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Come Live With Me and Be my Love...But Sign This Prenup!

Sondra Miller, New York Law Journal

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Because June is the preferred month for weddings and because the subject of prenuptial agreements commonly surfaces shortly before the wedding, we submit this article for the benefit of the bar and the public.

Prenuptial and postnuptial agreements have been commonly endorsed because they often serve the important function of providing financial protection and certainty in the event of divorce or death. They are particularly appropriate when older or previously divorced couples seek to provide that in the event of divorce or death their property goes to their children or grandchildren rather than the other parties' children.¹

However, notwithstanding the positive gains to the parties who successfully enter into such agreements, others less fortunate have encountered bitter and expensive litigation where the enforceability of such agreements has been attacked. Was the agreement entered into under "duress?" Was there adequate disclosure of the parties' assets? Did the parties have the advice of counsel and understand the provisions of the agreement? Was the agreement unconscionable under the circumstances?

Throughout the United States and here in New York, there are no clearly defined or absolute criteria to ensure the enforcement of such agreements. An agreement that may be found enforceable in one state may not survive in another. And here in New York the same agreement may be found valid by one judge yet subject to vacatur by another.

The uncertainty of enforcement of these agreements results from conflicting policies concerning them. First and foremost is the historic American philosophy of freedom of contract—the parties should be free to enter into an agreement ungoverned by judicial or legislative preferences and perspectives.² Mitigating that principle is the obvious difference between marital agreements and commercial contracts. Many courts have recognized that parties to prenuptial and postnuptial agreements are in a significantly different posture than those entering into commercial agreements. Some courts have held that these parties enjoy a confidential personal relationship—the one of a fiduciary nature—and that a higher level of conduct, fairness and disclosure should be required of them.

The subject of prenuptial agreements has been carefully considered by several commissions over the years. Prior to 1980, U.S. courts held that agreements "contemplating divorce" were unenforceable. The rationale was that contracts that make provisions for divorce violate public policy by allowing for the evasion of the spousal duty of support, degrading marriage, and encouraging the procurement of divorce. Before 1980, prenuptial agreements were limited to the distribution of the property at the time of death of a party.

However, in [Posner v. Posner](#), 2012 So. 2d. 1 Fla. 1980, in response to the country's growing divorce rate, the Florida Supreme Court held that prenuptial agreements settling the alimony and property rights of parties upon divorce should be held valid, as long as they do not induce separation or divorce. In its reasoning the court took "judicial notice" of the fact that the ratio of marriages to divorces had reached a "disturbing rate." Following the Posner decision, jurisdictions throughout the United States began to accept the idea that prenuptial agreements could be used in contemplation of divorce.

Efforts Toward Fairness

In 1976, the Uniform Premarital Agreement Act (UPAA) was drafted by the National Conference of Commissioners on Uniform State Laws. It has been enacted in some form by 28 states,⁴ but has faced criticism for failing to sufficiently protect vulnerable parties. It does not require that parties retain counsel or have the opportunity to consult counsel or understand the nature of the rights waived.

In 2012 the Uniform Premarital and Marital Agreement Act (UPMAA) was approved by the Uniform Law Commission. It requires that each party have access to independent legal counsel in order for an agreement to be enforceable, thereby strengthening the protection of the more vulnerable party.

There has been a movement in the United States and internationally to require that independent counsel must be employed in order for these agreements to be enforceable, e.g., Washington and California in the United States, and New Zealand, Australia and Canada. California was the first state to enact the UPAA in 1986. California's Legislature amended that state's version to include voluntariness after the famous *In re Marriage of Bonds* case. That court cited factors relevant to such agreements: i.e. inequality and bargaining power, coercion, the timing before the wedding, the presence of independent counsel and whether independent counsel was an important factor.

Under California's new provisions, a premarital agreement is executed involuntarily unless the court finds that:

1. The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.
2. The party against whom enforcement is sought did not have less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

. The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

4. The agreement and the writings executed pursuant to paragraphs 1 and were not executed under duress, fraud, or undue influence and the parties did not lack capacity to enter into the agreement.

. Any other factors the court deems relevant.

According to the legislative history of the amendment, supporters believed that representation by independent counsel is the greatest guarantee that a party is informed of his or her rights, understands the terms and effect of an agreement, and enters into that agreement free of coercion.

