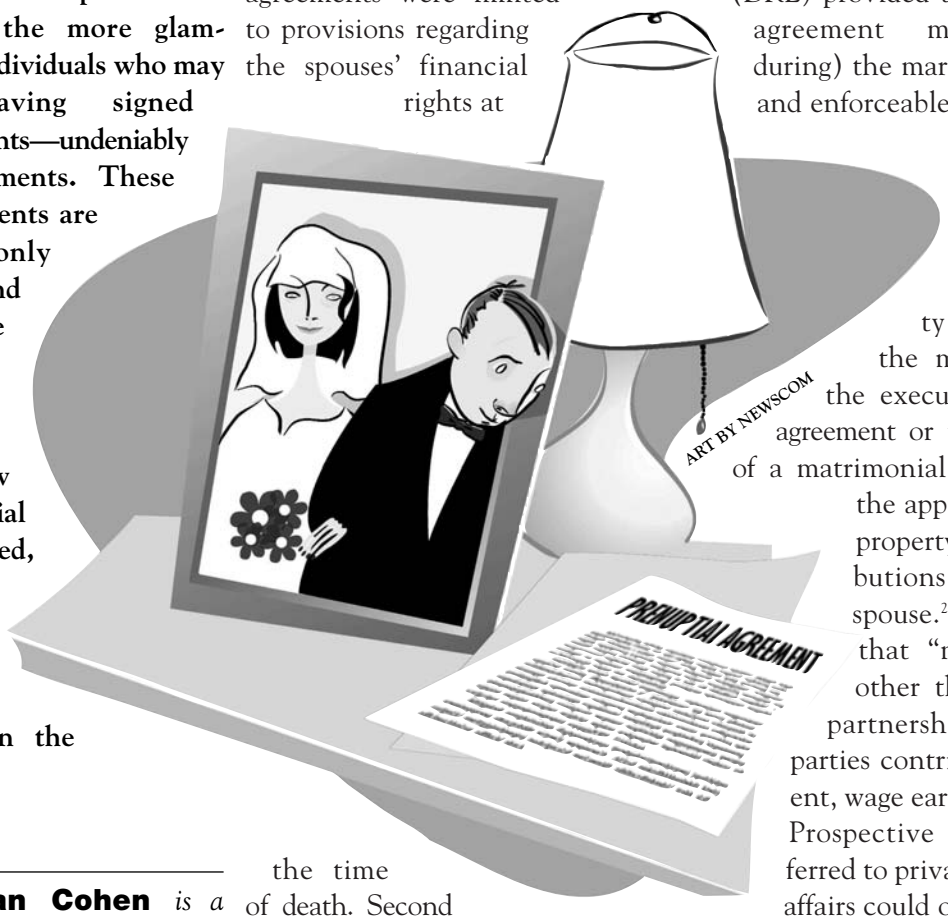
New York Law Journal
MATRIMONIAL LAW
VOLUME 236—NO. 25 MONDAY, AUGUST 7, 2006
ALM

To Have or Have Not (a Prenuptial Agreement)

Those in favor say disputes can be avoided, those opposed claim inequities and strain on the union.

BY HARRIET NEWMAN COHEN

PAUL McCARTNEY and Jessica Simpson are among the more glamorous individuals who may regret not having signed prenuptial agreements—undeniably unromantic documents. These days, such agreements are popular not only among the rich and famous, but more and more, among those less celebrated. This article discusses how the use of prenuptial agreements evolved, contentious provisions and whether prenuptial agreements will be upheld in the event of divorce.



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Before divorce laws were reformed by the enactment of the Equitable Distribution Law in 1980, prenuptial agreements were limited to provisions regarding the spouses' financial rights at the time of death. Second wives, late in life, were frequently asked to waive their inheritance rights so that the testator could leave his estate to his children.

