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## Pennsylvania Marital Agreements

Howard B. Zavodnick

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# Comments

## Pennsylvania Marital Agreements

*"The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts."*<sup>1</sup>

### INTRODUCTION

The purpose of this comment is to explore the law in Pennsylvania with respect to antenuptial and postnuptial agreements.<sup>2</sup> This material will be presented in the following order: (1) a look at the case of *Hillegass Estate*<sup>3</sup> which is said to be the final word in Pennsylvania's antenuptial law; (2) a presentation of some stereotype factors which make up the hypothetical antenuptial agreement situation dealt with throughout the paper; (3) the two-pronged disjunctive test for antenuptial agreements; (4) a miscellaneous section containing such matters as oral agreements, family exemption, divorce, support, equity, wife as creditor, and the presence of an attorney; (5) a look at the law of postnuptial agreements; (6) the factors which should be included in every antenuptial agreement; and (7) a conclusion.

### I. *Hillegass Estate*

In 1968 the Pennsylvania Supreme Court in *Hillegass Estate*<sup>4</sup> announced what it believed to be the final word in Pennsylvania in the confused area of antenuptial agreements. The court was extremely positive in its opinion and stated that this case stood for the true expression of Pennsylvania law and that all prior inconsistent case law was overruled.<sup>5</sup> The court overstated its position on antenuptial agree-

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1. *Balfour v. Balfour*, [1919] 2 K.B. 571, 579.

2. For a study of this area in earlier Pennsylvania cases, see Comment, *Antenuptial Agreements in Pennsylvania*, 55 DICK. L. REV. 382 (1951). For a comprehensive study of marital agreements in the United States, see A. LINDLEY, *SEPARATIONS AGREEMENTS AND ANTENUPTIAL CONTRACTS* (1967).

3. 431 Pa. 144, 244 A.2d 672 (1968).

4. *Id.*

5. *Id.* at 149, 244 A.2d at 675.

In the field of Antenuptial Agreements, the pertinent law has been differently and

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ments because even though this case may be the final statement on the general status of the law, there are a multitude of situations which factually differ from the *Hillegass* case and cannot be fully adjudicated using only the principles announced in that case.

In the *Hillegass* case, the husband died at the age of 76 leaving an estate of \$265,876. His widow, who he had married five years earlier, filed a petition to take against the husband's estate. Prior to the marriage the two parties had entered into an antenuptial agreement which provided: in consideration of the husband paying the wife \$10,000, the wife waived all interest in her husband's estate which had been fully disclosed to her. The husband then complied with the agreement and paid his wife \$10,000.<sup>6</sup>

One principle stated in the *Hillegass* case is that the parties to an antenuptial agreement stand in a relationship of mutual confidence and trust. The spouse who gives up his or her statutory rights in the estate of the other spouse is to receive a reasonable provision in light of the circumstances. In the absence of such a reasonable provision the spouse who has given up statutory rights is to receive full and fair disclosure of all pertinent facts and circumstances.<sup>7</sup> The court went on to state that the reasonableness of the provision is to be determined as of the date of the agreement and not at a later date. Also, the court propounded a list of criteria to determine reasonableness.<sup>8</sup> Many questions are left open by this case which is supposed to be the final statement of the law in this area. The *Hillegass* case does not explain which factors are to be most heavily weighted in determining whether the provision for the wife was adequate. The definition of disclosure is not made clear because the court does not state whether disclosure means divulging all of one's assets or whether assets must be disclosed and the rights being given up by the wife must also be disclosed. Another

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varyingly expressed in a number of cases, with the result that in several respects the law is not as clear, definite and certain as it should be. We shall therefore eliminate the confusion and conflicts resulting from different expressions of the applicable standards and principles by stating clearly and more definitely the applicable standards and principles in this field.

The footnotes to the above paragraph of the opinion states:

We have carefully examined and reviewed the facts and law in each and all of the prior cases, and any statement of law or of the appropriate test standards or principles in any of them which is contrary to or modifies or changes the hereinafter stated standards or tests or principles are hereby disapproved and nullified.

*Id.* (asterisk).

6. *Id.* at 146-48, 244 A.2d at 673-75.

7. *Id.* at 149, 244 A.2d at 675.

8. *Id.* at 150, 244 A.2d at 676.

question left unanswered by *Hillegass* is whether a schedule of assets, attached to an antenuptial agreement, necessarily implies full and fair disclosure. Whether the spouse who gives up rights has to be advised by independent counsel is a further question not resolved by the *Hillegass* case. Since these and other questions remain unanswered by *Hillegass* much of the pre-*Hillegass* case law is still vital to courts deciding antenuptial agreement issues and to attorneys drafting antenuptial agreements.