The Status in New York

In March 14, 2011, the New York Law Journal published an Associated Press article pertaining to prenuptial agreements. The article began: "Beating a prenup? Can't be done." However, it proceeded to state that the prevailing view was somewhat shaken by the publication of [Cioffi-Petrakis v. Petrakis](#), 10 A.D. 2d 2d Dept. 2011. Leave to the Court of Appeals was denied. In that case the appellate court unanimously affirmed Justice Anthony Falanga Supreme Court, Nassau County setting aside the agreement, finding that the wife had been fraudulently coerced into signing it. She had signed the prenup four days prior to the parties' wedding, and agreed to do so only after her fiancé promised that he would tear it up once they had children both had had legal representation. The court found the husband to be lacking in credibility.

Prior to that case, the Appellate Division, Second Department, had affirmed the Supreme Court in [Petracca v. Petracca](#), 101 AD 2d 2d Dept. 2012, where a postnuptial agreement signed three months after the marriage was vacated, relying on [Christian v. Christian](#), 42 NY2d 1, for the proposition that "an agreement between spouses or prospective spouses may be vacated if the party contesting it demonstrates that it was a product of fraud, duress or other inequitable conduct."

Clearly, the facts in Petracca cried out for redress. The wife had signed the postnuptial agreement shortly after her 42nd birthday when she had suffered a miscarriage. Her husband threatened that if she failed to sign the agreement she would never have children and their marriage would be over.

Subsequent to the publication of Cioffi-Petrakis in 2011, several well known matrimonial attorneys expressed dismay, fearing its major implications, i.e., that it would spawn much litigation and destabilize the enforcement of these agreements. Fortunately, these

forebodings have not come to pass. As Saul Felder predicted in the AP article cited above, "most lawyers are very careful. A good prenuptial agreement will last."

As wisely stated by the Supreme Court, Nassau County, in [C.S. v. L.S.](#), 202 2 2012, NYLJ 1202 100 1412, at 1 June , 201 , while vacating a prenuptial agreement "To those who fear that setting aside agreements as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement, with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party particularly destitute, it will be upheld."

In addition to following that sound advice, we urge the New York bar to promote legislation following the example of California, providing, inter alia, that parties to a prenuptial agreement are either represented by independent legal counsel, or expressly waive that right. The proposed solution is twofold: 1 Representation by independent counsel ensures that each party's consent is informed and creates more equality in the bargaining process 2 Agreements involving independent counsel are more likely to be held enforceable in court, which promotes predictability and the public policy favoring enforcement.

A seven day "cooling off" period between the presentation of an agreement and its execution ensures that the party to whom the agreement is presented has a sufficient amount of time to make important considerations, including whether to: retain counsel ask for modifications postpone the marriage or refuse to sign it.¹⁰ Importantly, the allowance for waiver of independent counsel, as long as the waiving party is fully informed, preserves the party's freedom of contract while guaranteeing that he or she knows the terms of the contract and consents to them.¹¹

The cost of a prenuptial agreement may be viewed as that of travel insurance reference to it may in some instances not be required. However, when required, an agreement entered into in compliance with the standards advocated above may well avoid major costs and anguish to the parties and their families, and also serve to relieve the burdens of the courts.

Literary Note

Caution has always played a role when it comes to matters of the heart. In the 16th century, Sir Walter Raleigh's rejection of Christopher Marlowe's beautiful invitation is a cautionary note to those who approach their nuptials with confidence that "amor omnia vincit," i.e. "love conquers all" and there is no need for a prenuptial agreement.

Marlowe's Song: The Passionate Shepherd To His Love;
Before 1593

Come live with me, and be my love
And we will all the pleasures prove
That hills and valleys, dates and fields,
Woods, or steepy mountain yields.

And we will sit upon the rocks,
Seeing the shepherds feed their flocks
By shallow rivers, to whose falls
Melodious birds sing madrigals.

And will make thee beds of roses,
And a thousand fragrant posies
A cap of flowers, and a kirtle
Embroidered all with leaves of myrtle

A gown made of the finest wool
Which from our pretty lambs we pull
Fair lined slippers for the cold,
With buckles of the purest gold

A belt of straw and ivy buds,
With coral clasps and amber studs:
And if these pleasures may thee move,
Come live with me, and be my love.

The shepherd swains shall dance and sing
For thy delight each May morning
If these delights thy mind may move,
Then live with me, and be my love

Raleigh's Reply:
Before 1599

If all the world and love were young,
And truth in every shepherd's tongue,
These pretty pleasures might me move
To live with thee and be thy love.

