

## What's Up with Prenups, Postnups & Cohabs?

By

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- I. Reasons for Explosive Growth - In 20 years the number of prenuptial agreements has quintupled.
  - A. The national divorce rate is 50 percent overall, 60 percent for remarriages.
    1. 70 percent of divorces occur over money; more than sex or in-laws.
    2. Prenups cause couples to communicate and compromise about money before the wedding, making it more likely that a marriage will last.
    3. Prenups alleviate anxiety and give couples peace of mind to enable them to get married.
    4. Prenups will make divorce less traumatic and cause married couples and their children less pain.

- B. People have more property to protect than ever before.
1. Young people are marrying later and by the time they do, they have accumulated more assets.
  2. We have a more educated population than ever before, and people want to protect their prospects - degrees or careers, for example. Today's geek is tomorrow's CEO. Today's waitress is tomorrow's movie star.
  3. Women come into the marriage with increasingly greater assets to protect.
  4. Largest intergenerational transfer of wealth in history - \$40 trillion over next 5 decades from Depression to baby boomer generation.

C. Divorce laws are murky.

1. Judges have a tremendous amount of discretion in this highly subjective area.
2. Particularly vague are critical areas such as stock options, businesses, professional practices and licenses.
3. Prenups enable couples to decide for themselves and write their own contract. Marital agreements can clarify, modify or override existing laws.

- II. Myths About Prenups - The myriad myths about prenuptial agreements do not stand up to scrutiny.
  - A. Prenups CAUSE divorce. Does buying health insurance make people sick?
  - B. Prenups are not for young people.
    - 1. Young people are marrying later than ever before. The average age for a woman is 25 and for a man, almost 27. By the time couples marry, they generally have acquired assets, such as cars, professional degrees, homes, 401Ks or stock options.
    - 2. Young people have prospects; for example, degrees, certifications, careers and/or businesses.
    - 3. Young people come into marriages with credit card debt and student loans.
    - 4. Young people often support their spouses through school or give up careers to raise children.
  - C. Prenups are bad for women.
    - 1. Misconception - The man takes advantage of the woman.
    - 2. Reality - Prenups can be used to help, not hurt, women.
    - 3. They can be used to ensure that women are 50/50 partners in a marriage.
    - 4. They can be used to compensate women for non-monetary contributions to marriage, such as child rearing.
    - 5. Of course, more and more women today go into marriage with assets and want to protect their progress.

- D. Prenups mean, “I don't love you, I don't trust you.” They're unromantic!
1. Prenups stimulate communication and compromise.
  2. Money is a touchy subject, but once broached, it opens the door to discussion of other sensitive issues, bringing couples closer.
  3. What's so romantic about a messy divorce?

### III. Bulletproofing a Prenuptial Agreement.

The media has reported on the horror stories of prenups that did not hold up in court. In real life, though, properly executed prenups will be upheld in the 50 states and the District of Columbia. New York is particularly hospitable to prenuptial agreements. Bloomfield v. Bloomfield, 738 N.Y.S.2d 650 (2001); Matisoff v. Dobi, 659 N.Y.S.2d 209 (1997).

- A. Absence of fraud, undue influence, duress or overreaching.
  - 1. Separate and independent counsel.
  - 2. Full financial disclosure of assets and liabilities; line by line inventory.
  - 3. Lead time before the wedding; aim to complete 30 days before the wedding and preferably before invitations go out.
- B. A threat not to marry without a prenuptial agreement, even if attacking party is pregnant, is not duress.
  - 1. No one is legally obligated to marry another.
  - 2. Duress constitutes threat to do something wrongful in and of itself. 805 Third Ave Co. v. M.W. Realty Associates, 58 N.Y.2d 447(1983).
  - 3. A hard bargain is not duress. Appel v. Ford Motor Co., 490 N.Y.S.2d 228 (2d Dep't 1985).
- C. Formalities.
  - 1. Must be in writing and signed by both parties.
  - 2. In New York, must be acknowledged in the manner required to entitle a deed to be recorded.
  - 3. "Consideration" for the contract is the marriage.

