WBASNY

The Women's Bar Association of the State of New York

presents

Convention 2021
Continuing Legal Education Series

The Perils of Prenups

May 21, 2021
1:15 pm - 2:45 pm

Presenter: Chaim Steinberger, Esq.

The Perils of Prenups: The psycho-social dynamics and legal effects of prenuptial agreements.

The Women's Bar Association of the State of New York (WBASNY)
2021 Convention
May 21, 2021, 1:15-2:45 pm

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"Shepherding good people through difficult family transitions with ferocious, relentless integrity!"

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I. THE UTILITY

6

Does everyone who gets married need a prenup?

7

Analogy:

Does everyone (who's going to die) need a will?

8

IN NEW YORK, THE DISTRIBUTION OF AN INTESTATE-DECEDENT'S ESTATE IS GOVERNED BY ARTICLE 4 OF THE ESTATES, POWERS & TRUSTS LAW ("EPTL").

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EPTL § 4-1.1

INTESTACY DISTRIBUTION

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- If a decedent is survived by a spouse and no children, the entire estate goes to the spouse.
- Children and no spouse, it all goes to the children.
- Spouse and children, $50k + ½ of remainder to spouse, the rest divided among the children.
- No spouse, no children, then to the decedent's parents.
- No spouse, no children, no parents, then to the decedent's siblings.

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YOU NEED A WILL ONLY IF (AMONG OTHER REASONS):

- For estate planning reasons (to save on estate taxes);
- to leave different amounts to different children/distributees (i.e., specific allocations of property to specific beneficiaries);
- To leave specific assets to specific distributees (*i.e.*, like-new '67 'vette to a nephew, mom's wedding ring to Suzy, etc.);
- To allocate estate tax liability in a certain way, other than proportional to the amounts inherited;
- To designate a specific person to administer the estate and/or not to require a bond;

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WILL IS NECESSARY (CONT.):

- There are young child(ren) and:
- a. they need to be provided for;
- b. ensure that children can't squander the inheritance; or
- c. wants someone specific to be their guardian / not be required to post a bond / wants to leave specific direction about how the children should be provided for (clothed, fed, educated, etc.) / wants to change the default standards about how the children's funds can or should be invested;
- d. has other specific wishes that would not otherwise be honored in a "plain vanilla" no-will situation;

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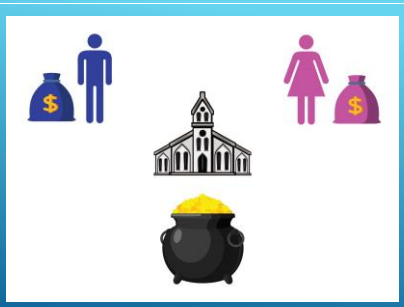
What typically happens if there is no prenuptial agreement?

14



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Marital vs. Separate Property

Commingling of separate property

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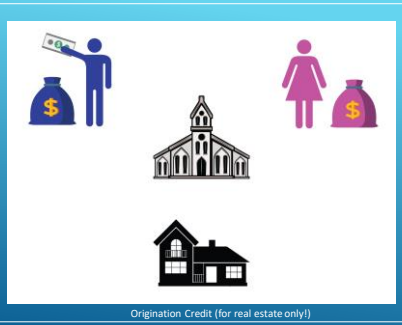

Origination Credit (for real estate only!)

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So what's the point of asking for a prenup . . . what part of the "separate/marital property" equation do you want to change . . . and how do you ask for it without sounding like a jerk?

18

There may be no advantage to having a prenup . . . and there may be significant costs!

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II. THE DANGERS

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"Predictability!"

Is that a good thing?

21

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23

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CHANGED CIRCUMSTANCES:

- A party's business/career tanks and he/she can no longer afford to maintain an appropriate lifestyle or pay the obligations agreed to in the prenup;
- One party earns all the money and the other spends inappropriately, or is drunk or a gambler.

K. vs. B., 13 AD3d 12, 784 NYS2d 76 (1st Dept., 2004) (wife cared for children and ran law firm while husband lived in another county and kept taking money from wife to invest in his money-losing ventures, 65%-35% award affirmed)

"while the husband may have contemplated an unconventional marriage in which the parties make unequal financial and emotional contributions, but, upon dissolution, the parties are nonetheless awarded an equal distribution of marital assets, the law does not contemplate such an arrangement; especially in a two-decade-long marriage like this, where time, a variety of difficult circumstances, and the arrival of three children have together created a life the parties likely never anticipated when they wrote a so-called "agreement." That writing-created in a pre-equitable distribution context-carries no legal force save for the minor impact of its historical voice.

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To summarize, executing a prenup is like buying a future—you can't be sure if it will be good or bad in twenty years:

1. Society's mores may change, but you'll be stuck with the terms of the prenup;
2. A spouse may make unanticipated sacrifices and be left vulnerable by the prenup;
3. The "Pretty Woman" result;
4. The tides of fortune may turn, and what seemed like a good deal is now a bad bargain.

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Just asking for it . . . .

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31

33

1. Mention of the "D" word is eternally toxic;
2. Places everyone on high alert;
3. At a time that they should be melding into one family unit, they're thrust into the role of adversaries;
4. Demonstrates a lack of confidence or commitment in themselves or their partner;
5. Requires articulation of worst fears that people prefer to remain in oblivious denial;

34

Will it reveal too much about each of you?

35

36

Is this a “good” way to get to know your betrothed?

37

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III. SOMETIMES THOUGH . . .

40

When might a prenup be necessary?

41

42

While the lack of "significant contributions" by one spouse may possibly warrant some adjustment, we should not assume that such a "contribution" requires either earning money or raising children. There are many kinds of couples and many types of marital arrangements. ***There are couples in which one provides the financial support, and the other appears to spend full time maintaining a youthful, attractive, and fashionable appearance, and socializing.*** Whatever a couple's mutual understanding is as to their respective roles in the marriage, we should not second guess them by negating the "contribution" of the non-earning spouse who is living completely in accordance with the other spouse's wishes and the couple's implicit or explicit arrangement.

K. vs. B., 13 AD3d 12, 32–33, 784 NYS2d 76 (1st Dept., 2004) (Saxe, J., *dissenting*)(*emphasis added*).

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44

To protect the non-monied spouse for their sacrifices.

45

Second Marriages with blended families.

46

. . . and the right of election, EPTL § 5-1.1-a, has to be waived.

47

48

To keep the family fortune intact.

49

50

Ensure the estate plan survives even if the testator does not.

51

Provide a proper standard of living for the surviving non-monied spouse.

52

53

Washington and Wisconsin are community property states that do not ascribe to the "marital property system" that segregates premarital from marital property.

J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 3.03[3] (Law Journal Press, 2020)

54

Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, Vermont, and Wyoming use the "kitchen sink" or "hotchpot" system in which courts divide all of the parties' property at divorce, regardless of how or when the property was acquired. Oldham, *supra*, § 3.03[2] & n.3.

J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 3.03[3] (Law Journal Press, 2020)

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Alabama, Alaska, Arkansas, Hawaii, Iowa, Minnesota, Ohio, and Wisconsin use a "hybrid" system that allows a court to invade the separate property of one spouse when distribution of the couple's marital assets would be unfair to the other. *Oldham, supra*, § 3.03[4] & n. 24. Some states limit the degree that a party's separate property can be invaded (*e.g.*, Minnesota, 50%), and some require a showing of "hardship" before the court may do so (*e.g.*, Iowa, Minnesota, and Wisconsin). *Id.* & n. 27-28.

56

Most common reason . . .

57

58

59

No “key man” insurance possible.

60

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Divorce is not an opportunity for an accounting of all of the marital expenditures. *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 881 NYS2d 369 (2009).

63

64

Avoid divorce's transactional costs:

- Memorialize existence & value of separate property;
- Agree on how to distribute appreciation of actively-managed separate property;
- Provide the parties with certainty.

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IV. DOING IT BETTER

66

Marriage planning instead of divorce planning!

67

Avoid surprises!

68

Discuss and memorialize shared goals and values.

69

Use fairness and principled negotiation (not positional bargaining) as touchstones.

70

Consider:

- Is the non-monied spouse sacrificing anything now (giving up a home or furniture to move into other's apartment) or during the marriage (forsaking career or education) that would leave the spouse disadvantaged at the end of the marriage?
- Is either party contributing separate property to the acquisition of a marital property asset (like a new home) and how will that be treated, if the marriage is short- or long-term?
- How will each party be provided for in their retirement?
- Treatment of pre-marital or separate-property debt;
- Treatment of prior marriage's assets (support payments) or liabilities?
- Treatment of business interests (often the parties' most valuable asset); If the new spouse will be working in the business, how will they be compensated? Will they acquire an interest in its appreciation?

71

Include provisions that provide safety to the non-monied spouse.

72

THE BETTER WAY TO DEAL WITH THE ISSUES:

- Use the prenup as a marriage-planning document, and don't take advantage of the other party (always use fairness as the touchstone);
- .Graciously fund a mechanism so that the non-monied spouse is well-cared for (like setting up marital property accounts, buying a house that will remain with the non-monied spouse, *a la Gottlieb*), and *be sure to live up to those funding commitments*!

73

Beware, however: The client must live up to the commitments because otherwise the shield turns into a sword!

74

What to do about what will likely be the family's most valuable asset:

The Business?

75

How to allow the non-titled spouse to share fairly in the increased value of the family business?

76

Link a formula to:

- Buy-sell agreements;
- Key-man policies;
- Audited financial statements;

77

Designate a trusted arbitrator or agree to use a trusted auditor

78

CHALLENGES OF DRAFTING A PRENUPTIAL AGREEMENT:

The prenup becomes effective way into the future and the parties may have a totally different:

- economic profile;
- health profile;
- family (children) profile;
- employment profile;
- domicile/jurisdiction;
- – new venue's public policy;

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CHALLENGES (CONT.):

- anticipating future events:
  - maintenance provision must be "fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment," DRL § 236[B][3][3].

80

UNCONSCIONABLE DEFINED:

- An "unconscionable agreement" is one in which "the inequality is so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" one "which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other" *Gottlieb quoting Christian.*
- Is "unconscionable" the same as "manifestly unfair"?

  There's a dispute on that issue between (now retired) Judge Saxe and (now on the Court of Appeals) Judge Feinman.

