Prenup Tutorial: A Survey of Recent Case Law
By Arlene G. Dubin and Rebecca A. Provder

Prenuptial agreements remain in high demand. While basic parameters for prenuptial agreements are relatively well known, recent case law offers important insights and critical reminders about this practice area. This article will highlight significant takeaways for family lawyers and other practitioners to consider regarding prenuptial agreements.

Lesson 1: Public Policy In Favor of Prenuptial Agreements

Case law continues to underscore New York's strong public policy in favor of prenuptial agreements.[1] The legal system encourages individuals to reach their own agreements through contracts. Courts give great deference to duly executed prenuptial agreements and generally uphold them.

Consequently, individuals can rely on prenuptial agreements as a mechanism to limit issues in the event of divorce and prescribe rights upon death. Instead of being constricted by default statutes, through prenuptial agreements, couples have the flexibility to tailor the law in accordance with their specific desires and goals.

It remains very difficult to set aside a validly executed prenuptial agreement.[2] There are only limited grounds on which to vacate or set aside a prenuptial agreement, including duress, fraud, overreaching, and unconscionability.[3] A prenuptial agreement is presumed to be valid unless and until the challenging party satisfies a high burden of proof to set it aside.[4]

Lesson 2: Duress

There is a common misperception that a prenuptial agreement is invalid if it is not executed sufficiently in advance of the wedding date. Case law, however, continues to hold that the execution of a prenuptial agreement close to the wedding date does not in and of itself render the agreement unenforceable.

For example, in *Ku v. Huey Min Lee*, the wife moved to set aside a prenuptial agreement on the basis of overreaching and duress.[5] In support of her duress claim, the wife alleged that the prenuptial agreement was executed ten days before the wedding. The court denied her motion and found that she failed to meet her burden of establishing a basis to set aside the agreement.

Mere threats to cancel a wedding are also insufficient to set aside a prenuptial agreement. In *Cohen v. Cohen*, the wife moved to vacate or set aside the parties' prenuptial agreement on the basis that she was pregnant at the time she signed the prenuptial agreement, she was not represented by counsel, and her husband threatened to cancel the wedding if she did not sign the prenuptial agreement.[6] The court nevertheless found that these circumstances did not amount to duress and upheld the parties' prenuptial

agreement. Similarly, in *Hof v. Hof*, the court found that the husband's threats to cancel a wedding if his wife did not sign the prenuptial agreement did not establish duress.[7]

Lesson 3: Fraud

The favorable outlook regarding prenuptial agreements has certain limits. Where one party fraudulently induces the other to enter into a prenuptial agreement, the contract will be set aside.[8]

For instance, in *Karg v. Karn*, the Supreme Court, Appellate Division, First Department, affirmed the lower court's finding that a prenuptial agreement was invalid on the basis of fraud.[9] In *Karg*, the agreement was written in German, the wife lacked proficiency in German, and the agreement was not translated into English prior to signing. In addition, the wife was presented with the prenuptial agreement for the first time upon her signing and was deprived of the opportunity to consult with a lawyer. Further, the court credited the wife's testimony that her husband told her that she was simply signing an agreement that waived all claims to his father's wealth and assets and did not find credible the testimony of the husband and his parents.

Lesson 4: Overreaching

Smith v. Smith is a helpful illustration regarding what type of activity constitutes overreaching.[10] In *Smith*, the Supreme Court, Appellate Division, Second Department, affirmed the decision of the lower court in finding that the terms of the parties' prenuptial agreement were manifestly unfair as a result of the husband's overreaching. In reaching this determination, the court focused on the extent and magnitude of the rights waived and the significant disparity in the parties' wealth. While these factors alone typically are insufficient to invalidate a prenuptial agreement, there were additional considerations, such as that the husband presented the agreement to his wife a mere two days before the wedding, the husband presented the agreement as a "take it or leave it" offer, and the wife had already moved into the home with her children.

