



EVALUATION FORM

In order for us to improve our continuing legal education programs, we need your input. Please complete this evaluation form and place it in the box provided at the registration desk at the end of the session. You may also mail the form to CLE Director, NYCLA, and 14 Vesey Street, New York, NY 10007.

Drafting Prenuptial and Spousal Settlement Agreements: From Routine to Complex Issues and Clauses

Friday, June 13, 2014 9:00 AM – 1:00 AM

I. Please rate each speaker in this session on a scale of 1 - 4
(1 = Poor; 2 = Fair; 3 = Good; 4 = Excellent)

	Presentation	Content	Written Materials
Robert M. Freedman			
Stephen Gassman			
Arlene Harris			
Ralph M. Randazzo			

II. Program Rating:

1. What is your overall rating for this course? Excellent Good Fair Poor

Suggestions/Comments: _____

A. Length of course: Too Long____ Too Short____ Just Right_____

B. Scheduling of course should be: Earlier____ Later____ Just Right_____

2. How did you find the program facilities?

Excellent Good Fair Poor

Comments: _____

3. How do you rate the technology used during the presentation?

Excellent Good Fair Poor

Comments: _____

PLEASE TURN OVER

4. Why did you choose to attend this course? (Check all that apply)

Please Turn Over

- Need the MCLE Credits Faculty Topics Covered
 Other (please specify) _____

5. How did you learn about this course? (Check all that apply)

- NYCLA Flyer NYCLA Postcard CLE Catalog NYCLA Newsletter
 NYCLA Website New York Law Journal Website NYCLA CLE Email
 Google Search
 Other (please specify) _____

6. What are the most important factors in deciding which CLE courses to attend (Please rate the factors 1- 5, 1 being the most important).

- ___ Cost
___ Subject matter
___ Location
___ Date and Time
___ Provider
___ Organization of which you are a member
___ Other _____

6. Are you a member of NYCLA? ___ Yes ___ No

III If NYCLA were creating a CLE program specifically tailored to your practice needs, what topics or issues would you want to see presented?

NEW YORK COUNTY
NYCLA
 LAWYERS' ASSOCIATION

**DRAFTING PRENUPTIAL
 AND SPOUSAL
 SETTLEMENT
 AGREEMENTS: FROM
 ROUTINE TO COMPLEX
 ISSUES AND CLAUSES**

Prepared in connection with a Continuing Legal Education course presented
 at New York County Lawyers' Association, 14 Vesey Street, New York, NY
 scheduled for June 13, 2014

Program Chair: Elliott Scheinberg, Esq.

**Faculty: Stephen Gassman, *Gassman Baiamonte Betts, PC*; Arlene Harris,
Kaye Scholer LLP; Robert M. Freedman, *Schiff Hardin LLP*; Ralph M. Randazzo,
*Randazzo & Randazzo LLP***

This course has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 4 Transitional and Non-Transitional credit hours: 2 Professional Practice/Law Practice Management and 2 Skills.

This program has been approved by the Board of Continuing Legal education of the Supreme Court of New Jersey for 4 hours of total CLE credits. Of these, 0 qualifies as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal law, workers compensation law and/or matrimonial law.

ACCREDITED PROVIDER STATUS: NYCLA's CLE Institute is currently certified as an Accredited Provider of continuing legal education in the States of New York and New Jersey.



Information Regarding CLE Credits and Certification

Drafting Prenuptial and Spousal Settlement Agreements: From Routine to
Complex Issues and Clauses

June 13, 2014; 9:00 AM to 1:00 PM

The New York State CLE Board Regulations require all accredited CLE providers to provide documentation that CLE course attendees are, in fact, present during the course. Please review the following NYCLA rules for MCLE credit allocation and certificate distribution.

- i. **You must sign-in** and note the time of arrival to receive your course materials and receive MCLE credit. The time will be verified by the Program Assistant.
- ii. You will receive your MCLE certificate as you exit the room at the end of the course. The certificates will bear your name and will be arranged in alphabetical order on the tables directly outside the auditorium.
- iii. If you arrive after the course has begun, you must sign-in and note the time of your arrival. The time will be verified by the Program Assistant. If it has been determined that you will still receive educational value by attending a portion of the program, you will receive a pro-rated CLE certificate.
- iv. **Please note: *We can only certify MCLE credit for the actual time you are in attendance.*** If you leave before the end of the course, you must sign-out and enter the time you are leaving. The time will be verified by the Program Assistant. Again, if it has been determined that you received educational value from attending a portion of the program, your CLE credits will be pro-rated and the certificate will be mailed to you within one week.
- v. If you leave early and do not sign out, we will assume that you left at the midpoint of the course. If it has been determined that you received educational value from the portion of the program you attended, we will pro-rate the credits accordingly, unless you can provide verification of course completion. Your certificate will be mailed to you within one week.

Thank you for choosing NYCLA as your CLE provider!





New York County Lawyers' Association
Continuing Legal Education Institute
14 Vesey Street, New York, N.Y. 10007 • (212) 267-6646

Drafting Prenuptial and Spousal Settlement Agreements: From Routine to Complex Issues and Clauses

Friday, June 13, 2014, 9:00 AM - 1:00 PM

Program Chair: Elliott Scheinberg, Esq.

AGENDA

- | | |
|---------------------|---|
| 8:30 AM – 9:00 AM | Registration |
| 9:00 AM – 9:10 PM | Introduction and Announcements |
| 9:10 AM – 10:00 AM | Considerations when Drafting Prenups and Spousal Agreements for the LGBT Community <ul style="list-style-type: none">• Anticipating portability, tax consequences, custody, etc., in New York and Mini-DOMA States• Sample provisions <i>Ralph M. Randazzo, Randazzo & Randazzo LLP</i> |
| 10:00 AM – 10:50 AM | Prenuptial and Spousal Settlement Agreements in Light of <i>Petrakis v. Petrakis</i> <ul style="list-style-type: none">• The role of the general and specific merger clauses• Sample provisions <i>Stephen Gassman, Gassman Baiamonte Betts, PC</i> |
| 10:50 AM – 11:00 AM | BREAK |
| 11:00 AM – 11:50 AM | Considerations Regarding Estates and Trusts When Drafting Prenup and Settlement Agreements <ul style="list-style-type: none">• Sample provisions <i>Arlene Harris, Kaye Scholer LLP</i> |
| 11:50 AM – 12:40 PM | Considerations Regarding Elder Law When Drafting Prenup and Spousal Settlement Agreements for Older Clients <ul style="list-style-type: none">• What to include; Sample provisions <i>Robert M. Freedman, Schiff Hardin LLP</i> |
| 12:40 PM – 1:00 PM | Closing Remarks; Questions and Answers |

RANDAZZO & RANDAZZO, L.L.P.

464 NEW YORK AVENUE, SUITE 100
HUNTINGTON, NEW YORK 11743
(631) 673-4998
FACSIMILE (631) 549-0826

SHERYL L. RANDAZZO - NY, PA
RALPH M. RANDAZZO - NY, MD, DC

215 PARK AVENUE SOUTH, SUITE 1402
NEW YORK, NY 10003
(212) 405-1610

With the availability of marriage to same-sex couples under the Marriage Equality Act in New York and in other jurisdictions, many same sex couples began marrying, some with legal counsel, but many without the benefit of legal counsel. Now, with Federal marriage recognition, even more couples are marrying. Because these couples are often marrying later in life with substantially separate assets, they benefit from legal advice and a prenuptial agreement in advance of their marriage and often seek a postnuptial after their marriage.

For you, the facts presented by these clients are frequently similar to second marriage situations. Often the couples do not share children, have different contingent beneficiaries, maintain separate assets and are substantially financially independent of one another. Many same-sex marriages entered since marriage rights became widely available and recognized are between couples in their sixties, seventies and eighties and/or couples with substantial asset and income diversity. Couples marry without any awareness of the attendant obligations, health care costs and maintenance burdens upon divorce. (In my opinion, some long term couples marry for the right to divorce as they have complex comingling of assets and need a structure for division without gift tax liabilities or transfer limitations (QDRO.))

While younger couples marry as well, it is often older clients with accumulated separate assets or deteriorating health who present the most significant issues, such as the health care (nursing home costs) spousal support obligation. Unlike many of the rights and obligations of marriage, this obligation cannot be waived or eliminated in a Pre- or Post-Nuptial Agreement.

In these materials I briefly discuss some of the unique issues presented by same sex couples who wish to marry or previously married without really understanding the attendant obligations. I also present several provisions we use to attempt to address the possibility that a couple may live, at the time of divorce, in a jurisdiction where their marriage is not recognized or legal.

In the drafting of prenuptial agreements confirm the gender provisions of your documents are accurate. It is a minor issue that can reinforce client confidence that you have sensitivity to and experience with same sex couples. Most standard provisions within an agreement that refer to “his and her” need to be rewritten.

Finally, for some individuals the protection of a prenuptial is insufficient. For such clients consider creating and funding an asset protection trust in advance of marriage.

Paragraphs For Consideration When Planning For Same Sex Couples

Controlling law and the enforceability of the agreement are of particular import to couples residing in a jurisdiction where their marriage is illegal or not recognized.

WHEREAS, FIANCÉ and CLIENT agree that, no matter where they reside in the future, their economic obligations from one to the other, including any right to support from the other and to equitable distribution shall be governed entirely by this Agreement; and

WHEREAS, this Agreement shall be governed by the laws of the State of New York, and no other law, including the law of community or marital property or equitable distribution of any state. Further, neither party shall ever make an application for another state’s law to apply to this Agreement or to the parties’ rights as a married couple regardless of where either of them resides; and

WHEREAS, the parties acknowledge that this Agreement has been executed in the State of New York; and

WHEREAS, the parties hereby submit to the jurisdiction of the Courts of the State of New York; and

ARTICLE II
GOVERNING LAW

1) CLIENT and FIANCÉ acknowledge and agree that this Agreement shall be governed by the laws of the State of New York and no other law, including the law of community or marital property or equitable distribution of any state or jurisdiction, shall ever apply to this Agreement or to the parties' rights as a Spouse regardless of where the parties reside.

2) CLIENT and FIANCÉ hereby submit to the jurisdiction of the Courts of the State of New York. No matter where the parties reside, the law of the State of New York shall govern.

3) A Marital Action shall be defined as the commencement of an Action for Divorce, Dissolution, Separation or Annulment or the execution by the parties of a written Separation Agreement.

(THE PARAGRAPH BELOW WAS SUGGESTED BY A COLLEAGUE IN A NEGOTIATION – IT HAS NOT BEEN MODIFIED AND ADOPTED BY ME)

4) Dissolution or Divorce. The Marriage may be dissolved or shall be deemed “terminated” by obtaining a Judgment of Divorce, annulment, or separation in a court of competent jurisdiction. If the parties are (or one of the parties is) then residing in a jurisdiction where their marriage is not recognized or is void, then termination of the relationship shall occur by one party providing written notice of termination to the other, such notice to be hand-delivered or sent by certified mail as set forth in _____, or by filing an action for legal or equitable relief, and any property to be divided or paid over pursuant to this Agreement shall be valued as of the earlier of the date such notice is sent or such action is commenced. Should the parties (or one of the parties) reside in a jurisdiction where their marriage is not recognized or is void, the parties agree, upon notice of termination, to take whatever steps are necessary to dissolve the Marriage, including instituting an action for divorce in New York State.

Couples of long duration may have existing claims and agreements between them. Consciously address the potential for and waiver of existing claims and/or any previously executed agreements.

ARTICLE XIII

Representations; Disclosure

4) Each party acknowledges that they each may have had the right to assert certain equitable claims by reason of their longstanding domestic partnership, such as constructive trusts, equitable accountings, partnership claims, and/or partition actions, and that replacing those rights with the agreements set forth herein is part of the consideration with respect to this Agreement.

Often clients suggest that they do not require provisions relating to inheritance. Because we recognize the possibility and risk of couples moving to a jurisdiction that does not recognize same sex spousal inheritance rights, we always include provisions for minimum bequests.

ARTICLE III

ESTATE RIGHTS

Consider a provision to require a minimum distribution to one another if they are then living in a state that does not recognize or considers the marriage void. **DO NOT RELY UPON THE LAW OF INTESTACY OR SPOUSAL RIGHTS FOR SAME SEX COUPLES.**

One party often owns the parties' residence; sometimes there is an anticipated transfer to Tenants by the Entireties. We want to plan for the impact in both situations. These situations are not different for same sex couples, though in my experience same sex couples are uneducated about the fact that a transfer of title to joint ownership cannot be unilaterally reversed and that they cannot demand their spouse vacate the home if they split up. We always address the rights of the owner and the timing of vacatur by the non-owner. We include provisions for the payment of a lump sum, separate from an agreement as to equitable distribution, to facilitate relocation by a non-monied or dependent spouse.

ARTICLE V
SEPARATE PROPERTY

PRIMARY RESIDENCE

9) Upon the parties' marriage, the parties intend to reside in an apartment solely owned and titled in CLIENT's name located at _____ or its successor (the "Primary Residence"). Except as otherwise provided for herein, such Primary Residence shall be CLIENT's Separate Property and FIANCÉ waives any right, title or interest in such Apartment except as provided otherwise in Article III, Paragraph 4 (INHERITANCE OR ESTATE RIGHTS).

10) If a Marital Action is commenced, CLIENT shall retain title to the Primary Residence and shall have exclusive use and occupancy of the Apartment. FIANCÉ shall vacate the Primary Residence within sixty (60) days of the service of a Summons in a Marital Action or the execution by the parties of a written Separation Agreement. As set forth below, CLIENT shall pay to FIANCÉ a lump sum payment calculated as \$50,000 plus \$50,000 times the number of years the parties are married (the parties shall pro rate the number of months in the year at the time of the service of a Summons in a Marital Action or the execution by the parties of a written Separation Agreement and pro rate the amount provided for in this paragraph) at the time of the service of a Summons in a Marital Action or the execution by the parties of a written Separation Agreement; provided however, such amount shall be capped at \$500,000. CLIENT shall pay FIANCÉ fifty percent (50%) of the amount owed thirty (30) days after the service of a Summons in a Marital Action or the execution by the parties of a written Separation Agreement and fifty (50%) percent upon FIANCÉ's vacatur.

11) In the event that FIANCÉ does not timely vacate under the terms set forth herein, then no vacatur payment shall be made.

12) In the event that at the time of service of a Summons in a Marital Action, or the execution by the parties of a written Separation Agreement, the parties are residing in a residence titled jointly in both names, then the above vacatur provisions (Article V, Paragraphs 10 and 11) shall remain in effect. Notwithstanding the foregoing, if the Primary Residence is titled in both names, then FIANCÉ'S vacatur payments shall be deemed an

advance of his/her interest in the jointly owned Primary Residence under Article VII, Paragraph 3.

Address return of contributions to jointly owned property.

ARTICLE VII
JOINTLY HELD PROPERTY

3) With respect to any real property, condominium apartment or cooperative apartment purchased by CLIENT and FIANCÉ jointly after the marriage and titled in joint names, they agree that should a Marital Action be commenced, the party who contributed more money to the purchase and/or improvement of the property (the “Majority Owner”) shall have the option to buy out the other, unless they agree otherwise in a notarized writing. The option provided for in this Article must be exercised within 120 days of a determination either by agreement or court order as to which party is the Majority Owner. If the Majority Owner does not exercise his/her option within the 120 day period, the person who contributed less to the purchase and/or improvements on said property (the “Minority Owner”) shall have 120 days to exercise an option to buy out the Majority Owner. The option will be deemed exercised by providing notice in writing pursuant to Article XVI, Paragraph 7 herein. The parties will jointly establish a fair market value for such property. If they are unable to do so, then each may select at his/her own expense, an appraiser who shall place a value on the property. If the said appraisals are appreciably at variance (which shall mean a difference of \$75,000 or more), a third independent appraiser shall be selected by the parties whose then determination of fair market value shall be binding. If the parties cannot agree upon a third independent appraiser, then the parties’ appraisers shall select the third independent appraiser, whose appraisal shall be binding. The parties shall equally bear the costs of the appraisal of the third independent appraiser. If the first two appraisals differ by less than \$75,000, then the parties shall split the difference. The party that exercises the option shall pay the other party fifty percent (50%) of the fair market value of the property as reduced by (a) any joint mortgage on the property, (b) the actual costs incurred in the transfer of the property from joint names to a party’s sole name (the “Actual Costs”) and (c) the amount of Separate

Property which was used to purchase, improve or renovate the property by the party who holds the option. The party who does not have the option to purchase the property shall also be entitled to the return of the amount of his/her Separate Property which was used to purchase, improve or renovate the property. Mortgage payments and ordinary repair and maintenance costs shall not be treated as improvements or renovations. Both parties shall cooperate and take whatever steps may be necessary to effectuate the transfer. For example, assume CLIENT and FIANCÉ purchased joint property for \$80,000. FIANCÉ used \$35,000 of his/her Separate Property, and CLIENT used \$15,000 of his/her Separate Property, to purchase, improve or renovate the property. Since FIANCÉ contributed more money than CLIENT to purchase, improve or renovate the property, FIANCÉ has the option to purchase. Assume also that the mortgage on the property is \$30,000 and the fair market value of the Property (after Actual Costs) is \$200,000. FIANCÉ shall pay CLIENT a total of \$75,000 for his/her interest in the property (\$200,000 FMV less the \$30,000 mortgage less the \$35,000 credit to FIANCÉ, less the \$15,000 credit to CLIENT, times 50% equals \$60,000, plus \$15,000, which sum represents a return of CLIENT's contribution of Separate Property). The party exercising the option shall pay the Actual Costs of the transfer of title, including customary and reasonable attorneys fees associated with the sale or transfer.

4) Payment due under Paragraph 3 of this Article by the purchasing party must be completed within six months of the execution of a Stipulation of Settlement or six months from the date of entry of the Judgment of Divorce, whichever occurs earlier.

5) If neither party decides to purchase the real property, condominium apartment or cooperative apartment referred to in Paragraph 3 of this Article VII, then upon the entry of a Judgment in a Marital Action, the property shall be sold, and the proceeds from the sale of property jointly owned by the parties shall be divided in the following priority: (i) all mortgages or other liens shall be satisfied with appropriate charge against or payment by the party responsible for any lien which was created, caused or suffered by one of the parties and not the other; (ii) customary costs, including but not limited to legal fees, transfer taxes, title changes, broker's commissions, and recording fees (the "Customary Costs") (borne equally by the parties); (iii) reimbursement to each of the parties for their respective Separate Property which was used to purchase, improve or renovate the property; and (iv) an equal division between the parties of any balance. Mortgage payments and ordinary repair and maintenance

costs shall not be treated as improvements or renovation expenses. Both parties agree to use his/her best efforts to obtain the highest price for the property on the open market. If the proceeds from any sale are insufficient to satisfy all liens and pay the **Customary Costs**, the parties shall be required to pay fifty percent (50%) of such items at the closing unless the lien was placed, caused or suffered by one of the parties and not the other, in which case the lien shall be paid by the party who placed, caused or suffered the lien.

6) The parties agree that in the event of the commencement of a Marital Action, the parties shall equally divide the balance of any joint bank accounts, and under any circumstances neither party shall withdraw any funds from such account, unless to pay mutually agreed upon joint liabilities.

Assets such as tangible personal property and pets would be difficult to divide because of the long duration of the relationship or for other reasons. Again, these issues are not necessarily unique to same sex couples, but are of particular import.

7) The parties agree that in the event of the commencement of a Marital Action, all household furniture, furnishings, and artwork ("Household Objects"), (unless such property is listed as Separate Property on the Financial Statement of either Party herein) which is currently owned by the parties and/or is purchased with Marital Property after the marriage, or is received by the Parties as gifts from third parties, shall be divided as the Parties shall agree or, if they cannot agree, as follows. The parties will flip a coin to see who selects the first Household Object. Whoever wins the coin toss shall choose one Household Object. The other Party shall then choose one or more Household Objects such that the value of the Household Object or Household Objects that he chooses roughly equals the value of the Household Object that the coin toss winner chose. The Parties will continue to select items in that order and using that methodology until all of the Household Objects have been selected.

8) Any and all pets owned before the marriage of the parties shall be jointly owned and any and all pets acquired after the marriage shall be Marital Property. In the event of the commencement of a Marital Action any and all pets shall be shared equally with each

party having said pet or pets for alternate weeks commencing on Fridays. Except as otherwise agreed by the parties, in writing, CLIENT shall have the pet(s) starting on the first Friday after the commencement of the Marital Action and FIANCÉ shall have the pet(s) starting on the following Friday, alternating every week until the death of the pet(s). All costs for medical or preventative care shall be shared equally upon presentation of written documentation of each expenditure.

For couples who plan to have children, natural or adopted, provision regarding child care and related provisions similar to those one would use for heterosexual couples should be discussed and included as appropriate. The only additional provision I add is a requirement that the parties consent to and participate in a second parent adoption of any child or children. While I believe such a provision is vulnerable to challenge at the time of a birth, I believe the indication of intent is an important item for couples to consider. Further, we discuss and consider any supplemental support and retirement contributions that would be made or provided annually for a caregiver parent.

ARTICLE XI

Future Children

1) Despite the parties being married, in the event a Child is born or adopted by one of the parties, there may be a necessity for a Second Parent Adoption. Each party agrees to cooperate with respect to execution of any additional documentation necessary to effectuate such adoption.

2013 was the first year same sex married couples were able and obligated to file their income tax returns jointly. They often discovered that taxes increased substantially or that they could be liable for errors in a joint return. For these reasons I always include provisions that enable either to elect to file separately and provisions for payment of amounts due under joint returns.

ARTICLE X

Liabilities and Living Expenses

2) Taxes.

i) Either party may elect to file income taxes as Married Filing Separately. Such election shall be binding on the other party.

ii) Each party shall indemnify and hold the other harmless from any taxes, additions to tax, penalties, interest, liabilities, fines, costs and expenses of any kind or nature, including reasonable accountant's and attorney's fees and disbursements, which either party may incur or be subject to by reason of the following: (a) Any false, misleading or incomplete statement made or to be made, directly or indirectly, by the indemnifying party on any joint tax return; (b) Any statement of fact or information whether or not false, misleading or incomplete, furnished or to be furnished, directly or indirectly, by the indemnifying party on any joint tax return; (c) Any act or action performed by the indemnifying party or any failure or neglect to perform any act or action by the indemnifying party, including the failure or neglect to file any joint tax return, make a statement or furnish information or make an election, which act or actions affects the income, gain, loss, deduction, credit or tax liability of the indemnifying party on any joint tax return; or (d) Any failure or neglect to disclose any item of income, gain, loss, deduction or credit that should have been or should be included on any joint tax return.

iii) (a) If the parties, with respect to any tax heretofore or hereafter paid under a joint tax return, are entitled to a tax refund or credit, such tax refund or credit shall be divided equally between the parties; (b) Except as may otherwise be set forth herein, if the parties, with respect to any tax heretofore or hereafter paid under a joint tax return, are required to pay taxes, additions to tax, penalties, liabilities, fines, costs and expenses of any kind or nature, including reasonable attorney's and accountant's fees and disbursements, imposed by any governmental authority ("additional tax payments") and the additional tax payments are attributable directly to one party, the same shall be paid by that party. Except as may otherwise be set forth herein, if the additional tax payments are not so directly attributable, then said payments shall be

paid in proportion to the parties' respective incomes at the time of the tax return from which the additional tax payment is due was filed; (c) In the event of an audit of the parties' joint tax returns, the parties shall share the cost of such audit in the same proportion that they share any additional tax liability that may be incurred. If there is no additional tax liability, the cost of such audit shall be shared in the same proportion as the parties shared the income tax liability for the joint tax return subject to the audit. If either party agrees to be solely liable for any additional tax liability as a result of an audit, such party shall be solely responsible for the costs of the audit and shall solely determine the procedure for representing the parties in such audit; (d) All notices received by a party in connection with any previously filed joint tax return shall promptly be provided to the other party within seven (7) days of receipt.

3) The parties agree if CLIENT or FIANCÉ (voluntarily) contributes any of his/her separate income or Separate Property, as defined in this Agreement, to their family living expenses in order to achieve or maintain the standard of living desired by both CLIENT and FIANCÉ, neither shall have any right thereafter to seek reimbursement for any part of such contributions, unless otherwise expressly agreed between them in writing. Unless otherwise agreed in writing, contribution of either party's Separate Property or of Jointly Held Property to the maintenance, operating expenses, taxes, insurance, or principal or interest payments on encumbrances with respect to any family residence shall not affect the ownership of that residence.

**PRENUPTIAL AND SPOUSAL AGREEMENTS IN
THE POST - PETRAKIS and PETRACCA WORLD**

NEW YORK COUNTY LAWYERS ASSOCIATION

JUNE 13, 2014

**STEPHEN GASSMAN, ESQ.
GASSMAN BAIAMONTE BETTS, P.C.**

I. Statute - Domestic Relations Law §236(B)(3)¹

A. "Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) *provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment*, and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision."

B. The "fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment" provision applies only to maintenance provisions in separation or settlement agreements and not to property settlements. (*Grubman v. Grubman*, NYLJ, 6/8/92, p.29 col. 1, S. Ct., N.Y. Co., Silberman, J.)

a) *Deckoff v. Deckoff*, 284 AD2d 426, 726 NYS2d 567 (2d Dept. 2001) - the issue of whether the wife's waiver of spousal maintenance in the 1993 prenuptial agreement is enforceable should await resolution at trial.

C. Unconscionability as relating to marital agreement - *Christian v. Christian*, 42 NY2d 63, 396 NYS2d 817 (1977)

1. "an unconscionable bargain has been regarded as one " 'such as no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other' " (*Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 136, 33 L.Ed. 393), the inequality being " 'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense'"

2. "when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided."

¹ / My gratitude to Glenn Koopersmith, Esq. for his substantial help in the preparation of this outline.

3. "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching."

II. Prenuptial Agreements

A. Relationship of Parties - Relationship of trust and confidence at the time of execution (*Greiff v. Greiff*, 92 NY2d 341, 680 NYS2d 894 [1998])

B. Public Policy - Duly executed prenuptial agreements are generally valid and enforceable given the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements. Where a prenuptial agreement is clear and unambiguous on its face, the intent of the parties is gleaned from the four corners of the writing as a whole with a practical interpretation of the language employed so that the parties' reasonable expectations are met. *Katsaros v Katsaros*, 80 AD3d 666, 914 NYS2d 910 (2d Dept. 2011)

1. Where a prenuptial agreement designates as separate property "his or her own property, whether now owned or hereafter acquired", such clause is not ambiguous and permits separate ownership of each asset held in each party's name, even if it is acquired during the marriage. *Wolanin v. Wolanin*, 39 M3d 122(A), S.Ct., Albany Co., 2013, Lynch, J.

C. Attempt to Set Aside - Burden of Proof

1. General Rule - The party seeking to invalidate a prenuptial agreement bears the burden of producing evidence showing fraud, overreaching or other misconduct by the other party. (*Lombardi v. Lombardi*, 235 AD2d 400, 652 NYS2d 549 [2d Dept. 1997]; *Forsberg v. Forsberg*, 291 AD2d 615, 631 NYS2d 709 [2d Dept. 1995])

2. Shifting of Burden (*Greiff v. Greiff, supra*)

a) Where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed to disprove fraud or overreaching.

b) Where a party challenging a prenuptial agreement demonstrates by a preponderance of the evidence that the premarital relationship of the parties manifested "probable" undue and unfair advantage, the burden falls on the proponent of the agreement to show freedom from fraud, deception or undue influence.

c) “whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based particularized inequality before a proponent of a prenuptial agreement suffers the shift in burden to disprove fraud or overreaching.”

3. Same shifting of burden can occur with respect to postnuptial agreements (*Petracca v. Petracca*, 101 AD3d 695, 956 NYS2d 77 [2d Dept. 2012])

III. **Petracca v. Petracca, 101 AD3d 695, 956 NYS2d 77 [2d Dept. 2012]**

A. Postnuptial Agreement - Facts

B. Fiduciary Relationship - courts have “thrown their cloak of protection” over postnuptial agreements

C. Agreement manifestly unfair when executed because of wife’s waiver of any claim to the marital residence and her rights of inheritance

1. Cf. *Label v. Label*, 70 AD3d 898, 899, 895 NYS2d 192 [2d Dept. 2010]; *Schultz v. Schultz*, 58 AD3d 616, 871 NYS2d 636 [2d Dept. 2009] - Refusal to invalidate agreements which are improvident or one-sided.

IV. **Cioffi-Petrakis v. Petrakis, 103 AD3d 766, 960 NYS2d 152 (2d Dept. 2013)**

A. Prenuptial agreement set aside based on fraudulent inducement

B. Disclaimers in agreement

1. The “entire understanding” of the parties was set forth in the agreement;

2. There were no oral representations other than those set forth in the agreement.

3. “the agreement and its provisions merge any prior agreement”

4. Neither party was relying on any promises which were not set forth in the agreement.

C. cf. Longstanding rule in the Second Department that “a cause of action alleging fraudulent inducement may not be maintained if specific disclaimer provisions in the contract...disavow reliance upon oral representations. *Tarantul v. Cherkassky*, 94 AD3d 933 (2d Dept. 2011); *Laxer v. Edelman*, 75 AD3d 584 (2d Dpt. 2010)

D. Both the Trial Court and the Appellate Division failed to address the sufficiency of the disclaimers set forth in the agreement.

V. Post-Petracca-Petrakis Decisions

A. *C.S. v. L.S.*, 41 Misc3d 1209(A) (Sup. Ct., Nassau Co., 2013)

1. Prenuptial agreements set aside - first paragraph of Court's decision: "Nonetheless if the Husband's present motion before the court is granted, upon the parties divorce wife will be left no home, no assets, no bank account and no maintenance."
2. Blueprint of what not to do in drafting, negotiation and execution of a prenuptial agreement.
3. Shifted burden of proof to husband to disprove "freedom from fraud, deception or undue influence"

B. *Zinter v. Zinter*, 42 Misc3d 1233 (Sup. Ct., Saratoga Co., 2014)

1. While not finding fraud or duress, court redesigned the agreement's property settlement finding it was "manifestly unfair and unconscionable as applied to the facts of this case."²
2. After-acquired property - marital property if owned or held by the parties jointly; otherwise, separate property

C. *E.C. v. L.C.*, 41 Misc3d 1050 (Sup. Ct., Nassau Co., 2013)

D. *D.R. v. M.R.*, 41 Misc3d 1208(A) (Sup. Ct., Westchester Co., 2013)

1. Denied husband's motion to dismiss wife's cause of action to set aside divorce settlement agreement.
2. Emphasis on magnitude of asset waived by wife and the perceived inequity rather than whether there was fraud, duress or overreaching in the execution of this agreement.

² / cf. *Christian v. Christian*, supra, stating that "if the execution of the agreement, however, be fair, no further inquiry will be made." Also, cf. *Cappelli v. Cappelli*, 286 AD2d 359, 360, 729 NYS2d 174, 175 (2001), stating that: "A marital contract is subject to the principles of contract interpretation (see, *Matter of Meccico v. Meccico*, 76 N.Y.2d 822, 559 N.Y.S.2d 974, 559 N.E.2d 668; *Matter of Jenkins v. Jenkins*, 260 A.D.2d 380, 687 N.Y.S.2d 686). Therefore, a court may not rewrite or impose different or additional contractual terms, nor may a court ignore unequivocal language, search for evidence of the parties' intent outside of the contract, or read the contract so as to distort its apparent meaning (see, *Salvano v. Merrill Lynch Pierce Fenner & Smith*, 85 N.Y.2d 173, 623 N.Y.S.2d 790, 647 N.E.2d 1298; *Matter of Meccico v. Meccico*, supra; *Matter of Jenkins v. Jenkins*, supra; *Scalabrini v. Scalabrini*, 242 A.D.2d 725, 662 N.Y.S.2d 581)."

3. “Pursuant to the terms of the Settlement Agreement, Plaintiff agreed to give up her rights to what appears to be the single largest asset of the marriage, the Marital Residence, as well as her rights in a vintage car, and received, in exchange, Defendant’s interest in the Teamsters Fund, which may be less than half the value of Plaintiff’s interest in the Marital Residence. *Petracca*, 101 A.D.2d at 698 (wife demonstrated that terms of agreement were manifestly unfair given the nature and magnitude of rights she waived, giving rise to inference of overreaching); *Pennise*, 120 Misc.2d at 788-89, *Christian*, 42 N.Y.2d at 71-72.”

VI. The Lessons of *Petracca-Petrakis* and Their Progeny

- Never provide for nothing.
- At a minimum, provide within the realm of “fairness”
- Avoid title controlling disposition of after-acquired property.
- Consider sliding-scale formula for division of marital property and in setting maintenance amounts and durations.
- Independent counsel is essential.
- Non-monied spouse (and his/her attorney) should have draft of agreement substantially in advance of execution of the agreement and the wedding date.
- When representing non-monied spouse, engage in negotiations with opposing counsel as to proposed terms.
- Carefully consider mutual estate waivers, waiver of right of election and mutual waivers of retirement assets.
- Disclaimers - multiple and specific and broad as possible, with examples
- Identify all assets and do *not* undervalue them; if anything, err on side of over-valuation
- Segregate rights under Domestic Relations Law §236(9)(b) (“extreme hardship”) from balance of agreement (*Barocas v. Barocas*, 94 AD3d 551 [1st Dept., 2012])

APPENDIX "A"

SAMPLE CLAUSE - NO VERBAL AGREEMENTS

This agreement contains the entire understanding of the parties, who hereby acknowledge that there have been no agreements, stipulations, promises, covenants, representations, warranties, undertakings or otherwise, other than those expressly set forth herein. Without limiting the foregoing each party specifically acknowledges that neither the other party, nor any third party has made any representation of fact or opinion, promise or agreement, other than is set forth herein expressly or by express reference, to retain, change, renegotiate, modify, expand, extend, limit, cancel, nullify, enforce or withhold enforcement of this agreement, in whole or in part, at any time or upon the occasion of any events(s) or circumstances whatsoever, **including but not limited to:**

1. The birth or adoption of a child(ren) of the marriage;
2. Change in economic status or employment of either party;
3. Length of the marriage;
4. Acquisition of a marital residence;
5. Marital fault, fidelity or infidelity of either party of the marriage; or
6. Any other circumstance affecting the parties.