D. Unconscionability/Reasonableness.

1. Many states focus on “unconscionability” at the time of enforcement of the contract, that is, at the time of death or enforcement; some courts also consider “fairness.”
2. In New York, maintenance/spousal support must be fair and reasonable at time of making of the agreement; not unconscionable at the time of divorce.
3. In New York, spousal support cannot be waived if as a result one of the spouses is likely to become a public charge. General Obligations Law Section 5-311.
4. Reasonableness/fairness are amorphous concepts. Most judges look at the circumstances of the parties - their ages, stations in life, assets, income, health, employment, dependents, and level of understanding of the agreement.
5. “Unconscionable” means one-sided, manifestly unfair and inequitable - shocking to the conscience. An unconscionable agreement is one that no person in his or her senses would make and one that no honest or fair person would accept. Christian v. Christian, 396 N.Y.S.2d 817 (1977).

E. Statute of Limitations.

1. Most states provide that the statute of limitations is “tolled” during the period of marriage. Thus, the statute begins to run from the time of commencement of a divorce action or probate proceeding to contest a prenup, not from the time of marriage.
2. Note: In New York, there used to be a disagreement among the courts as to whether the statute of limitations is tolled during the marriage. This disagreement was resolved by the legislature on July 3, 2007. Domestic Relations Law § 250 provides that the statute of limitations shall be three years and is tolled during the marriage.

F. Marital Laws.

1. 41 states and District of Columbia are “equitable distribution” states. 9 states are community property states. New York is an equitable distribution state.
2. In equitable distribution states, the value of property is generally divided upon divorce, based on a variety of “equitable” factors, such as income and property; length of marriage; age and health; need of a caretaker to stay home; any award of spousal support; financial and non-financial contributions, such as homemaking and child rearing; and tax consequences.
3. In community property states, the value of property is generally divided equally, although not necessarily.
4. Property may be divided irrespective of who holds technical title.
5. A majority of states, including New York, distinguish between “separate” and “marital/community” property. In these so-called “dual property” states only the value of marital/community property is subject to division upon divorce.
6. In some states, no distinction is made between separate and marital/community property. These are so-called “unitary” property states. All property (subject to certain exceptions) may be divided upon divorce.
7. Whether appreciation on separate property is marital or separate property is an unclear area; generally the determination is based on whether the appreciation is “active” or “passive.” “Active” appreciation generally results from personal efforts; “passive” appreciation results from efforts of others or external factors (e.g., inflation or interest rate).
8. Prenups are recognized in both equitable distribution and community property systems to modify, clarify or override existing domestic relations laws.

G. Uniform Premarital Agreement Act (UPPA)

1. The Uniform Premarital Agreement Act (UPAA) was created in 1983 by a conference of commissioners in response to growing interest in prenups.
2. The majority of states and the District of Columbia have adopted a version of the UPAA.
3. New York has not adopted the UPAA. Prenuptial agreements are governed by DRL § 236, Part B (3).

H. Retainer Agreement.

1. Required in New York, together with Statement of Client's Rights and Responsibilities. 22 NYCRR §§ 1400.2-1400.3.
2. Recommendation: state that one attorney cannot represent both parties.
3. Recommendation: state that attorney will be paid hourly rate if called as a witness.

#### IV. Estate Planning and Prenuptial Agreements.

##### A. State laws vary widely on entitlement of surviving spouse.

1. Equitable distribution states provided an automatic “elective share” for surviving spouse: usually one-third to one-half outright or a life interest in one-third to one-half of deceased spouse’s assets. In New York, if there is a will, the automatic “elective share” for the surviving spouse is one-third outright of the deceased spouse's assets.
2. Without will, state intestacy laws determine who gets deceased spouse’s assets, usually one-third to one-half of the assets if there are children; without children, possibly all the assets. In New York, if there is no will, if there are no children, 100% of the assets to surviving spouse; with children, \$50,000 plus 50% of the remaining assets to surviving spouse.
3. Community property states provide the surviving spouse is entitled to community share and sometimes a portion of separate property.

##### B. Prenuptial agreement overrides elective share and “intestacy” rights.

1. Although a prenuptial agreement may override the “intestate” share statute, it is obviously advisable to have a will to conform to terms of the prenuptial.
2. A prenuptial can modify the entitlement of a surviving spouse and provide less or more than state law would allow (but see (D), below, regarding qualified plan benefits).
3. New York law mandates a surviving spouse to receive an outright share of the deceased spouse's assets; a prenuptial can provide that the surviving spouse will receive his or interest in trust (e.g., QTIPs to qualify for the marital deduction).