Lesson 5: Unconscionability

A prenuptial agreement "is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense."[11]

Taha v. Elzmetity offers important insights into what renders a prenuptial agreement unconscionable.[12] In reversing the lower court's decision and granting the wife's motion to set aside the parties' prenuptial agreement on the basis of unconscionability, the appellate court considered the possibility that the wife would end up as a public charge if the prenuptial agreement was enforced. The court noted that the wife, the primary caregiver of the parties' children, was unemployed, had limited assets, and would receive

only $20,000 in satisfaction of all claims despite her husband earning about $300,000 per year as a physician.

Further, *Taha* serves as a reminder that while a prenuptial agreement may not have been unconscionable at the time of its signing, the agreement, as it pertains to maintenance, may be deemed unconscionable when examined at the time of the granting of a judgment of divorce. The case tracks the New York statute, which provides that maintenance provisions set forth in a prenuptial agreement must be fair and reasonable at the time of the making of the prenuptial agreement and not unconscionable at the time of entry of final judgment.[13]

Notably, however, a prenuptial agreement is not unconscionable, "merely because, in retrospect, some of its provisions were improvident or one-sided."[14] Illustratively, in *Barocas v. Barocas*, the court upheld the property division provisions set forth in the parties' prenuptial agreement and refused to set it aside based upon unconscionability.[15] Consequently, despite a fifteen year marriage, the husband was entitled to property valued at approximately $4,600,000 and the wife was entitled to only an IRA account valued at about $30,550.[16]

Lesson 6: Procedural Formalities

Domestic Relations Law §236(B)(3) provides that, "[a]n 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."

The acknowledgment requirement functions to prove the identity and authenticate the signature of the person signing the prenuptial agreement.[17] In addition, the acknowledgement imposes on the signer a measure of deliberateness in the act of executing the document.[18]

In *Galetta v. Galetta*, the Court of Appeals was tasked with determining whether the acknowledgment was deficient, thus rendering the prenuptial agreement invalid.[19] The Court of Appeals ruled that the acknowledgment was defective because it omitted the language that the notary knew the party or had obtained sufficient evidence to know that the party was the person described in the prenuptial agreement.[20]

Instructively, in *Galetta*, the Court differentiated between the facts in the case at hand and a situation in which an acknowledgment conforms with substantive elements of a valid acknowledgment but deviates from the exact language prescribed by statute. In making this important distinction, the court compared the circumstances to *Weinstein v. Weinstein*, in which a party argued that the prenuptial agreement was invalid and unenforceable because the acknowledgment did not contain the precise statutory language.[21] In *Weinstein*, the court held that since the acknowledgment substantially complied with the statutory requirements, the prenuptial agreement was valid.[22]

Likewise, in *B.W. v. R.F.*, the court upheld the prenuptial agreement, where it found that the language in the acknowledgment conformed substantially with the statutorily required language.[23] Therefore, an acknowledgment generally is deemed sufficient if it is in substantial compliance with the applicable statute.

Clearly, in order to assure the validity of a prenuptial agreement, it is best practice to strictly adhere to formality requirements. Otherwise, the matter may be litigated and a court will use its discretion in determining substantial compliance.

Lesson 7: Interim Relief

A long time might lapse between the commencement of a divorce and the resolution of the case. During such time, a party may be entitled to receive or apply for interim relief, such as temporary maintenance.

A notable lesson can be gleaned from the case *Lennox v. Weberman*.[24] In *Lennox*, the parties entered into a prenuptial agreement in which the wife waived all claims to a final award of alimony or maintenance. The appellate court upheld an award of temporary maintenance in the absence of an express provision in the prenuptial agreement waiving temporary maintenance.

Similarly, in *McKenna v. McKenna*, the parties' prenuptial agreement contained a provision waiving maintenance and equitable distribution.[25] However, as in *Lennox*, there was not an express waiver of temporary maintenance. Therefore, the court in *McKenna* held that the wife was not precluded from seeking temporary maintenance.

The key takeaway from cases like *Lennox* and *McKenna* is that in instances where the parties intend to effectuate a full waiver of maintenance, the prenuptial agreement should make explicit reference to interim, temporary, and/or pendente lite maintenance.