SAMPLE CLAUSE - COUNSEL FEES

If either party, by any action, proceeding, defense, counterclaim or otherwise, seeks to vacate or set aside this agreement or declare any of its terms and conditions as invalid, void or against public policy, by any reason including but not limited to actual fraud, fraud in the inducement, duress, incompetency, overreaching, or unconscionability, said party shall reimburse the other party and be liable for any and all such party's reasonable attorney's fees and expenses, provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims.

Westlaw

101 A.D.3d 695

Page 1

101 A.D.3d 695

(Cite as: 101 A.D.3d 695, 956 N.Y.S.2d 77)

Petracca v Petracca
101 A.D.3d 695, 956 N.Y.S.2d 77
NY, 2012.

101 A.D.3d 695, 956 N.Y.S.2d 77, 2012 WL
6030894, 2012 N.Y. Slip Op. 08294

Janine Petracca, Respondent
v
Eugene Petracca, Appellant.
Supreme Court, Appellate Division, Second De-
partment, New York

December 5, 2012

CITE TITLE AS: Petracca v Petracca

HEADNOTE

Marriage
Postnuptial Agreement
Overreaching

Glenn S. Koopersmith, Garden City, N.Y., for ap-
pellant.
Goldman & Greenbaum, P.C., New York, N.Y.
(Sheldon M. Greenbaum of counsel), for respond-
ent.

In an action for a divorce and ancillary relief, the
defendant appeals (1) from a decision of the Su-
preme Court, Nassau County (Brown, J.), dated
June 22, 2011, made after a hearing, and (2) from
an order of the same court dated December 13,
2011, which, upon the decision, granted the
plaintiff's cross motion to set aside the parties' post-
nuptial agreement.

Ordered that the appeal from the decision is dis-
missed, as no appeal lies from a decision (*see*
Schicchi v J.A. Green Constr. Corp., 100 AD2d 509
[1984]); and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that the plaintiff is awarded one bill of

costs.

The parties were married on December 16, 1995. In
March 1996, the parties entered into a postnuptial
agreement. The agreement provided that the jointly
owned marital residence, which had been purchased
for approximately \$3.1 million after the parties
were married, and which was subsequently renov-
ated *696 at a cost of between \$3 million and \$5
million, was the defendant's separate property.

The agreement further provided that if the parties
divorced, the plaintiff, who had not been employed
other than as a homemaker since October 1995,
would waive her interest in any business in which
the defendant had an interest, including any appre-
ciation in the value of such interests accruing dur-
ing the marriage. At the time the agreement was
entered into, the defendant valued his interests in
these business entities at over \$10 million. The
plaintiff also waived any and all rights she had to
the defendant's estate, including her right to an
elective share. At the time the agreement was
entered into, the defendant valued his net worth at
more than \$22 million.

Finally, the agreement provided that if the parties
divorced, the plaintiff would waive any right to
maintenance except as provided in schedule "C" of
the agreement, which indicated that **2 the
plaintiff could receive maintenance in the sum of
between \$24,000 and \$36,000 per year, for varying
lengths of time, depending on the duration of the
marriage. The defendant's obligation to pay the lim-
ited maintenance enumerated in the agreement was
contingent upon his receipt of certain visitation
with any children that the parties might have, and
upon certain residency requirements imposed upon
the plaintiff.

In 2008, the plaintiff commenced this action, inter
alia, for a divorce on the ground of constructive
abandonment. In his answer, the defendant, among
other things, sought enforcement of the postnuptial

101 A.D.3d 695

Page 2

101 A.D.3d 695

(Cite as: 101 A.D.3d 695, 956 N.Y.S.2d 77)

agreement. The defendant subsequently moved for a protective order in response to the plaintiff's discovery demands, and the plaintiff cross-moved to set aside the postnuptial agreement.

A hearing was held at which both parties testified. The plaintiff testified that the defendant had presented the postnuptial agreement to her for signature days after her 42nd birthday, and shortly after she had suffered a miscarriage. She testified that the defendant had "bullied" her into signing the agreement by threatening that they would not have any children and that the marriage would be over if she did not consent to the postnuptial agreement. The plaintiff testified that she and the defendant had agreed to have children prior to the marriage, and that their agreement to have children had been an important factor in her decision to marry him. She signed the agreement within days of receiving it and, although she reviewed some portions of it, she did not understand its terms and did not consult an attorney. The plaintiff also adduced evidence demonstrating that the statement of the defendant's net *697 worth contained in the agreement was inaccurate at the time it was made in that it was undervalued by at least \$11 million.

When the defendant testified, he denied any knowledge of the plaintiff's miscarriage and stated that he had wanted the postnuptial agreement in order to protect his son from a prior marriage. The defendant testified that the parties had discussed the issue of entering into a postnuptial agreement prior to the marriage and that they had negotiated the postnuptial agreement over the course of many weeks. The defendant testified that his attorney had drafted the agreement and that he believed that the plaintiff had consulted with her own attorney, although she had not disclosed her attorney's name to him. The defendant explained that the marital residence had been purchased in both parties' names because the plaintiff said she wanted to have her name on it "for perception purposes, for other people," but that she had been willing to sign the agreement converting it into the defendant's separate property shortly after

its purchase.

In a decision made after the hearing, the Supreme Court expressed doubts as to the defendant's veracity and credited the plaintiff's testimony over conflicting portions of the defendant's testimony. The court found that the plaintiff had not been represented by counsel and had been precluded from effectively analyzing the financial impact of the postnuptial agreement due to the inaccuracies contained in the financial disclosures that had been incorporated into the agreement. The court determined that the terms of the agreement were "wholly unfair" and, after examining the totality of the circumstances, concluded that it was unenforceable. In a subsequent order, made upon the decision, the court granted the plaintiff's cross motion to set aside the postnuptial agreement.

In general, a postnuptial agreement "which is regular on its face will be recognized and enforced by the courts in much the same manner as an ordinary contract" (*Levine v Levine*, 56 NY2d 42, 47 [1982]; see *Rauso v Rauso*, 73 AD3d 888, 889 [2010]; *Cioffi-Petrakis v Petrakis*, 72 AD3d 868, 869 [2010]; *Whitmore v Whitmore*, 8 AD3d 371, 372 [2004]). However, "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian v Christian*, 42 NY2d 63, 72 [1977]; see *Matter of Greiff*, 92 NY2d 341, 345 [1998]; *O'Malley v O'Malley*, 41 AD3d 449, 451 [2007]; *Manes v Manes*, 277 AD2d 359, 361 [2000]). Accordingly, "courts have thrown their cloak of protection" over postnuptial agreements, "and made it their business, when confronted, to see to it that they are arrived at *698 fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity" (*Christian v Christian*, 42 NY2d at 72; see *Infante v Infante*, 76 AD3d 1048, 1049 [2010]).**3

Because of the fiduciary relationship between spouses, postnuptial agreements "are closely scrutinized by the courts, and such agreements are more

101 A.D.3d 695

Page 3

101 A.D.3d 695

(Cite as: 101 A.D.3d 695, 956 N.Y.S.2d 77)

readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" (*Levine v Levine*, 56 NY2d at 47; see *Kabir v Kabir*, 85 AD3d 1127, 1127 [2011]; *Manes v Manes*, 277 AD2d at 361; *Cardinal v Cardinal*, 275 AD2d 756, 757 [2000]). "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching" (*Christian v Christian*, 42 NY2d at 72-73; see *Infante v Infante*, 76 AD3d at 1049; *O'Malley v O'Malley*, 41 AD3d at 451; *Frank v Frank*, 260 AD2d 344, 345 [1999]; see also *Levine v Levine*, 56 NY2d at 47).

In determining whether a postnuptial agreement is invalid, "courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution" (*Christian v Christian*, 42 NY2d at 73; see *Terio v Terio*, 150 AD2d 675, 675-676 [1989]; *Stern v Stern*, 63 AD2d 700, 700-701 [1978]). A spouse seeking to set aside a postnuptial agreement initially "bears the burden to establish a fact-based, particularized inequality" (*Matter of Greiff*, 92 NY2d at 346; see *Matter of Barabash*, 84 AD3d 1363, 1364 [2011]; *D'Elia v D'Elia*, 14 AD3d 477, 478-479 [2005]; accord *Brennan-Duffy v Duffy*, 22 AD3d 699, 700 [2005]; *Chambers v McIntyre*, 5 AD3d 344, 345 [2004]). Where this initial burden is satisfied, a proponent of a postnuptial agreement "suffers the shift in burden to disprove fraud or overreaching" (*Matter of Greiff*, 92 NY2d at 346; see *Matter of Barabash*, 84 AD3d at 1364; *D'Elia v D'Elia*, 14 AD3d at 478-479).

Here, the plaintiff demonstrated that the terms of the postnuptial agreement were manifestly unfair given the nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in the marital residence and her waiver of all of her inheritance rights, in light of the vast disparity in the parties' net worth and earnings (see *Manes v Manes*, 277 AD2d at 361; *Frank v Frank*, 260 AD2d at 345; *Terio v Terio*, 150 AD2d at

675-676; *Stern v Stern*, 63 AD2d at 700-701; see also *O'Malley v O'Malley*, 41 AD3d at 451; *Pisano v Pisano*, 71 AD2d 670, 670 [1979]; cf. *Levine v Levine*, 56 NY2d at 47). Furthermore, inasmuch as the terms of the agreement were manifestly unfair to the plaintiff and were unfair when the *699 agreement was executed, they give rise to an inference of overreaching (see *Christian v Christian*, 42 NY2d at 73; *Terio v Terio*, 150 AD2d at 675-676; *Stern v Stern*, 63 AD2d at 700-701). This inference of overreaching is bolstered by the evidence submitted by the plaintiff, including her testimony, regarding the circumstances which led her to give her assent to the postnuptial agreement (see *Kabir v Kabir*, 85 AD3d at 1127; *Cardinal v Cardinal*, 275 AD2d at 757; *Terio v Terio*, 150 AD2d at 675-676). The defendant's testimony which tended to show that he did not engage in overreaching raised an issue of credibility, and we decline to disturb the Supreme Court's determination with respect thereto (see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492 [1983]; *Reid v Reid*, 57 AD3d 960 [2008]).

The defendant's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the plaintiff's cross motion to set aside the parties' postnuptial agreement. Eng. P.J., Florio, Sgroi and Miller, JJ., concur.

Copr. (c) 2014, Secretary of State, State of New York NY, 2012.

Petracca v Petracca

101 A.D.3d 695, 956 N.Y.S.2d 776022012 WL 60308949992012 N.Y. Slip Op. 082944603, 956 N.Y.S.2d 776022012 WL 60308949992012 N.Y. Slip Op. 082944603, 956 N.Y.S.2d 776022012 WL 60308949992012 N.Y. Slip Op. 082944603

END OF DOCUMENT

Westlaw

103 A.D.3d 766

Page 1

103 A.D.3d 766

(Cite as: 103 A.D.3d 766, 960 N.Y.S.2d 152)

Cioffi-Petrakis v Petrakis
103 A.D.3d 766, 960 N.Y.S.2d 152
NY, 2013.

103 A.D.3d 766, 960 N.Y.S.2d 152, 2013 WL
616899, 2013 N.Y. Slip Op. 01057

Elizabeth Cioffi-Petrakis, Respondent
v
Panagiotis Petrakis, Appellant.
Supreme Court, Appellate Division, Second De-
partment, New York

February 20, 2013

CITE TITLE AS: Cioffi-Petrakis v Petrakis

HEADNOTE

Marriage
Prenuptial Agreement
Setting Aside Prenuptial Agreement—Fraudulent
Inducement

Gassman Baiamonte Betts, P.C., Garden City, N.Y.
(Stephen Gassman and Cheryl Y. Mallis of counsel),
for appellant.

Weg and Meyers, P.C., New York, N.Y. (Dennis T.
D'Antonio and Derek M. Zisser of counsel), for re-
spondent.

In an action, inter alia, to set aside a prenuptial
agreement, the defendant appeals, as limited by his
brief, from so much of a *767 judgment of the Su-
preme Court, Nassau County (Bennett, J.), entered
February 6, 2012, as, upon a decision of the same
court (Falanga, J.), dated December 12, 2011, made
after a nonjury trial, is in favor of the plaintiff and
against him setting aside the prenuptial agreement.

Ordered that the judgment is affirmed insofar as ap-
pealed from, with costs.

In general, New York has a "strong public policy
favoring individuals ordering and deciding their

own interests through contractual arrangements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]; see *Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). "However, this right is not and has never been without limitation" (*Kessler v Kessler*, 33 AD3d 42, 45 [2006]). "[T]he State is deeply concerned with marriage and takes a supervisory role in matrimonial proceedings. . . . Indeed, in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general" (*id.* at 46 [citation omitted]). Thus, while "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties" (*Brassey v Brassey*, 154 AD2d 293, 295 [1989]), an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct (see *Christian v Christian*, 42 NY2d 63, 73 [1977]; *Petracca v Petracca*, 101 AD3d 695 [2012]; *Weinstein v Weinstein*, 36 AD3d 797, 798 [2007]; *Lombardi v Lombardi*, 235 AD2d 400 [1997]).

"In reviewing a trial court's findings of fact following a nonjury trial, this Court's authority is as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts, bearing in mind that due regard must be given to the decision of a trial judge who was in the position to assess the evidence and the credibility of witnesses" (*D'Argenio v Ashland Bldg. LLC*, 78 AD3d 758, 758 [2010]).**2

Here, the Supreme Court reasonably resolved credibility issues in favor of the plaintiff, and its determination that the defendant fraudulently induced the plaintiff to execute the prenuptial agreement was supported by the evidence. With respect to the material facts underlying the plaintiff's claim, the Supreme Court found that the plaintiff's testimony was "credible," "convincing," "unequivocal," and consistent with "additional corroborative evidence," and that any "inconsistencies" in her testimony re-

103 A.D.3d 766

Page 2

103 A.D.3d 766

(Cite as: 103 A.D.3d 766, 960 N.Y.S.2d 153)

lated to "insignificant" matters. By contrast, the Supreme Court found the defendant's "credibility to be suspect," due in part, to his "patent evasiveness." The Supreme *768 Court's credibility findings are supported by the record. The plaintiff's claim in this case rested largely on the credibility of the parties, and we decline to disturb the Supreme Court's determination with respect thereto (*see Reid v Reid*, 57 AD3d 960 [2008]). On the particular facts of this case, the Supreme Court correctly determined that the plaintiff sustained her burden of establishing grounds to set aside the prenuptial agreement (*cf. Petracca v Petracca*, 101 AD3d at 695).

The defendant's remaining contentions are without merit. Angiolillo, J.P., Sgroi, Cohen and Miller, JJ., concur.

Copr. (c) 2014, Secretary of State, State of New York NY, 2013.

Cioffi-Petrakis v Petrakis

103 A.D.3d 766, 960 N.Y.S.2d 1526022013 WL 616899992013 N.Y. Slip Op. 010574603, 960 N.Y.S.2d 1526022013 WL 616899992013 N.Y. Slip Op. 010574603, 960 N.Y.S.2d 1526022013 WL 616899992013 N.Y. Slip Op. 010574603

END OF DOCUMENT

41 Misc.3d 1209(A), 980 N.Y.S.2d 274 (Table), 2013 WL 5526048 (N.Y.Sup.), 2013 N.Y. Slip Op. 51624(U)

Unreported Disposition

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 C.S., Plaintiff,

v.

L.S., Defendant.

202692/2012

Supreme Court, Nassau County

Decided on June 6, 2013

CITE TITLE AS: C.S. v L.S.

ABSTRACT

Marriage
Prenuptial Agreement
Overreaching

C.S. v L.S., 2013 NY Slip Op 51624(U). Marriage—Prenuptial Agreement—Overreaching. (Sup Ct, Nassau County, June 6, 2013, Steinman, J.)

APPEARANCES OF COUNSEL

Plaintiff's Attorney

Marc Ialenti, Esq.

377 Oak Street

Suite 410

Garden City, NY 11530

Defendant's Attorney

Maria Schwartz, Esq.

100 Quentin Roosevelt Boulevard

Suite 208

Garden City, NY 11530

OPINION OF THE COURT

Leonard D. Steinman, J.

By means of this action, C.S. ("Wife"), fifty-one (51) years of age, and her husband, L. S.

("Husband"), sixty-six (66) years of age, shall obtain a divorce. For nineteen years prior to the institution of this action the parties were engaged in an intimate relationship; they were married for the latter eleven years. Wife is a part-time teacher's assistant earning approximately \$5,000 annually. Husband is a successful business owner with assets of several million dollars. The parties' 2011 joint federal income tax return reflects earnings by Husband of over \$1,000,000. Nonetheless, if Husband's present motion before the court is granted, upon the parties' divorce Wife will be left no home, no assets, no bank accounts and no maintenance. This is the effect of a prenuptial agreement executed by the parties that Husband now seeks to enforce.

The validity and circumstances surrounding the execution of that agreement was the subject of a hearing before this Court in April of this year. At the hearing, Wife demonstrated that she was presented with the agreement days before her wedding on a "take it or leave it" basis, given no opportunity to review it even overnight, and was "represented" by an attorney she was first introduced to upon being handed the agreement to sign - an attorney chosen by Husband's lawyer from among his office suite mates. Because the agreement was the result of overreaching *2 and was unconscionable when signed, this court holds it to be unenforceable and denies Husband's motion

for a judgment based upon its terms and grants Wife's cross-motion to set it aside.

FACTUAL BACKGROUND

In 1993, the parties met and started dating. At the time, Wife was living in Delaware with her two children from a marriage that was in the midst of a divorce. Husband resided in Manhasset, New York and himself was near the end of a long, painful divorce. In 1994, Wife moved into a rental unit in the nearby town of Port Washington, New York where her mother also resided. Husband and Wife saw each other every day thereafter but agreed not to move in with each other for the sake of the children, who were then five and seven years old.

For approximately eight years the parties continued their relationship in this fashion. The parties would occasionally sleep at each other's residences. Husband was generous to Wife during this period, paying for the parties' vacations, entertainment, frequent dinners, Wife's major car repairs and her children's summer camp. Approximately two years into their relationship Wife brought up the subject of marriage. Because of his painful divorce, Husband was not anxious to remarry.

Nonetheless, in August of 2001, Husband suggested that the parties get married before the start of the coming school year so that Wife and her children could move into Husband's Manhasset home and the children could enroll in the Manhasset school district. By that time, Husband loved and treated Wife's children as his own. Wife, who had grown frustrated that the couple had not yet married, readily agreed and quickly notified her landlord that she would be moving out and disposed of her furniture.

Unbeknownst to Wife, Husband at least a month earlier had requested that his long-time attorney, William Cahill, Esq., draft a prenuptial agreement. Husband understandably wanted to ensure that there would be no repeat performance of his prior protracted divorce. During the course of their relationship Husband and Wife had discussed signing a prenuptial agreement on several occasions and Wife had expressed her willingness to sign one.

Cahill specializes in trusts and estates and real estate tax issues and lacked matrimonial experience. He informed Husband when they first spoke that Wife was going to need to hire a lawyer. Cahill drafted an agreement and forwarded to Husband for his review on July 19, 2001. Husband does not recall receiving the draft agreement, reviewing its terms or discussing it with Cahill. He informed Husband when they first spoke on the topic earlier that month that Wife was going to need to hire a lawyer.

Sometime in August, Husband and Cahill again spoke. Husband informed Cahill that Wife was having difficulty obtaining a lawyer and that Cahill should find her one. Approximately a week before the agreement was signed Cahill approached his office suite mate, Charles Jacobson, Esq., and asked him if he would represent Wife. Cahill explained that Husband would be paying his fee. Jacobson, a commercial litigator who had some matrimonial experience, agreed. Cahill gave Jacobson a copy of the agreement and informed him that its terms were non-negotiable.

Notwithstanding Husband's conversations with Cahill, Husband never informed Wife that she should seek an attorney concerning the agreement and therefore Wife never told Husband that she was having trouble hiring one. Indeed, Husband did not inform Wife that she would be required to sign a prenuptial agreement until either the night before or the morning of ~~the~~ the appointment to sign the agreement at Cahill's office on September 5, 2001. ~~ENL~~ The wedding was scheduled for September 7, 2001.

On September 5, at Husband's suggestion, Husband drove Wife to work so that he could later pick her up there and drive her to Cahill's office to sign the agreement. Wife was upset when Husband arrived later that day. Once at Cahill's office, Wife was introduced to Jacobson, who took Wife into a conference room to speak with her. In the meantime, Husband met with Cahill and signed the agreement with no changes being made.

Wife was initially quiet as Jacobson introduced himself and his role. Jacobson doesn't recall

reviewing any financial information from the Husband or Wife. Jacobson did not ask Wife any questions concerning her financial situation or her background. Indeed, he asked her no questions at all. Instead, Jacobson proceeded to explained the terms of the agreement to Wife and as he did so she began to sob. Jacobson vividly recalls this meeting with Wife over 11 years later because it was an extraordinarily emotional experience for Wife, and thus for him.

Jacobson believed that the agreement was very one-sided in favor of Husband, yet he did not seek to negotiate any of its terms or recommend to Wife that she attempt to do so. Instead, he informed her that it was a take-it-or-leave-it proposition. Wife, still crying, then spoke alone with Husband for about 15 - 20 minutes. At some point she stated that it was the worst day of her life. Wife then signed the agreement. It was the only time Jacobson recalls that a client first saw and signed a prenuptial agreement on the same day. The entire process took 45 minutes. **LEGAL ANALYSIS**

The right of parties to conduct their affairs through private agreements is so fundamental that it is embedded in our federal Constitution. United States Constitution, Article 1, section 10, clause 1 ("No State shall...pass any...Law Impairing the Obligation of Contracts..."). In the context of marital relations, this right is explicitly recognized in New York's statutory divorce laws. See Domestic Relations Law § 236(B)(3) ("An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action..."). Our courts have recognized in the face of legal challenges to prenuptial agreements that there is a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements." Bloomfield v. Bloomfield, 92 NY2d 188, 193 (2001), quoting Matter of Greiff, 92 NY2d 341, 344 (1998). Duly executed prenuptial agreements are generally valid and enforceable. Van Kipnis v. Van Kipnis, 11 NY3d 573 (2008).

Nonetheless, the freedom to contract is not absolute. In recognition of the less admirable and gullible traits of human nature, legislatures, executive branches and the courts have instituted laws and rules restricting, regulating, and where appropriate, reversing contracts. For example, if an unscrupulous (or even merely persuasive) salesman comes to your home and *4 convinces you to purchase an expensive household item you don't truly need, or upon reflection want, you have three full business days by law to change your mind and cancel the contract. 16 CFR 429 (1995). A contract made by one who lacks the mental capacity is voidable. See Ortelere v. Teachers' Retirement Bd. Of City of New York, 25 NY2d 196 (1969). And it has long been recognized that where a confidential or fiduciary relationship exists between parties, an attempt to gain an advantage in contract through the utilization of undue or controlling influence will not be countenanced. See Allen v. La Vaud, 213 NY 322 (1915); Matter of LoGuidice, 186 AD2d 659 (2d Dept. 1992).

While the law has long favored marital agreements and seeks to uphold them (See DeCiccio v. Schweitzer, 221 NY 431, 439 (1917)), marital agreements are not immune from the public policy considerations that engage the attention and oversight of the courts. See Matter of Greiff, 92 NY2d at 345 (prenuptial agreements are not insulated from "typical contract avoidances"). Nor should they be, given the very nature of the parties' relationship that carries beyond trust into the realm of the intimate. Surely, a fiancé or spouse is presumed more persuasive than a salesman at the door; and the outsized influence romantic partners may exercise is often observed. Courts have therefore "thrown their cloak of protection" over marital agreements "to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." Petracca v. Petracca, 101 AD2d 695, 699 (2d Dept. 2012) quoting Christian v. Christian, 42 NY2d 63, 72 (1977). These agreements include both post-nuptial and pre-nuptial agreements. See Matter of Greiff, 92 NY2d at 347 (recognizing the "unique character of the inchoate bond between prospective spouses - a relationship by its nature permeated with trust, confidence, honesty and reliance"; Cioffi-Petrakis, 102 AD3d 766 (2d Dept. 2013).

Husband here asserts that the parties' agreement can withstand the scrutiny of this Court's examination. And given the nature of the parties' relationship he has the burden of establishing that this is so. In Greiff, the Court of Appeals instructed that in determining the parties' respective burdens where a pre-nuptial agreement is challenged, courts should calibrate and apply the principles of the various cases discussed therein and decide whether the "nature of the relationship between the couple at the time they executed their prenuptial agreemen[t] rose to the level to shift the burden to

the proponen[t] of the agreemen[t] to prove freedom from fraud, deception or undue influence." Matter of Greiff, 92 NY2d at 347.

The nature of the parties' relationship here calls for the shifting of the burden onto Husband. Husband concedes that during the six years leading up to the execution of the agreement Wife anxiously wanted to wed; Husband not so much. Husband asserts that during this period he made his position clear: if he were ever to wed a pre-nuptial agreement would be required. Wife's outsized trust and dependence upon Husband is perhaps best reflected in her responsive entreaty: "I will sign any piece of paper you put in front of me and I won't even read it."

Wife, who was raising two young boys on her own and was estranged from her parents, was also financially dependent upon Husband. As set forth above, Husband was the successful and wealthy business owner who paid for everything the couple did together, including dinners, vacations and various entertainment activities. Husband paid for Wife's car repairs and summer camp for her boys, as well as for the boys' various sporting equipment throughout the years. After Husband proposed, but before the first subsequent mention of a pre-nup, Wife had given *5 up her rental home and disposed of her furniture. As a result, Wife felt financially vulnerable and disadvantaged when Husband informed her at the eleventh hour that she would be driven to his lawyer's office to sign a prenuptial agreement.

Although the present effect of the Agreement is to leave Wife nearly destitute, that does not end the court's inquiry; it is not even the starting point. Cf. Barocas v. Barocas, 94 AD3d 551 (1st Dept. 2012) (in the absence of inequitable conduct at time of execution application of agreement governing disposition of assets of 15 year marriage held not unconscionable where one spouse retained property valued at \$4.6 million while other spouse entitled only to IRA account valued at \$30,550). Instead, the substance of the agreement itself must be examined as well as the circumstances surrounding its execution.

Husband argues that the Agreement, on its face, is not inequitable. He points to provisions requiring him to maintain life insurance policies with benefits of nearly \$600,000 for Wife to be paid to her upon his death. He is obligated to bequeath to Wife in his will the marital residence he owns in Manhasset (subject to any outstanding mortgage). All furnishings acquired by the parties for the marital residence are deemed to be joint or marital property of the parties except for art, antiques and collectibles acquired as separate property by either party. All personal property acquired by the parties in joint names is deemed marital, as is all real estate - provided it is acquired as tenants by entirety or with a right of survivorship. Finally, Wife gets to keep all gifts purchased for her by Husband.

As Wife correctly points out, however, there is less to the Agreement than at first meets the eye. The most significant provisions benefitting Wife - the house and insurance proceeds - only apply upon Husband's death and only if the parties remain married until that time. Otherwise, these provisions pre-decease Husband. Categorizing after-acquired household furniture, personal property and real estate as marital property provides nothing the law doesn't already presume. See Shah v. Shah, 100 AD3d 734 (2d Dept. 2012) (property acquired during the marriage is presumed to be marital property). Wife is then left only with the gifts given to her by Husband - in which Husband gallantly agrees not to seek an equitable interest.

Measured against the right to keep her own gifts are the following rights that Wife agreed to waive:

- all interest in Husband's retirement or pension benefits;
- all rights to receive maintenance or any other support;
- any increase in the value of Husband's business;
- all interest in after-acquired real property titled in Husband's name;

- all interest in after-acquired personal property titled in Husband's name;
- any interest in the appreciation of the marital residence;
- any right to remain in the residence; and,
- all rights to elect against Husband's estate pursuant to EPTL 65-1.1-A.

The scales of this equitable balance tip grossly in Husband's favor to the detriment of *6 Wife. Although Husband waived many of the same rights, it was Wife, as the non-morried spouse lacking control over the couple's financial decisions, who gave away something of value.

It was not necessary to wait until this final chapter of the parties' relationship to observe the one-sidedness and inequity of their bargain. Indeed, it was readily apparent to Wife's own attorney when he presented it to her. Nonetheless, he did not advise her to seek to negotiate any of its terms or refuse to sign it. Given the nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in after-acquired real and personal property and her waiver of all inheritance rights, and in light of the vast disparity in the parties' net worth and earnings, Wife has demonstrated that the terms of the Agreement are manifestly unfair, giving rise to an inference of overreaching. *Petracca* at 698, 699. ^{FN2}

As in *Petracca*, the inference of overreaching here is bolstered by evidence submitted at the hearing regarding the circumstances which led to the execution of the Agreement. Wife was afforded no opportunity to obtain counsel of her choice to represent her. Instead she was introduced to her attorney, paid for by Husband and selected by Husband's lawyer, at the time of execution. She was afforded no meaningful opportunity to consider and reflect upon the terms of the Agreement thrust upon her (not even 24 hours; indeed not even a full hour). Wife was not given an opportunity to request better or different terms but was advised the Agreement was on a

take it or leave it basis. The execution was organized so that Wife did not even have independent means to walk out and leave Husband's attorney's law office if she so desired; Husband arranged in advance to drive her to the office in his car. Everyone agrees that Wife broke down in tears upon being presented with the documents and that the experience was contemporaneously described by her as the "worst day of my life." All this after she had given up her rental apartment, disposed of her possessions and just days prior to the scheduled wedding.

In contrast, Husband coordinated at least one month in advance with his trusted counselor to draft the agreement. Husband also arranged with his lawyer to find a "suitable" attorney for Wife without her knowledge. The Agreement was sent to Husband at least one month in advance to review. Although Husband claimed not to recall seeing the Agreement before he signed it or to know its terms in advance, this Court finds such testimony to be incredible, particularly since his lawyer testified that he sent Husband an advance draft.

In sum, it appears that Husband determined that he could take advantage of his Wife's promise to "sign anything" in exchange for a marriage proposal - and she did just that.

Husband correctly points out that a threat to call off a marriage alone is insufficient to strike down an agreement on the grounds of duress. See *Weinstein v Weinstein*, 36 AD2d 797 (2nd Dept. 2007). Nor, by itself, is the procurement and payment by a spouse of the other party's counsel determinative. See *Strong v Dublin*, 48 AD3d 232 (1st Dept. 2008). Nonetheless, when viewed in the totality of all of the circumstances presented here it is clear that Husband has failed to meet his burden of disproving overreaching; Wife's will was overcome resulting in an *7 unconscionable agreement. Cf. *E.C.P. v.P.P.*, 33 Misc 3d 1233 (Sup. Ct. Nassau Co. 2011) *aff'd* 103 AD3d 466 (2d Dept. 2013); *Cioffi-Petrakis v Petrakis* (court viewed totality of circumstances surrounding execution of pre-nuptial agreement).

Thus, this Court finds that the Agreement is to be set aside. ^{FN3} In so holding, this Court does not

mean to imply that Husband was wrong to desire to enter into an agreement that would clearly spell out the parties' rights upon a termination of the marriage or his death. Such agreements are commonplace and serve understandable and laudable goals, particularly where as here the marriage is not the parties' first. Nonetheless, there are right ways and wrong ways to go about such things. To those who fear that setting aside agreements such as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer or his or her own choosing, is provided with a proposed agreement with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party practically destitute, it will be upheld. Unfortunately, that was not the case here and this court cannot turn back the clock and make it so.

For all of the aforesaid reasons, Husband's motion is denied and Wife's cross-motion is granted.

Any other relief requested not specifically addressed herein is denied.

This constitutes the DECISION and ORDER of this Court.

Dated: June 6, 2013

Mineola, N Y N T E R:

LEONARD D. STEINMAN, J.S.C.

FOOTNOTES

FN1. Husband testified that he told Wife about the need to execute a prenuptial agreement several days after he proposed and did suggest to Wife that she retain counsel. Husband further testified that Wife later asked him whether Cahill could get a lawyer for her. This Court credits Wife's testimony to the contrary as reflected above. In all events, it is undisputed that Cahill obtained counsel for Wife and that she did not meet or speak to her counsel - or even know his identity - until she was given the agreement to execute on September 5, 2001.

FN2. That Petracca concerned a postnuptial rather than a prenuptial agreement is a distinction without a difference since New York law scrutinizes both types of marital agreements because of the unique relationships between the parties. There is no logical basis to deviate in the manner of scrutiny.

FN3. As a result of this Court's holding it is unnecessary to discuss at length whether the agreement was properly acknowledged (it was, giving credit to Cahill's testimony) and whether Husband provided adequate financial disclosure (he did).

Copr. (c) 2014, Secretary of State, State of New York

N.Y.Sup. 2013.

C.S. v L.S.

41 Misc.3d 1209(A), 980 N.Y.S.2d 274 (Table), 2013 WL 5526048 (N.Y.Sup.), 2013 N.Y. Slip Op. 51624(U)

Unreported Disposition

END OF DOCUMENT

Adobe Reader is required to view PDF images.



(c) 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

Slip Copy, 42 Misc.3d 1233(A), 2014 WL 903155 (Table) (N.Y.Sup.), 2014 N.Y. Slip Op. 50316(U)
Unreported Disposition

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 Jennifer Huntzinger Zinter, Plaintiff,

v.

Scott Zinter, Defendant.

20132235

Supreme Court, Saratoga County

Decided on February 7, 2014

CITE TITLE AS: Zinter v Zinter

ABSTRACT

Marriage
 Prenuptial Agreement
 Unconscionable Agreements

Zinter v Zinter, 2014 NY Slip Op 50316(U). Marriage—Prenuptial Agreement—Unconscionable Agreements. (Sup Ct, Saratoga County, Feb. 7, 2014, Nolan, J.)

