

Pre-Nups vs. Mid-Nups



Because Who Knew Love Had Terms & Conditions?

The Law & Practical Considerations

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PURPOSE

WHAT ARE WE TRYING TO ACCOMPLISH?

- Define financial expectations
- Protect premarital assets
- Address business interests
- Coordinate inheritance and estate planning
- Define appreciation and income
- Establish treatment of marital property
- Address alimony and support rights
- Reduce uncertainty and litigation costs

Timing changes the legal context

PRENUPTIAL AGREEMENT

- 1 Before marriage
- 2 In contemplation of marriage
- 3 Effective upon marriage
- 4 Marriage is the surrounding context

MIDNUPTIAL AGREEMENT

- 1 During marriage
- 2 Existing marital relationship
- 3 Operates within the marriage
- 4 The relationship changes the analysis

THE KEY DIFFERENCE: THE PARTIES ARE ALREADY MARRIED.



Pennsylvania favors freedom of contract

“ **Absent fraud, misrepresentation, or duress, parties generally are held to their agreement.**

THE SHIFT

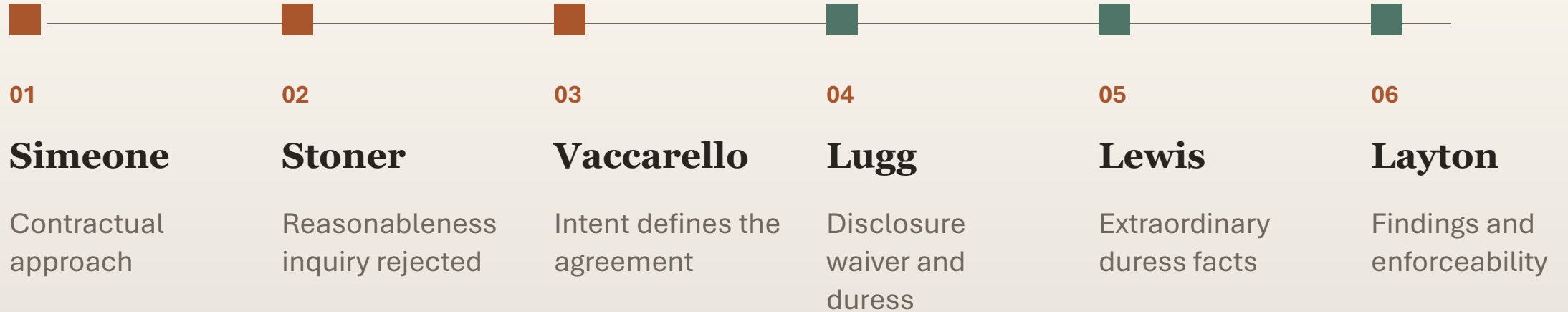
Judicial paternalism



Freedom of contract

A court generally will not invalidate an agreement simply because one party later thinks it was a bad deal.

Six cases form the working roadmap



A roadmap—not a single checklist.

Simeone made contract principles the baseline

581 A.2d 162

THE FOUNDATIONAL SHIFT

- Rejected the former paternalistic approach
- Emphasized freedom of contract
- Focused on fraud, misrepresentation, and duress
- Rejected automatic review of whether the bargain was “fair”

A bad bargain is not necessarily an unenforceable bargain.

Three cases refine the contractual rule

STONER

819 A.2d 529 (Pa. 2003)

- No generalized reasonableness inquiry
- Traditional contract principles apply

VACCARELLO

757 A.2d 909 (Pa. 2000)

- Look to the parties' intent
- Distinguish final settlements from other arrangements

LUGG

64 A.3d 1109 (Pa. Super. 2013)

- Postnuptial agreement
- Disclosure waiver upheld; pressure was not legal duress

Postnuptial agreements remain contracts governed by contract principles.

Facts decide whether pressure is duress

LEWIS

Extraordinary circumstances mattered.

- Abuse and threats
- Medication issues
- Severely constrained access to counsel
- Findings supporting duress

LAYTON

The factual record had to support the ruling.

- Prenup challenge
- Findings insufficiently supported
- Decree and order vacated
- Remanded for further proceedings

Section 3106 puts the burden on the challenger

1

BURDEN OF PROOF

The party challenging enforceability bears the burden.

2

CLEAR AND CONVINCING EVIDENCE

Lack of voluntary execution OR failure of disclosure / knowledge requirements

DISCLOSURE

Fair and reasonable disclosure • written waiver • adequate knowledge

Areas which expose a risk of unenforceability

- 1** ☐ **Fraud or misrepresentation?**
- 2** ☐ **Duress?**
- 3** ☐ **Adequate financial disclosure?**
- 4** ☐ **Did the client understand the waiver?**
- 5** ☐ **Is the agreement internally consistent?**

WHAT DISCLOSURE WAS THERE

LOOK FOR

- False financial information
- Material omissions
- Mischaracterization of assets
- Undisclosed liabilities
- Misrepresentation of financial circumstances

THE LITIGATION QUESTION

What can the parties prove was disclosed—and when?



Disclosure must be provable years later

01

Real estate

04

Retirement accounts

07

Contingent interests

02

Businesses

05

Stock options

08

Significant liabilities

03

Trust interests

06

Investments

09

Closely held entities

Don't just ask whether disclosure occurred. Ask: "Can we prove it occurred?"



Pressure is not always legal duress

WARNING SIGNS

- Last-minute presentation
- Threat to cancel the wedding
- Financial dependence
- Pregnancy
- Immigration concerns
- Emotional pressure
- Threats or intimidation
- Limited access to counsel

PRESSURE



LEGAL DURESS

The factual record decides.



ISSUES TO CONSIDER

CONSIDER

- Separate counsel
- Time for review
- Language barriers
- Sophistication
- Complexity
- Significant waivers
- Explanation of unusual provisions

No separate attorney

≠ **automatically
unenforceable**

Independent counsel

valuable risk management

Support provisions must be explicit

01 **Complete waiver**

02 **Limited waiver**

03 **Formula**

04 **Cap**

05 **Duration**

06 **Triggering events**

07 **Sunset provisions**

08 **Modification provisions**

THEN ASK

How does the provision interact with applicable law and public policy?

A prenup is not an estate plan

COORDINATE

Wills

Trusts

Beneficiary designations

Life insurance

Retirement accounts

Powers of attorney

Do the documents actually work together?



MODIFICATION

A handshake is not an amendment

FIVE YEARS LATER...

The parties change their minds.

- | | | | |
|---|--|---|-------------------------------|
| 1 | Is amendment permitted? | 2 | What formalities apply? |
| 3 | Does it identify the original provision? | 4 | Is consideration required? |
| 5 | Is there new disclosure? | 6 | Are both parties represented? |

WHY ARE MIDNUPS DIFFERENT?

Because the parties are already married.

THE OBVIOUS AND MOST IMPORTANT QUESTION

What is the consideration?

Financial restructuring • reconciliation • separation discussions •
changes in wealth
business problems • infidelity • estate planning • preserving the
marriage



Draft for marriage and future dispute

DON'T ASK ONLY

“Can we get this signed now?”

ASK

“Will this agreement still make sense—and survive scrutiny—ten years from now?”

DRAFT FOR: THE MARRIAGE + THE FUTURE DISPUTE



LOVE MAY BE UNCONDITIONAL....

The agreement shouldn't be.

Know the bargain.
Document the bargain.
Draft the bargain.

Then make sure the documents can prove it.





Questions & Discussion

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