- C. A prenuptial overrides a will and is a contract enforceable against the deceased spouse's estate. A will is a unilateral document that may be changed at any time by one party; a prenuptial is a bilateral document, and both parties must agree to amend or revoke it.
- D. Qualified plan survivor benefits are governed by the federal Employee Retirement Income Security Act (“ERISA”). Hurwitz v. Sher, 982 F.2d 778 (2d Cir. 1992).
1. Qualified plans include most company-sponsored defined benefit, profit sharing, 401(k) plans, employee stock option plans (“ESOPs”) and Keogh plans for the self-employed. Individual Retirement Accounts (IRAs) are not governed by ERISA. ERISA requires qualified plans to provide that a surviving spouse receive at least half, and in many cases all of the deceased participant's accrued benefits. A participant may waive these rights with the spouse's acknowledged consent during applicable election periods.
  2. Prenuptial agreements written before marriage are not effective to waive qualified plan survivor benefits. IRA survivor benefits, however, can be waived in a prenuptial agreement.
  3. Applicable waiver forms can be attached to a prenuptial agreement as exhibits. The prenuptial should provide that the forms will be signed (and notarized) promptly after the marriage.
  4. Penalty clauses may be inserted in a prenuptial agreement so that other assets which would otherwise pass to the surviving spouse can be reduced if the surviving spouse either did not sign the benefit waivers or otherwise receives qualified plan benefits that had been waived in the prenuptial.

V. What May or May Not be Covered.

A. Financial/substantive provisions.

1. List all assets, liabilities, income, and expectations of gifts and inheritances.
2. Provide how premarital and post-marital debts will be paid.
3. Agree upon what happens to each party's pre-marital property - and post-marriage appreciation, gains, income, rentals, dividends and proceeds of such property - in the event of death or divorce.
4. Agree upon what happens to post-marital property in the event of death or divorce.
5. Determine ownership of marital residence and secondary homes in the event of death or divorce.
6. Decide upon the status of gifts, inheritances, and trusts either spouse receives or benefits from, whether before or after marriage.
7. Select the beneficiary of all 401(k), 403(b), profit-sharing, pension, IRA, and all other retirement plans upon death and state if such benefits will be divided in the event of divorce.
8. Clarify what will happen to each type of property, whether jointly or individually owned, such as real estate, artwork, antiques, jewelry, earnings from employment or self-employment, stock options, stocks, bonds, mutual funds, business, professional practices, professional licenses or degrees, celebrity, goodwill, contracts, patents and copyrights, accident settlements, and winnings.
9. Specify valuation methodology for property that is difficult to value, such as closely-held businesses and stock options.

10. Define rights or limits to alimony, maintenance, or spousal support; provide for waivers or property settlement instead of support (to the extent allowable).
11. Detail death benefits, stating what each will provide the other by will, life insurance, other testamentary documents and the effect on state-mandated rights, such as “elective share” and “intestate” amounts.
12. Determine whether the parties wish each other to be an executor of the other's estate or trustee of any trust or guardian or conservator in the event of disability.
13. Decide upon medical, disability, life, and/or long-term-care insurance coverage.
14. Identify attorneys.
15. Determine what state's law will apply and how the marital agreement will be affected by a move to another state.
16. Decide on whether to provide for child support or custody (although nonbinding and in New York subject to Child Support Standards Act, Domestic Relations Law § 240 [1-(b)]).

B. “Escalator” and “Sunset” clauses.

1. “Escalator” clauses provide that the longer the marriage, the greater the payout on divorce or death. Note, agreement between Marla Maples and Donald Trump ratcheted up after five years of marriage.
2. “Sunset” clauses provide that the agreement expires automatically after the passage of a certain period of time, e.g., Jack Welch's agreement with Jane Welch expired after ten years.

C. Lifestyle or nonfinancial issues.

1. Serious issues such as careers or child rearing or light issues, such as who walks the dog, who does the dishes. These clauses are morally persuasive, rather than legally binding.
2. “Bad boy”/”bad girl” clauses: For example, it was reported that the agreement between Catherine Zeta-Jones and Michael Douglas contained a “fling fee” requiring Michael to pay \$5 million if he cheats on her.
3. Recommendation - limit prenuptial agreement to property issues; cover lifestyle issues in a personal letter, if desired.

