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Home / Articles / Articles / Do Prenuptial Agreements Hold Up?



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Do Prenuptial Agreements Hold Up?

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Recent court decisions continue to underscore New York’s strong public policy in favor of prenuptial agreements. It remains difficult to set aside a validly executed prenuptial agreement. Only limited grounds exist on which to vacate a prenuptial agreement, including duress, fraud, overreaching, and unconscionability.

Duress

It is generally recommended that a prenuptial agreement be executed well in advance of the wedding date. Case law, however, continues to hold that the execution of a prenuptial agreement close to the wedding date does not in and of itself render the agreement unenforceable. Also a threat to cancel a wedding if a prenuptial agreement is not signed also is insufficient to set aside a prenuptial agreement.

Unconscionability

A recent case stated that a prenuptial agreement “is unconscionable if it is 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.”

A party seeking to overturn a prenuptial agreement on grounds of unconscionability faces a high bar. For example, a recent case focused on the possibility that the wife would end up as a public charge if the prenuptial agreement was enforced. Another case stated that a prenuptial

agreement is not unconscionable “merely because, in retrospect, some of its provisions were improvident or one-sided.”

Fraud

The favorable outlook regarding prenuptial agreements has certain limits. Where one party fraudulently induces the other to enter into a prenuptial agreement, the contract will be set aside.

For instance, a recent case invalidated a prenuptial agreement on the basis of fraud, finding that the agreement was written in a foreign language, the wife lacked proficiency in such language, and the agreement was not translated into English prior to signing. In addition, the wife was presented with the prenuptial agreement for the first time upon her signing and was deprived of the opportunity to consult with a lawyer. Further, the court credited the wife’s testimony that her husband told her that she was simply signing an agreement that waived all claims to his father’s wealth and assets.

Occupancy of the Marital Residence

The occupancy of the marital residence frequently becomes a hot button issue in a divorce. Because it may be difficult or impossible to meet the standard for obtaining exclusive occupancy of the marital residence during a divorce proceeding, it is generally helpful to include provisions in a prenuptial agreement governing temporary exclusive occupancy of a residence during a divorce proceeding.

Courts have upheld the enforceability in a prenuptial agreement of the disposition of the marital residence in the event of a divorce, as well as provisions governing occupancy and vacating of the premises.

Legal Representation

Although not a specific statutory requirement, each party should retain separate and independent counsel of his or her own choosing in connection with a prenuptial agreement. This is the optimal way to demonstrate that each party entered into the agreement knowingly and voluntarily.

In common practice, a drafting attorney may provide recommendations for opposing counsel and relay them through his or her client. The fact that a party’s attorney recommended the other party’s counsel, even if that party also paid for all of the other party’s legal fees, is insufficient to establish duress or overreaching.

Counsel Fees

Case and statutory law typically provides that the wealthier spouse is responsible to contribute to the less wealthy spouse’s counsel fees in the event of a divorce. In a prenuptial agreement, each party may waive or

limit counsel fees from the other party in the event of a divorce. Such a waiver is valid, subject to certain exceptions, such as custody litigation, where a court may deem it necessary to award legal fees in order to level the playing field regarding counsel fees.

Procedural Formalities

New York law provides that a marital agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.”

Although the courts have on occasion permitted “substantial compliance” with procedural requirements, it is the best practice to adhere strictly to procedural requirements. Otherwise, the matter may be litigated and a court will use its discretion in determining the validity of the prenuptial agreement.

Conclusion

The legal system in New York encourages individuals to reach their own agreements through contracts. With certain limited exceptions, individuals can rely on properly executed prenuptial agreements to limit issues in the event of divorce and prescribe rights upon death.

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