Lesson 8: Occupancy of the Marital Residence

Any residence, regardless of its size, typically seems too small during the pendency of a divorce. People often develop strong attachments to their homes and such connections can intensify during the divorce process.

In some cases, a party may voluntarily move out. Otherwise, in order to obtain exclusive occupancy during a divorce proceeding, a party needs to show: (i) either his/her spouse established an alternate residence and his/her return would case domestic strife; or (ii) his/her spouse poses physical harm or threatens to damage property.[26]

This standard may be a difficult or impossible to meet. Therefore, it may be helpful to include provisions in a prenuptial agreement governing temporary exclusive occupancy of a residence during a divorce proceeding.

In a prenuptial agreement, couples may address the disposition of the marital residence in the event of a divorce, as well as incorporate provisions governing occupancy and vacating of the premises. The agreement also may set forth terms regarding the sale or buyout of the property.

Such occupancy provisions are enforceable, as demonstrated by *Freed v. Kapla*.[27] In *Freed*, a husband endeavored to invalidate a prenuptial agreement on the basis that his wife made oral promises to take care of him. In the parties' prenuptial agreement, the husband waived spousal maintenance and agreed to vacate the wife's residence upon notice of her intent to permanently separate. The court in *Freed* held that alleged verbal assurances were insufficient to overcome the clear and unambiguous language set forth in the parties' prenuptial agreement and denied the husband's application.

Lesson 9: Legal Representation and Counsel Fees

While the absence of legal representation without more does not establish overreaching or by itself nullify an agreement,[28] it is important for each party to retain separate and independent counsel of his or her own choosing in connection with a prenuptial agreement. Separate counsel is significant because prenuptial agreements have far-reaching implications, and each party should enter into the agreement knowingly and voluntarily.

In common practice, a drafting attorney may provide recommendations for opposing counsel and relay them through his or her client. The fact that a party's attorney recommended the other party's counsel, even if that party also paid for all of the other party's legal fees, is insufficient to establish duress or overreaching.[29]

Case and statutory law typically provides that the wealthier spouse is responsible to contribute to the less wealthy spouse's counsel fees in the event of a divorce. Domestic Relations Law §237, which governs the award of counsel fees, imposes a rebuttable presumption that counsel fees should be awarded to the less monied spouse.

In a prenuptial agreement, couples may choose to deviate from the applicable law that would otherwise pertain to counsel fees. For example, each party may waive or limit counsel fees from the other party in the event of a divorce. The waiver or restrictions at times may be subject to certain exceptions, such as custody litigation, where a court may deem it necessary to award legal fees in order to level the playing field regarding counsel fees.[30]

Lesson 10: Drafting Detail

Careful attention must be paid to detail in drafting prenuptial agreements, as upon divorce or death every word may be carefully scrutinized. As much time may have passed and circumstances may have substantially changed, practitioners may find that concepts and formulas that may have seemed clear at the time of execution of the agreement may be susceptible to varying interpretations.

For example, in *Anonymous v. Anonymous*, the court was required to determine the ownership of valuable artwork.[31] The husband claimed to own tens of millions of dollars of artwork, whereas the wife contended it was jointly owned. She also claimed to separately own other pieces of expensive artwork. The parties' prenuptial agreement did not include a specific mechanism regarding the division of their art collection upon divorce. Rather, the prenuptial agreement provided that any property owned as of the date of the agreement or "hereafter…acquired" by one party would remain that party's separate property. The prenuptial agreement further provided that any property acquired during the marriage that is jointly held by the parties shall be equally divided. The appellate court, in reversing the lower court's decision, held that invoices alone, while relevant, were not dispositive of ownership, and remanded the case to the lower court to consider all of the facts and circumstances regarding the acquisition of the artwork.