But time drives flocks from field to fold,
When rivers rage and rocks grow cold
And Philomel becometh dumb
The rest complains of cares to come.

The flowers do fade, and wanton fields
To wayward winter reckoning yields:
A honey tongue, a heart of gall,
A fancy's spring, but sorrow's fall.

Thy gowns, thy shoes, thy beds of roses,
Thy cap, thy kirtle, and thy posies,
Soon break, soon wither, soon forgotten,
In folly ripe, in reason rotten.

Thy belt of straw and ivy buds,
Thy coral clasps and amber studs,

All those in me no means can move
To come to thee and be thy love.

But could youth last, and love still breed;
Had joys no date, nor age no need;
Then those delights my mind might move
To live with thee and be thy love.

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Endnotes:

1. According to a Harris Interactive poll of 2,323 adults in 2010, approximately 3 percent of people with a spouse or fiancé in the United States have a prenuptial agreement. That number is significantly up from the 1 percent recorded in a similar 2002 poll. Recent marital trends have shown an increase in the ages of marrying couples and the number of second and third marriages. These trends suggest that people are entering into marriages with more assets. Laura Petrecca, "Prenuptial Agreements: Unromantic, But Important," USA Today (March 11, 2010), http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_CV_N.htm.

In a recent poll of the American Academy of Matrimonial Lawyer members, 73 percent of divorce attorneys cited an increase in prenuptial agreements in the past five years. Fifty-two percent of those surveyed noted an increase in women initiating the requests, while 36 percent cited an increase in pensions and retirement benefits being included under prenuptial agreements.

As these trends demonstrate, people are marrying and remarrying later in life, and prenuptial agreements provide a way for those parties to protect their assets. American Academy of Matrimonial Lawyers, Press Release, Big Rise in Prenuptial Agreements, Says Survey of Nation's Top Divorce Lawyers, Sept. 22, 2010, available at <http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/big-rise-prenuptial-agreements-sa>.

2. Elliott Scheinberg, NYSBA, "Contract Doctrine and Marital Agreements in New York," Vol. Two, Ch. 41.

3. UNIF. PREMARITAL AGREEMENT ACT, §3, 9B U.L.A 373-74 (2001 & Supp. 2012).

4. Thirteen states have adopted the UPAA without any significant changes: ARIZ. REV. STAT. ANN. §25-201 (2011); ARK. CODE ANN. §9-11-401 (West 2009); DEL. CODE ANN. TIT. 13, §321 (West 2009); HAW, REV. STAT. §572D-1 (West 2010); IDAHO CODE ANN. §32-921 (West 2006); 750 ILL. COMP. STAT. ANN., 40/2601 (West 2011); KAN. STAT. ANN. §23-801 (West 2007); MONT. CODE ANN. §40-2-601 (West 2011); NEB. REV. STAT. §42.1001 (2011); N.C. GEN. STAT. ANN. §52B-1 (West 2010); OR. REV. STAT. §108.700 (2009); TEX. FAM. CODE ANN. §4.001 (West 2011); VA. CODE ANN. §20-147 (West 2011); D.C. CODE §46-501 (2005). Twelve states adopted the UPAA after significant revisions: CAL. FAM. CODE §1600 (West 2009); CON. GEN. STAT. ANN. §46b-36a-j (West

2008); FLA. STAT. ANN. §61.079; IND. CODE ANN. §31-11-3-1 (West 2009); IOWA CODE ANN. §596.1 (West 2009); 19A ME. REV. STAT. ANN. §601-11 (2008); NEV. REV. STAT. ANN. §123A.010 (West 2009); N. . STAT. ANN. §37:2-31 (West 2009); N.M. STAT. ANN. §40-3A-1 (West 2009); N.D. CENT. CODE §14-03.1-01 (2008); R.I. GEN. LAWS §15-17-1 (2009); S.D. CODIFIED LAWS §§ 25-2-16 (2009).

5. . Thomas Oldham, "With All My Worldly Good I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 DUKE . GENDER L. & POL'Y 83, 84 (2011).

6. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (2012), §9(a)(2).

7. 5 P.3d 815 (Cal. 2000).

8. CAL. FAM. CODE §1615(c) (West 2002).

9. Sandra Kennedy, "Ignorance is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements," 52 FAM. CT. REV. (forthcoming Oct. 2014).

10. Oldham, *supra* note 6, at 118.

11. CAL. FAM. CODE §1615(c) (West 2002).

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