

# Uncharted Territory of Amending Prenuptial Agreements

by Jonathan W. Wolfe and Thomas J. DeCataldo Jr.

Mr. Smith seeks to hire you to enforce a prenuptial agreement that was amended during his marriage. He explains that he and his wife had executed a prenuptial agreement 20 years ago, prior to their marriage, and then amended their agreement on July 15, 2013. The Smiths were represented by counsel when they executed their prenuptial agreement, and had made all necessary financial disclosures at the time. He explains they were happily married with three children when they amended their agreement because Mrs. Smith's premarital business proved far more successful than either party had anticipated. The business, which was valued at \$2 million at the time of the marriage, had grown in value by an estimated \$18 million during the marriage. Both its original value and the appreciation were deemed exempt under their prenuptial agreement.

Mr. Smith explains that both spouses were concerned about the financial imbalance created by the terms of their existing agreement. To address this disparity, they hired lawyers, made financial disclosures, and amended the agreement to provide him with a payment in exchange for his waiver to the appreciation of her business. Mr. Smith argued he should receive 40 percent of the appreciated value at the time of divorce, but the parties ultimately agreed his payment would be limited to \$5 million—not tied to any percentage of the business's value or appreciation. Mrs. Smith preferred this approach because she wanted to avoid a formal valuation at the time of the amendment and any divorce (and, Mr. Smith believes, because she anticipated the business would continue to appreciate).

The amendment did not address Mr. Smith's business, which had been valued at \$800,000 prior to the marriage and was believed to be worth the same or less at the time of the amendment. In Jan. 2014, Mrs. Smith's business collapsed after a defect in its top-selling product injured a customer. In April 2014, to everybody's amazement, Mr. Smith sold his company to Facebook for net proceeds of \$17 million.

In July 2014, Mr. Smith discovered his wife was having an affair. He now seeks to enforce the parties' agreement and the amendment. Mrs. Smith's business is worthless. The parties have a home with equity of \$1.5 million and savings of \$8.5 million, both of which are considered 'marital' under their agreement, leaving both parties with the right to receive \$5 million. If the amendment were enforced, Mrs. Smith would be required to pay Mr. Smith \$5 million for his share of her defunct business. She would be left with nothing, and Mr. Smith would retain all \$10 million of marital assets plus the \$17 million sale proceeds from his business.

What standard will be employed by the court to assess the enforceability of the parties' prenuptial agreement? How about the amendment? Is the standard the same or different? Is consideration required for the amendment? Will the agreement be subject to review based upon the change of circumstances? What about the original agreement?

The operative standards governing the enforceability of prenuptial agreements and mid-marriage agreements—namely, agreements entered into during the marriage by spouses without prenuptial agreements—have been widely addressed by the New Jersey Legislature and courts. However, parties that elect to *amend* a premarital agreement have little guidance concerning the standard of review that will be applied to their amendment.

## Background

Under New Jersey law, prenuptial agreements have historically been treated very differently than mid-marriage agreements, with the former more commonly enforced and the latter being subject to a heightened scrutiny in divorce. Under New Jersey's Uniform Premarital and Pre-Civil Union Agreement Act (UPA),<sup>1</sup> such agreements may be amended during divorce *without consideration*. Yet there is no precedent governing whether such an amendment will be reviewed under the standard for prenuptial agreements or the heightened mid-marriage agreement standard.

Further complicating matters, the UPA was significantly amended effective June 27, 2013. Even if amendments to prenuptial agreements were to be reviewed under the standard applicable to prenuptial agreements, not mid-marriage agreements, there may be many parties like the Smiths that entered into their original agreement before the change in the law, and entered into their amendment after the new standard became effective.

This article addresses the disparate legal standards governing the enforceability of prenuptial and marital agreements in New Jersey, the lack of precedent governing the standard for enforceability of amendments to prenuptial agreements in New Jersey, and conflicting approaches adopted elsewhere to address this issue.

### **Enforceability of Prenuptial Agreements**

The 2013 amendments to the New Jersey UPA substantially limited a challenging spouse's ability to set aside a premarital agreement by: 1) narrowing the scope of what will be considered unconscionable, and 2) limiting the focus to a review of facts as they existed at the time the agreement was entered, removing prior authority to review circumstances as they exist at the time of the agreement is enforced. The new standard applies to all agreements entered into on or after the effective date of June 27, 2013.

