

Survey of the Law of Spousal Rights in Business Property

By
Contributing
Authors



Richard A. Saliterman



Ellen E. Barton

I. INTRODUCTION

Spousal interest in business property is an often-neglected topic in both business and personal planning. The determination of spousal rights is important in a wide variety of contexts including but not limited to dissolution of marriage, death of a spouse, creditor rights/bankruptcy, and taxation. This article will briefly survey the first two contexts, dissolution of marriage and death of a spouse. Since these events do not normally coincide with the formation of a business, and since there is a tendency to consider business transactions distinct from the marital relationship realm, spousal rights are not thoroughly addressed in either corporate law or dissolution law materials.¹

Unfortunately, incidences of divorce and death do occur and can cause unwanted or unplanned transfers of assets, such as transfers of controlling shares in a corporation to the nonparticipating spouse. Therefore, it would seem essential that spousal rights be a consideration in almost all business planning.

This article will acquaint the reader with the overall concepts and terminology of the body of law affecting spousal interests in business assets, then endeavor to show some specific applications of these concepts as translated into rules, and next offer some practice pointers. The article will conclude with public policy

considerations, especially those of balancing due process and equity at the time of dissolution or death against the values of predictability and speed which characterize much of the law that governs commercial areas to the benefit of participants and the public at large.

At the outset, as a general principle, it is important to note that Minnesota courts have jurisdiction not only over the parties to a dissolution, but also over any property, real or personal, owned by the parties wherever situated.² In addition, as a general principle, Minnesota courts will apply Minnesota law regarding the marital or nonmarital character of the assets.³

II. TERMINOLOGY

Marital Property

All property, real or personal, acquired by either party during the marriage relationship is presumed to be "marital property" regardless of whose name appears on the title.⁴ Marriage is a joint enterprise, and the courts have considered it analogous to a partnership for this and other principles.⁵ The spouses are presumed, especially absent specific agreement to the contrary, to have made or to make equally important contributions to the acquisition of marital property during the marriage and to any appreciation in value

of marital property during the marriage.⁶ This presumption may be overcome only by showing that the property is "non-marital."⁷

Nonmarital Property

Nonmarital property is property owned prior to marriage and property acquired after marriage as a gift from a third party, such as an inheritance or property which "is excluded by a valid antenuptial contract."⁸ Nonmarital property also includes property which is acquired in exchange for or is the increase in value of nonmarital property.⁹

Mixed Marital and Nonmarital and the Concept of Active Versus Passive Appreciation

Income from nonmarital property, even if reinvested, is considered marital property.¹⁰ Therefore, cash dividends on stock, bank account interest, and income from rental property are normally considered marital property.¹¹ Marital property also includes appreciation of nonmarital property which occurs during the marriage and which is due to "efforts of one or both spouses, whether by financial investment, labor or entrepreneurial decision-making."¹² This type of increase is called "active" appreciation.¹³

Conversely, any increase in value of nonmarital property attributable solely to market forces or conditions remains nonmarital.¹⁴ This type of increase is labeled "passive" appreciation.¹⁵

III. NATURE OF THE POWERS OF COURT AT DISSOLUTION

Nature of the Power of the Court over Marital Property

The power of the court to apportion marital property is potentially unlimited and this rule is not always appreciated at the outset in marital and business planning. The court in a dissolution action has the power to apportion marital property equitably, which may result in a division not necessarily mathematically equal.¹⁶

Nature of the Power of the Court over Nonmarital Property

The power of the court over nonmarital property is generally less than that over marital property. However, the power as presently outlined by Minnesota case law is still very significant, and under many circumstances not yet well defined by our courts. Nonmarital property of one spouse can be awarded by the court to the other spouse. This phenomenon is not well acknowledged or necessarily known by many planners. The court has power to apportion [up to one-half the] nonmarital property if "the court finds that [a] party will suffer undue hardship upon an equal division of the marital property."¹⁷ The court may apportion nonmarital property when severe financial disparity will otherwise result.¹⁸ For example, where one spouse had been a homemaker during most of the parties' 30-year marriage, had health problems, and possessed no marketable skills, it was held to be appropriate to award her 40 percent of the nonmarital property.¹⁹

Nature of the Power of the Court over Mixed Marital and Nonmarital Property

After marriage any increase in value of a nonmarital asset due to passive appreciation continues to be nonmarital. On the other hand, income from nonmarital property or appreciation due to efforts of the spouses is considered marital.²⁰ For example, a cash dividend is income and marital while a stock dividend or stock split is not usually considered income and remains nonmarital.²¹ The court has the power to distribute the property equitably according to the principles set out above.