After divorce reform, things changed. Prenuptial agreements could now also deal with the financial affairs of the parties in divorce, and §236(B)(3) of the Domestic Relations Law (DRL) provided that a duly executed agreement made before (or during) the marriage would be valid and enforceable.[1]

Under the new statute, marital property was broadly defined to include "all property acquired…during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action," as well as the appreciation of separate property due to the contributions of the non-titled spouse.[2] The premise was that "marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker."[3] Prospective spouses who preferred to privately order their own affairs could opt out of the statute through prenuptial agreements.

Proponents of prenuptial agreements argue that they offer substantial benefits. They claim that by clarifying positions on thorny issues, such as each party's rights in New York's

Harriet Newman Cohen *is a member of Cohen Hennessey Bienstock & Rabin and the author of "The Divorce Book for Men and Women" (Avon 1994).* **Orrit Hershkovitz,** *an associate at the firm, assisted in the preparation of this article.*

expansive list of property (e.g., businesses, licenses, enhanced earning capacity, celebrity goodwill), future costly disputes can be avoided. Detractors disagree and decry the imbalance that generally ensues, and the potential of irremediable strain on the marriage.

Contentious Clauses

Often a party is asked to agree that no portion of a party's separate property is to be transmutable into marital property, regardless of contributions by either spouse.[4]

It is difficult, albeit not impossible, to set aside property waivers in prenuptial agreements, and a party agreeing to such waiver must therefore understand that it will generally be upheld.[5]

Although the statute requires that the agreement be "fair and reasonable at the time of the making of the agreement" and not "unconscionable at the time of entry of final judgment,"[6] this language appears only in clause (3) of DRL §236(B)(3) and has been interpreted as applying to the maintenance provisions of an agreement and not to its property provisions.[7]

Even though the "fair and reasonable" and "not unconscionable" standard set forth in DRL §236(B)(3) may not apply to property waivers, courts will scrutinize them for unconscionability applying the principles enunciated in *Christian v. Christian*.[8] Moreover, where parties have children at the time of divorce, the courts will try to find creative ways to ameliorate harsh provisions in prenuptial agreements.[9]

A "have not" needs to stand firm and not lightly give up statutorily protected rights in property that would be "marital" property absent the prenuptial agreement. He or she can bargain for alternative provisions such as a lump sum in lieu of a division of marital property in kind. There can be a sliding scale based on, for example, years of the marriage, number of children, or years out of the paid workforce to lessen the inequity for the "have not."

Lump-sum payments can also substitute for monthly maintenance. Escalation clauses, where the lump sum increases at certain intervals in the marriage, and sunset clauses, after which maintenance can be determined by a court, can also be considered.

In drafting clauses that provide for pension waivers at the time of death and/or divorce, it is important to know that there is a split between the First and Second Departments regarding ERISA's spousal consent provisions.[10]

The First Department has broadly interpreted those provisions as governing not only survivor benefits, but also "spousal rights" in a pension upon divorce.[11] The Second Department has held that ERISA's spousal consent provisions have no bearing on a spouse's claim for equitable distribution of the other's retirement funds following their divorce.[12]

Until further clarification from the appellate courts, parties cannot rely on prenuptial agreements to serve as valid waivers under ERISA-qualified plans. For now, it is advisable to insert a provision requiring the parties to execute ERISA waivers after the marriage. Sample forms may be attached to the agreement.[13]

Waivers of inheritance rights are also frequently sought clauses in prenuptial agreements. Since New York law forbids a decedent spouse to disinherit a surviving spouse except by a properly executed waiver, such as that found in a prenuptial agreement, the bride or groom of one hour may inherit no less than one-third and as much as 100 percent of his or her new spouse's estate if there is a sudden death.[14]

Unlike divorce law, estate law does not distinguish between separate and marital property. Therefore, unless a prenuptial agreement provides otherwise, a surviving spouse will inherit not only "marital" property, but "separate" property as well. This is also true in more seasoned marriages when "marital" property is insufficient to satisfy the elective share.

