

Making Prenuptial Agreements 'Bulletproof'

David B. Saxe, New York Law Journal - April 19, 2017

Can prenuptial agreements be made "bulletproof," that is, immune from the challenges and vagaries of litigation? Perhaps not entirely, but with certain precautions, many of those agreements can be made more invulnerable. I spoke on this topic at a recent meeting of the New York State Bar Association's Family Law and Matrimonial section. Given the level of interest, I thought it appropriate to formulate a more thorough discussion of the subject.

Prenuptial agreements are a mainstay of matrimonial practice today. They serve as a means of avoiding much of the endless litigation that a divorce can turn into. But, the practice of drafting them is filled with minefields. It falls to the practitioner to do far more than fill names into a form agreement. The lawyer must think, carefully, of possible contingencies, and provide for them in the agreement, because if a situation is not covered in an agreement, a court is not permitted to fill in what the parties' agreement must have intended. The lack of a provision does not create an ambiguity allowing a court to use parol evidence. *Reiss v. Financial Performance*, 97 N.Y.2d 195 (2001).

The Domestic Relations Law requires that a prenuptial agreement, to be valid, be executed and "acknowledged or proven in the manner required to enable a deed to be recorded." Domestic Relations Law §236(B)(3). Beyond that, it is a good idea that the process of executing the prenuptial agreement be approached with the same formality as that used for any important business contract. So, pretty much the opposite of the writing on a cocktail napkin that was reportedly the form of prenuptial agreement entered into by Amy Irving and Steven Spielberg—and which was later held to be unenforceable.

To talk about bulletproofing prenuptial agreements, it may be useful to offer a list of important considerations.

- It should go without saying that the non-monied spouse must be represented by independent counsel. Without that, an agreement is very likely to be found unenforceable. The question is, exactly how is this requirement satisfied? I suggest that the better practice is for the monied spouse to have the non-monied spouse choose his or her own attorney (to be paid by the monied spouse), and to include in the prenuptial agreement a recitation that the non-monied spouse chose his or her counsel and is fully satisfied with the assistance received.
- Financial disclosure is important, if a bit more tricky. It is clear from the First Department's *Gottlieb v. Gottlieb* case that a very wealthy monied spouse need not disclose every asset and account, or even every source of income—the majority in *Gottlieb* pointed out that "the wife lived with the husband and was aware of the luxurious lifestyle his income and assets afforded, even if the precise amount of the income was unknown to her." *Gottlieb v. Gottlieb*, 138 A.D.3d 30, 38 (1st Dept. 2016). But, the better practice is to avoid any possibly claim of deceit by providing enough financial disclosure to the non-monied spouse so that he or she cannot claim a lack of understanding of the nature and extent of the claims being waived.
- Maintenance provisions in prenuptial agreements are required by statute to be "fair and reasonable at the time of the making of the agreement and ... not unconscionable at the time of entry of final

judgment." Domestic Relations Law §236(B)(3). The First Department's majority opinion in *Gottlieb* explained: "An agreement will be viewed as *unconscionable* only 'if the inequality is so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense.'" *Gottlieb*, 138 A.D.3d at 47. The court also applied the standard of *Christian v. Christian*, 42 N.Y.2d 63, 72 (1977), under which a prenuptial agreement can be set aside where it is shown to be the product of fraud, duress, or overreaching resulting in manifest unfairness. To establish overreaching in the execution of the agreement—a concept that may be equated with the term "procedural unconscionability"—the challenging party may rely on evidence showing the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception. *Gottlieb*, 138 A.D.3d at 37, 57 (Saxe, J., dissenting). Assuming such overreaching is established, it must also be shown that the overreaching resulted in terms "so manifestly unfair as to warrant equity's intervention." *Id.* While the exact characteristics of "manifest unfairness" may be imprecise, the term is arguably the equivalent of substantive unconscionability. *Id.* at 58 (Saxe, J., dissenting).

There is no requirement that a prenuptial agreement provide that the non-monied spouse should receive maintenance sufficient to sustain the style enjoyed during the marriage. In *Gottlieb*, the agreement provided the wife with \$12,500 per month until the youngest child reached the age of four, free luxury housing until the youngest child turned 18, and free health insurance during that time; the majority found that the requirements for maintenance provisions were satisfied, noting that the wife recited in the agreement that she was "self-supporting and had sufficient ability to maintain a reasonable and satisfactory standard of living," and that she had a bachelor's degree in economics from the University of Pennsylvania and had worked for several years in advertising and finance. As the agreement did there, it is best to include a specific acknowledgment by the non-monied spouse that he or she has the ability to maintain a reasonable and satisfactory standard of living and understands and agrees that, in the event of a divorce, he or she will not continue to maintain the lifestyle of the marriage. It may also be useful to reference the case of *Cioffi-Petrakis v. Petrakis*, 72 A.D.3d 868 (2d Dept 2010), where the prenuptial agreement gave the wife an amount no greater than the sum of \$25,000 per year for each year the parties were married, and the court, in approving it, explained that the wife was represented by independent counsel, she signed the agreement, her counsel signed the agreement as a witness, and the agreement specifically recited that the wife entered into it "freely, voluntarily and with full knowledge of all circumstances having a bearing on this agreement," and the agreement provided her with what the court called "meaningful bargained-for benefits." *Id.* at 869

