

Postnuptial Agreements: Considerations for Drafting and Enforcement under New Jersey and New York Law

by Stephanie F. Lehman and Ashley B. Slobodkin

New Jersey attorneys often represent clients who have jurisdictional ties to both New Jersey and New York. In these instances, the attorney is obligated to analyze the law of both states to appropriately counsel the client. This issue frequently arises in the context of spousal agreements, including postnuptial agreements. There is a vast difference between New York and New Jersey law regarding the standard of review for enforcement of postnuptial agreements. This article provides an overview of the requirements for drafting a postnuptial agreement in each state and the disparity between New York and New Jersey law. While postnuptial agreements present a dilemma for attorneys in either state, a greater potential for enforcement unquestionably exists under New York law.

New Jersey's Postnuptial Agreement Law

The enforceability of postnuptial agreements in New Jersey remains unsettled, making it difficult and risky for attorneys to recommend them to their New Jersey clients. A postnuptial agreement is differentiated from both a prenuptial agreement—where the party presented with an unfavorable proposition remains free to walk away—and a property settlement agreement, which is entered into when the marriage has already 'died,' and the parties are adversarial and are assumed to be negotiating in their own self-interest. The courts distinguish between parties to a postnuptial agreement and those contemplating either a prenuptial or settlement agreement because parties to a postnuptial agreement have already entered into, and intend to remain in, the legal relationship of marriage.

The leading case regarding postnuptial agreements in New Jersey is the Appellate Division's decision in *Pacelli v. Pacelli*, where the court found the parties' postnuptial agreement was unenforceable.¹ The court declined to issue a bright line rule stating postnuptial agreements are *per se* unenforceable, and instead concluded the

agreements must be closely scrutinized and carefully evaluated. However, approximately 11 years later, the court in *Ward-Gallagher v. Gallagher* stated that "[g]enerally, mid-marriage agreements are unenforceable as they are 'inherently coercive'..."² Thus, the enforceability of postnuptial agreements in New Jersey appears highly questionable and should not be relied upon to alter the financial relationship between spouses.

To constitute a potentially enforceable postnuptial agreement, the agreement must be executed when the parties' relationship has genuinely deteriorated and must not be entered into merely to enable one spouse to exact a financial gain over the other. For example, in *Pacelli* the court found the husband artificially created a marital "crisis" to take advantage of the wife's desire to keep the parties' marriage and their family intact. The court further found the context in which the husband made his demand—in essence, sign an agreement or I will divorce you—was "inherently coercive," as the wife's decision to sign the agreement was dictated by her desire to preserve her family rather than by a consideration of her legal rights. Notably, the fact that the wife was represented by independent legal counsel, who advised her not to sign the agreement, was of no consequence.

In addition, a postnuptial agreement must be fair and equitable both when it is made and when enforcement is sought. It is important to note this dual inquiry makes the standard of review for postnuptial agreements different than the standard applicable to prenuptial agreements, which are governed by N.J.S.A. 37:2-38 and which are evaluated for unconscionability only at the time of execution.³

For an agreement to be deemed fair at the time of execution, full and accurate disclosure must be made. The court will examine the agreement as a whole, considering its total effect, including the division of assets, provisions for alimony and rights upon a spouse's death.

The agreement must also be equitable at the time enforcement is sought. Changed circumstances must not have made enforcement inequitable, and the court in *Pacelli* notes two reasons for this inquiry. First, a marriage may survive for many years after such an agreement, and it may be inequitable to preclude the non-moneyed spouse's participation in post-agreement wealth, particularly when the family's prosperity is due, in part, to the contribution of a spouse in the role of homemaker and caregiver to the parties' children. Second, the postnuptial agreement may be inequitable to the obligor if a family's assets are worth less at the time of enforcement than when the agreement was executed.

Although New Jersey law presumably favors the enforcement of marital agreements, the "law affords particular leniency to agreements made in the domestic arena and similarly allows judges greater discretion when interpreting these agreements."⁴ As stated in *Lepis v. Lepis*, "contract principles have little place in the law of domestic relations."⁵ Courts will, however, review each agreement on a case-by-case basis and have found agreements between spouses to be enforceable under the appropriate facts and circumstances.⁶ Thus, while it appears postnuptial agreements will be enforced under the appropriate facts and circumstances, extreme caution should be exercised when altering the financial relationship between spouses.