Clauses in prenuptial agreements that provide for who will occupy the marital residence in the event of divorce can have a direct impact on custody, because the spouse who keeps the marital home often also keeps the children.[15] For a "have not" who is likely to become the custodial parent, it is better if the prenuptial agreement is silent on this issue.

Challenging an Agreement

Those who sign a prenuptial agreement on the assumption that a court will set it aside should beware.

A threat to cancel the wedding if the betrothed refuses to sign a prenuptial agreement does not constitute duress.[16] A threat to do that which one has a legal right to do is not duress.[17]

A party's claim that he or she did not consult independent counsel may also fail, particularly if the party had an opportunity to do so.[18]

Lawyers are often chosen and paid for by the other spouse, and that will not necessarily invalidate the agreement.[19] Claims of inadequate financial disclosure have also failed.[20]

The Statute of Limitations

By the same token, use of the statute of limitations as a defense by

the proponent of the prenuptial agreement may also fail.[21]

In the First Department, courts have held that the statute is tolled during the "happy" days of the marriage.[22] In the Second Department, those time tables have been rigidly applied.[23]

In *Bloomfield v. Bloomfield*, a case out of the First Department, the Court of Appeals held that the wife's challenge to the prenuptial agreement executed 25 years earlier was not time-barred, not because the statute of limitations was tolled, but because it was asserted defensively against the husband's claim that the agreement precluded the equitable distribution of his assets.[24]

In making this determination, the Court relied on the principle that "claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by [the wife] might have been time-barred at the time the action was commenced."[25]

The *Bloomfield* Court's statement that an independent action by the wife "might" have been time-barred has served to further obfuscate rather than to clarify the issue. Did the Court mean that the wife "would" have been time-barred had she challenged the agreement in an independent action? If so, would she have been time-barred under any circumstances, or only in the absence of one of the statutory tolls, such as continuing duress or recent discovery of an alleged fraud? If the Court did not mean that the wife "would" have been time-barred, under what circumstances "might" she have been time-barred?[26]

As at least one commentator has observed, the holding that the statute of limitations does not bar a defensive attack on a prenuptial agreement may render moot the question of whether the statute is tolled during the marriage, since a spouse typically challenges the validity of a prenuptial agreement in defense to a claim by the other spouse that the agreement precludes equitable distribution and other relief.[27]

Counsel Fees to Rescind

Fees for services rendered in connection with an action to rescind a prenuptial agreement are not recoverable, unless the action is frivolous and warrants sanctions under 22 N.Y.C.R.R. §130-1.1.[28] The courts will, however, uphold a provision in a prenuptial agreement awarding counsel fees to the party successfully enforcing or defending the action.[29]

Counsel should bear in mind that a waiver of counsel fees (or maintenance) may well not effectuate a waiver of interim counsel fees (or pendente lite support), since these provisions will be narrowly construed as in derogation of New York law.[30]

Conclusion

Representing a party who wants to have or not have a prenuptial agreement is a delicate task. It will be the responsibility of counsel to use sensitivity and skill in guiding the client to achieve the result best suited to him or her.

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1. DRL §236(B)(3) provides, 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 agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.... Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter.

N.Y. Dom. Rel. Law §236(B)(3) (McKinney 1999 & Supp. 2006).

2. N.Y. Dom. Rel. Law §236(B)(1)(c) and (d)(3) (McKinney 1999 & Supp. 2006). The Court of Appeals has interpreted the statute to include as marital property the appreciation of separate property due to the active contributions, direct or indirect, of either spouse. *Hartog v. Hartog*, 85 N.Y.2d 36, 46 (1995); *Price v. Price*, 69 N.Y.2d 8, 17-19 (1986).

3. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585 (1985).

4. See, e.g., *Kessler v. Kessler*, __A.D.3d__, 2006 WL 1899873, at *1 (2d Dept. 2006). The wife in *Kessler* waived her rights to the appreciation of the husband's separate property. She did not, however, appeal from the holding of the court below that the prenuptial agreement was not unconscionable.

