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A New Standard for Prenuptial Agreements

Does the amended statute provide more questions than answers?

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On June 27, our legislature modified portions of New Jersey's Premarital Agreement Statute, N.J.S.A. 37:2-32 and 37:2-38. Initially, many family lawyers hailed the revised statute, believing it strengthened the enforceability of prenuptial agreements and provided a clearer groundwork for giving legal advice and drafting such agreements. However, upon taking a closer look at the revised statute, does it provide more questions than answers?

Under the old regulations, a party seeking to set aside a prenuptial agreement had the burden of proving, by clear and convincing evidence, that there existed some inherent unfairness in the negotiation, execution or enforcement of the agreement. The statute focused on three basic factors, specifically, whether: (1) the agreement was executed voluntarily; (2) the agreement was unconscionable at the time enforcement was sought; and (3) the agreement was unconscionable before or at the time it was executed.

The statute provided various definitions and examples of what might constitute "unconscionability." Section 37:2-32(c) defined unconscionability as leaving a spouse with:

> [A] lack of property or employability:
>
> (1) Which would render a spouse ... without a means of reasonable support;
>
> (2) Which would make a spouse ... a public charge; or
>
> (3) Which would provide a standard of living far below that which was enjoyed before the marriage.

According to N.J.S.A. 37:2-38(c), an agreement may be considered unconscionable at the time it was signed if, prior to the agreement: (1) there was not full disclosure of the other party's earnings, property and financial obligations, and the right to such disclosure was not voluntarily and expressly waived in writing; or (2) prior to the agreement, the challenging party did not have the opportunity to consult with independent counsel, and this right was not voluntarily and expressly waived in writing.

Family law attorneys struggled with the previous version of the statute. Even if they ensured the disclosure and independent counsel requirements were met, there was no way to be certain that it would not be considered unconscionable at the time of enforcement. Many attorneys, therefore, shied away from drafting prenuptial agreements in fear that a client would someday blame them if it was later deemed unenforceable due to circumstances beyond the attorney's control.

For example, assume the parties had independent legal counsel when the agreement was executed. The attorneys exchanged comprehensive case information statements, disclosing all earnings, assets and financial obligations. The wife waived alimony. The agreement was signed several months before the wedding day. The attorneys even arranged for a court reporter to transcribe the parties' sworn testimony concerning their voluntariness and satisfaction with the financial disclosures. The parties testified they knowingly entered into the agreement, thereby waiving certain rights that would have otherwise been afforded to them in a divorce.

Sounds like an "ironclad prenup," right? Not necessarily. Everyone was still left with the uncertainty of whether it would ultimately be deemed unconscionable based on the circumstances that existed when enforcement was sought. With all of this discretion and uncertainty, was the prenuptial agreement even worth the paper it was written on?

The purpose of the recent amendments to the statute is to protect the enforceability of prenuptial agreements,

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regardless of the parties' circumstances at the time of the divorce. The revisions brought about three major changes to the statute:

(1) The determination of unconscionability is based on the circumstances that existed when the agreement was signed — not when enforcement is sought.

(2) A court's discretion in determining unconscionability is limited to the grounds set forth in N.J.S.A. 37:2-38(c) (i.e., full disclosure, independent counsel, waiver in writing, etc.).

(3) The new standard applies only to prenuptial agreements executed after June 27, 2013. Couples who signed prenups before this date have the option of voluntarily revising their agreement to memorialize their desire for the new standard to apply in the event enforcement is ever sought.

This may all appear rather clear-cut, but, in practice, does it leave us with more questions than answers?

First, if a married couple agrees to execute an addendum to incorporate the current law as the standard of enforcement, must they repeat all the fanfare and expense? Is it necessary to again retain independent counsel and satisfy the disclosure or waiver requirements?

Second, is such an addendum even enforceable? Would we be affording married couples an opportunity to have the protections of the new law? Or, will this addendum be considered a "mid-marriage agreement" that may be thrown out of court?

In *Pacelli v. Pacelli*, the Appellate Division found that mid-marriage agreements are "inherently coercive." This is because the decision to enter into an agreement with one's spouse during the marriage is primarily fueled by the desire to preserve the existing marriage or family. It is not an arms-length negotiation dictated by one's consideration of his/her legal rights. While the court in *Pacelli* did not declare mid-marriage agreements void, per se, it held that such agreements require careful scrutiny. In reality, when push comes to shove, they are rarely enforced.

Imagine the hypothetical case of a couple married for 20 years. They have four children. The wife was a financially independent professional, who left her lucrative career 18 years earlier to care for the children. She is now financially dependent on her husband, who earns a substantial income. Learning of the new law, the husband demanded that his wife sign an addendum to their prenuptial agreement to apply the new standard. The wife fears that if she does not, divorce would be imminent.

However, the wife is not comfortable signing the addendum. Her absence from the workforce has severely impaired her ability to support herself, much less live a lifestyle commensurate with the one she enjoyed before the marriage. At the time the prenup was signed, her lawyer assured her that such circumstances would likely render the prenup unconscionable, and therefore, unenforceable. If she signs the addendum, she would be relinquishing the protections of the law that she relied on when making these decisions. On the other hand, it would preserve her marriage and family.

If the wife caves in to the pressure, signs the addendum and the parties later divorce, will a family-part judge enforce the prenup under the amended statute and leave her without any alimony? Or will the addendum be considered a mid-marriage agreement and likely thrown out?

This is not the first time that an amended statute governing a family-law issue has left attorneys with questions about how to implement it. In January 2010, our palimony laws changed drastically when the Statute of Frauds, N.J.S.A. 25:1-5, was amended to require that palimony agreements be in writing with the benefit of independent counsel. Family law practitioners were left confused. Did the new law apply to all palimony agreements (written or verbal), regardless of when they were entered into? Moreover, what would become of the palimony cases already pending in court?

We did not have concrete answers until April 21, 2011, when the Appellate Division held, in *Botus v. Estate of Kudrick*, that the amended statute applied only to palimony complaints filed after the law changed. All cases pending in the court system were to be evaluated under the previous law. Further, a palimony action instituted after the amendment must meet the new requirements, regardless of when the actual agreement was made.

Similar to our initial confusion with the revised palimony law, we may need to depend on future case law to provide a framework on how a previously signed prenuptial agreement may be enforced under the current standard.

In the meantime, attorneys who prepare addendums to prenuptial agreements should proceed carefully to maximize the chances of enforcement. All of the requirements to enter into an original prenuptial agreement should be carefully followed, regardless of whether they were adhered to the first time around. The parties should fully and separately disclose present earnings, assets and obligations. This can be accomplished by completing and exchanging case information statements.

Both parties should have independent counsel. If you are representing the spouse with greater access to finances, advise him/her to make funds available for the other spouse to retain an attorney. This will maximize the likelihood of enforceability. If one party ultimately waives his/her right to independent counsel, it should be confirmed in writing.

The addendum should be signed with both parties, their attorneys and a court reporter present. Explain on the record the effect that the new statute has on the prenuptial agreement. Both parties should testify, under oath and on the record, that they understand the impact of the amended statute on their previously signed prenuptial agreement. They should confirm their intention that their prenuptial agreement be governed by the new standard. Finally, they should testify that they have voluntarily entered into the addendum, without undue pressure or duress.

Then, as with all of our clients who come to us for prenuptial agreements, wish them a long and happy marriage.■