## II. STEREOTYPE CASE

The Stereotype situation which will be dealt with throughout this work will include the following factors: (1) an antenuptial agreement in which the wife gives up all rights in her husband's estate in exchange for some monetary consideration; (2) a man who is well advanced in his years and is contemplating marriage with a woman somewhat younger than he; (3) a man having considerable financial means; (4) a contemplated second or third marriage for the man; (5) some adult children of the prior marriage or marriages of the man; (6) the death of the husband after the marriage; (7) the widow attempting to take her statutory share against the will of the deceased husband;<sup>9</sup> and (8) the children of the prior marriages asserting the antenuptial agreement as a defense to the widow's election to take against the will. There will be variations in the factual situations in many of the instances analyzed in this work but these eight factors represent the basic dispute in most antenuptial agreement cases. One other factor which must be kept in mind as being present in antenuptial agreements, as well as the eight stereotype factors, is that of *uberrima fides*,<sup>10</sup> abundant good faith between the parties to the agreement.<sup>11</sup>

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9. PA. STAT. ANN. tit. 20, § 2508 (1973) (this is the new Consolidated Probate, Estates & Fiduciaries Code):

(a) Right of election. When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated: Provided, That the spouse so electing must also elect to take against all conveyances within the scope of section 6111(a) of this code (relating to conveyances to defeat marital rights), of which he is a beneficiary.

(b) Share of estate. The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator if the testator is survived by more than one child or by one or more children and the issue of a deceased child or children or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.

10. BLACK'S LAW DICTIONARY 1690 (rev. 4th ed. 1968).

11. Shea's Appeal, 121 Pa. 302, 15 A. 629 (1888).

The relation (between betrothed persons) is one of such extreme mutual confidence

In referring to the spouse who is giving up rights in return for either a reasonable provision or full disclosure this writer uses the female gender. All principles are equally applicable when the male partner of the marriage is the one who is giving up his rights in the estate of the female, but since it is more often the case that the female is giving up rights in the estate of the male, the spouse referred to as the *wife* in this work is the one who has given up rights.

### III. REASONABLE PROVISION

One of the two prongs of the *Hillegass* test for the validity of an antenuptial agreement is a reasonable, adequate provision for the wife,<sup>12</sup> in return for her giving up of her rights in the estate of the husband. One question that the *Hillegass* case did answer was that of the burden of proof. The party seeking to nullify the antenuptial agreement has the burden of showing that there was no reasonable provision for the wife and that there was no fair disclosure of the husband's worth.<sup>13</sup> Cases prior to *Hillegass*<sup>14</sup> held that where there was an adequate provision for the wife, a presumption of designed concealment arises and the burden of proof is shifted to the husband to rebut this presumption. When there is no evidence to prove or disprove disclosure of assets, the placement of the burden of proof will be the decisive factor in determining which side will be successful. The *Hillegass* court would find for the husband when there were no facts as to disclosure and an unreasonable provision for the wife while prior cases would find for the

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that a special duty of full disclosure arises which has no place in the ordinary contractual relation. Thus, in the case of *Kline v. Kline*, 57 Pa. 120, we said: "There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say they are dealing at arms' length, we think is a mistake. Surely when a man and a woman are on the eve of marriage and it is proposed to them, as in this instance, to enter into an ante-nuptial contract upon the subject of the enjoyment and disposition of their respective estates, it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement. We held that the relation existing between betrothed persons was one of the confidential relations which require uberrima fides in all transactions between them.

*Id.* at 318-19, 15 A. 633.

12. 431 Pa. at 149, 244 A.2d at 675.

13. *Id.* at 150, 244 A.2d at 675.

14. *McClellan Estate*, 365 Pa. 401, 75 A.2d 595 (1950); *Groff's Estate*, 341 Pa. 105, 19 A.2d 107 (1941); *Neely's Appeal*, 124 Pa. 406, 16 A. 883 (1889); *Mauk's Estate* 19 Pa. Super. 338 (1902).

wife in this same situation. In *Mauk's Estate*<sup>15</sup> the court said:

The provision not being adequate for the maintenance of the widow, the question arose whether it was so disproportionate to the estate of the husband so as to raise the presumption of designed concealment, and throw upon those who sought to interpose contract as a bar to the widow's right the burden of disproof.<sup>16</sup>

In this case the burden was not met by the representative of the husband's estate and the widow was successful in setting aside the antenuptial agreement.<sup>17</sup> In this particular case the husband's estate was worth approximately eleven thousand dollars and the six hundred dollar provision for the wife was held to be inadequate.<sup>18</sup>

