
LAW AND THE FAMILY

"Invalidity of Prenuptial Agreements"

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PRENUPTIAL AGREEMENTS must be fair and reasonable and not tainted with fraud, misrepresentation, coercion or imposition. In the absence of such taints, these agreements have been presumed to be valid, and the party alleging taints or defects has had the burden of proof to establish their invalidity. [FN1]

Domestic Relations Law (DRL) 236[B](3), enacted in 1980, attempted to modernize the New York law dealing with prenuptial and post-nuptial agreements. The subject matter of such agreements includes: "(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 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 custody, care, education and maintenance of any child of the parties."

Former 5-311 of the General Obligations Law prohibited spouses from contracting to relieve a husband from his liability to support his wife. It was repealed in 1980 as part of the enactment of the Equitable Distribution Law (EDL) and a new 5-311 was enacted, effective July 19, 1980. The current section abrogates the gender-based distinction in the predecessor statute that only prohibited spouses from contracting to relieve a husband's liability to support his wife, a distinction found unconstitutional by the Second Department in *Greschler v. Greschler*. [FN2] Based on the premise that either spouse has the obligation to support the other on a needs basis [FN3]

the current 5-311 provides that either spouse may waive his or her right to support as long as he or she is not likely to become a public charge.

In the past, prenuptial agreements have been treated differently than post nuptial agreements. Courts have sustained the validity of a prenuptial agreement where there has been an intelligent waiver and full disclosure was not made. [FN4]

'Fiduciary Relationships' Redefined

In Matter of Greiff [FN5] the Court of Appeals extended the concept of "fiduciary relationships" to engaged parties when they execute a prenuptial agreement and held that the existence of certain "exceptional circumstances" can warrant a shift of the burden of proof bearing on its legality and enforceability. The Court of Appeals held that the spouse who contests the validity of a prenuptial agreement bears the burden to establish a "fact-based, particularized inequality" before the burden shifts to the party seeking to uphold the validity of the agreement to disprove fraud or overreaching. The court adopted a "particularized and exceptional scrutiny" test. It stated:

"Whenever * * * the relations between the contracting parties appear to be of such a character as to render it

certain that * * * either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, * * * it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood" * * * .

Prior to this determination our intermediate appellate courts upheld antenuptial agreements not tainted by fraud, without an affirmative obligation on the part of both parties to fully disclose their finances and without consideration of whether the terms of the agreement were fair when made.

The 'Bloomfield' Case

In Bloomfield v. Bloomfield [FN6] the First Department affirmed an order of the Supreme Court, which held the parties' prenuptial agreement unenforceable. Marshall and Barbara Bloomfield separated in January 1995, after 25 years of marriage, and Marshall initiated divorce proceedings in August 1995. Barbara answered and counterclaimed, demanding, inter alia, equitable distribution.

At the time they were married, Marshall was about 30 years old, a practicing attorney, and the son of a practicing attorney who was involved in real estate and owned various properties and who placed real estate properties in Marshall's name. Barbara was 24 and had finished one year of college. Before the wedding in May 1969, at Marshall's request, Barbara signed a document in which she waived certain property and elective rights. Barbara claimed they were alone in her apartment. Marshall claimed they were at his father's office with a notary present. Barbara was not represented by counsel. The document reads:

I, BARBARA FRIEDLANDER, in order to induce MARSHALL E. BLOOMFIELD, to marry me, and for the consideration of a Lady's Wedding Ring , the receipt of which is hereby acknowledged, (which I have had appraised by Marcus & Co., Inc., located in Gimbel Bros., 33rd Street in New York City, Invoice No. 69630) appraised at the value of one-thousand and six-hundred dollars (\$1,600.00), and for the consideration of Marshall's promise to maintain a life insurance policy on his life payable to me upon his death (should he die before me) in the amount of ten-thousand dollars (\$10,000), and for other good and valuable consideration, do hereby WAIVE AND RENOUNCE ANY AND ALL RIGHTS that, and to which, I would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which Marshall has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated, and I do further expressly WAIVE THE RIGHT OF ELECTION to take, or to make any demand for, contrary to the provisions of Marshall's last will and testament, pursuant to the provisions of 5-1.1 of the Estates, Powers and Trusts Law of the State of New York, as said section now exists or may hereafter be amended.

I understand the meaning of the above, and I make each and every statement contained in this agreement of my own free will and accord. Copy received.

The initial provision of the agreement, which is completely separate states: "I ... do hereby WAIVE AND RENOUNCE ANY AND ALL RIGHTS that, and to which, I would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which Marshall has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated ..." This is followed by a separate provision that states: "And I do further expressly WAIVE THE RIGHT OF ELECTION to take, or to make any demand for, contrary to the provisions of Marshall's last will and testament ..." (emphasis added).

The First Department held that since in 1969, when the agreement was executed, a wife had no rights in or to her husband's property apart from the right to support, or alimony, the only right that could possibly have been referred to in this waiver was Barbara's right to support upon termination of the marriage. It pointed out that at the time the agreement was entered into GOL 5-311 prohibited a wife from waiving her right to support and an agreement that sought to do so was void. It held that the agreement was void on this ground alone.

Marshall construed the first provision in the agreement, which he acknowledged was a "waiver of non-existent distribution rights," as being "merely prophylactic" and not waiving "any current property rights, but only the right to receive a distribution if there were any subsequent changes in the law."