APPEARANCES OF COUNSEL

FRIEDMAN AND MOLINSEK, P.C.

Attorneys for Plaintiff

2 Normanskill Boulevard

P.O. Box 69

Delmar, New York 12054-0069

GORDON, TEPPER & DECOURSEY, LLP

Attorneys for Defendant

Socha Plaza South

113 Saratoga Road

Route 50

Glenville, New York 12302

NANCY C. SUTIN

Attorney for Children

530 Maple Avenue

Route 9

Saratoga Springs, New York 12866

OPINION OF THE COURT

Thomas D. Nolan Jr., J.

In this divorce action, defendant husband moves to dismiss the second cause of action in plaintiff wife's complaint seeking to set aside the parties' prenuptial agreement which plaintiff contends is unfair, unreasonable, unconscionable, and the product of defendant's bad faith, deception, undue influence, and overreaching.

BACKGROUND

Plaintiff and defendant married on December 23, 2005. Plaintiff was then 29 years old, a music teacher with a Master's degree, and reported a net worth of \$71,500.00. Defendant was then 35 years old, a college graduate, and an officer and part owner of his family-owned and operated business, and reported a net worth of approximately \$2.7 million. Defendant retained an attorney, Mario Papa, Esq., to prepare an antenuptial agreement. In November 2005, plaintiff and defendant met with Mr. Papa to review the proposed agreement. At the time, plaintiff was not represented by

counsel, and according to Mr. Papa, he provided to plaintiff at that meeting the names of three attorneys experienced in matrimonial law she might consider to represent her in reviewing the proposed agreement. Shortly thereafter, plaintiff retained Gerard McAuliffe, Jr., Esq., one of the three attorneys Mr. Papa had identified. According to Mr. McAuliffe's affidavit, plaintiff met with him three times in December 2005 before the agreement was signed on December 19th.

The agreement, *inter alia*, provided for the parties to essentially "opt out" of the equitable distribution and maintenance provisions set forth in the Domestic Relations Law if their marriage were to end in divorce. It also established an expansive definition of separate and a limited definition of marital property and recited the assets that each party owned which would constitute and remain his or her separate property in the event of divorce. It also contained a provision asserting and confirming that adequate asset disclosure both written and oral had occurred.

If the parties were to divorce, the agreement included a formula tied to the parties' gross annual earnings during the marriage to compute the amount of maintenance the wife would be entitled to and the manner and time for such payment.

The agreement also contained provisions establishing the rights of the survivor upon the death of the other, including reciprocal waivers of statutory rights of election and specifying what assets the wife would receive in the event the husband died during the marriage.

THE LITIGATION

In this action commenced in July 2013, plaintiff alleges in her complaint two causes of action. The first seeks judgment of divorce on the grounds of the irretrievable breakdown of the marriage. The second seeks, once again, judgment setting aside the antenuptial agreement. Plaintiff seeks custody of the parties' two children - a girl, age 6, and a boy, age 3, child support, equitable distribution, maintenance, and other ancillary relief. Issue has been joined. In his answer, defendant asserts the defense that both of plaintiff's causes of action fall to state a claim.

PENDING MOTION

Now defendant moves, denominating his motion as one under CPLR 3211 (a) (7), to dismiss the second cause of action in plaintiff's complaint on the ground that it fails to state a cause of action. In addition and if defendant's motion to dismiss were granted, defendant requests, pursuant to CPLR 3103, a protective order limiting disclosure of financial information to that relevant and necessary to the court's determination of child support and maintenance. More specifically, defendant seeks to bar plaintiff from any inquiry concerning the value of the *2 closely held family corporation and any and all assets that he also contends constitute separate, non-marital property, including the marital residence which he contends is his separate property. Defendant's motion is supported by the agreement, his affidavit, and the discovery notices from plaintiff.

Plaintiff opposes and cross-moves for an order awarding to her expert's fees to value defendant's business and to appraise the marital residence. Plaintiff submits her affidavit with numerous exhibits including the pleadings, copies of the parties' income tax returns for the years 2005 to 2011, the parties' net worth statements, and an affidavit from Mr. McAuliffe.

In reply, defendant submits his second affidavit and one from Mr. Papa.

Briefly, in support of his motion, defendant contends that prior to execution of the agreement, he fully informed plaintiff about his financial affairs and that he fully and accurately disclosed to plaintiff that his assets had a value of approximately \$2.7 million as reflected in Exhibit A to the agreement and that there was no deception, overreaching, or coercion on his part. Moreover, defendant contends that plaintiff was fully aware that a prenuptial agreement was a condition to his marriage. Mr. Papa avers that, in accordance with his custom, he informed plaintiff that she ought to secure her own counsel, and since she did not then have an attorney, he provided her with the names of at least three attorneys, including Mr. McAuliffe, with good reputations in matrimonial law. Defendant relates that plaintiff retained Mr. McAuliffe to review the agreement and that changes he suggested but not

Identified in this record were incorporated into the final version.

In opposition, plaintiff contends that since defendant's motion is characterized as one under CPLR 3211 (a) (7) to dismiss for failure to state a cause of action, the court must accept her allegations in her complaint that the agreement was unconscionable and not fair and not reasonable, and therefore, on its face, her complaint must be sustained. Plaintiff further avers in general terms that before the agreement was signed that defendant hid from her "details of his wealth and income", that defendant's attorney "steered" her to retain Mr. McAuliffe, that defendant discouraged her "from (prior to execution) sharing the agreement with family and friends", and misled her into signing it by telling her "that I was going to get so much from him that he could not afford to divorce me". She further avers that she did not "understand the agreement or its import in relation to what under New York's Domestic Relations Law she might be entitled to be awarded if divorce took place". Plaintiff asserts that she was not provided with a copy of the agreement after it was signed, and not until recently, did she become informed of the full extent and probable value of defendant's pre-marriage holdings and the value of the rights she, inter alia, agreed to waive, either upon divorce or if defendant predeceased her during the marriage. In short, plaintiff contends that the agreement was and is unconscionable and that her second cause of action ought not be dismissed on this motion. In his affidavit, Mr. McAuliffe states that plaintiff was referred to him by Mr. Papa and then when she consulted him, he did not have defendant's tax returns, pay stubs, or a business evaluation to review.

ANALYSIS AND DISCUSSION

First addressed is the issue whether the CPLR 3211 (a) dismissal or CPLR 3212 summary judgment standard of review should be applied. While defendant's notice of motion refers to CPLR 3211 (a) (7), the supporting affidavit of defendant's attorney and memorandum of law specifically state that summary judgment dismissing the complaint's second cause of action and *3 declaring the antenuptial agreement valid and enforceable constituted the relief sought. Moreover, in opposition, plaintiff submits affidavits detailing facts and circumstances attendant to the negotiation and execution of the agreement, as opposed to relying solely on the strength of the allegations made in the complaint. In the court's view, the parties effectively have treated the motion as one for summary judgment, and the court will review the motion as such.

As on all summary judgment motions, the court's initial role is issue identification, not issue resolution, Speller v Sears, Roebuck & Co., 100 NY2d 38, 44 (2003) or stated differently, the court's role is not to try issues of fact but to determine whether there are such issues to be tried. Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). Provided the movant establishes by competent and admissible evidence the absence of all material issues of fact, Oswald v Oswald, 107 AD3d 45 (3rd Dept 2013), the nonmovant, to defeat the motion, must demonstrate the existence of material triable issues of fact by "affirmative proof to demonstrate that the matters are real and capable of being established upon a trial". Nelson v Lundy, 298 AD2d 689, 690 (3rd Dept 2002). The facts must be viewed in the light most favorable to the party opposing summary judgment, here the plaintiff. Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 37 (2004); Czarnecki v Welch, 13 AD3d 952 (3rd Dept 2004). And, in doing so, the court must "accord [the opposing party] the benefit of every reasonable inference from the record proof, without making any credibility determinations". Winn v Town of Duanesburg, 86 AD3d 779, 781 (3rd Dept 2011).

Generally, duly executed prenuptial agreements are valid and enforceable. VanKlonis v VanKlonis, 11 NY3d 573, 577 (2008). "Indeed, there is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements." Bloomfield v Bloomfield, 97 NY2d 188, 193 (2001), quoting Matter of Greiff, 92 NY2d 341, 344 (1998). An agreement, duly executed, must be "considered valid and binding unless the contesting party can establish that he or she was induced by fraud, overreaching or duress attributable to the party seeking enforcement". Pulver v Pulver, 40 AD3d 1315, 1317 (3rd Dept 2007). And, to defeat the motion and cause the matter to be brought to trial, plaintiff must come forward with evidence, not conclusions or speculation, demonstrating an issue of fact that "it was the product of fraud, duress or other inequitable conduct", Cioffi-Petrakis v Petrakis, 103 AD3d 766, 767 (2nd Dept 2013), or unconscionable. Darrin v Darrin, 40 AD3d 1391, 1393 (3rd Dept 2007). To be sure, agreements between prospective spouses, "involve a fiduciary relationship requiring the utmost of good faith...[and] the courts [make] it their business

when confronted to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity". Christian v Christian, 42 NY2d 63, 72 (1977); Petracca v Petracca, 101 AD2d 695 (2nd Dept 2012). Yet, fraud will not be presumed; there must be evidence of concealment, misrepresentation, or deception of some type: Darrin v Darrin, *supra*; Panosian v Panosian, 172 AD2d 811 (2nd Dept 1991). "...[W]hen there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which may vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided." Christian v Christian, *supra*, at 72.*4

Guided by these principles, the court must first evaluate plaintiff's position that triable issues regarding fraud, duress, or overreaching exist which preclude a summary determination. Here, the parties had disparate financial resources at the time of their marriage. Defendant held assets that he valued at \$2,725,771.62, and by comparison plaintiff held assets that she valued at \$71,500.00. All of this is disclosed in the agreement. And now in his net worth statement, defendant identifies his separate assets, including the marital residence, that he valued at \$2,732,000.00 [*sic*] and marital assets that he valued at \$76,000.00 in two bank accounts. In her net worth statement, plaintiff identifies her separate property valued now at \$48,000.00 excluding personal items such as jewelry. In her opposition to defendant's motion, plaintiff points out that in the agreement defendant did not disclose his 2005 annual income of approximately \$259,000.00 and offers her opinion that the \$145,000.00 value^{FN1} then placed on his interest in the family corporation, Zinter Handling, Inc., was unconscionably low, as evidence of less than full and complete disclosure, and she further points out that by 2012, the business was paying him \$1 million. Smith v Walsh-Smith, 66 AD3d 534 (1st Dept 2009), *lv denied* 14 NY3d 704 (2010) [Failure to include income in financial disclosure not by itself sufficient to vitiate agreement]. Yet, she does not challenge that defendant disclosed a significant net worth, and plaintiff does not allege that had defendant's 2005 income and a different valuation of his interest in the family business had been set forth, she would not have signed the agreement. What is clear from this record is that at the time of the agreement defendant had considerable means while plaintiff did not, and these disparities were indeed disclosed. *see Smith v Walsh-Smith, supra*. Plaintiff offers no evidence sufficient to demonstrate an issue of fact regarding fraud.

Likewise, there is no evidence that the plaintiff's free will and volition were overcome by defendant's words or conduct before she executed the agreement. Defendant is frank that his insistence on an antenuptial agreement was motivated by his desire to protect and preserve his separate assets, including his interest in a family owned business and to restrict plaintiff's claims or rights upon divorce or death. The claim that plaintiff was unable to consult with family and friends because to do so would cause their jointly planned "surprise" wedding to no longer be "their" secret does not constitute, in this court's view, evidence of duress.^{FN2} The agreement was not foisted or sprung on the plaintiff at the last minute prior to their wedding ceremony. She had a draft more than a month before the wedding, and once again she met with her attorney three times before she signed the final version. That her attorney was one of the three that defendant's counsel suggested is of little moment and not determinative. Boracas v Boracas, 94 AD3d 551 (1st Dept 2012); Strona v Dubin, 48 AD3d 232 (1st Dept 2008). In short, the court cannot tease from this record sufficient proof that demonstrates the existence of triable issues regarding duress or undue influence by defendant.

The inquiry does not end there. Because of the fiduciary nature of the relationship *5 between spouses or, in this case, prospective spouses, under the court's equity power, an agreement or certain provisions may also be set aside if "manifestly unfair" and thus unconscionable. Christian v Christian, *supra*; Infante v Infante, 76 AD3d 1048 (2nd Dept 2010). Regardless of the absence of fraud or duress or undue influence, the court must nonetheless evaluate whether the terms were so unfair "as to shock the conscience and confound the judgment of any [person] of common sense". Christian v Christian, *supra* at 71; Lounsbury v Lounsbury, 300 AD2d 812, 814 (3rd Dept 2002). Yet, "...an agreement will not be set aside simply because a party relinquished more than the law would have provided", Herr v Herr, 97 AD3d 961, 963 (3rd Dept 2012), or "merely because some terms may seem improvident", Garner v Garner, 46 AD3d 1239, 1240 (3rd Dept 2007), or because marital

assets are divided unequally. Lounsbury v Lounsbury, 300 AD2d 812, 814 (3rd Dept 2002). An agreement or portion thereof may be set aside if "so inequitable that no reasonable and competent person would have consented to it". Curtis v Curtis, 20 AD3d 653, 654 (3rd Dept 2005); Bishop v Bishop, 104 AD3d 112 (3rd Dept 2013). "...[A]n unconscionable bargain has been regarded as one such as no [person] in his [or her] senses and not under delusion would make on the one hand and as no honest and fair [person] would accept on the other" Hume v United States, 132 US 406, 411." Christian v Christian, *supra* at 71.

To be sure, plaintiff's post-divorce rights are severely limited by the agreement. It provides that plaintiff would be entitled to maintenance equal to 5% of defendant's cumulative gross earnings and 25% of her cumulative gross earnings over the marriage's duration to be paid in five (5) equal annual installments.^{FN3} Thus, provision has been made for plaintiff to receive maintenance based on a formula tied the duration of their marriage and to the parties' not insignificant annual income albeit in an amount perhaps lower than what she might be entitled to if the agreement were set aside. The longer the marriage, presumably the greater the amount of cumulative earnings and thus greater the maintenance would be. And, the duration of five years for transitional maintenance is not manifestly unfair, particularly where as here the divorce action was commenced less than eight (8) years after the marriage, the plaintiff has a Master's Degree, had a teaching position, and both are relatively young and in good health.

In addition, the agreement provides that any appreciation in his separate property, specifically his interest in the family business, even if plaintiff's indirect efforts may have contributed to such appreciation, remains entirely defendant's separate property. Herr v Herr, 97 AD3d 961 (3rd Dept 2012).

At great length, the agreement also excludes from the claims of the other in the event of divorce, contributions to retirement plans made after the marriage. While the waivers were reciprocal, their effect disproportionately benefits the defendant. At the time the agreement was made, the defendant's 401K was valued at \$253,193.76 and plaintiff's teacher's retirement plan was valued at \$1,500.00. In their statements of net worth, the defendant's 401K is valued at \$620,490.00 and the plaintiff's plan at \$14,224.73. The disparity is to some extent not set forth in the record attributable to the plaintiff's leaving her teaching career - a choice which *6 presumably she was not compelled to make.

Upon the death of defendant, the agreement provides that plaintiff's claims of inheritance would be limited to \$250,000.00 in cash, a marital residence (more about which later), a motor vehicle, and would include his retirement plan.

The agreement leaves for future agreement or determination child support issues.

While the agreement is strongly in defendant's favor, in its totality, it is not so one-sided as to shock the court's conscience with one exception, i.e., the definition of "Marital Property" at page 2, 1. Definitions 1.1 B, particularly viewed with the agreement's expansive definition of "Separate Property".

As defined in the agreement,

"Marital Property" means all that property that Scott and Jennifer purchase or otherwise acquire during the marriage that is owned or held by them jointly, including, without limitation, wedding gifts, automobiles, bank accounts, real property, household furnishings and investments.

While "Separate Property" is defined at page 2, 1. Definitions 1.1A as:

(i) all property, real, personal or other, whatever situated, that each party now holds or owns (including, without limitation, all property listed, referred to, or described in Exhibits A and B attached) regardless of whether held directly or indirectly, in trust or otherwise,

(ii) property acquired by bequest, devise, or descent or gift from a third party,

(iii) compensation received for personal injuries,

(iv) all interests in Retirement plans acquired or contributed during the marriage,

(v) any and all income from, or proceeds of the property described in subparagraphs (i)-(iv) above or the reinvestment thereof, including any property acquired by the exchange or sale of the property described in subparagraphs (i)-(iv) above, whether by reorganization, merger or otherwise, even though the receipt of such income or proceeds may have occurred after the impending marriage, and

(vi) any and all increase in value of the property described in subparagraphs (i)-(iv) above, including, without limitation, any appreciation thereon, regardless of the active, inactive, direct or indirect contribution or counsel, advice, energy or other efforts of either party.

Thus, there are two prerequisites - timing and title - to make property marital. In application, despite approximately \$2,755,488.00 in marital gross earnings from 2006 to 2011,^{FN4} the defendant once again lists in his statement of net worth only one jointly titled checking account and one jointly titled savings account with a combined balance that the defendant lists in his statement of net worth as \$76,333.00 and plaintiff lists in hers at \$81,684.00.

Since the defendant was essentially the sole breadwinner, he had the means and capacity to title accounts as he saw fit and thus to create marital or separate property at his whim. It is obvious that he titled only two existing accounts as joint in comparatively small amounts. This definition of marital property, giving the defendant as it does the power to make separate and to take out of the reach of plaintiff on divorce any and all assets acquired during the marriage *7 regardless of its duration is manifestly unfair and unconscionable as applied to the circumstances of this case.^{FN5} compare Clermont v Clermont, 198 AD2d 631 (3rd Dept 1993), *lv dismissed* 83 NY2d 953 (1994) [Provision in agreement declared unconscionable granted to husband all marital property unless wife demanded in writing that husband acknowledged property she purchased with her separate property would remain hers]; Barocas v Barocas, 94 AD3d 551 (1st Dept 2012) [Triable issue whether waiver of spousal support is unconscionable as applied to the facts as they existed at time enforcement sought].

The court strikes from the definition of Marital Property, page 2, paragraph 1. Definitions 1.1B the words "That is owned or held by them jointly" and none other. Just to be clear, the agreement's definition of "Separate Property" is left intact.

Defendant's motion is granted to the extent that the antenuptial agreement is declared valid and enforceable except for that which is stricken as unconscionable and as to that provision his motion is denied, all without costs.

Lastly, the plaintiff's request for expert fees to value the defendant's interest in his family business and the marital residence and defendant's cross motion for a protective order are now considered.

Once again, the agreement defines at great length that the defendant's business interests owned at the time of his marriage are separate property and goes on to provide that any appreciation in value, even if attributable to the plaintiff's direct or indirect contributions, is likewise separate. In short, the defendant's business interests are not subject to equitable distribution.

Further, the not insignificant values that defendant assigned to them, both in the agreement and in his statement of net worth, may suffice for purposes of this court's inquiry into the value of defendant's separate property in determining what will be equitable in the distribution of marital property. In short, the court declines to direct the defendant to pay for a valuation of defendant's business interests.

Lastly, the marital residence ought to be valued at the defendant's initial expense, subject to potential future adjustment on equitable distribution. Notwithstanding the agreement's provision that a marital residence acquired after the marriage be titled in the plaintiff and defendant, as tenants by

the entirety, the defendant apparently took title to the marital residence in Saratoga Springs in his name alone. Whether the defendant breached the agreement or whether there is any substance to the defendant's apparent position that the marital residence is not marital property are left for another day. If the parties cannot agree on an appraiser, each is to submit the names of two New York State licensed real estate brokers or appraisers and the court will appoint one, not necessarily from those submitted. The written valuation is to be filed with the court or before March 31, 2014; the parties are directed to cooperate with the appraiser in making available the premises for inspection.

And, inasmuch as defendant has disclosed tax returns and W-2's and K-1 statements for the years 2005 through 2011, he need only produce income tax returns, including W-2's and K-1 statements for 2012 and 2013.

Defendant's motion for a protective order is granted, except as specified above, and *8 plaintiff's cross motion to compel defendant to contribute towards the fees of her experts is denied, except as specified above, all without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for defendant. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: February 7, 2014

Saratoga Springs, New York

HON. THOMAS D. NOLAN, JR.

Supreme Court Justice

FOOTNOTES

FN1. A footnote in Exhibit A, defendant's list of separate property, states that the \$145,000.00 value represents book value of his shares which, it goes on to state, may have an actual value ranging from \$580,000.00 to \$725,000.00.

FN2. The parties invited family and friends to what the parties described as an engagement party on December 23, 2005.

FN3. Based upon the parties' joint income tax returns for the years 2006 through 2011, the couple's gross income totaled \$2,755,488 and it appears that just about 100% of that sum represented defendant's earnings. Five (5) percent equals \$137,775.00.

FN4. The tax returns for 2012 and 2013 are not included in the motion papers.

FN5. The agreement contains a severability clause.

Copr. (c) 2014, Secretary of State, State of New York

N.Y.Sup. 2014.

Zinter v Zinter

Slip Copy, 42 Misc.3d 1233(A), 2014 WL 903155 (Table) (N.Y.Sup.), 2014 N.Y. Slip Op. 50316(U)

Unreported Disposition

END OF DOCUMENT

Westlaw

41 Misc.3d 1050

Page 1

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

E.C. v L.C.
41 Misc.3d 1050, 974 N.Y.S.2d 745
NY,2013.

41 Misc.3d 1050, 974 N.Y.S.2d 745, 2013 WL
5583564, 2013 N.Y. Slip Op. 23345

E.C., Plaintiff
v
L.C., Defendant.
Supreme Court, Nassau County

August 30, 2013

CITE TITLE AS: E.C. v L.C.

HEADNOTES

Husband and Wife and Other Domestic Relationships
Separation Agreement
Abandonment

(1) In a matrimonial action, a previously executed separation agreement that settled the parties' marital property arrangements and set forth that it may be incorporated into any final judgment of divorce was enforceable because it was not abandoned by the parties. Although certain aspects of the parties' financial relationship did not change after the parties executed the agreement, they slept in separate bedrooms, never again engaged in sexual relations, filed separate tax returns, lived separate private lives, and informed certain family members and friends that they were separated. A sine qua non of a valid separation agreement is the separation of the parties, which must exist when the agreement is executed or follow immediately thereafter. In the absence of reliable indicia to the contrary, a failure to separate after the execution of a separation agreement constitutes an implied revocation of the agreement and the property dispositions contained therein. Here, the facts showed that the parties had, in fact, separated.

Husband and Wife and Other Domestic Relationships
Separation Agreement
Overreaching

(2) In a matrimonial action, a previously executed separation agreement that settled the parties' marital property arrangements and set forth that it may be incorporated into any final judgment of divorce was enforceable because neither the terms of the agreement nor the circumstances of its execution demonstrated that it was the product of plaintiff husband's overreaching. Defendant wife produced no evidence that the marriage was an unequal partnership dominated by plaintiff husband. She initiated the separation and the execution of the agreement, failed to substantiate her claims of past domestic violence, and demonstrated her independence when she bought a car without consulting plaintiff, using the parties' home equity credit line. Accordingly, she bore the burden to prove that the circumstances leading to the execution of the agreement led to a manifestly unfair and inequitable bargain, which she failed to do. Defendant drafted the agreement and plaintiff signed it at her request a month after she presented it to him. Defendant filed the agreement with the county clerk. Neither party had legal counsel. Defendant had full access to the parties' banking information and neither requested financial disclosure. Finally, the property settlements in the agreement were not unconscionable and did not otherwise give rise to an inference of overreaching.

Husband and Wife and Other Domestic Relationships
Separation Agreement
Fraudulent Inducement

(3) In a matrimonial action, a previously executed separation agreement that settled the parties' marital property arrangements was enforceable because plaintiff husband did not fraudulently induce defendant wife to sign it by promising that it would be modified to incorporate certain financial terms

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

41 Misc.3d 1050

Page 2

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

upon the parties' divorce. A marital agreement, like any other contract, may be vitiated if induced by fraud. The challenger to an agreement must establish the basic elements of a fraud claim: representation of a material existing fact, *1051 falsity, scienter, deception and injury. Proof that a promise was made with a preconceived and undisclosed intention of not performing it may be sufficient to maintain a fraud claim, but general allegations to this effect are not. Here, defendant submitted no evidence that plaintiff lacked the intent to modify the agreement when he allegedly promised to do so, and fraudulent intent cannot be inferred from mere nonperformance. Further, the terms of the agreement, which were not silent upon the financial matters that defendant claimed were saved for later agreement, belied defendant's claims that the parties did not intend to be bound by them. The agreement contained an integration clause and a no-oral-modification clause, and stated that it would be effective as of the date it was executed by both parties, would be binding and may be incorporated into any final judgment of divorce.

RESEARCH REFERENCES

Am Jur 2d, Divorce and Separation §§ 1030, 1035, 1036, 1045, 1047, 1059-1062.

Carmody-Wak 2d, Separation §§ 117:6, 117:7, 117:81, 117:106, 117:107, 117:109, 117:110, 117:162, 117:168, 117:170.

2 Law and the Family New York (2d ed) §§ 12:7, 12:47, 12:48.

NY Jur 2d, Domestic Relations §§ 1918, 1920, 1922, 1924, 1928, 1932, 1970, 1971, 1977, 2013 - 2016.

ANNOTATION REFERENCE

See ALR Index under Divorce and Separation; Fraud and Deceit.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: separation /2 agreement & abandon /4 intent

APPEARANCES OF COUNSEL

Parola & Gross, LLP, Wantagh, for plaintiff.
Winter & Grossman, PLLC, Garden City, for defendant.

OPINION OF THE COURT

Leonard D. Steinman, J.

On April 17, 2012, plaintiff E.C. (husband) filed this action for divorce from his wife of 26 years, defendant L.C. (wife). Husband seeks a judgment of divorce incorporating a marital separation agreement and property settlement agreement dated April 12, 2010 (the agreement). Wife has asserted counterclaims and also seeks a judgment of divorce, but on different terms. *1052 Wife asserts the agreement should be disregarded on various grounds and demands an equitable distribution of the parties' marital property, maintenance, child support and additional relief.

On February 6, 2013, this court denied wife's motion for summary judgment and ordered a hearing to determine the validity of the agreement. The hearing was held on May 13, 17, 21 and 29, 2013. At the conclusion of the testimony the court reserved decision pending the submission of post-hearing memoranda, which were submitted by both husband and wife on June 18, 2013.

The court finds, for the reasons set forth below, that the parties' agreement is valid and enforceable. Wife has not sustained her burden of establishing that the agreement was abandoned, was induced by fraud or was the product of overreaching.

Facts

The parties were married on June 7, 1986. They have three children, ages 24, 20 and 19. Husband is 55 years old and works as a computer technician for Hitachi, where he earns approximately \$90,000 per annum. He has an Associate's degree from the State University of New York at Farmingdale.

41 Misc.3d 1050

Page 3

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

Wife is 52 years old and is employed by Hofstra University as an administrative assistant, where she earns approximately \$27,000 per annum. Wife has a Bachelor of Arts degree from Hofstra University. At the time of the parties' marriage in 1986, wife was employed as an ad buyer for Doyle Dane Bernbach earning \$30,000 per annum. In January 1990 wife left that position to concentrate on raising the parties' children. Wife began working for Hofstra as a part-time secretary in 2001 and began working on a full-time basis in 2003. Because of her position at Hofstra, all of the parties' children have attended college there tuition-free. In addition to her job at Hofstra, wife is a licensed real estate broker. In 2010, wife earned approximately \$20,000 in real estate commissions (before expenses). In 2011, this amount decreased to approximately \$8,200.

The parties' marriage broke down in January 2010 when husband became convinced that wife was having an affair. One evening, wife did not return to the marital home and husband caught her lying about her whereabouts. When confronted, wife suggested that the parties divorce. In response, husband suggested that the parties return to a marriage counseling retreat they had visited in 2009. Wife demurred and moved out of the marital bedroom.

*1053 Two or three weeks later, wife followed up on her suggestion that the parties divorce and handed to husband a copy of the agreement. Wife utilized a form agreement that she obtained from an Internet website. Wife suggested to husband that they immediately sign the agreement and then convert the agreement into a divorce when their youngest child graduated high school, in approximately two years.

Husband, still hopeful that the parties could reconcile, did not review the agreement immediately. The following month, he approached wife and let her know he would sign it. Husband made and requested no changes to the agreement. Neither party made any financial disclosures to the other. There was no attorney involvement. Two days later, on April 12, 2010, the parties separately drove to a

bank and before a notary public together signed the agreement. That very day, wife filed the agreement with the Nassau County Clerk's office.

Discussion

New York law protects the rights of parties to enter into agreements relating to their marital relations. (See Domestic Relations Law § 236 [B] [3] ["An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action"].) *Duly executed separation agreements are generally valid and enforceable.* (*Van Kipnis v Van Kipnis*, 11 NY3d 573 [2008].) When presented with legal challenges to marital agreements, our courts have recognized that there is a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements." (*Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001], quoting *Matter of Greiff*, 92 NY2d 341, 344 [1998].) "Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences . . ." (*Christian v Christian*, 42 NY2d 63, 71 [1977].)

While the law has long favored marital agreements and seeks to uphold them (*see De Cicco v Schweizer*, 221 NY 431, 439 [1917]), marital agreements are not immune from the public policy considerations that engage the attention and oversight of the courts. (*See Matter of Greiff*, 92 NY2d at 345 [marital agreements are not insulated from "typical contract avoidances"].) Courts have "thrown their cloak of protection" over marital agreements "to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and *1054 duress, and to set aside or refuse to enforce those born of and subsisting in inequity." (*Petracca v Petracca*, 101 AD3d 695, 697-699 [2d Dept 2012], quoting *Christian v Christian*, 42 NY2d at 72.)

Wife makes three arguments in support of her assertion that the agreement is unenforceable: (1) the

41 Misc.3d 1050

Page 4

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

parties abandoned the agreement; (2) the agreement is the product of overreaching; and (3) she was fraudulently induced into signing it.

A. Abandonment

A sine qua non of a valid separation agreement is a separation of the parties. The separation must exist at the time of the agreement or follow immediately thereafter. (*LaMontagne v LaMontagne*, 239 App Div 352 [1st Dept 1933].) As a matter of public policy, a separation agreement must merely recognize and not induce the breakup of a family unit. (See *Matter of Wilson*, 50 NY2d 59, 63 [1980]; *Tirrell v Tirrell*, 232 NY 224, 228-229 [1921].) The law's insistence that the separation is a present or imminent fact removes any doubt that the agreement itself may cause or trigger a future separation.

Furthermore, in the absence of reliable indicia to the contrary, a failure to separate after the execution of a separation agreement constitutes an implied revocation of the agreement and the property dispositions contained therein. (*Matter of Wilson*, 50 NY2d 59, 66 [1980].) This is because when marital property arrangements are made part of a separation agreement, the separation is considered the underlying *raison d'être* for the dispositions.

Here, wife argues that the parties' relationship before and after the agreement was signed remained substantially similar—thus demonstrating an abandonment of the agreement. Since the parties continued to conduct themselves as a married couple after the execution of the agreement, wife asserts, “it may be deemed a resumption of the marital relationship evincing an intent to abandon the agreement.” (Defendant's posttrial mem at 1; see *Rosner v Rosner*, 66 AD3d 983 [2d Dept 2009].)

(1) But the facts are to the contrary. After the parties executed the agreement, wife moved out of the marital bedroom. The parties never again engaged in sexual relations. When the parties thereafter went on a vacation to Universal Studios with their child they slept in separate bedrooms. In 2009 and years prior, the parties filed their taxes jointly;

in 2010 and 2011, after the execution of the agreement, the parties filed individual *1055 tax returns. Four months after the agreement was signed, husband did not go to wife's 50th birthday party. Wife did not attend husband's father's 95th birthday party, the wake following husband's father's death or the weddings of husband's cousin and nephew. The family stopped sharing meals. Husband and wife threw separate high school graduation parties for their son. The parties purposely waited until shortly before their son graduated high school to inform him of their separation and to file a divorce complaint, but they each told their siblings, parents and certain friends of their separation shortly after the agreement was signed.

Although certain aspects of the parties' financial relationship did not change, such as the continued existence of a joint bank account, this was done for the convenience of the parties. Furthermore, although not every aspect of the agreement was slavishly followed, this is not surprising considering the agreement was the product of an Internet form and not tailored to the parties' particular circumstances. Importantly, the parties did wait until their youngest son graduated high school before putting their marital residence up for sale; the parties' cars were utilized and dominion was exercised over them as agreed; and even wife concedes that they lived separate private lives. As a result, this court finds that the parties did in fact separate and the agreement was not abandoned.

B. Overreaching

Prior to the Court of Appeals' decision in *Matter of Greiff* (92 NY2d 341 [1998]), it was presumed that the party seeking to vitiate a marital contract based upon fraud or overreaching bore the burden of proof. (*Matter of Phillips*, 293 NY 483, 490-491 [1944]; *Matter of Sunshine*, 51 AD2d 326, 327 [1st Dept 1976], *aff'd* 40 NY2d 875 [1976].) In *Greiff*, the Court of Appeals instructed that in determining the parties' respective burdens where a marital agreement is challenged, courts should decide whether the “nature of the relationship between the

41 Misc.3d 1050

Page 5

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

couple at the time they executed their . . . agreement[] rose to the level to shift the burden to the proponent[] of the agreement[] to prove freedom from fraud, deception or undue influence." (*Matter of Greiff*, 92 NY2d at 347.) The spouse contesting the agreement must establish a fact-based, particularized inequality before a proponent of the agreement "suffers the shift in burden to disprove fraud or overreaching." (*Id.* at 346.)