Likewise, in *Tietjen v. Tietjen*, the wife moved for a declaration that, pursuant to the parties' prenuptial agreement, the appreciation of her separate property was excluded from equitable distribution.[32] The court declined to preclude her husband from seeking equitable distribution of the appreciation on the wife's separate property, including her separate property residence and pension, based upon his contributions and efforts during the marriage, because the parties' prenuptial agreement failed to evidence a clear intent to override the default equitable distribution statute pertaining to appreciation on separate property. Therefore, the husband was permitted to seek equitable distribution of the appreciation in value of, or enhancements or additions to, the wife's separate property, as well as any income derived from her separate property, to the extent that such appreciation or income was attributable to his contributions or efforts.

Conclusions

Prenuptial agreements remain highly favored by New York courts and are attractive to an ever growing number of couples. As discussed in this article, many nuances are involved in drafting and negotiating prenuptial agreements. As a result, it is imperative for practitioners to stay abreast of the recent case law developments.

ARLENE G. DUBIN is a partner and chair of the matrimonial and family law practice group at Moses & Singer LLP and author of *Prenups for Lovers: A Romantic Guide to Prenuptial Agreements.* REBECCA A. PROVDER is a partner in the matrimonial and family law practice group at Moses & Singer LLP.

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[1] *Gottlieb v. Gottlieb*, 138 A.D.3d 30 (1st Dept. 2016); *Freed v. Kapla*, 129 A.D.3d 615 (1st Dept. 2015).
[2] *Abram v. Joanne Cheung Sui Mei*, 148 A.D.3d 599 (1st Dept. 2017).
[3] *Postiglione v. Postiglione,* 125 A.D.3d 625 (2d Dept. 2015)*; Trbovich v. Trbovich*, 122 A.D.3d 1381 (4th Dept. 2014).
[4] *Anonymous v. Anonymous*, 123 A.D.3d 581 (1st Dept. 2014).
[5] 151 A.D.3d 1040 (2d Dept. 2017).
[6] *Cohen v. Cohen*, 93 A.D.3d 506 (1st Dept. 2012).
[7] 131 A.D.3d 579 (2d Dept. 2015).
[8] *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dept. 2013).
[9] 129 A.D.3d 620 (2d Dept. 2015)

[10] 129 A.D.3d 934 (2d Dept. 2015)
[11] *Taha v. Elzmetity*, 157 A.D.3d 744 (2d Dept. 2018)
[12] *Id*.
[13] Domestic Relations Law §236(B)(3).
[14] *Ku v. Huey Min Lee*, 151 A.D.3d 1040 (2d Dept. 2017).
[15] *Barocas v. Barocas*, 94 A.D.3d 551 (1st Dept. 2012).
[16] *Id*.
[17] *Matisoff v. Dobi,* 90 N.Y.2d 127 (1997).
[18] *Galetta v. Galetta,* 21 N.Y.3d 186 (2013).
[19] *Id*.
[20] *Id*.
[21] *Id.*; *Weinstein v. Weinstein*, 36 A.D.3d 797 (2d Dept. 2007).
[22] 36 A.D.3d 797 (2d Dept. 2007).
[23] 53 Misc.3d 366 (Sup. Ct., Westchester Cty., 2016).
[24] 109 A.D. 3d 703 (1st Dept. 2013). *See also Vinik v. Lee*, 96 A.D.3d 522 (1st Dept. 2012).
[25] 121 A.D.3d 864 (2d Dept. 2014).
[26] *Taub v. Taub*, 33 A.D.3d 612 (2d Dept. 2006); *Kenner v. Kenner*, 13 A.D.3d 52 (1st Dept. 2004).
[27] 129 A.D.3d 615 (1st Dept. 2015)
[28] *A.N. v. E.N.*, 37 Misc.3d 1201(A) (Sup. Ct., Rockland Cty., 2012).
[29] *Barocas v. Barocas*, 94 A.D.3d 551 (1st Dept. 2012); *Strong v. Dubin*, 48 A.D.3d 232 (1st Dept. 2008).
[30] *Karg v. Kern*, 125 A.D.3d 527 (1st Dept. 527); *Abramson v. Gaveres*, 109 A.D.3d 849 (2d Dept. 2013).
[31] 150 A.D.3d 91 (1st Dept. 2017).
[32] 48 A.D.3d 789 (2d Dept. 2008).