

# Postnuptial Agreements

*Is It Better to Live in New York or New Jersey?*

*Part One of a Two-Part Article*

By **Judith E. Siegel-Baum & Stephanie F. Lehman**

The answer to the question, "Is it better to live in New York or in New Jersey if you want your postnuptial agreement to be enforced?" is plain and simple — New York is where you need to be. If your client lives in New Jersey, keep him or her away from postnuptial agreements.

There is a vast difference between New York and New Jersey law in the standard of review for enforcement of postnuptial agreements. This article provides an overview of the requirements for a valid postnuptial agreement in New York and the disparity between New York and New Jersey law.

## THE POSTNUPTIAL AGREEMENT IN NEW YORK

Postnuptial agreements are authorized by Domestic Relations Law (DRL) § 236(B)(3), which says that in order for a postnuptial agreement to be valid and enforceable it must: 1) be for consideration; 2) be properly executed; 3) provide adequate disclosure; and 4) follow the principles of contract law. It is our opinion that each party needs to be represented by independent counsel during the negotiation of, and execution of, the postnuptial agreement. However, the issue of representation or the failure of representation by counsel is only one factor a court will consider when determining the validity of a postnuptial agreement. *Beutel*

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*v. Beutel*, 55 NY2d 957 (1982); *Cron v. Cron*, 8 AD2d 3d 186 (1st Dept. 2004); *Rodriguez v. Rodriguez*, 11 AD3d 768 (3d Dept. 2004); *Forsberg v. Forsberg*, 219 AD2d 615, 631 (2d Dept. 1995); *Brassey v. Brassey*, 154 AD2d 293 (1st Dept. 1989).

Postnuptial agreements require consideration to be binding. A promise to remain married, alone, should not be sufficient consideration, although case law exists to the contrary. See *Whitmore v. Whitmore*, 8 AD3d 371, 372 (2d Dept. 2004) (wife's agreement to continue to remain married to husband did not provide adequate consideration); *Zagari v. Zagari*, 191 Misc. 2d 733 (Sup. Ct., Monroe Cty. 2002) (wife's consideration was the "continuation of marriage," and the agreement was, as a matter of law, enforceable). A determination of adequate consideration is fact specific in each case.

Pursuant to DRL §236(B)(3) "an agreement by the parties, made ... during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties and acknowledged," meaning "acknowledged or proven in the manner required [for] a deed to be recorded." *Matisoff v. Dobi*, 90 NY2d 127, 128 (1997). Moreover, postnuptial agreements must be subscribed and acknowledged at the same time to be valid. *Leighton v. Leighton*, 46 AD3d 264 (1st Dept. 2007); *Kerner-Puritz v. Puritz*, NYLJ, Sept. 25, 2006, p. 22, col. 1 (Sup.Ct. N.Y. Co.); *D'Elia v. D'Elia*, 14 AD3d 477 (2d Dept. 2005).

## FULL AND COMPLETE DISCLOSURE

DRL § 236(B)(3) specifically requires full and complete disclosure. The fiduciary relationship that exists between spouses places couples in a confidential relationship which further requires a husband and wife to make adequate disclosure in order for a postnuptial agreement to be enforceable. See *Dayton v. Dayton*, 175 AD2d 427 (3d Dept. 1991); *Urfirer v. Cornfeld*, 17 AD3d 129 (1st Dept. 2005); *Chalos v. Chalos*, 128 AD2d 498, 499 (2d Dept. 1987) (failure by husband to apprise wife of the value of his holdings, of which

the wife was familiar, did not constitute fraud sufficient to invalidate the agreement). Be as specific as possible when identifying the property in the body as well as in the schedules of the postnuptial agreement.

Ordinary principals of contract law apply, with the further caveat that as a result of the confidential/fiduciary relationship between the parties to a postnuptial agreement, fraud need not be proven before relief is granted. *Christian v. Christian*, 42 NY2d 63 (1977); *O'Malley v. O'Malley*, 41 AD3d 449 (2d Dept. 2007); *Barchella v. Barchella*, NYLJ, Oct. 15, 2007, p. 34, col. 5 (App. Div.). To set aside agreements on the grounds of coercion, duress, undue influence or overreaching a party must demonstrate that he or she is unable to exercise his or her own free will or is unable to act in such a manner as to further his or her own interests. Please note, with the exception of spousal support provisions made in a postnuptial agreement, the terms of the postnuptial agreement must be fair and equitable at the time they are made. Spousal support provisions must be fair and reasonable upon execution and not unconscionable at the time of enforcement. See DRL § 236(B)(3). See also *Valente v. Valente*, 269 AD2d 389 (2d Dept. 2000).

## STATUTE OF LIMITATIONS

DRL § 250 amended the law relating to the statute of limitations for marital agreements, including postnuptial agreements. DRL § 250 provides that the statute of limitations for an action or proceeding arising from a postnuptial agreement is three years. The statute further provides that the statute of limitations is tolled until a matrimonial action is commenced or one of the parties to the agreement dies. DRL § 250 is only applicable to postnuptial agreements executed on or after July 3, 2007. *Brody v. Brody*, NYLJ, May 13, 1998, p. 28, col. 3 (Sup. Ct. Nassau Co.).

If a challenge is made to a postnuptial agreement that was executed prior to July 3, 2007 the applicable

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statute of limitations is six years. However, the tolling of the statute of limitations is treated differently by the First and Second Departments. See CPLR § 213. The First Department tolls the statute of limitation, until an action for divorce is commenced or one of the parties dies. *Bloomfield v. Bloomfield*, 97 NY2d 188 (2001). In

the Second Department a proceeding arising from a postnuptial agreement will be time barred if it is not brought within six years of the date of execution. By not tolling the statute, spouses may be compelled to litigate in order to escape the running of the statute of limitations. DRL § 250 is also applicable to invalidate or enforce a postnuptial agreement in estate or non-marital litigation. If a claim is made to challenge that part

of the postnuptial agreement that addresses waiver of estate rights, and a matrimonial action was never brought during the lifetime of the deceased spouse, the statute of limitations is tolled until the decedent's death.

In next month's issue, we'll look at how New Jersey law treats postnuptial agreements, comparing and contrasting the two state's methods.