(2) Here, there is no basis to shift the burden of proof from wife to husband. Wife failed to provide any evidence that their *1056 marriage was an unequal partnership dominated by husband or that he exerted any outsized influence over her. Importantly, it was wife who initiated the parties' separation and the execution of the agreement. Although wife claimed at trial that she feared husband and asserted incidents of domestic violence took place in 2008 and 2009, there was no evidence of police involvement and wife testified that she never informed or sought assistance from her brother, a former police officer, who resides on the same block as the parties. And just one month prior to the agreement's execution wife purchased for herself a new car without consulting husband, utilizing the parties' home equity credit line. Wife thus demonstrated her independence. Therefore, to succeed on her claim of overreaching wife must prove that the circumstances leading to the execution of the agreement led to a manifestly unfair and inequitable bargain. (See *Barocas v Barocas*, 94 AD3d 551, 551 [1st Dept 2012] ["(i)f the execution of the agreement . . . be fair, no further inquiry will be made" (quoting *Levine v Levine*, 56 NY2d 42, 47 [1982])].)

Wife has failed to meet her burden. There was no evidence establishing that the circumstances surrounding the execution of the agreement were inequitable. *The agreement signed by the parties was drafted by wife, from an Internet form, without any changes made or requested by husband.* It was executed only after husband agreed to do so at wife's request, a month after wife presented it to him.

Each party separately drove to the same bank to execute the agreement and wife took the initiative to file it with the County Clerk.

Although wife was not represented by counsel, the absence of independent legal representation, without more, does not establish overreaching or require nullification of an agreement. (*Levine v Levine*, 56 NY2d 42 [1982]; *Forsberg v Forsberg*, 219 AD2d 615 [2d Dept 1995].) Husband also did not have legal counsel.

There was no evidence presented that husband concealed or misrepresented to wife any financial information. Wife had full access to the parties' banking information. Financial disclosure was not requested by either party. The parties' agreement provided that the parties would either exchange financial statements and documentation or agree not to do so. It is clear that they chose the latter course. This is permissible. (See *Berman v Berman*, 217 AD2d 531 [2d Dept 1995].) In all events, the failure to provide full financial disclosure, by itself, does not invalidate an agreement. (See *1057 *Cohen v Cohen*, 93 AD3d 506 [1st Dept 2012]; *March v March*, 233 AD2d 371 [2d Dept 1996] [failure to disclose existence of retirement plan not grounds to set aside agreement dividing marital property].)

Nor do the terms of the agreement, including wife's waiver of maintenance, give rise to any inference of overreaching. (*Cf. Petracca v Petracca*, 101 AD3d 695 [2d Dept 2012].) Wife, a college graduate, worked before and during the marriage, currently earning her salary from Hofstra as well as additional income as a licensed real estate agent. Thus, her waiver of maintenance cannot be viewed as unconscionable.

The parties owned a residence in Mineola, New York, that, pursuant to the agreement, was sold and the proceeds were equally divided. The parties agreed that wife would maintain ownership of the parties' then new Nissan Versa, which was fully paid for utilizing funds from the parties' home equity line of credit; husband kept the lease on the

41 Misc.3d 1050

Page 6

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

2008 Nissan Sentra. The parties agreed to sell their principal asset, the marital home, upon the high school graduation of their youngest child and equally divide the proceeds. This equal division is to take place notwithstanding husband's potential claim for a separate property credit stemming from his premarital ownership of the parties' prior residence, which was sold and the proceeds of which were used to purchase the current marital residence.

The agreement provides that husband is to pay 100% of the carrying charges of the residence until sold and that he can have exclusive occupancy. Husband abided by his obligation to pay the carrying charges (albeit, prior to the institution of this action, from a joint account into which wife also contributed), but did not exclude wife from the home. The home has now been put on the market for sale.

In sum, neither the terms of the agreement nor the circumstances surrounding its execution evidence overreaching on the part of husband. As a result, this court may "not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident" or imprudent. (*Christian v Christian*, 42 NY2d at 72.)

C. Fraudulent Inducement

Wife claims the parties never intended to utilize the agreement as a final document to be incorporated into a divorce judgment. She argues that she was fraudulently induced into signing the agreement by husband's promise that it would be *1058 modified to incorporate various financial terms, such as the payment of maintenance and child support, when the parties divorced. In support of her assertion, wife points to the absence of such financial obligations of the husband in the agreement as well as the parties' attempt to mediate their present dispute prior to the institution of this action. She testified that the parties could not agree on the terms of such support, thus leading to the current litigation.

To be sure, a marital agreement, like any other con-

tract, may be vitiated if induced by fraud. (See e.g. *Cioffi-Petrakis v Petrakis*, 103 AD3d 766 [2d Dept 2013].) To succeed on such a claim wife must also allege and establish the basic elements of a fraud claim: representation of a material existing fact, falsity, scienter, deception and injury. (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995].) She has not done so.

In contrast, in *Cioffi-Petrakis*, a prenuptial agreement was found to be invalid as a result of husband's oral promise to tear it up after the parties had children. Although the Second Department's decision has been characterized by some as a "landmark ruling,"^{FN1} it is consistent with long-standing New York contract and fraud law and does not assist wife in the present instance (or, likely, most future litigants seeking to undo marital agreements).

A promise made with a preconceived and undisclosed intention of not performing it may be viewed as a misrepresentation of a present material fact sufficient to maintain a claim of fraud independent of a contract. (See *Sabo v Delman*, 3 NY2d 155 [1957]; *Brown v Lockwood*, 76 AD2d 721, 731-733 [2d Dept 1980].) The trial court in *Cioffi-Petrakis* cited to *Sabo* and explicitly based its decision on this principle of law. (*E.C.-P. v P.P.*, 33 Misc 3d 1233[A], 2011 NY Slip Op 52221[U] [Sup Ct, Nassau County 2011].) The court did not change or extend the principles of law under which marital agreements are typically analyzed: unconscionability and overreaching. Indeed, the trial court and the Appellate Division previously rejected a challenge to the *Cioffi-Petrakis* agreement on such grounds. (See *Cioffi-Petrakis v Petrakis*, 72 AD3d 868 [2d Dept 2010].)

What makes *Cioffi-Petrakis* distinctive is that the plaintiff was able to successfully plead and prove that the husband's promise was false when made. Such successes are rare in any *1059 type of contract dispute. The lawbooks are replete with attempts that fell short. (See e.g. *Stangel v Zhi Dan Chen*, 74 AD3d 1050 [2d Dept 2010]; *McGee v J.*

41 Misc.3d 1050

Page 7

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

Dunn Constr. Corp., 54 AD3d 1010 [2d Dept 2008].) This is because general allegations that a party entered into a contract while lacking the intent to perform it are insufficient. (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 318; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013].) Parties typically lack the evidence courts require to sustain such claims. Plaintiff's uncommon success in *Cioffi-Petrakis* was magnified because it occurred in the context of a challenge to a marital agreement—where the success rate is generally low to begin with. But it did not change the law.

(3) Here, wife submitted no evidence that husband lacked the intent to modify the agreement when he allegedly promised to do so. Fraudulent intent cannot be inferred merely from the fact of nonperformance. (*Brown v Lockwood*, 76 AD2d at 733.) Furthermore, wife's argument that the parties did not intend to be bound by the agreement as written is belied by the unambiguous terms of the agreement, which states that it was to be effective "as of the date it is executed by both parties," "shall be binding" and may be incorporated into any final judgment of divorce. (See agreement at 8 ["Effective Date of Agreement"]; *id.* at 10 ["Binding Effect"]; *id.* at 11 ["Submission to Court"].) The agreement also contains an integration clause (*id.* at 10 ["Entire Understanding"]) and states that it may not be modified absent a writing signed by both parties or as ordered by a court. (*Id.* at 11 ["Modification"].)

And the agreement is not silent as it relates to the financial terms of maintenance and child support—the provisions wife claims were saved for later agreement. The parties expressly waived their right to receive maintenance in a section of the agreement entitled "Maintenance"; the subtitle is "Mutual Waiver." The parties each represented in that section that "[i]t is the mutual desire of the parties that hereafter they shall each maintain and support themselves separately and independently of the other." They then proceeded to release and dis-

charge each other, in separate paragraphs of that section, from any claim or right to receive temporary or definite alimony, maintenance or support. To hammer the point home, wife also acknowledged that "by the execution of [the] Agreement she cannot at any time in the future make any claim against Husband for alimony, support, or maintenance of any kind whatsoever"1060 for herself." As to child support, the parties also expressly agreed that "no demand for child support payments will be made by either party upon the other." FN2 Therefore, wife has not met her burden of establishing that the agreement was fraudulently induced. As a result, the agreement is valid and enforceable. The parties are to contact the court by September 10, 2013 to schedule a conference to discuss all other outstanding matters in this action. Any other relief requested but not specifically addressed in this decision is denied.

FOOTNOTES

FN1. See e.g. Martha Neil, "Landmark" NY Appeals Court Ruling Voids Prenup Due to Millionaire's Oral Promises to Wife-to-be, ABA J, Mar. 11, 2013.

FN2. Husband concedes this provision of the agreement is unenforceable because it does not comply with the requirements of the Child Support Standards Act, but correctly points out that the remainder of the agreement may be severed and enforced. (See *Seligman v Seligman*, 78 Misc 2d 632 [Sup Ct, Kings County 1974] [separation agreement may be deemed valid separate and apart from support provisions].) Although the agreement contains no severability clause (cf. *Christian v Christian*, 42 NY2d at 73), the language of the agreement reflects, and the parties' testimony established, the parties' intent to be bound by the agreement notwithstanding the need to alter certain financial provisions. (See *Rubin v Rubin*, 72 AD2d 810 [2d Dept 1979]

41 Misc.3d 1050

Page 8

41 Misc.3d 1050

(Cite as: 41 Misc.3d 1050, 974 N.Y.S.2d 745)

) Indeed, it is wife's argument that the parties themselves were to modify the support provisions.

Copr. (c) 2014, Secretary of State, State of New York NY, 2013.

E.C. v L.C.

41 Misc.3d 1050, 974 N.Y.S.2d 7456022013 WL 55835649992013 N.Y. Slip Op. 233454603, 974 N.Y.S.2d 7456022013 WL 55835649992013 N.Y. Slip Op. 233454603, 974 N.Y.S.2d 7456022013 WL 55835649992013 N.Y. Slip Op. 233454603

END OF DOCUMENT

41 Misc.3d 1208(A), 977 N.Y.S.2d 666 (Table), 2013 WL 5509135 (N.Y.Sup.), 2013 N.Y. Slip Op. 51617(U)

Unreported Disposition

View National Reporter System version

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 D.R., Plaintiff,

v.

M.R., Defendant.

3246-08

Supreme Court, Westchester County

Decided on September 25, 2013

CITE TITLE AS: D.R. v M.R.

ABSTRACT

Husband and Wife and Other Domestic Relationships

Stipulations

Divorce Settlement—Fraud in Inducement—Rescission

D.R. v M.R., 2013 NY Slip Op 51617(U). Husband and Wife and Other Domestic Relationships—Stipulations—Divorce Settlement—Fraud in Inducement—Rescission. (Sup Ct, Westchester County, Sept. 25, 2013, Duffy, J.)

APPEARANCES OF COUNSEL

Neil VanderWoude, Esq.

Attorney for Plaintiff

Gerosa & VanderWoude

770 Farmers Mills Road

Carmel, New York 10512

David J. Whelan, Esq.

Attorney for Defendant

17 Stillman Avenue

Pleasantville, New York 10570

OPINION OF THE COURT

Colleen Duffy, J.

This Decision addresses a plenary action commenced on April 23, 2012, by D.R. *2 ("Plaintiff"), seeking, *inter alia*, to rescind the terms of the parties' settlement agreement in a matrimonial action, and a motion brought by Order to Show Cause in the post-judgment matrimonial part on February 13, 2013, by M.R. ("Defendant"), in which he seeks dismissal of the plenary action and a declaratory judgment directing Plaintiff to comply with the terms of the parties' Judgment of Divorce, filed July 15, 2011 ("Judgment of Divorce"), and Separation and Property Settlement Agreement, dated July 21, 2010 ("Separation Agreement"), which was incorporated but not merged into the Judgment of Divorce.

As the issues in the Plenary Action and Defendant's motion in the Post-Judgment part are inextricably intertwined, this Decision addresses all matters.

I. PROCEDURAL HISTORY

The parties in this matter were married in the State of New York on June 5, 1993 and have three children.

In or around January or February 2008, Plaintiff commenced an action for divorce.

On July 21, 2010, the parties entered into a written Settlement Agreement that was later incorporated but not merged into the parties' Judgment of Divorce.

On April 23, 2012, Plaintiff commenced a plenary action by Summons and Verified Complaint, Index No. 2876-12, seeking: (1) rescission or reformation of the Settlement Agreement based upon repeated material breaches of the Settlement Agreement by Defendant; (2) rescission of the Settlement Agreement on the grounds of fraud in the inducement, fraud and forgery; or (3) rescission on the grounds that the terms of the Settlement Agreement were unconscionable (the "Plenary Action").

On February 5, 2013, Defendant moved, by Order to Show Cause in the post-judgment matrimonial part, under Index No. 3246-2008 (the "Post-Judgment Action"), for an order: (1) dismissing Plaintiff's complaint in the Plenary Action and (2) a declaratory judgment directing Plaintiff to comply with that portion of the Judgment of Divorce and Settlement Agreement requiring Plaintiff to deliver a deed conveying Plaintiff's right, title and interest in the premises at [], New York (the "Marital Residence").

On March 20, 2013, Plaintiff filed an Affidavit in Opposition to Defendant's Order to Show Cause in the Post-Judgment Action.

On or about April 5, 2013, Defendant filed the Reply Affirmation of David Whelan, Esq., attorney for Defendant, and exhibits thereto, in Reply to Plaintiff's Affidavit in Opposition.

II. CONCLUSIONS OF LAW

As an initial matter, the Court notes that the appropriate procedural mechanism to seek to set aside a settlement agreement made during marriage is a plenary action. Brender v. Brender, 199 AD2d 665, 666, fn2 (3d Dept. 1993) (action to challenge settlement agreement should be commenced by plenary action, rather than motion); Teltelbaum Holdings, Ltd. v. Gold, 48 NY2d 51, 55-56 (1979) (where prior action has been terminated, challenge to stipulation of settlement should be brought by plenary action). Plaintiff properly initiated a Plenary Action.*3

Because the Plenary Action to determine the validity of the Settlement Agreement should be determined before Defendant's motion for a declaratory judgment regarding certain terms of the Settlement Agreement is addressed, the Court necessarily addresses both proceedings in this Decision and Order.

With respect to Defendant's motion to dismiss the Plenary Action and obtain a declaratory judgment, for the reasons set forth below, such application is denied in part and granted in part. As set forth in Section A below, the Court finds that as there are issues of fact as to the validity of the Settlement Agreement, a trial is required and therefore Defendant's application for a declaratory judgment is denied.

A. Defendant's Motion to Dismiss Plenary Action

is Granted in Part and Denied in Part

As set forth below, Defendant's motion to dismiss the Plenary Action is granted as to the claims of fraudulent inducement, fraud, forgery, and rescission based upon breach, but denied as to dismissal of Plaintiff's other claims.

1. Defendant's Motion to Dismiss Plaintiff's Causes

of Action for Fraud and Forgery is Granted

Defendant's motion to dismiss Plaintiff's claims of fraud in the inducement, fraud and forgery for

failure to state a cause of action is granted.

In determining a motion pursuant to CPLR § 3211(a)(7), the Court must

accept each of the factual allegations of the Verified Complaint as true and sustain the cause of action if it may be discerned, even if inartfully crafted. Fishbach & Moor, Inc. v. E.W. Howell Co., 240 AD2d 157 (1st Dept. 1997). A pleading is to be construed to allege whatever can be fairly implied from the facts. Nastesi v. Nastesi, 26 AD3d 32, 37 (2d Dept. 2005).

A claim for a cause of action sounding in fraud must include the following elements: (1) a material misrepresentation of an existing fact, (2) made with knowledge of the falsity, (3) an intent to induce reliance thereon, (4) justifiable reliance upon the misrepresentation, and (5) damages. Orchid Construction Corp. v. Gonzalez, 89 AD3d 705, 707 (2d Dept. 2011).

Here, Plaintiff has failed to allege any justifiable reliance on alleged misrepresentations by Defendant. In short, Plaintiff contends that the basis of the fraud is that she relied, to her detriment, on Defendant's purported failure to disclose certain "marital property . . . at the time of the parties' Settlement Agreement consist[ing] of \$28,000 in a business account and shared ownership of at least one and as many as three real estate holdings." Verified Complaint, ¶ 10. The argument is absurd. There can be no real dispute that Plaintiff was aware of such purported assets (the business account, the cash in the metal box, the business and at least one real estate holding) at the time she entered into the parties' Settlement Agreement. Plaintiff's Affidavit In Opposition to Defendant's Order to Show Cause ("Plaintiff's Aff."), ¶¶ 6-11, 36-39, 44-45. Her own knowledge and awareness of the existence of those very assets she now claims Defendant failed to disclose defeats any fraud claim. NM IO, LLC v. OmniSky Corp., 31 AD3d 315, 316 (1st Dept. 2006) (where plaintiff received independent analyst's report of defendant's need for capital, reliance upon defendant's representation that it had sufficient capital was unreasonable), *app. denied*, 2006 NY App. Div. Lexis 12559 (1st Dept. 2006), *app. denied*, 8 NY3d 804 (2007); AIX Partners I, LLC v. AIX Energy, Inc., 2013 NY Slip Op. 32003U, *8 (Sup. Ct., New York Co. 2013) (plaintiff's actual knowledge of facts defeated claim for fraud in the inducement as a matter of law). Accordingly, Plaintiff's claim that she relied to her detriment on Defendant's failure to disclose such assets, cannot lie. Kalvia Food Corp. v. Hunts Point Co-op Market, Inc., 244 AD2d 460, 460 (2d Dept. 1987) (failure to show justifiable reliance is fatal to claim for rescission based on fraud).

Plaintiff's fraud claims also fail to sufficiently detail the allegedly fraudulent conduct to permit a reasonable inference of the alleged conduct, as required by CPLR § 3016(b). Sarajss v. Magaroli, 12 NY3d 527, 530 (2009).

Plaintiff's bald assertions, without more, that certain real property that Defendant held jointly with his family was concealed or disposed of by Defendant a few months before the divorce action was filed, after Defendant had learned that Plaintiff had consulted an attorney about a divorce, also are insufficient for a fraud cause of action. Plaintiff also has failed to allege any facts or submit any documentary evidence to support her contentions that Defendant forged her signature on documents and authorized bank transactions that required her signature. Such causes of action for fraud and forgery cannot lie. Other than citing an address or the name of the business

in response to Defendant's Bill of Particulars, Plaintiff has wholly failed to allege any facts with any specificity that would support such causes of action pertaining to these claimed assets. Indeed, Plaintiff has not even alleged when such purported assets which Defendant owned jointly with his family became marital property, or how they were transferred. Plaintiff's conclusory allegations, without any factual basis, fail to meet the statutory requirement that a cause of action in fraud be pleaded with particularity. Greschler v. Greschler, 51 NY2d 368, 375 (1980); Rubin v. Rubin, 33 AD3d 983, 985-86 (2d Dept. 2006). See Verified Complaint, ¶¶ 33-45.

Plaintiff's own admitted knowledge of assets she claims were marital that Defendant failed to disclose, together with her failure to plead specific facts to allege the elements of fraud are fatal to her claim of rescission of the Settlement Agreement on these grounds. Accordingly, Defendant's motion to dismiss Plaintiff's causes of action on the basis of fraud in the inducement, fraud and

forgery is granted.2.Defendant's Motion to Dismiss Plaintiff's Claim for

Rescission Based upon Unconscionability Is Denied

With respect to Plaintiff's claim seeking rescission of the contract on the grounds that the terms of the Settlement Agreement are unconscionable, Defendant's motion to dismiss is denied.

New York State has a strong public interest in marriage and takes a supervisory role in matrimonial affairs. Cioffi-Petrakis v. Petrakis, 103 AD3d 766, 766 (2d Dept. 2013), citing Kessler v. Kessler, 33 AD3d 42, 45 (2006). Agreements between spouses "are closely scrutinized by the courts, and . . . are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract."

Petracca v. Petracca, 101 AD2d 695, 698 (2d Dept. 2012), quoting Levine v. Levine, 56 NY2d 42, 47 (1982); Cioffi-Petrakis at 466 (agreements affecting matrimonial issues *5 have been subjected to limitations and scrutiny beyond that of other contracts).

Relief from an agreement between spouses will be granted if the agreement is manifestly unfair to one spouse because of the other's overreaching. Christian v. Christian, 42 NY2d 63, 72-73 (1977); Petracca, 101 AD3d at 698. A contract will not be enforced if the inequality of the bargain is so strong and manifest as to shock the conscience. Pennise v. Pennise, 120 Misc 2d 782, 788-89 (Sup. Ct., Nassau Co. 1983)(allegations that wife gave up her livelihood and her home and got nothing in return, and was not represented by counsel, raises strong inference of overreaching and unconscionability); Christian, 42 NY2d at 71-72.

Here, Plaintiff's claims that Defendant transferred or disposed of certain marital assets upon his learning of Plaintiff's desire for a divorce, to circumvent any claim Plaintiff may have had to such property, including real property and cash, if true, would constitute a basis for setting aside the parties' Separation Agreement on the grounds of unconscionability. The Court notes that the parties' Settlement Agreement, including the division of the marital property between the parties, is silent about any such assets. Thus, if such assets did exist as marital property, Plaintiff received no consideration whatsoever for relinquishing any claims to such property.

Moreover, irrespective of Plaintiff's claims of Defendant's purported transfer of and the disappearance of claimed marital property, the Settlement Agreement appears to be unfair on its face. The Settlement Agreement provides, in relevant part, as follows:

ARTICLE 4

REAL PROPERTY

B.It is stipulated and agreed that in consideration of the entire sum contained in the Teamsters Local 456 annuity fund, which was \$76,268.34 as of March 31, 2010 and shall remained untouched by [Defendant] pending disbursement to [Plaintiff], [Plaintiff] shall deliver a deed conveying her right, title and interest in the aforesaid premises to [Defendant]. . . .

ARTICLE 5

AUTOMOBILES

B.[Defendant] shall have and keep as his own the 1973 Ford Mustang automobile currently in his possession, and [Plaintiff] hereby relinquishes any claim that she may have to same. . . .

ARTICLE 7

MAINTENANCE AND SUPPORT

B.[Defendant] shall pay to [Plaintiff], as and for [Defendant's] obligation toward support of the Children, the sum of \$300.00 per month, allocated in accordance with the Child Support Standards Act, until the Children shall become *6 emancipated.

(a)the Children of the marriage entitled to receive parental support are: [] . . . [] . . . ; and [], . . .

(e)[Defendant's] basic support obligation is \$6261.01 per year;

(g)Taking in to account the social security disability payments received by the children, [Defendant] shall pay to [Plaintiff] \$300.00 per month for statutory support of the three children of the marriage.

Settlement Agreement, Articles 4, 5 and 7.

The parties' Settlement Agreement contemplates that, with respect to equitable distribution, Plaintiff was to receive the entire value of a Teamsters Local 456 annuity fund ("Teamsters Fund"), which was \$76,268.34 as of March 31, 2010, ^{FN1} in exchange for conveying to Defendant her right, title and interest in the Marital Residence which she contends had marital equity of approximately \$220,000.00 (to which she was entitled to half). Plaintiff also relinquished any claim she may have had to a 1973 Ford Mustang which she claims has a value of \$10,000.00-15,000.00. Moreover, Plaintiff agreed to accept child support for the parties' three minor children in the amount of \$300.00 per month although, under the CSSA calculations set forth by the parties in the Settlement Agreement, Defendant's annual child support obligation, on an income of approximately \$21,571.00 is \$6261.01 per year.^{FN2} Pursuant to the parties' Settlement Agreement, *7 Defendant also is obligated to pay one third (1/3) of the Subject Children's unreimbursed medical costs.^{FN3}

With respect to equitable distribution, according to the amounts asserted by Plaintiff, she relinquished her interest in the Marital Residence of approximately \$105,000.00 plus her share of whatever the value was of the 1973 Ford Mustang. In exchange, the only consideration which Plaintiff received was the portion of the Teamsters Fund to which the Defendant would otherwise have been entitled. That consideration has not been valued by the parties or the Settlement Agreement. There can be no dispute that, to the extent that any or all of the funds in the Teamsters Fund is marital property, Plaintiff's interest in that marital property is not consideration. As neither party has indicated whether all or some portion of the Teamsters Fund constituted marital property and the parties' Settlement Agreement also is silent on this point, the Court cannot ascertain the value of the consideration received by Plaintiff. If most or all of the funds in the Teamsters Fund were marital property, then the actual consideration Plaintiff received was significantly less than that which Defendant received, to wit, Plaintiff's equity in the Marital Residence and the Ford Mustang.

In addition, Plaintiff's contentions that an *ex parte* communication to her by Rene Matola, Esq., Law Secretary to the Honorable Bruce Tolbert, Supreme Court Justice, advising Plaintiff to accept the terms of the Agreement constituted duress causing her to agree to the terms of the parties' Settlement Agreement, if true, also may be a basis for rescission of the Settlement Agreement on the grounds of unconscionability. See *Yuda v. Yuda*, 143 AD2d 657, 659 (2d Dept. 1988)(improper pressure from court to settle case contributed to appellate court's finding of unconscionability); *Schunk v. Schunk*, 84 AD2d 904, 904 (4th Dept. 1981)(court should not act as a lever to exert undue pressure on litigants to settle, particularly in divorce cases; stipulation rescinded). According to Plaintiff, during a settlement conference between the parties and counsel with Ms. Matola, Defendant became upset and, when he and his attorney stepped outside the room, Ms. Matola proposed that Plaintiff accept the full retirement fund in lieu of her share of the house. Plaintiff's Aff., ¶¶ 48-65.

Pursuant to the terms of the Settlement Agreement, Plaintiff agreed to give up her rights to what appears to be the single largest asset of the marriage, the Marital Residence, as well as her rights in a vintage car, and received, in exchange, *8 Defendant's interest in the Teamsters Fund, which may be less than half the value of Plaintiff's interest in the Marital Residence. Petracca, 101 AD2d at 698 (wife demonstrated that terms of agreement were manifestly unfair given the nature and magnitude of rights she waived, giving rise to inference of overreaching); Pennise, 120 Misc 2d at 788-89; Christian, 42 NY2d at 71-72.

In short, Plaintiff has alleged concealment and transfer of marital assets by Defendant as well as an *ex parte* communication from the trial Judge's court attorney urging her to accept the terms, and, according to Plaintiff, the Agreement itself is unfairly lopsided in favor of Defendant. Any one of such allegations, if true, would permit this Court to find that it would be unconscionable to enforce the Settlement Agreement. Pennise, 120 Misc 2d at 788; Yuda, 143 AD2d at 659.

3. Defendant's Motion to Dismiss Plaintiff's Application for

Rescission on the Grounds of Repeated Breach is Granted

Although Plaintiff may seek to proceed on a breach of contract claim, the Court grants Defendant's motion to dismiss Plaintiff's claim for rescission on the grounds of breach of contract.

Rescission for a breach of contract is an extraordinary remedy that is only appropriate when the breach is material and willful or so substantial and fundamental that the breach goes to the root of the parties' agreement, frustrating the entire contract. Lenel Sys. Intl. v. Smith, 106 AD3d 1536, 1538 (4th Dept. 2013), citing Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co., 199 NY 268, 284 (1927). When the failure to perform does not go to the root of the contract, rescission is not an appropriate remedy. Rosenwasser v. Blyn Shoes, Inc., 246, NY 340, 348 (1927); Berit Realty, LLC v. Vortex Group, Inc., 2009 NY Slip Op. 31677U, 2009 NY Misc. Lexis 5387, *24-25 (Sup. Ct., New York Co. 2009); Morgan Stanley v. Discover Fin. Serv., 26 Misc 3d 1215A, 2010 NY Misc. Lexis 119, ***11-12 (Sup. Ct., New York Co. 2010).

Here, even if Defendant has repeatedly breached the parties' Settlement Agreement by failing to consistently pay monthly child support and failing to reimburse Plaintiff one third (1/3) of the unreimbursed medical expenses for the Subject Children, rescission of the entire agreement is not warranted.

The Settlement Agreement between the parties encompasses far more than the child support and "add on" obligations of Defendant to Plaintiff. The Settlement Agreement delineates the parties' rights and obligations *vis a vis* the division of assets and debts, bank accounts, stocks and bonds, as well as custody and visitation of the Subject Children. Thus, any breach by Defendant of his payment obligations, even if persistent, could not be said to be so fundamental as to frustrate the heart of the Settlement Agreement. Berit Realty, LLC, 2009 NY Misc. Lexis 5387, *24-25; Morgan Stanley, 2010 NY Misc. Lexis 119, ***11-12 (where alleged breach relates to only one provision of extensive agreement, and no showing that it goes to the root of the agreement, no rescission).

The Court also notes that the Settlement Agreement expressly provides that "[e]ach of the respective rights and obligations of the parties hereunder shall be deemed independent and may be enforced independently, irrespective of any other right and obligations set forth herein." Settlement Agreement, Article 16. Accordingly, *9 there can be no real dispute that the parties intended that each of the provisions of the Agreement could operate independent of the others such that no one clause or provision would constitute the root of the contract.

B. Plaintiff is Entitled to a Trial on the Issue of Whether the

Stipulation of Settlement Should be Rescinded or Reformed

For the reasons already articulated by this Court (see Section II.A.2, *supra*), Plaintiff is entitled to

proceed on the issue of whether the Settlement Agreement should be rescinded or reformed. Haberman v. Wright, 121 AD2d 187, 189 (1st Dept. 1986)(where factual issues exist as to whether agreement should be rescinded, trial court must resolve the issue); Metzendorf v. 130 West 57 Co., 132 AD2d 262, 266 (1st Dept. 1987)(where papers submitted on cross motions raise factual issues regarding the actual agreement, such issues may only be resolved at trial). Accordingly, Defendant's application for a declaratory judgment requiring Plaintiff to comply with those portions of the Judgment of Divorce and Settlement Agreement that require her to deliver a deed conveying her right, title and interest in the Marital Residence to Defendant is denied, without prejudice to Defendant's right to renew the application at the conclusion of the trial.

A conference is scheduled before this Court on October 15, 2013, at 9:30 a.m., to address the issue of discovery, if any. Upon completion of discovery, a trial will be ordered.

The Court considered the following in deciding the motion: Summons and Verified Complaint, filed under Index No. 2876-12, on April 23, 2011; Order to Show Cause, and Affirmation of David J. Whelan, Esq., in Support of Motion, filed February 28, 2013; Affidavit of D.R. in Opposition to Order to Show Cause, filed March 20, 2013; Reply Affirmation of David J. Whelan, Esq., in Reply to Opposition to Order to Show Cause, filed April 5, 2013.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

September 25, 2013

COLLEEN D. DUFFY

Justice of the Supreme Court

FOOTNOTES

FN1. Article 20 "Pension/Retirement Benefits" of the parties' Settlement Agreement also sets forth the parties' agreement as to the appropriate division of their respective retirement/pension accounts, carving out an exception for the Teamsters Local 456 Pension, which was to be distributed in its entirety, at least with respect to its value as of March 31, 2010, to Plaintiff. The Settlement Agreement mandates that each party is responsible for the cost and expense of a Qualified Domestic Relations Order for his/her respective share of the other party's qualified monies. Settlement Agreement, Article 20, ¶¶ B and C.

FN2. With respect to child support, the Settlement Agreement provides, in relevant part, as follows: C.(1) The parties hereto each warrant and represent that they are familiar with the provisions of the Domestic Relations Law Section 240 (1-b) statutory provision commonly known as the Child Support Standards Act of 1989 . . . and are aware that an award of child support in accordance with DRL Section 240(1-b) would be based on the following considerations: ****(b) the income of [Plaintiff], who is the custodial parent, is approximately \$31,0876.76 per year; (c) the income of [Defendant], who is the non-custodial parent, is approximately \$21,571.00 per year; (d) the applicable child support percentage is 29%; (e) Defendant's] basic support obligation is \$6261.01 per year; (f) The basic child support obligation as defined in DRL Section 240 (1-b) presumptively results in the correct amount of child support to be awarded; . . .

FN3. With respect to medical coverage, the parties' Settlement Agreement provides, in relevant part, that: [Plaintiff] will be responsible for two-thirds and [Defendant] will be responsible for one-third of any and all of the Children's health care expenses which are not covered by insurance, including but not limited to, hospital expenses, doctor

expenses, pharmaceutical expenses, dental expenses, orthodontia expenses, psychiatric expenses, psychological expenses, mental health care expenses, optometric expenses and ophthalmologic expenses. Settlement Agreement, Article 21.

Copr. (c) 2014, Secretary of State, State of New York

N.Y.Sup. 2013.

D.R. v M.R.

41 Misc.3d 1208(A), 977 N.Y.S.2d 666 (Table), 2013 WL 5509135 (N.Y.Sup.), 2013 N.Y. Slip Op. 51617(U)

Unreported Disposition

END OF DOCUMENT

Adobe Reader is required to view PDF images.



(c) 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

Arlene Harris, Special Counsel¹
Kaye Scholer LLP
425 Park Avenue
New York, New York 10022-3598
Tel: 212-836-8816
Fax: 212-836-6529
arlene.harris@kayescholer.com

New York County Lawyers
Drafting Prenuptial and Spousal
Settlement Agreements
June 13, 2014

Estate Planning Provisions in Prenuptial Agreements

- I. Background: Spousal Rights Under New York Law
(copies of the statutes listed in “a” through “d” are attached)
 - a. SCPA 1001: Primary right to serve as administrator of spouse’s estate if spouse dies intestate
 - b. EPTL 4-1.1: Right to share of property not disposed of by Will (the “intestate estate”)
 - i. If the spouse survives and issue survive, the spouse is entitled to \$50,000 plus 1/2 of the residue of the intestate estate, and the issue are entitled to the balance.
 - ii. If the spouse survives and no issue survive, the spouse is entitled to the entire intestate estate.
 - c. EPTL 5-1.1-A: Right of election
 - i. The greater of (i) \$50,000 and (ii) 1/3 of the decedent’s net estate, including testamentary substitutes.
 - d. EPTL 5-3.1: Family exemption property
 - i. Certain property - up to a specified monetary value - is not considered an asset of the decedent’s estate but instead vests in a surviving spouse. Examples: Housekeeping utensils, musical instruments, jewelry unless disposed of by Will, clothing, religious books, one motor vehicle, up to \$25,000 in value.

