

INTRODUCTION

This *amicus* brief is filed by the Family Law Section of the Minnesota State Bar Association, an organization of more than eight hundred (800) attorneys practicing in the area of family law throughout the State of Minnesota¹. Our members negotiate and draft antenuptial contracts for clients attempting to protect their property following marriage.

The Family Law Section of the Minnesota State Bar Association agrees with the dissent of Judge Dietzen in *Antone v. Mirviss*, 694 N.W.2d 564, 572 (Minn. App. 2005), who concluded that the statute of limitations for legal malpractice in negotiating and drafting an antenuptial contract accrues as of the marriage of the parties. Judge Dietzen's dissent recognizes the chilling effect of the majority opinion of the Court of Appeals and its predictable result – namely that attorneys will be reluctant (refuse!!) to draft such agreements to avoid malpractice claims brought many years after the alleged malpractice occurred.

STATEMENT OF THE CASE

This case arises from the Court of Appeals' reversal of the trial court's dismissal of the legal malpractice suit of Respondent Richard Antone ("Antone") against Appellant Israel Mirviss ("Mirviss"), the attorney who drafted the antenuptial contract before Antone's marriage to Debra Schmidt in 1986. The trial court dismissed Antone's malpractice claim as occurring outside the six-year statutory limit for legal malpractice. The trial court concluded that Antone's marriage triggered the running of the statute of limitations for Antone's malpractice claim against Mirviss. Alternatively, the trial court concluded that some damage had occurred more than six years before

¹ This brief was prepared by the Amicus Committee of the Family Law Section of the Minnesota State Bar Association, with no involvement or monetary contribution from the parties, with all costs borne by the Section.

the commencement of the malpractice action because of the immediate appreciation of Antone's premarital property.

The Court of Appeals reversed the trial court's dismissal of the malpractice claim, holding that the statute of limitations did not accrue until the district court in the *Antone*² divorce entered an amended judgment awarding Mrs. Antone an interest in the appreciated value of Antone's premarital real estate.

Judge Dietzen, in his dissent, forecast a bleak future for antenuptial contracts because of the majority decision. He predicted that "parties desiring an antenuptial agreement will encounter practitioners reluctant to draft such agreements because they will be held liable for legal advice long after the alleged malpractice has occurred." He disagreed with the majority's holding that the damage allegedly suffered by the malpractice plaintiff must be in the form of ascertainable money damages for the statute of limitations to accrue. (*See id.*, 694 N.W.2d at 572)

ARGUMENT 1

As public policy, Minnesota law favors antenuptial contracts and the ability of competent adults to contract.

Antenuptial contracts showed up in our legal system in the sixteenth century when couples used them in attempts to alter the incidents of legal marital property. Judith T. Younger, *Antenuptial Agreements*, 28 Wm. Mitchell L. Rev. 697, 2001, citing Sir William Holdsworth, *A History of English Law*, 310 – 12 (3rd Ed. 1945). As stated in *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. App. 1989), Minnesota has long recognized the validity of antenuptial agreements which serve to alter statutory schemes regulating the disposition of marital property.

As the cases demonstrate, premarital agreements, if fairly arrived at, following full disclosure of financial condition, and with opportunity to consult independently with counsel, have been favored in the common law of Minnesota. — even though marital property was included within their scope.

² *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002).

Id 429 N.W.2d at 265.

In *McKee-Johnson*, this Supreme Court expressly acknowledged the neutrality of Minn. Stat. § 519.11 as to the disposition of property acquired during coverture, consistent with Minnesota common-law.

Antenuptial contracts allow parties to operate their private affairs outside the statutory structures of dissolution and probate law. Increasingly, parties on the brink of matrimony have careers with established retirement accounts, portfolios or real property, which they wish to have sequestered from claims of the marriage. It is also common for a party contemplating a second marriage to identify and exclude premarital property or exclude assets acquired after marriage in order to assure the financial interests of children from a prior marriage.

Karon v. Karon, 435 N.W. 2d 501 (Minn. 1989) recognized the instances where waivers of statutory rights occur with some frequency, such as in probate law, where heirs enter into stipulations to distribute property or to waive statutory allowances. *Karon* upheld as important public policy the ability of competent adults to freely contract and waive otherwise available statutory protections.

In short, antenuptial contracts are important documents drafted to define and protect property, anticipate changes to life circumstances and provide a framework of expectations as to what will happen in the event of death or divorce.

Amicus questions whether these important antenuptial contracts will remain available, should the Supreme Court affirm the Court of Appeals' decision in *Antone v. Mirviss*.

ARGUMENT II.

A cause of action for legal malpractice attributable to the drafting of an antenuptial contract accrues on the date of marriage.

The majority opinion in *Antone v. Mirviss* holds that a cause of action for legal

malpractice in the negotiating and drafting of an antenuptial contract accrues when the malpractice claimant sustains ascertainable monetary damages. *Antone*, at 570-571. Judge Dietzen, in his dissenting opinion, concluded that the statute of limitations accrues upon the marriage of the parties to the antenuptial contract.

Upon marriage, the antenuptial agreement becomes operative to resolve issues of property division and spousal maintenance, if the marriage is dissolved.

Antone at 572.

The Court of Appeals' decision in *Antone* contravenes this Court's holding in *Hermann v. McMenemy & Severson*, 590 N.W.2d 641, (Minn. 1999). In *Hermann*, the Court of Appeals held that the statute of limitations begins to run when the malpractice claimant suffers "pecuniary loss" or when harm manifests in some form. This Court explicitly rejected the Court of Appeals' "discovery rule," holding that a cause of action for legal malpractice accrues and the statute of limitations begins to run when "some damage" has occurred because of the alleged malpractice. *Hermann*, 590 N.W.2d at 643.