Antenuptial and Postnuptial Contractual Agreements; Other Agreements Between Spouses

Despite the limitations of antenuptial agreements, which will be discussed later, antenuptial agreements under Minnesota law seem in most instances to go a long way toward resolving issues pertaining to marital, nonmarital, and mixed property

at death or dissolution by unequivocally stating the parties' intention. The agreement must be procedurally and substantively fair at its inception and substantively fair when enforced.²²


Under recent statutory enactments in Minnesota, spouses may now also enter into agreements after marriage to resolve issues pertaining to marital, nonmarital, and mixed property at death or dissolution.²³ The statute requires that a post-nuptial agreement be "procedurally and substantively fair both at the time of its execution and at the time of its enforcement."²⁴ Parties and their advisors may unintentionally invoke the auspices of Minn. Stat. §519.11 without providing full regard to its prescriptions and proscriptions upon drafting waivers, disclaimers, and other agreements not entirely uncommon in business planning settings.²⁵

IV. SOME MORE SPECIFIC APPLICATIONS, REPRESENTATIVE ILLUSTRATIONS

Title in Which Property Is Held and Commingling of Assets

The title in which property is held, while strong evidence of ownership, is not dispositive.²⁶ Thus, transferring ownership from individual to joint does not necessarily transfer it into marital property. However, if the spouses transfer the title into joint ownership with the provable intention of converting the asset to marital property, then it becomes marital.²⁷

If after marriage the spouses commingle nonmarital and marital property so that tracing is impossible, the property will be considered to be entirely marital.²⁸ For example, a separate bank account which is reclassified as joint and then commingled with other marital funds loses its nonmarital status.²⁹ On the other hand, inherited cash maintained in a separate savings account and invested in municipal bonds has been held to maintain its separate character.³⁰

 Continued on next page

Marital and Nonmarital Characterization of Business Assets

Closely held corporations

The leading case pertaining to spousal interests in closely held businesses is *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987). The court was required to determine the amount of nonmarital and marital interest in a business owned entirely by the spouses. The court held that because the spouses made substantial contributions to the business during marriage, increasing its value substantially, it was mostly marital property. Only the value of the spouse's premarital investment was held to retain its nonmarital character.

In *Duffey v. Duffey*, 416 N.W.2d 830 (Minn. Ct. App. 1987), the court apportioned the husband's minority interests in seven closely held corporations and one partnership. The husband was vice president and secretary and on the board of directors of one company, and an officer

and a director of the other companies. The evidence showed that the husband was not a key person in any of the enterprises; he was primarily involved with warehousing, equipment, buildings, and trucks and showed no interest in becoming involved in the key functions of the business. The court concluded that his role was limited and that he had not "contributed in any material way toward any increase in value in any of the business entities during the marriage relationship" and held that, under those circumstances, any increase in value was unrelated to the husband's efforts and, therefore, nonmarital.

Real estate, buildings, and equipment

Investment of marital funds into capital improvements increases the marital portion of a business.³¹ For example, in *Poach v. Poach*, the Minnesota Court of Appeals held that the increase in value of a business due to its expansion during the

marriage, attributable to the purchase of a new building and equipment, was marital.³²

In *Burns v. Burns*, 466 N.W.2d 421 (Minn. Ct. App. 1991), the husband owned two fourplex apartments at the time of marriage. During the marriage, the parties used rental income and other marital funds to pay off the mortgage, thereby increasing the equity. The increase in equity of the property attributable to payment of the mortgage was found to be marital.

