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YouTube Aside, The Law On Prenups

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THE ENTIRE NATION was recently captivated by Tricia Walsh-Smith's April 2008 YouTube video in which she took the concept of "airing your dirty laundry in public" to a new level. Ms. Walsh-Smith filmed a home video in which she explained in extreme detail how unfair her prenuptial agreement was towards her now that her husband had filed for divorce. Many believed her demonstration to be appalling; but those who looked past her outwardly irate display observed a woman who felt powerless and trapped by a premarital agreement she believed to be unconscionable.

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Historically, the state of New York has taken the position that all prenuptial agreements are presumptively valid and binding. Efforts to change this presumption are moving along sluggishly, at best.

In addition to a discussion of the impact of New York Domestic Relations Law §250, this article will explore possible challenges to a presumptively valid prenuptial agreement that can be maintained in an effort to modify or set aside such an agreement—without having to resort to YouTube.

Basic Presumptions

It is well established in New York state that prenuptial agreements are given the same presumption of legality as any other contract,¹ and as such are binding on the parties, unless and until they are set aside.²

Courts, however, will scrutinize agreements between spouses more closely than general business contracts to ensure that the agreement was freely

entered into and is not unconscionable.³ "Equity is so zealous in respect to an agreement between spouses that an antenuptial agreement may be set aside on grounds that would ordinarily be insufficient to vitiate an ordinary contract."⁴

For example, no actual fraud need be shown in an effort to set aside a prenuptial agreement, as would ordinarily be necessary in a contract action, for relief will be granted if the terms of the agreement are manifestly unfair to a spouse because of the other's overreaching.⁵ In determining the validity of a prenuptial agreement, courts may look at its terms to see if there is an inference, or even a negative inference, of overreaching at the time of execution.⁶

Two main criteria commonly play a role in a court's consideration of whether or not a prenuptial agreement should be set aside.⁷

First the court will inquire as to whether it was entered into freely or as a result of "fraud, duress or mistake, or misrepresentation or nondisclosure of material fact."⁸ Following a determination on the first criterion, the court will then evaluate whether the agreement was unconscionable when executed, or whether the parties' situation has changed since the agreement was entered into rendering its enforcement "unfair and unreasonable."⁹

Consequently, in order to prevail on a motion to set aside a prenuptial agreement, the moving party commonly must provide substantial evidence that the agreement either:

- 1) was entered into fraudulently, through demonstration of duress and undue influence;
- 2) is unconscionable, through demonstration that the agreement is manifestly unfair and if so, that unfairness was achieved by one party's overreaching;¹⁰

Determining whether an agreement was entered into voluntarily will require the court to consider several factors, the most important being that it was not entered into fraudulently by means of duress, or undue influence. Inquiry into this issue includes questions such as whether or not the party against whom enforcement is sought was given a significant amount of time to consider the agreement; whether or not the parties retained independent representation, or if they chose not to be represented, that they understood the consequences of waiving such rights.

Therefore, the party moving to have the antenuptial agreement set aside must demonstrate that threats allegedly made by the non-moving spouse "deprived [him or her] of the ability to act

in furtherance of their own interests,"¹¹ or deprived [him or her] of the ability to exercise her own free will, in order to prevail on a claim of duress.¹²

The moving spouse must also establish that any threats by the nonmoving spouse were unlawful acts, because it is well established that a threat to do that which one has a legal right to do, such as threatening to cancel the wedding if the agreement is not signed, will not constitute duress.¹³

A court's consideration of unconscionability will involve an examination of whether or not the agreement was manifestly unfair to either party in any way so as to render its execution invalid. An unconscionable bargain has been regarded as one "such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other,"¹⁴ the inequality being "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense."¹⁵

A prenuptial agreement will not be per se unconscionable simply because marital assets have been divided unequally, in that one spouse may have given away more than he or she might have been legally required to do, or because one spouse's decision to approve the agreement might be characterized as unwise.¹⁶

Statute of Limitations

Section 250 of the N.Y. Domestic Relations Law, effective July 3, 2007, has made an attempt to clear up any confusion as to when a party can challenge a prenuptial agreement.

Prior to its enactment, two separate interpretations existed regarding the application of the statute of limitations upon an action to rescind a pre-nuptial agreement. The initial interpretation was set forth in *Lieberman v. Lieberman*,¹⁷ where the court adopted what has come to be referred to as the "tolling concept." In its decision, the court determined that the statute of limitations applicable to any challenge to the validity of a prenuptial agreement was tolled during the marriage and would not begin to run until the parties had either physically separated or commenced an action for separation or divorce, or one of the parties had died.¹⁸

This position has been adopted by 18 states and has been expressed in §8 of the Uniform Premarital Agreement Act (which New York has not adopted) providing that: "Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement."¹⁹