Another pre-*Hillegass* case which shifted the burden of proof to the legatees to prove full disclosure when an inadequate provision was made for the wife is *Haberman Estate*.<sup>19</sup> In that case the husband had an estate of approximately seventeen thousand dollars and the wife was given a house to live in as her sole provision. There were no funds given to her for maintenance and support. Again, as in *Mauk* the legatees could not meet the burden of disproving fraudulent concealment.<sup>20</sup> *Hillegass'* placing of this burden on the person attempting to invalidate the antenuptial agreement is a complete reversal of prior case law which placed this burden on the estate of the husband where an inadequate provision was made for the wife. In light of the general Pennsylvania policy to protect the rights of a surviving spouse<sup>21</sup> the *Hillegass* case should not have reversed the law as far as shifting the burden of proof to the husband where an inadequate provision was made for the wife.

The *Hillegass* case did restate one essential provision in determining the adequacy of the provision for the wife, which is that this adequacy will be determined in light of the time when the agreement was made.<sup>22</sup> Hindsight and later accumulation of wealth plays no role in determining the adequacy and reasonableness of the provision.

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15. 19 Pa. Super. 338 (1902).

16. *Id.* at 342.

17. *Id.*

18. *Id.* at 341.

19. 239 Pa. 10, 86 A. 641 (1913).

20. *Id.* at 11, 86 A. at 642.

21. *Gelb Estate*, 425 Pa. 117, 228 A.2d 367 (1966).

Pennsylvania has always carefully protected the rights of a widow in her husband's estate, particularly, as in this case, where the husband and wife have lived harmoniously together for years prior to the death of the husband.

*Id.* at 125, 288 A.2d 371-72.

22. 431 Pa. at 150, 244 A.2d at 675.

A vague test for adequacy was stated in 1950 in *McClellan's Estate*:<sup>23</sup> It is also well established that in considering the adequacy of the provisions for a wife in an ante-nuptial agreement, all of the relevant facts and circumstances surrounding the case must be considered; and the true test of adequacy is whether the provision for the intended wife is sufficient to enable her to live comfortably after her husband's death in substantially the same way as, considering all the circumstances, she had previously lived.<sup>24</sup>

In 1889, *Neely's Appeal*<sup>25</sup> announced its criteria for determining the adequacy of the provision for the wife.<sup>26</sup> *Kaufmann's Estate*<sup>27</sup> in 1961 announced six criteria which were to be considered in determining the adequacy of the provision for the wife: (1) the financial worth of the husband; (2) the financial worth of the wife; (3) the age of the parties; (4) the number of children of each of the parties; (5) the intelligence of the parties; and (6) whether the wife aided in the accumulation of the wealth.<sup>28</sup> *Hillegass* adopted these criteria as promulgated in the *Kaufmann* case and added the criterion of considering the standard of living of the survivor before the marriage and that which that survivor could expect after the marriage.<sup>29</sup>

#### IV. FULL DISCLOSURE

The second prong of the *Hillegass* test for the validity of an ante-nuptial agreement is that in the absence of the first prong (reasonable, adequate provision for the wife) the husband must make a full and fair disclosure.<sup>30</sup> It is very clear that these two prongs are stated in the disjunctive. One need not consider whether there was a full and fair disclosure if one decides that there has been an adequate provision for the wife. Along these same lines is the fact that one can give the wife a nominal provision or no provision at all if one makes full and fair disclosure.

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23. 365 Pa. 401, 75 A.2d 595 (1950).

24. *Id.* at 405, 75 A.2d 597.

25. 124 Pa. 406, 16 A. 883 (1889).

26. *Id.* at 426, 16 A. at 884.

When we consider the question of the adequacy of the provision we must regard all the circumstances surrounding the case. This was a marriage between persons well advanced in years. The appellant was not the mother of his children, nor was she likely ever to bear him any. She had not in any way aided him to accumulate his fortune.

27. 404 Pa. 131, 171 A.2d 48 (1961).

28. *Id.* at 137, 171 A.2d at 51.

29. 431 Pa. at 150, 244 A.2d at 676.

30. *Id.*, 244 A.2d at 675.

As stated earlier, the *Hillegass* case puts the burden of showing non-disclosure on the party trying to invalidate the antenuptial agreement even where there is a wholly inadequate provision for the wife. The court held in that case that since there was no proof to rebut the allegation contained in the clause in the agreement which stated that full disclosure had been made, that there was full disclosure regardless of the provision made for the wife.<sup>31</sup> This holding is opposite earlier cases like *Slagle's Appeal*<sup>32</sup> which called for a presumption of fraudulent concealment when the provision for the wife was unreasonably disproportionate to the means of the husband.