Pension plan division—an example

In *White v. White*, 521 N.W.2d 874 (Minn. Ct. App. 1994), the husband began participating in a pension plan prior to marriage. Initially, the husband directed how the investments were to be made. After the plan was set up, the husband had no further control of investment decisions nor the power to withdraw money until he terminated employment or retired. After marriage, the husband made additional contributions to the plan. The court held that the value of the pension at marriage and the income earned on that portion after marriage were nonmarital property. All contributions made after marriage, and the income earned on those contributions were held to be marital property. The court reasoned that since the husband had no control over the investment and could not withdraw any funds, no marital efforts had contributed toward appreciation of the nonmarital portion of the pension.

Valuation Issues in the Closely Held Corporation

The impact of buy-sell agreements

Minnesota law seems to provide that the court should consider, but need not adopt, the valuation of a closely held corporation contained in a buy-sell agreement.³³ Its valuation should, however, reflect any transfer restrictions.³⁴ For example, if a corporation previously redeemed shares of a family member for more than the price set in a buy-sell agreement, the court may disregard the agreement as well.³⁵

Likewise, where the spouse owns a majority interest and might be able to modify the terms of the buy-sell agreement, the value set is not dispositive.³⁶

The impact of non-compete agreements

In *Sweere v. Gilbert-Sweere*,³⁷ the court determined what portion of the sales proceeds of a business was attributable to a non-compete agreement. In *Sweere*, the husband sold his stock for \$1,350,000. Part of the consideration for the sale was a non-compete agreement. The court made a distinction between the goodwill of a company, which is marital, and a covenant not to compete, which is not. The court held that the non-compete agreement must *actually restrict* the former spouse's working. The court remanded with instructions to assign an appropriate value to the non-compete agreement.

Validity and Enforcement of Antenuptial Agreements

Marital dissolution context

Minn. Stat. §518.58 provides that non-marital property which is excluded by a valid antenuptial agreement cannot be apportioned.³⁸ However, a court may disregard an antenuptial agreement, which was valid at its inception, if the court finds it to be "unconscionable and unfair" to enforce the agreement at dissolution or death.³⁹ For example, in *Hill v. Hill* the wife, who was in poor physical health and encumbered with emotional problems, had worked in the business with her husband but not otherwise outside the home during the marriage. The court of appeals affirmed awards of spousal maintenance and attorneys fees even though waived in the antenuptial agreement.⁴⁰

In *McKee-Johnson v. Johnson*, *supra*, the Minnesota Supreme Court's inquiry focused, among other things, on the nature of the parties' legal representation at the time the antenuptial agreement was executed.

The parties were well educated, previously married, and employed full-time in professional careers when they signed the agreement. Prior to signing the agreement,

both parties consulted the husband's lawyer who encouraged the wife to obtain separate counsel. The wife was able to consult alone with the attorney and to ask questions before signing. Schedules listing all income, assets, and liabilities of both parties were attached to the agreement.⁴¹ The parties agreed that they would acquire no interest in each other's pre- or postmarital property.

The Supreme Court held that the trial court must analyze both the procedural and substantive fairness of the parties' agreement at its inception and substantive fairness *at the time of its enforcement*. The Court warned that while it is not improper for one attorney to represent both parties, "under some circumstances, not as clear cut as those in this case, such dual representation might be questionable, or perhaps, even fatal, to a proponent's case."⁴²

The Court remanded the case to the trial court for findings regarding substantive fairness of the agreement in light of changed circumstances, including the birth of the parties' child, which might make enforcement of the agreement "oppressive and unconscionable." Critically, the Minnesota Supreme Court instructed the trial court to "strike a balance between the law's policy favoring freedom of contract between informed consenting adults, and substantive fairness . . ."⁴³

Unfortunately, there is no certainty that this holding will be upheld or enforced in the future.⁴⁴ It may raise more questions than it resolves; and there may be a need for legislative changes in this area.