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STATUTE OF LIMITATIONS DEFENSE?

- Not to maintenance, but for coercion, duress, mistake of fact,

  see Freiman v. Freiman, 178 Misc. 2d 764, 765-66, 680 N.Y.S.2d 797, 798 (Sup. Ct., Nassau Cty., 1998)("any claim that the parties' antenuptial agreement is unconscionable is: (a) time-barred as to any property distribution contained in the agreement by the six-year time limitation for equitable causes of action encompassed by CPLR 213(1); and (b) not barred by any durational limitation of time with respect to the maintenance provisions contained in the agreement since these provisions are governed by the statutory mandate of Domestic Relations Law § 236(B)(3)").

  Rosenbaum v. Rosenbaum, 271 AD2d 427, 427, 706 NYS2d 890 (2d Dept., 2000) ("A cause of action to rescind the provisions of a marital agreement which allocates property must be commenced within six years of the execution of the agreement" and the fraud " claim is also untimely since it was not raised within six years after the alleged fraud was committed, or within two years of when it reasonably could have been discovered");

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OTHER STATES, THE UNIFORM PREMARITAL AGREEMENT ACT ("UPAA") AND UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT ("UPMAA") HAVE DIFFERENT STANDARDS. SOME OF THE ASPECTS THEY WILL LOOK AT ARE:

- Procedural fairness;
  - voluntary and not under duress;
  - access to counsel – time and money;
  - if unrepresented, a plain language notice of waiver of rights;
- Substantive fairness (some states at execution, some at enforcement (called the "second look");
- An unconscionable agreement might be rescued, in some jurisdictions, by financial disclosure (or constructive knowledge or an effective waiver);

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COMMONLY INCLUDED PROVISIONS:

- Define differently what will be marital and separate property;
- Waiver of the spouse's right of election, EPTL § 5-1.1-a;
- Arrangements for maintenance (alimony) [but recall required reasonableness of this provision];
  - Temporary (interim or *pendente lite*) maintenance must be separately spelled out, and a general maintenance waiver has been held not to apply to interim maintenance while the divorce action was pending. *Lennox v. Weberman*, 109 AD3d 703, 974 NYS2d 3 (1st Dept. 2013)
  - Broad, encompassing language like "any and all," however, has been deemed to waive even temporary maintenance: *Anonymous v. Anonymous*, 137 AD3d 583, 585, 27 NYS3d 541, 544 (1st Dept., 2016)
- Acknowledgments of certain required notices at divorce (*e.g.*, cessation of health insurance, of maintenance guidelines) so that it is covered if a party defaults and does not appear in response to a summons for divorce;

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COMMON PROVISIONS (CONT.):

- (But no child custody, parenting time or child support provisions);
- Interspousal gifts?
- Waiver of legal fees in divorce action;
  - But cannot waive legal fees to challenge the prenuptial agreement itself (if the challenge is ultimately successful), or for the legal fees involved in seeking custody of the children. *Gottlieb*.
  - Cannot waive legal fees on custody or custody-related matters;
  - How about on maintenance issues?
- Agreement free of fraud or duress
  - Duress might be an agreement presented the night before the wedding.
  - *See, Cioffi-Petrakis vs. Petrakis*, 103 AD3d 766 (2d Dept., 2013) (presentation of prenuptial agreement two weeks before elaborately planned wedding, among other factors, invalidates it);
  - *But see, Anonymous v. Anonymous*, where prenup was negotiated over four weeks but signed only the night before the rehearsal dinner was held valid because "The agreement went through 6 drafts before a final copy was signed and changes in the terms of the agreement requested by plaintiff's counsel were incorporated into the final document." *Anonymous v. Anonymous*, 123 A.D.3d 581, 583, 999 N.Y.S.2d 386, 389–90 (2014);

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REQ PROV (CONT.):

- Choice of law;
- Legal fees on an unsuccessful challenge;
- Triggering event;
- Notarized and acknowledged
  - Required by DRL § 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 132, 681 N.E.2d 376, 378 (1997)
  - Generally a relaxed standard, but the omission of the "to me known and known to me" phrase was deemed a disqualifying defect. *Galetta v. Galetta*, 21 NY3d 186, 193 (2013);

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PROVISIONS THAT ARE REQUIRED OR ADVISED:

- Separate representation;
- Merger & integration clauses;
- Financial disclosure (though not technically required in NYS):
  - "the mere fact that the husband did not include his income in his financial disclosure, standing alone, is not a basis to set the agreement aside," *Gottlieb, supra*;
  - "Plaintiff was well acquainted with defendant's assets, and she specifically acknowledged in the agreement that the amounts she would receive 'are so significantly less than either [defendant's] assets or annual income that the precise amount of [his] assets and income is irrelevant to her decision to enter into this Agreement and the enforceability of this Agreement.'" *Anonymous v. Anonymous*, 123 A.D.3d 581, 583–84, 999 N.Y.S.2d 386, 390 (1st Dept., 2014).
- Execution of further documents (particularly post-marriage ERISA waivers);

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AFTER EXECUTION (CRITICAL ISSUE):

YOU CAN DESTROY THE PRENUPS VALIDITY BY BREACHING IT. (CONVERSELY, LIVING UP TO IT, AND HAVING THE OTHER SPOUSE ACCEPT THE BENEFITS, AMOUNTS TO ITS RATIFICATION!)

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PRACTICE TIPS:

- •Memorialize the negotiations;
- •The non-moneyed spouse's lawyer is the best insurance the monied spouse has!
- •Ensure procedural fairness. (Do not be coy or clever, misrepresent, conceal or mischaracterize facts, do not use fraud, duress or overreaching to achieve an agreement!)
- •Acknowledge the wealth of the monied spouse and the likelihood of further accumulation during the marriage, the non-monied spouse disclaiming any rights thereto;
- •Have the non-monied spouse acknowledge that he or she is satisfied with the financial disclosure;
- •Acknowledge the non-monied spouse's ability to be self-supporting, and ensure that what the party ends up with at the end of the marriage is sufficient for a satisfactory lifestyle;
- •Video record the execution?

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OTHER POSSIBLE PROVISIONS:

- Religious upbringing of children
  - held binding, *Ramon v. Ramon*, 34 NYS2d 100, 113 (N.Y. Dom. Rel. Ct., Richmond Cty., 1942) (O'Brien, J.)
  - But is this still good law?
- Social media clauses
- Non-disparagement (1st Amend. Prevents Courts from ordering but can be agreed to);
- Non-stalking
- Non-disclosure/Return of intimate photos
- Revenge porn
- Prohibition against posting children's pictures on social media

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- Religious determination of disputes (Jewish *Beth Din* or Muslim Imam):
  - Submission to religious authority and enforcement of a *ketubah*
  - *Avitzur v. Avitzur*, 58 NY2d 108, 459 NYS2d 572 (1983) (Wachtler, J.)
  - Islamic *mahr – Aziz v. Aziz*, 127 Misc.2d 1013, 488 NYS2d 123 (Sup. Ct., Queens Cty., 1985) (Herbert Miller, J.) (held enforceable)
- .Lifestyle clauses:
  - *Query:* Do we want courts intervening in a married couple's daily domestic affairs?
  - Should courts pass judgment on the lifestyle choices that the parties made? *K. vs. B.*, 13 AD3d 12, 784 NYS2d 76 (1st Dept., 2004)
- punishment and education of children, *Ball v. Ball*, 36 So. 2d 172 (Fla., 1948);
- where they would live, *Isaacs v. Isaacs*, 99 NW 268 (Neb. 1904);
- intercourse 1/week, *Favrot v. Barnes*, 332 So.2d 873 (La. Ct. App. 1976);
- husband's mother could live with them, *Koch v. Koch*, 232 A.2d 157 (NJ Super. Ct. App. Div. 1967);
- wife's children not to live with parties, *Mengal v. Mengal*, 103 NYS2d 992 (Fam. Ct. 1951);
- weight?
- Penalty clauses;

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A wise guide rather than just a lawyer.

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SHARE

The Perils of Prenups: Part I

By **Chaim Steinberger**

BY CHAIM STEINBERGER

Prenuptial agreements are gaining in popularity even, according to one source, at a fivefold increase despite the fact that almost two-thirds of those surveyed believe that a prenup would weaken their relationship and likely increase their chances for divorce.

Indeed asking for (read, demanding) a prenuptial agreement creates significant risk to the pending nuptials and, for many, provides no real benefit while simultaneously creating substantial risk. Although there are situations (outlined in the next article in this series) in which an agreement's benefits outweigh its psycho-social risks, asking for one should never be a mere casual decision. Its costs are too high. Moreover, like a self-fulfilling prophecy, the prenup might itself plant the seed for exactly that outcome that the parties fear the most–a divorce!

In New York State a prenup is not required to protect separate property – While there are some states that allow for the distribution of one spouse's pre-marital property to the other at the time of divorce,[1] in New York a person's pre-marital property retains its "separate property" character and is not subject to distribution by a divorce court. So long as the owner of separate property does not change its character by, for example, retitling it in both spouses' names, commingling it with marital property, or depositing it into a jointly-titled bank account, it will remain protected. Thus, in New York, a prenup is generally not needed to protect one's pre-marital property.

Similarly, under current law, if a married couple purchases real estate and one of them uses pre-marital, separate property for the down payment, a Court will typically allow that person an "origination" credit equal to the amount of separate-property funds contributed to the property's purchase. If the property is sold at divorce, the separate property contribution is recouped after the mortgage is paid off, and any remaining equity is split between the parties. Again, no prenup is necessary to protect the separate-property contribution for jointly-titled real estate. (For some reason that isn't well explained, origination credits are applied only to real estate. Couples should, therefore, be forewarned not to transfer any money or assets that they want to have retain its separate property character, into a joint bank or investment account. The typical prenup, however, does not protect against such an intentional commingling anyway.)

Thus, under "standard" New York matrimonial law, assets owned before the marriage continue to belong to the party who owned them, and anything earned or acquired during the marriage belongs to the both of them. Because that tracks the general expectation of the contemporary public, it is near-nigh impossible to demand different terms without sounding like a scoundrel who is attempting to take advantage of the other.