Antone submitted an expert witness affidavit by Martin L. Swaden³ who opines that antenuptial agreements do not confer property rights because they are contingent and subject to challenge, and "generally do not affect property interests of the parties during the marriage." This misses the point on two grounds. First, whether damages are contingent, unknown or unpredictable is irrelevant to the issue of whether damages have occurred. Second, none of these factors bears upon the binding nature of antenuptial agreements. Mr. Swaden infers that there is no contract at all until a court declares the antenuptial contract valid at some distant future date. If that is in fact *Antone's* argument, it is false and effectively stands Minn. Stat. § 519.11 on its head.

³ Mr. Swaden is a highly respected family attorney, who is co-author with Linda A. Olup of

Antenuptial agreements are not void or prohibited; they are statutorily authorized and presumptively valid. In fact, Minn. Stat. §519.11, Subd. 3 expressly authorizes the filing of antenuptial contracts in “every county where any real estate so described is so situated.”

The burden of proof as to the enforceability of an antenuptial contract is on the party contesting enforceability. Antenuptial contracts are binding agreements when validly entered into, like any other contract. They are enforceable unless set aside because of procedural defects, or because they are substantively unfair at the time of enforcement (similar to an unconscionability analysis).

There is a final problem with Mr. Swaden’s analysis. He suggests that because an antenuptial agreement may not be enforced or challenged for many years into the future, that the statute of limitations malpractice should not run until that date. This is a *nonsequitur*. Society does not encourage divorce, and as a result has no interest in having antenuptial agreements presented to the court for enforcement within a specified period. There are other policy reasons reflected in statutes of limitations, including the prevention of stale claims. The two situations cannot be reconciled in the manner proposed by Antone; they are, in fact, mutually exclusive. The correct resolution is to recognize that antenuptial agreements are, like other contracts, binding agreements that define rights and responsibilities. Hence, the signatories may sustain loss of rights (*i.e.*, damages) upon their marriage, which triggers the running of the statute.

The *Antone v. Mirviss* decision, if affirmed by this Court, will have serious implications for attorneys who draft or negotiate antenuptial contracts. The indefinite threshold established by the Court of Appeals’ decision extends far beyond any rational limits of a statute of limitations. (Minn. Stat. § 541.05, Subd. 1 2004) This decision has created a new rule regarding perpetuities

that conceivably extends long past the retirement of an attorney and beyond the grave as a chargeable claim against his or her estate.

There may be no way for an attorney to insure against such malpractice exposure, even if there is an ability to purchase “tail insurance.” The cost thereof could be prohibitive, particularly for somebody who is no longer engaged in the active practice of law.

The purpose of a statute of limitations is to provide closure on potential litigation as a matter of public policy. *See Karels v. American Family Mut. Ins. Co.*, 371 N.W.2d 617, 619 (Minn. App. 1985) Statutes of limitation serve a general purpose of repose, meeting the interest of a potential defendant and society in freedom from stale claims which could otherwise overburden the judicial system. An open-ended statute of limitations on antenuptial contracts carves an exception to the purpose of a statute of limitations. This case highlights the difficulty in reconstructing the rationale for the inclusion or omissions of many foreseeable and unforeseeable possibilities contemplated, omitted, not mentioned or expressly excluded in the emotional (often last-minute) negotiations between engaged couples of the provisions of an antenuptial contract. As recognized in *McKee-Johnson v. Johnson*, the parties had “somewhat different recollections with respect to his or her understanding of the contents and ‘coverage’ ” of their antenuptial contract. This is the norm in all litigation. A statute of limitations exists specifically to prevent the potential for indefinite exposure to liability and to provide a definite time after which claims are barred. As Judge Dietzen pointed out, the standard of care might long have been forgotten. The standard of care might also have evolved over the intervening years to a different standard by the time the malpractice action is brought.

Application of the Court of Appeals’ decision in *Antone v. Mirviss* will lead to severe limitations on the number of attorneys willing to craft antenuptial contracts. This decision has already resulted in attorneys refusing to draft and/or negotiate antenuptial contracts to avoid

unforeseeable malpractice claims decades later. Quite simply, no client could pay enough for the drafting of any document that would result in such an open-ended risk of legal liability.

The need for attorney involvement in the drafting of antenuptial contracts is vital. Minn. Stat. §519.11, Subd. 1 guarantees that each party has the right to consult with legal counsel of his or her choice. If public policy favors antenuptial contracts as negotiated by competent, consenting adults, the statutory procedural protections afforded by attorney review and participation therein will be radically eviscerated by attorneys opting out of any invitation to participate in a high-stakes game of roulette. This reluctance or self-limitation on practice by attorneys in the negotiation and drafting of antenuptial contracts would adversely affect the public, given the public policy in favor of marriage and the desire and ability of competent adults to contract prior to marriage.

CONCLUSION

It is necessary for the Supreme Court of the State of Minnesota to reverse the Court of Appeals and integrate its prior decisions on the statute of limitations in attorney malpractice actions. This reversal will affirm the trial court in dismissing this case as time-barred.

Respectfully Submitted:

FAMILY LAW SECTION,
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DISCLAIMER

Section § 14.2 of the Restated Articles and Bylaws on the Minnesota State Bar Association provides that:

No report, recommendation, amicus brief, or other action of any Section or Committee shall be considered as the action of the MSBA unless and until it has been approved by the Assembly, House of Delegates, Board of Governors or Executive Committee. . . .

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 12 point, and according to the word processing system's word count, is no more than 1,932 words, exclusive of the cover page, table of contents, table of authorities, signature block and this certification, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: August 8, 2005

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