One question that arises in terms of full and fair disclosure is whether the husband need only disclose the dollar value of his assets or whether he must both disclose this dollar value and fully disclose to the wife the statutory share of his estate which she is giving up in signing the agreement. A full and fair disclosure of the value of one's estate is absolutely meaningless to a wife-to-be who does not know that by reason of her marriage she will be entitled to a statutory share of her husband's disclosed assets.

Another problem which arises in the disclosure area is the question of the clause in an antenuptial agreement which states that each spouse has full knowledge of the extent of the other's assets. It is arguable that this is merely a boilerplate clause which is of no value. But if a disclosure clause in an antenuptial agreement is considered valueless, what happens in the situation where the husband *has* actually fully disclosed to his wife and puts a clause in the agreement to that effect.

The *Vallish Estate*<sup>33</sup> case held that a full disclosure clause in an antenuptial agreement was not conclusive evidence of this disclosure but only rebuttable prima facie evidence.<sup>34</sup> This court held that the refusal of the court below to allow the wife to bring in evidence to rebut the full disclosure clause in the agreement placed too much of an obstacle in the wife's path to allow her to show that there was no full and fair disclosure.<sup>35</sup> Other earlier cases have taken this same position that a full disclosure clause in an antenuptial agreement is not conclusive

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31. *Id.* at 152-53, 244 A.2d at 677.

32. 294 Pa. 442, 144 A. 426 (1928).

33. 431 Pa. 88, 244 A.2d 745 (1968).

34. *Id.* at 96, 244 A.2d at 749.

35. *Id.* at 100-01, 244 A.2d at 751.

but only prima facie evidence of disclosure which can be overcome by positive facts to the contrary.<sup>36</sup>

In *McClellan Estate*<sup>37</sup> the court speaks of nondisclosure as fraud and states that a court has the inherent right to set aside any contract for fraud. Fraud is defined by this court in terms of silence as well as positive assertion. One might be able to argue that if a husband merely discloses his assets to his wife but is silent as to the rights she is giving up by signing the agreement, that this silence is a fraud on the wife and is grounds to vitiate the antenuptial contract.

The *Hillegass* case<sup>38</sup> as well as *Emery's Estate*<sup>39</sup> held that one need not disclose the exact value of one's estate to one's wife where the wife knows that the husband is a man of large financial means. *In re Perelman's Estate*<sup>40</sup> was a case where the wife claimed that the husband's failure to disclose a \$15,000 tax free income from a life estate in a trust rendered the agreement invalid. The court said that it would not look into such factors as earning capacity, salary, expected gifts, possible inheritances, or other contingent factors to determine if a full and fair disclosure has been made. They stated that the only things that must be divulged are currently owned assets that are subject to an individual's testamentary control.<sup>41</sup>

*Flannery's Estate*<sup>42</sup> is a case where there was no disclosure of assets to the wife when she signed an antenuptial agreement. The attorney for the husband argued that since the wife resided in the same neighborhood where the husband's properties were located that this imparted knowledge to her of the nature of her husband's estate. The court did not feel that this was enough of a disclosure to validate the antenuptial agreement.<sup>43</sup>

The full disclosure prong of the test for the validity of an antenuptial

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36. *McCready's Estate*, 316 Pa. 246, 175 A. 554 (1934); *Gelb Estate*, 38 Pa. D. & C.2d 203 (O.C. Phila. Co. 1966).

37. 365 Pa. at 407, 75 A.2d at 598. The court quotes from *Reichert Estate*, 356 Pa. 269, 274, 51 A.2d 615, 617 (1947), stating:

As a general rule, fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture. It is any artifice by which a person is deceived to his disadvantage. . . .

38. 431 Pa. at 151, 244 A.2d at 676.

39. 362 Pa. 142, 146, 66 A.2d 262, 264 (1949).

40. 438 Pa. 112, 263 A.2d 375 (1970).

41. *Id.* at 114, 263 A.2d at 376.

42. 315 Pa. 576, 173 A. 303 (1934).

43. *Id.* at 577-79, 173 A. at 304.

agreement is murky at best. A husband need not necessarily attach a schedule of his assets to the agreement; nor does exact disclosure have to be made. It is clear where a husband gives an inadequate provision to his wife in the agreement and makes a material misrepresentation of the value of his estate that the antenuptial agreement is invalid.