Under the revised statute, a party seeking to set aside a prenuptial agreement may only do so after proving the agreement was executed involuntarily, or it was unconscionable at the time it was executed because a party did not have an opportunity to retain independent counsel or full and complete financial disclosure.<sup>2</sup> The statute further limited the discretion of a reviewing judge, providing that "[a]n agreement shall not be deemed unconscionable unless the circumstances set out in [the act] are applicable."<sup>3</sup>

Agreements entered into prior to June 2013 are still subject to review based upon the prior broader definition of unconscionable under N.J.S.A. 37:2-32C, pursuant to which a party may demonstrate unconscionability by proving he or she will be left without a means of reasonable support, or that enforcement will provide a standard of living far below what was enjoyed before the marriage. Under this prior version of this statute, a reviewing court is afforded far wider discretion, and examines the appropriateness of the agreement based upon the facts and circumstances at the time the agreement was made *and* when it is sought to be enforced.

Since the current form of New Jersey's UPA was only codified in June 2013, there is an absence of precedent testing the new standard and its limitations.

### **Enforceability of Mid-marriage Agreements**

Parties without prenuptial agreements that enter into an agreement during their marriage to define their rights and obligations in the event of divorce are treated very differently under New Jersey law.<sup>4</sup> In *Pacelli*, the court explained the rationale for treating mid-marriage agreements differently than prenuptial agreements, as follows:

Here, unlike the pre-nuptial bride, [the Wife] had entered into the legal relationship of marriage when her husband presented her with his ultimatum. Moreover, the marriage had produced two children. Thus, [the Wife] faced a more difficult choice than a bride who is presented with a demand for a prenuptial agreement. The cost to [the Wife] would have been the destruction of a family and the stigma of a failed marriage.<sup>5</sup>

The court concluded that "placing a mid-marriage agreement in the same category as a pre-nuptial agreement is inappropriate," noting that the "dynamics and pressures involved...are qualitatively different."<sup>6</sup> Accordingly, the court ruled that mid-marriage agreements must be "fair and just" and will be "closely scrutinized" at the time they are executed *and* based upon the facts that exist at the time of enforcement.<sup>7</sup>

In *Nicholson*, the Appellate Division affirmed the enforceability of a reconciliation agreement entered into during the parties' marriage.<sup>8</sup> The court ruled, "where...the marital relationship has deteriorated at least to the brink of an indefinite separation or suit for divorce, a spousal promise that induces reconciliation will be enforced if it is fair and equitable."<sup>9</sup> The court held that the "consideration" for the property conveyed by the husband to the wife during the marriage was her agreement to reconcile (after discovering his repeated infidelities) and that "there is no reason why a valid reconciliation agreement should not be enforced."<sup>10</sup> The court held, however, that such agreements are subject to a heightened level review, and 1) "must have been conscionable when the agreement was made," 2) the "party seeking enforcement must have acted in good faith," and 3) "changed circumstances must not have rendered literal enforcement inequitable."<sup>11</sup>

## Standard of Review for an Amendment to a Prenuptial Agreement

There are no cases in New Jersey addressing the appropriate standard of review to be utilized for assessing the enforceability of an amendment to a prenuptial agreement. However, the UPA explicitly contemplates such amendments.<sup>12</sup> Moreover, while mid-marriage agreements require consideration to be enforceable, the UPA specifically provides that an amended prenuptial agreement “is enforceable without consideration.”<sup>13</sup> Not only are amendments explicitly authorized by statute without consideration, parties amending their agreement during their marriage are in a decidedly different position than parties who never had an agreement in the first place. They have already been through the process, prior to their marriage, of negotiating and entering into an agreement defining their legal rights in the event of divorce, presumably with the benefit of legal counsel and financial discovery. That being said, to the extent there is a “qualitatively different” dynamic as described in *Pacelli*, negotiating an agreement during the marriage, that difference, it could be argued, exists equally for couples negotiating an amendment during their marriage.

Given their dramatically different standard of review, whether the amendment will be treated as a premarital agreement or a mid-marriage agreement may determine the outcome of the client’s matter. This particularly will be the case given the 2013 amendments to the UPA. For example, unlike the new UPA, *Pacelli* and *Nicholson* require an examination of whether there has been a change of circumstance that would render enforcement of the agreement unfair.

The Connecticut Superior Court, in *Hornung v. Hornung*,<sup>14</sup> addressed this issue of what standard to apply to an amendment to a prenuptial agreement. In *Hornung*, at the time the parties negotiated a prenuptial agreement, the husband had estimated his interest in his business was worth between \$275,000 and \$550,000, and the parties agreed the business and its appreciation would constitute his separate property. Three years into the marriage, the husband sold his interest for approximately \$37 million. Eight years later, the parties amended their agreement to provide the wife an additional payment of \$3.5 million, but otherwise left her waiver to his business intact.