The very predictability that the parties seek, is also one of the prenup's greatest danger. While parties now have a clear idea about how to fairly divvy up their current belongings, life inevitably throws either curve balls or monkey wrenches into everyone's expectations. Thus, at the dissolution of their hopefully-long-lived marriage, parties' situations will invariably be different from what either of them had expected it to be.

In a divorce action the Court is mandated to distribute the parties' property "equitably" after considering their individual circumstances. Moreover, as the mores of society change, develop, and evolve the law strives to catch up. When there is a valid prenup, however, fair-and-equitable under current standards is no longer a consideration. The parties remain bound by the immutable terms that they negotiated for themselves for the most part without regard to any injustice that might later occur.

A party may have given up an education, a career, and any hope for significant earning potential, in order to care for or raise a family. The parties' major asset may be a business that absorbed decades of the family's joint, constant efforts. Nevertheless, if that business was designated as separate property in a prenup and no provision made for the stay-at-home parent, the non-titled spouse will have no claim to, and receive perhaps only minimal benefit from,[2] the parties' major asset, no matter the extent of the non-titled spouse's contributions to it or the family.

Such an in-hindsight-onerous prenup can result in what I call the "Pretty Woman" result, after the movie of that name.

[1] *See* n. 1–4 and its accompanying text in Part II of this series.

[2] By way of increased maintenance payments.

In those situations, the Richard Gere character need only ask the Julia Roberts character, "What street corner shall I drop you off at?" and owe her nothing more, despite the dramatic change of intervening lifestyle and expectations. Obviously, this result can be devastating to the non-monied spouse who has become accustomed (and perhaps morally entitled) to a better lifestyle, and its threat might even keep someone permanently trapped in an abusive relationship.

Alternatively, the tides of fortune may turn and the formerly-wealthy spouse who demanded a prenup may later be compelled to live up to what are now onerous obligations, well-beyond the person's current ability to pay. Because the terms were agreed upon, however, the Courts will have very little ability to reform their agreement.

Asking for a prenuptial agreement damages the parties' relationship. There are certain things that once uttered aloud can never be erased, forgotten, or recanted. These utterances are so toxic that they continue to linger on in the ether, and infect the parties, even decades later. This is so, in typical cases, when a man tells his woman that he doesn't find her sexually appealing or when a woman tells her man that he doesn't satisfy her in the bedroom. They might continue to remain "happily" married for decades longer, but the insecurity, self-doubt, self-consciousness, and uncertainty continue to gnaw and endure no matter how many times it is renounced, disclaimed and denied by the person who originally uttered them or how much reassurance and penance is later given. Some bells can never be unrung.

The same is true if a person ever utters the "D"-[divorce]-word to a spouse or fiance.[3] The parties may continue to remain married but, like Pandora's ills once released, can never be corralled and reconfined to the repressed-subconscious. The thoughts continue to linger on, affecting them both as well as their relationship and commitment to each another. Neither is ever completely secure in their marriage, each wary of any sudden movement by the other.

Thus, at the time that the parties should be planning their lives together and joining in cohesion and unity, discussing and negotiating the terms of a prenuptial agreement requires them to give voice to the very threats they fear most, threats that are better kept repressed. Because a prenup sets the terms of divorce, the couple is thrust into adversarial stances one to the other at the very time they should be working in unison to create a shared bond.

Requesting a prenup further reveals that a party either lacks confidence in the viability of the marriage or questions their own commitment or that of their betrothed. No matter which, the request sets the other on high alert leaving them both feeling insecure about the forthcoming marriage.

Although every marriage ends in either marriage or divorce, the vast majority of people refuse to consider either. Perhaps they are justified in refusing to articulate such eventualities knowing that people lead happier lives in blissful denial and that by articulating an unwanted outcome they might create a self-fulfilling prophecy.

Additionally, when negotiating a prenup a fiance may reveal more about themselves and how they treat others than they might intend or want to. For better or worse, negotiating a prenup shows each fiance who the other really is, what their values are, how they go about achieving their goals, and how they behave when they encounter resistance. It reveals whether the person is a fair negotiator and good sport. It reveals if the person is seeking a fair result or whether they are trying to take advantage of the other. It reveals if the person remains respectful even when they don't get the result that they want. How they behave under pressure. Whether they negotiate from a position of mutual care and respect. A person's behavior is the best indicator of who they really are and, therefore, might put the kibosh on the marriage by revealing more about themselves than betrotheds typically intend or want to reveal. While some argue that this is precisely the reason to demand a prenup–to see how the future spouse behaves under strain–it seems like an unwarranted stress test for the relationship that only the most solid can endure.

The prenup may inadvertently create a roommate relationship rather than the loving, committed marital partnership most people desire. In 1980, the New York State legislature transformed New York's divorce law by decreeing that all income earned during marriage belongs to both of the parties. New York recognized that a marriage is not only a physical and emotional partnership, but an economic one as well.

A simple prenup that opts out of this scheme and provides that each party's earnings remains the separate property of the party earning it, while having superficial appeal and being easy and inexpensive to draft, also means that the parties are no longer partners-in-life but only roommates sharing living expenses. Such an economic choice has profound psychological effects, each person knowing that there are clear boundaries and limitations to the relationship. They know that they are less than full life-partners. This knowledge alone could very well prevent their relationship from ever maturing into the lifelong emotional partnership, commitment, and unity that most marrying people desire.

A prenup that paves the way for a simple, easy, and predictable divorce could itself make divorce a too-easy option and remove the incentive for spouses to work hard to resolve the difficulties that inevitably arise in every relationship. The point of a prenup, its advocates argue, is to remove the common points of controversy and litigation typical in divorce actions, thereby reducing or eliminating its transactional costs. When difficulties arise as they inevitably do, a spouse may be lured by the seemingly-easy, well-prepared escape route, and forego the hard work of confronting and dealing with the tough issues, and gaining the required insight, self-awareness and growth. Moreover, without the incentive to resolve things together, the relationship may remain perpetually stagnant at its nascent relatively superficial level.

Future articles in this series will discuss the circumstances that might warrant betrothed couples to incur these significant risks, and the techniques they and their lawyers can employ to minimize the damage and dangers that negotiating prenups often create.

[3]To remain gender neutral, this article will use the term "fiance" to refer cumulatively to both a fiancé and fiancée.

Part II

Part I of this series describes the several dangers commonly caused by asking a betrothed to sign a prenuptial agreement. There are, however, circumstances in which a compelling need outweighs the risks that the typical prenup creates. These include situations like when:

A couple intends to have an unconventional marriage and wish to set their own terms. Many cultures don't share our view of a marital economic-partnership or our expectation that each spouse has a duty to support the other. For people with those beliefs, the ideas of marital-earnings-belongs-to-both-spouses or post-marital support might be anathema. Our society allows people to set their own terms for their marriage and, by a properly drafted and executed writing, the terms will generally be respected by the Courts.

A couple anticipates that one of them will be sacrificing a career or education to care for the family and they want to ensure that that spouse is secured and properly provided-for. Though New York recently enacted formulaic maintenance guidelines, the maintenance guidelines will not provide sufficient resources for a non-monied spouse in a high-net-worth family to continue the marital standard of living. It might also be unfair to a spouse who left the workforce and relinquished a career to care for children. A couple may, therefore, want to provide the future homemaker with the peace of mind and security to know that the homemaker's future lifestyle and standard of living will be assured.

A betrothed intends to bequeath more than two-thirds of her estate to beneficiaries other than the spouse–as is common for people entering a second marriage who have children from the first. New York law properly does not permit a resident to completely disinherit a surviving spouse. New York, like many other states, protects surviving spouses from being disinherited by allowing them to "elect" to take one-third of the estate in defiance of any will that leaves them less.[1] Thus, if a betrothed wishes to ensure that prior children inherit more than two-thirds of their estate, the intended spouse has to execute a waiver of the spousal right of election, most preferably done before their marriage.

A fiance has, or will likely inherit, a substantial fortune and the family needs assurances that the fortune will remain in its blood-line. Because, as stated above, without a waiver a spouse inherits no less than one-third of a decedent's estate (and significantly more if the decedent dies intestate), the wealthy family of a betrothed may fear that its wealth will be inherited by the spouse and from there pass on to the *spouse's* family and not its own, diluting the original family's estate. To protect against such an eventuality, a family might insist that any betrothed obtain a prenuptial agreement ensuring that its wealth only be passed to the family's progeny and not to a spouse's family. Whatever the wisdom and effects of such a demand, the couple might have to accede to it. If the request for such a carve-out is refused and the betrothed proceeds with the marriage, the family might opt to exclude even the child from inheritance rights and bequeath directly only to the children of the couple.

Similarly, a betrothed that has a significant estate and wants to control who among the couple's beneficiaries will receive it after the death of the both of them, needs a waiver of the right of election by the future spouse to ensure that their estate plan is not defeated if the future spouse outlives the betrothed. Without such a waiver, the surviving spouse can "elect," reduce the estate by one-third, and dispose of that third in any way the surviving spouse desires without regard to the decedent's wishes. A waiver of the right of election therefore is necessary to eliminate the survivor's ability to defeat the decedent's wishes. Then, to allow the surviving spouse all of the income from the property but still guarantee its ultimate disposition after the death of the second-to-die spouse, the title-owner may want to transfer the property into a QTIP (Qualified Terminable Interest Property) Trust, thereby ensuring that the interest of the designated "remainder" beneficiaries cannot be defeated by the surviving spouse.

There is a significant chance that the couple will move to a state that allows its courts to invade a spouse's pre-marital property in a divorce. There are currently nine states[2] with community property laws some of which incorporate pre-marital property into the "community" pot available for distribution upon dissolution of the marriage.[3] In addition, there are several other states that divide all of

[1]EPTL § 5-1.1-A.

[2]Nine states (eight western, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, and Wisconsin) Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. Am. Acad. Matrim. Law 335 n. 8 (2003), derive their community property laws from what the Visigoths brought into southwest France and Spain and from there to the Spanish colonies of the Americas. Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women* 11 U. Md. L.J. Race Relig. Gender & Class 1 at 2 & fn. 3; 13-14 & fn. 63 (2011) (available at: http://digitalcommons.law.umaryland.edu/rrgc/vol11/iss1/2); William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 10 at 18; § 13 at 31 (University of Arizona Press, 1971). In addition, Alaska has an elective community property regime allowing couples to themselves choose whether they wish community property to control. Puerto Rico and the Philippine Republic have also adopted the community property regime. de Funiak, *supra*. Thus, about one-quarter of the population of the United States are subject to community property laws. Moreover, because the community-property regime has been in effect longer than equitable distribution ones, courts in equitable distribution jurisdictions often take guidance from community-property courts and how they treated certain issues. J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 3.03[5] & n. 46 (Law Journal Press, 2020).

