

RUTKIN and OLDHAM, L.L.C.

ARNOLD H. RUTKIN
SARAH S. OLDHAM
MELISSA J. NEEDLE
MARIA A. DORNFRIED

OF COUNSEL
KATHLEEN A. HOGAN†

†Also admitted in Colorado

PLEASE REPLY TO:

P.O. BOX 295
5 IMPERIAL AVENUE
WESTPORT, CONNECTICUT 06881
(203) 227-7301
FAX: (203) 222-9295

125 MASON STREET
GREENWICH, CONNECTICUT 06830
(203) 869-7277

EMAIL - law@rutkinoldham.com

TO: Co-Chair Representative Michael Lawlor
Co-Chair Senator Andrew McDonald

FROM: Arnold H. Rutkin

DATE: March 3, 2006

RE: Raised Bill 5538/An Act Concerning The Enforcement Of Premarital Agreements

I have been a practicing attorney for 40 years; much of that time has been in divorce and family law, having limited my practice to family law for about 20 years. I am here today as an individual, although now and in the past I have held numerous offices and positions in the Family Law Sections of the Connecticut Bar Association and American Bar Association and am an active member of the Connecticut Chapter of the American Academy of Matrimonial Lawyers and in the national organization.

I am co-author of Connecticut Family Law and Practice, Volumes 7,8 and 8A of the Connecticut Practice Series published by West Group. In addition, I have been a volunteer Special Master in the Regional Family Trial Docket since its inception, as well as the Judicial Districts of Bridgeport and Stamford since the inception of the Special Master pretrials.

I am here today to speak against the adoption of Raised Bill 5538. The subject before you in Raised Bill 5538 is essentially whether to eliminate the issue of unconscionability from the present statute. I strongly urge that you do not do that. To do so would, as a certainty, cause great harm to many persons in which circumstances have changed during the marriage or where

unknown circumstances at the time of execution come to light. To do so would place Connecticut in the extreme minority of states in our country.

I think it would be helpful for you to examine two actual fact patterns to illustrate why you should not change our statute. I was involved in a case in which the parties had three children following the marriage, which included a prenuptial agreement in which the wife would get no alimony and almost no property from her multi-millionaire husband even though before the marriage she had a good career and made substantial money. It was a first marriage for both. Her husband asked her to move to Connecticut and give up her job. It turned out that he was a serious alcohol and drug abuser.

As fair men and women of the legislature, I hope it is not your view that a woman who gives up her ability to earn a good living and is raising three children under the age of 10, who signed a prenuptial agreement voluntarily with full financial disclosure and counsel, should not have a judge take a second look at the situation? If you gave this question to a group of citizens, sitting as a jury, no doubt they would not view that as fair that she would get no alimony or property and would only get child support and enough to keep her and the children off the welfare assistance rolls. But that would be the result under HB 5538.

Our present law, CGS 46b-36a-j is the result of years of study and analysis of laws from throughout the United States. At the time of its adoption in 1995, it represented a significant change from our law as represented in the case of *McHugh v. McHugh*. The new law changed the entire subject of enforcement of a prenuptial agreement by shifting the burden of proof to the person seeking to prevent enforcement. Under the old law, a person wishing to have a prenuptial agreement enforced had to prove that the agreement was enforceable. Under the new law which you passed in 1995, the burden of proof shifted to the party who tries to prevent its enforcement. That party must prove that he/she did not sign the agreement voluntarily, didn't get fair and

reasonable disclosure, did not have an opportunity to consult with counsel, and that the agreement was unconscionable when it was executed or when enforcement is sought.

I believe that you, the legislature, along with lawyers and judges, believe in a system that is fair and that properly sets forth the public policy of the state of Connecticut. I certainly hope that we would all find it immoral for that woman and children in that situation to be thrown out in the cold while her husband is living in a warm big house. This example is unfortunately fairly common.

Another example is that of a man with a substantial estate who signed a prenuptial agreement in good faith. It was a second marriage for both and no children were born of this second marriage. However, years later it turned out that the wife had a hidden lover all through the marriage, a lover carried over from her single days. The execution of the agreement satisfied the conditions of our statute but without the chance for a judge to make a legal determination of unconscionability, the fraudulent behavior of the wife would go unchallenged.

An examination of the cases decided by our judges since 1995 will lead you to the conclusion that judges are taking seriously the change in the laws of prenuptial agreements that you passed in 1995 after long debate. The "unconscionability" factor is not always the reason some prenuptial agreements are not enforced. In fact, most prenuptial agreements are enforced throughout the state. Where people have signed a prenuptial agreement in a complex society where good behavior is not always the norm, every situation cannot be determined without an examination of the facts as to what is or is not unconscionable as a matter of law. I believe the new law you passed in 1995 is working. I invite you to read a recent case, Winchester v. McCue, 91 Conn. App. 721, decided in October of 2005, wherein the Appellate Court affirmed the trial court decision which enforced a prenuptial agreement where unconscionability was a major issue. And, as you say, if it ain't broke, don't fix it. Thank you.