Posner v. Posner*, 257 So.2d 530 (Fla. 1972) (“*Posner II*”), however, we limited this freedom by allowing a court to modify the agreement. Id. at 535; see also *Belcher*, 271 So.2d at 13 (noting that “*Posner I* holds, upon the satisfaction of certain conditions, that antenuptial agreements limiting alimony to a certain amount are enforceable (and subject to modification as held in *Posner II*)”).

Shortly after *Posner II*, we considered in *Belcher* “whether or not by express provision in an antenuptial agreement the husband can, by the payment of a present, fixed consideration, contract away his future obligation to pay alimony, suit money and attorney's fees during a separation prior to dissolution of the marriage.” 271 So.2d at 8. We held that “[u]ntil there is a decree of dissolution of the marriage, thus ending her role as wife, the wife's support remains within long-established guidelines of support by the husband which cannot be conclusively supplanted by his advance summary disposition by agreement.” Id. at 11. Given the husband's long-established obligation of spousal support “under the historical line of cases since shortly after Florida became a state in 1845,” id. at 9, tradition and the perceived need to protect women led the Court to conclude that pre-judgment support obligations cannot be waived.[FN2]

FN2. *Belcher* spoke of the marital support obligation in terms of a husband's duty to support his wife because that was how Florida law described this obligation at the time *Belcher* was decided. 271 So.2d at 8-9. The statute has since been revised to require either spouse to support the other, see ch. 71-241, ch. 95-147, Laws of Fla; see also § 61.09, Fla. Stat. (2004), and the courts have long interpreted the statute in a gender-neutral way. See *Werk v. Werk*, 416 So.2d 483 (Fla. 4th DCA 1982) (requiring a wife to pay temporary alimony to her husband).

Finally, in *Casto v. Casto*, 508 So.2d 330 (Fla. 1987), we confirmed that even unreasonable nuptial agreements regarding post-dissolution property and support, if freely executed, are enforceable. Id. at 334. In that case, we explained the circumstances that would justify invalidating a nuptial agreement. We stated that there were two ways an otherwise enforceable nuptial agreement may be held invalid. Id. at 333. First, the agreement may be set aside or modified by a court if it was “reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.” Id. Second, if the agreement is “unfair or unreasonable ... given the circumstances of the parties,” and the trial court finds the agreement “disproportionate to the means of the defending spouse,” then the rebuttable presumption is that “there was either concealment by the defending spouse or a ... lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached.” Id. Further, incompetence of counsel is not a ground to set aside a valid nuptial agreement. Id. at 334.

As the cited cases demonstrate, the evolution in Florida law approving prenuptial agreements concerning *post*-dissolution support has so far not extended to provisions waiving the right to recover *pre*-judgment support such as temporary alimony. In fact, in the more than thirty years since *Belcher*, Florida courts consistently have rejected attempts to waive prejudgment support. See *Fernandez v. Fernandez*, 710 So.2d 223, 225 (Fla. 2d DCA 1998) (noting that “*Belcher* still requires one spouse, who has the ability, to support the other more needy spouse until a final judgment of dissolution is entered even in the face of an antenuptial agreement to the contrary”); *Appelbaum v. Appelbaum*, 620 So.2d 1293 (Fla. 4th DCA 1993) (holding that a waiver cannot be conclusive for the period before dissolution); *Lawhon v. Lawhon*, 583 So.2d 776, 777 (Fla. 2d DCA 1991) (noting that a husband's duty of spousal support during the marriage cannot be “waived or contracted away in an antenuptial agreement”); *Urbanek v. Urbanek*, 484 So.2d 597, 601 (Fla. 4th DCA 1986) (holding that allowing a husband to offset attorney's fees from a lump sum award would “allow the husband to contract away his responsibility for his wife's prejudgment attorney's fees, which he may not do”).

The evolution in our law, therefore, has been toward greater freedom of contract regarding *post*-dissolution spousal support, while recognizing the continuing obligations of support before the marriage is dissolved.

Lashkajani v. Lashkajani, 911 So.2d 1154, 1156-1158 (Fla. 2005).