The *Hornung* court arrived at a hybrid approach. First, *Hornung* held, because the modified agreement had its origins as a prenuptial agreement, consideration was not required because Connecticut law, like New Jersey’s

UPA, provides that consideration is not required for an amendment to a pre-marital agreement.<sup>15</sup> Second, the court decided that the “special scrutiny” standard for mid-marriage agreements would apply to the amendment.<sup>16</sup> In so ruling, the court noted the parties had “entered into the agreement as a married couple with no intention to end the union,” and “what sets any postnuptial agreement apart from prenuptial...agreements is the status of an intact marriage.”<sup>17</sup>

☛ In applying the hybrid standard, the court remarkably upheld the prenuptial agreement and the amendment, notwithstanding its findings that: 1) “the difference between the husband’s estimate [of the business value] and its actual value...renders the initial estimate ‘implausible’ at best,”<sup>18</sup> 2) the husband was “a controlling, emotional bully”<sup>19</sup> and had misled his wife into believing the purpose of the amendment was estate planning when it was really to protect his assets upon divorce,<sup>20</sup> and 3) the husband had “fail[ed] to adequately disclose his income for the year and one-half preceding the execution of the agreement....”<sup>21</sup>

A dramatically different approach may be found in the 2012 Premarital and Marital Agreements Act adopted by the Uniform Law Commission (ULC), which seeks to apply the same legal standard to both premarital and mid-marriage agreements. In its review of the 1983 Premarital Agreement Act, the model act upon which New Jersey’s UPA was originally based, the ULC noted the disparate treatment most states afford to premarital agreements and postnuptial agreements. It also considered the potential problems that could ensue from applying different legal standards to these agreements, particularly when a premarital agreement is amended during a marriage.

In a note to the 2012 act, the ULC indicated that “[w]hatever its faults, [the 1983 act] has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.”<sup>22</sup> On the contrary, however, “the situation regarding marital agreements has been far less settled and consistent.”<sup>23</sup> The ULC indicated the commission’s “general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage.”<sup>24</sup>

Accordingly, the 2012 act has been redesigned for premarital agreements and marital agreements to be governed “under the same set of principles and requirements.”<sup>25</sup> Even the act’s title was changed to include both premarital and marital agreements, with the

act now known as the Uniform Premarital *and* Marital Agreements Act.

The act, at Section 2(2), defines “marital agreement” as follows:

an agreement between spouses who intend to remain married, which affirms, modified, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

The 2012 act has been approved by the American Bar Association, has been adopted in two states, and is being presented for legislation in multiple jurisdictions.

## Conclusion

For practitioners counseling clients amending an existing premarital agreement, be sure to include in any agreement the legal standard that the parties seek to govern the enforcement of their agreement, and the agreement’s purpose for their amendment. For parties like Mr. Smith, seeking to enforce an amendment to a prenuptial agreement, stay tuned, as this uncharted area of the law continues to develop. ■

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## Endnotes

1. N.J.S.A. 37:2-31-41.
2. See N.J.S.A. 37:2-40.
3. *Id.*
4. See *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999) cert. denied 161 N.J. 147 (1999) (setting aside a mid-marriage agreement); compare *Nicholson v. Nicholson*, 199 N.J. Super. 525, 529 (App. Div. 1985) (upholding enforcement of reconciliation agreement).
5. 319 N.J. Super. at 191.
6. *Id.* at 195.
7. *Id.* at 198 (holding changed circumstances, for the better or worse, could render enforcement “inequitable”).
8. 199 N.J. Super. at 531-2.
9. *Id.*
10. *Id.* at 529.
11. *Id.* at 532.
12. See N.J.S.A. 37:2-37 (“After marriage...a premarital... agreement may be amended...only by a written agreement signed by the parties, and the amended agreement...”).
13. *Id.*
14. 2014 WL 1568631, \*1 (Super. Ct. March 20, 2014).
15. *Id.* at \*\* 3, 5.
16. *Id.* at \*5.
17. *Id.* at \*4.
18. *Id.* at \*3.
19. *Id.* at \*2.
20. *Id.* at \*6.
21. *Id.* at \* 7.
22. See Uniform Premarital and Marital Agreements Act, at 1.
23. *Id.*
24. *Id.*
25. *Id.* at 2.