Probate context

In *Affiliated Banc Group, Ltd. v. Zehringer*,⁴⁵ the court was presented with the issue of the waiveability of a spouse's elective share of the other spouse's estate. The court held that such a waiver was valid so long as it complied with Minn. Stat. §519.11 and ruled that the waiver to the elective share must be unambiguous and must state that its purpose is to limit claims against the estate "in order to preserve a portion . . . for [the] children of a prior marriage and for the continuation of certain of his [or her] busi-

ness enterprises."⁴⁶ In that case, the wife's acceptance of "a specific bequest from her husband's estate 'in lieu of' her right to elect against her husband's will" was enforceable.⁴⁷

Similarly, in *In re Estate of Aspenson*,⁴⁸ the court was asked to enforce an antenuptial agreement that provided that each party would "keep [his or her] individual assets in the event of death or divorce."⁴⁹ The wife argued that she was entitled as an "omitted spouse" to an intestate share of her husband's estate because the husband executed his will prior to the parties' marriage. The court examined the issue of whether execution of the antenuptial agreement and other actions by the husband could be construed as transfers of property in lieu of the will, thereby creating an exception to the omitted spouse rule.⁵⁰

The court held that since the wife received \$280,000 either as a beneficiary or as the surviving joint tenant, the omitted spouse rule did not apply.⁵¹ Also, the court found the antenuptial agreement valid and enforceable because it was fair at its inception and because there had been no drastic change of the parties' situation by the time of its enforcement.⁵²

Validity and Enforceability of Postnuptial Agreements

The Minnesota statute provides that postnuptial agreements will be valid and enforceable provided that the agreement complies with the requirements for antenuptial agreements as well as the *additional requirements* of the statute. There is no published case law on the appellate level regarding this statute. However, it would seem quite likely that postnuptial agreements will be governed by essentially the same standards as have antenuptial agreements.

The postnuptial statutory provision specifically excludes from its purview a "contract, agreement, or waiver which is entered into after marriage and which is described in [the probate code]" and further excludes deeds transferring property into and out of joint tenancy.⁵³

Continued on next page

A person may waive all rights to elect under the probate statutes but must do so specifically, including language as to what specific rights are being waived. Importantly, a waiver as to "all rights" will only waive a spouse's right to an elective share and will not waive his or her right to the homestead, a family allowance, exempt property, etc.⁵⁴

V. SOME PRACTICE POINTERS

Use of Antenuptial and Postnuptial Agreements

Antenuptial agreements

As suggested, due to the fact that present Minnesota case law may be unclear and somewhat ad hoc, especially as to what set of facts will trigger intervention of the equity powers of the court, written voluntary dispositions may be the least that could be done in antenuptial agreements. The requirements for a valid antenuptial agreement under Minnesota law in-

clude the following:

- (1) Full and fair disclosure of the earning and property of each party;
- (2) the opportunity to consult with independent counsel;⁵⁵
- (3) in writing; and
- (4) executed under oath prior to the marriage in the presence of two witnesses.⁵⁶

Agreements pertaining to nonmarital property are governed by Minn. Stat. §519.11, while agreements pertaining to marital property are governed by the common law.⁵⁷ The statutory and common law procedural requirements for the most part are the same.⁵⁸ However, there are some differences. For instance, under common law, there must be adequate consideration to support the agreement, i.e., the mutual promise to marry, while the statute dispenses of that requirement.⁵⁹

In addition, under the statute the burden of proof rests on the person challenging the antenuptial agreement to show that it is invalid.⁶⁰ Under the common law the

burden rests on the person attempting to establish the agreement's validity.⁶¹ Therefore, agreements which dispose of marital property will likely be scrutinized more carefully than those that pertain only to nonmarital property and are more likely to be found invalid by the court.

Postnuptial agreements; other agreements/provisions

The statute provides that a postnuptial agreement "may determine all matters that may be determined by an antenuptial contract" or settlement except child support and custody.⁶² In addition to the statutory and common law requirements for an antenuptial agreement, the statute requires the following:

- (1) Each spouse must be represented by separate counsel;
- (2) Each spouse must possess assets in excess of \$1,200,000 at execution of the agreement; and
- (3) The agreement is void if dissolution or legal separation proceedings are commenced within two

years of its execution.⁶³

Spouses may desire to enter into postnuptial agreements if they intend to start a business or have been promoted into a decision-making position in a family-owned business. Postnuptial agreements also can apply to a recently received business benefit, such as stock options or offers to become a partner or shareholder, as well as to recently received inheritances or gifts. In addition, spouses who did not enter into antenuptial agreements or wish to alter their antenuptial agreement must do so pursuant to the statute.⁶⁴ Again, however, the \$1,200,000 asset threshold may be prohibitive to many. However, this does not necessarily mean that otherwise conforming to the statute is unwise to help minimize court intervention.

