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The Art of Drafting Enforceable Prenups

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The statutory requirements for a prenuptial agreement (a "prenup") are set forth in Domestic Relations Law §236(B)(3), which provides that an agreement made before or during the marriage is enforceable if it is 1) in writing, 2) subscribed by the parties, and 3) acknowledged or proven in the manner required to entitle a deed to be recorded. That's it—that's all the law requires. Any agreement that meets these elementary criteria is presumptively valid, and any party looking to rebut this presumption faces a high burden. *See D.K. v. E.K*, 140 N.Y.S.3d 684, 687 (Sup. Ct. 2021).

However, even though it is very difficult to set aside a New York prenup, it is not impossible. In *Christian v. Christian*, a seminal case on the enforceability of marital agreements, the court noted several distinct grounds for setting aside a marital agreement: fraud, duress, overreaching resulting in manifest unfairness, and unconscionability. 365 N.E. 2d 63 (N.Y. 1977). These remain the same basic legal grounds for challenging a prenup today.

Drafting enforceable prenups is an art, not a science. Even though there are distinct legal grounds under which a prenup can be voided, the inquiry

into prenup enforceability is holistic and fact-based rather than technical and legalistic. *See, e.g., Petracca v. Petracca,* 101 A.D.3d. 695, 698 (2d App. Div. 2015). That said, there are certain important dimensions that courts have repeatedly and routinely recognized as "plus factors" in determining whether a prenup should be enforced.

Full and Fair Financial Disclosure

Unlike many other states, New York law does not require any disclosure of earnings and property as a prerequisite of prenup validity. Accordingly, a failure to disclose a party's financial information does not itself constitute fraud and is not sufficient to challenge a prenup's validity. *Hoffman v. Hoffman,*

474 N.Y.S.2d 621, 624 (3d App. Div. 1984). However, courts will typically consider whether disclosure of assets has occurred when evaluating a prenup's enforceability. *See P.M. v. M.M.,* 144 N.Y.S.3d. 312, 327 (Sup. Ct. 2021).

Although there is no duty to disclose, if a party does choose to engage in financial disclosure, they must do so honestly. If a prenup contains a fraudulent or material misrepresentation, and the deceived party justifiably relies on that misrepresentation, he or she may be able to set aside the prenup for fraud.

For example, in *Carter v. Fairchild-Carter,* the Court held unenforceable an agreement that promised the wife 50% of any appreciation in the marital residence by which the residence "exceeded its mutually agreed upon current fair market value of $800,000." 133 N.Y.S.3d 316 (3d App. Div. 2020). At trial, the wife produced evidence showing that the actual market value of the residence at the time of the parties' marriage was only $515,000. Because the husband had artificially inflated the value of the marital residence in the prenup, the wife was not entitled to any appreciation in the residence upon the divorce.

At trial, the court concluded that the husband had intentionally misrepresented this value in the prenup. This deception, when coupled with other misrepresentations and the substantively unfair nature of the agreement, led to the prenup being set aside on grounds of fraud and overreaching.

In order to foreclose any claims of fraud, we recommend that both parties engage in full and fair financial disclosure, even though financial disclosure is not legally required. However, no disclosure is undoubtedly preferable to a misleading or inaccurate disclosure.

Independent Counsel

The absence of independent counsel, although not enough to set aside an agreement, is a factor that courts consider negatively. *Campbell v. Campbell,* 173 N.Y.S.3d 372 (4th App. Div. 2022). The presence of independent counsel serves as an important proxy for general procedural fairness, and a party that is represented by counsel during negotiations will have a much more difficult time asserting that the prenup was the product of duress, fraud, etc. In *Gottlieb v. Gottlieb*, for example, the court refused to credit the wife's claims of overreaching based largely on the fact that she was effectively represented by independent counsel. 25 N.Y.S.3d 90 (1st App. Div. 2016).