In June 2007, an intermediate appeals court in Florida wrote:

The wife also contends that the trial court erred in failing to award her temporary or rehabilitative alimony. In the pre-nuptial agreement, however, “[e]ach party acknowledges that he or she is self-supporting and hereby waives any and all rights for support, maintenance or alimony or similar proceeding initiated under the laws of any jurisdiction....” While the parties cannot waive pre-judgment support through pre-nuptial agreements, pre-nuptial agreements concerning post-dissolution support are enforceable. See *Lashkajani v. Lashkajani*, 911 So.2d 1154, 1157 (Fla. 2005); *Fernandez v. Fernandez*, 710 So.2d 223, 225 (Fla. 2d DCA 1998) (prevailing law “still requires one spouse, who has the ability, to support the other more needy spouse until a final judgment of dissolution is entered even in the face of an antenuptial agreement to the contrary”). Here, however, the wife did not request any temporary alimony during the proceedings, but only at the final hearing. The trial court found that she did not prove a need for such alimony, and we conclude that it did not abuse its discretion. Further, the trial court correctly denied rehabilitative alimony, because the pre-nuptial agreement waived any support.

Ledea-Genaro v. Genaro, 963 So.2d 749, 753 (Fla.App. 4Dist. 2007).

Two cases during 2008 continued this holding:

- *Aguilar v. Montero*, 992 So.2d 872, 872 (Fla.App. 3Dist. 2008) (“The question we address is whether a waiver of temporary support in a prenuptial agreement may be enforced. Under existing law, the answer is no. Florida case law nonetheless holds, as already stated, that the right to pre-dissolution support cannot be waived.”);
- *Lord v. Lord*, 993 So.2d 562, 564 (Fla.App. 4Dist. 2008) (“The substantive issue raised by the wife concerns Florida's long-standing policy of not enforcing agreements that purport to waive pre-dissolution support and attorney's fees.”).

unfair waiver is enforceable

Florida has case law that allows enforcement of a bad bargain in a prenuptial agreement, even if such bad bargain is unfair or unreasonable to the financially weaker party. This means that the financially weaker spouse can waive alimony in a prenuptial agreement.

- *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20 (Fla. 1962) (“Inadequacy of provision for the wife does not in itself vitiate an antenuptial agreement. If, when she signed the contract freely and voluntarily, she had some understanding of her rights and had been fully informed by the husband as to his property or if, notwithstanding the husband's failure to disclose, she had or reasonably should have had a general and approximate knowledge of the character and extent of his property she will be bound.”);
- *Posner v. Posner*, 257 So.2d 530, 534-535 (Fla. 1972) (“We reiterate that inadequate and disproportionate provision for the wife, even to the extent evidenced in the instant case, will not vitiate an antenuptial agreement. Freedom to contract includes freedom to make a bad bargain.”);
- *Casto v. Casto*, 508 So.2d 330, 334 (Fla. 1987) (“... the fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement. The critical test in determining the validity of marital agreements is whether there was fraud or overreaching on one side, or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the marital property and income of the parties at the time the agreement was reached. A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. There may be a desire to leave the marriage for reasons unrelated to the parties' fiscal position. If an agreement that is unreasonable is freely entered into, it is enforceable.”).

In July 1993, an intermediate appellate court in Florida upheld the waiver of alimony in a prenuptial agreement, despite the fact that the agreement was unfair to the wife who sought alimony.

Although the trial court initially determined that the agreement was valid under the designated law of Pennsylvania, the trial court also found that by completely waiving the right to alimony in the event of a divorce, the agreement left Alyce a pauper and a potential ward of the State of Florida. The trial court further found that since Ted had the ability to pay permanent periodic alimony, the agreement was unconscionable and overreaching. As a result, the trial court refused to uphold the agreement under the public policy of Florida.

However, a review of the law in both Pennsylvania and Florida shows that the antenuptial agreement in the instant case was valid and enforceable in both states. In Pennsylvania, antenuptial agreements are valid when executed by the parties with the benefit of full and fair financial disclosure and in the absence of fraud, misrepresentation, or duress. *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162 (1990). See also *Hamilton v. Hamilton*, 404 Pa.Super.