## V. MISCELLANEOUS

### A. Oral Agreements

In 1842 the Pennsylvania Supreme Court recognized oral antenuptial agreements when it stated in *Gackenbach v. Brouse*:<sup>44</sup>

A parol antenuptial settlement such as this, being in consideration of marriage which is a valid one, is binding at the expiration of coverture. No statute requires it to be in writing where the subject of the contract is the wife's chattels; and here it covers the whole case; for it precludes not only the husband's ownership during coverture but his right of survivorship at the dissolution of it.<sup>45</sup>

Of course antenuptial agreements are, as are other contracts, subject to the Statute of Frauds, but since the all-encompassing *Hillegass* case made no mention of oral antenuptial agreements, they remain valid as being consistent with that case. In *Hunt's Appeal*,<sup>46</sup> the court held that an oral antenuptial agreement must be shown by those asserting it by clear, convincing proof. More than a slight preponderance of the evidence is necessary to show such an agreement. In this particular case the court held against the finding of an oral antenuptial agreement.<sup>47</sup>

### B. Family Exemption

In Pennsylvania the widow is entitled to take \$1500 as a family exemption from the estate of her deceased spouse.<sup>48</sup> A question which arises is whether this exemption can be waived by antenuptial agreement and what language is needed to waive such exemption. In *Fruchtman's Estate*,<sup>49</sup> the court attempts to explain when this exemption is waived by an antenuptial agreement and when it is not. The court

44. 4 W. & S. 546 (Pa. 1842).

45. *Id.* at 547.

46. 100 Pa. 590 (1882).

47. *Id.* at 597.

48. PA. STAT. ANN. tit. 20, § 3121 (1973) (this is also from the new Consolidated Probate, Estates & Fiduciaries Code).

49. 47 Pa. D. & C.2d 208 (O.C. Phila. Co. 1969).

looked at the language of some prior case law in order to make this determination. One case which it viewed was *Hughes' Estate*<sup>50</sup> where there was a postnuptial agreement which provided that both spouses would not take against the will of the other. The court in *Hughes* stated that the family exemption was not an inheritance but a gratuity prompted by public policy. The agreement not to take against the spouse's will would not cancel the wife's right to take her family exemption. The *Hughes* court looked at *Jackson's Estate*<sup>51</sup> where the wife waived all rights and demands of every character and description against her husband's estate. The court in *Jackson* held that this language was sufficient to effect a waiver of the widow's right to her family exemption. Thus the general rule is that a waiver of all rights in one's spouse's property, though there is no specific mention of the family exemption, is sufficient to waive that exemption. Where the agreement is more narrow such as a waiver not to take against the real and personal property of one's spouse as of the time of the agreement,<sup>52</sup> the wife will still be entitled to her family exemption.

### C. Divorce

What is or should be the effect of divorce on a duly executed antenuptial agreement? Should the divorce abrogate the agreement or should the agreement be upheld notwithstanding the divorce? In *Cavazza's Estate*,<sup>53</sup> there was an antenuptial agreement in which a wife was to get a certain monetary amount in exchange for her full release of all claims in the estate of her husband. The husband argued, but the court did not agree, that since the agreement was entered into in contemplation of marriage, and the marriage is destroyed by divorce, that the agreement must fail. The court held that the husband failed to protect his interest and even though the wife was the guilty party in the divorce, the agreement is not abrogated unless it contains a provision which expressly invalidates the agreement upon divorce.<sup>54</sup>

Where the husband enters into a contract to pay his wife a specified sum of money each month in return for her giving up all rights in his estate, this contract is not vitiated by a subsequent divorce. One ques-

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50. 41 Pa. D. & C.2d 601 (O.C. Chest. Co. 1966).

51. 33 Pa. D. & C.2d 402 (O.C. Montg. Co. 1964).

52. Landis Estate, 60 Berks 122, 124 (Pa. C.P. 1968).

53. 169 Pa. Super. 246, 82 A.2d 331 (1951).

54. *Id.* at 247-48, 82 A.2d at 332.

tion not answered to date by Pennsylvania case law is what effect annulment has on an antenuptial agreement. In the case of a divorce the marriage is initially admitted but then destroyed, while in annulment the marital status is said to never have existed. The same question arises when there is an antenuptial agreement but no subsequent marriage. It is submitted that since the marriage is consideration for the agreement and in both aforementioned cases there is no marriage thus a failure of consideration.

#### D. Support

One must ask what are the outer boundaries of what the wife can contract away in her marital agreement. In *Commonwealth v. Miller*,<sup>55</sup> there was an antenuptial agreement which provided that the husband would not be liable for the education, maintenance, or support of the children resulting from this marriage.<sup>56</sup> The court held this clause to be void as being contrary to public policy. The husband here was about to marry a woman he knew to be pregnant and was attempting to escape a duty which Pennsylvania law imposes on every husband.<sup>57</sup> One could argue that this case stands for a principle which is broader than the facts of the case. That principle being that the outer limits which any court with a conscience will allow in an antenuptial agreement will be that the agreement must be within the gamut of public policy.

