

# Marry Me – But Sign Here First

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Imagine the following scenario: Prince Charming kneeling before Princess Innocence with fountain pen in hand pleading with passionate aspirations “will you sign this” and then follows with “let’s get married”.

With the advent of Scherer v. Scherer in 1982, Georgia entered into a new realm of domestic relations law – prenuptial agreements in contemplation of *divorce*. The Prince Charming proposal to Princess Innocence now seems more reality than fantasy. Prior to the Court’s holding in Scherer, public policy mandated any premarital spousal agreements contemplating divorce to be null and void. This is in sharp contrast to the basic tenant (which predates the founding of our country) of premarital spousal agreements in contemplation of *marriage* (known as O.C.G.A. §19-3-63) and is recognized in common law.

History demonstrates that the legislature believed that women needed extra protection because they lacked basic rights, such as the right to contract; the right to vote; and the right to own property. O.C.G.A. §19-3-60 et. seq. recognized the societal importance of protecting property, particularly the property of a woman entering into a marital relationship. This gave parents assurances that their new son-in-law would not squander their generous gift, and that the property would be used to benefit future generations.

Establishing O.C.G.A. §19-3-63 et seq., the legislature set in place formalities concerning contracts in contemplation of marriage. It is of historical significance that contracts in contemplation of marriage had to comport to the same legal requirements as real property transferred by deed. Not only were contracts in contemplation of marriage required to be notarized by two witnesses, but O.C.G.A. §19-3-67 mandated the

agreements be recorded with the Clerk of the Superior Court within three months of their execution. These requirements were essential, as agreements in contemplation of marriage generally entailed the disposition of real property, and these steps would put potential bona fide purchasers on notice of ownership.

Now fast forward to 1982 and the Georgia Supreme Court's decision in Scherer v. Scherer, 292 S.E.2d 662 (1982). The Scherer case signaled the advent of prenuptial agreements and changed centuries of public policy. The Scherer holding created a new class of documents now known as prenuptial agreements in contemplation of *divorce*. The Court recognized the cultural change in society brought about by elevated divorce rates and the shifting dynamics of the relationship of men and women in the workplace, society and family when it stated "The incidence of divorce is increasing, and more persons with families and wealth are in a position to consider the possibility of a marriage later in life. Public policy is not violated by permitting these persons ...to anticipate divorce and establish their rights by contract." Scherer not only provided for the disposition of any premarital property upon divorce, but also property accumulated during the marriage that is disposed of during a divorce by the premarital agreement.

Unlike contracts in contemplation of marriage codified under the Marriage Articles, the Scherer decision made no specific requirements for any formalities of prenuptial agreements in contemplation of divorce. As such, a premarital agreement is governed under the same rules as any other contractual agreement under the contracts code.

A review of O.C.G.A. §19-3-63 shows there are no cases in Georgia dealing with post Scherer agreements in contemplation of divorce. Case law that exists prior to the Scherer holding deal with O.C.G.A. §13-8-2, which handles contracts that are void as against public policy. Prior to 1982, contracts in contemplation of divorce were per se null and void as against public policy. However this is no longer the case after the Scherer decision.

In Chubbuck v. Lake, 635 S.E.2d 764 (2006), the Supreme Court recently observed the question of the legal requirements for agreements in contemplation of divorce and O.C.G.A. §19-3-63. Although the Court did not rule on the merits, the Court stated “We have been unable to find a case in which an antenuptial agreement made in contemplation of divorce has been ruled void and unenforceable for a reason other than a failure to live up to the criteria set out by this Court in Scherer.” This furthers the point that no cases dealing with agreements in contemplation of divorce have required the criteria set out in O.C.G.A. §19-3-63, i.e. – the need of two notarized witnesses. This observation is axiomatic as Scherer created a new breed of agreements known as “contracts in contemplation of *divorce*” while the existing law only dealt with agreements in contemplation of “*marriage*”.

Though the trial court in Chubbuck v. Lake ruled that the agreement in contemplation of divorce falls under the criteria of O.C.G.A. §19-3-63 (dealing only with contracts in contemplation of marriage), the Supreme Court notes specifically that it can only rule upon the *effect* of the trial court’s legal ruling, not the *merits*.

The question of whether a contract in contemplation of divorce falls under the requirements of O.C.G.A. §19-3-63 (two notarized witnesses, recordation in the Superior Court within three months, etc). remains to be entertained by the Supreme Court. Nevertheless, considering the statutory history and court rulings based on public policy, one could easily conclude that agreements in contemplation of divorce under Scherer are not envisioned to be governed by O.C.G.A. §19-3-63, which deals with contracts in contemplation of marriage. To imagine otherwise would mean the Scherer agreements would impose upon individuals a new class of agreements neither contemplated in common law, nor in the enactment of the Marriage Articles of 1863 that still exist today.