533, 591 A.2d 720, 722-23 (1991) (holding that the lack of a reasonable provision for a financially dependent spouse does not render an antenuptial agreement unenforceable). Similarly, in Florida, an antenuptial agreement that makes an unfair or unreasonable provision for a financially dependent spouse is valid if the party in the inferior economic position freely and voluntarily executes the agreement with the benefit of either full and frank financial disclosure or a general and approximate knowledge of the character, value, and extent of the other party's property and in the absence of fraud, deceit, duress, coercion, misrepresentation, or overreaching. *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20-21 (Fla. 1962); *Masilotti v. Masilotti*, 158 Fla. 663, 29 So.2d 872 (1947). In the instant case, we find that the trial court erred by concluding that the antenuptial agreement violated Florida's public policy on the basis of the unfair outcome resulting from Alyce's complete waiver of alimony. See *Cladis v. Cladis*, 512 So.2d 271, 273-74 (Fla. 4th DCA 1987) (holding that a finding by the trial court that an antenuptial agreement is unfair and inequitable is not sufficient by itself to set aside the agreement); *Ivanhoe v. Ivanhoe*, 397 So.2d 410, 411 (Fla. 5th DCA 1981) (recognizing that a party may waive the right to alimony in an antenuptial agreement); *Turner v. Turner*, 383 So.2d 700, 703 (Fla. 4th DCA), review denied, 392 So.2d 1381 (Fla. 1980) (finding that the public policy of Florida does not prevent a party from completely waiving the right to alimony).

Furthermore, the record in the instant case provides no evidence to support the trial court's finding that the antenuptial agreement was unconscionable and overreaching. ... the record shows that Alyce freely entered into the agreement after full financial disclosure by Ted and without any overreaching by Ted. See *Casto v. Casto*, 508 So.2d 330, 333-34 (Fla. 1987) (applying the standards set for antenuptial agreements in *Del Vecchio* to postnuptial agreements and holding that a bad fiscal bargain which was freely executed and the lack of competent assistance of counsel are not proper grounds upon which to vacate or modify a postnuptial agreement); *Jackson v. Seder*, 467 So.2d 422, 422-23 (Fla. 4th DCA), review denied, 479 So.2d 118 (Fla. 1985) (reversing a trial court's order setting aside an antenuptial agreement because the record provided no evidence to support the trial court's finding that the agreement was unconscionable, lacked consideration, and constituted overreaching). Thus, we hold that the trial court erred by finding that the agreement in the instant case was unconscionable and overreaching.

Overall, the evidence in the record demonstrates that while the antenuptial agreement was unfair and inequitable to Alyce, she freely and voluntarily executed the agreement with the benefit of full and fair disclosure of Ted's financial assets and in the absence of fraud, deceit, duress, coercion, misrepresentation, or overreaching. As a result, the agreement in the instant case was valid and enforceable under the law and public policy of both Pennsylvania and Florida, and thus, we find that the trial court erred by refusing to uphold the agreement. *Baker v. Baker*, 622 So.2d 541, 543-544 (Fla.App. 5Dist. 1993).

In 2004, an intermediate appellate court in Florida wrote:

We recognize that the result in this dissolution after eighteen years of marriage is harsh. Wife has not worked full time in thirteen years, while Husband is now making a very large salary and has a net worth of over three million dollars. As a result, Husband is left with considerable wealth and income, while Wife waived all rights to alimony and equitable distribution by signing an antenuptial agreement. It is undisputed that the agreement is patently unreasonable. However, if an unreasonable agreement is freely entered into, it is enforceable. *Casto v. Casto*, 508 So.2d 330, 334 (Fla. 1987).

Watson v. Watson, 887 So.2d 419, 421 (Fla.App. 4Dist. 2004).

In summary, a contract that is unfair to one party is a signal for more judicial scrutiny, but unfairness is *not* a per se bar to enforcement of the contract.

postnuptial same as prenuptial

In Florida, both pre-nuptial agreements and post-nuptial agreements are subject to the same legal rules. *Casto v. Casto*, 508 So.2d at 333, n. * (Fla. 1987) (“The standards set forth for antenuptial agreements in *Del Vecchio* were subsequently approved for postnuptial agreements in *Belcher*.”); *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970) (“... rules prescribed in *Del Vecchio* ... for ante- and post-nuptial agreements ...”); *Balazs v. Balazs*, 817 So.2d 1004, 1004, n.1 (Fla.App. 4 Dist. 2002) (Farmer, J. concurring specially) (“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.”); *Bailey v. Bailey*, 300 So.2d 294, 295 (Fla.App. 4 Dist. 1974) (“There is no reason why this same principle [in *Del Vecchio*] would not apply to a postnuptial agreement.” [citations to two cases]).

