

## Family Law

### Preuptial Agreements: Avoiding the Minefield

By Jonathan W. Wolfe

Attorneys face a minefield of potential problems when representing clients negotiating prenuptial agreements. This article addresses pitfalls that practitioners should be wary of when drafting such agreements.

**1. Do Not Predict the Future:** Clients frequently seek guarantees about the enforceability of premarital agreements, and attorneys must avoid making them. It is essential that attorneys advise their prospective client of the treatment that premarital agreements receive under the New Jersey Premarital Agreement Act, N.J.S.A. § 37:2-38. Attorneys must advise their clients of the standard under which an agreement will be examined in the event of both divorce and death, and that the terms will be assessed under the circumstances that existed at the time the agreement is executed and in the future when it is sought to be enforced.

**2. Remember Death Can Be More Significant Than Divorce:** Because New Jersey law exempts premarital assets, gifts and inheritance from equitable distribution, one question that may be posed by

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the client is whether the agreement is needed if separate property is otherwise protected.

In addition to the benefit of using an agreement to protect all increases in value of separate property, the client must be advised of the impact of the agreement in the event of death. Consider a client that has millions of dollars and believes she has limited to no risk that her separate property and/or its increase in value could be deemed marital. What is her downside if the agreement is not enforced? Her problem is that she has not considered what happens in the event of her death. New Jersey's Elective Share Statute, N.J.S.A. § 3B:8-1, provides that her surviving spouse would have the right to elect to receive one-third of her estate. This means that unless the agreement waiving his right to his elective share is enforced, her surviving spouse may receive millions.

The enforceability of the prenuptial agreement in death will be governed by the same statute and/or common law as in the event of divorce. *Estate of Towbin*, No. 2008-0676, 2009 WL 1917411 (App. Div. July 7, 2009). Accordingly, your client must be advised of the significant exposure that their estate could face in the event of their death if they overreach in the drafting of their premarital agreement.

**3. Minimize Throwaway Points:**

Many clients believe that they should include points to which they know the other side will object. Taking knowingly objectionable positions can only create unnecessary problems between people at a particularly emotional and volatile period in their lives. Since the party "proposing" the prenuptial agreement is typically the spouse with assets to protect, the "receiving" spouse will likely react strongly to terms that he/she believes to be manifestly unfair or objectionable. Although some negotiations are sure to follow, everyone will be better served if the "proposing" party takes reasonable positions and proposes an agreement that he or she believes will be acceptable in its entirety.

**4. Insist Both Sides Have Legal Counsel:** The act provides that a spouse may waive the right to consult independent legal counsel prior to entering into a premarital agreement. That being said, you should be wary of becoming involved in the negotiation and drafting of a prenuptial agreement unless the other side will be represented by counsel. The stakes are too high and the lack of independent representation can be used in a variety of ways to challenge the enforceability of the premarital agreement.

**5. Do Not Agree to Sign off on the Agreement:** You may be contacted by a prospective client interested in retaining you to "sign off" on a premarital agree-

ment, because their prospective spouse has insisted they retain independent representation. Typically, if you receive such a call, the prospective client will indicate that they wish to pay you at a level commensurate with the amount of work they anticipate you will be performing.

You should explain to such prospective clients the steps that you will need to take in his or her representation. You should stress the importance of taking such steps and the prejudice that they may face if they fail to fully and adequately participate in the process of negotiating the terms of the agreement. If a prospective client maintains their position that they simply want you to “sign off” on the agreement, I strongly recommend declining the representation. As stated previously, the stakes are too high in this context.

#### **6. Do Not Wait Until Wedding Day:**

So, what if a client calls you on their wedding day and explains that her husband has told her to sign the agreement or the marriage is not going forward? An agreement entered into under such circumstances couldn't possibly be enforceable, right? Not necessarily.

In recent cases, the Appellate Division has upheld the enforceability of agreements entered into within days of the wedding, and even on the wedding day itself. In *Hiemstra*, 2010 WL 1433880, the husband (seeking to enforce the agreement) claimed that he and his wife had executed the agreement three days prior to the marriage. The wife testified that, to the contrary, they had signed the agreement on their wedding day. The trial court found the agreement enforceable and the Appellate Division affirmed, noting simply that the agreement had been executed prior to the marriage. In *Estate of Towbin*, 2009 WL 1917411, the Appellate Division similarly affirmed the enforceability of an agreement entered into on the parties' wedding date. The Court recognized that both parties had been represented by counsel and exchanged financial discovery.

Nevertheless, clients should be counseled that a last-minute execution unneces-

sarily provides their spouse with the ability to assert that the agreement was entered into under duress. For the practitioner retained at the time of a divorce to defend the enforceability of an agreement entered into in close proximity to the wedding, the key will be to demonstrate that both spouses had sufficient time and opportunity to review the agreement and financial disclosures and consult with independent counsel.

#### **7. Remember the Retirement Benefits After Marriage:**

Clients must be advised of their ability (and inability) to protect their retirement benefits in a premarital agreement. The Employee Retirement Income Security Act of 1974 (ERISA) sets forth in plain language the requirements for an effective spousal waiver of benefits. 29 U.S.C. §1055(c) (1988). In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit affirmed a grant of summary judgment finding that a prenuptial agreement signed by a surviving spouse was not an effective waiver under ERISA, notwithstanding that the husband died only nine months after their marriage. The Court held that the prenuptial agreement was not ineffective, because, *inter alia*, the parties had not yet married and Sher was not a spouse at the time that she signed the agreement.

In *Savage-Keough v. Keough*, 373 N.J. Super., 198 (App. Div. 2004), the Appellate Division concluded that, unlike surviving spouses, divorcing spouses can effectively waive their claim to equitable distribution. The court rejected the husband's argument that the waiver was ineffective, holding that ERISA's plain language applied only to the renunciation of survivor benefits under a spouse's policy, and that because the parties were divorced and would no longer be married, there was no question of anyone being a surviving spouse.

Accordingly, parties wishing to ensure a proper waiver in the event of divorce and death must effectuate a waiver after they have married.

**8. Insist Your Client Makes Full Financial Disclosure:** One of the most troubling issues to some clients is the need to make full financial disclosures to their prospective spouse. So, can the agreement simply describe the parties' financial condition in general terms?

In *De Lorean v. De Lorean*, 211 N.J. Super. 432 (App. Div. 1986), the court ruled that under New Jersey common law disclosure required detailed — not general — disclosures. An argument could be made that the Act would permit more generalized financial disclosure, together with a waiver. While this issue has not been squarely addressed in New Jersey, some states (albeit a minority) have held that full disclosure may not always be necessary for an agreement to be enforceable. Nevertheless, practitioners should strongly recommend to the client that he or she make such disclosures.

#### **9. Do Not Include Child Support:**

Contrary to what may be popular belief, premarital agreements may not be used to limit the child support rights of a child at some point in the future.

Although it is possible that the Court will enforce the remainder of a premarital agreement, notwithstanding the inclusion of otherwise improper limitations on child support, practitioners should be wary of including such provisions that are not only invalid but may jeopardize the enforceability of the entire agreement.

#### **10. Do Not Finalize the Agreement After the Wedding Ceremony:**

Clients may inquire whether they can simply execute the agreement after the marriage. The Appellate Division has, on at least one occasion, ruled an agreement “finalized” after marriage could be analyzed and enforced as a prenuptial agreement. See *Pattison v. Pattison*, 2007 WL 1008642 (App. Div. Apr. 5, 2007). However, it is more likely that an agreement executed after the marriage will be evaluated as a “mid-marriage” agreement, of which courts can be significantly more skeptical. See *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999). ■