¹ Appreciation to Daniella Wittenberg, Kaye Scholer LLP for preparation of these materials.

e. But note:

i. EPTL 5-1.2, which disqualifies a husband or wife as a “surviving spouse” for purposes of the above EPTL sections, if:

1. A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died;

a. Case law: A post-death annulment will not disqualify a surviving spouse from the right of election, because the annulment was not “in effect when the deceased spouse died”. *Estate of Dominguez*, 2002 WL 31844696 (Sur. Ct. Bronx Co. 2002); *Parente v. Wenger*, 119 Misc.2d 758, (NY Sup. 1983).

2. The marriage was void as incestuous or bigamous;

3. The spouse had procured outside of New York state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of New York.

4. A final decree or judgment of separation, recognized as valid under the law of New York was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died.

5. The spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

6. A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.

ii. EPTL 5-1.4, which provides that a divorce, judicial separation or annulment of marriage revokes the following (unless the governing instrument provides otherwise):

1. A disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation

in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form;

2. A provision conferring a power or power of disposition on the former spouse, and
3. A nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.

II. Common Statutory Waivers in Prenuptial Agreements

- a. Waiver of right to Letters of Administration
- b. Waiver of right of election under EPTL 5-1.1-A
 - i. Note that the right of election can also be waived in a separate instrument. Any such waiver must be in writing, signed by the maker and acknowledged, and it may be executed either before or after the marriage. A waiver that is set forth in a prenuptial agreement must meet these same requirements, though it is possible for an improper acknowledgment on a prenuptial agreement to be cured after the death of a spouse. *See Estate of Menahem*, 13 Misc.3d 1226(A), 831 N.Y.S.2d 348 (Sur. Ct., Kings County 2006).
- c. Waiver of share of the property not disposed of by Will under EPTL 4-1.1
- d. Waiver of family exemption property under EPTL 5-3.1
- e. Waiver of the above rights, except to the extent of specific obligations created under the Agreement (see V, below)

III. Common General Waiver Provisions

- a. “Waiver of any right of election to take against the Will of the other party, or any Codicil thereto, and/or any testamentary substitutes; without restricting the generality of the foregoing, said waiver shall apply with respect to dower, curtesy and any elective share under Section 5-1.1-A of the Estates, Powers and Trusts Law of the State of New York (or under the laws of any other jurisdiction that may control the disposition of the other's property)”
- b. “Waiver of any right to take any intestate share, homestead allowance, family allowance, distributive share or other statutory allowance of any kind in the estate

of the other party under the laws of the State of New York (or under the laws of any other jurisdiction that may control the disposition of the other Party's property).”

- c. “Waiver of any right to receive payments under any pension, retirement, death benefit, stock bonus, profit-sharing plan or other employee benefit plan with respect to which the other party is a participant or member, under any Individual Retirement Account held in the name of the other party or under any policy of insurance on the life of the other party.”
- d. “Waiver of any claim to a community property interest in Separate Property held by the other party.”
- e. “Agree to refrain from any action or proceeding which might tend to void or nullify all or part of the terms of the other party’s Will or any other testamentary provision which disposes of his or her assets.”

IV. Common Preservation of Rights Provisions

- a. Preserve right to receive voluntary bequests under Will of the other party as well as lifetime gifts from the other party.
- b. Preserve right to be named Executor or Trustee in a testamentary document.

V. Agreement Can Impose Obligations at Death

- a. Moneyed spouse can be required to execute a Will (or other testamentary document) containing specific terms within a certain time frame (for example, within 120 days of executing the Agreement) and can be required to maintain such document until his or her death. The Agreement should make clear that if a Termination Event occurs, the moneyed spouse is no longer required to maintain such document.
- b. When drafting his or her Will, a spouse can always leave the other spouse more than what is required by the prenuptial agreement.
- c. Examples of Bequests Required by Agreement
 - i. One-third of net estate to poorer spouse outright.
 - ii. One-third of net estate to poorer spouse in trust. This enables the moneyed spouse to control the ultimate disposition of the assets after the spouse’s death. This does not satisfy the right of election.
 - iii. One-third of net estate plus primary residence to poorer spouse.

- iv. Primary residence to poorer spouse plus, if the parties have minor children, one secondary residence of the poorer spouse's choosing.

d. Primary Residence - Outright or in Trust

- i. Moneyed spouse can agree to give the other spouse the parties' primary residence either outright or in a trust that gives the spouse a life interest in the residence and names the children as remainder beneficiaries.

e. Life Insurance - Outright or in Trust

- i. Moneyed spouse can be required to purchase and maintain one or more policies on his or her life naming the spouse as outright beneficiary, or as primary beneficiary of life insurance trust. A trust enables the moneyed spouse to control the ultimate disposition of the assets after the spouse's death.
- ii. The Agreement should provide that upon a Termination Event, the moneyed spouse's obligation to maintain such policy or policies ceases.

iii. Sample Language

“Within one hundred twenty (120) days of the signing of this Agreement, JOHN shall establish a trust for the primary benefit of JANE, the terms of which shall be reviewed by JANE prior to execution and subject to her consent (except as set forth in the last sentence of this paragraph), for the purpose of owning and being the beneficiary of one or more life insurance policies on the life of JOHN with a minimum total death benefit of One Million Dollars (\$1,000,000) (the “Minimum Total Death Benefit”). Unless JANE otherwise agrees, the trust shall provide that in the absence of a Termination Event, the insurance proceeds will be paid to JANE outright and free of trust within thirty (30) days of JOHN's death. JOHN shall provide such trust with sufficient funds, which may be paid from Marital Property, to purchase and maintain such insurance with the Minimum Total Death Benefit throughout the parties' marriage. Notwithstanding the foregoing, such trust shall provide that upon the occurrence of a Termination Event, as defined herein, such trust may cause such insurance policy to lapse or otherwise terminate such policy and that any cash or other value payable to such trust upon lapse or termination of the policy or upon the death of the insured may be disposed of for other than the benefit of JANE.”

- f. Note: Once the Agreement has been signed, the parties' Wills and Revocable Trusts should reference the Agreement and should state that the provisions of the Agreement are being satisfied in the Will/Revocable Trust. For example:

“My wife and I entered into a Prenuptial Agreement dated [] (“Prenuptial Agreement”) and were subsequently married. Pursuant to the provisions of the Prenuptial Agreement, I am required to make certain provisions to or for the benefit of my wife. The provisions I am making to or for my wife’s benefit in this my last will and testament are intended to satisfy in full all of my obligations to my wife under the Prenuptial Agreement. To the extent that any obligations I may have to my wife under the Prenuptial Agreement are not satisfied, I hereby authorize and direct my Executor to satisfy such obligations.”

VI. Considerations

a. Funding the Bequest where Assets are Closely Held

- i. Provide that the Executor of the estate, or the Trustees of the revocable trust, as the case may be, can determine the specific property used to fund the bequest, however make clear that, for example, “in no event shall more than ten percent (10%) of the bequest be funded with any interest in a closely held or non-public corporation, a partnership or a limited liability company. In addition, if any interest in such corporation, partnership, limited liability company or other entity is used to partially fund the bequest, only the ‘economic interest’ (e.g., the right to share in profits, losses, tax credits, etc.) associated with any such interest shall be bequeathed, and in no event shall the receiving spouse be entitled to qualify as a voting shareholder, a partner or a member in any such entity.” Further provide that any voting rights attributable to such bequeathed interests shall pass as part of the moneyed spouse’s residuary estate unless otherwise specifically provided in his or her Will or revocable trust.

b. Estate taxes

- i. Can include provision stating that no estate or inheritance taxes of whatever kind, whether federal or state, imposed by reason of the moneyed spouse’s death shall be charged against the bequest to the poorer spouse.

c. Retirement Assets

- i. If a payment settlement will be funded with retirement assets, there may be potential tax/penalty consequences. Consider having the parties agree to a Qualified Domestic Relations Order, or QDRO.

d. Attorney Conflict Issues

Come Live With Me and Be my Love... But Sign This Prenup First!

Because June is the preferred month for weddings and because the subject of prenuptial agreements commonly surfaces shortly before the wedding, we submit this article for the benefit of the bar and the public.

Prenuptial and postnuptial agreements have been commonly endorsed because they often serve the important function of providing financial protection and certainty in the event of divorce or death. They are particularly appropriate when older or previously divorced couples seek to provide that in the event of divorce or death their property goes to their children or grandchildren rather than the other parties' children.¹

However, notwithstanding the positive gains to the parties who successfully enter into such agreements, others less fortunate have encountered bitter and expensive litigation where the enforceability of such agreements has been attacked. Was the agreement entered into under "duress?" Was there adequate disclosure of the parties' assets? Did the parties have the advice of counsel and understand the provisions of the agreement? Was the agreement unconscionable under the circumstances?

Throughout the United States and here in New York, there are no clearly defined or absolute criteria to ensure the enforcement of such agreements. An agreement that may be found enforceable in one state may not survive in another. And here in New York the same agreement may be found valid by one judge yet subject to vacatur by another.

The uncertainty of enforcement of these agreements results from conflicting policies concerning them. First and foremost is the historic American philosophy of freedom of contract—the par-

By
Sondra
Miller



ties should be free to enter into an agreement unguided by judicial or legislative preferences and perspectives.² Mitigating that principle is the obvious difference between marital agreements and commercial contracts: Many courts have recognized that parties to prenuptial and postnuptial agreements are in a significantly different posture than those entering into commercial agreements. Some courts have held that these parties enjoy a confidential personal relationship—one of a fiduciary nature—and that a higher level of

Throughout the United States and in New York, there are no clearly defined or absolute criteria to ensure the enforcement of prenuptial and postnuptial agreements.

conduct, fairness and disclosure should be required of them.

The subject of prenuptial agreements has been carefully considered by several commissions over the years. Prior to 1970, U.S. courts held that agreements "contemplating divorce" were unenforceable. The rationale was that contracts that make provisions for divorce violate public policy by allowing for the evasion of the spousal duty of support, degrading marriage, and encouraging the procurement of divorce. Before 1970, prenuptial agreements were limited to the distribution of the property at the time of death of a party.

However, in *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), in response to the country's growing divorce rate, the Florida Supreme Court held that prenuptial agreements settling the alimony and

property rights of parties upon divorce should be held valid, as long as they do not induce separation or divorce. In its reasoning the court took "judicial notice" of the fact that the ratio of marriages to divorces had reached a "disturbing rate." Following the Posner decision, jurisdictions throughout the United States began to accept the idea that prenuptial agreements could be used in contemplation of divorce.

Efforts Toward Fairness

In 1983, the Uniform Premarital Agreement Act (UPAA) was drafted by the National Conference of Commissioners on Uniform State Laws.³ It has been enacted in some form by 26 states,⁴ but has faced criticism for failing to sufficiently protect vulnerable parties.⁵ It does not require that parties retain counsel or have the opportunity to consult counsel or understand the nature of the rights waived.

In 2012 the Uniform Premarital and Marital Agreement Act (UPMAA) was approved by the Uniform Law Commission.⁶ It requires that each party have access to independent legal counsel in order for an agreement to be enforceable, thereby strengthening the protection of the more vulnerable party.

There has been a movement in the United States and internationally to require that independent counsel must be employed in order for these agreements to be enforceable, e.g., Washington and California (in the United States), and New Zealand, Australia and Canada. California was the first state to enact the UPAA in 1985. California's Legislature amended that state's version to include voluntariness after the famous *In re Marriage of Bonds*⁷ case. That court cited factors relevant to such agreements: i.e. inequality and bargaining power, coercion, the timing before the wedding, the presence of independent counsel and whether independent counsel was an important factor.

Under California's new provisions, a premarital agreement is executed involuntarily unless the court finds that:

SONDRA MILLER is chief counsel at McCarthy Fingar in White Plains and a former justice of the Appellate Division, Second Department. SANDRA KENNEDY, a law student, assisted in the preparation of this article.

Prenup

«Continued from page 4»

1. The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

2. The party against whom enforcement is sought did not have less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

3. The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

4. The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence and the parties did not lack capacity to enter into the agreement.

5. Any other factors the court deems relevant.

According to the legislative history of the amendment, supporters believed that representation by independent counsel is the greatest guarantee that a party is informed of his or her rights, understands the terms and effect of an agreement, and

enters into that agreement free of coercion.

The Status in New York

On March 14, 2013, the New York Law Journal published an Associated Press article pertaining to prenuptial agreements. The article began: "Beating a prenup? Can't be done." However, it proceeded to state that the prevailing view was somewhat shaken by the publication of *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dept. 2013). Leave to the Court of Appeals was denied. In that case the appellate court unanimously affirmed Justice Anthony Falanga (Supreme Court, Nassau County) setting aside the agreement, finding that the wife had been fraudulently coerced into signing it. She had signed the prenup four days prior to the parties' wedding, and agreed to do so only after her fiancée promised that he would tear it up once they had children (both had had legal representation). The court found the husband to be lacking in credibility.

Prior to that case, the Appellate Division, Second Department, had affirmed the Supreme Court in *Petracca v. Petracca*, 101 AD3d 695 (2d Dept. 2012), where a postnuptial agreement signed three months after the marriage was vacated, relying on *Christian v. Christian*, 42 NY2d 63 (1977), for the proposition that "an agreement between spouses or prospective spouses may be vacated if the party contesting it demonstrates that it was a product of fraud, duress or other inequitable conduct."

Clearly, the facts in *Petracca* cried out for redress. The wife had signed the postnuptial agreement shortly after her 42nd birthday when she had suffered a miscarriage. Her husband threatened that if she failed to sign the agreement she would never have children and their marriage would be over.

Subsequent to the publication of *Cioffi-Petrakis* in 2013, several well-known matrimonial attorneys expressed dismay, fearing its major implications, i.e., that it would spawn much litigation and destabilize the enforcement of these agreements. Fortunately, these forebodings have not come to pass. As Raoul Felder predicted in the AP article cited above, "most lawyers are very careful. A good

prenuptial agreement will last." It was wisely stated by the Supreme Court, Nassau County, in C.S. 07LS, 202692/2012, NYLJ 1202610051412, at *1 (June 6, 2013), while vacating a prenuptial agreement—"To those who fear that setting aside agreements as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement, with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party particularly destitute, it will be upheld."

In addition to following that sound advice, we urge the New York bar to promote legislation following the example of California, providing, inter alia, that parties to a prenuptial agreement are either represented by independent legal counsel, or expressly waive that right.⁸ The proposed solution is twofold: (1) Representation by independent counsel ensures that each party's consent is informed and creates more equality in the bargaining process; (2) Agreements involving independent counsel are more likely to be held enforceable in court, which promotes predictability and the public policy favoring enforcement.⁹

A seven-day "cooling-off" period between the presentation of an agreement and its execution ensures that the party to whom the agreement is presented has a sufficient amount of time to make important considerations, including whether to: retain counsel; ask for modifications; postpone the marriage; or refuse to sign it.¹⁰ Importantly, the allowance for waiver of independent counsel, as long as the waiving party is fully informed, preserves the party's freedom of contract while guaranteeing that he or she knows the terms of the contract and consents to them.¹¹

The cost of a prenuptial agreement may be viewed as that of travel insurance—reference to it may in some instances not be required. However, when required,

an agreement entered into in compliance with the standards advocated above may well avoid major costs and anguish to the parties and their families, and also serve to relieve the burdens of the courts.

Literary Note

Caution has always played a role when it comes to matters of the heart. In the 16th century, Sir Walter Raleigh's rejection (1599) of Christopher Marlowe's beautiful invitation (1593) is a cautionary note to those who approach their nuptials with confidence that "amor omnia vincit," i.e. "love conquers all" and there is no need for a prenuptial agreement.

Marlowe's Song: The Passionate Shepherd To His Love; Before 1593

COME live with me,
and be my love;
And we will
all the pleasures prove
That hills and valleys,
dates and fields,
Woods, or steepy
mountain yields.

And we will sit
upon the rocks,
Seeing the shepherds
feed their flocks
By shallow rivers,
to whose falls
Melodious birds sing
madrigals.

And I will make thee
beds of roses,
And a thousand
fragrant posies;
A cap of flowers,
and a kirtle
Embroidered all
with leaves of myrtle;

A gown made
of the finest wool
Which from our
pretty lambs we pull;
Fair-lined slippers
for the cold,
With buckles
of the purest gold;

A belt of straw
and ivy-buds,
With coral clasps
and amber-studs:
And if these pleasures

may thee move,
Come live with me,
and be my love.

The shepherd-swains
shall dance and sing
For thy delight
each May-morning;
If these delights
thy mind may move,
Then live with me,
and be my love

Raleigh's Reply: Before 1599

If all the world
and love were young,
And truth in every
shepherd's tongue,
These pretty pleasures
might me move
To live with thee
and be thy love.

But time drives flocks
from field to fold,
When rivers rage
and rocks grow cold;
And Philomel
becometh dumb;
The rest complains
of cares to come:

The flowers do fade,
and wanton fields
To wayward winter
reckoning yields:
A honey tongue,
a heart of gall,
Is fancy's spring,
but sorrow's fall.

Thy gowns, thy shoes,
thy beds of roses,
Thy cap, thy kirtle,
and thy posies,
Soon break, soon wither,
soon forgotten,—
In folly ripe, in reason rotten.

Thy belt of straw
and ivy-buds,
Thy coral clasps
and amber studs,—
All those in me
no means can move
To come to thee
and be thy love.

But could youth last,
and love still breed;
Had joys no date,
nor age no need,
Then those delights
my mind might move

To live with thee

and be thy love

1. According to a Harris Interactive poll of 2,323 adults in 2010, approximately 3 percent of people with a spouse or fiancé in the United States have a prenuptial agreement. That number is significantly up from the 1 percent recorded in a similar 2002 poll. Recent marital trends have shown an increase in the ages of marrying couples and the number of second and third marriages. These trends suggest that people are entering into marriages with more assets. Laura Petrecca, "Prenuptial Agreements: Unromantic, But Important," USA Today (March 11, 2010), http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_CV_N.htm.

In a recent poll of the American Academy of Matrimonial Lawyer members, 73 percent of divorce attorneys cited an increase in prenuptial agreements in the past five years. Fifty-two percent of those surveyed noted an increase in women initiating the requests, while 36 percent cited an increase in pensions and retirement benefits being included under prenuptial agreements.

As these trends demonstrate, people are marrying and remarrying later in life, and prenuptial agreements provide a way for those parties to protect their assets. American Academy of Matrimonial Lawyers, Press Release, Big Rise in Prenuptial Agreements, Says Survey of Nation's Top Divorce Lawyers, Sept. 22, 2010, available at <http://www.aaml.org/about-the-academy/press-press-releases/pre-post-nuptial-agreements/blg-rise-prenuptial-agreements-sa>.

2. Elliott Scheinberg, NYSBA, "Contract Doctrine and Marital Agreements in New York," Vol. Two, Ch. 41.

3. UNIF. PREMARITAL AGREEMENT ACT, §3, 9B U.L.A. 373-74 (2001 & Supp. 2012).

4. Thirteen states have adopted the UPAA without any significant changes: ARIZ. REV. STAT. ANN. §25-201 (2011); ARK. CODE ANN. §9-11-401 (West 2009); DEL. CODE ANN. TIT. 13, §321 (West 2009); HAW. REV. STAT. §572D-1 (West 2010); IDAHO CODE ANN. §32-921 (West 2006); 750 ILL. COMP. STAT. ANN., 40/2601 (West 2011); KAN. STAT. ANN. §23-801 (West 2007); MONT. CODE ANN. §40-2-601 (West 2011); NEB. REV. STAT. §42-1001 (2011); N.C. GEN. STAT. ANN. §52B-1 (West 2010); OR. REV. STAT. §108.700 (2009); TEX. FAM. CODE ANN. §4.001 (West 2011); VA. CODE ANN. §20-147 (West 2011); D.C. CODE §46-501 (2005). Twelve states adopted the UPAA after significant revisions: CAL. FAM. CODE §1600 (West 2009); CON. GEN. STAT. ANN. §46b-36a-j (West 2008); FLA. STAT. ANN. §61.079; IND. CODE ANN. §31-11-3-1 (West 2009); IOWA CODE ANN. §596.1 (West 2009); 19A ME. REV. STAT. ANN. §601-1:1 (2008); NEV. REV. STAT. ANN. §123A.010 (West 2009); N.J. STAT. ANN. §37-2-31 (West 2009); N.M. STAT. ANN. §40-3A-1 (West 2009); N.D. CENT. CODE §14-03.1-01 (2009); R.I. GEN. LAWS §15-17-1 (2009); S.D. CODIFIED LAWS §25-2-16 (2009).

5. J. Thomas Oldham, "With All My Worldly Good I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 DUKE J. GENDER L. & POL'Y 83, 84 (2011).

6. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (2012), §9(a)(2).

7. 5 P.3d 815 (Cal. 2000).

8. CAL. FAM. CODE §1615(c) (West 2002).

9. Sandra Kennedy, "Ignorance Is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements," 52 FAM. CT. REV. (forthcoming Oct. 2014).

10. Oldham, *supra* note 6, at 118.

11. CAL. FAM. CODE §1615(c) (West 2002).

▷

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness

Surrogate's Court Procedure Act (Refs & Annos)

[§] Chapter 59-A. Of the Consolidated Laws (Refs & Annos) [§] Article 10. Intestate Administration (Refs & Annos) → → **§ 1001. Order of priority for granting letters of administration**

1. Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:

(a) the surviving spouse,

(b) the children,

(c) the grandchildren,

(d) the father or mother,

(e) the brothers or sisters,

(f) any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as hereinafter provided:

(i) Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons.

(ii) If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county.

2. If the sole distributee has died or is an infant, incompetent or conservatee, his fiduciary, committee or conservator, if he is eligible and qualifies shall be granted letters of administration. The court may deny letters to a guardian or committee of the person only.

3. (a) Where all the distributees have died or are infants, incompetents or conservatees the court may grant letters of administration to a fiduciary, committee or conservator of a deceased distributee or infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.

(b) Where all such distributees are equally entitled to share in the estate the court may grant letters of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

4. (a) Where a distributee who has died or is an infant, incompetent or conservatee would have had a prior right to letters of administration except for his death or disability the court may grant letters to his fiduciary, committee or conservator, if he is eligible and qualifies.

(b) Where no eligible distributee having a prior or equal right to letters of administration will accept the same and there are distributees who have died or are infants, incompetents or conservatees the court may grant letters to a fiduciary, committee or conservator of a deceased distributee, infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.

(c) Where all such distributees who have died or are infants, incompetents or conservatees in the circumstances of subdivision 4(b) are equally entitled to share in the estate the court may grant letters of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

5. Upon the petition of a distributee having a prior or equal right to letters of administration the court may grant letters jointly to an eligible distributee or distributees and to one or more eligible persons whether distributees or not, including a trust company or other corporation authorized to act as fiduciary. Such joint fiduciaries shall be entitled to commissions as authorized by 2307.

6. Letters of administration may be granted to an eligible distributee or to an eligible person who is not a distributee upon the acknowledged and filed consents of all eligible distributees, or if there are no eligible distributees, then on the consents of all distributees, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the State of New York may so consent on behalf of his ward.

7. Letters of administration may be granted to a trust company or other corporation authorized to act as fiduciary upon the acknowledged and filed consents of all distributees inclusive of those who may be non-domiciliary aliens, provided that all such persons are otherwise eligible, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the state of New York may so consent on behalf of his ward.

8. When letters are not granted under the foregoing provisions and an appointment is not made by consent as hereinbefore provided then letters of administration shall be granted in the following order:

(a) to the public administrator, or the chief fiscal officer of the county, or

(b) to the petitioner, in the discretion of the court, or

(c) to any other person or persons.

9. Letters of administration may be granted by the court in any case in which a paper writing purporting to be a will has been filed in the court and proceedings for its probate have not been instituted within a reasonable time or have not been diligently prosecuted.

CREDIT(S)

(L.1966, c. 953. Amended L.1967, c. 685, § 45; L.1968, c. 267; L.1969, c. 772, § 6; L.1971, c. 344, § 2; L.1981, c. 115, §§ 117 to 120; L.1992, c. 595, § 22; L.1993, c. 514, § 27.)

HISTORICAL AND STATUTORY NOTES

L.1993, c. 514 legislation

Subd. 6. L.1993, c. 514, §27, authorized the granting of letters based on the consents of all distributees if there are no eligible distributees and substituted “filed consents of all eligible distributees,” for “filed consents of all distributees, provided all such distributees are themselves eligible”.

Subd. 8, par. (b). L.1993, c. 514, § 27, inserted “or” following “of the court.”.

Derivation

Subds. 1 to 6. S.C.A.1920, § 118, amended L.1921, c. 201; L.1923, c. 214; L.1925, c. 574; L.1938, c. 191; L.1943, c. 365.

C.C.P.1876, § 2660, added L.1893, c. 686; amended L.1894, c. 503; L.1897, c. 177; L.1909, c. 65; L.1913, c. 403, originally revised from R.S., pt. 2, c. 6, tit. 2, §§ 27 to 29, 33, 34; L.1867, c. 782, § 6. C.C.P. § 2660 was revised to 2588 by L.1914, c. 443.

Subd. 7. Banking Law, § 100-a(2), added L.1937, c. 319; amended L.1948, c. 221; L.1966, c. 961.

Subd. 8. See note for subds. 1 to 6, ante.

Subd. 9. New.

**Effective:[See Text Amendments]**

McKinney's Consolidated Laws of New York Annotated Currentness

Estates, Powers and Trusts Law (Refs & Annos)

Chapter 17-B. Of the Consolidated Laws

▣ Article 4. Descent and Distribution of an Intestate Estate (Refs & Annos)

▣ Part 1. Rules Governing Intestate Succession

→→ § 4-1.1 Descent and distribution of a decedent's estate

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.

(b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.

(d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

CREDIT(S)

(L.1966, c. 952, Amended L.1967, c. 686, § 27; L.1969, c. 596; L.1971, c. 68; L.1974, c. 903, § 2; L.1978, c. 423, § 1; L.1992, c. 595, § 8.)

HISTORICAL AND STATUTORY NOTES

L.1992, c. 595 legislation

Opening paragraph. L.1992, c. 595, § 8, eff. Sept. 1, 1992, rewrote the opening paragraph, which previously read:

“The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:”

Subd. (a), par. (1). L.1992, c. 595, § 8, eff. Sept. 1, 1992, rewrote par. (1), which previously read:

“A spouse and children or their issue, money or personal property not exceeding in value four thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes”.

Subd. (a), par. (2). L.1992, c. 595, § 8, eff. Sept. 1, 1992, redesignated former par. (5) as par. (2), and deleted “or parent” following “no issue”; former par. (2) read as follows:



Effective: January 1, 2011

McKinney's Consolidated Laws of New York Annotated Currentness

Estates, Powers and Trusts Law (Refs & Annos)

Chapter 17-B. Of the Consolidated Laws

▣ Article 5. Family Rights

▣ Part 1. Rights of Surviving Spouse

→ → § 5-1.1-A Right of election by surviving spouse

(a) Where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(1) For the purpose of this section, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b)(1).

(2) The elective share, as used in this paragraph, is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate. In computing the net estate, debts, administration expenses and reasonable funeral expenses shall be deducted, but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

(3) The term "testamentary provision", as used in this paragraph, includes, in addition to dispositions made by the decedent's will, distributions of property pursuant to 4-1.1 and any transaction described as a testamentary substitute in subparagraph (b)(1).

(4) The share of the testamentary provisions to which the surviving spouse is entitled hereunder (the "net elective share") is his or her elective share, as defined in subparagraphs (1) and (2), reduced by the capital value of any interest which passes absolutely from the decedent to such spouse, or which would have passed absolutely from the decedent to such spouse but was renounced by the spouse, (i) by intestacy, (ii) by testamentary substitute as described in subparagraph (b)(1), or (iii) by disposition under the decedent's last will.

(A) Unless the decedent has provided otherwise, if a spouse elects under this section, such election shall have the same effect with respect to any interest which passes or would have passed to the spouse, other than absolutely, as though the spouse died on the same date but immediately before the death of the decedent.

(B) For the purposes of this subparagraph (4), (i) an interest in property shall be deemed to pass other than absolutely from the decedent to the spouse if the interest so passing consists of less than the decedent's entire interest in that property or consists of any interest in a trust or trust equivalent created by the decedent; and (ii) an interest in property shall be deemed to pass absolutely from the decedent to the spouse if it is not deemed to pass other than absolutely.

(5) Where a decedent dies before September first, nineteen hundred ninety-four, paragraphs (c)(1)(D) through (c)(1)(K) of section 5-1.1 shall apply except that the words "fifty thousand dollars" shall be substituted for the words "ten thousand dollars" wherever they appear in such paragraphs.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred ninety-two and is survived by a spouse who exercises a right of election under paragraph (a), the transactions affected by and property interests of the decedent described in clauses (A) through (H), whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, shall be included in the net estate subject to the surviving spouse's elective right except to the extent that the surviving spouse has executed a waiver of release pursuant to paragraph (e) with respect thereto. Notwithstanding the foregoing, a transaction, other than a transaction described in clause (G), that is irrevocable or is revocable only with the consent of a person having a substantial adverse interest (including any such transactions with respect to which the decedent retained a special power of appointment as defined in 10-3.2), will constitute a testamentary substitute only if it is effected after the date of the marriage.

(A) Gifts causa mortis.

(B) The aggregate transfers of property (including the transfer, release or relinquishment of any property interest which, but for such transfer, release or relinquishment, would come within the scope of clause (F)), other than gifts causa mortis and transfers coming within the scope of clauses (G) and (H), to or for the benefit of any person, made after August thirty-first, nineteen hundred ninety-two, and within one year of the death of the decedent, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for such transfers; provided, however, that any portion of any such transfer that was excludible from taxable gifts pursuant to subsections (b) and (e) of section two thousand five hundred three of the United States Internal Revenue Code, [FN1] including any amounts excluded as a result of the election by the surviving spouse to treat any such transfer as having been made one half by him or her, shall not be treated as a testamentary substitute.

(C) Money deposited, together with all dividends or interest credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends or interest credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the

deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(E) Any disposition of property made by the decedent whereby property, at the date of his or her death, is held (i) by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety where the disposition was made after August thirty-first, nineteen hundred sixty-six, or (ii) by the decedent and is payable on his or her death to a person other than the decedent or his or her estate.

(F) Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that the decedent (i) after August thirty-first, nineteen hundred ninety-two, retained for his or her life or for any period not ascertainable without reference to his or her death or for any period which does not in fact end before his or her death the possession or enjoyment of, or the right to income from, the property except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth; or (ii) at the date of his or her death retained either alone or in conjunction with any other person who does not have a substantial adverse interest, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this subparagraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death nor shall they impair or defeat any right which has vested on or before August thirty-first, nineteen hundred ninety-two.

(G) Any money, securities or other property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, except that with respect to a plan to which subsection (a)(11) of section four hundred one of the United States Internal Revenue Code [FN1] applies or a defined contribution plan to which such subsection does not apply pursuant to paragraph (B)(iii) thereof, only to the extent of fifty percent of the capital value thereof. Notwithstanding the foregoing, a transaction described herein shall not constitute a testamentary substitute if the decedent designated the beneficiary or beneficiaries of the plan benefits on or before September first, nineteen hundred ninety-two and did not change such beneficiary designation thereafter.

(H) Any interest in property to the extent the passing of the principal thereof to or for the benefit of any person was subject to a presently exercisable general power of appointment, as defined in section two thousand forty-one of the United States Internal Revenue Code, [FN1] held by the decedent immediately before his or her death or which the decedent, within one year of his or her death, released (except to the extent such release results from a lapse of the power which is not treated as a release pursuant to section two thousand forty-one of the United States Internal Revenue Code) or exercised in favor of any person other than himself or herself or his or her estate.

(I) A transfer of a security to a beneficiary pursuant to part 4 of article 13 of this chapter.

(2) Transactions described in clause (D) or (E) (i) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property described in clause (E) (i) was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution; provided, however, that where the surviving spouse is the other party to

the transaction, it will be conclusively presumed that the proportion of the decedent's contribution is one-half. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(3) The property referred to in clause (E) shall include United States savings bonds and other United States obligations.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction. A corporation or other person paying or transferring any funds or property described in clause (G) of subparagraph one of this paragraph to a person otherwise entitled thereto, shall be held harmless and free from any liability for making such payment or transfer, in any action or proceeding which involves such funds or property. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his or her right of election under paragraph (a). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a defense, during the effective period of the order, in any action or proceeding which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1) of this paragraph, this paragraph controls.

(7) If any part of this section is preempted by federal law with respect to a payment or an item of property included in the net estate, a person who, not for value, received that payment or item of property is obligated to return to the surviving spouse that payment or item of property or is personally liable to the surviving spouse for the amount of that payment or the value of that item of property, to the extent required under this section.

(c) General provisions governing right of election.

(1) Where an election has been made under this section, the will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted, and the terms of such will or instrument remain otherwise effective so far as possible, subject, however, to the provisions of clause (a)(4)(A).

(2) Except as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the share to which the surviving spouse is entitled shall be made by the beneficiaries and distributees (including the recipients of any such testamentary provision), other than the surviving spouse, under the decedent's will, by intestacy and other instruments making testamentary provisions, which contribution may be made in cash or in the specific property received from the decedent by the person required to make such contribution or partly in cash and

partly in such property as such person in his or her discretion shall determine.

(3) The right of election is personal to the surviving spouse, except that an election may be made by:

(A) The guardian of the property of an infant spouse, when so authorized by the court having jurisdiction of the decedent's estate.

(B) The committee of an incompetent spouse, when so authorized by the court that appointed the committee.