#### E. Equity

The Supreme Court of this State has consistently held that equitable principles will be applied to effectuate the intentions of the parties as evidenced by their antenuptial agreements, written or oral, where there is no fraud or over-reaching.<sup>58</sup>

The court in *Holwig's Estate*<sup>59</sup> held that the husband could not revoke an antenuptial agreement and take a share of his widow's estate. The court felt that principles of equity force the effectuation of parties' intentions as shown by their marital contract.<sup>60</sup> One must remember

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55. 20 West. 49 (Pa. C.P. 1930).

56. *Id.* at 50.

57. *Id.* at 52.

58. *Holwig's Estate*, 348 Pa. 71, 74, 33 A.2d 915, 916 (1943).

59. 348 Pa. 71, 33 A.2d 915 (1943).

60. *Id.* at 74, 33 A.2d at 916.

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that this stream of equity underlies the entire area of marital agreements in drafting agreements, advising clients as to agreements, and predicting how courts will decide issues relating to agreements.

### F. *Wife as Creditor*

Does an antenuptial agreement place a wife in the status of a creditor of her husband's estate or is she considered a legatee? In *Zeitichick's Estate*,<sup>61</sup> there was an antenuptial agreement which provided that the wife was to receive some specific real property from the estate of the husband or, if that property had been sold, the wife was to receive \$10,000.00. In exchange the wife released all claims against her husband's estate. The antenuptial agreement provisions were restated in the will of the husband which also provided the son with some specific property and the remainder interest in the estate. At the time of the death of the husband the specific property granted to the wife in the agreement had been sold.<sup>62</sup> The court made its position clear that the wife was to take as a creditor and not as a legatee as a result of the antenuptial agreement.<sup>63</sup>

The son in this case argued that since specific property was granted to him by will, that this constituted a waiver with respect to that specific property, and the wife could not take her \$10,000.00 from that specific property. The court held for the widow and decreed that the son should sell the property specifically devised to him and pay the wife her \$10,000.00 out of the proceeds.<sup>64</sup>

One must ask if the wife will be better off in all circumstances when treated as a creditor rather than a legatee. In many cases the wife will get the best of both worlds since courts will look at her as more than a mere creditor of the estate but rather hybrid: legatee-creditor.

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61. 426 Pa. 171, 231 A.2d 131 (1967).

62. *Id.* at 172-73, 231 A.2d at 132.

63. Quoting from *Pratt Estate*, 422 Pa. 446, 450, 221 A.2d 117 (1966), the court stated: The law is well settled that where a testator in his will gives specified property or a share of his estate in exact or substantial compliance with the terms of his obligations under an inter vivos property settlement (or separation) agreement made with his wife, that wife is a creditor of his estate and not a legatee under his will. . . . (Emphasis in original.)

The same principles which apply to property settlements made in contemplation of separation or divorce apply with equal force to antenuptial agreements made in contemplation of marriage.

*Id.* at 175-76, 231 A.2d at 133 (citations omitted).

64. *Id.* at 177, 231 A.2d at 133.

### G. Presence of an Attorney

One writer<sup>65</sup> states that it is not ethical to have one attorney advise both the husband and wife in regard to an antenuptial agreement in light of the confidential relationship of husband and wife and the conflicting interests of the agreement. This same writer cites the American Bar Association's Code of Professional Responsibility which, in ethical considerations numbers 5-15 and 5-16, limit the situations in which an attorney can represent multiple clients. The writer concludes that an antenuptial agreement is not in the category of situations where one attorney can represent both parties. One can run into the problem of whether the wife in the stereotype antenuptial agreement situation can, and did, knowingly waive her opportunity to be separately represented.

In the *McClellan* case,<sup>66</sup> an antenuptial agreement was prepared by the attorney of the husband who brought his office assistant along to the meeting of the parties in order to have his assistant represent the husband's fiancée. The court stated in this case that this did not constitute independent legal counsel for the wife.

Many inquiries are raised when one questions the necessity of the wife having an attorney represent her at the signing of an antenuptial agreement. Primarily, one must ask whether the wife must have advice of counsel in order to have a binding agreement. Is an explanation of the contract to the wife sufficient if this explanation comes from either the husband or the husband's counsel? No Pennsylvania appellate court has handed down a decision which states emphatically that the wife *must* have independent legal counsel in order to have a valid antenuptial agreement. This writer feels that in light of the policy in the state of Pennsylvania to protect the spouse and to make sure her interests are not overreached, it would be reasonable for a court to decree that all antenuptial agreements executed after a specified date will require that both spouses have independent legal counsel in order for either to later assert the validity of that agreement.