New York State

New York State has *not* adopted the Uniform Premarital Agreement Act, but has its own unique statute on the topic:

An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

New York State Domestic Relations Law §236(B)(3) (effective²⁷ 1980, current Aug 2009).

The General Obligations Law §5-311, referenced above, says:

Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or

²⁷ *Gotthainer v. Gotthainer*, 435 N.Y.S.2d 444, 446 (N.Y.Fam.Ct. 1980) (statute effective 19 July 1980).

hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

New York State General Obligations Law §5-311 (enacted 1980, current Aug 2009).

An earlier version of § 5-311 was declared unconstitutional, because of gender asymmetries.

Greschler v. Greschler, 422 N.Y.S.2d 718 (N.Y.A.D. 1979).

My quick search of case law in New York State from 1980 to July 2009 shows only a few terse nuggets about waiver of alimony in prenuptial agreements:

- *Peerce v. Peerce*, 451 N.Y.S.2d 139 (N.Y.A.D. 1982) (enforces APL amount in prenuptial contract);
- *Schor v. Schor*, 467 N.Y.S.2d 429 (N.Y.A.D. 1983) (Denial of alimony proper when “the marriage here was of very short duration, between two elderly people who had principally sought companionship, not financial security; they had waived their rights to each other’s estates by antenuptial agreement. Prior to the marriage, the [wife] had been entirely self-supporting, and had been so for many, many years. She had independent savings and assets, which she had kept separate during the 18-month period during which the parties cohabited as husband and wife.”);
- *Propp v. Propp*, 493 N.Y.S.2d 147 (N.Y.A.D. 1985) (prenuptial contract specifies alimony as function of parties’ current income);
- *Panossian v. Panossian*, 569 N.Y.S.2d 182 (N.Y.A.D. 1991) (affirmed waiver of alimony in prenuptial contract);
- *Lobatto v. Lobatto*, 586 N.Y.S.2d 971 (N.Y.A.D. 1992) (prenuptial contract established a \$250,000 trust fund for payment of support to wife “in the event of marital discord” and wife then waived both APL and alimony.);
- *Clanton v. Clanton*, 592 N.Y.S.2d 783, 784 (N.Y.A.D. 1993) (enforced prenuptial contract that waived both APL and alimony);
- *Rubin v. Rubin*, 690 N.Y.S.2d 742, 743 (N.Y.A.D. 1999) (enforced prenuptial contract that waived both APL and alimony).

In April 2000, a trial court in New York State enforced a waiver of APL in a prenuptial agreement:

Defendant’s application for an award of temporary maintenance must also be denied.

Paragraph three of the agreement provides that “[b]oth parties give up the right to temporary or permanent alimony or maintenance in the event of a separation or divorce.” It is undisputed that the parties are separated, and defendant does not claim that he is about to become a public charge. Defendant’s contractual waiver of his right to temporary maintenance is valid and enforceable (see, *Valente v. Valente*, 269 A.D.2d 389, 703 N.Y.S.2d 206; *Rubin v. Rubin*, 262 A.D.2d 390, 690 N.Y.S.2d 742; *Clanton v. Clanton*, 189 A.D.2d 849, 592 N.Y.S.2d 783; *Peerce v. Peerce*, 88 A.D.2d 832, 451 N.Y.S.2d 139).

Edmonds v. Edmonds, 710 N.Y.S.2d 765, 770 (N.Y.Sup. 2000).

- *Cron v. Cron*, 780 N.Y.S.2d 121 (N.Y.A.D. 1Dept. 2004) (“... [wife’s] waiver of maintenance [in prenuptial agreement] does not place her in danger of becoming a public charge and, accordingly, is not unconscionable (see *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 194, 738 N.Y.S.2d 650, 764 N.E.2d 950; General Obligations Law § 5-311),”);
- *Strong v. Dubin*, 851 N.Y.S.2d 428 (N.Y.A.D. 1Dept. 2008) (Upheld prenuptial agreement in which wife waived maintenance.);
- *Schultz v. Schultz*, 871 N.Y.S.2d 636, 637 (N.Y.A.D. 2Dept. 2009) (Court upheld postnuptial agreement. “Although [husband] received less than one half of the value of the marital assets because the agreement permitted [wife] to retain the marital residence, he was provided with meaningful bargained-for benefits, including the [wife’s] waiver of a viable lifetime maintenance claim.”).