D. What cannot be covered.

1. Violations of public policy - e.g., cannot leave one spouse destitute and eligible for public assistance; no provision requiring the dissolution of the marriage or calling for the procurement of grounds for divorce.
2. Agreement to commit a criminal act, i.e., smoking marijuana.
3. The rights of a child may not be adversely affected and are always subject to judicial review in the “best interests of child.”

VI. How to Broach the Topic - Popping the “P” Word.

- A. Basically the idea is to present each party's concerns directly, honestly, and openly.
  - 1. “I want to make sure that your assets are not affected by my debts.”
  - 2. “If the unthinkable occurs, I want to keep what I came into marriage with, share what is acquired afterwards.”
  - 3. “I went through a messy divorce. Even though I have every expectation that this marriage is forever, I want to make sure that I will never go through an ugly scene again.”
- B. Bring up as early as possible, on a general level, while dating, then move from general to specific when the relationship becomes serious and no later than before a public engagement.
- C. Listen to the other partner's reaction, solicit input, feedback and work out in a collaborative way.
- D. If on the receiving end:
  - 1. act rationally, not emotionally;
  - 2. focus on content of what partner is saying;
  - 3. try not to feel pressure to agree/disagree at the outset. One partner is initiating a dialogue, which will need to be implemented by the two of them over time; and
  - 4. think about own objectives in an agreement.
- E. The goal is to negotiate an agreement that is mutual and fair to both sides. Both sides should derive a benefit.

## VII. Postnuptial Agreements.

- A. Distinguish postnuptial agreement and prenuptial agreement: A prenuptial agreement is between a prospective bride and groom and is entered into before marriage. A postnuptial agreement is an agreement between a husband and wife and is entered into after marriage.
- B. Distinguish postnuptial agreement and separation agreement: A separation agreement is prepared in contemplation of divorce; a postnuptial agreement is prepared in contemplation of an ongoing marriage.
- C. Growing trend among married couples to enter into postnuptials or internuptials. Mid-marriage agreements have exploded in the past five years, perhaps as much as tenfold.
  - 1. Couple didn't get around to signing a prenuptial agreement before marriage. Couple may have gotten married at a time when discussion of marital contracts was uncommon.
  - 2. Couple's circumstances have changed; they didn't need one before marriage but need one during marriage, perhaps as a result of an inheritance, birth of a child, career change, illness or sale of a business.
  - 3. Couple may want to amend an agreement they entered into before marriage.
  - 4. One or both spouses may have an emotional need for security.
  - 5. It can be used for reconciliation purposes. If couple has had marital difficulties and decides to give it another shot, a postnup can be used as a security blanket.
- D. Create a deadline for drawing up a postnuptial. Unlike a prenuptial agreement, there is no deadline of a wedding.

- E. Bringing up the topic can be very sensitive, especially if the other person automatically thinks “divorce.” It is easier to bring up the topic if a prenup is in place, since the postnup is a natural extension. If a marital contract has not previously been discussed, proceed as gently as possible.
  - 1. Approach from a collaborative point of view.
  - 2. A change of circumstances (financial or lifestyle) can present a good opportunity to bring up a postnup.
  - 3. An attorney or financial planner can raise the issue in conjunction with overall financial/estate planning.
  
- F. Enforceability.
  - 1. No uniform act applies to postnups. UPAA applies specifically to prenups.
  - 2. States recognize postnups by statute implicitly or explicitly or as a matter of case law.
  - 3. In New York, postnups are governed by the same statute as prenups. Domestic Relations Law 236, Part B (3). Treated for almost all purposes like prenups.
  - 4. Some courts scrutinize postnups more carefully than prenups, sometimes holding them to a higher standard of fairness on the theory that the parties have less leverage in postnups than in prenups. See Pacelli v. Pacelli, 725 A.2d 56 (N.J. Sup. Ct. App. Div. 1999).