(C) The conservator of a conservatee spouse, when so authorized by the court that appointed the conservator.

(D) The guardian ad litem for the surviving spouse when so authorized by the court that appointed such guardian.

(E) A guardian authorized under Article 81 of the mental hygiene law, when so authorized by the court that appointed the guardian.

(4) Any question arising as to the right of election shall be determined by the court having jurisdiction of the decedent's estate in a proceeding brought for that purpose on notice to all interested persons in such manner as the court may direct, or in a proceeding for the judicial settlement of the accounts of the personal representative.

(5) Upon application by a surviving spouse who has made an election under this section, the court may make an order cancelling such election, provided that no adverse rights have intervened and no prejudice is shown to creditors of such spouse or other persons interested in the estate. Such application shall be made on notice to such persons and in such manner as the court may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of the county in which any real property of the decedent is situated.

(6) The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent has elected, under paragraph (h) of 3-5.1, to have the disposition of his or her property situated in this state governed by the laws of this state.

(7) The decedent's estate shall include all property of the decedent wherever situated.

(8) An election made by the surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(9) The references in this paragraph to sections of the United States Internal Revenue Code [FN1] are to the Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(d) Procedure for exercise of right of election.

(1) An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Such notice may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation required by section 708 of the surrogate's court procedure act or in such other manner as the surrogate may direct.

(2) The time to make such election may be extended before expiration by an order of the surrogate's court from which such letters issued for a further period not exceeding six months upon any one application. If the spouse defaults in filing such election within the time provided in subparagraph (1) of this paragraph, the surrogate's court may relieve the spouse from such default and authorize the making of an election within the period fixed by the order, provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of the letters, and two years have not elapsed since the decedent's date of death, in the case of initial application; except that the court may, in its discretion for good cause shown, extend the time to make such election beyond such period of two years. An application for relief from the default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of each county in which real property of the decedent is situated.

(3) The time limited in this paragraph for making an election is exclusive and shall not be suspended or otherwise affected by any provision of law, except that the surrogate may, in his or her discretion, permit an election to be made in behalf of an infant or incompetent spouse at any time up to, but no later than, the entry of the decree of the first judicial account of the representative of the estate, made more than seven months after the issuance of letters.

(e) Waiver or release of right of election.

(1) A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b)(1) made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

(3) Such a waiver or release is effective, in accordance with its terms, whether:

- (A) Executed before or after the marriage of the spouses.
- (B) Executed before, on or after September first, nineteen hundred sixty-six.
- (C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.
- (D) Executed with or without consideration.
- (E) Absolute or conditional.

(4) If there is in effect at the time of the decedent's death a waiver, or a consent to the decedent's waiver, executed by the surviving spouse with respect to any survivor benefit, or right to such benefit, under subsection (a)(11) of section four hundred one or section four hundred seventeen of the United States Internal Revenue Code, [FN1] then such waiver shall be deemed to be a waiver within the meaning of this paragraph (e) against the testamentary substitute constituting such benefit.

CREDIT(S)

(Added L.1992, c. 595, § 10, eff. Sept. 1, 1992. Amended L.1993, c. 515, § 3; L.2005, c. 325, § 6, eff. Jan. 1, 2006; L.2010, c. 545, § 1, eff. Jan. 1, 2011.)

[FN1] For Internal Revenue Code provisions, see 26 USCA § 1 et seq.

HISTORICAL AND STATUTORY NOTES

L.2010, c. 545 legislation

Par. (d), subpar. (1). L.2010, c. 545, § 1, rewrote subpar. (1), which had read:

“(1) An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death. Such notice may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation required by SCPA 708 or in such other manner as the surrogate may direct.”

C**Effective: January 1, 2011**

McKinney's Consolidated Laws of New York Annotated Currentness

Estates, Powers and Trusts Law (Refs & Annos)

Chapter 17-B. Of the Consolidated Laws

Article 5. Family Rights

Part 3. Rights of Family Unit

→→ § 5-3.1 Exemption for benefit of family

(a) If a person dies, leaving a surviving spouse or children under the age of twenty-one years, the following items of property are not assets of the estate but vest in, and shall be set off to such surviving spouse, unless disqualified, under 5-1.2, from taking an elective or distributive share of the decedent's estate. In case there is no surviving spouse or such spouse, if surviving, is disqualified, such items of property vest in, and shall be set off to the decedent's children under the age of twenty-one years:

(1) All housekeeping utensils, musical instruments, sewing machine, jewelry unless disposed of in the will, clothing of the decedent, household furniture and appliances, electronic and photographic devices, and fuel for personal use, not exceeding in aggregate value twenty thousand dollars. This subparagraph shall not include items used exclusively for business purposes.

(2) The family bible or other religious books, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices, including but not limited to videotapes, used by such family, not exceeding in value two thousand five hundred dollars.

(3) Domestic and farm animals with their necessary food for sixty days, farm machinery, one tractor and one lawn tractor, not exceeding in aggregate value twenty thousand dollars.

(4) The surviving spouse or decedent's children may acquire items referred to in subparagraphs (1), (2) and (3) of this paragraph, in excess of the values set forth in such subparagraphs by payment to the estate of the amount by which the value of the items acquired exceeds the amounts set forth in such subparagraphs. If any item so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate for such item shall vest in the specific legatee.

(5) One motor vehicle not exceeding in value twenty-five thousand dollars. In the alternative, if the decedent shall have been the owner of one or more motor vehicles each of which exceed twenty-five thousand dollars in value, the

surviving spouse or decedent's children may acquire one such motor vehicle from the estate, regardless of the fact that the decedent may also have been the owner of another motor vehicle of lesser value than twenty-five thousand dollars, by payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars; in lieu of receiving such motor vehicle, the surviving spouse or children may elect to receive in cash an amount equal to the value of the motor vehicle, not to exceed twenty-five thousand dollars. If any motor vehicle so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars shall vest in the specific legatee.

(6) Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, and marketable securities, not exceeding in value twenty-five thousand dollars, reduced by the excess value, if any, of acquired items referred to in subparagraphs (1), (2), (3) and (5) of this paragraph. However, where assets are insufficient to pay the reasonable funeral expenses of the decedent, the personal representative must first apply such money to defray any deficiency in such expenses.

(7) Any set off to a child under the age of twenty-one years not exceeding ten thousand dollars shall be covered by the provisions of section twenty-two hundred twenty of the surrogate's court procedure act as if the child were a beneficiary of the estate. Any excess amounts shall be governed by the guardianship statute, if applicable.

(8) The court shall have the authority to issue such documentation as necessary to effectuate the transfer of any items under this section.

(b) No allowance shall be made in money or other property if the items of property described in subparagraph (1), (2), (3) or (5) of paragraph (a) are not in existence when the decedent dies.

(c) The items of property, set off as provided in paragraph (a), shall, at least to the extent thereof, be deemed reasonably required for the support of the surviving spouse or children under the age of twenty-one years of the decedent during the settlement of the estate.

(d) As used in this section, the term "value" shall refer to the fair market value of each item, reduced by all outstanding security interests or other encumbrances affecting the decedent's ownership of said item.

CREDIT(S)

(L.1966, c. 952. Amended L.1967, c. 686, § 43; L.1971, c. 149; L.1974, c. 903, § 4; L.1980, c. 82, § 1; L.1983, c. 103, § 1; L.1992, c. 595, § 11; L.2010, c. 437, § 1, eff. Jan. 1, 2011; L.2012, c. 123, §§ 1, 2, eff. July 18, 2012, deemed eff. Jan. 1, 2011.)

HISTORICAL AND STATUTORY NOTES

L.2012, c. 123 legislation

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

H

(The decision of the Court is referenced in a table in the New York Supplement.)

Surrogate's Court, Sur Ct, Kings County.
In the Matter of the Administration Proceeding, ES-
TATE OF Joseph MENAHEM, Deceased.

No. 4191/2004.
Aug. 13, 2007.

The Mangiaracina Law Firm, Howard Beach, for petitioner.

Max D. Leifer, P.C., New York, for objectant/cross-petitioner.

MARGARITA LÓPEZ TORRES, J.

*1 In this contested administration proceeding, the issue before the court is whether a prenuptial agreement between the decedent, Joseph Menahem (Joseph), and his spouse, Gita Menahem (Gita), should be nullified upon the grounds that it was not properly executed, or in the alternative that it was obtained through fraud, undue influence or Gita lacked the mental capacity to knowingly execute the agreement.

Gita and Joseph executed a prenuptial agreement in January, 2000 in anticipation of their wedding on March 4, 2000. The agreement provided that property titled or held in each party's individual name would always remain the separate property of the title holder and the other party would make no claim of ownership in that property after the marriage. In addition, each party waived the right of equitable distribution, right of election, and the right to inherit in each other's

estate for separately owned property. Rights of distribution or inheritance for jointly owned property was not waived in the agreement. The right to demand any enhancement in value in separately owned property in a divorce proceeding was also waived. Property inherited from a family member would remain separate property.

The marriage between Gita and Joseph was Joseph's first marriage. Gita's previous marriage ended in divorce. At the time of the marriage, Joseph owned a home in Brooklyn, New York.

Prior to their marriage, in November 1998, Gita was diagnosed with bipolar disorder with severe psychotic features and had been hospitalized a number of times for treatment. A few months prior to the execution of the prenuptial agreement, on September 18, 1999, Gita was hospitalized due to her mental illness. She was treated and discharged on October 6, 1999, approximately three months prior to the parties' execution of the prenuptial agreement. Gita received outpatient therapy for some time after being discharged from the hospital and was receiving outpatient therapy at the time the parties entered into the prenuptial agreement.

Despite her battle with mental illness, Gita attended school and successfully completed her program during this time. On March 1, 2000, Gita received a proficiency diploma in Medical Computer Applications from the Grace Institute of Business Technology in Brooklyn, New York. Her transcript reveals that the lowest grade she ever received was a "B".

After four years of marriage, Joseph died on May 5, 2004 survived by Gita and his father, Isaac Menahem (Isaac). Joseph had no children and his mother

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U)

**(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))**

predeceased him. On May 25, 2004, Isaac post-deceased Joseph, leaving a will disposing of his assets among his seven children. Isaac's son, Shlomo Menahem (Shlomo) was appointed the representative of Isaac's estate in Israel, where Isaac resided prior to his death. Shlomo designated his sister, Dorette Dayan, to petition for letters of administration on behalf of their father's estate. Gita filed objections and designated her stepfather, Chaim Schwartz (Schwartz), to cross-petition for letters of administration on her behalf.

*2 Gita alleges that the prenuptial agreement should be nullified because it was not properly acknowledged at the time the parties executed it. She further asserts the agreement was obtained by fraud and undue influence. Finally, Gita asserts that she lacked the mental capacity to enter into the agreement.

On August 9, 2005, Chaim brought a motion for summary judgment seeking to void the prenuptial agreement alleging it was improperly acknowledged, and for a finding that Gita could inherit from Joseph's estate. The Court, finding issues of fact, denied the motion for summary judgment.

The Court had a three day trial at which six witnesses testified. For her case in chief, Dorette testified on her own behalf. For her case in chief, Gita testified on her own behalf. Gita also called Victor Schlesinger, (a certified, licensed real estate appraiser), Dorette (petitioner), Joseph Dayan (her son) and Dr. Stephen Reich, Ph.D (a clinical psychologist). As a rebuttal witness, Dorette called Lyudmila Smirnova (the director of financial aid from Grace Institute of Business Technology).

Dorette submitted into evidence a copy of the prenuptial agreement as an attachment to Dorette's Petition for Letters of Administration. It contains a "Verification" by Joseph and another by Gita. The Joseph "Verification" is notarized by Ivan L. Van Lear

and reads as follows:

On the 12 day of January, 2000, before me came and personally appeared JOSEPH MENAHEM, a person know (sic) to me and who identify himself to me and who did sign his name in front of me this 12 day of January, 2000.

The Gita "Verification" was notarized by Sam Zalta (Zalta) and states as follows:

On the 17 day of January, 2000, before me came and personally appeared GITA LAFER, a person known to me and who did identify herself to me and who did sign her name above before me.

(Hereinafter, "Gita's verification statement")

Dorette also offered into evidence an original prenuptial agreement with three pages attached to it.

The first page consists of a notarized acknowledgment signed by Zalta with respect to Gita, and reads as follows:

On the 17 day of January in the year 2000, before me, the undersigned personally appeared Gita Lafer also known as Gita Laffer, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual executed the instrument.

(Hereinafter, "Zalta's certificate of acknowledgment")

The second page is an acknowledgment notarized by Van Lear with respect to Joseph, and reads as follows:

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

On the 12 day of January in the year 2000, before me, the undersigned personally appeared Joseph Menahem, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed the instrument.

*3 The third page contains the following notarized statement by Zalta:

On the 17 day of Oct, in the year 2005, before me, the undersigned, personally appeared SAM ZALTA, the subscribing notary witness to the foregoing instrument, with whom I am personally acquainted, who, being duly sworn, did depose and say that he resides at 1804 East 7th Street, Brooklyn, New York 11223; that he knows Gita Lafer also known as Gita Laffer to be the individual described in and who executed the foregoing instrument, that said subscribing witness was present and saw said Gita Lafer also known as Gita Laffer execute the same; and said witness at the same time subscribed his name as a witness thereto.

(Hereinafter, "Zalta's subscribing witness statement")

The record reflects that the subscribing witness statement and corrected certificate of acknowledgment from Zalta were executed on or about August 2005, five years after the agreement was executed by the parties and over a year after the decedent's death. A subscribing witness statement executed after the death of one of the parties to a prenuptial agreement is valid and may be accepted by the court (*see Estate of Saperstein, 254 A.D. 2d 88, 678 N.Y.S. 2d 618* [1st Dept 1998]).

Also entered into evidence were affidavits from Zalta, one stating that Gita did acknowledge the prenuptial agreement and one stating that she did not. Zalta was not called as a witness. Instead by agreement, a transcript of Zalta's examination before trial was entered into evidence.

Acknowledgment

A duly executed prenuptial agreement is given the same presumption of legality as any other contract, commercial or otherwise. It is presumed to be valid in the absence of fraud (*Bloomfield v. Bloomfield, 97 N.Y.2d 188* [2001]; *Matter of Sunshine, 51 A.D.2d 326, 381 N.Y.S.2d 260* [1st Dept 1976], *affd* 40 N.Y.2d 875 [1976]; *see Panossian v. Panossian, 172 A.D.2d 811, 569 N.Y.S.2d 182* [2d Dept 1991]; *Brassey v. Brassey, 154 A.D.2d 293, 546 N.Y.S.2d 370* [1st Dept 1989]; *Estate of Zach, 144 A.D.2d 19, 536 N.Y.S.2d 774* [1st Dept 1989]).

Estates, Powers and Trusts Law 5-1.1-A(e)(2) establishes the requirements for an effective waiver of a spouse's right of election against the estate of a deceased spouse:

To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

As established by Real Property Law §§ 291, 292 and 304, a conveyance of real property may be proved for recording purposes either by an acknowledgment of the person who executed the conveyance or by the proof submitted by a subscribing witness, that is, a person who was a witness of the execution and who at the same time subscribed his or her name to the conveyance as a witness.

Real Property Law 304 provides:

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and if his place of residence is in a city, the street and street number, if any thereof, and that he knew the person described in and who executed the conveyance.

*4 At trial, Dorette submitted into evidence the prenuptial agreement as described above, with the amended certificates and subscribing witness statement. Certification of the acknowledgment or proof of a writing in the manner prescribed by law is prima facie evidence that it was executed by the person who purported to do so (CPLR 4538; see *Matter of Kazuba*, 9 Misc.3d 1116(A) [Sur Ct, Nassau County 2005]). Said evidence may be rebutted by clear and convincing proof. It is undisputed that the decedent's signature was properly acknowledged by Ivan Van Lear, the attorney-drafter of the agreement. The question is whether Gita's signature was properly acknowledged or witnessed.

The execution of this agreement may be proved in two ways, either by acknowledgment or in the second manner in which a conveyance of real property could be proved, i.e., by the statement of the subscribing witness (*Estate of Saperstein*, 254 A.D. 2d 88, 678 N.Y.S. 2d 618 [1st Dept 1998] [statement of subscribing witness of waiver of right of election prepared after deceased spouse's death sufficient to prove that waiver was valid]; *Estate of Maul*, 176 Misc. 170, 26 N.Y.S.2d 847 [Sur Ct, Erie County, 1941] *aff'd* 262 A.D. 941, 29 N.Y.S.2d 429 [4th Dept 1941], *aff'd* 287 N.Y. 694 [1942] [subscribing witness' testimony at hearing allowed to prove the waiver of an elective share]; *Matter of Felicetti*, NYLJ, Jan. 22, 1998 at 31, col 3 [Sur Ct, Nassau County] [motion to dismiss based on invalidity of waiver of right of election as a result of improper acknowledgment denied because notary could supply necessary proof as subscribing witness]; *Estate of Beckford*, 280 A.D.2d 472, 720 N.Y.S.2d 176 [2d Dept 2001] [deposition testi-

mony of the attorney who notarized the spouse's signature on the prenuptial agreement created an issue of fact as to whether waiver of right of election is valid]; see, also *Matter of Kazuba*, *supra*).

If the acknowledgment is defective, the defect may be cured by the notary supplying the necessary proof as a subscribing witness. Substantial compliance with the statutory requisites of an acknowledgment are sufficient. Where the circumstances adequately disclose compliance with the statutory requirements, the acknowledgment of the signer may take the form of conduct that expressly or impliedly signifies signer's assent (*Matter of Kazuba*, *supra*).

The credible evidence shows that Gita's signature was properly acknowledged. Zalta's certificate of acknowledgment (as amended) is in the proper form and is prima facie evidence of execution. The parties also have not disputed that Gita executed the instrument before Zalta and that he observed her execution of it. Zalta's examination before trial shows that the acknowledgment was proper. Zalta testified that Gita asked him to notarize her signature and that he saw her sign the document (see Exhibit "E", Zalta Examination Before Trial, dated January 18, 2006, p. 18, line 24 and p. 19, line 18). While the word "acknowledge" was not used, this testimony along with Zalta's certificate of acknowledgment clearly shows substantial compliance with the statutory requisites (see *Matter of Kazuba*, *supra*).

*5 Even were the acknowledgment improper, the submission of Zalta's subscribing witness statement provides the necessary proof to establish due execution of the prenuptial agreement. The statement clearly complies with the statutory requisites. In addition, Zalta's EBT shows that he witnessed the signatures, contains his place of residence, and indicates that he examined Gita's identification and observed her execute the document (see Exhibit "E", Zalta Examination Before Trial, dated January 18, 2006, p. 15, line

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

20). Thus, Zalta “knew her to be the person described in and who executed” the document (*see* RPL 304). While certain sections of Zalta's examination before trial seem to contradict earlier portions, the contradictions appear to be due to the confusion of the objections and certain dialogue between the attorneys. The earlier portions of the examination before trial of Zalta, before the later confusion and disagreements between the attorneys, are clearly consistent with Zalta's certificate of acknowledgment (as amended) and subscribing witness statement. The weight of the evidence clearly supports Dorette's position that the agreement was properly executed by the parties. Therefore, this court finds that the prenuptial agreement was duly executed.

Mental Capacity

The court now turns to the issue of whether Gita had the requisite mental capacity to enter into the prenuptial agreement.

At trial, Gita's attorneys called Dr. Stephen Reich, Ph.D to testify as an expert witness regarding Gita's mental capacity. Dr. Reich is a clinical psychologist, retained by Gita for the purposes of this litigation. Dr. Reich maintains a practice as a forensic psychologist and he serves as one of the clinical directors of an organization that services senior citizens in nursing homes and senior care facilities, although he does not actually provide the services himself. He testified that he never treated Gita and his sole direct contact with Gita was when he interviewed her on January 17, 2006 for 75 minutes (approximately six years after the contract was executed). He indicated that she arrived at the interview 45 minutes after her scheduled appointment time. Her appearance was mildly disheveled. There were no indications in the record that the interview was conducted for any reason other than for his preparation to testify as an expert witness at trial.

Dr. Reich testified that he reviewed Gita's entire medical record, including, but not limited to, the

records from 1998, 1999, 2001 (all from South Beach Psychiatric Center) and 2005 and 2006 (both from Maimonides Medical Center). From his review of these medical records and his interview with Gita in 2006, Dr. Reich concluded that Gita suffers from bipolar disorder and a schizophrenia-like process. At the interview, Dr. Reich observed that Gita showed evidence of a thought process disorder, which he asserts means that she has an inability to speak and reason in a logical manner. He further testified that this disorder is not curable. He also testified that Gita suffers from bipolar disorder which is likewise not curable, but medically treatable if the person is medically compliant. A person who suffers from bipolar disorder, but is medically compliant, he testified, may lead a normal life. Moreover, Dr. Reich testified that as a result of these illnesses, Gita suffers from impaired judgment. She is unable to think clearly enough so that her thought processes are logical and rational.

*6 When questioned regarding the basis for his opinion, Dr. Reich pointed to several entries in the medical records that indicated Gita had been diagnosed with bipolar disorder, that she suffered from and received treatment for depression and took medication for psychosis. For example, on November 13, 1998 the records indicate that Gita suffered from depression and contains the diagnosis of bipolar disorder with psychotic features. On November 14, 1998 and November 15, 1998 the records contain the notation “delusional thinking”. On November 18, 1998, the records contain the notation “psychotic”. On November 30, 1998, the records indicate that Gita was prescribed Halydol, an anti-psychotic medication and Depicote, a mood stabilizer for bipolar disorder. On December 16, 1998, the medical records indicate a prescription for Depicote and Cogentin, a medication prescribed to counter the side effects of Halydol, an anti-psychotic medication. On September 18, 1999, the medical records indicate that Gita suffered from severely impaired judgment, insight and impulse control. On September 29, 1999, the medical records indicate a diagnosis of bipolar disorder with psychotic

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

features and includes a notation of poor insight. On October 26, 2001, the records again indicate that Gita suffered from severely impaired judgment, insight and impulse control. An entry from October 21, 2004 indicates a diagnosis of schizoaffective disorder. An entry from July 6, 2006 indicates a diagnosis of bipolar disorder with the most recent episode severe with psychotic features.

Dr. Reich further testified that he believed that Gita suffered from the above illnesses in the year 2000 (the same year in which she executed the prenuptial agreement). He testified that the medical records indicated that for two and a half months in 1990 she was hospitalized in Lithuania. However, there is no evidence as to what records contained and it is claimed that the records were not available to them. He concluded that only a severe medical illness would require a two and a half month hospitalization and that hospitalizations of that nature for a person of Gita's age are almost exclusively psychiatric in nature. He also testified that the medical records indicated that she had been diagnosed with bipolar disorder in 1998. Because bipolar disorder is a chronic and ongoing mental disability that manifests at various times in a person's life, Gita had the illness in 2000.

During the trial, Gita's attorney sought to enter Gita's medical records into evidence regarding Gita's mental illness. Dorette's attorney objected. The court allowed the records subject to connection, but reserved decision as to whether the connection was made. Based upon the relevancy of the record to the issues presented, the medical records are admitted in evidence. There was sufficient testimony regarding Gita's mental capacity to warrant admission of the medical records. Gita testified to her hospitalization in 1998 and 1999. Dr. Reich also testified that the illness under which Gita suffers is a chronic and incurable, but nevertheless treatable illness. Therefore, while some portion of the records are more relevant to the underlying circumstances than others, the entire

record is relevant to Gita's mental capacity in this proceeding and the entire record is admitted into evidence (CPLR 4518(c)). While this court considered the entire record in its decision, more weight was afforded the portions of the record that were closer in time to the execution of the prenuptial agreement.

*7 Gita's medical records show that Gita suffers from bipolar disorder and has suffered from this mental illness since at least November 13, 1998, when she was admitted to Maimonides hospital where she was diagnosed with bipolar disorder with severe psychotic features. The record also reflects that Gita was admitted to Maimonides a few months prior to executing the prenuptial agreement on September 18, 1999 due to medication noncompliance. The records further show that Gita suffered from impaired judgment. She was discharged on October 6, 1999.

Gita continued to receive outpatient therapy, where the records show that she was again noncompliant with her medications on December 15, 1999 and her judgment was diagnosed as limited. On December 28, 1999, Gita's insight and judgment was fair. Moreover, on January 7, 2000, ten days before Gita executed the prenuptial agreement, Gita's records indicate that she was medically compliant. The records again report medical compliance, four days after Gita executed the prenuptial agreement, on January 21, 2000.

A person is presumed to be competent at the time of the performance of the challenged action and the burden of proving incompetence rests with the party asserting incapacity (*Estate of Obermeier*, 150 A.D.2d 863, 540 N.Y.S.2d 613 [3d Dept 1989]). The court must determine whether the individual was unable to comprehend the nature of the transaction and make a rational judgment with respect to the transaction. The Court of Appeals has stated that a contract is invalid if a person entered into it under the compulsion of a mental disease or disorder, but for which the

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

contract would not have been made. Under this standard, nothing less than medically classified psychosis could excuse a person entering a contract (*Ortelere v. Teachers' Retirement Board of the City of New York*, 25 N.Y.2d 196 [1969]; *Matter of Goldberg*, 153 Misc.2d 560, 582 N.Y.S.2d 617 [Sur Ct, New York County 1992]). Gita has the burden of proving that she did not have the requisite mental capacity to enter into this prenuptial agreement by a preponderance of the evidence (*Fleming v. Ponziani*, 24 N.Y.2d 105, 299 N.Y.S.2d 134, 247 N.E.2d 114 (1969)).

While bipolar disorder is a serious mental illness which may in certain circumstances render a person incapable of forming the mental capacity to enter into contracts and agreements, there is no authority to conclude that all persons who are diagnosed as being bipolar lack mental capacity to enter into contracts. Thus, this court is loathe to conclude as a matter of law that all persons suffering from this disorder lack the mental capacity to enter into agreements or conduct their business in their own best interests. Moreover, in light of the evidence that if treated, a person suffering from this disorder may lead a normal life, the court is equally loathe to make such an assumption or assertion. The court is also mindful that a person suffering from this disorder may lack the mental capacity to enter into contracts or even negotiate in their own best interests, because of their inability to think rationally. Thus, it is necessary for the court to assess the evidence presented in each case. In the instant case, based on the credible evidence it is the determination of the court that Gita has failed to sustain her burden of proof that she lacked mental capacity to enter into the prenuptial agreement.

*8 The record shows that Gita was diagnosed with bipolar disorder and was hospitalized in November 13, 1998 and September 18, 1999. On October 6, 1999, she was deemed sufficiently recovered from her episode to be discharged. Her mental status was alert, in good control with no overt signs of psychotic

process on the date of her discharge. She continued to receive therapy after she was discharged. On January 7, 2000, the records report that she was medically compliant. The records also report medical compliance on January 21, 2000. Gita executed the prenuptial agreement on January 17, 2000. At the same time, Gita was also successfully completing her program with the Grace Institute of Business Technology. The records from the institute show that between October 1999 and March 2000, Gita was completing her courses and taking exams. She completed her courses and received a certificate, her transcript reflects grades of no lower than "B".

The record further reflects that Gita worked as a secretary for a half a year from 1999 to 2000, as a healthcare aide from 2000 to 2001 and as decedent's assistant in his photography business from 2001 to 2004.

Dr. Reich testified that a person who suffers from bipolar disorder, who is medically compliant may lead a normal life. The record reflects that before and after the prenuptial agreement was executed by Gita, she was medically compliant. Moreover, Gita's medical records report that her judgment was fair a little over two weeks prior to her execution of the agreement. From this evidence, the court may infer medical compliance at the time of the execution of the agreement.

Despite her illness, Gita appeared to engage in the normal functions of life. The record reflects that she attended school and received good grades for her work. The record also reflects that Gita was gainfully employed during the time that she entered into the agreement. Accordingly, based upon the medical evidence submitted, the court finds that Gita did not suffer from impaired judgment at the time she entered into the prenuptial agreement and that Gita retained the necessary mental capacity to enter into the prenuptial agreement.

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

Undue Influence

Gita has been equally unsuccessful in meeting her burden of proof regarding her allegation of undue influence. To prove undue influence, it must be shown that the influence exercised amounted to moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the contracting party to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist (*Children's Aid Soc. of City of New York v. Loveridge*, 70 N.Y. 387 [1877]). The spouse who challenges a prenuptial agreement has a threshold burden of proving by a fair preponderance of the credible evidence a fact-based particularized inequality between the parties that demonstrates probable undue influence and unfair advantage. If the initial burden is proven then the burden shifts to the proponent of the prenuptial agreement to prove that the agreement was free from fraud deception and undue influence (*Estate of Grieff*, 92 N.Y.2d 341 [1998]).

*9 The factors considered by the court are: (a) detrimental reliance on the part of the poorer spouse; (b) relative financial positions of the parties; (c) formality of the execution ceremony; (d) full disclosure of assets as a prerequisite to a knowing waiver; (e) physical or mental condition of the objecting spouse at the time of execution; (f) superior knowledge/ability and overmastering influence on the part of the proponent of the agreement; (g) present of separate, independent counsel for each party; (h) circumstances under which the agreement was proposed and whether it is fair and reasonable on its face; and (I) provision for the poorer spouse in the will (*see Estate of Buzen*, NYLJ, Apr. 2, 1999, at 35, col 1[Sur Ct, Nassau County]).

Again here, the weight of the evidence is not in Gita's favor. There is insufficient evidence of undue influence to shift the burden of proof to Dorette.

There is no evidence to show that Gita relied on this agreement to her detriment. There is no evidence that she gave up any rights that she possessed prior to the marriage to become decedent's wife. While there was a disparity in the financial positions of the parties, this circumstance did not appear to affect the parties' agreement positions. The decedent owned a home prior to marrying Gita. He purchased the home with assistance from his family. Gita had about \$11,000 at the time of the marriage.

As for the execution, both parties executed the agreement at different times and in front of different notaries public. It is also not contested that the decedent's signature was acknowledged. Moreover, the record reflects that Gita also signed the agreement in front of Zalta, the notary who took her signature and later verified his status as a witness by supplying a subscribing witness affidavit.

The agreement itself reflects that the parties had some discussion of their respective financial positions. The agreement discloses that decedent owned a business and a house. The agreement also discloses that Gita was attending school.

While Gita has argued that her mental condition did not allow her the requisite capacity to enter into the agreement, her medical records reflect that at the time that she entered into the agreement, she was receiving treatment, medically compliant and functioning as a student. Under the circumstances in this case, the court has found that Gita had the requisite mental capacity to understand the nature of the agreement and its consequences. There is also no evidence that decedent exerted undue influence over Gita in obtaining her signature on the agreement.

While it is unclear how many attorneys Gita visited prior to her execution of the agreement, it is undisputed that the attorney-drafter of the agreement,

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U) (Table, Text in WESTLAW), Unreported Disposition (Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))

Ivan Van Lear, instructed the couple to seek legal advice from another attorney for Gita. It is also clear that Gita did seek legal advice from an attorney and as a result, a change was made to the agreement prior to Gita's execution.

*10 Dorette testified credibly and without being controverted that Gita was willing to enter into the agreement in order to ease the decedent's family's reservations regarding the upcoming wedding. The agreement appears to maintain the pre-marital status quo in the event of divorce or death. The agreement further provided for a waiver of inheritance rights for separately owned property. There is no provision of waiver for jointly owned property.^{FN1}

FN1. The parties have specified no property in the decedent's estate that was jointly owned.

Accordingly, this court declines to invalidate the prenuptial agreement based upon Gita's claim of undue influence.

Fraud

Gita alleges the agreement was induced by fraud. To prove fraud, an individual must show a misrepresentation or a material omission of fact which was false and known to be false by the other party, made for the purpose of inducing the individual to rely upon it, justifiable reliance of the individual on the misrepresentation or material omission, and injury (*Whitehall v. Town House Equities, Ltd.*, 8 A.D.3d 367, 780 N.Y.S.2d 15 [2d Dept 2004]; *Ozelkan v. Tyree Brothers Environmental Services, Inc.*, 29 A.D.3d 877, 815 N.Y.S.2d 265 [2d Dept 2006]). The burden of proving the alleged fraud by clear and convincing evidence is on the party seeking to invalidate the agreement (*see Grieff, supra; Matter of Gross*, 242 A.D.2d 333, 662 N.Y.S.2d 62 [2d Dept 1997], *lv denied*, 90 N.Y.2d 812 [1997]).

In her pleadings, Gita's testimony that she was misled to believe that the prenuptial agreement was only applicable in the event of divorce is not credible. Gita also testified that she understood the agreement to be applicable in the event of divorce. No evidence was presented that the decedent or anyone else fostered this belief. No evidence was presented that anyone purposely misrepresented the agreement to her or omitted a portion of the agreement. There is no dispute that Gita signed the agreement and had an understanding of its contents.

Gita was given the opportunity to and did visit an attorney regarding the terms of the agreement. Gita has simply failed to meet her burden of proof regarding her allegations of fraud, and the court declines to invalidate the agreement on this ground.

Conclusion

The prenuptial agreement between the decedent and Gita is valid. In the agreement, Gita waived her right of inheritance for property owned separately by the parties. The property of the decedent is a house located in Brooklyn, New York. There has been no allegation regarding any jointly owned property. Inasmuch as Gita has waived her rights of inheritance, decedent's property passes by the laws of intestacy into the estate of decedent's post-deceased father.

Accordingly letters of administration shall be granted to Dorette Dayan, as a designee of the personal representative of the estate of Isaac Menahem, decedent's post-deceased father, upon duly qualifying according to law.

Settle decree.

N.Y.Sur.,2007.

In re Estate of Menahem

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U)

16 Misc.3d 1125(A), 847 N.Y.S.2d 903, 2007 WL 2350237 (N.Y.Sur.), 2007 N.Y. Slip Op. 51571(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1125(A), 2007 WL 2350237 (N.Y.Sur.))
END OF DOCUMENT

119 Misc.2d 758, 464 N.Y.S.2d 341
 (Cite as: 119 Misc.2d 758, 464 N.Y.S.2d 341)

C

Supreme Court, New York County, New York,
 Special Term, Part I.

