

P E N N S Y L V A N I A LAW WEEKLY

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WHEN WHAT YOU SEE IS WHAT YOU GET **Well-drafted agreements can save clients from heartache and litigation**

By Dorothy K. Phillips
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A well drafted pre-nuptial agreement sets out the rights and responsibilities of the parties from the date of marriage forward, including separation, divorce and death. The validity of pre-nuptial agreements in Pennsylvania has been controlled by the Supreme Court decision in *Simeone v. Simeone*, 581 A.2d 162, (Pa. 1990), which was codified in the 2005 amendments to the Domestic Relations Code at 23 Pa. C.S. § 3106.

The *Simeone* court held that a fair and reasonable disclosure of the property of the other party be made in writing so that each knows the assets and liabilities of the other. This disclosure usually is prepared in the form of schedules to the agreement, listing the assets, approximate worth and liabilities of each party. If a party waives in writing any right to disclosure of the property of the other, there must be clear language that such a waiver was voluntary and was not coerced by the other party. There is no requirement in Pennsylvania that each party must be represented by independent counsel.

On the eve of her wedding, Catherine Walsh was told by lawyers for Frederick Simeone that she either sign the agreement or there would be no wedding. She chose to sign the agreement, and became Catherine Walsh Simeone.

But the *Simeone* court held that as long as a fair and reasonably accurate disclosure of the husband's assets was made and as long as the wife-to-be was of sound mind, the pre-nuptial agreement would be deemed valid.

The *Simeone* court concluded that "[t]here is no longer validity in the implicit presumption that supplied the basis for ... 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

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agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets."

Thus, in Pennsylvania, the criteria for a valid pre-nuptial agreement are that there has been approximate disclosure of each party's assets and that the person asked to sign had not been declared incompetent. The argument that Catherine Simeone was coerced because it was the eve of the wedding did not fly. The basic requirement in Pennsylvania is full and fair disclosure.

Twenty-six states and the District of Columbia have adopted the Uniform Premarital Agreement Act, which contains very clear guidelines for the content of such agreements, and also outline the specific challenges that can be made to enforcement. For instance, in UPAA states, a party that did not consult with independent legal counsel and was not given that opportunity, has sufficient ground to set aside the agreement.

In almost all states, the burden to go forward is on the party challenging the validity of the agreement and the burden of proof is "clear and convincing evidence."

Pursuant to the statute of frauds, any pre-nuptial agreement must be in writing and any modification of such agreement or revocation must also be in writing. Finally, the consideration for a pre-nuptial agreement is the marriage itself.

Post-Marital Agreements

Post-marital agreements can be divided into several categories. There are post-marital agreements which are entered into for the purpose of preserving a marriage by setting out legal rights and responsibilities which may vary from a pre-nuptial or from the actual law of the jurisdiction. This category certainly includes modification and/or revocation of a pre-nuptial agreement as well as the drafting of a post-nuptial agreement to set out the rights and responsibilities of the parties at the time of the agreement.

The other category of post-marital agreements is agreements drafted to conclude a divorce and to resolve all economic rights and responsibilities of the parties as part of the dissolution of the marriage. Such agreements must be comprehensive and provide for all aspects of the dissolution of the marriage, including, but not limited to, equitable distribution of marital property, spousal support during the period when the action is pending; final alimony; payment of counsel fees; custody; child support; tax ramifications concerning transfer of assets; retirement vehicles and the tax consequences of transfer from one person's retirement account to another; life insurance provisions; responsibility for marital debt; transfer of automobiles, estate planning, mutual releases, both during life and after death, and payment of counsel fees in the event of a breach.

Divorcing parents must be made aware that in Pennsylvania, there is no requirement for separated, divorced, or never married parents to pay college tuition and fees for children.

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Pennsylvania's age of emancipation is eighteen (18) years or graduation from high school, whichever first occurs, and no further support obligation is required of parents.