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The New York Court of Appeals offered an alternative interpretation in *Bloomfield v. Bloomfield*,²⁰ in which the tolling concept was not specifically addressed. Rather, the Court held that the six year statute of limitations, running from the time of execution of the prenuptial agreement, would bar affirmative claims by a spouse seeking to void a prenuptial agreement.²¹ This approach, however, would require that a husband and wife assume adversarial positions as to their prenuptial agreement within the first six years of their marriage²² or forever lose their right to challenge the agreement.²³ Such a requirement would be against public policy and would critically undermine...the vitality of marriages generally.²⁴

DRL §250 addresses this problem of conflicting interpretations by displacing the *Bloomfield* approach and adopting the tolling concept,²⁵ which will now apply both where a spouse is seeking to invalidate and where a spouse is seeking to enforce an agreement.²⁶

Physical separation of the parties will no longer signal the end of the toll; only the commencement of a matrimonial action will suffice.²⁷ To protect the defendant spouse, DRL §250 also continues the toll past the actual date of the commencement of the action; the toll begins on the date the defendant is served with process in the action.²⁸

As much as DRL §250 has provided relief for antenuptial agreements created less than six years prior to its enactment, the statute seems to offer no relief to older, already executed agreements.²⁹

Drafting an Agreement Today

With DRL §250 now allowing for the challenge to a prenuptial agreement to be tolled until the marriage has come to an end, it is more important than ever to ensure that any such agreement you are currently drafting will stand up to legal scrutiny.

First and foremost, it is of the utmost importance that the agreement be clear and unambiguous. Though the intentions of your clients may seem obvious, it is in their best interest that those intentions be clearly spelled out so as to avoid any possibility for future dispute.

Oftentimes, unless specifically listed in the agreement, the line between the parties' separate and marital property will begin to blur and they will forget down the line what may have been separate property and what now constitutes marital property. The only way to avoid this confusion is to set forth every thought in detail, in clear and unambiguous language, trusting nothing to extrinsic evidence or common sense.

Otherwise, the parties may be required to engage in costly litigation where their agreement will be subject to judicial interpretation, and your client may not prevail on the manner in which the agreement was originally expected to be interpreted.³⁰

Second, be sure to advise your clients that it is in their best interest to provide their soon-to-be spouse with full and honest disclosure of all assets and liabilities. This does not mean to say they must provide a detailed list of each and every asset owned, but instead that each party to the prenuptial agreement is given a clear idea of the nature, extent and value of the other party's assets, avoiding any possible future claims of fraud.³¹

While a failure to disclose will not, standing alone, constitute fraud or overreaching sufficient to vitiate an agreement, it is important that there be no

indication that a client failed to disclose information in an attempt to conceal or misrepresent the nature or extent of his or her assets.³²

Additionally, it is ideal that the prospective bride and bridegroom retain independent counsel throughout the process and that the parties are given adequate amounts of time to consider the agreement. This is highly recommended because often their interests will be adverse and the retention of independent counsel will assist in establishing that they voluntarily and knowingly entered into the agreement.

While the absence of independent counsel will not necessarily warrant setting the agreement aside, it is a factor to be considered by a court when determining whether the agreement was entered into voluntarily, free from duress or undue influence. It is not uncommon for the spouse who requested the agreement be drafted to provide for the other's legal fees.³³ However it is wise to allow that spouse to retain counsel of his or her choosing so as to avoid any accusations that that party's best interests were not represented.³⁴

Finally, the agreement must be fair at the time it is drawn, as well as at the time of its execution, so as not to be regarded as unconscionable. This is the most difficult consideration given that application of the unconscionability principles enunciated in *Christian v. Christian*³⁵ requires that a reasonable person would accept the terms of the agreement, without there being a straightforward answer regarding who is to be considered a reasonable person.

Each and every reasonable person may have a different interpretation of what a fair agreement involves. However, so long as all other steps in drafting the agreement are performed in good faith (e.g., full and honest disclosure, separate representation, etc.), the chances that an agreement will be found unconscionable will be greatly diminished.

Therefore, for parties who sign agreements they have had time to consider, and have been advised by independent counsel may be unfair towards their interests, the agreements will most likely not be found to be unconscionable: Unilateral mistake alone is an insufficient basis for reformation or rescission.³⁶ It will be difficult for a party who has been given full and honest disclosure, the opportunity to retain independent representation and adequate time to consider the agreement to argue that any unfairness resulted from the other party's actions. Therefore, any unfairness would be considered a result of the party's own unilateral mistake.

Conclusion

A prenuptial agreement can be an invaluable tool in the event of a divorce in that it can provide for a smooth, amicable dissolution of the marriage. However, if drafted without caution and extreme attention to detail, it can also provide for a litigation nightmare in the event of a dissolution of the marriage.



1. See *Brody v. Brody*, 2008 WL 1958954 (N.Y.Sup. 2008) (marital agreements, both pre- and post-nuptial, are contracts governed under principles of contract law); see also *Rainbow v. Swisher*, 72 NY2d 106, 531 N.Y.S.2d 775 (1988); *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 764 N.E.2d 950 (2001).

