



## How Enforceable Is Your Prenuptial Agreement? - Part One

by *Curtis J. Romanowski, Esq.*

Over the past 35 years, prenuptial agreements have increased in popularity in New Jersey. These agreements are entered into, not only to protect assets and to avoid or limit liability for spousal support, but also to avoid what could otherwise be a prohibitively expensive divorce.

Prenuptial agreements are entered into for any number of reasons. Obviously prenuptial agreements are not for every couple. A previously divorced individual, for example, might very well desire to safeguard certain marital assets for his or her children of the prior marriage, when contemplating remarriage to a second partner. Others, extremely fortunate in their financial standing, may seek to enter into prenuptial agreements to assure them that their intended is not planning to marry them for their wealth. Still others considering marriage may have an ancestral home intended to remain in the family. Prenuptial agreements can be crafted to address these issues.

There is also the issue of interpretation of our statutory and case law at the time of the divorce. Judges have quite a bit of discretion in applying the facts of the case to the law in any given New Jersey divorce. Couples in contemplation of marriage may elect to eliminate some of the guesswork by taking these decisions away from the courts by entering into prenuptial agreements.

Unfortunately, prenuptial agreements are not automatically enforceable. This, despite the unquestionable benefits of expeditiously settling financial issues and notwithstanding the intentions of the parties. NJ Divorce lawyers must be quite conversant with the applicable law, to adequately protect the interests of the prenuptial agreement client.

Prenuptial agreements have typically fallen into one of two general categories. The first type sets forth the terms of settlement in the event of divorce. The second type enumerates the rights and liabilities of the surviving spouse when the other spouse dies. Historically, premarital agreements in New Jersey were typically entered into prior to parties remarrying after divorce. In more recent years, prenuptial agreements in New Jersey are increasingly common in the context of first marriages.

Although prenuptial agreements designed to distribute property upon the death of a party were traditionally enforced, there were immediately problems with the enforceability of the divorce-related variety. Death and taxes, it would seem, were inevitable, while divorce was not. Unromantically, prenuptial agreements designed to pre-engineer a divorce seemed to cut across the grain of the very intentions behind bona fide decisions to marry. Marriages were for better or for worse; in sickness and in health. Public policy favored marriage as a permanent concept, with the very idea of asking for a prenuptial agreement consistent with marital troubles getting kicked off in the engagement phase.

Back in the day, when women were thought of as the weaker sex, the primitive concept triggered the presumption that any robust, bread-winning male who would even think to approach his wife with a prenuptial agreement, could only be up to no good. Obviously, he was conniving to take advantage of his admiring mate, who was committed to marry him whatever the cost. Public policy, therefore, mitigated against enforcing the prenuptial agreement at the expense of the impoverishment of the divorced wife.

This public policy concern still obtains today. However, it applies equally to spouses of either gender. The growth of this area of the New Jersey divorce law has been gradual. There remains an uncomfortable level of uncertainty. The very idea of one fiancé introducing the prenuptial agreement idea to the other as a condition for marriage is still unsettling to many. The courts cannot help but notice that coercion, duress, fraud and unconscionability could easily enter into the picture when such agreements are sought, especially after the band has been booked and honeymoon plans made.

Since the advent of the premarital agreement, socioeconomic changes have occurred with respect to the people negotiating them. In recent years, both husband and wife are frequently full-time members of the workforce. Both are often highly educated and capable of entering into fair and balanced agreements, with the assistance of counsel. The failure rate of first marriages is better than 50 percent, with the rate of NJ divorces from second marriages significantly higher than that. It is not unusual, therefore, for intelligent couples to be interested in entering into premarital agreements.

When one considers the level of acrimony commonly associated with most divorces, it would appear that a well-balanced plan for equitable distribution and spousal support would more likely be stipulated to during a time when the parties were getting along well enough to contemplate marriage. To date, earlier reservations on the part of the Court to the idea of prenuptial agreements have all but evaporated.

The New Jersey divorce court initially addressed the issue of prenuptial agreement enforceability in *Chaudry v. Chaudry* (1978). The husband and wife entered into a prenuptial agreement in Chaudry, which provided that the wife would receive a lump sum of money either during or after the marriage. However, as specified in the agreement, she would not be entitled to receive any support whatsoever if there was a divorce. Both parties happen to be citizens of Pakistan. The agreement was consistent with the laws of that nation.