New York's Postnuptial Agreement Law

Unlike their New Jersey counterparts, postnuptial agreements in New York are addressed by statute. Domestic Relations Law §236(B)(3) provides "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 or proven in the manner required to entitle a deed to be recorded." The agreement must be signed and acknowledged simultaneously.⁷

Ordinary principles of contract law apply, with the caveat that "[b]ecause of the fiduciary relationship that exists between spouses, postnuptial agreements are closely scrutinized by the courts and are more readily set aside on grounds that would be insufficient to nullify an ordinary contract."⁸ The spouse seeking to set aside an agreement bears the burden of showing the agreement was the result of fraud or overreaching, or that its terms were unconscionable.⁹

A postnuptial agreement may be set aside upon a showing of either actual or constructive fraud. Unlike with actual fraud, a finding of constructive fraud does not require a demonstration of fraudulent intent; rather, "[t]he law regards the making of a misrepresentation by a defendant who possesses a position of superiority and influence over the plaintiff by reason of the confidential relationship between them as a breach of duty actionable as constructive fraud."¹⁰ The doctrine of constructive fraud is applicable in the context of postnuptial agreements since spouses share a confidential relationship requiring the utmost good faith when contracting with each other. A finding of fraud is not, however, required to set aside an agreement, as relief will be granted if the agreement is manifestly unfair because of the other spouse's overreaching.¹¹

If the terms of a postnuptial agreement are manifestly unfair to a spouse when the agreement was executed, the inference of overreaching¹² arises.¹³ The terms of a postnuptial agreement must also not be unconscionable when the agreement was executed. An unconscionable agreement has been defined as "one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense."¹⁴ Spousal support provisions, however, must be fair and reasonable upon execution of the postnuptial agreement, and must not be unconscionable at the time of enforcement.¹⁵

Agreements between spouses involve a fiduciary relationship, which requires each spouse to make adequate financial disclosure. Property should be identified as specifically as possible, and any agreement that references "attached schedules" must be accompanied by those attachments.¹⁶ In addition to financial disclosure, each party should be represented by independent counsel, and should be afforded adequate time to reflect upon the terms of the agreement to minimize the likelihood it will be held unenforceable.¹⁷

Conclusion

New York is clearly more protective of the letter of its postnuptial agreements, while New Jersey is less interested in the contract itself and more concerned with what appears equitable at the time of enforcement. Further, while New Jersey law's baseline is that postnuptial agree-

ments are 'generally' unenforceable, New York law specifically provides for these agreements and is much more likely to enforce them.

The stark contrast between the standard for enforcement of postnuptial agreements in New York and New Jersey makes it clear why attorneys considering postnuptial agreements for clients with jurisdictional ties to both states must carefully consider the law of the state in which the agreement is to be interpreted. If you represent the client who is likely to fare better if the agreement is upheld in its entirety, then a choice of New York law is indisputably in your client's best interest. ■

Stephanie F. Lehman is a partner in the firm of Hartmann Doherty Rosa Berman & Bulbulia. Ashley B. Slobodkin is an associate at the firm.

Endnotes

1. *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999).
2. *Ward-Gallagher v. Gallagher*, 2010 WL 3257916m at *6 (App. Div. 2010)(quoting *Pacelli*, *supra*, 319 N.J. Super. at 190-191)(Emphasis added).
3. Applies to prenuptial agreements entered on or after June 27, 2013.
4. *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995)(citing *Guglielmo v. Guglielmo*, 253 N.J. Super. 542 (App. Div. 1992)).
5. *Lepis v. Lepis*, 83 N.J. 139, 148 (1980).
6. See *Massar*, *supra* (finding an agreement that limited the grounds under which a party could file for divorce enforceable).
7. See *Galetta v. Galetta*, 991 N.E.2d 684, 692 (N.Y. 2013); see also, *D'Elia v. D'Elia*, 788 N.Y.S.2d 156, 157 (N.Y. App. Div. 2005).
8. *Einhorn v. Einhorn*, 899 N.Y.S.2d 59, at *6 (N.Y. Sup. Ct. 2009)(citations omitted).
9. *Id.* at *7.
10. *Abbate v. Abbate*, 441 N.Y.S.2d 506, 512 (App. Div. 1981)(citations omitted).
11. *Christian v. Christian*, 365 N.E.2d 849, 856 (N.Y. 1977).
12. Overreaching is defined as "the concealment of facts, misrepresentation or some form of deception." *In re Phillips' Estate*, 58 N.E.2d 504, 508 (N.Y. 1944).
13. *Petracca v. Petracca*, 956 N.Y.S.2d 77, 80-81 (App. Div. 2012).
14. *Einhorn*, *supra*, 899 N.Y.S.2d., at *7.
15. See D.R.L. §236(B)(3); see also *Einhorn*, *supra*.
16. See *Darius v. Darius*, 665 N.Y.S.2d 447, 450 (App. Div. 1997).
17. See *C.S. v. L.S.*, 980 N.Y.S.2d 274, at *6 (N.Y. Sup. Ct. 2013).