5. See, e.g., *Iuliano v. Iuliano*, 2006 WL 1549051, at *1 (3rd Dept. 2006); *Colello*, 9 A.D.3d at 859-60; *Valente v. Valente*, 269 A.D.2d 389, 390 (2d Dept. 2000); *Strugatz v. Strugatz*, 269 A.D.2d 331, 331 (1st Dept. 2000); *Panossian v. Panossian*, 172 A.D.2d 811, 812-13 (2d Dept. 1991); see also *Kessler*, 2006 WL 1899873, at *1, in which the trial court rejected the wife's claim that the prenuptial agreement was unconscionable as a whole, an issue which was not presented to the Second Department.

6. N.Y. Dom. Rel. Law §236(B)(3) (McKinney 1999 & Supp. 2006).

7. *Colello v. Colello*, 9 A.D.3d 855, 860 (4th Dept. 2004); see also Scheinkman, Practice Commentaries, McKinney's Consol. Laws of N.Y., Book 14, N.Y. Dom. Rel. Law §236, C236B:15 at 355-57 (McKinney 1999) (arguing that application of "fair and reasonable" and "not unconscionable" phrase should be limited to clause (3), thereby exempting property agreements from review for fairness, reasonableness, and unconscionability). An example of a case in the Second Department where a wife's waiver of maintenance was held to be unconscionable and facially unfair, is *Siclari v. Siclari*, 291 A.D.2d 392, 393 (2d Dept. 2002). See also

Deckoff v. Deckoff, 284 A.D.2d 426, 427 (2d Dept. 2001) (court granted wife a hearing on whether her maintenance waiver should be upheld).

8. See, e.g., *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 194 (2001); *Clermont v. Clermont*, 198 A.D.2d 631, 633 (3rd Dept. 1993); *Pennise v. Pennise*, 120 Misc.2d 782, 786 (Sup. Ct., Nassau Co., 1983) (cases applying *Christian* standard). In *Christian v. Christian*, 42 N.Y.2d 63 (1977), an unconscionable bargain was defined as one that no person in his or her senses and not under delusion would make and that no honest and fair person would accept, the type of inequality that would shock the conscience of a person of common sense. Id at 71.

9. See, e.g., *Cron v. Cron*, 8 A.D.3d 186, 187 (1st Dept. 2004) (upholding wife's waiver of maintenance but rescinding housing provisions as inequitable in light of children's luxurious lifestyle and father's affluence).

10. See 29 U.S.C. §1055(a), (c)(1) and (2) (Employee Retirement Income Security Act of 1974 [ERISA], as amended by the Retirement Equity Act of 1984).

11. *Richards v. Richards*, 232 A.D.2d 303, 303 (1996), aff'g, 167 Misc.2d 392 (Sup. Ct., New York Co., 1995) (citing *Hurwitz v. Sher*, 982 F.2d 778, 782 [2d Cir. 1992]).

12. *Moor-Jankowski v. Moor-Jankowski*, 222 A.D.2d 422, 423 (2d Dept. 1995).

13. Non-qualified ERISA plans are not subject to the same consent requirements. Parties who do not participate in ERISA-qualified plans may nevertheless consider executing ERISA waivers after the marriage, since the nature of the parties' plans may change during the marriage.

14. Under the statute governing elective shares that was enacted in 1992 to reform prior law, a surviving spouse is entitled to inherit the greater of $50,000 or one-third of the net estate outright if the decedent leaves a will. N.Y. Est. Powers & Trusts Law (EPTL) §5-1.1-A(a) (McKinney 1999 & Supp. 2006). Under EPTL §4-1.1(a)(1) and (2), if the decedent dies intestate, the surviving spouse will inherit 100 percent of the estate if the decedent has neither living children nor parents, and $50,000 plus one-half of the rest of the net estate if the decedent has surviving children.

15. Harriet Newman Cohen & Ralph Gardner, Jr., "The Divorce Book for Men and Women: A Step-by-Step Guide to Gaining Your Freedom Without Losing Everything Else" (Avon Books 1994), 159-60.