Charles PARENTE, Jr., as Executor of the Estate of
 Emily Wenger, and Charles Parente, Jr., Ann Parente,
 Charles Parente, and Florence Boffardi, as Next of
 Kin, Plaintiffs,

v.

Andrew WENGER, as Committee of the Person and
 Property of Frank J. Wenger, Defendant.

June 8, 1983.

Relatives and personal representatives of deceased wife sought leave of court to commence an action against committee of husband, an adjudicated incompetent, seeking to annul wife's marriage based upon mental incompetency of husband at time it was contracted and the alleged fraudulent concealment of that fact from wife during their marriage. The complaint also sought an adjudication that husband had no financial interest in deceased wife's estate. The Supreme Court, Special Term, New York County, Ethel B. Danzig, J., held that: (1) cause of action abated upon wife's death, and (2) cause of action was time barred.

Application denied and petition dismissed.

West Headnotes

[1] Abatement and Revival 2 ↪ 52

2 Abatement and Revival

- 2V Death of Party and Revival of Action
- 2V(A) Abatement or Survival of Action
- 2k51 Causes of Action Which Survive
- 2k52 k. In General. Most Cited Cases

Relative or personal representative of deceased wife did not have standing to maintain cause of action for annulment of marriage based upon mental incompetency of husband at time it was contracted and such cause of action did not survive death of wife and abated on such occurrence. McKinney's DRL § 140(c).

[2] Limitation of Actions 241 ↪ 104(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241III(F) Ignorance, Mistake, Trust, Fraud, and
 Concealment or Discovery of Cause of Action

241k104 Concealment of Cause of Action

241k104(1) k. In General. Most Cited

Cases

Even if cause of action for annulment of marriage based on mental incompetency of husband at time it was contracted and alleged fraudulent concealment of his incompetency during their marriage did not abate upon death of wife, cause of action was time barred no later than two years after wife's discovery that husband had been adjudicated incompetent. McKinney's DRL § 140(e); McKinney's CPLR 203(f), 214, subd. 7.

[3] Wills 409 ↪ 785.5(1)

409 Wills

409VII Rights and Liabilities of Devisees and
 Legatees

409VII(K) Election

409k785.5 Waiver, Release, or Forfeiture of

Right

409k785.5(1) k. In General. Most Cited

Cases

119 Misc.2d 758, 464 N.Y.S.2d 341
 (Cite as: 119 Misc.2d 758, 464 N.Y.S.2d 341)

Postdeath annulment does not bar a surviving spouse's right of election against the estate of decedent spouse. McKinney's EPTL 5-1.1.

****342 *758 D'Amato, Forchelli & Capetola, Mineola,**
 for plaintiffs.

Marvin George Florman, New York City, for defend-
 ant.

ETHEL B. DANZIG, Justice:

By this application, plaintiff Charles Parente, Jr., as executor of the estate of Emily Wenger, deceased, and said plaintiff and others, as next of kin of said decedent, seek leave of this court to commence an action against the committee of Frank J. Wenger, an adjudicated incompetent who is the surviving spouse of Emily Wenger. The proposed complaint which is attached to the moving papers seeks to annul the marriage of Emily Wenger to Frank Wenger on the ground that at the time of their marriage, Emily Wenger was unaware that Frank Wenger was an adjudicated incompetent and that this fact was fraudulently concealed from her during their marriage. The complaint also seeks an adjudication that Frank Wenger has no financial interest in the estate of Emily Wenger.

It appears from the allegations that Frank Wenger was adjudicated an incompetent by a judgment of this court rendered on September 14, 1948, and that his marriage to ***759** Emily Wenger occurred on October 11, 1953, in a ceremony which took place in this state. Emily Wenger died on March 5, 1982.

In order for this court to authorize a lawsuit against the committee of an incompetent, it must be satisfied that the proposed action contains, prima facie, a meritorious claim, upon which relief could be based. (*Matter of Shapiro*, 253 App.Div. 741, 742, 300 N.Y.S. 774). Where as here, the proposed action

which abated at the death of the plaintiff's decedent fails to state a cause of action upon which relief could be granted, and is subject to a valid affirmative defense of statute of limitations, no such lawsuit should be authorized.

[1] Under general common law principles, a cause of action for *annulment* of a marriage did *not* survive the death of either of the parties thereto (see *Matter of Haney*, 14 A.D.2d 121, 123, 217 N.Y.S.2d 324; *Grotsch v. Hassey*, 133 Misc. 373, 231 N.Y.S. 469), since such a cause was considered purely personal in nature (see *Hegerich v. Keddie*, 99 N.Y. 258, 1 N.E. 787). Although the legislature has modified such rule by statute in the case of a cause of action for annulment in favor of a party to a marriage whose consent thereto was obtained by fraud, force or duress, and in favor of a mentally ill or retarded party grounded upon his or her mental illness or retardation at the time of the marriage (see *id.*, secs. 140[c] and [e]; *Matter of Haney*, *supra*), it does not appear to have so for a cause of action for annulment in favor of the competent party to the marriage grounded solely upon the mental illness or incompetence of the other party at the time of the marriage. In fact, such a cause of action did not even exist prior to the amendment in 1928 of former CPA, Section 1137, by Chapter 83 of the Laws of 1928 (see *Gilels v. Gilels*, 159 Misc. 31, 32, 287 N.Y.S. 5, *aff'd* 247 App.Div. 922, 288 N.Y.S. 882). In any event, it has been held in substance that any question as to the survival of such a cause of action, or as to the person or persons who may properly maintain same, is to be resolved by resorting exclusively to the relevant statutory provisions which, being in derogation of the common law, are, of ****343** course, to be strictly construed (see *Walter v. Walter*, 217 N.Y. 439, 111 N.E. 1081; see also, *Matter of Haney*, *supra*). Thus, in the *Walter* case ***760** (*supra*), the Court of Appeals held that where the relevant statutes then in effect specifically enumerated the persons authorized to maintain a cause of action for annulment of a marriage based upon the mental incompetency of one of the parties thereto at the time it was contracted, and

119 Misc.2d 758, 464 N.Y.S.2d 341
 (Cite as: 119 Misc.2d 758, 464 N.Y.S.2d 341)

such enumeration did not include the incompetent's committee, application of the familiar maxim "expressio unius est exclusio alterius" required a finding that the latter lacked the requisite standing (*id.*, at p. 443, 111 N.E. 1081). By parity of reasoning, there being no provision in the present statute (i.e., Domestic Relations Law § 140[c]) authorizing the maintenance of such a cause of action by the relatives or the personal representative of the deceased competent party during the lifetime of the mentally ill party (see, *Gilels v. Gilels*, supra, 159 Misc. at p. 34, 287 N.Y.S. 5), it must be concluded that such relatives and such representative likewise lack the requisite standing to maintain such a cause of action. It follows, then, that the cause of action for annulment attempted to be asserted in the proposed complaint herein, insofar as it may be predicated upon the ground set forth in Section 140(c) of the Domestic Relations Law, did not survive the death of the proposed plaintiffs' decedent, and must be deemed to have abated upon the occurrence of such event.

[2] Assuming, arguendo, that the proposed action does not abate on death, the court is still not persuaded that plaintiffs have shown even prima facie that a meritorious claim upon which relief could be granted exists. This is because the proposed complaint fails to state a cause of action and is subject to a valid defense of statute of limitations.

In *Romano v. Romano*, 19 N.Y.2d 444, 280 N.Y.S.2d 570, 227 N.E.2d 389, it was established that the three year period provided by CPLR 214(7) for the commencement of an action to annul a marriage for fraud is an inherent part of the cause of action; i.e., a condition precedent to liability, and, as such, the burden is cast upon the plaintiff to plead and prove that he has brought the action within the prescribed time limit. Although the proposed complaint here submitted concedes (at paragraph "Eighth" thereof) that the proposed plaintiffs' decedent "discovered (her husband's) insanity", no mention whatever is made as to the *761 time when such discovery took place.

Accordingly, it must be concluded that said complaint fails to state a cause of action for annulment under subdivision (e) of Section 140 of the Domestic Relations Law based upon the incompetent's alleged fraudulent concealment of his mental illness. Furthermore, insofar as can be discerned from the papers here submitted, such proposed cause of action appears to be time barred. In an uncontroverted affirmation submitted in opposition to this application, it is stated that the plaintiff-executor, in a proceeding pending in Nassau County, admits that his decedent had discovered her husband's incompetency sometime in 1977. According to the defendant, plaintiff-executor stated the following:

"It was only in 1977 after Emily Wenger's action for divorce against Frank Wenger was dismissed on the ground that the summons and complaint were not served on the committee for the incompetent that Emily Wenger found out that Frank Wenger was incompetent."

If this is the case, the proposed cause of action based upon the incompetent's alleged fraud must, by virtue of the provisions of CPLR 214(7) and 203(f), be deemed to have become time-barred no later than two years after such discovery, i.e., sometime in 1979. The effect of the last-cited provisions is to permit the action in question to be brought either three years after the cause of action for fraud accrued (i.e., when the fraud was committed), or two years after the facts constituting the fraud were discovered by the proposed plaintiffs' decedent, whichever period gives the plaintiffs the longer time to sue (see, 18 Carmody-Wait 2d, Section 113:65; Practice Commentary Section C214:7 to CPLR 214 in McKinney's Consol. **344 Laws of N.Y., Bk. 7B, at pp. 439-40). Since the fraud alleged in the proposed complaint was committed in 1953 and was discovered no later than 1977, any cause of action based thereon would be time barred.

[3] Finally, the court notes that the proposed an-

119 Misc.2d 758, 464 N.Y.S.2d 341

(Cite as: 119 Misc.2d 758, 464 N.Y.S.2d 341)

annulment action is a thinly disguised attempt to defeat the incompetent's right of election pursuant to EPTL § 5-1.1. In that regard, it cannot achieve the purpose for which it would be brought. Since the enactment of EPTL 5-1.2(a)(1) it has been authoritatively held that a post-death *762 annulment does not bar a surviving spouse's right of election under EPTL 5-1.1 against the estate of the decedent spouse (*Bennett v. Thomas*, 38 A.D.2d 682, 327 N.Y.S.2d 139); nor, presumably, in view of the explicit language of the aforesaid EPTL provisions, would such an annulment affect any other rights the former might have in the latter's estate under the provisions of EPTL 4-1.1, 5-1.3, 5-3.1 and 5-4.4. Under the provisions of EPTL 5-1.2(a)(1), as was noted by the court in the case last mentioned, the surviving husband's "right to elect against his wife's estate became fixed and unalterable upon the wife's death". Accordingly, to the extent that the earlier decision by the same court in *Matter of Haney* (supra), rendered prior to the enactment of the EPTL, held to the contrary, it may no longer be regarded as viable or controlling.

For all of the reasons indicated, the application is denied and the petition (incorrectly denominated as an affidavit in support of a motion) is dismissed.

N.Y.Sup.,1983.

Parente v. Wenger

119 Misc.2d 758, 464 N.Y.S.2d 341

END OF DOCUMENT

NYCLA CLE INSTITUTE

Elder Law Issues in Drafting Prenuptial Agreements and Spousal Settlement Agreements

June 13, 2014

ROBERT M. FREEDMAN, ESQ.

**Schiff Hardin LLP
666 Fifth Avenue, 17th Floor
New York, New York 10103
212-745-9575
rfreedman@schiffhardin.com**

ELDER LAW ISSUES IN DRAFTING PRENUPTIAL AGREEMENTS

A. Should the Client Get Married?

1. A preliminary issue in elder law is advising a client about whether he or she should get married. Although marriage often provides economic benefits, for elderly clients it also brings a potential risk of liability that may outweigh the benefits: the cost of paying for the long term care of his or her spouse.

2. Most health care costs are covered by private insurance or through Medicare. However, since neither private insurance nor Medicare provides coverage of long term care, the question of who will bear the financial burden of long term care should be considered before marriage. Many clients will not want to address this issue, but as the attorney you need to raise it. And, in drafting a prenuptial agreement for your client, this issue should be specifically addressed.

B. Obligation of Support

1. Marriage brings with it an obligation of support, which means an obligation to pay for the necessities of the spouse, including health care. While the recipient spouse of the goods and services is primarily liable for payment, his or her spouse is liable to the third party vendors who provide the goods and services that constitute such “necessaries” (*see, generally, Medical Bus. Assoc. v. Steiner*, 183 A.D.2d 86 (2d Dept 1992)).

2. In addition, “[a] married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.” New York Family Court Act § 412. Long term care would be considered a “necessary” or an element of support that a spouse may be required to pay.

C. Medicaid and the Obligation of Support

1. The bottom line: a spouse cannot contract his or her way out of his or her liability for necessities. In New York, “...a husband and wife cannot contract...to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge,” (General Obligations Law § 5-311). In the elder law context, becoming a public charge would likely include receiving Medicaid. You cannot draft around this issue, and the clients should be warned of this fact. New York Domestic Relations Law § 236 covers provisions relating to support obligations made in prenuptial agreements. (*See also, Propp v. Propp*, 112 A.D.2d 868 (1st Dept 1985) *and Bloomfield v. Bloomfield* (97 N.Y.2d 188 (2001))).

2. If a spouse qualifies for Medicaid, then Medicaid will pay the health care provider, thereby eliminating the risk of liability to the provider. In addition, Medicaid provides the spouse of a Medicaid recipient (otherwise known as the “community spouse”) with certain protections against impoverishment by allotting the community spouse a Minimum Monthly

Maintenance Needs Allowance (MMMNA) (\$2,931 in 2014) and a Community Spouse Resource Allowance (CSRA) (minimum of \$74,820 and up to a maximum of \$117,240 in 2014 subject to certain increases). If the community spouse has income above the MMMNA or resources in excess of the CSRA, the recipient spouse can still qualify for Medicaid if the community spouse executes a “spousal refusal” form, effectively refusing to contribute income and assets towards the cost of the institutionalized spouse’s care. Medicaid will then pay the health care provider, eliminating the community spouse’s liability as to that provider. However, Medicaid will have a right for reimbursement against the community spouse (*see* Social Services Law §§ 366 and 104, et. seq; *see also* Family Court Act § 415). So, instead of liability to the spouse or the provider of health care, there may be liability to Medicaid, unless the community spouse is beneath the MMMNA and CSRA.

3. The waiver of the obligation for support and maintenance may be void, and it will not protect the spouse against a claim asserted by Medicaid. (Drafting warning: for this reason, if a provision with a waiver of support and maintenance is in a prenuptial agreement, you should strongly consider adding a severability clause to protect the other provisions of the agreement.)

DRAFTING CONSIDERATIONS IN PRENUPTIAL AGREEMENTS

A. Compel the Purchase and Maintenance of Long Term Care Insurance

1. The best protection is for the prenuptial agreement to compel the spouse to obtain and maintain long term care insurance to cover the cost of long term care. The client benefits from having provisions that protect him or her against liability for the spouse’s long term care costs. The coverage has to be adequate to cover most, if not all, of the cost of long term care (in 2014 in the New York City area, twenty four hour home care will cost about \$250 per day and a nursing home will cost about \$500 per day). Long term care insurance can be expensive and it may not be affordable for the parties. In addition, the agreement must have some mechanism to guarantee that the policy will not lapse. This may mean purchasing an annuity to pay the premiums. Drafting the provision is only the beginning; enforcement may be difficult.

B. Medicaid Issues

1. While having the spouse receive Medicaid does not relieve the client of his or her obligation of support, it does provide coverage for the cost of care and eliminates the risk of the provider’s claim against the client. In addition, Medicaid provides protections, albeit limited, against spousal impoverishment.

2. In other words, having the spouse on Medicaid is good. It allows the client to keep the MMMNA and the CSRA. In addition, the liability would be to Medicaid, and Medicaid may not pursue the claim or may be willing to settle the claim. However, the client must understand that having the spouse on Medicaid does not provide complete protection for the community spouse. Also consider that if long term care insurance is not guaranteed, the agreement should attempt to prevent the spouse from impoverishing himself or herself in order to qualify for Medicaid.

C. Asset Transfers and Medicaid Eligibility

1. Individuals can qualify for Medicaid by divesting themselves of their assets. In order to qualify for Community Medicaid services including homecare, the applicant can divest him or herself of his or her assets the month before applying and still qualify for Medicaid. In order to qualify for institutional Medicaid services including a nursing home, the applicant must divest himself or herself of assets five years before applying (there are exceptions, including the transfer of the home to a child or a sibling who resides there, or to a disabled child or to a trust for the sole benefit of a disabled individual). If the applicant takes steps to qualify for Medicaid, he or she may protect assets for his or her children, but the spouse would still be liable for the cost of his or her long term care to the extent that the spouse's income was above the MMMNA or assets were above the CSRA. Bottom line: if assets are transferred to the children, the spouse may become liable.

2. In order to protect your client from his or her spouse planning for Medicaid by transferring assets, the prenuptial agreement should prohibit the transfer of assets to children or others.

D. Nature of the Marriage

1. The fear of the cost of long term care for the spouse is why many elderly couples choose to live together rather than get married. Many have religious, but not civil, marriages, under New York Law, they may be legally married which means there may be the obligation of support and payment of necessities. Of course, if they do not disclose their marriage on government forms like tax returns and the Medicaid application, the government may never have any reason to believe that they are married. Advising a client to have a religious, but not civil, marriage, raises ethical issues, and knowingly filing a Medicaid application on behalf of a client who has such a marriage, but listing them as not married, may constitute fraud.

E. Pre-Nuptial Agreement Provisions Present Potential Issues for Medicaid Eligibility

1. Waiver of Right of Election

a) A typical provision in a prenuptial agreement is a waiver of the right of the elective share. The waiver will prohibit the spouse from exercising the right of election. However, the waiver may cause the spouse to be ineligible for Medicaid. The spouse may have the worst of both worlds: no elective share and no Medicaid.

b) During lifetime, the spouse may waive or release the right of election either in full or as to a particular asset. To be effective, the waiver must be in writing, subscribed by the maker, and acknowledged or proved in the manner required for a conveyance of real property. EPTL § 5-1.1A (e). Pursuant to Social Services Law § 366(5)(d)(i), the spouse who is receiving Medicaid services is bound to seek out all available resources. One of those resources is the elective share pursuant to EPTL § 5-1.1A. Failure to exercise the right of election will be treated as a transfer of an available asset, subjecting the Medicaid applicant or recipient to the transfer of asset penalties which are applied to eligibility for institutional (nursing

home) Medicaid. One might assume that a waiver of the right of election would be treated as a transfer of assets between spouses, and therefore exempt from the transfer of asset penalties no matter when it occurred or for whatever reason. However, this is not the way that the Department of Social Services regards a waiver of the right of election.

c) A waiver of the right of election has been determined to be a transfer of resources, since it is a failure to claim an available asset (Matter of Dionisio v. Westchester Co. DSS, 244 A.D.2d 483 (2d Dept. 1997) (See Appendix A)). The *Dionisio* decision, which addressed the waiver of the right of election of a married couple, not of a waiver under a prenuptial agreement, upheld the determination by the Department of Social Services that the transfer took place at the time of the death of the non-applicant spouse, not the date that the waiver was executed. It should be noted that in *Dionisio*, the wife signed the waiver of the right of election two weeks before she entered a nursing home and there was no evidence of a mutual waiver by the husband. QUERY: if mutual waivers were executed in a prenuptial agreement when both parties were in good health, would it be treated as a transfer to the spouse? Or would it be considered a transfer for estate planning purposes and not for the purpose of qualifying for Medicaid? Since it is unclear, it may be worth executing mutual waivers in a prenuptial agreement, though there is no guarantee that this strategy will be successful.

d) The Second Department, Appellate Division, reversed a denial of Medicaid eligibility by the New York City Human Resources Administration (HRA) which determined that the right of the Medicaid applicant to elect against the estate of her deceased husband was an available asset (Matter of Tillie Richartz, 278 A.D.2d 237 (App.Div.2d Dept. 2000) (See Appendix B)). In *Richartz*, the Medicaid applicant and her husband had signed mutual waivers of the right of election seven years before the husband died. The wife thereafter entered a nursing home, and the determination by HRA to deny her Medicaid application for failure to exercise the elective share was reversed. However, the decision does not address the issue of whether the waiver of the right of election was a transfer of assets. It also does not address to whom the transfer was made nor the intent of the transfer. It simply determined that the waiver was not revocable and the assets were therefore not available.

e) Since the Department of Social Services will probably treat the waiver of the right of election as a transfer of assets at the time of the death of the non-applying spouse, does it make any sense for elderly individuals to exercise waivers of the right of election? By putting such a provision into the agreement, a strong argument can be made that the transfer occurs at the time of the execution of the waiver and is being done for mutual estate planning and not as a transfer to other parties as a Medicaid planning technique. However, it is not clear if this argument will prevail. The other option is to provide for testamentary substitutes that satisfy the elective share without jeopardizing Medicaid eligibility. Options would include the marital residence and retirement accounts.

2. Marital Residence

a) The prenuptial agreement may provide the spouse with certain rights in the marital residence including the right to occupy or to purchase. This is usually not a problem for future Medicaid eligibility.

b) Under the Medicaid rules and regulations, except under limited circumstances, the primary residence is an exempt resource and Medicaid cannot force a sale or put a lien on the homestead if the spouse continues to reside there. If the Medicaid recipient passes away, and there is a surviving spouse, Medicaid cannot assert a claim against the estate for the value of the home if it is in the Medicaid recipient's estate. (However, this protection may not exist if the surviving spouse is disinherited.)

3. Deferred Compensation

a) Deferred compensation assets (401(k)s, 403(b)s, IRAs, etc.) are exempt from consideration in determining Medicaid eligibility provided they are in "periodic payment" status. In New York State (but not all states) "periodic payment" status requires that distributions be made on a monthly basis. The distributions would be the required minimum distribution if the applicant/recipient is over age 70 ½ or a percentage that would provide for full distribution over the applicant/recipient's lifetime. The monthly distributions are considered income, but the remainder of the account is considered exempt, will pass to the designated beneficiaries, and will not be subject to a claim by Medicaid. See Appendix C for a discussion of retirement accounts and Medicaid eligibility.

F. Sample Provisions

1. *Both parties covenant to take out a long term care insurance policy and to maintain said policy for the remainder of his or her respective life. The policy shall have minimum benefits of \$350 per day for nursing home care, assisted living and homecare for a minimum of five years with inflation protection.*

2. *Both parties covenant that they will maintain a minimum of \$300,000 of Separate Property. They agree not to encumber, convey or otherwise dispose of Separate Property if they have less than \$300,000.*

3. The problem is that while both of these provisions are advisable, many times the parties do not have sufficient income or assets to consent to these provisions.

ELDER LAW ISSUES IN SPOUSAL SETTLEMENT AGREEMENTS

I. Legal Separation v. Divorce

A. Advantages of Legal Separation over Divorce

1. Maintains Social Security Benefits based upon the spouse's work record.
2. Maintains eligibility under the spouse's health insurance plan. (This is less of a benefit if eligible for Medicare.)
3. Provides potential tax benefits including the ability to file joint tax returns, rollover retirement accounts, split gifts and double the capital gains exclusion on sale of a personal residence
4. Provides Medicaid treatment as a married couple which allows for spousal budgeting and provides the community spouse with a Minimum Monthly Maintenance Needs Allowance (MMMNA) and a Community Spouse Resource Allowance (CSRA). It also allows exempt transfers between spouses and for the use of the spousal refusal option.

B. Advantages of Divorce over Legal Separation

1. Eliminates the risk that a health care provider will pursue a claim against the spouse for necessities provided subsequent to the divorce, and substantially reduces the risk that the health care provider will pursue a claim against the spouse based upon obligation of support and maintenance for services rendered prior to the divorce.

2. Reduces, practically eliminates, the risk that Medicaid will pursue claim against ex-spouse. The claim exists, but:

a) Medicaid may not be aware of the claim. Since the application will be made for an individual, the divorce settlement may not be provided to or reviewed by Medicaid.

b) Medicaid is less likely to pursue the claim since it will be more costly and difficult than a claim against a spouse.

c) In addition, many local Departments of Social Services do not pursue all claims against spouses for a variety of reasons including the cost, a lack of personnel, and the fact that the claim may be denied or reduced. The potential benefit may not be worth the cost. These districts are even less likely to pursue a claim against a former spouse.

3. Just as the decision as to whether or not to get married has financial advantages and disadvantages, the decision as to whether or not to get divorced has financial advantages and disadvantages. Especially when considering the cost of long term care and Medicaid, there needs to be a thorough financial analysis of the costs and benefits.

II. Issues in a Divorce

A. Maintenance

1. Spouse may require maintenance for support after divorce. However, maintenance may affect eligibility for Medicaid or may have to be paid towards the cost of care. It may be possible to shelter maintenance income for Medicaid homecare, but it would have to be paid towards the cost of nursing home care.

2. A waiver of maintenance may be a problem under Domestic Relations Law § 236, Part B (3), which requires that waivers or limitations of maintenance must be “fair and reasonable at the time of the making of the agreement.” Query: Can Medicaid object to a waiver of maintenance if it was foreseeable that the spouse would need Medicaid? Possibly, but unlikely, and may be difficult to prove that it was not reasonable at the time of the making of the agreement.

3. Also, Family Court Act Section 412 provides that an ex-spouse can be liable for the maintenance/support of a public charge, so Medicaid would have a claim under that provision.

B. Equitable Distribution

1. Spouse is entitled to it and may need it.

2. There may be an effect on Medicaid eligibility if the spouse does not receive his or her equitable distribution of marital assets or retain his or her separate property. Since a Medicaid applicant is required to utilize all available resources, will the failure to receive his or her equitable distribution of marital assets, or retain his or her separate property, result in a denial of Medicaid because the assets were available, or because the failure to receive the property is a transfer of assets which may result in ineligibility for Medicaid? The failure to exercise a right of election is a transfer of assets under the Medicaid law. *See Appendix A*. The failure to receive equitable distribution may also be considered a transfer of assets. This is a difficult argument for Medicaid if the settlement is reasonable under the circumstances, but could be raised if the settlement is inherently unfair and unreasonable. It is advisable to have proof in the settlement agreement that the spouse who may apply for Medicaid was competent at the time of the making of the agreement and was represented by counsel. It is also advisable to have language supporting the reasonableness and fairness of the agreement. It may be advisable (but probably not practicable) to have the judge make a finding that the agreement is reasonable and fair under the circumstances.

Comment: I know of no cases or Fair Hearing decisions that address this issue.

3. Two assets which may be used to provide equitable distribution without jeopardizing the spouse’s eligibility for Medicaid are:

a) Deferred Compensation

- It may be advantageous for the settlement to give the deferred compensation through a Qualified Domestic Relations Order (QDRO) to the spouse who may need long term care and Medicaid.

- Deferred compensation assets (401(k)s, 403(b)s, IRAs, etc.) are exempt from consideration in determining Medicaid eligibility provided they are in “periodic payment” status. In New York State (but not in all states) “periodic payment” status requires that distributions be made on a monthly basis. The distributions would be the required minimum distribution if the applicant/recipient is over age 70 ½ or a percentage that would provide for full distribution over the applicant/recipient’s lifetime. The monthly distributions are considered income, but the remainder of the account is considered exempt, will pass to the designated beneficiaries, and will not be subject to a claim by Medicaid. *See Appendix C.*

b) Personal Residence

- It may be advantageous for the settlement to give the personal residence or an interest therein to the spouse who may need long term care and Medicaid.

- Personal residences are an exempt resource for the purpose of determining Medicaid eligibility provided that the Medicaid recipient resides there. If the applicant goes into a nursing home, Medicaid can place a lien on the residence if there is not a reasonable possibility of the Medicaid recipient returning home, or if the Medicaid recipient does not have an intent to return home. Medicaid has to comply with a number of procedural requirements, including notice of intent to place the lien. The recipient is entitled to a Fair Hearing on the issue as to whether the recipient has a reasonable possibility of returning home. Medicaid may also have a right of recovery against the recipient’s estate for the value of the home if it is within the estate as defined in Social Services Law § 369. In addition, there are a number of planning techniques that will allow the recipient to protect the home from liens and rights of recovery.

C. Use of Payback Trusts for Equitable Distribution of Assets

1. The settlement agreement can provide that the spouse’s share of assets be paid into an exempt trust. If the spouse is under age 65, an exempt trust can be established by a parent (not impossible), grandparent, and legal guardian or by Court Order, including the Order settling the divorce. The assets in this trust would be exempt from consideration for the purpose of Medicaid eligibility provided that certain requirements were followed, primarily that upon the death of the beneficiary, any assets remaining in the Trust be paid to Medicaid for reimbursement of any Medical Assistance paid on behalf of the beneficiary. The Trust would be a Supplemental Needs Trust available to pay for the beneficiary’s needs and desires not provided by Medicaid.

2. The settlement agreement can provide that the spouse’s share of assets be paid into an exempt trust administered by a not for profit agency. The trust fund would be available to pay for the beneficiary’s needs not provided by Medicaid.

For a discussion of these exempt trusts, see appendix D.

III. The Effect of No Fault Divorce

A. In the past, divorce was seldom used in Medicaid planning due to a number of factors. First, in many cases, one spouse lacked capacity to consent to a divorce or settlement. Second, divorce required cause and was not available in many cases. Third, many spouses could obtain better protection of their assets utilizing spousal refusal rather than having a divorce with issues of maintenance and equitable distribution of marital assets. Now, with no fault divorce available in New York, it may become more common.

244 A.D.2d 483, 665 N.Y.S.2d 904
(Mem), 1997 N.Y. Slip Op. 09642

In the Matter of the Estate of
Jeanette Dionisio, Petitioner,
v.
Westchester County Department of
Social Services et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
(November 17, 1997)

CITE TITLE AS: Matter of Dionisio v
Westchester County Dept. of Social Servs.

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Department of Social Services dated January 17, 1996, which, after a hearing, found that the respondent Westchester County Department of Social Services had correctly determined that Jeanette Dionisio was ineligible for medical assistance for a 30-month period.

Adjudged that the determination is confirmed and the proceeding is dismissed on the merits, with one bill of costs.

Jeanette Dionisio executed a waiver of her right to receive any property or assets from the estate of her husband two weeks before she entered a nursing facility, and approximately 20 months before applying for medical assistance. When her husband died testate four months after she entered the facility he left an estate valued at \$469,500, and he had made no provisions in his will to provide for his wife. Mrs. Dionisio's

share of her husband's estate would have been one-third, or \$156,500.

The Westchester County Department of Social Services ultimately denied Mrs. Dionisio's application for medical assistance on the ground that, by waiving her marital rights to a portion of her husband's estate, she had transferred resources for the purpose of qualifying for medical assistance. Mrs. Dionisio died after this determination was made. *484

Following a hearing at which the representative of Mrs. Dionisio's estate presented evidence that the waiver was executed for estate purposes, and not to qualify for medical assistance, the Commissioner of the New York State Department of Social Services found that the denial on the stated ground was appropriate and that the 30-month penalty period was correctly imposed. Although the estate's counsel averred that Mrs. Dionisio and her late husband executed mutual waivers in each others' estates, Mrs. Dionisio's estate has failed to proffer a copy of her late husband's waiver.

Because there was a rational basis for the respondents' determination that Mrs. Dionisio's waiver of the right to elect a share of her husband's estate constituted a transfer of assets, and that the representatives of her estate failed to rebut the presumption that the transfer was for the purpose of qualifying for medical assistance, the determination should be confirmed (*see, Matter of Molloy v Bane*, 214 AD2d 171; *Matter of Flynn v Bates*, 67 AD2d 975; *Matter of Mattei*, 169 Misc 2d 989). The respondents did not err in calculating the appropriate penalty period.

Miller, J. P., Ritter, Santucci and Florio, JJ., concur.

Copr. (c) 2014, Secretary of State, State of New York

278 A.D.2d 237, 717 N.Y.S.2d
294, 2000 N.Y. Slip Op. 10654

In the Matter of Tillie Richartz, Petitioner,
v.
New York City Human Resources
Administration et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
(December 4, 2000)

CITE TITLE AS: Matter of Richartz v
New York City Human Resources Admin.

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Department of Health, dated November 9, 1998, which, after a hearing, confirmed a determination of the respondent New York City Human Resources Administration denying the petitioner's application for medical assistance.

Adjudged that the petition is granted, on the law, without costs or disbursements, the determination is annulled, and the matter is remitted to the respondents for a new determination on the petitioner's application for medical assistance in accordance herewith.

The petitioner Tillie Richartz and her husband Harry Richartz executed waivers of their rights of election in each other's *238 estates on March 22, 1990. Seven years later, Harry Richartz died. The petitioner entered a nursing home, and subsequently applied for medical assistance. That application was denied by the New York City Human Resources Administration on the ground that the petitioner had available assets, i.e., her right of election against her deceased husband's estate. That determination was upheld by the New York State Department of Health on the ground that the waiver was revocable, and that the petitioner had a statutory obligation to pursue her elective share of her deceased husband's estate (*see*, 18 NYCRR 360-2.3 [c]).

The statutory waiver of the right of election may be unilateral, without consideration, absolute, or conditional (*see*, EPTL 5-1.1 [f]). The determination of the respondents that the waiver was revocable is not supported by substantial evidence (*see*, CPLR 7803 [4]; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176).

O'Brien, J. P., Friedmann, Krausman and Schmidt, JJ.,
concur.

Copr. (c) 2014, Secretary of State, State of New York

MEDICAID TREATMENT OF INDIVIDUAL RETIREMENT ACCOUNTS

FRANCES M. PANTALEO, ESQ.

Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, New York 10601
914-287-6113
fpantaleo@bpslaw.com

This outline will discuss the Medicaid treatment of work related plans which provide income for retirement. These include Individual Retirement Accounts (IRAs), 401(k)s, 403(b)s, Keogh accounts (for self-employed individuals), pension plans, and Roth IRAs. Depending on the requirements established by the employer, some profit sharing plans are also considered retirement funds. For purposes of simplicity, all such accounts will be referred to as “retirement accounts” unless the outline specifically discusses a particular type of account.