## VI. POSTNUPTIAL AGREEMENTS

In 1971 the case of *Ratony's Estate*<sup>67</sup> held that the principles applicable to antenuptial agreements are equally applicable to postnuptial

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65. Cathey, *Ante-nuptial Agreements in Arkansas—A Drafter's Problem*, 24 *ARK. L. REV.* 275, 290 (1970).

66. 365 Pa. at 406-07, 75 A.2d at 598.

67. 443 Pa. 454, 277 A.2d 791 (1971).

agreements.<sup>68</sup> This means that the two-pronged test of the 1968 *Hille-gass* case and all case law consistent with that case can be applied to postnuptial agreements. Problems in the postnuptial agreement area arise often because of the distinction between postnuptial agreements and separation agreements.

*Commonwealth ex rel. DiValerio v. DiValerio*<sup>69</sup> described the difference between postnuptial and separation agreements by distinguishing between situations where there is a full and fair determination of the separate property of the spouses and where there is no such determination. The postnuptial agreement calls for a final division of the property rights of the spouses and this agreement is not abrogated upon subsequent reconciliation of the parties while a separation agreement is a giving up of the wife's right to support for some property settlement and is abrogated by subsequent reconciliation.<sup>70</sup>

*Muhr's Estate*<sup>71</sup> looked at the effect of a divorce on a separation agreement. The agreement provided that the wife should receive \$3.00 per week in lieu of all of her claims against the husband's estate. The husband then got a divorce from his wife on the grounds of her adultery. The court disagreed with the husband that this divorce terminated the agreement and the husband's duty to pay. Since the husband retained the benefits of the agreement regardless of the divorce, he must keep his end if the contract.<sup>72</sup> The *Muhr* case is consistent with *Cavazza's Estate*<sup>73</sup> mentioned earlier in this comment, which dealt with whether a divorce abrogated an antenuptial agreement.

In a 1955 case, the Pennsylvania Supreme Court held that the failure of the husband to provide the consideration in a postnuptial agreement

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68. *Id.* at 458, 277 A.2d at 793.

69. 169 Pa. Super. 477, 82 A.2d 687 (1951).

Whether the articles of separation constitute a post-nuptial agreement or merely a separation agreement depends on the intent of the parties as gathered from all the facts. Where parties decide to settle and dispose of their respective property rights finally and for all time, such agreement should be construed as a post-nuptial agreement. *Commonwealth ex rel. Makowski v. Makowski*, 163 Pa. Super. 441, 444, 62 A.2d 71. The subsequent reconciliation of the parties does not abrogate such a post-nuptial agreement. *Ray's Estate*, 304 Pa. 421, 156 A. 64. On the other hand, a separation agreement does not constitute, nor is it intended to constitute a full and final determination of the separate property rights of the parties; it is customarily a surrender of the wife's right to support in consideration of some property settlement. Subsequent reconciliation and cohabitation presumably end a separations agreement.

*Id.* at 479-80, 82 A.2d at 688.

70. *Id.*

71. 59 Pa. Super. 393 (1915).

72. *Id.* at 395-96.

73. 169 Pa. Super. 246, 82 A.2d 331 (1951). See textual material relating to note 53 *supra*.

released the wife from all of the obligations in that agreement. This case looked at the postnuptial agreement as a simple contract and allowed the failure of consideration to be asserted as a defense to the agreement thus allowing the wife to take against her husband's will.<sup>74</sup>

*Fratoni's Estate*<sup>75</sup> looked at the question of whether a postnuptial agreement which provided for the mutual release of the interests of each others' estates was revoked by implication by a provision in the will of one spouse that the other spouse be his executrix. The court held that an executorship is not an *interest* and that the postnuptial agreement only revoked distributive interests not this executorship.<sup>76</sup>

One must be able to distinguish between postnuptial and separation agreements because one can apply the case law principles of antenuptial agreements to the former but not the latter. This is important to the practitioner as far as predictability so that he will be able to decide exactly how the court will treat his agreement. As in the area of antenuptial agreements, many questions are left unanswered in the field of postnuptial agreements. Though the *Ratony*<sup>77</sup> case held that antenuptial agreement principles are applicable to postnuptial agreements, one must ask whether the converse is true. One must also question whether the courts will be as strict in applying the *Hillegass* antenuptial provisions in postnuptial agreement cases as in antenuptial cases.

## VII. ELEMENTS NECESSARY IN ANTENUPTIAL AND POSTNUPTIAL AGREEMENTS

The practitioner in preparing a marital agreement must make sure to include the following mandatory elements and may include any or all of the following permissible elements in order to have a valid, binding agreement.