Importantly, other agreements or amendments to other agreements not necessarily only directly including the parties might be considered by marital and business planners. For instance, specific provisions for shareholders undergoing dissolution of marriage may be included in buy-sell agreements. The nonowner spouse might, for example, in some settings be afforded a specified sum in the event of divorce and a sinking fund established in order to help minimize the effects of divorce litigation and court restructuring. There is room for ingenuity in planning vis-a-vis business agreements involving third parties.

Disclosure and Ensuring Confidentiality

Full disclosure between contracting parties seems to be essential to help ensure the validity of antenuptial and postnuptial agreements, and it would seem overall to help preclude intervention of the court's equitable powers. However, not necessarily unreasonably, a business or professional client may be reluctant to disclose all of his or her assets in a written agreement that could potentially become public record. Disclosure by attaching lists of assets and liabilities is necessary for the validity of anten-

uptial or postnuptial contracts. However, that mechanical procedure alone may not be adequate if the party who is provided the information is not also represented by capable legal and other professionals who can understand and can analyze such information, and opportunity to inquire is afforded.

The agreements need not be recorded to be valid between the parties. However, where real property is involved, the agreement must be recorded or it is not enforceable against a good-faith purchaser for valuable consideration.⁶⁵ Furthermore, upon dissolution or death the agreement must be produced as proof of the parties' agreement. One option is for the parties to agree that the agreement will be kept confidential and to request that the court seal its file.

Separate Representation

Although not statutorily required, as suggested, separate representation may increase the likelihood that a court will find the agreement is fair at the time of its enforcement and help preclude intervention of equitable powers. Lawyers would be required to undertake such representation with care and due diligence and prepare a plan of analysis and review of assets not totally unlike that used in other business planning settings.

Also, as a potential substitute for court intervention and the application of equitable powers at the time of enforcement of the agreement, the practitioner should encourage the parties to consider inclusion of the following provisions:

- (1) Formulas for the disposition of assets in times of hardship or times of prosperity or for other contingencies or events affecting either the parties, the business, or business investments;
- (2) An agreed-upon sum or escrow for certain contingencies separate from a formula; and
- (3) Periodic disclosures of updated financial information on an annual basis or on the occurrence of certain events or contingencies.

Title to Property—How Acquired and How Maintained

A party must establish by a preponderance of the evidence that a particular asset is nonmarital.⁶⁶ The property should be clearly identified as to its nonmarital character and plain measures taken to maintain this status after marriage. The nonmarital character of the asset may be established by testimony of the donor, gift tax returns, the will or probate documents, bank statements, canceled checks, deeds, mortgages, and the like.⁶⁷

Accounts


The parties should consider maintenance of separate accounts for nonmarital property. Interest on nonmarital funds should be withdrawn as it accrues. The parties should avoid commingling marital and nonmarital funds in their separate accounts.

Real property

The title to property should be maintained in the name of the owner-spouse.⁶⁸ Taxes and mortgage payments should be made from separate funds rather than from income. Financing, including bank loans, may be more or less fail-safe points and, if maintaining the nonmarital status of an asset is desired, the source of funds for repayment will be traced or scrutinized. If the spouse co-signs a loan or executes a personal guarantee, it would seem clear that by being "at risk" the spouse is indeed affording a consideration, and the nonmarital status of the property will reasonably be altered.