## VIII. Cohabitation Agreements.

- A. Reasons why cohabitation has jumped 72% from 1990 to 2000 and increased over 1,000% in 40 years.
  - 1. Reduction of living expenses.
  - 2. Increasing formalization of same sex relationships.
  - 3. Widespread acceptance:
    - (i) celebrity role models, such as Goldie Hawn and Kurt Russell; Susan Sarandon and Tim Robbins;
    - (ii) astounding 40% of US adults say they have lived with a partner without the benefit of marriage.
  - 4. Stepping-stone for parties headed for marriage.
  - 5. Choice by older couples who don't want to upset their family or friends or lose Social Security or other benefits.
- B. Other reasons for an agreement.
  - 1. To guarantee financially less secure partner an equitable settlement.
  - 2. To properly compensate a party for his/her role as caretaker.
  - 3. To allow financially more secure person to limit exposure in the event of a breakup.
  - 4. To disclose expectations of relationship, both financial and personal.

- C. The law of cohabitation agreements varies from state to state.
1. On the one hand, the law may provide unmarried partners with fewer benefits than the parties intend for one another; on the other hand, the law may provide benefits for the partners greater than intended. The way out is through an express cohabitation agreement, where rights and obligations are clearly spelled out.
  2. Although parties living together usually regard each other as family members, in many states, the law treats them as legal strangers in the event of death or a breakup.
    - (i) If there is a death without a will, property will pass to next-of-kin.
    - (ii) If there is a split up, there may be no support for the less wealthy party.
    - (iii) Unmarried heterosexual couples need a cohab more than married couples need a prenup. The law provides a default system of protection for married couples. It may not be the optimal system, but nevertheless a system is in place. With respect to unmarried couples, there is no safety net at all. The unmarried couple has to take express, affirmative action to create benefits and rights for his/her partner, in a cohabitation agreement.

3. Some states do confer rights upon cohabitants, applying a theory known as an “implied-in-fact” contract. This is implied from the course of behavior and circumstances of the relationship and gives rise to:
  - (i) A presumption that property will be split if partners jointly contribute to the cost of purchase.
  - (ii) An entitlement to a portion of appreciation on a business if partners jointly operate it and spend money on equipment and supplies.
  - (iii) A right to receive support if a party gives up a career to become full-time homemaker and parent.
  - (iv) A right to share property if the parties live together and pool assets and earnings.
4. Some states use other equitable remedies to apportion assets:
  - (i) agreement of partnership.
  - (ii) joint venture.
  - (iii) *quantum meruit* (claim based upon value of services).
  - (iv) unjust enrichment (retention of a benefit conferred, without offering compensation, when compensation is reasonably expected).
  - (v) constructive trusts (trust imposed against someone if he/she obtained property through wrongdoing).
5. Some states, however, reject implied-in-fact contracts and equitable remedies on policy grounds. New York is not generally receptive to such remedies.

6. In certain states, courts believe that the application of these theories give rise to common law marriage, or equate cohabitation to marriage, and violate state marriage laws that are designed to promote marriage.
7. The public policy ground is invoked more in the same-sex context than the heterosexual context, although the distinction is less pronounced today than it used to be.

- D. Express cohabitation agreements are permitted in New York and most states but not in all. (There are issues in Georgia, Illinois, and Louisiana).
1. Some states still have statutes banning unmarried cohabitation but nevertheless will enforce property rights between cohabitants.
    - (i) Laws banning fornication and cohabitation may be vulnerable under the 2003 United States Supreme Court case, Lawrence v. Texas, which struck down a sodomy law.
  2. Some states will not uphold a cohabitation agreement between two parties if one party is married to a third party.
  3. Some states permit oral contracts; some states require a writing, holding that the “statute of frauds” applies.
    - (i) Of course, for evidentiary purposes, a writing is far preferable in all events.
  4. Contract principles apply to cohabits, but it is advisable to follow the stricter rules applicable to prenups:
    - (i) separate and independent counsel.
    - (ii) full and fair disclosure.
    - (iii) compliance with procedural rules, such as notarization, especially if real estate is involved.
  5. Sex is unmentionable in cohabitation agreements since it cannot be sole consideration for the contract. Okay to say a person will be business partner, homemaker, housekeeper, and/or social director, as long as you don’t say lover.