The husband filed for divorce under Pakistani law. He thereupon paid to his wife the amount specified in the agreement. She then filed suit in New Jersey divorce court, the State in which the husband then resided, asking that the premarital agreement be set aside. The New Jersey trial court found that, under the terms of the agreement, the wife was being paid a relatively meager amount. This, among other factors, the New Jersey divorce court found, rendered the enforcement of the agreement contrary to public policy. The Appellate Division, however, reversed the New Jersey divorce court findings, holding that, since the premarital agreement was freely negotiated, fair and equitable at the time was entered into, it was in no way against public policy. The agreement was enforced according to Pakistani law.

There have been a number of important cases published in New Jersey since 1984. First there was *Marschall v. Marschall*. The *Marschall* decision established specified criteria for the enforceability of prenuptial agreements. Full disclosure by the parties concerning their independent assets and financial status was mandated, which disclosure must include any and all items that might influence the other party's decision concerning the ultimate fairness of the agreement. To enforce the agreement in the future, the party seeking enforcement has the burden of proving that the required disclosure had occurred.

The *Marschall* Court also recommended that the advice of independent counsel be sought by both parties. It is important to note that independent legal representation alone is not enough to validate a New Jersey prenuptial agreement. However, independent representation by a New Jersey divorce lawyer prior to entering into such an agreement, bears considerable weight in proving that the represented party fully understood the meeting of the agreement prior to signing it.

*Marschall* made it clear that the Court could not enforce any agreement that was "unconscionable." An agreement, therefore, that would provide a standard of living that was far below that which was enjoyed before and during the marriage would more than likely not be enforceable by any Court.

Then came *D'Onofrio v. D'Onofrio*, which concerned itself with more fully developing the requirement of mutual disclosure. In that case, Ms. D'Onofrio sought to have the premarital agreement that she had entered into without the benefit of legal counsel set aside. In making its decision, the Court examined the husband's disclosure of the assets that had been given to his wife. The prenuptial agreement included statements that acknowledged the disparity between the holdings of the parties.

Further statements illustrated the wife's acceptance of the monetary settlement she would receive in the event of a divorce. Interestingly, the wife acted as the husband's bookkeeper prior to marrying him. This fact provided proof that the wife fully understood what it was she was signing.

The Appellate Court agreed with the Trial Court's assessment that the agreement was indeed enforceable, citing *Marschall*. That notwithstanding, the Appellate Court adjusted the wife's alimony, in order to more closely approximate the standard of living enjoyed during the marriage. This was done in view of the fact that there was not sufficient equitable distribution to the wife to otherwise offset the costs of maintaining her lifestyle.

Next, the widely publicized case of *DeLorean v. DeLorean*. This case focused its attention on voluntariness and duress. The Court found, regardless of the fact that Mr. DeLorean threatened to pull the plug on his wedding if his fiancée refused to sign the prenuptial agreement, that the threat did not amount to duress or fraud. The wife had retained independent counsel, whose advice she actually disregarded when she opted to sign the agreement. Although the Court reiterated the principle that unconscionable agreements are not enforceable, it went on to draw the distinction between "unconscionable" and "unfair." The Court made it clear that it would not refuse to enforce a prenuptial agreement simply because that agreement may be unfair.

The next New Jersey divorce case is *Orgler v. Orgler*. There, the wife demonstrated that she did not have sufficient

knowledge to competently enter into a prenuptial agreement. She had signed the agreement after consulting with an NJ divorce attorney for less than one hour. The agreement did not have a statement of the parties' assets attached. Even though the wife knew that her husband was a man of some wealth, the balance of the proofs showed that she really had no idea of what the consequences of signing the prenuptial agreement truly entailed. The attorney that she had consulted had been chosen for her. The attorney met with her only once and on the same day that the agreement was signed. Equitable distribution and alimony was not explained. The Appellate Division affirmed the Trial Court's decision that the agreement was not enforceable, based on prior New Jersey divorce case law.

In 1993, the Appellate Division decided the New Jersey divorce case of *Jacobitti v. Jacobitti*. The holding of the Court was that any prenuptial agreement that would leave one spouse wealthy and the other without means of support is unconscionable and therefore unenforceable under New Jersey divorce law. *Jacobitti* was, however, an extremely fact-sensitive case. Ms. *Jacobitti* was wheelchair bound and suffering from multiple sclerosis in a progressively deteriorating condition. The Court found that the circumstances clearly made the enforcement of the agreement unconscionable; a finding that is also consistent with the definition of unconscionable within the context of the New Jersey Premarital Agreement Act.

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