[3]For example, Washington and Wisconsin are community property states that do not ascribe to the "marital property system" that segregates premarital from marital property. Oldham, *supra*, § 3.03[3]

the parties' property without regard to when it was acquired.[4] A few states use a "hybrid" system that allows a court to invade the separate property of one spouse when distribution of the couple's marital assets would be unfair to the other.[5] Additional proposals, if enacted, would merge separate property into marital property after a certain number of years.[6] Thus, where a betrothed has significant premarital assets and there's a chance that the couple will move to a state with one of these regimes, a prenuptial agreement might be appropriate.

A betrothed wants to ensure that the appreciation of separate property will also remain separate, free from any claim of being marital. Whether the appreciation of one spouse's separate property during the marriage is subject to equitable distribution depends on whether the asset was passive or actively managed, whether the appreciation was due to market forces alone or the efforts of one or both of the spouses. A non-titled spouse can have a significant claim to the appreciation of an actively-managed asset. This can lead to significant litigation and require expensive and intrusive expert valuations. The parties may want a prenup to memorialize the existence and current values of any premarital assets, or the separate property investment one is making to a joint asset.

To eliminate or reduce these areas of contention, prenups are often drafted simply to provide that any appreciation of separate assets continue to belong exclusively to the titled-owner. While this may be simple and easy, when it applies to a couple's main future business, the non-titled spouse is left knowing that they've been excluded from the parties' major asset.

This type of a prenuptial provision might, nevertheless, be necessary where a fiance has a business with other partners. Most partners would never countenance a partnership with one of their partners' ex-spouse. (Indeed many business owners purchase "key man" life insurance policies so that in the event a partner dies, the business has the funds with which to "buy out" the surviving spouse's interest in the business. Insurance, however, is not available to pay out in the event of a partner's divorce. And, worse than having a partner's widow as a partner would be having a partner's ex-spouse as a one-half partner in the business.) Thus, business partners may require every partner to have a prenup preventing their spouses from ever obtaining an ownership interest in the business.

A prenup with such a provision, however, does not solve the inherent unfairness of excluding a non-titled spouse from what might likely be the parties' most valuable asset–one in which perhaps one or the both of them may have devoted the bulk of their energies to.[7]

(An Appellate Division decision has introduced further uncertainty into this field when it held that a spouse who listed separate property on a joint tax return might have converted it into marital property.[8] Though this reasoning has been rejected by two other Departments,[9] a party who requires certainty might wish to employ a prenuptial agreement. Moreover, with case law constantly evolving, a couple may wish to chart their own course and ensure what their outcome will be, without worrying about the shifting currents of judicial tides.)

A betrothed has significant debt and the couple wishes to decide how that will be handled. Generally Courts will not entertain claims for recoupment of marital expenditures.[10] Where one of the parties has significant debt and the parties want that debt allocated in a certain way, they might wish to memorialize their agreement in an enforceable prenup.

A betrothed, having seen friends or family experience terrible divorce battles, may be so afraid that they won't get married without a prenup. Because so many people have been through or seen ugly, painful divorces, a substantial number of them may fear marriage and may only consider getting married if they are assured of a smooth landing if the marriage fails. They may insist that all of the terms be resolved ahead of the marriage, and the number of issues to be fought-over reduced, so that they can rest assured that any divorce will be as painless as possible. For these people a prenup facilitates their marriage.

To avoid the transactional costs of divorce, the couple might agree that unless one stops working to care for children, there will be no post-divorce support from either of them to the other. They might want to agree on the existence and value of each of their separate properties and each's origination credits, and how any separate-property appreciation will be handled.

The next installment of this series will explore the least destructive ways of drafting and negotiating prenuptial agreements when they are necessary.

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[4]A number of states use the "kitchen sink" or "hotchpot" system in which courts divide all of the parties' property at divorce, regardless of how or when the property was acquired. Oldham, *supra*, § 3.03[2]. These include Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, Vermont, and Wyoming. *Id.* n. 3.

[5]Alabama, Alaska, Arkansas, Hawaii, Iowa, Minnesota, Ohio, and Wisconsin. *Oldham, supra*, § 3.03[4] & n. 24. Some states limit the degree that a party's separate property can be invaded (*e.g.*, Minnesota, 50%), and some require a showing of "hardship" before the court may do so (*e.g.,* Iowa, Minnesota, and Wisconsin). *Id.* & n. 27-28.

[6]American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 4.12 (2002); J. Thomas Oldham, *Should Separate Property Gradually Become Community Property as a Marriage Continues*, 72 La. L.Rev. 127, 128-29 (2011) *available at* https://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/6; Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. Det. Mercy L.Rev. 307 (Spr. 2007).

[7]Part III of this series will explore possible options that are more fair to both spouses in these situations.

[8]*Foti v. Foti*, 114 AD3d 1207, 979 NYS2d 914 (4th Dept., 2014) (losses from wife's inherited businesses listed on joint tax returns may constitute commingling and therefore summary judgment to declare them separate property was inappropriate).

[9]*Miszko v. Miszko*, 163 AD3d 1204, 81 NYS3d 617(3rd Dept., 2018), *Giannuzzi v. Kearney*, 160 AD3d 1079, 74 NYS3d 123 (3rd Dept., 2018), *Angelo v. Angelo*, 74 AD2d 327 (2d Dept 1980), all expressly rejecting the theory that listing separate property on a joint return converts it to marital.

[10]*Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 881 NYS2d 369 (2009).

Part III

Having established the dangers that prenuptial agreements create and that certain situations nevertheless require them, it may be useful to consider how to effectively negotiate and draft a prenuptial agreement in a way that minimizes the dangers and maximizes its benefits.

Use the prenup as a marriage-planning document. Instead of approaching the prenup as a divorce-contingency document, view and draft it as marriage-planning one. A marriage-planning document should require the parties to consider how they intend to lead their joint lives. What can each expect from the other? How will they pay their joint and separate living expenses? If their incomes differ substantially, how will they allocate their common expenses and vacations? Will they share all of their finances, or will they each maintain some portion for discretionary, whimsical expenditures that will not be subject to the veto or judgment of the other? Though some or all of these "lifestyle" provisions may not be legally enforceable, the change of focus converts the tone of the discussions, and the resulting document helps the parties avoid surprises. A good adage in life is that any time one person is surprised, another has failed to communicate properly.[1] Negotiating and drafting the prenuptial agreement can be converted into an opportunity for the parties to articulate and discuss their shared values, goals and desires, memorialize their common aspirations, and set the joint vision for their union, creating a stronger basis for their marriage instead of weakening it.

Use "Fairness" as the touchstone of negotiations. To the extent that the parties can anchor their positions and negotiating style to an expectation of fairness, they can use controversy to bring them closer to one another instead of driving them further apart.[2] Use the negotiation strategies of "Getting to Yes"[3] by using "principled negotiation" rather than positional bargaining. Consider:

- Whether the non-monied spouse is sacrificing anything now (like giving up a home or furniture to move into the other's apartment) or during the marriage (forsaking a career or education) that could potentially leave the spouse disadvantaged at the conclusion of the marriage, and the methods that are available to fairly provide for it?
- Whether either party is contributing separate property to the acquisition of a marital-property asset (like a new home) and how that should be treated?
- How each party will be provided for at the time of their retirement?
- How the parties wish to treat any pre-marital or separate-property debt, any prior marriage's assets (like support payments from a previous spouse) or liabilities?
- How the parties can fairly treat a business interest which might become the parties' most valuable asset?
- Will one spouse be working in the other's separately-titled business and how will those efforts be fairly recognized and compensated; will it result in any ownership or other interest in the business' appreciation?

Sometimes, however, one of the betrothed is compelled by external forces to insist on certain terms that are not fair. Asking for fairness in such a situation may call attention to the otherwise invisible elephant in the room and some lawyers might object to such an approach.

Include provisions that assure the non-monied spouse's financial safety. In certain circumstances, it might be appropriate for a monied spouse to provide the non-monied spouse an annual stipend *during* the marriage. This money should go into a separate-property account in the non-monied spouse's name alone, and is not to be used for marital expenses. In the event of a divorce, the non-monied spouse will then have their own post-marriage security. With an amount properly set, it maximizes the enforceability of the prenup, precludes challenge to it, and is an immediate demonstration of the monied spouse's love and commitment to the betrothed.

An important cautionary note should be included here. Clients must be advised of the need to live up to this type of a prenuptial obligation all throughout the marriage. Complied with, each year's acceptance of the stipend becomes a ratification of the prenuptial agreement, strengthens it, and renders it impervious. If, however, the monied spouse fails to live up to the prenup's obligation, the breach itself makes the prenup vulnerable even if no grounds for challenge otherwise existed. As with so many other things, such a provision is a double-edged sword and clients should be cautioned to adhere to it scrupulously.

Consider and provide survivorship benefits. Particularly in second marriages where a non-monied spouse will live in the monied-spouse's home, the monied spouse should include appropriate provisions if the non-monied spouse outlives him. If the non-monied spouse waives the statutory right of election and the marital home is left to other beneficiaries, the non-monied spouse can be ejected

[1]Steinberger, *Make More Money by Being More Ethical*, 33 Family Advocate 2 at 13 (Fall 2010) (any time a client is surprised, their lawyer has failed to communicate the possible and likely outcomes).

[2]Applying the principle that one should view every adversity as an opportunity for improvement, and each controversy as an opportunity to forge a stronger relationship. *Steinberger, supra*, at 14

[3]Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*.

from the home almost immediately upon the monied-spouse's death. The monied-spouse might, therefore, want to leave a life-estate to the surviving spouse or make some other direction or provision in a prenup and will for the surviving-spouse's residence, support and lifestyle.