### A. *Mandatory Elements*

A reasonable provision for the wife in light of the following criteria: (1) financial worth of the husband; (2) financial worth of the wife; (3) age of the parties; (4) number of children of each party; (5) intelligence

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74. *Levine Estate*, 383 Pa. 354, 357-59, 118 A.2d 741, 743 (1955).

75. 28 Pa. D. & C. 739 (O.C. Montg. Co. 1962).

76. *Id.* at 740-41.

77. See textual material relating to note 67 *supra*.

of parties; and (6) whether the wife aided in accumulation of the wealth.

In lieu of an adequate provision for the wife, the husband must provide full and fair disclosure to his spouse. Courts will probably look very carefully for evidence of overreaching in cases where the wife gets absolutely nothing in a marital agreement in return for her giving up of all her rights in the husband's estate. To insure the validity of an agreement with such a provision the husband's attorney must do more than merely provide a clause in the agreement that full and fair disclosure was made to the wife. Two necessary safeguards in this situation are: (1) the husband attach a full and accurate statement of his assets to the agreement; and (2) the wife is represented by independent counsel at the time of the signing of the agreement.

### B. *Permissible Elements*

Probably, as is the case in most areas of the law, the outer limits of what court will allow to be included in marital agreements is governed by the dictates of public policy. Even when one is within the boundaries of public policy one must be sure to be explicit enough to accomplish one's goals without overlooking small details. Primarily, in consideration of the marital agreement, where there is either a reasonable provision for the wife or full disclosure, there should be a clause whereby the wife waives all rights and demands of every character and description against the husband's estate. A waiver of this nature is preferable because of its breadth to a waiver of the wife's right not to take against her husband's will.

In the case of the family exemption, mentioned earlier in this comment, the broad waiver will invalidate the wife's claim to the exemption while the agreement not to take against her husband's will does not invalidate the exemption. A provision to not take against one's spouse's will is consistent with the wife taking her family exemption. An even better way to handle the possibility of the wife's taking a family exemption is to both have a broad waiver and an express clause in the agreement which specifically waives the exemption.

To solve the problem of whether an antenuptial or postnuptial agreement is abrogated by divorce, the drafter need only put a clause to that effect in the agreement. An express provision is necessary here or the wife will continue to collect her benefits from the agreement after

divorce. Fault in the divorce plays no role as far as abrogation, the only way to cut off a wife after divorce is by express provision. Although no Pennsylvania appellate case has decided the issue of whether a marital agreement survives an annulment, by analogy, one could argue that, as in divorce, the agreement is not abrogated unless there is a specific provision ending the agreement at annulment.

Another place where one would need an express provision to abrogate the wife's receiving some money from the estate of the husband after a broad waiver of her rights is in the case where the wife is the executrix of her husband's estate. Even a broad waiver of rights will not revoke this executorship by implication because the executorship is not a distributive share of the estate. An express provision to have one's spouse give up this executorship would operate in Pennsylvania as a codicil to one's will and take this right away from the wife.

#### VIII. CONCLUSION

The law in the area of Pennsylvania antenuptial agreements is not as finalized as the *Hillegass* case tends to imply. Necessarily, the most important thing to understand in this area is the disjunctive two-pronged test which is the key to the drafting of a valid antenuptial agreement. Having one of these two prongs in one's agreement is only the bare bones of an antenuptial agreement. The meat of each agreement should be molded to the needs of each individual's circumstances.

This writer believes that courts will go to great lengths to protect the female partner to a marital agreement especially where she has given up all of her rights in her husband's property in return for an unreasonable provision for herself. Though the black letter of the law (the two-pronged test) holds her to this unreasonable provision where full disclosure has been made, courts will tend to lean in the wife's direction in construing full disclosure. Part of this problem can be alleviated if the husband attaches a full and accurate account of his assets to the agreement. To fully insure that the wife understands her rights when she signs the agreement, the husband should make sure that the wife is represented by independent counsel at this signing. The enigma raised by this proposed situation is when the wife is represented by counsel at the signing of the agreement which takes away her rights and leaves her with an unreasonable provision, he will probably advise her that she should not sign. The attorney should advise the spouse that

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she could probably bargain for a more reasonable provision in the agreement.

The courts of Pennsylvania have long been the proponents of this two-pronged disjunctive test for the validity of marital agreements. The *Hillegass* case has cemented this basic test into Pennsylvania law while leaving many related issues open for discussion. In view of equal protection laws for women, courts may, in the future, cease treating widows as their wards and hold them to their antenuptial agreements where the test has been satisfied.

HOWARD B. ZAVODNICK