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**How Enforceable Is Your Prenuptial Agreement? – Part One - Nj Divorce Law Prior To The
New Jersey Premarital Agreement Act.**

By Curtis J. Romanowski

Prenuptial agreements have increased in popularity in New Jersey. These agreements are entered into to protect assets and to avoid or limit liability for spousal support and to avoid what could otherwise be a prohibitively expensive divorce.

Obviously prenuptial agreements are not for every couple. A previously divorced individual, for example, might want to safeguard certain marital assets for children of the prior marriage. Others of robust 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 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 NJ divorce law at the time of the divorce. Judges have much discretion in applying the facts of the case to the law in a New Jersey divorce. Engaged couples can eliminate some of the guesswork by taking these decisions away from the courts by entering into prenuptial agreements.

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.

Back in the day, when women were thought of as the weaker sex, this 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, applied 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. 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.

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 meaning 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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How Enforceable Is Your Prenuptial Agreement?

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Part Two - The New Jersey Premarital Agreement Act

Part One of this two-part article dealt with NJ Divorce Law Prior to the New Jersey Premarital Agreement Act. New Jersey divorce lawyers would do well to recognize that the New Jersey Premarital Agreement Act only applies to prenuptial agreements executed after November 3, 1988. The cases of Chaudry, Marshall, D'Onofrio, De Lorean, Orgler and Jacobitti, all discussed in Part One of this article, therefore, had to be decided based on pre-statutory case law.

All of the cases summarized in Part One, however, generally conform to the standards expressed in the Uniform Premarital Agreement Act, now codified in New Jersey. New Jersey divorce lawyers now measure the enforceability of prenuptial agreements against the standard set by the Uniform Premarital Agreement Act. In Part Two, we will discuss this Act, as well as New Jersey's codification; the New Jersey Premarital Agreement Act.

The Act applies to agreements between prospective spouses made in contemplation of marriage and to be effective upon marriage. The Act specifies that all New Jersey prenuptial agreements must be condensed to a writing. The writing must then be signed by both parties. There is no requirement that consideration be exchanged for the agreement to be enforceable.

When couples considering marriage enter into a prenuptial agreement, they can resolve in advance any potential issues involving the distribution of assets and spousal support. Notably, however, such an agreement may not adversely affect any party's obligation to pay child support. Other than that, the issues that can be addressed and planned for in a prenuptial agreement are fairly broad. While all such agreements must be in writing, any modification or revocation of a premarital agreement must likewise

be in writing.

If any party chooses to contest the enforceability of a prenuptial agreement, the burden of proof is always on the party opposing it. That party must prove that the agreement is unenforceable because of the existence of certain specific conditions prior to or at the time of the agreement's execution. Voluntariness is an essential requirement. Premarital agreements will not be enforced in cases where any party did not sign on voluntarily.

Although the Uniform Premarital Agreement Act does not specifically define what is meant by "unconscionable," it does specify that a lack of fair and reasonable disclosure of assets - unless that disclosure is specifically waived - along with a complete lack of knowledge of one party's part as to the financial status of the other party, are factors to be explored and weighed.

The Act also addresses the issue of a spouse who would be rendered a public charge as a result of the enforcement of a prenuptial agreement that does not provide for spousal support, and provides a remedy. That remedy permits the Court to award alimony to the disadvantaged spouse in contradiction to the terms agreed to prior to marriage. This is reflective of the same sort of thinking that impeded the enforceability of such agreements historically.

There are some differences between the New Jersey Premarital Agreement Act and the Uniform

Premarital Agreement Act. The New Jersey Act adds a definition for the term "unconscionable premarital agreement." According to the New Jersey Act, an agreement is unconscionable if it leaves a spouse without a means of support, makes a spouse a public charge or provides a standard of living far below what the spouse enjoyed before marriage. The definition has a familiar ring to it, since it is quite similar to implied definitions and dicta contained in the case law we discussed earlier.

The enforceability of a premarital agreement executed after the enactment of the New Jersey statute was contested in the case of *Hawxhurst v. Hawxhurst*. The husband in *Hawxhurst* claimed that he had signed the agreement under duress and that it was unconscionable, regardless of the fact that the agreement was his idea and that it was drafted by his attorney, with whom he had at least two consultations. The Court held that the premarital agreement was not unconscionable. The Trial Court found that the husband received exactly what he had bargained for at the time the agreement was entered into, and that he could not complain about the deal five years down the road. The Court found that the husband did not sign the agreement under duress.

The Appellate Division, on review, cited both *Marschall* and *D'Onofrio* for the enforceability of premarital agreements, holding that prenuptial agreements that establish post-divorce rights and obligations should be held to be enforceable and valid. The Court added that such agreements should be encouraged by the courts at least to the extent that the parties have developed comprehensive and particularized agreements responsive to their particular circumstances.

The Court held that a prenuptial agreement would not necessarily be rendered voidable just because one spouse would receive a disproportionate amount of the assets as the result of the enforcement. A finding of fraud, duress or overreaching would, on the other hand, bar the enforcement of a prenuptial

agreement.

As far as fairness is concerned, the Appellate Division stated that it is for the parties themselves to decide what is fair and equitable. The Appellate Division held that so long as a spouse had the opportunity to reflect on his or her actions, providing that the spouse was competent and had access to legal counsel, a Court should not substitute its own assessment of what is fair and equitable for the parties, except in rare instances under unusual circumstances.

In addition to the signed written agreement requirements of the Uniform Premarital Agreement Act, New Jersey specifies the statement of assets must be appended to the agreement. This mandate results in a clear footprint being left of the required full and fair disclosure.

New Jersey embellishes on the Uniform Premarital Agreement Act by placing the burden of proof on any party who alleges after the fact that the agreement is unenforceable. The burden of proof is quite high. The burden the party must prove his or her case for unenforceability by clear and convincing evidence. Clear and convincing evidence borders on the beyond a reasonable doubt standard required in criminal cases. *Hawxhurst* addressed the statutory provision.

New Jersey also requires disclosure of the earnings, in addition to the disclosure of property and financial liabilities. New Jersey also preconditions enforceability on both parties either having the benefit of legal counsel prior to entering into a prenuptial agreement, or upon a waiver of the right to legal counsel. Any such waiver of the right to consult with an attorney must be in writing.

In New Jersey, prenuptial agreements are fairly difficult to set aside, provided that the procedural aspects of the act are abided by. Unconscionability is difficult to prove and the burden of proof is quite

high. Parties contemplating premarital agreements should not take the waiver of the right to assistance by a competent New Jersey divorce attorney lightly.

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