Timing

Despite the popular misconception, prenups executed just before a wedding are not *per se* invalid. *See, e.g., Barocas v. Barocas*, 942 N.Y.S.2d 491, 495 (1st App. Div. 2018). However, a prenup that is signed on or around the wedding day can—in combination with other factors—give rise to an inference of overreaching. In *Smith v. Smith*, for example, the Court found overreaching where the wife had been confronted with a "take it or leave it" ultimatum two days before the wedding. 11 N.Y.S.3d (2nd App. Div. 2015). In order to ensure that the prenup is free of the taint of duress (and to make the attorneys' lives easier) we recommend that parties leave a comfortable amount of time before the wedding to create their prenup.

Power to Say No

Threatening to cancel a wedding unless your fiancée signs a prenup is highly distasteful, but it is not *per se* grounds for voiding a prenup. *Gottlieb,* 25 N.Y.S.3d 90 at 94. Parties have a legal right to refrain from marriage, and the threatened exercise of a lawful right cannot amount to duress under New York law. *See Collelo v. Collelo*, 780 N.Y.S.2d 450, 458 (4th App. Div. 2016).

At the same time, the fact that a party was coerced into signing a prenup, even if such threats

were lawful, can support an inference of overreaching. In *Chait v. Chait*, the court held a prenup void on grounds of duress after the wife threatened to take the parties' child away from plaintiff if he did not sign the agreement. 681 N.Y.S.2d 269 (1st App. Div. 1998). Our basic expectation is that both parties will agree to the prenup because they want to, not because someone is twisting their arm.

Substantive Fairness

A prenup will not be set aside merely because it is one-sided. *Barocas v. Barocas*, 942 N.Y.S.2d 491, (1st App. Div. 2018). At the same time, a prenup will be set aside as unconscionable if the inequality is "so strong and manifest as to shock the conscience." *Taha v. Elzemity,* 68 N.Y.S.3d 493 (2d App. Div. 2018). By way of example, provisions of a prenup which literally contemplated that the wife would "get nothing" other than that which the husband "might periodically deign to designate [as marital property]" were held unenforceable and unconscionable. *Clermont v. Clermont*, 603 N.Y.S.2d 923 (3d App. Div. 1993).

Substantive fairness is particularly important in cases concerning high-net-worth clients because courts will consider the discrepancy between the prenup and the default matrimonial law. For example, the court in *P.M. v. M.M.* found a question of fact as to whether the terms of a prenup were manifestly unfair, even though the terms of a prenup resulted in the wife retaining nearly $1.5 million. In reaching this holding, the court explicitly considered the fact that the wife's award represented "at most 5% of [the husband's] net worth." 144 N.Y.S.3d. 312, 322. *Cioffi-Petrakis v. Petrakis* and *Petracca v. Petracca,* both controversial cases where prenups were set aside, follow a similar fact pattern. In both cases, the prenups resulted in stay-at-home wives receiving an award that was low in absolute terms and a pittance relative to the overall marital estate.

Ironically, parties who try too aggressively to protect their property in a prenup may end up being the most vulnerable upon a divorce. A prenup that is substantively fair will almost never be set aside, as parties are generally required to prove not only overreaching in the execution, but also that the overreaching led to a manifestly unfair agreement. *Gottlieb,* 25 N.Y.S.3d at 101. Accordingly, the simplest way to ensure a prenup remains enforceable is to make it fair and reasonable.

Conclusion

When creating a prenup, we encourage our clients to go beyond the mere statutory requirements for prenup enforceability and strive for all the above "plus factors." After all, the safest prenups are those that neither party wishes to set aside in the first place.

However, we recognize that many couples are not always in the position to do everything by the book, and that is okay. For example, a client's family may be hesitant to disclose the assets of their child's trust interests, making a full financial disclosure impossible. Other times, parties might procrastinate the prenup process, resulting in a prenup signed just prior to the wedding ceremony.

These mistakes are not fatal, and with the help of experienced matrimonial counsel, couples can still create a prenup that is clearly enforceable. A voided prenup is a complete waste of time and effort, so it is important that parties work with experienced counsel that understand both the statutory and common law requirements for prenup enforceability.