In *Blue v. Blue*, 616 A.2d 628 (Pa. 1992), after 30 years of case law requiring divorcing parents to pay for college, the state Supreme Court ruled there was no obligation for this group of parents to pay college support for children and invited the legislature to draft legislation which would so provide. The General Assembly passed legislation July 2, 1993, 23 Pa. C.S. § 4327, for payment of post-secondary educational costs. However, in *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995), a constitutional challenge to the legislation was brought and the statute providing for the post-secondary education was held unconstitutional.

Since *Curtis*, there has been no possibility of a court order providing for parental responsibility for payment of college of children of separated, divorced, or never married parents in Pennsylvania. Therefore, for any parents entering into a final post-separation agreement resolving all economic issues, it is crucial to provide in the agreement that there is an obligation for the parents to pay for the college tuition, room, board and other expenses of the children and, further, to make that provision non-modifiable. Short of such a provision in a post-marital agreement, there is no effective way to provide for a child's college education.

Enforcement

The law in Pennsylvania on enforcement of marital agreements has evolved significantly since the 1988 Amendments to the Domestic Relations Code with the Superior Court recently expanding enforcement rights. Subsequent to the Divorce Code of 1980, and specifically after the 1988 Amendments, parties were permitted to incorporate an agreement for enforcement purposes only, but not merge the agreement into the divorce decree. By so doing, a party was able to go back to court on the divorce decree which incorporated the marital agreement for enforcement. Many questions followed the 1988 Amendments. If a post-marital agreement provided for alimony payments and child support payments which were subsequently made a part of a court order, could those alimony or child support payments be modified by a court?

In *Peck v. Peck*, 707 A.2d 1163 (Pa. Super. 1998), the court held that a court order regarding alimony which was entered into by the parties pursuant to the dictates of their property settlement agreement could not be modified, if the terms of the property settlement agreement specifically stated that modification was precluded unless agreed to and signed by both parties. The Peck court was clear in stating that § 3105 of the Divorce Code permitted enforcement of both merged and unmerged property settlement agreements. The court stated in *Peck* as follows:

"The 1988 Amendments to the Divorce Code clearly mandate that alimony provisions in a property settlement agreement are not modifiable by the court, while child support provisions are always modifiable if a party can show a change in circumstances, citing 23 Pa. C.S. § 3105(b)(c)."

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Practitioners should be aware that the more specifically the intent of the parties is spelled out in an agreement, the more likely the court will enforce those provisions. If an agreement provides that an award of alimony is non-modifiable for any reason, whether or not a subsequent voluntary order is entered into by the parties pursuant to their agreement, the award will be non-modifiable. Conversely, the parties can never contract away child support for their children and child support, upon a showing of significant change of circumstances, can be modified.

In *Annechino v. Joire*, 946 A.2d 121 (Pa. Super. 2008), the Superior Court recently expanded enforcement rights. The court examined an enforcement situation where the parties had entered into a post-marital agreement prior to the entry of a divorce decree, but did not incorporate or merge that agreement into the final divorce decree. Donna M. Annechino claimed that 23 Pa. C.S. § 3104(a) limited the jurisdiction and enforcement powers under 23 Pa. C.S. § 3105 to only those matters which were raised in the pleadings. She argued that because there was not a count in the divorce complaint for equitable distribution, and also, since the agreement was not incorporated into the divorce decree, that the trial court was without authority to enforce the agreement.

The Superior Court of Pennsylvania agreed with the trial court and held that 23 Pa. C.S. § 3105(a) permitted enforcement of an agreement whether or not equitable distribution was pled and regardless of whether an agreement had been merged or incorporated into the divorce decree.

Once the ink is dry on a post-marital agreement that both parties have executed, such an agreement has the same effect as if it were made an order of the court because it falls within the jurisdiction of Family Court. The family practitioner is well advised to specifically include in such a post-marital agreement all provisions regarding the rights and responsibilities of the parties as if they were set in stone. In any contract, the intent of the parties controls. It is better to spell out the intent as carefully as possible than to leave any provision ambiguous and open to the interpretation of a third party, namely a court. In a well drafted agreement, what you see is what you get. •

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