2. *Christian v. Christian*, 42 N.Y.2d 63, 365 N.E.2d 849 (1977); see DRL §236(B)(3), providing in relevant part: "An agreement by the parties, made before or during the marriage,

shall be valid and enforceable in a matrimonial action if such an agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." N.Y. Dom. Rel. Law §236(B)(3) (McKinney 1999 & Supp. 2006).

3. *Lounsbury v. Lounsbury*, 300 A.D.2d 812, 752 N.Y.S.2d 103 (3rd Dept. 2002).

4. *Christian*, 42 N.Y.2d at 72.

5. *Id.*

6. *Id.* at 73.

7. The most effective way to set aside a prenuptial agreement remains via a procedural mistake in the execution process pursuant to *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376 (1997), in the event that the prenuptial agreement is not executed with the exact same formality as a deed.

8. Nancy R. Schembri, "Prenuptial Agreements and the Significance of Independent Counsel," 17 St. John's J. Legal Comment. 313, 314 (2003).

9. *Id.*

10. *Surlak v. Surlak*, 95 A.D.2d 371, 466 N.Y.S.2d 461 (2nd Dept. 1983).

11. *Lyons*, 289 A.D.2d 902, 903, 734 N.Y.S.2d 734 (3rd Dept. 2001); see *Lounsbury*, 300 A.D.2d at 812, 752 N.Y.S.2d 103 (3rd Dept. 2002).

12. *Lyons*, 289 A.D.2d at 904.

13. *Lyons*, 289 A.D.2d at 904; *Lounsbury*, 300 A.D.2d at 812.

14. *Christian*, 42 N.Y.2d at 71, citing *Hume v. United States*, 132 U.S. 406, 411 (1889).

15. *Id.*

16. *Id.*

17. See *Lieberman v. Lieberman*, 154 Misc.2d 749, 587 N.Y.S.2d 107 (Sup. Ct. N.Y. Cty. 1992).

18. *Id.*

19. Unif. Premarital Agreement Act §8, 9B U.L.A. 369 (West 1987 & Supp. 2000).

20. *Bloomfield*, supra.

21. *Id.*

22. See, 2007 Assembly Bill 3074, 2007 Senate Bill 6310 ("It is unlikely in the context of a marriage that the party will move to contest or change the terms of a prenuptial agreement until a proceeding has begun to dissolve the marriage itself. Most parties would not contest the validity or terms of a prenuptial agreement or agreements made during the marriage while their marriage is intact.")

23. See *Lieberman*, 154 Misc. 2d at 753, 754.

24. *Zuch v. Zuch*, 117 A.D.2d 397, 405, 503 N.Y.S.2d 343 (1st Dept. 1986).

25. N.Y. Dom. Rel. Law §250 (McKinney 2007).

26. *Id.*

27. *Id.*

28. D.R.L. §250

29. See D.R.L. §250 final session law (Chapter 226) ("This act shall take effect *** and shall not apply to any agreement where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date").

30. See *Genovese v. Axel*, 40 A.D.3d 693, 835 N.Y.S.2d 684 (2nd Dept. 2007) (Parties disagreed as to intent of provision in prenuptial agreement; Court held that where an agreement is clear and unambiguous on its face, the intent of the parties is gleaned from the four corners of the writing as a whole with a practical interpretation of the language employed so that the parties' reasonable expectations are met).

31. See *Webb v. Webb*, 18 Misc. 3d 822, 851 N.Y.S.2d 828 (N.Y.Sup., 2007) (Court found that the initial prenuptial agreement was not the product of overreaching where defendant was provided, at least one month before signing, with plaintiff's tax returns for the prior three years, as well as a detailed financial statement).

32. See *Panossian v. Panossian*, 172 A.D.2d 811, 569 N.Y.S.2d 182 (2nd Dept. 1991) (Court held plaintiff was aware of various properties owned by defendant, and since there was no indication defendant had at any time attempted to conceal or misrepresent the extent of his assets, there was no credible evidence to support a finding of fraud or overreaching).

33. See *Colello v. Colello*, 9 A.D.3d 855, 858 (4th Dept. 2004) (recognizing that lawyers are often chosen and paid for by the other spouse, and that will not necessarily invalidate the agreement).

34. See *Christian*, 42 NY2d 63 (Court found wife was not represented by an attorney acting solely in her interests where husband deceptively retained the counsel by whom she was represented, without her consent).

35. See *Christian*, 42 N.Y.2d at 71.

36. See *Surlak*, 95 A.D.2d at 384, 466 N.Y.S.2d 461, 471 (2nd Dept. 1983), citing *Winant v. Winant*, 83 A.D.2d 849, 442 N.Y.S.2d 13 (2d Dept. 1981).