Buy-sell agreements, voting trusts

Buy-sell agreements must set a fair value for the stock (with consideration given to minority discounts and lack of marketability, for example), and the parties to the agreement must consistently abide by it. Further, the buy-sell agreement should have some restrictions on alteration, especially as to when and how and the amount of the valuation that is

 Continued on next page

based on ownership interests, or the court may assume that it can be changed by a major or controlling shareholder and thereby not follow the values or formulas set forth in the agreement. A stock restriction contained in a buy-sell agreement or in other corporate documents must specifically state that it applies to voluntary and to involuntary transfers.

If both spouses are owners, a voting trust may be created which gives the active spouse control.⁶⁹ The trust should state that it continues upon dissolution of the parties' marriage.

Partnerships

Normally, a court may not award a spouse partnership rights if he or she was not originally a partner, because a partnership is a contractual relationship and consent of the contracting parties is required. However, a spouse may acquire an economic interest in the partner spouse's share or unit. While partnership liabilities may be considered to determine value, the partner's personal obligations incident to those liabilities will not likely be awarded to a nonpartner spouse.⁷⁰ To

a major extent, these principles should also hold true as translated to operations of limited liability companies. However, this is a general rule, and with partnerships and other investment units or vehicles, it is conceivable in the future that the courts will apportion spousal rights. This rule appears applicable to owner-operated or owner-employee partnerships. As to limited liability partnerships and even subchapter S corporations, it would especially seem that very careful planning is necessary to avoid court reapportionment or intervention if that is the goal.

Wills, trusts

The spouse must specifically waive his or her rights under the probate statutes. A general waiver of "all rights" is insufficient.⁷¹ The agreement must mention and address each of the rights granted a surviving spouse under the probate code, including elective share, family allowance, exempt property, and the homestead.⁷²

Pensions

After marriage, the spouses may wish to cease making contributions to pension

plans owned prior to marriage if possible. Before marriage the participating spouse should ensure that he or she will have no control over investment decisions after the marriage and may wish to discontinue "self-directed IRAs" and similar plans.

VI. SOME POLICY CONSIDERATIONS


The holdings in the critical Minnesota cases of *Hill v. Hill* and *McKee-Johnson v. Johnson* may have added uncertainty of resolution of matters in an area where certainty is important and may overall in some sense represent Minnesota law providing substantial power to the courts for apportionment of marital and nonmarital assets alike. Instead of merely ascertaining whether the parties' agreement was fair when created, the trial courts must honor these rulings and also consider whether the agreement is fair at the time of its enforcement. The changed circumstances which were found sufficient to require an analysis of the contract's fairness at enforcement were the wife's inability to work in *Hill* and the birth of a child in *McKee-Johnson*. Therefore, the trial court may be required in all cases to determine whether changed circumstances prohibit enforcement of some or all provisions of the agreement.

An analysis of the impact of changed circumstances will require, as William F. Fraatz pointed out in a *Minnesota Law Review* article, "an investigation of the parties' original expectations, evidence of which will depend primarily on memories dimmed by the passage of time and clouded by the bitterness of the dissolution itself," resulting in increased litigation.⁷³

Fraatz does not address the potential disruption or injury to businesses or to owners and employees.

Antenuptial and postnuptial agreements should be upheld when the statutory and common law requirements of validity at inception are met; the parties are separately and capably represented; and the parties have equal access to information on assets and liabilities. This approach would seem to help promote predictabil-

ity, speed, and privacy or confidentiality and also help decrease acrimony, especially when business assets or settings are involved.⁷⁴ These settings, like the public policy setting eventually leading to the enactment of the Uniform Commercial Code, appear to warrant the application of such values.

Another consideration for placing more emphasis on policies which encourage upfront fairness and planning, rather than post facto judicial intervention in the restructuring or engineering of business economic relationships, is that a spouse who undertakes the risks and invests his or her time, effort, and money should be entitled to the reasonable fruits of his or her labor. This is especially true if the spouses have agreed to this in advance and have reasonably planned for future contingencies, such as including specific provisions in antenuptial and postnuptial agreements addressing or accounting for favorable and unfavorable economic developments and other changes or scenarios. Also, the realization of such a value would seem most reasonable when full disclosure and competent separate representation had occurred at the outset. 

