

LJNLAW JOURNAL
NEWSLETTERS**NEW YORK**
FAMILY LAW MONTHLY®

An incisivemedia publication

Volume 10, Number 4 • December 2008

**The Postnuptial
Agreement in
NY and NJ***Part One of a Two-Part Article***By Judith E. Siegel-Baum
and Stephanie F. Lehman**

In last month's newsletter, we looked at the law in New York concerning enforcement of postnuptial agreements. In general, unless the terms of a postnuptial agreement were unfair and inequitable at the time they were made, or the party opposing enforcement can prove coercion, duress or undue influence, the agreement will be upheld. New Jersey's system is different, and knowing what those differences are is crucial when counseling clients with jurisdictional ties to both states.

**NEW JERSEY'S POSTNUPTIAL
AGREEMENT LAW**

As a result of a 1999 New Jersey decision, drafting postnuptial decisions in New Jersey appears to be risky for attorneys. Four standards must be met for a postnuptial agreement to be enforceable. They included: 1) full disclosure; 2) independent representation by each party; 3) absence of coercion or duress; and 4) that the terms of the agreement are fair and equitable, not only at the time of negotiation and signing, but also at the time that they are being enforced. Because a change in circumstances subsequent to the execution of the postnuptial agreement may

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Postnuptial Agreement

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occur, thereby rendering the postnuptial agreement unconscionable in the future, it makes it extremely difficult for attorneys to recommend postnuptial agreements to their New Jersey clients. *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999). This difference between New York and New Jersey law is paramount.

However, it would still appear that postnuptial agreements will be enforced in New Jersey under the appropriate facts and circumstances. *Massar v. Massar*, 279 N.J. Super. 89 (App. Div. 1995); *Nicholson v. Nicholson*, 199 N.J. Super. 525 (App. Div. 1985). To be enforceable, in New Jersey as in New York, the parties must be committed to their marriage. At the same time creating an enforceable agreement requires that property be divided in a manner consistent with each other's contributions to the marital assets in the event of a divorce.

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In *Pacelli*, with respect to the enforcement of the parties' postnuptial agreement, the Appellate Division determined that whether or not an agreement is fair and equitable should be measured at two different time periods: 1) at the time of execution; and 2) at the time of enforcement. It is important to note that the *Pacelli* decision made the standard of review for postnuptial agreements different than premarital agreements. In reaching this determination the court found that the relationship of a couple at the time of drafting a postnuptial agreement was different than that of a couple entering into a marriage (prenuptial agreement) or ending a marriage (settlement agreement). The rationale, which appears somewhat contrived, is that the purpose of entering into a postnuptial agreement is to preserve the family, which makes the relationship between the parties "inherently cohesive" and different from the relationship of the parties at the time they enter a premarital agreement or property settlement agreement.

In *Pacelli*, the court found that the agreement's terms were neither fair nor equitable at the time of execution nor at the time that enforcement was sought; accordingly, the Appellate Division refused to enforce the terms of the postnuptial agreement. This standard for review

is unreasonable in comparison with the other standards for enforcement of other matrimonial agreements, especially the standard for premarital agreements. *Brandenberg v. Brandenberg*, 83 N.J. 198, 211 (1980), Uniform Premarital Act N.J.S.A. 37:2-31 to N.J.S.A. 37:24.

CONCLUSION

New York is obviously more protective of the letter of its postnuptial agreements, while New Jersey is less interested in the contract itself and more concerned with what seems fair at the time of enforcement. Thus, changes in circumstance for a couple whose postnuptial agreement is governed by New Jersey law may eviscerate or negate the terms of that agreement.

The difference between the standard for enforcement of postnuptial agreements in New York and New Jersey makes it clear why, when drafting and executing a postnuptial agreement, it is necessary to dictate the law of the state in which the agreement is to be interpreted. If a couple has connections with both New York and New Jersey, and your client is the one who is likely to fare better if the agreement is upheld in its entirety, then a choice of New York law is in your client's best interest.