States remaining anachronistic

Some states continue to follow the old, and anachronistic, rule that alimony can *never* be waived by a party to a marriage. My research in August 2009 found the following states continue to follow the old rule. However, there may be additional states that still follow the old rule.

Iowa

When I searched Westlaw on 25 Aug 2009, Iowa still had a statute that absolutely prohibited waivers of alimony.

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

Iowa Code § 596.5 (2) (enacted 1991, still current Aug 2009).

This statute added the words “spouse or” to the words in the UPAA, thereby treating wives as children, who the husband *must* support.

In December 2008, the Iowa Supreme Court said:

The [Iowa Uniform Premarital Agreement Act, in contrast to the Uniform Act,] prohibits premarital agreements from adversely affecting spousal support. Iowa Code § 596.5(2).

Thus, the district court correctly concluded the purported alimony waiver in this premarital agreement is invalid and unenforceable.

In re Marriage of Shanks, 758 N.W.2d 506, 513 (Iowa 2008).

In 1996, the Iowa Supreme Court gave more history:

In *Vande Kop v. McGill*, 528 N.W.2d 609, 613 (Iowa 1995), we noted that prior to 1980, alimony waivers were considered void as against public policy, but this common-law rule was modified when an amendment to Iowa Code section 598.21 allowed courts to consider them. In 1992, as a part of the uniform premarital agreement act, Iowa Code section 596.5(2) was adopted, reestablishing our prior rule prohibiting these provisions. 1991 Iowa Acts ch. 77, § 5.

In re Marriage of Spiegel, 553 N.W.2d 309, 319 (Iowa 1996).

New Mexico

When New Mexico adopted the UPAA in 1995, New Mexico followed Iowa in not only omitting “the modification or elimination of spousal support” in the list of terms of a prenuptial contract, but also in adding a specific prohibition against waiving alimony (i.e., support):

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

New Mexico Statutes § 40-3A-4(B) [Chapt. 40, Article 3A, § 4(B)] (enacted 1995, still current Aug 2009).

My 25 Aug 2009 search of the West database for judicial opinions in New Mexico found nothing on waiving, relinquishing, or limiting either alimony or support in a prenuptial contract. Further, West’s Annotated Statutes includes no cases for this section of statute.

South Dakota

In March 2005, the South Dakota Supreme Court again rejected waivers of alimony in prenuptial contracts:

This Court previously held in *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978),²⁸ that provisions in a prenuptial agreement purporting to limit alimony obligations are against public policy and therefore not enforceable.

Our opinion in *Connolly* reiterated the validity of the public policy underlying South Dakota's domestic relations code, that while parties may enter into a valid support agreement in contemplation of divorce, the trial court has the ultimate authority to approve or reject a spousal support agreement in a divorce proceeding.

In 1989, twelve years after *Connolly*, the South Dakota legislature adopted portions of the Uniform Premarital Agreement Act (UPAA) as SDCL [South Dakota Codified Laws] 25-2-16 to 25-2-26.

The South Dakota legislature did not include portions of the UPAA relating to spousal support [in SDCL 25-2-18]. Specifically, the Legislature did not enact those portions of the UPAA that allowed parties to a prenuptial agreement to contract with respect to “the modification or elimination of spousal support.” [FN2]

[FN2.] Forty-one states allow premarital waivers of spousal support, twenty-one by virtue of their legislatures' adoption of all or substantial portions of the UPAA. Another eighteen have permitted waivers pursuant to judicial decisions. New York permits spousal support waivers under other statutory authority. *In re Marriage of Pendleton & Fireman*, 24 Cal.4th 39, 99 Cal.Rptr.2d 278, 5 P.3d 839, 849 (2000).

Sanford v. Sanford, 694 N.W.2d 283, 287-288, 2005 SD 34, ¶¶ 15-18 (S.Dak. 2005).

²⁸ *Connolly* is quoted at page 15, above.

In May 2009, the South Dakota Supreme Court again prohibited a waiver of alimony in a prenuptial agreement. *Walker v. Walker*, 765 N.W.2d 747, 755, 2009 SD 31, ¶25 (S.Dak. 2009) (“In *Sanford v. Sanford*, we determined that public policy precludes a waiver of alimony in a prenuptial agreement. 2005 SD 34, ¶38, 694 N.W.2d at 293. The logical extension of our holding is that attorney’s fees associated with an alimony award also cannot be prohibited by the prenuptial agreement.”).