Determine a fair methodology for apportioning the marital-appreciation of the business in a manner that will not be unduly disruptive or invasive to its operation, and will fairly recognize the non-titled spouse's contributions. The common approach of designating the pre-marital business and all its appreciation as the separate property of the titled spouse, leaves both spouses knowing that the marriage is not a total partnership. The more time, effort, and energy devoted to the business and the more the business overshadows the other marital assets or the marriage itself, the more excluded the non-titled spouse is from the marital partnership. Thus, there's great value to the parties to develop ahead of time, a fair methodology and formula that assures the non-titled spouse that they too have an interest in the success of the business. To accomplish the goals of the prenup, however, the methodology should be reasonable, predictable, and not susceptible to manipulation when the marriage unravels.

Business partnership or buy-sell agreements often contain clauses setting out the values of each partnership interest or the method to determine it in the event of the businesses' dissolution or an irreparable rift between the partners. These clauses, negotiated at arms length, are presumptively fair to all of the business partners and necessarily delineate a spouse's value in the business. A business might also purchase "key man" life-insurance policies that provide funds for the buyout of a survivor's widow(er), revealing the expectation of that partner's interest. A prenuptial agreement can, therefore, link to those values at the time of the marriage and its dissolution, and use an appropriate formula to determine the non-titled spouse's interest in the marital-appreciation of the business. The titled spouse can then hopefully obtain financing to "cash out" the non-titled spouse's interest with little disruption to the business itself.

Audited financial statements can also be linked to with relative ease to designate a non-titled spouse's buyout from a business. When statements are routinely audited, the non-titled spouse can safely rely on their accuracy and year-to-year stability.

Alternatively, parties to a prenup can designate a trusted auditor or business valuator who will be used at the time of dissolution to determine its marital-appreciation. By agreeing in advance, the parties can avoid any later dispute over the valuator, and the disruptiveness and intrusion of unconsented-to outside evaluators.

Obviously, these are all complicated issues that must be carefully considered and developed to minimize disruption to the business but ensure fairness to both parties, so that they are both invested in the success of the marriage and its business enterprises. They also have profound psycho-social ramifications on the parties' psyches and therefore must be handled with wisdom, insight and aforethought.

All prenuptial agreements require parties to consider and plan for their worst ultimate fates–mortality or divorce. These issues should not be undertaken or treated lightly and parties undertaking it should enlist the help of not only competent lawyers but also wise legal counselors to guide them safely through these perilous shoals.

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LECTURES & PUBLICATIONS

Divorce Without Destruction: Overcoming the Psychological Imperatives That Make Good People Fight Viciously, presented at the American Bar Association Family Law Section Fall Conference in Austin, Texas, and available for viewing at https://youtu.be/B7oDu6LJ44s — Sept. 2019

Divorce Without Destruction, New York Law Journal — July 2018

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What Every Mental Health Professional Needs to Know about Divorce Law, — Oct. 2010

Make More Money by Being More Ethical, ABA Family Law Section's Advocate — Oct. 2010

Billing Pitfalls & Pratfalls: Avoiding the Ethical Issues that Snag Attorneys — Dec. 2008
ABA Family Law Section

Co-Author, Breast Cancer Legal Advocacy Guide, Chap. 13, *Divorce*

Hot Tips in Trial Practice, American Bar Association Annual Meeting — Aug. 2008

Father? What Father? Parental Alienation and Its Effects on Children, — Spring 2006
NYSBA Family Law Review, NYS Appellate Division Law Guardian Reporter

What Every Lawyer Should Know About Matrimonial Law, NYCLA Inn of Court — Feb. '05

A Roadmap Through New York Divorce Proceedings, National Business Inst. — Nov. 2004

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In response to President Clinton's Call to Action, established a program in which surviving members of the Tuskegee Airmen of World War II make presentations at NYC public schools motivating the children to apply themselves to their studies.

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Divorce **Without** Destruction

By **Chaim Steinberger**

BY CHAIM STEINBERGER

Die-hard litigators who have only one tool in their toolbox often believe that the way to achieve the best results for their clients is to be as aggressive and confrontational as possible. Clients buy into this narrative because by the time they involve lawyers they have already concluded that the other party is unreasonable. Clients mistakenly believe that in order to win the other party must lose. Moreover, the fear, anger and pain of the dispute restrict parties' creativity and result in psychological tunnel vision, leaving them unable to visualize or create other acceptable options. As a result, too many pursue (intentionally or inadvertently) a scorched-earth strategy that destroys what might be their most precious things–their children, businesses and family relations.

Game Theory

Aside from the benefits of avoiding permanent injury to children, using game theory and advanced negotiation techniques can often achieve better financial and emotional results for the clients. Lawyers can be part of the healing rather than the destroying, doing well as they do good.

Game theory teaches that adversaries achieve better results by developing trust and working collaboratively, than they ever could by remaining distrustful, oppositional adversaries. As adversaries each party must protect themselves against the possible double-cross by the other. As a result, the parties can only agree to what is a "pareto optimal" solution—a solution in which any unilateral deviation by a party will hurt the deviating party more than it advantages them. These solutions are akin to the "lowest common denominator," often not the very best solution for either of the parties but only the best solution that leaves them both protected. If the parties can, however, create some measure of trust and collaboration they can often find solutions that leave them *both* better off. The techniques outlined below foster just such results.

"Win-Win" Techniques

In their seminal book *Getting to Yes: Negotiating Agreement Without Giving In*, Professors Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project develop techniques for achieving the seemingly impossible "win-win" resolutions in which both competing sides win at the same time. They recommend that negotiators be "hard on the problem, but soft on the people." That is, negotiators should thoroughly and critically analyze the positions of both of the parties, but do so without personally attacking either of them which could destroy any hope of a future working relationship between them.

Instead of using "positional bargaining" where each side conclusively states their demands, the professors recommend "principled" negotiation in which the parties negotiate around core values. So for example, parties may agree that they both want to be fair. They may agree that they both want to do right. They will likely both agree that they want to protect their children. Just expressing such common core values reminds the parties of the interests that unite them.

The parties can then discuss aspects of fairness, of what is right, or of how to protect the children. Because the discussion is centered around fairness rather than demands, neither party feels attacked or becomes defensive. Parties can now hear and acknowledge the validity of the points made by the other, without feeling vulnerable or giving up their own deeply-held positions. This allows each party to feel heard and validated, a major step in fostering the trust that is necessary for a collaborative result. Unlike in the typical brute-force negotiations–negotiations in which the parties negotiate based on who has the better legal argument, the more aggressive or intransigent lawyer, or who is willing to spend more on legal fees–from which the parties walk away feeling worse about one another, these techniques create trust and understanding between the parties, making them more willing to work collaboratively in the future and perhaps even giving them the tools with which to resolve their own future disputes. Often a magical moment occurs in which what was a "me-against-you" problem becomes a "we have a problem; how can we find a solution that works for the both of us." Using creativity and empathy the lawyers and parties can then put their heads together to find win-win resolutions that would be impossible when the parties distrust one another.

Another powerful technique is to focus on the parties' interests instead of their positions. Instead of accepting the parties' posi-

tions as absolutes, the negotiator delves into the reasons why each position is important to the party. Though asking basic questions when the answer seems obvious might make one feel a bit daft, it is surprising how often the seemingly obvious motivation is not the party's actual motivation. The other difficulty of this technique is that after asking for the reasons behind the party's position, the person asking must be quiet, not talk, and actually listen to the answer–a skill difficult for many, lawyers included.

The classic example of this principle involves two people fighting over an orange. Unable to agree and having grown impatient, one pulls out a knife, slices the orange in half and walks off with half. Having walked away, the party peels the half-orange and throws away the peel to eat the fruit. The second peels the remaining half, throws away the fruit and uses the peel to bake a cake. How frustrating for those with a bird's eye view to know that each could have had the whole orange–one the whole fruit and the other the whole peel. Because it hadn't occurred to either of them to ask why the other wanted the orange, their "positions" were diametrically opposed, though their "interests" in actuality were not. Because of the way the dispute was positioned, it seemed that one could "win" only if the other "lost." At the least, each had to "settle" for one-half of what they wanted in order to reach the only "fair" result they imagined. In actuality, however, neither had to give up anything; they each could have received 100 percent of what they wanted and they both could have "won" without ever making the other one "lose."

Like with the orange, so often uncovering the reasons behind parties' stated positions allows creative, empathetic lawyers to find win-win resolutions in which both sides win. A parent might demand the family home but really only want to remain in the school district with the special-needs program for the parties' child. Or it may not be the specific home a parent wants but only proximity to certain special friends or family members. Each of these motivations opens myriad choices that can fulfill the party's interest, one of which might satisfy the other party's interest as well and making a win-win resolution possible. A father's stated position may arise from his fear that his relationship with the children will be impaired. Acknowledging his legitimate concerns and providing assurances and guarantees may go a long way in reestablishing the shattered trust between them, which might then make it possible for the parties to craft an out-of-the-box resolution that is right for them and that can benefit them and their families for years to come.

Be Calm, Cool and Collected

Like litigation itself, these techniques require solid, thorough preparation, lots of patience and a cool and collected demeanor. The lawyer must know the client's case and all of its relevant, even picayune but emotionally persuasive, details. The litigator's theory of the case demonstrating why justice demands a ruling in the client's favor, is used here to demonstrate the fairness of a particular position. The facts, the law (and the fairness it represents), the closing argument and the advocacy are all put in play, but in a safe, respectful collegial environment, one that makes the parties feel heard and understood so that they can be amenable to fashioning a resolution that works best for themselves and their family. As Sun-tzu advocates, a true pacifist must be the most accomplished warrior.

> Game theory teaches that **adversaries achieve better results by developing trust** and working collaboratively, than they ever could by remaining distrustful, **oppositional adversaries**.

By listening carefully and respectfully, being genuine and forthright, agreeing with valid concerns and accommodating them when they can reasonably and fairly be accommodated, a good negotiator can avoid further traumatizing the parties' relationship and obtain better results for the client. By creating an atmosphere of rapport and even trust, the parties can discover or create resolutions that benefit both of them in ways that no adversarial win could. Achieving such a better resolution allows the parties to heal and move on, without the emotional negativity, recriminations and ill will that often linger long after the final appeal is decided and the adversarial battle is supposed to be over. Moreover, in addition to the better settlement terms, the parties will be better positioned to work together in good faith on joint issues like those involving their children. They will give their children the greatest gift divorcing parents can give children–permission to love the other parent and a willingness to work together to raise their children in a loving, cooperative manner.