- E. What to cover in a cohabitation agreement - can cover one or more areas or the waterfront.
1. Distribution of property upon breakup of the relationship.
  2. Obligation to contribute to the support of the household or, upon dissolution of the relationship, to pay financial support.
  3. Payment of debts - who is responsible?
  4. Disposition of residence upon breakup of the relationship.
  5. Support, custody, or visitation rights for minor children (although nonbinding).
  6. Surviving party's right to inherit property and receive pension benefits, life insurance, and other entitlements.
  7. Health insurance.
  8. Right to serve as guardian/conservator in the event of incapacitation.
  9. Right to make medical decisions.
  10. Lifestyle provisions.
  11. Definition of "termination of relationship."
  12. Method for resolving disputes, such as arbitration/mediation.

F. Distinction between cohabitation agreement and prenuptial agreement.

1. Many think of a cohab as a prenup without the nup. But there are important legal distinctions.
2. A prenup is governed by specific statutory requirements, while a cohab is governed almost exclusively by contract principles.
3. The Uniform Premarital Agreement Act defines “premarital agreement” as:

an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.”

Thus, a cohab generally may not serve double duty as a prenup.

4. Financial disclosure in a prenup must be current; the disclosure used at the time of a cohab may not be accurate at the time of marriage.

## G. Cohabitation Agreements and Tax Issues.

1. Payments made by one partner for shared living expenses may constitute taxable income or taxable gifts above the exemption amount.
2. Transfers above the exemption amount into joint names may give rise to gift tax if the parties don't contribute equally.
3. Health care coverage under an employer plan is a taxable benefit.
4. Support at the termination of a relationship may constitute taxable income or taxable gifts above the exemption amount.
5. Gain or loss may be recognized on the transfer of appreciated property at the termination of the relationship.
6. Estate tax may be triggered on estates greater than the exemption amount.
7. One area where recently non-spousal beneficiaries were given parity with spousal beneficiaries is the Pension Protection Act of 2006.
  - (i) Following the death of a participant in an employer-sponsored plan, a plan of such type may require that a benefit be distributed in a lump sum to a designated beneficiary.
  - (ii) A spousal beneficiary has been able to roll the benefit over into an IRA.
  - (iii) In the past, however, a non-spousal beneficiary had to take as the benefit as a lump sum and suffer immediate tax consequences.
  - (iv) Under new rule, a non-spousal beneficiary can also roll benefits into an IRA.

## H. Common Law Marriage.

1. 15 states and the District of Columbia recognize common law marriage.
  - (i) Generally these states require the parties to agree orally or in writing to enter into a husband/wife relationship; to hold themselves out as married; and acquire a reputation as a married couple.
  - (ii) New York does not recognize common law marriage.
2. If a state recognizes a couple as married under the common law, they are legally considered married to the same degree as if they had a ceremony. They are too late for a cohab or prenup; they would need a postnup.
3. If the parties cohabit, but are not married either by a ceremony or common law, they are legally considered single.
4. Many (but not all) states that don't recognize common law marriage formed within their borders will recognize a common law marriage formed in another state.
5. It is critical that if the parties live or possibly may live in a state that recognizes common law marriage, they should include a provision that they do not want to be considered married in their cohabitation agreement.

IX. Recent New York Decisions of Interest.

- A. New York's public policy in favor of prenuptial agreements results in upholding a 38 year old French prenuptial agreement.

Van Kipnis v. Van Kipnis, 840 N.Y.S.2d 36 (1st Dep't 2007) (July 12, 2007)

Parties execute a "Contrat de Mariage" (Contract) (a form of prenuptial agreement under French Civil Code) in France in 1965. Plaintiff wife a Canadian citizen was studying at Sorbonne and defendant husband US citizen had just finished college at that time. Parties moved to NY shortly after they were married and remained there throughout their 38 years of marriage. Husband became trained economist enjoying profitable career. Wife worked as a professor until 1978 and then cultural counselor for Quebec Government in NY until 1986 and has since maintained marital household and was primary caregiver for parties' two now adult children. Husband acquired approximately \$7 million in liquid assets and wife acquired approximately \$700,000-\$800,000 including an inheritance. Parties kept their assets completely separate throughout their marriage except for wife being granted temporary signing privileges of one of husband's accounts while he was temporarily out of the country. Contract unambiguously called for each spouse to retain ownership of all property held at time of marriage or acquired thereafter. NY has strong policy favoring resolution of disputes through contractual arrangements. See also Stawski v. Stawski, 2007 N.Y. Slip Op. 07051 (App. Div. 1<sup>st</sup> Dep't Sept. 27, 2007)