Conclusion

The old law in the USA was that every husband had a statutory duty to support his wife and such duty could *not* be bargained away in a contract, regardless of the reasonableness of the bargain. These statutes viewed *all* people in terms of their status (i.e., married or unmarried) and gender (i.e., husband or wife), instead of treating people as individuals with a unique set of facts and personal values.

Sometime during the late 1950s and continuing through the 1960s and 1970s, society’s view of marriage changed from the traditional view held during the 1800s and earlier. Even after legislatures changed the divorce statutes during the 1960s and 1970s, courts in many states were glacially slow to change the common law to reflect the spirit of the new statutes.

It is now well settled law in most states that alimony (i.e., spousal support *after* divorce) can be waived in a prenuptial or postnuptial contract. However, the conclusion that a waiver of alimony in prenuptial agreement is no longer automatically void, does *not* mean that the judge in a divorce court will enforce the waiver. The judge in most states has the discretion not to enforce the waiver if the financially weaker party would be destitute (e.g., eligible for welfare) without alimony. Note that need for alimony is determined at the time of divorce, not at the time the contract was signed.

I believe that parties should be free to *design* their marriage, express their design in a written prenuptial contract, and have that contract enforced during divorce litigation. It is overly paternalistic — and anachronistic — for judges to impose mandatory economic features on *every* marriage. My review of cases involving prenuptial contracts in the USA show that judges often use their personal opinion of fairness or conscionability to invalidate part of a prenuptial contract. There are really *two* sides to the concept of fairness in prenuptial contracts:

1. One does not want to see a financially weaker party abused by the other party — and conventional judges in divorce courts traditionally do a good job of protecting the weaker party.
2. But the financially stronger party might not have agreed to marry without the legal protection of a prenuptial contract, and that stronger party is entitled to have the literal terms of the contract enforced by a judge in a divorce court. People should be entitled to rely on contracts, especially when a prenuptial contract was a condition precedent for the marriage.

It is unfair to the financially stronger party when a judge voids the bargain that the spouses made, *after* the financially weaker party has obtained the benefit of the bargain during the marriage, and then, at divorce, give the weaker party benefits that she/he had previously agreed to waive. For these reasons, I agree with *Simeone* in Pennsylvania²⁹ that judges should not be evaluating prenuptial contracts for fairness or reasonableness — just enforce the contract.

Pennsylvania and Florida give spouses the most freedom to contract about division of marital property at divorce and alimony after divorce, although Florida refuses to allow waiver of alimony pendente lite.

A few states have also allowed pre- or post-nuptial contracts to waive alimony pendente lite (i.e., spousal support *between* separation and divorce). This is still controversial in most of the USA, because of the statutory duty to support one's spouse. Such a waiver seems reasonable to me, because — while the separated parties remain *legally* married prior to divorce — they are actually “living separate and apart”, as that technical phrase is used in family law. In my view, it is illogical for the husband to have a legal duty to support his wife, after the wife not only stops providing services to her husband, but also disloyally attacks her husband in divorce court.

Attorneys for the party who waived alimony often allege that the waiver is *unfair* or *unconscionable*. Such alleged unfairness appears to come from the legal fiction that both spouses contribute *equally* to a marriage, even when one has an above-average income and the other is a homemaker with zero earned income. Lawyers for the financially weaker party allege that a prenuptial contract is *unfair*, when the reality is that one spouse has a much higher earning potential (i.e., is more valuable economically) than the other spouse, so that one spouse earned nearly all of the marital assets. It is generally *unfair* for the financially stronger party to pay alimony to his/her ex-spouse, who no longer contributes any service to the payor of alimony.

Finally, women need to take prenuptial contracts seriously at the time they negotiate and sign them.

²⁹ See page 49, above.

Bibliography

After spending 14 hours on Westlaw searching and reading cases, and after drafting a nearly final version of this essay,³⁰ I searched Westlaw for recent articles in legal journals on waivers of alimony in prenuptial contracts. The following list is *not* a complete bibliography on this topic. The articles below give a different point of view than my essay, or discuss cases not cited in my essay.

Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 JOURNAL OF LEGISLATION 127 (1993).

Brian Bix, "Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage," 40 WILLIAM & MARY LAW REVIEW 145 (Oct 1998).

Gail Frommer Brod, "Premarital Agreements and Gender Justice," 6 YALE JOURNAL LAW & FEMINISM 229 (Summer 1994).

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