The First Department pointed out that in 1969, a wife's waiver of "any and all rights that, and to which, I would otherwise be entitled to because of such marriage, whether present or future rights," necessarily encompassed her right to alimony. It stated that the agreement must be read in the context of the economic disparities that generally prevailed between husbands and wives at the time the agreement was entered into and the import of the law as it existed at the time it was signed by Barbara in 1969. It found that the only meaning that could be attributed to the first provision was that it purported impermissibly to relieve Marshall of his obligation to support Barbara and was therefore void.

Statute of Limitations

The court then held that Supreme Court correctly rejected Marshall's argument that Barbara was time-barred from challenging the 1969 agreement. It found that the Statute of Limitations was no defense to her claim that the agreement was void at its inception, [FN7] holding that the Statute of Limitations does not apply in the case of an agreement void on its face. [FN8] It went on to state, in dicta, that even if the agreement was voidable, it would find that the Statute of Limitations for a challenge to a prenuptial agreement was tolled during the marriage, referring to *Lieberman v. Lieberman*, [FN9] which held that, in view of the public policy of this State, the statute must be tolled until the parties physically separate, until an action for divorce or separation is commenced, or until the death of one of the parties. Otherwise, irrespective of the viability of the marriage relationship, the husband and wife would have to assume adversarial positions as to their prenuptial agreement within the first six years of their marriage or forever lose their right to challenge the agreement.

Justice Friedman dissented. He pointed out that in *Propp v. Propp* [FN10] the First Department was faced with the identical issue and found that it was

the current version of GOL 5-311 that controlled. There the court adopted the reasoning of the Second Department's decision in *Goldfarb v. Goldfarb*. [FN11] He also asserted that it has long been the law that the Statute of Limitations is not tolled merely because the parties are married, and the creation of such a toll is beyond the power of any court. [FN12]

We agree with the dissent.

In *Propp v. Propp*, the First Department held that the validity of the agreement was governed by the current GOL 5-311, which provides in effect that either spouse may waive his or her right to support as long as he or she is not likely to become a public charge. [FN13]

'*Goldfarb v. Goldfarb*'

In *Goldfarb v. Goldfarb*, [FN14] the parties executed a separation agreement on Oct. 16, 1979. It provided for a limitation on the husband's liability to support his wife, that the total amount of support would be \$7,000, payable within seven years. At the time the agreement was executed, former 5-311 of the General Obligations Law prohibited spouses from contracting to relieve a husband from his liability to support his wife, which is exactly what the parties did, by limiting the total amount of support to be paid to the wife. The first cause of action sought rescission of the separation agreement as violative of former 5-311 of the General Obligations Law, which had been previously repealed the current section being in effect at the commencement of the action. The Second Department held that the current section was the applicable law. While pointing out that contracts made by private parties must necessarily be construed in the light of the applicable law at the time of their execution a contract "may be affected by subsequent legislation in the exercise of the police power, or by a subsequent statute announcing a new public policy ... or by repeal of a prohibitory act. Where there has been a repeal of a prohibitory statute, which had rendered invalid a contract violative of its provisions, such a repeal will render the contract valid and enforceable and not subject to the defense of illegality. This principle, however, applies only to those acts of the Legislature that are strictly measures of public policy, not to those which are intended primarily to establish or affect the rights of parties as to each other.

Public Policy Change

The 1980 enactment of a new GOL 5-311, as part of this statutory overhaul of the family law of New York represented a change in the public policy of this State. Consequently, even though the parties, by including in their separation agreement a partial waiver of the husband's wife support obligation, violated former 5-311, those provisions were rendered valid and enforceable and not subject to a claim of illegality, when the statute

prohibiting such a waiver was repealed by acts of the Legislature constituting measures of public policy.

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FN(1) Matter of Phillips, 293 NY 483, 58 NE2d 504, reh. den. 294 NY 662, 60 NE2d 389.

FN(2) 71 AD2d 322, mod. on other grounds 51 NY2d 368.

FN(3) See Orr v. Orr, 440 U.S. 268.

FN(4) See Hoffman v. Hoffman (3d Dept), 100 AD2d 704, 474 NYS2d 621.

FN(5) 92 NY2d 341 (1998).

FN(6) __ AD2d __, 723 NYS2d 143 (1st Dept., 2001).

FN(7) Citing Pacchiana v. Pacchiana, 94 AD2d 721, appeal dismissed, 60 NY2d 586.

FN(8) Citing Clermont v. Clermont, 198 AD2d 631 lv dismissed, 83 NY2d 953).

FN(9) 154 Misc 2d 749.

FN(10) 112 AD2d 868, appeal dismissed 66 NY2d 855.

FN(11) 86 AD2d 459.

FN(12) Citing Scheuer v. Scheuer , 308 NY 447; Dunning v. Dunning, 300 NY 341, 343; see also, Rosenbaum v. Rosenbaum , 271 AD2d 427; Pacchiana v. Pacchiana, 94 AD2d 721, appeal dismissed 60 NY2d 586; Anonymous v. Anonymous, 71 AD2d 209, 212.

FN(13) L 1980, Ch 281, 19.

FN(14) 86 A.D.2d 459, 450 N.Y.S.2d 212 (2d Dept., 1982).

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