Richard A. Saliterman is a partner in Saliterman & Siefferman Law Firm. He received a B.A. degree from the University of Minnesota summa cum laude and Phi Beta Kappa; a J.D. degree from Columbia Law School; and an LL.M. degree from NYU School of Law. He is the author of *Advising Minnesota Corporations and Other Business Organizations*, published by Michie-Butterworth in 1995 (4 vols., hardbound); and for several years instructed the principal course in business planning at Hamline Law School.

Ellen E. Barton graduated cum laude from the University of Puget Sound (now Seattle University) School of Law in Tacoma, Wash. She practiced law for nine years in Washington state as a civil litigator. Since relocating to Minnesota in 1995, Ms. Barton has been practicing in the family and business law areas.

The authors are indebted to Nicholas M. Wenner, Esq., Nancy Z. Berg, Esq., Gary A. Weissman, Esq., Louis Reidenberg, Esq., A. Larry Katz, Esq., Richard S. Ziegler, Esq., and Arthur B. Carlson, CPA, for their assistance with this article.

ENDNOTES

¹ A portion of this article is based on the text by Richard A. Saliterman entitled *Advising Minnesota Corporations and Other Business Organizations* §36 (1995).

² Minn. Stat. §§518.06 and 518.07; Schmitz v. Schmitz, 309 N.W.2d 748 (Minn. 1981), (Florida real estate); Moore v. Moore, 391 N.W.2d 42 (Minn. Ct. App. 1986), (Canadian bank account).

³ 7 Mark D. Dunnell Dunnell's Minnesota Digest, *Conflict of Laws* §6.02(a) (4th ed. 1990). Thus, the marital or non-marital character of money inherited from a relative living in another country will be determined by the laws of Minnesota. Muus v. Muus, 12 N.W. 343 (1882).

⁴ Minn. Stat. §518.54, subd. 5.

⁵ White v. White, 521 N.W.2d 874, 878 (Minn. Ct. App. 1994); Daniel J. Goldberg, *Non-Marital Property "What's Mine is Mine" Case Law Summary*, Minnesota Institute of Legal Education (1995).

⁶ Minn. Stat. §518.58, subd. 1; Goldberg, *supra* note 5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Goldberg, *supra* note 5, citing Swick v. Swick, 467 N.W.2d 328 (Minn. Ct. App. 1991).

¹¹ White, 521 N.W.2d at 878 (interest on certificate of deposit); Moore, 391 N.W.2d at 44 (interest on nonmarital bank account); Nardini v. Nardini, 414 N.W.2d 184, 195 (Minn. 1987) (cash dividends on stock); Burns v. Burns, 466 N.W.2d 421, 424 (Minn. Ct. App. 1991) (rental income).

¹² White, 521 N.W.2d at 878.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ruzic v. Ruzic, 281 N.W.2d 502, 505 (Minn. 1979).

¹⁷ Minn. Stat. §518.58, subd. 2; Roel v. Roel, 406 N.W.2d 619, 622 (Minn. Ct. App. 1987).

¹⁸ Reynolds v. Reynolds, 498 N.W.2d 266, 271 (Minn. Ct. App. 1993).

¹⁹ Roel, 406 N.W.2d at 622.

²⁰ Moore, 391 N.W.2d at 42 (bank account); Poach v. Poach, 392 N.W.2d 749 (Minn. Ct. App. 1986) (business); Burns, 466 N.W.2d 421 (real estate).

²¹ Nardini, 414 N.W.2d at 194.

²² Minn. Stat. §519.11, subd. 1; Neil B.

Davidson, Minnesota Family Law Practice Manual, §10.11 2d ed. 1990; McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989); Affiliated Banc Group, Ltd. v. Zehringer, 527 N.W.2d 585 (Minn. Ct. App. 1995).

²³ Minn. Stat. §519.11, subd. 1(a).

²⁴ *Id.*

²⁵ William E. Mullin & Judith T. Younger, *Pre-marital and Post-marital Agreements*, Bench and Bar of Minnesota, Dec. 1994, at 25.

²⁶ Minn. Stat. §518.54, subd. 5; Olsen v. Olsen, 552 N.W.2d 290 (Minn. Ct. App. 1996).