SHUTTERSTOCK

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Make More Money by Being More Ethical

BY **CHAIM STEINBERGER**

Many believe that professional rules of ethics encumber us, make us less efficient, and prevent us from making more money. Actually, quite the opposite is true. 'Turns out that "good ethics," in addition to keeping us out of trouble, is also "good business."

BY FOLLOWING ETHICS BEST PRACTICES, you will operate your business in a manner most likely to provide more repeat business, generate more referrals, and ensure that a greater percentage of your invoices are paid. Follow these philosophical and technical rules and you likely will have more work, more clients, and more money in your pocket.

1. Be client-centric. Like successful dieting, it's not just one single thing that has to be done, but rather a way of life, an attitude, a frame of mind. Consider how everything you do will look and feel to the client. Being client-centric should affect every aspect of your practice. Here are some of the ways it can help you make more money.

• **Demonstrate care and concern for clients** over and over again. Studies show that, surprisingly, many attorneys do not know what is most important to their clients. Though many attorneys believe that clients are most worried about (1) costs, and (2) results, clients report that their attorney's *concern* for them is the *single most important factor* in determining whether they will rehire the lawyer. (J. Harris Morgan & Jay G. Foonberg, *How to Draft Bills Clients Rush to Pay* 77–78 (2d ed. 2003), citing the Missouri Bar Prentice-Hall Survey: A Motivational Study of Public Attitudes and Law Office Management 67 (The Missouri Bar 1963) (the "Missouri Study").

The wise lawyer, therefore, will demonstrate genuine

care and concern for clients at every opportunity. This includes simple courtesies like not permitting clients to wait when arriving at your office, personally escorting them into and out of your office, and not allowing yourself to be interrupted or distracted by phone calls, e-mails, or other office pressures while with the client. Giving a client your complete, undivided attention demonstrates powerfully how important the client is to you.

Analogously, it is widely reported that doctors with a good bedside manner are less likely to be sued for malpractice than those with a poor bedside manner. Likewise, patients are more understanding and forgiving of a "caring" doctor's mistakes. The same is true of legal clients. Clients are more likely to pay for legal services and less likely to file a grievance or malpractice action if they feel the lawyer is dedicated to them. Indeed, grievance committees have confirmed that the single most important thing an attorney can do to reduce complaints is to return telephone calls promptly. Obviously, this is a good business practice, too.

2. Draft time entries and invoices that convey your effort and dedication to clients. Instead of limp, lifeless, passive time entries, use powerful, active present-tense verbs that give life and vibrancy to the many hours you devote to the client's matter. For example an entry like "Review every reported decision involving a parent whose income exceeds the CSSA cap to determine client's maximum child support exposure" is likely to be more meaningful to the client than the vague "legal research–15 hours" type of entry most of us are accustomed to seeing. Your efforts are more likely to be appreciated and paid for, too.

Avoid time entries that would cause a reasonable person to raise an eyebrow. For example, never include two separate but identical entries. Distinguish them so that it is obvious that you are not asking the client to pay twice for the same work. For example, when charging for a phone call, specify what was accomplished, or attempted, during the phone call. Show the value the client is receiving for the money.

3. Always treat the client as you wish to be treated. That's the Golden Rule. Even better is the "Platinum" Rule: Treat each client in the way that client wishes to be treated. Here's how:

- **Never surprise a client.** We all hate surprises, unless they're the good kind. Lawyers' bills rarely are. We don't ever want to be surprised when we pick up our cars from the mechanic. Our clients shouldn't be surprised when they get our bills either. Anytime a client is surprised, it means that the lawyer has dropped the ball.

  Avoid surprising the client by calling ahead of time. Yes, I know it's uncomfortable. No one ever wants to be the bearer of bad news. It's still better to call clients ahead of time to personally explain why a bill is higher than expected. Even better, call the client before you do the extra work to explain what happened and why you need to do additional work and what it will likely cost. The client will feel more in control, and the work you do will more likely be appreciated and paid for. As one of our colleagues recently posted on the Family Law Section's listserve, "As between doing the work and not getting paid and not doing the work and not getting paid, I'd prefer the latter." A bill, or for that matter anything else in the lawsuit, should never surprise the client.
- **Keep clients informed.** Another way to avoid client surprises is to establish a mechanism within your office to ensure that clients are always kept informed of each development in their cases. By forwarding to them copies of each letter, e-mail, and motions, they see the work as you are doing it. They can, therefore, better appreciate the time you are devoting to their matters. At the end of the month when they receive your bill, the entries remind them of all the work you've done, and they'll appreciate it more and pay for it more easily. Of course, this also cuts down on clients complaining that they don't know what's going on in their cases.

  Avoiding client surprises also requires you to spell out early and clearly what the client must pay for, approximately how much it will cost, and when and how to pay. Do all of this in your initial retainer agreement. Every potential client is concerned about costs and likely feels uncomfortable raising the issue. By raising the issue early, you demonstrate your integrity, alleviate your client's anxiety, and build trust and respect. In addition, doing so avoids misunderstandings and reduces challenges to your bills or grievance complaints against you.

4. Bill "early and often." Clients are more apt to pay bills immediately before or immediately after the work is done. The more time that passes after the work's completion, the less likely the client is to recognize its value or pay for it. Like the old saw warns, "The value of a service decreases dramatically after it's been rendered."

An added benefit to frequent billing is that the client stays informed about the status of the case and the cost of your services. The more work you do for your client, therefore, the more often you should bill. This will help your cash flow and keep your clients happier. As studies show, yet another benefit of frequent billing is more referrals from existing clients. So by billing more frequently you'll have more clients, happier current clients, better cash flow, greater realization on your billings, and fewer complaints.

- **Track time religiously.** In order to bill early and often, you must track your time religiously and contemporaneously as you do your work. Your time records will be more reliable, will generate fewer challenges to your bills, and your records will better protect you in the event of any dispute. More frequent billings also will help you

make more money. Lawyers who have a system in place for recording and billing their time earn 40 percent more money than lawyers who do not. Morgan & Foonberg, *supra*, at 67.

- **Invoices must look and be reasonable under the circumstances and be accurate.** Do not issue an invoice that you would be unhappy or offended to receive.

5. Maintain and project ethics and integrity in everything you do. According to the Missouri Bar study, the second most important thing clients value is the attorney's integrity. Morgan and Foonberg, supra, at 2. If you show that you treat opposing counsel, the courts, or others deceitfully, your clients won't trust you either. By maintaining and demonstrating the highest ethical standards, you will earn and keep your clients' trust, confidence, and respect. This will lead to more business and more referrals. Ensure that all of your bills and time entries are correct and appear, both objectively and subjectively, reasonable. If they do not, then provide greater detail on bills to show why the time devoted was necessary.

6. Run your business competently like the business that it is. That means:

- **Do not let any client get (too far) behind in payments,** because the value of a service diminishes rapidly. Every day that passes after the work is done dramatically decreases the likelihood that your client will pay—no matter how genuinely or earnestly the client promises payment.

  You expose yourself to additional risks, moreover, when you allow a client to owe you a lot of money. The easiest way for a client to avoid paying your bill is to claim that you did something wrong. Thus, the more delinquent the bill, the greater the incentive for the client to file a grievance or malpractice action against you. The "nicer" you are to clients and the longer you "carry" them, the more incentive they have to betray you. At some point, the temptation may become too great for mere mortals to resist.

- **Get out of a bad situation sooner, rather than later.** About the only thing worse than a client stiffing you for your fee, is a client stiffing you for twice that amount and filing a grievance against you to boot. Although it's hard to walk away from work, particularly in troubled times, if a client is having trouble paying, consider withdrawing from the case (with leave of court, where leave is required, of course). Cut your losses and devote your time to productive matters.

  Remaining in a case in which a client is not paying you is problematic for another reason, too. When a client owes you a significant amount of money, your ability to collect will likely hinge on your success in the action. You have now, therefore, been converted from a dispassionate advocate on behalf of another, to an unnamed *de facto* silent party in the suit. You may feel pressured now that your own interests are at stake in the litigation and it may affect your judgment, impinge your objectivity and detachment, and increase the likelihood that you will commit a sanctionable error. Don't let yourself get caught between a rock and this hard place.

7. Use client challenges as marketing opportunities rather than attacks against you. Whenever a client questions or challenges your bill, try not to become defensive. Instead, use this as an opportunity to forge an even stronger relationship with the client. Treat each complaint as if it were an honest, good faith request for additional information. View it as an opportunity to explain your billing practices, the quality of the work you do, and your dedication to clients.

Begin by trying to find some common-ground principles regarding payment to which you both can agree. This might be something like, "I don't want any money from you that I am not legitimately entitled to, and I assume that you want to pay me the money you agree I am legitimately entitled to. Is that right?" Articulating such principles converts the negotiations from "positional bargaining," to what Fisher, Ury, and Patton, in *Getting to Yes, Negotiating Agreement Without Giving In*, call "principled negotiations." You can then discuss whether you are "legitimately entitled" to the money you seek without getting angry, threatening, or demeaning one another. This allows you to argue your claims without harming your underlying relationship.

Next, ask the client open-ended, probing questions that elicit how and why the client is unhappy and feels the charges are not legitimate. Even if you already know why or believe you do, giving the client an opportunity to explain it directly to you will help the client feel better and dissipate his dissatisfaction. Of course, try not to take any attacks personally, and respond in a measured fashion, not aggressively or defensively. Find out why the client feels the money you're asking for is not fair and what, in the client's view, would be fair under the circumstances and why.

Listen "actively" or "reflectively" to the client by repeating in your own words what you hear the client saying. This will demonstrate that you "get" it. Then ask if you have understood the client correctly or if you're missing any part of it. Allow the client to speak again. Then restate what the client has just told you. Wash, rinse, and repeat, over and over again, until the client feels completely heard and understood. Use this active or reflective listening technique any time you want to establish a powerful, deep connection with another human being.

When reflecting the client's position and then stating

your own, use clear, but nonjudgmental, nonaccusatory language. For example, you might fairly recharacterize a client's statement: "You stole our money from the escrow account," to "If I understand you correctly, what you're saying is that you think we were not entitled to the money we withdrew from your escrow account. Is that correct? Did I understand you correctly?" Using nonjudgmental language will help reduce passion and tensions, and allow each of you to hear the other without erecting mental barriers that make further conversation pointless.