B. Waiver of counsel fees is unenforceable in light of public policy.

Kessler v. Kessler, 818 N.Y.S.2d 571 (2d Dep't 2006)

Parties execute prenuptial agreement 4 days before marriage in 1996 making limited provision for wife during marriage and leaving her with little or nothing if parties divorced. March 2002 wife seeks divorce seeking rescission or reformation of the prenuptial agreement. Husband seeks enforcement of prenuptial agreement. Supreme Court held that portion of the agreement waiving her right to seek attorney fees was unconscionable and unenforceable in light of public policy embodied in DRL § 237(a). Husband appeals. Affirmed. Two competing public policies, one favors resolving marital issues by agreement, other favors assuring matrimonial actions include parties operating on level playing field. DRL § 236(B)(3) expressly authorizes parties to enter a contractual agreement before or during the marriage but does not expressly address parties' right to enter into agreement concerning attorney fees in matrimonial action. However, DRL § 237(a) "authorizes the court to 'direct either spouse...to pay such sum or sums of money directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties'." DRL § 237 embodies public policy where matrimonial matters are best resolved by parties operating on level playing field. Here, there is great disparity between parties' relative financial positions at the time the prenuptial agreement was executed and at time action commenced. Wife's separate property set forth in schedule attached to prenuptial agreement was \$135,596, while husband's was almost \$4,000,000. By 2002, wife's total assets were essentially the same as when she entered the marriage, while husband's net worth had grown to \$5,626,224.15.

C. Postnuptial agreements require consideration.

Whitemore v. Whitemore, 778 N.Y.S.2d 73 (2d Dep't 2004)

Parties married on January 28, 1984 and executed a "Marital Agreement" approximately three months later. Postnuptial agreements are contracts subject to the "ordinary principles of contract interpretation" including consideration. "Consideration exists if there is a 'benefit to the promisor or a detriment to the promisee' and" "[i]t is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him" Wife did not receive consideration for signing postnuptial agreement and agreement does not recite any consideration.

D. Waiver of property rights is not waiver of support.

Bloomfield v. Bloomfield, 738 N.Y.S.2d 650 (N.Y. 2001)

The Court of Appeals examined the scope and enforceability of a prenuptial agreement executed 30 years before. In that agreement, drafted by the attorney-husband, the wife, unrepresented by counsel, waived her spousal property and elective rights. The court ruled that the plain language of the agreement indicated that the wife's waiver of her rights to present and future interest in her husband's property did not constitute a waiver of her right to receive support. See Moldofsky v. Moldofsky, 2007 N.Y. Slip Opinion 6844; NYLJ (September 24, 2007, p. 39, col. 3 (2<sup>nd</sup> Dep't September 18, 2007)(waiver of interest in decedent's estate does not constitute waiver of equitable distribution).

- E. If undue influence or unfair advantage is deemed manifest, burden shifts to proponent of prenuptial agreement to show it was entered into freely and voluntarily.

In re Greiff, 680 N.Y.S.2d 894 (1998)

The Court of Appeals ruled that the special relationship between prospective spouses when they execute a prenuptial agreement can warrant a shift of the burden of persuasion bearing on the legality and enforceability of the agreement. In this case, husband and wife signed a reciprocal prenuptial agreement waiving the statutory right of election. The husband died three months after the marriage, leaving a will that left no provision to his spouse and leaving his entire estate to his children from a previous marriage. Generally, a party seeking to vitiate a contract on the ground of fraud bears the burden of proving the impediment attributable to the proponent seeking enforcement. Here, the court held that when a party challenging the prenuptial agreement demonstrates by a preponderance of the evidence that the premarital relationship between the contracting individuals manifested “probable” undue and unfair advantage, the burden then shifts to the proponent of the prenuptial agreement to show freedom from fraud, deception or undue influence.

**WHAT'S UP WITH PRENUPS:**

**The Basics of Prenuptial, Postnuptial and Cohabitation Agreements**

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#### TIMED OUTLINE

1. Overview	10 Minutes
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