I. **Treatment for Applicant/Recipient**

(A) New York State’s Medicaid regulations at 18 NYCRR § 360-4.6(b)(2)(iii) provide that “pension funds belonging to an ineligible or non-applying legally responsible relative which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans” shall be disregarded as resources. “However, amounts disbursed from a pension fund to a pensioner are income . . . which will be considered in the deeming process.” Although a strict reading of this regulation would appear to require that retirement accounts be treated in all instances as exempt resources, the interpretation of the regulation by the Medicaid program is quite complex.

(B) **Countable Resource** – If an elderly or disabled Medicaid applicant owns a retirement account, and is able to make withdrawals from the account, the account will be considered an available resource to the Medicaid applicant. The fund’s value is the amount available to the individual after any penalty for early withdrawal. Any taxes due upon the distribution of the withdrawn funds are not deductible in determining the fund’s value. If the individual is eligible for periodic retirement benefits, he or she must apply for those benefits or the Medicaid application will be denied. If the individual is not entitled to periodic payments but is allowed to withdraw any of the funds, the fund is an available resource to the extent of the funds available for withdrawal. See, NYS Department of Health Medicaid Reference Guide (“MRG”) at 316; SSA POMS Section SI 01 120.210.

(C) **Exempt Resource** – If the Medicaid applicant owns a retirement account but is in receipt of, or has elected to receive, “periodic payments” from the account, the retirement account is not a countable resource. See, MRG at 316 and General Information System Message (“GIS”) 98 MA/024 (issued to clarify the statewide policy and treatment of retirement funds).

The applicant, if eligible, must apply for “periodic payments” from the retirement account in order to be eligible for Medicaid. The MRG at page 317 states that the applicant must apply for “maximized” benefits as a condition of eligibility. GIS 98 MA/024 states that the Medicaid applicant “must choose the maximum income payment that could be made available over the individual’s lifetime.” The placing of the retirement account into “periodic payment” status will result in the principal of the retirement account no longer being treated as an “available resource” although the stream of payments will be treated as “income” for Medicaid eligibility.

(D) **Exceptions:**

(a) Effective October 1, 2011, retirement funds of an individual who participates in the Medicaid Buy-In Program for Working People with Disabilities, or his or her spouse, are disregarded. See Chapter 59 of the Laws of 2011, 11 OHIP/ADM-07 and MRG page 391. In addition, since 2010, pregnant women and children who apply for Medicaid are no longer required to document their resources.

(b) GIS 98 MA/024 states that a retirement account is not a countable resource if the individual has elected to receive periodic payments which are less than the maximum periodic payment which is available and the election is irrevocable.

(c) An applicant who has met the minimum benefit duration requirement of a New York State Partnership for Long Term Care policy is not required to maximize income from a retirement account. See MRG at page 92.

(E) What Constitutes Periodic Payments? Many local Departments of Social Services require that the Medicaid applicant take distributions from retirement accounts in accordance with life expectancy tables utilized by the Social Security Administration. However, some countries treat retirement accounts as exempt resources if an applicant is over the age of 70 ½ and is taking only the minimum distribution required by the IRS tables (“RMD”). Many local agencies permit the use of the IRS RMD tables for married applicants, but require the use of the Social Security tables for single individuals.

NY52108122.1

FIRST PARTY EXEMPT TRUSTS

ROBERT M. FREEDMAN, ESQ.

Schiff Hardin LLP
666 Fifth Avenue, 17th Floor
New York, New York 10103
212-745-9575
rfreedman@schiffhardin.com

Self-Settled First Party Supplemental Needs Trusts/“Pay Back Trusts”

A first party SNT, also called a “pay-back trust” is one in which the beneficiary’s own funds are used to fund the trust. The funds may come from the beneficiary’s savings, an inheritance, or proceeds from a lawsuit. Federal legislation authorizing first party SNTs is found in the Omnibus Budget Reconciliation Act of 1993 (“OBRA ’93). See 42 USCA §1396p(d)(4), NY Soc. Sec. Law §366(2)(b) iii.

Under federal law, in order for a trust to qualify as a “Pay Back” trust, it must:

- a. be for the benefit of a disabled individual under age 65. If the trust is established for an individual under the age of 65, the exception continues to apply after the individual reaches age 65.
- b. be “established” by the disabled individual’s parent, grandparent, legal guardian, or by a Court. Under federal and state law, the SNT cannot be “established” by the beneficiary him/herself.
- c. have a provision for payback to the State of all Medicaid benefits expended after the death of the individual.
- d. be funded with the disabled individual’s assets. If the assets used to fund the trust are coming from a third party (i.e. not the beneficiary or beneficiary’s spouse), then there would be no need to have a “payback” provision.

The New York State regulations require the following of a Trustee of a self-settled “Pay-Back” SNT (18 NYCRR 360-4.5(b)(5)(iii):

- a. Notify the social services district of the creation or funding of the trust.
- b. Notify the social services district of the death of the beneficiary.
- c. If the trust principal exceeds \$100,000, notify the social services district in advance of substantial depletions of the trust. Substantial depletion is defined as a distribution in excess of 5% of trusts valued between \$100,000 and \$500,000; 10% for trusts valued between \$500,000 and \$1,000,000 and 15% for trusts valued at \$1,000,000 or more.
- d. Notify the social services district in advance of any transactions involving transfers from the principal for less than fair market value.
- e. Provide the social services district with proof of bonding if assets exceed \$1 million or if required by court order.

The Social Security Administration has guidance set forth in its Procedural Operating Manual regulations pertaining to SNTs for beneficiaries who receive SSI. See POMS at SI 01120.200, SI 01120.201 and SI 01120.203. The statutory requirements for a pay-back trust outlined in the SSI Program Operating Manual at POMS SI 01120.203 are fairly straightforward.

How the disabled individual obtained the assets is irrelevant. The source of funds could be a settlement from a personal injury case, an inheritance, or an already-existing asset of the disabled individual. The Trust may also be funded with income.

WARNING: A Medicaid lien against a recovery from a personal injury lawsuit must be satisfied before the trust can be funded.

Like third-party trusts, the purpose of the trust is to provide services which are not provided by Medicaid or other government programs such as: housing, (purchasing a house or co-op, paying rent, supplementing rent payments, etc.), vacations, recreation, restaurant meals, social services, legal services, etc. In addition, the trust may purchase goods such as: computers, stereos, televisions, exercise equipment, and medical equipment not covered by Medicaid. The only requirement is that the goods must be for the primary (not sole) benefit of the disabled individual. (The statutory language does not specifically require the distribution to be for the sole or exclusive benefit of the disabled individual. However, with regard to SSI beneficiaries, the Social Security Administration has determined that the distributions must be used for the sole benefit of the disabled individual).

Choosing a Trustee

The statute places no limit on who may be the trustee. A corporate trustee may be advisable if the Trust is large enough, although there is no amount at which a corporate trustee is required. An individual co-trustee is often advisable to address the personal needs of the beneficiary. It is not unusual for the Court to impose a requirement for a corporate trustee or co-trustee when a self-settled trust is established by a Court-appointed guardian or by a Court.

Most individuals would prefer to have a family member or close friend as trustee of their self-settled trust. However, some judges have been reluctant to appoint family members, particularly parents, as trustees. For example, a judge may be concerned that the parents lack sufficient experience or financial sophistication. Moreover, the parents' remainder interest in the trust (as heirs of the beneficiary's estate) could conflict with the "pay-back" provision in favor of the state. Another conflict of interest could arise where expenditures made "on behalf of" the disabled individual directly or indirectly benefit the parent, such as home improvements, computers, recreational items, etc.

Most judges seek to safeguard against such potential conflicts by:

- a) Bonding, however, parents might not qualify for bond, and posting of bond could needlessly deplete trust assets.

- b) Court supervision;
- c) Compulsory annual accounting which, while less intrusive, can be an onerous burden on parents and often will result in the use of trust assets to pay legal and accounting fees.
- d) Appointment of a professional co-trustee, however, a co-trustee's commission will also have to be paid from trust assets. Corporate trustees will usually only agree to serve if the Court order and trust document guarantee compensation according to its usual schedule of rates. Thus, trust assets would be depleted.
- e) Prior Court approval of distribution of principal which is most restrictive, and appears to frustrate the legislative intent of OBRA '93 to encourage use of trust funds for disabled individuals.

"Payback" to the State

OBRA '93 provides that the payback to the State must be made after the death of the individual. There is no question that the State is entitled to repayment before any distributions to remainder beneficiaries are made. However, the trustee may pay the cost of administering the trust, including attorney's fees and trustee commissions, before paying back the State. The trust cannot pay for the funeral and burial for the beneficiary before the "pay-back" to Medicaid.

Following the payment to the State, assets remaining in the trust, if any, are distributed to the beneficiary's estate.

In November 2008, the Court of Appeals issued a decision in Matter of Abraham XX, 11 NY3d 429, which clarified that the State is entitled to payback of all Medicaid provided during the lifetime of the beneficiary and is not limited to Medicaid provided after the establishment of the Trust.

Social Security POMS provisions promulgated in 2009 permit the trust to be terminated during the lifetime of the beneficiary, but the trustee must first pay back all Medicaid provided to the trust beneficiary.

Issues for the Trustee

The Trustee should never distribute funds directly to the beneficiary. However, the trustee can purchase goods and services for the benefit of the beneficiary. Additionally, the trustee should be aware of SSI rules regarding distributions for shelter and food and how those distributions may reduce benefits.

In a self-settled SNT, the State Department of Social Services is a remainder beneficiary or creditor (statute is unclear) and therefore can object to distributions, although it is

an open question as to what duty a trustee owes to Medicaid. State regulations now authorize the Department of Social Services to commence proceedings against the trustee for any act, commission or failure to act, which is inconsistent with the trust agreement, or applicable laws and regulations.

Guidelines for Trustees

The Elder Law Section of the New York State Bar Association has issued a pamphlet entitled Guidelines for Trustees of Self-Settled Supplemental Needs Trusts.

Pooled Income Trusts

A Pooled Income Trust allows individuals with disabilities who do not have a family member, trusted person or bank to manage their assets to protect their assets by pooling them with those of others in a similar situation. The assets are placed in a trust established and managed by a non-profit organization. Funds are pooled for purposes of investment and management, but are treated as the disabled person's separate property and held in a discrete account for his or her benefit. The funds remain available for his or her benefit at the discretion of the not-for-profit trustee. Some Pooled Income Trusts provide special services such as case management and advocacy for a fee. When considering this type of trust, it is essential to research the non-profit organization that administers the trust to determine whether its priorities for the trust are aligned with your family member's needs. Pooled Income Trusts are available for both First Party and Third Party SNTs.

There are a growing number of not-for-profit agencies which have established "pooled trusts" in New York State. Some require a minimum deposit of funds, which may be waived if the individual with disabilities receives services from the agency. Parents and other family members can deposit money to the trust during their lifetime or may name the trust in their wills or as beneficiary of life insurance policies, retirement or investment accounts. The trust account, once funded, is generally irrevocable. Assets in the trust may be used to purchase goods and services which enhance the quality of life of the beneficiary. As with the third party trusts discussed above, the pooled trust may purchase recreational equipment, entertainment, travel, music lessons, educational services, therapies and medical supplies not covered by government benefits.

A third party trust instrument can be drafted to give the trustee the discretion, at some future date, to deposit some or all of the trust principal to a pooled trust. This may be particularly important if there are few family members or trusted individuals who would be willing and able to devote the necessary time and energy to manage the trust and provide care to the individual with disabilities. For example, if there is only one alternate standby trustee who can be easily identified, that individual can serve for a period of years and subsequently transfer the assets in the third party trust to a pooled trust. The Trust should be drafted to authorize such a transfer.

Some of the pooled trusts will accept contributions of excess income by Medicaid recipients. The amount determined to be "excess income" by the Medicaid budget is deposited

to the pooled trust which can then use that “excess income” to pay for the monthly expenses of the Medicaid recipient. The trust will charge monthly or annual administrative fees which will be deducted from the assets deposited to the trust.

In order to participate in the pooled trust, a Joinder Agreement between the beneficiary and the not-for-profit organization (and the trustees) must be completed. The Agreement must be signed by the beneficiary (if he or she has capacity) or by a parent, grandparent, guardian, or a person acting under a Power of Attorney. If there are no such persons, the Agreement must be approved by a Court.

NY52108115.1

The author wishes to acknowledge the contributions of:

Barry I. Lutzky, Esq.
Schiff Hardin LLP
666 Fifth Avenue, 17th Floor
New York, New York 10103
Tel: 212-745-9577
blutzky@schiffhardin.com

Lauren I. Mechaly, Esq.
Schiff Hardin LLP
666 Fifth Avenue, 17th Floor
New York, New York 10103
Tel: 212-745-9580
lmechaly@schiffhardin.com

FACULTY BIOGRAPHIES AND
SUPPLEMENTAL INFORMATION

- HOME
- PRACTICE AREAS
- ABOUT US
- BOOKS
- OTHER CHAPTERS
- PUBLICATIONS
- AMICUS BRIEFS
- LECTURES
- ARTICLES
- TESTIMONIALS
- BLOG



[Share](#)

• **Elliott Scheinberg lectures on expert witness hearsay for NYCLA.** [More Info](#)

Contact Us Today

Name:

Phone:

Email:

Type your message here: (Note: Messages sent using this form are not considered private. Avoid sending highly confidential or private information via email.)

Submit

Matrimonial Appeals

Elliott Scheinberg, Esq., ([view profile/cv](#)) is a matrimonial attorney with over 30 years of experience, whose practice is limited exclusively to [appeals](#) (see Practice Areas, Appellate Law Overview) arising from [divorce](#) and [family law](#) on all aspects related to property distribution, spousal support, child support, custody and visitation, counsel fees, and expert fees.

Mr. Scheinberg is recognized by his peers and by members of the judiciary as a scholar and [legal commentator](#) with a nuanced understanding of the law and is named in "The Best Lawyers in America", "Who's Who in American Law", and "New York Super Lawyers." His publications include the only treatise of its kind, in two volumes, Contract Doctrine And Marital Agreements In New York (see [Books](#)), book chapters in another [treatise](#) (see [Other Chapters](#)), and many other monographs and articles (see [Articles](#)). He also lectures extensively to bar associations and to appellate courts (see [Lectures](#)).

Elliott Scheinberg, Esq.
 583 Ocean Terrace
 Staten Island, NY 10301
 212.490.0009
 Fax: 718.447.7794

By Appointment Only

Elliott Scheinberg represents clients in NYC and the surrounding areas, including Manhattan, Brooklyn, Staten Island, The Bronx, Queens, Westchester, Rockland, Orange, Dutchess, Putnam, Nassau and Suffolk Counties.

ELLIOTT SCHEINBERG, ESQ.

212-490-0009

- HOME
- PRACTICE AREAS
- ABOUT US
- BOOKS
- OTHER CHAPTERS
- PUBLICATIONS
- AMICUS BRIEFS
- LECTURES
- ARTICLES
- TESTIMONIALS
- BLOG



• *Elliott Scheinberg lectures on expert witness hearsay for NYCLA. [More Info](#)*

[🔗](#) [📄](#) [📧](#) [📧](#) [📧](#) [📧](#) [Share](#)

Contact Us Today

Name:

Phone:

Email:

Type your message here: (Note: Messages sent using this form are not considered private. Avoid sending highly confidential or private information via email.)

Submit

Elliott Scheinberg, Esq.

Education

Benjamin N. Cardozo School of Law, New York, NY

University of Chicago, Chicago, IL
Doctoral Candidate, Romance Philology

University of Michigan, Ann Arbor, MI
Teaching Fellow, French Department /
Romance Linguistics Program

Brooklyn College, Brooklyn, NY

- Bachelor of Science, Mathematics and French
- Honors courses in both subject areas

Honors and Recognitions

Who's Who in American Law

Best Lawyers in America

Best Law Firms, U.S. News and World Report

New York Super Lawyers

Bar Association Participation

American Academy of Matrimonial Lawyers (AAML)
Fellow, American Academy of Matrimonial Lawyers.

Board of Managers, New York Chapter.

Co-Chair, Amicus Curiae Committee, New York Chapter.

Co-Chair, Legislative Committee, New York Chapter.

Member, Amicus Committee, National Organization.

Member, Legislation Committee, National Organization.

Inter Bar Association Legislation Committee.



Robert M. Freedman

Partner

Robert M. Freedman focuses his practice on elder law, special needs planning, and trusts and estates.

Elder Law

Mr. Freedman is nationally recognized authority and pioneer in the field of elder law. He has more than 30 years of experience assisting multigenerational families with planning for their current and future needs related to:

- Long-term care planning
- Medicaid eligibility
- Medicare
- Guardianship
- Tax planning
- Estate administration

Mr. Freedman's focus on elder law began in law school, and in 1985, he founded one of the nation's first elder law firms. He is a founder of both the National Academy of Elder Law Attorneys (NAELA) and the Elder Law Section of the New York State Bar Association.

Special Needs Planning

Mr. Freedman represents individuals with disabilities and mental illness and their families. His legal experience and his knowledge of available services for individuals with disabilities allow him to provide practical, thoughtful estate planning for his clients and their loved ones.

Publications

"Analyzing the Unique Duties and Obligations of Special Needs Trustees,"
(co-author) *New York Law Journal* (Sept. 16, 2013)

Speeches and Presentations

"What Every Attorney Should Know about Elder Law and Special Needs Planning," Hudson Valley Bank & CUNY Law School CLE Seminar, New York, N.Y. (Feb. 12, 2014)

"Clients with Diminished Capacity – What Attorneys Need to Know," Annual CLE Event, UJA-Federation of New York Lawyers Division Trusts & Estates Group, New York, N.Y. (Nov. 20, 2013)

CONTACT INFORMATION

New York

t 212.745.9575

f 212.753.5044

rfreedman@schiffhardin.com

PRACTICE AREAS

Private Clients, Trusts and Estates

BAR ADMISSIONS

New York

U.S. District Court
Eastern District of New York
Southern District of New York



"Advising the Trustee of a SNT," 2013 Fall Meeting, New York State Bar Association Elder Law Section, Albany, N.Y. (Oct. 31, 2013)

"Elder Law and Special Needs Planning," 44th Annual New York Estate, Tax & Financial Planning Conference, New York, N.Y. (Oct. 9, 2013)

Previous Experience

Prior to joining Schiff Hardin, Mr. Freedman was a partner at Mazur Carp & Rubin in New York. In July 2013, Mazur Carp & Rubin combined with Schiff Hardin. In 1985, Mr. Freedman founded the elder law firm Freedman and Fish, which was one of the preeminent firms in the field of elder law for 23 years.

Mr. Freedman began working in elder law as a law student and then as a staff attorney at the Institute on Law and Rights of Older Adults of the Brookdale Center on Aging in 1978. He was a staff attorney at Legal Services for the Elderly until he left to assist in starting the Bet Tzedek Legal Clinic at the Cardozo School of Law at Yeshiva University, which provides legal services to indigent elderly and disabled clients.

Awards and Honors

Advocacy Award, Council of Senior Centers and Services

Best Lawyers in America, Elder Law – Lawyer of the Year (2013)

Best Lawyers in America, Elder Law

Elder Law Attorney of the Year, Selfhelp Community Services, Inc.

Evelyn Frank Legal Resources Program

New York Super Lawyers – Elder Law

Trustee Award, Council of Senior Centers and Services

Education

New York University School of Law (J.D., 1980)

Tufts University (B.A., 1976)

Professional Memberships

National Academy of Elder Law Attorneys, Inc.
Founder
Fellow



New York State Bar Association
Elder Law Section
Founder, Past Chair
Executive Committee
Trusts and Estates Section
Executive Committee

Civic and Charitable Memberships

Arthritis Foundation
Planned Giving Committee

Calvary Hospice Services
Planned Giving Committee

Carter Burden Center on Aging
Board of Directors

Council of Senior Centers and Services
Board of Directors

East Side Council on the Aging (ESCOTA)
Executive Board Member-at-Large

UJA-Federation of New York

HOME (/)

FIRM PROFILE (/OVERVIEW/)

ATTORNEYS (/ATTORNEYS/)

PARTNERS

(/ATTORNEYS/PARTNERS/)

STEPHEN GASSMAN

(/ATTORNEYS/STEPHEN-GASSMAN/)

ROSALIA BAIAMONTE

(/ATTORNEYS/ROSALIA-BAIAMONTE/)

CHARLOTTE BETTS

(/ATTORNEYS/CHARLOTTE-BETTS/)

ASSOCIATES

(/ATTORNEYS/ASSOCIATES/)

JOSHUA B. GRUNER

(/ATTORNEYS/JOSHUA-GRUNER/)

CHERYL Y. MALLIS

(/ATTORNEYS/CHERYL-MALLIS/)

DEBORAH A. KELLY

(/ATTORNEYS/DEBORAH-A-KELLY/)

KAREN BODNER

(/ATTORNEYS/KAREN-BODNER/)

OF COUNSEL (/ATTORNEYS/OF-COUNSEL/)

MICHAEL C. DAAB

(/ATTORNEYS/MICHAEL-C-DAAB/)

TIMOTHY M. TIPPINS

(/ATTORNEYS/TIMOTHY-TIPPINS/)

TRIBUTE TO RICHARD J. KEIDEL,
ESQ. (/ATTORNEYS/RICHARD-KEIDEL/)

Stephen Gassman

Member

sgassman@gbbtlaw.com (<mailto:sgassman@gbbtlaw.com>)

Born: New York, N.Y., September 8, 1945

Education: University of North Carolina at Chapel Hill, B.A., 1967, New York State Bar Association, 1972

Practice Areas: Matrimonial Law; Family Law; Litigation; Appellate Practice

Membership: Nassau County (President, 1988-1989) and New York State (1994) Bar Associations.

Admissions: 1972, New York

Reported Cases: DeMille v. DeMille, 5AD3d 428, 774 NYS2d 156 (2d Dept. 2006); AD3d 691, 808 NYS2d, 735 (2d Dept., 2006).



Miscellaneous Information: Editor, Matrimonial Law, American Academy of Matrimonial Lawyers; Diplomate, American College of Family Trial Judges; Member, New York Chapter of Matrimonial Lawyers, New York Chapter of American Academy of Matrimonial Lawyers, 2003; Member, Board of Managers, 2004-2006; Member: Committee on Matrimonial Practice, New York State Bar Association, 1997-; WE CARE FUND, Nassau County Bar Association (Member, Advisory Board); Law Guardian / Reporter, Nassau County Bar Association, 1993-; Task Force on Family Law, New York State Bar Association; Judicial Hearing Officer Screening Committee, New York State Bar Association, 2006. Member, Board of Editors, Fairshare Law Firm, Gassman & Tippins, "Evidence for Matrimonial Litigation,"

Co-author, Gassman & Tippins, "Matrimonial Valuation," Matrimonial Law Systems, "The Valuation of Marital Property," Valuation & Distribution of Marital Property, "Distribution and Valuation of Assets," Family Law Review, New York State Bar Association; "Distribution of Real Property," Family Law Review, New York State Bar Association; "§ 516(a) Litigation," The Nassau Lawyer, Nassau County Bar Association. Lecture series symposiums conducted by New York State Bar Association, American Academy of Matrimonial Lawyers, New York Law Journal, American Bar Association, Nassau County Bar Association, Office of Court Administration-Judicial Seminars, Westchester County Bar Association.

PRACTICE AREAS (/AOP/)

DECISIONS OF INTEREST
(/DECISIONS-OF-INTEREST/)

DIRECTIONS (/DIRECTIONS/)

CONTACT US (/CONTACT-US/)

GETTING STARTED

* Denotes required fields

To help you get started, please fill out the form below and click submit or if you prefer, call our office at: **(516) 228-9181**.

Submit

Appellate Division, Second Department, Association of the Bar of the City Association, Matlaw Systems, New York State Trial Lawyers Association, 10th Judicial District, and other bar groups. Adjunct Professor of Law, To Family Law, 1990-1991).

Biography:

→

Stephen Gassman has been practicing matrimonial and family law for over 20 years and has a nationwide reputation as a leader in the field. He is one of fewer than 100 attorneys nationwide designated as a Diplomate of the exclusive American College of Family Law.

A graduate of the University of North Carolina and New York Law School, Mr. Gassman is a professor of law at Touro Law School, as Chair of the Family Law Section and as President of the Nassau County Bar Association. He is a Fellow of the American College of Lawyers and a member of the Committee on Matrimonial Practice of the New York State Bar Association. He also serves on the Law Guardian Advisory Panel to the Tenth Judicial District and the Law Guardian Hearing Officer Screening Committee of the Tenth Judicial District.

Mr. Gassman has authored numerous articles and monographs on all family law topics. He is a frequent author, with Timothy M. Tippins, Esq., of counsel to Gassman Baiamonte & Associates, P.C. for Matrimonial Lawyers and Matrimonial Valuation. He is an editor of Family Law magazine, a publication, and has authored a chapter on the Use of Appraisers in the Valuation of Marital Assets with Matthew Bender, as well as articles for the New York State Bar Association. He has lectured extensively to bar groups and at judicial symposiums on the topics of family law.

As the founding member of the firm, Mr. Gassman has successfully tried and litigated thousands of cases, throughout his career. In addition, he has served on the Appellate Division and the Court of Appeals. The New York Post has written about Mr. Gassman as a lawyer in Nassau County.



(<http://www.superlawyers.com/redirect?>

[r=http://www.superlawyers.com/new-york-metro/Family-Law/browse&c=180_grey_badge&i=browse_pa_geo](http://www.superlawyers.com/new-york-metro/Family-Law/browse&c=180_grey_badge&i=browse_pa_geo))

Stephen Gassman

(<http://www.superlawyers.com/redirect?>

[r=http://www.superlawyers.com/new-york-metro/lawyer/Stephen-Gassman/14a405a3-9594-49d1-96fd-d810a796f88a.html&c=180_grey_badge&i=14a405a3-](http://www.superlawyers.com/new-york-metro/lawyer/Stephen-Gassman/14a405a3-9594-49d1-96fd-d810a796f88a.html&c=180_grey_badge&i=14a405a3-)



666 Old Country Road | Suite 801 | Garden City, New York 11530

(http://www.martindale.com/Products_and_Services/Peer_Review_Ratings.aspx)

(<http://www.bestlawyers.com/firms/gassman-baiamonte-betts-tannenbaum-p-c-/27125/US>)



[Home](#) | [Firm Profile](#) | [Attorneys](#) | [Stephen Gassman](#) | [Rosalia Baiamonte](#) | [Joshua B. Gruner](#) | [Cheryl Y. Mallis](#) | [Deborah A. Kelly](#) | [Michael C. Daab](#) | [Timothy M. Tippins](#) | [Tribute to Richard .](#)
[Practice Areas](#) | [Decisions of Interest](#) | [Directions](#) | [Contact Us](#)

qualifications and experience. This web site is designed for general information only. The information presented at this site should not be construed to be a lawyer/client relationship. [[Sitemap](#)] See our profile at [lawyers.com](http://www.lawyers.com/New-York/Garden-City/Gassman-Baiamonte) (<http://www.lawyers.com/New-York/Garden-City/Gassman-Baiamonte>).

Arlene Harris



SPECIAL COUNSEL

arlene.harris@kayescholer.com

NEW YORK

T: +1 212 836 8816

Arlene Harris is a member of the Private Clients Department and resident in the firm's New York office. She has practiced for more than forty years and focuses on estate and trust litigation, and also practices in the area of estate and trust planning, probate and administration of estates and trusts, and pre- and post-nuptial agreements.

Arlene is a Fellow of The American College of Trust and Estate Counsel, the former Chair of the Executive Committee of the Trusts and Estates Law Section of the New York State Bar Association, and the former Chair and a member of the OCA Advisory Committee on the Surrogate's Courts. She is also a former member of the Surrogate's Court Committee of the City Bar Association, the International Academy of Estate and Trust Law, the New York City Estate Planning Council, and the UJA-Federation Trusts & Estates Specialty Group, which she also chaired. She has lectured frequently and is a former adjunct professor of law at St. John's University School of Law. She is the former Chief Law Assistant of the New York County Surrogate's Court, and a former Assistant Attorney General of the New York State Department of Law.

She has authored chapters on Probate and Administration for the *Practical Skills and Forms* treatise of the New York State Bar Association and chapters for the New York State Bar Association treatise on *Probate and Administration of New York Estates*.

Arlene has been recognized as a leading wealth management lawyer in *Chambers USA: America's Leading Lawyers for Business* every year since 2007. *New York Metro SuperLawyers* named her to the "Top 100" list in 2009, and the "Top 50 Women" list from 2006 to 2011.

> NEWS

October 28, 2013 Recognition	Four Kaye Scholer Lawyers Recognized as Leading Women in Business Law
August 15, 2013 Recognition	46 Kaye Scholer Lawyers Among "The Best Lawyers in America" for 2014
May 24, 2013 Recognition	Kaye Scholer Honored With 14 Practice and 48 Lawyer Rankings in <i>Chambers USA</i> 2013
August 23, 2012 Recognition	<i>Best Lawyers 2013</i> Recognizes 44 Kaye Scholer Attorneys

Practice Areas

- Estate, Trust & Tax Planning
- Contested Estates & Trusts Matters
- Pre- & Post-Nuptial Agreements
- Probate and Administration of Estates and Trust Matters
- Wills and Trusts Agreements
- Private Clients

Education

New York University School of Law, JD, *cum laude*, 1968

Former Chief Law Assistant of New York County Surrogate's Court

Bar Admission(s)

New York

US District Court, Eastern and Southern Districts of New York

US Tax Court

June 7, 2012 Recognition	Kaye Scholer Scores 13 Practice and 39 Lawyer Rankings in <i>Chambers USA</i>
December 27, 2011 Recognition	26 Lawyers in 38 Areas Named in <i>Euromoney's 2011 Expert Guides</i>
August 31, 2011 Recognition	<i>Best Lawyers 2012</i> Recognizes 39 Kaye Scholer Attorneys
June 13, 2011 Recognition	Kaye Scholer Recognized in <i>Chambers USA: America's Leading Lawyers for Business (2011)</i>
June 11, 2010 Recognition	<i>Chambers USA: America's Leading Lawyers for Business (2010)</i> , 16 Areas of Practice Recognized and 33 Lawyers Ranked
December 31, 2009 Client Alerts	Federal Estate, Gift, and Generation Skipping Transfer Taxes in 2010
June 12, 2009 Recognition	<i>Chambers USA: America's Leading Lawyers for Business (2009)</i> , 15 Areas of Practice Recognized and 30 Lawyers Ranked
Fall 2008 Client Alerts	Fall 2008 Trusts and Estates Department Update
June 16, 2008 Recognition	Fourteen Practice Areas and 25 Lawyers Ranked Among the Nation's Best in <i>Chambers USA - America's Leading Lawyers for Business (2008)</i>
June 2008 Client Alerts	"Heroes Act" Slated to Increase Tax Burden on U.S. Expatriates
February 2008 Client Alerts	Tax and Trusts & Estates Update
November 8, 2007 Recognition	Arlene Harris Named Top Attorney by <i>Worth Magazine</i>
November 2007 Client Alerts	IRS Extends Time For Compliance With Section 409A
July 2, 2007 Recognition	<i>Chambers USA</i> Ranks Kaye Scholer Lawyers in 17 Areas of Practice; 19 Lawyers Ranked
May 2007 Client Alerts	Final Section 409A Regulations: Planning Opportunities and Year-End Compliance
April 18, 2007 Client Alerts	Final 409A Deferred Compensation Regulations: Not the Hoped for Relief
April 2007 Client Alerts	Tax and Trusts & Estates Update
January 4, 2007 Client Alerts	FIN 48: Significant New U.S. GAAP Reporting Requirements for Uncertainty in Income Taxes
May 18, 2006 Recognition	Best of the US Inc. Recognizes 11 Kaye Scholer Attorneys

Kaye Scholer LLP

Copyright © 2014 Kaye Scholer LLP. This web site contains attorney advertising. Prior results do not guarantee a similar outcome.

RANDAZZO & RANDAZZO, L.L.P.

464 NEW YORK AVENUE, SUITE 100
HUNTINGTON, NEW YORK 11743
(631) 673-4998
FACSIMILE (631) 549-0826

SHERYL L. RANDAZZO - NY, PA
RALPH M. RANDAZZO - NY, MD, DC

215 PARK AVENUE SOUTH, SUITE 1402
NEW YORK, NY 10003
(212) 405-1610

Ralph M. Randazzo is a Partner in Randazzo & Randazzo, L.L.P., a firm with offices in New York City and Huntington, Long Island. He is admitted to practice law in New York, Maryland, and the District of Columbia. Mr. Randazzo has extensive experience in elder law, estate planning, guardianship, Medicare and Medicaid, taxation, and has been the court appointed guardian to several incapacitated individuals. His firm concentrates in the areas of life and estate planning, elder law, planning for disabilities, probate, and guardianship.

Mr. Randazzo is a former member of the Board of Directors of SAGE (Services and Advocacy for GLBT Elders), the past Chairman of the Taxation Law Committee and a member of the Elder Law, Taxation Law and Surrogates Court Committees of the Suffolk County Bar Association and the former Treasurer and Board Member of LeGaL (Lesbian and Gay Law Association of Greater New York). He is the author of *Elder Law and Estate Planning for Gay and Lesbian Individuals and Couples*, Marquette Elder's Advisor, Volume 6, Number 1 (Fall 2004).

Mr. Randazzo lectures frequently for bar associations, universities, community groups, special interest groups and individuals on issues relating to Estate Planning, Elder Law, Guardianship, and marriage as it applies to the GLBT community.

Joanna B. Sobel is a Summer Associate at Randazzo & Randazzo, L.L.P. She graduated from the Pennsylvania State University in May of 2012, and is now working towards earning her Juris Doctor at Benjamin N. Cardozo School of Law. At Cardozo, Ms. Sobel is a member of the Moot Court Honor Society, Cardozo Advocates for Battered Women, for which she has successfully assisted clients in obtaining temporary restraining orders, and OUTlaw, Cardozo's longest-standing LGBT student group.