Empathize freely and easily with the client's emotions, even if you disagree with the substance of the claims. It will make the client feel heard and understood, without your conceding your own position. "I understand that this lawsuit cost you a lot more than you intended to spend," can go a long way in making a client feel understood and allowing negative feelings to dissipate.

> Whenever a client questions or challenges your bill, use this as an opportunity to forge an even stronger relationship. Treat each complaint as if it were an honest, good faith request for additional information.

Recognize that there's a difference between responsibility and blame. Try to accept responsibility freely and easily for your role in the matter, without feeling blamed or defensive about it. This will allow you to apologize for the way your client felt, with everyone recognizing that such an apology (such as, "I'm sorry you felt neglected") is not an admission of guilt, fault, or failure and goes a long way toward dissipating hard feelings.

Next, review the issue from your own point of view. Again, use only nonjudgmental, nonaccusatory language. In addition to the facts that dispel the client's claim, review the value the client received from your work. Be sure to address the client's feelings as well as the logic of her arguments.

As the authors recommend in *Getting to Yes*, "be hard on the problem, but soft on the people." See, hear, and feel what the client is complaining about and try to assuage the client's hurt feelings. Be empathetic and understanding. Oftentimes, that will get you more money than fighting will give you.

In one fee dispute in which I served as a mediator, the client, a doctor, was outraged that his lawyers kept him waiting for more than an hour when he came for a scheduled meeting. He passionately explained how he would *never* permit his own patients to wait that long and, as another professional, he knew and respected the value of time. He also complained that the lawyers did not keep him apprised of what they were doing and did not return his phone calls. He also received some information that cast doubt on all of the "law" the lawyers had told him throughout the case and said he didn't trust anything they said or did anymore.

Although he had already paid 90 percent of the lawyers' bill, he was disputing the last ten percent. I was convinced that the doctor would pay the entire fee if the lawyer only apologized. I asked the lawyer if, before addressing the substance of the claims, he had anything to say about how the doctor felt. The lawyer, unfortunately, felt threatened or attacked and needed to deny the doctor's claims and justify his own actions. He could not "hear" what the doctor was saying and, because he was too intent on denying the "waiting incident," despite my prodding, could not bring himself to concede that it might have happened. He could not empathize with his client's hurt feelings. The result was that the parties became entrenched. Although the amount in dispute was reduced to a negligible sum, as "a matter of principle" neither party accepted the other's terms. As negotiations broke down, the client promised to sue, not only to avoid paying the final 10 percent, but also for return of a substantial portion of monies already paid.

Had the lawyer acknowledged that the doctor had once been kept waiting and apologized for it, had he empathized with his client, and, perhaps, offered to implement procedures that would ensure that clients would never again have to wait, he likely would have been paid his entire fee and ended up with a happy client and more money in his pocket. Instead, he now has a fee battle with a disgruntled client.

Good ethics and good business practice are not at odds. Both help lawyers work smarter, rather than harder, keep more money and clients, have fewer worries, spend less time chasing bad money and defending grievances, and leave law practices healthier. More importantly, they leave the lawyer with a healthier and happier lifestyle. **FA**

Chaim Steinberger is the principal of Chaim Steinberger, P.C., in New York, NY, where he represents clients in simple and complex family law matters from trial through appeal. In addition to being a litigator, he is also a mediator, negotiator, arbitrator, and collaborative law practitioner. He serves as a mediator and arbitrator on the Attorney-Client Fee Dispute Resolution Panel in Kings County. He is a member of the ABA Section of Family Law and chairs its Alternative Dispute Resolution Committee. He can be reached at csteinberger@mindspring.com.

CHAIM STEINBERGER, P.C.

Chaim Steinberger, J.D.

Sometimes we just have to fight–to protect ourselves, our loved ones, our security, our future. But most people fight because they believe they don't have a choice. Imagine if someone could give you that choice–if you are enabled and empowered to protect yourself, your loved ones, your future and your security, without destroying the things that are most precious to you. Wouldn't that be a relief? You could focus on making life better and moving on, rather than getting mired down in the past, embroiled in controversy as life passes you by.

Mr. Steinberger graduated top of his class in law school earning numerous distinctions and working at some of the most prestigious law firms in the country. Clerking for a Federal judge allowed him to peer behind the curtain and understand what motivates judges to rule the way that they do. During this time he went through his own nasty divorce and realized that "there must be a better way." He has since dedicated his life to practicing that better way on behalf of his clients and the public.

Utilizing the latest in mediation, negotiation and psychological techniques, Mr. Steinberger protects and defends his clients when they are most vulnerable. His compassion, insight and professionalism comfort his clients and give them the freedom to make bold choices. His dedication and leave-no-stone-unturned meticulousness, protects his clients from any shenanigans and gives them the best chance to achieve their goals. Respected by many, he is warm and approachable and will make you feel welcome and well-cared-for.

As a speaker Mr. Steinberger engages and draws his audience into participating in a conversation and discussion. Frequently lecturing on issues such as *Divorce Without Destruction, Love & True Love*, ethics and the painful issue of parental alienation, Mr. Steinberger is a frequent volunteer and lecturer educating the Bench, Bar and public on these important legal and social issues.

As a mediator, Mr. Steinberger has quickly resolved many disputes (commercial as well as matrimonial), some which have lasted for years and have cost the litigants many hundreds of thousands of dollars in legal fees. One divorcing couple, having participated in a mediation session with Mr. Steinberger, decided afterwards not to get divorced. Dubbed by clients "The Divorce Whisperer," his unique approach was characterized as the "Chaimlich Maneuver." One parent thanked him saying, "You gave my daughter back her childhood," while a psychologist noted that, "Before I heard you speak I would've never let any of my children become a lawyer." Mr. Steinberger welcomes the opportunity to help you or speak to your organization. Call the office below to contact him.

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McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 4. Descent and Distribution of an Intestate Estate (Refs & Annos)
Part 1. Rules Governing Intestate Succession

McKinney's EPTL § 4-1.1

§ 4-1.1 Descent and distribution of a decedent's estate

Currentness

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per

capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.

(b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.

(d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

Credits

(L.1966, c. 952. Amended L.1967, c. 686, § 27; L.1969, c. 596; L.1971, c. 68; L.1974, c. 903, § 2; L.1978, c. 423, § 1; L.1992, c. 595, § 8.)

McKinney's E. P. T. L. § 4-1.1, NY EST POW & TRST § 4-1.1
Current through L.2018, chapters 1 to 321.

End of Document

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 5. Family Rights
Part 1. Rights of Surviving Spouse

McKinney's EPTL § 5-1.1

§ 5-1.1 Right of election by surviving spouse

Currentness

(a) Election by surviving spouse against will executed after August thirty-first, nineteen hundred thirty and prior to September first, nineteen hundred sixty-six.

(1) [1] Where a testator executes a will after August thirty-first, nineteen hundred thirty but prior to September first, nineteen hundred sixty-six, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(A) For the purposes of this section, the elective share of the surviving spouse is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8.

(B) Where the elective share is over twenty-five hundred dollars and the testator has made a testamentary disposition in trust of an amount equal to or greater than the elective share, with income therefrom payable to the surviving spouse for life, the surviving spouse has the limited right to elect to take the sum of twenty-five hundred dollars absolutely, which shall be deducted from the principal of such trust and the terms of the will remain otherwise effective.

(C) Where the elective share of the surviving spouse does not exceed twenty-five hundred dollars, the surviving spouse has the right to elect to take his elective share absolutely, which shall be in lieu of any provision for his benefit in the will.

(D) Where the will contains an absolute disposition to the surviving spouse of or in excess of the sum of twenty-five hundred dollars and also a disposition in trust with income payable to such spouse for life of an amount equal to or greater than the difference between the absolute disposition and his elective share, the surviving spouse has no right of election.

(E) Where the will contains an absolute disposition to the surviving spouse of an amount less than the sum of twenty-five hundred dollars and also a disposition in trust with income payable to such spouse for life of an amount equal to or greater than the difference between the absolute disposition and his elective share, the surviving spouse has the limited right to elect to take the sum of twenty-five hundred dollars, inclusive of the amount of such absolute disposition, and

the difference between such disposition and the sum of twenty-five hundred dollars shall be deducted from the principal of such trust and the terms of the will remain otherwise effective.

(F) Where the aggregate of the provisions in the will for the surviving spouse, including the principal of a trust, an absolute disposition or any other kind of testamentary disposition is less than the elective share, the surviving spouse has the limited right to elect to take the difference between such aggregate and the amount of the elective share, and the terms of the will remain otherwise effective. In every estate, the surviving spouse has the limited right to withdraw the sum of twenty-five hundred dollars if the elective share is equal to or greater than that amount. Such sum, however, is inclusive of any absolute disposition, whether general or specific. Where a trust is created for the life of the surviving spouse, such sum of twenty-five hundred dollars or any lesser amount necessary to make up that sum is payable from the principal of such trust.

(G) The provisions of this paragraph with respect to trusts with income payable for the life of the surviving spouse likewise apply to a legal life estate, to an annuity for life or to any other disposition in the will by which income is payable for the life of the surviving spouse. In computing the value of the dispositions in the will, the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

(H) The grant of authority in a will to a fiduciary or his successor (i) to act without bond, (ii) to name his successor to act without bond, (iii) to sell assets of the estate upon terms fixed by him, (iv) to invest the funds of the estate in other than legal investments, (v) to retain in the assets of the estate investments or property owned by the testator in his lifetime, (vi) to make distribution in kind, (vii) to make a binding and conclusive valuation of assets for the purpose of their distribution, (viii) to allocate assets either outright or in trust for the life of a surviving spouse or (ix) to conduct the affairs of the estate with partial or total exoneration from the legal responsibility of a fiduciary, shall not, either singly or in the aggregate, give the surviving spouse an absolute right to take his elective share; but the surrogate's court having jurisdiction of the estate, notwithstanding the terms of the will, may, in its discretion, in an appropriate proceeding by the surviving spouse or upon an accounting, direct and enforce for the protection of the surviving spouse an equitable distribution, allocation or valuation of the assets, enforce the liability of a fiduciary under the law and make such other directions, consistent with the provisions and purposes of this paragraph, as it may consider necessary for the protection of the surviving spouse.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred sixty-six and is survived by a spouse who exercises a right of election under paragraph (c), the following transactions effected by such decedent at any time after the date of the marriage and after August thirty-first, nineteen hundred sixty-six, whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, included in the net estate subject to the surviving spouse's elective right:

(A) Gifts causa mortis.