16. *Colello*, 9 A.D.3d at 858.

17. *767 Third Ave. LLC v. Orix Capital Markets, LLC*, 26 A.D.3d 216, 218 (1st Dept. 2006).

18. *In re Estate of Garbade*, 221 A.D.2d 844, 846 (3rd Dept. 1995); *Forsberg v. Forsberg*, 219 A.D.2d 615, 616 (2d Dept. 1995); *Brassey v. Brassey*, 154 A.D.2d 293, 294-95 (1st Dept. 1989); *Werther v. Werther*, No. 03-202917, slip op. at 7 (Sup. Ct., Nassau Co., 2005).

19. *Colello*, 9 A.D.3d at 858.

20. *In re Davis' Estate*, 20 N.Y.2d 70, 74 (1967); *Panossian*, 172 A.D.2d at 813; *Eckstein v. Eckstein*, 129 A.D.2d 552, 553 (2d Dept. 1987); *Hoffman v. Hoffman*, 100 A.D.2d 704, 705 (3rd Dept. 1984).

21. N.Y. C.P.L.R. §213(1) and (8); §203(g) (McKinney 2003).

22. *Bloomfield v. Bloomfield*, 281 A.D.2d 301, 304 (1st Dept. 2001); see also *Lieberman v. Lieberman*, 154 Misc.2d 749, 753-55 (Sup. Ct., N.Y. Co., 1992). Section 8 of the Uniform Premarital Agreement Act (which New York has not adopted) also provides that the statute of limitations applicable to an action asserting a claim for relief under a prenuptial agreement is tolled during the marriage, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. Unif. Premarital Agreement Act §8, 9B U.L.A. 369 (West 1987 & Supp. 2000).

23. *DeMille v. DeMille*, 5 A.D.3d 428, 429 (2d Dept. 2004); *In re Neidich*, 290 A.D.2d 557, 558 (2d Dep't 2002).

24. *Bloomfield*, 97 N.Y.2d at 192-93.

25. Id. at 193 (citing N.Y. C.P.L.R. §203[d]).

26. See generally Leonard G. Florescue, "Prenuptial Agreements: Claims and Defenses After 'Bloomfield'," 231 New York Law Journal 3 (2004) (arguing that statute of limitations should apply to prenuptial agreements unless statutorily tolled and "the concern for whether these attacks are raised in complaints or answers should be put out of our minds").

27. Myrna Felder, "Prenuptial Agreements—'Bloomfield v. Bloomfield'," 226 N.Y.L.J. 3 (2001); but see Florescue, supra, note 26, arguing that "it is logically impossible to assert that a Prenuptial Agreement is invalid in a purely defensive manner," since its "essential nature cannot change—the attacking party wants the agreement totally thrown out and equitable distribution to proceed as if it didn't exist."

28. *Anonymous v. Anonymous*, 258 A.D.2d 547, 548 (2d Dept. 1999); *Schapiro v. Schapiro*, 204 A.D.2d 87, 88 (1st Dept. 1994); see also *Fine v. Fine*, 26 A.D.3d 406, 407 (2d Dept. 2006) (former wife's action to set aside separation agreement was not matrimonial action, precluding fee award under DRL §237 [b]).

29. *Strugatz*, 269 A.D.2d at 331.

30. *Solomon v. Solomon*, 224 A.D.2d 331, 331 (1st Dept. 1996); *DelDuca v. DelDuca*, 304 A.D.2d 610, 611 (2d Dept. 2003); see also, *Kessler*, 2006 WL 1899873, at *4 (blanket waiver of right to seek counsel fees may be set aside upon weighing of competing public policy interests in light of all relevant facts and circumstances, including conduct of the parties over the course of the matrimonial action).

Harriet Newman Cohen
Cohen Rabin Stine Schumann LLP
11 Times Square - 10th Floor
New York, NY 10036
Phone: (212) 512-0825
Dir. Dial (212) 512-0801
hcohen@crsslaw.com