²⁷ Goldberg, *supra* note 5.

²⁸ Burns, 466 N.W.2d at 424; Wiegiers v. Wiegiers, 467 N.W.2d 342, 344 (Minn. Ct. App. 1991).

²⁹ Burns, 466 N.W.2d at 424.

³⁰ Schmitz, 309 N.W.2d at 750.

³¹ Poach, 392 N.W.2d at 749.

³² *Id.* at 754.

³³ Berenberg v. Berenberg, 474 N.W.2d 843, 847 (Minn. Ct. App. 1991).

³⁴ Lyon v. Lyon, 439 N.W.2d 18, 20 (Minn. 1989).

³⁵ Berenberg, 474 N.W.2d at 847.

³⁶ Lyon, 439 N.W.2d at 20.

³⁷ 554 N.W.2d 294 (Minn. Ct. App. 1995).

³⁸ Minn. Stat. §518.58, subd. 2.

³⁹ McKee-Johnson, 444 N.W.2d 259; Hill v. Hill, 356 N.W.2d 49 (Minn. Ct. App. 1984).

⁴⁰ Hill, 356 N.W.2d at 57.

⁴¹ McKee-Johnson, 444 N.W.2d at 261-62.

⁴² *Id.* at 265-67.

⁴³ *Id.* at 267-68.

⁴⁴ However, a recent Supreme Court decision seems to indicate that the higher court will hold trial courts to a fairly strict standard in determining unconscionabilities. Kubes v. Kubes, 534 N.W.2d 706 (Minn. 1995).

⁴⁵ 527 N.W.2d 585 (Minn. Ct. App. 1995).

⁴⁶ *Id.* at 588.

⁴⁷ *Id.*

⁴⁸ 470 N.W.2d 692 (Minn. Ct. App. 1991).

⁴⁹ *Id.* at 694.

⁵⁰ Minn. Stat. §524.2-301(a).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Minn. Stat. §519.11, subd. 1a (f).

⁵⁴ Minn. Stat. §524.2-213; Melvin J. Peterson & Richard Wolfson, *Election Against the Will: The Elective Share of the Surviving Spouse*, Bench and Bar of Minnesota, Oct. 1986, at 20.

⁵⁵ It is best if both parties are represented by separate counsel. Richard S. Ziegler, *Antenuptial Agreements*, Henn. Lawyer, (Sept.-Oct. 1981), at 6. Mullin & Younger, *supra* note 25.

⁵⁶ Minn. Stat. §519.11, subd. 2.


⁵⁷ Davidson, *supra* note 22.

⁵⁸ *Id.*

⁵⁹ Ziegler, *supra* note 55.

⁶⁰ Minn. Stat. §519.11, subd. 5.

⁶¹ Minn. Stat. §519.11, subd. 5; McKee-

 Continued on next page

SALITERMAN/BARTON
CONTINUED . . .

ENDNOTES

Johnson, 444 N.W.2d at 265; Hill, 356 N.W.2d at 53.

⁶² Minn. Stat. §519.11, subd. 1a (b).

⁶³ *Id.*

⁶⁴ Minn. Stat. §519.11, subd. 2a.

⁶⁵ Minn. Stat. §519.11, subds. 3 and 4.

⁶⁶ Jill Frieders, *Non-Marital Property Division* §III, Minnesota Institute of Legal Education.

⁶⁷ *Id.*

⁶⁸ Although recommended, this does not preclude a court from determining that the property or some portion of it is nonetheless marital.

⁶⁹ Saliterman, *supra* note 1, §36.08.

⁷⁰ Spearman v. Spearman, 379 N.W. 2d 627 (Minn. Ct. App. 1986).

⁷¹ Ziegler, *supra* note 55.

⁷² Minn. Stat. §524.2-213.

⁷³ See, e.g., William F. Fraatz, *Enforcing Antenuptial Contracts in Minnesota: A Practice in Search of a Policy Basis in the Wake of McKee-Johnson v. Johnson*, 77 Minn. L. Rev. 441, 460 (1992).

⁷⁴ *Id.*