- A waiver of any right to distribution of wealth acquired by the monied spouse during the marriage should stand up as long as the prenuptial agreement includes recitations by the non-monied spouse acknowledging the wealth of the monied spouse and the likelihood of additional wealth accumulating during the marriage, and disclaiming any right to the assets to the extent indicated in the provisions. I feel compelled to point out that, despite some of the language of the majority opinion in *Gottlieb*, property distribution provisions of prenuptial agreements should not be subject to the "manifest unfairness" inquiry of *Christian v. Christian*. Rather, in my view, the appropriate inquiry is the standard contract principles of whether the agreement was obtained by fraud, duress or unconscionability.

I have heard of situations where a monied spouse becomes far wealthier during the marriage, and, because the prenuptial did not discuss anticipated additional wealth, seeks to enter into a new postnuptial agreement, giving the non-monied spouse additional property, in an effort to eliminate any possible legal challenge. Where the prenuptial neglects to specifically discuss the prospect of greater

wealth obtained during the marriage, such a postnuptial agreement seems like a good idea. A postnuptial agreement may also be a good idea if subsequent review of the terms of the prenuptial agreement reveals that some of its provisions may be subject to attack.

- I have already pointed out that a prenuptial agreement should contain a full recitation by the non-monied spouse acknowledging that sufficient information has been provided regarding the extent of the monied spouse's assets that are the subject of the agreement, and acknowledging that the extent of support provided for by the agreement will be sufficient given the non-monied spouse's ability to be self-supporting at an appropriate level. Depending on the unique personalities and circumstances of the parties, it may be worth considering making a video recording of the execution of the agreement, in which the non-monied spouse is shown acknowledging aloud the nature and extent of the waivers and limitations. I recognize that even where it could be useful, such a process may be considered objectionable. Nevertheless, it is worth considering.
- There is no hard-and-fast rule prohibiting the introduction of a prenuptial agreement on the eve of your wedding. Cruel, callous, and downright nasty behavior has been held to be insufficient to invalidate a prenuptial agreement, including threatening a pregnant woman with cancellation of the wedding if she refused to sign the agreement. *Gottlieb*, 138 A.D.3d at 40. However, for purposes of maintaining the integrity of the prenuptial agreement, the far better approach is to proffer the agreement far enough in advance to avoid the appearance of duress and to allow the non-monied spouse sufficient time to consult with counsel of his or her choosing and fully consider the proposal.
- Waivers of counsel fees (except for issues relating to the parties' children) will hold up best when the prenuptial agreement is careful to provide for all issues, and minimizes issues left to be handled by a court. Once a trial issue is found to exist, such as a question as to whether the agreement's maintenance provision was unfair when entered into, that issue may be used to call into question the counsel fee waiver as well. *Anonymous v. Anonymous*, 123 A.D.3d 581 (1st Dept 2014); *Kessler v. Kessler*, 33 A.D.3d 42 (2d Dept 2006). To make counsel fee waivers bulletproof, make the rest of your prenuptial agreement bulletproof.
- Don't forget to include in your prenuptial agreement a complete integration clause, also called a merger clause, to avoid the possibility of any claims that other agreements were made elsewhere that were intended to remain enforceable.
- It is best to omit any provisions that will breed doubt about your client's seriousness of purpose. Although any questionable or downright nutty provisions ought to simply be ignored by a court, as their inclusion can create doubt or questions that may have a spillover effect onto the rest of the agreement. An example of questionable provisions in a prenuptial agreement can be found in *K. v B.*, 13 A.D.2d 12, 24 n.2 (1st Dept 2004) (Saxe, J. dissenting).
- A lawyer called upon to negotiate and draft a prenuptial agreement for very wealthy or powerful clients may find that those clients require an extraordinary amount of time and attention, and expect you to obtain the results they demand. Such clients may not understand just how little attention a court, even a concerned and caring matrimonial judge, may pay to them and their demands and expectations in the context of matrimonial litigation. It may be worth considering engaging the services of a private mediator who has judicial experience with issues of the enforceability of marital agreements. Such a person may help to ensure that the terms of a negotiated prenuptial agreement will withstand a legal

challenge, and help convince a client of the value of necessary compromises to protect the integrity of the agreement against legal challenge.

Finally, I want to emphasize that the more clearly an agreement establishes that the non-monied spouse fully understands and accepts the facts regarding the monied spouse's finances and intentions, the more bulletproof the agreement will be. Think of the recitations of the agreement along the lines of a defendant's allocution in the course of a guilty plea. Like a plea allocution, a prenuptial agreement gains validity the more completely it acknowledges the factual situation, and will hold up best if the parties specifically acknowledge the rights that are being waived.

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