(B) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(C) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six whereby property is held, at the date of his death, by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety.

(E) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this paragraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death.

(2) Nothing in this paragraph shall affect, impair or defeat the right of any person entitled to receive (A) payment in money, securities or other property under a thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust, (B) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract, a policy of life, group life, industrial life or accident and health insurance or a contract by such insurer relating to the payment of proceeds or avails thereof or (C) payment of any United States savings bond payable to a designated person, and such transactions are not testamentary substitutes within the meaning of this paragraph.

(3) Transactions described in subparagraphs (C) or (D) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entirety was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution. Where the other party to a transaction described in subparagraphs (C) or (D) is a surviving spouse, such spouse shall have the burden of establishing the proportion of his contribution, if any. For the purpose of this subparagraph, the surrogate's court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his right of election under paragraph (c). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a defense to it, during the effective period of the order, in any action or proceeding brought against it which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1), this paragraph controls.

(c) Election by surviving spouse against wills executed and testamentary provisions made after August thirty-first, nineteen hundred sixty-six; election where decedent dies intestate as to all or any part of his estate.

(1) Where, after August thirty-first, nineteen hundred sixty-six, a testator executes a will disposing of his entire estate, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(A) For the purposes of this paragraph, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b)(1).

(B) The elective share, as used in this paragraph, is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8.

(C) The term “testamentary provision”, as used in this paragraph, includes, in addition to dispositions made by the decedent's will, any transaction described as a testamentary substitute in subparagraph (b)(1).

(D) Where the elective share is over ten thousand dollars and the decedent has by testamentary provision created a trust in an amount equal to or greater than the elective share, with income therefrom payable to the surviving spouse for life, the surviving spouse has the limited right to elect to take the sum of ten thousand dollars absolutely, which shall be deducted from the principal of such trust and the terms of the instrument making the testamentary provision remain otherwise effective.

(E) Where the elective share of the surviving spouse does not exceed ten thousand dollars, the surviving spouse has the right to take the elective share absolutely, in lieu of any testamentary provision for his benefit.

(F) Where an absolute testamentary provision is made for the surviving spouse of or in excess of ten thousand dollars, and also a provision in trust with income payable to such spouse for life of an amount equal to or greater than the difference between such absolute testamentary provision and his elective share, the surviving spouse has no right of election.

(G) Where an absolute testamentary provision is made for the surviving spouse in an amount less than ten thousand dollars, and also a testamentary provision in trust with income payable to such spouse for life of an amount equal to or greater than the difference between such absolute testamentary provision and his elective share, the surviving spouse has the limited right to take the sum of ten thousand dollars, inclusive of the amount of such absolute testamentary provision, and the difference between such absolute testamentary provision and the sum of ten thousand dollars shall be deducted from the principal of the trust and the terms of the instrument making the testamentary provision remain otherwise effective.

(H) Where the aggregate of the testamentary provisions for the surviving spouse, including the principal of a trust, an absolute testamentary provision or any other kind of testamentary provision, is less than the elective share, the surviving spouse has the limited right to elect to take the difference between such aggregate and the amount of the elective share, and the terms of the instrument making such testamentary provisions remain otherwise effective. In every estate, the surviving spouse has the limited right to withdraw the sum of ten thousand dollars if the elective share is equal to or greater than that amount. Such sum, however, is inclusive of any absolute testamentary provision. Where a trust is created with income payable to the surviving spouse for life, such sum of ten thousand dollars or any lesser amount necessary to make up that sum is payable from the principal of such trust.

(I) The provisions of this paragraph with respect to trusts for the life of the surviving spouse also apply to a legal life estate, to an annuity for the life of the surviving spouse, to an annuity trust and a unitrust as provided in subparagraph (K) of paragraph one of this subdivision or to any other testamentary provision by which income is payable for the life of the surviving spouse. In computing the value of the testamentary provisions the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

(J) The surviving spouse is entitled to take the capital value (in no case to exceed such spouse's elective share) of the fund or other property producing the income whenever any instrument making a testamentary provision of income for his life authorizes:

(i) The reduction of any trust, legal life estate or annuity by invasion of the principal for another person.

(ii) The termination of any trust, legal life estate or annuity prior to the death of the surviving spouse by payment of the principal thereof to another person.

(iii) The fiduciary to pay or apply to the use of the surviving spouse less than substantially all of the net income from any trust, legal life estate or annuity.

If an instrument making any such testamentary provision contains grants of authority to a fiduciary other than the foregoing, the surrogate's court having jurisdiction of the decedent's estate may, in its discretion, in an appropriate proceeding by the surviving spouse or upon an accounting, direct and enforce for the protection of the surviving spouse an equitable distribution, allocation or valuation of the assets, enjoin any fiduciary, whether appointed by will or otherwise, from exercising any power, statutory or otherwise, which would be prejudicial to the interests of the surviving spouse, enforce the liability of a fiduciary under the law and make such other directions, consistent with the provisions and purposes of this paragraph, as it may consider necessary for the protection of the surviving spouse.

(K) If any testamentary provision for the surviving spouse provides that such spouse shall receive, for life and not less often than annually, from a charitable remainder annuity trust, as defined in paragraph one of subdivision (d) of section six hundred sixty-four of the United States Internal Revenue Code, [2] a sum certain (which is not less than five percent of the initial net fair market value of all property placed in such trust) or from a charitable remainder unitrust, as defined in paragraph two of subdivision (d) of section six hundred sixty-four of such code, a fixed percentage (which is not less than five percent) of the net fair market value of its assets, valued annually, such testamentary provisions shall satisfy the provisions of this paragraph with respect to trusts with income payable to the surviving spouse for life.

(2) Where, after August thirty-first, nineteen hundred sixty-six, a person dies intestate as to all or any part of his estate, and, in the case of part intestacy, executes a will after such date, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the testamentary provisions made by the decedent, as such provisions are defined in subparagraph (1)(C), subject to the following:

(A) The share of the testamentary provisions to which the surviving spouse is entitled hereunder is his elective share, as defined in subparagraphs (1)(A) and (B), reduced by the capital value of all property passing to such spouse (i) in intestacy under 4-1.1, (ii) by testamentary substitute as described in subparagraph (b)(1) and (iii) by disposition under the decedent's last will.

(B) The satisfaction of such elective share shall not reduce the intestate share of any other distributee of the decedent.

(C) Whenever a testamentary provision for the surviving spouse takes the form of income payable for his life:

(i) The surviving spouse has the limited right to elect to take, absolutely, the sum of ten thousand dollars or the share to which he is entitled hereunder, whichever is less. Such sum, however, is inclusive of any absolute testamentary provision, as described in subparagraph (1)(C), and any amount to which the surviving spouse is entitled in intestacy under 4-1.1, and is payable from the principal of any trust, legal life estate or annuity created by such testamentary provision, the terms of which remain otherwise effective.

(ii). The provisions of subparagraph (1)(J) apply.

(d) General provisions governing right of election.

(1) Where an election has been made under this section, the will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted, and the terms of such will or instrument remain otherwise effective so far as possible.

(2) Whenever a will creates a trust, legal life estate or annuity for the benefit of the surviving spouse for life, and such will commands, directs, authorizes or permits the fiduciary to allocate, apportion or charge receipts or expenses to principal or income in such manner as will or might deprive the spouse of income as defined in section 11-2.1 of this act or in any other law applicable to such trust, legal life estate or annuity, and where such trust, legal life estate or annuity, but for such will provision would satisfy the elective share of the spouse in whole or in part, such command, direction, authorization or permission shall not of itself give the surviving spouse an absolute right to take his elective share. The surrogate's court having jurisdiction of the decedent's estate may, in any appropriate proceeding, direct and enforce for the protection of the surviving spouse an allocation, apportionment or charge of all receipts and expenses in accordance with applicable legal or equitable principles so as to assure such surviving spouse of all or substantially all of the income of such trust, legal life estate or annuity consistent with the purposes and provisions of this section. The court may enjoin any fiduciary from exercising any power; [3] authority or permission or doing any act which would be prejudicial to the rights and interests of such surviving spouse under this section. The court may enforce the liability of a fiduciary under the law and make such directions, consistent with the purposes and provisions of this section, as it may consider necessary for the protection of the surviving spouse.

(3) Except as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the share to which the surviving spouse is entitled shall be made by the beneficiaries (including the recipients of any such testamentary provision), other than the surviving spouse, under:

(A) In the case of an election under paragraph (a), the decedent's will.

(B) In the case of an election under paragraph (c), the decedent's will and other instruments making testamentary provisions.

(4) The right of election is personal to the surviving spouse, except that an election may be made by:

(A) The guardian of the property of an infant spouse, when so authorized by the surrogate having jurisdiction of the decedent's estate.

(B) The committee of an incompetent spouse, when so authorized by the supreme court.

(C) The conservator of conservatee spouse, when so authorized by the supreme court.

(5) Any question arising as to the right of election shall be determined by the surrogate's court having jurisdiction of the decedent's estate in a proceeding brought for that purpose on notice to all interested persons in such manner as the court may direct, or in a proceeding for the judicial settlement of the accounts of the personal representative.

(6) Upon application by a surviving spouse who has made an election under this section, the surrogate may make an order cancelling such election, provided that no adverse rights have intervened and no prejudice is shown to creditors of such spouse or other persons interested in the estate. Such application shall be made on notice to such persons and in such manner as the court may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of the county in which any real property of the decedent is situated.

(7) The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent elects, under paragraph (h) of 3-5.1, to have the disposition of his property situated in this state governed by the laws of this state.

(8) The decedent's estate shall include all property of the decedent, wherever situated.

(9) An election made by the surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(e) Procedure for exercise of right of election.

(1) An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters. Such notice may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation required by SCPA 708 or in such other manner as the surrogate may direct.

(2) The time to make such election may be extended before its expiration by an order of the surrogate's court from which such letters issued for a further period not exceeding six months upon any one application. If a spouse defaults in filing such election within six months from the date of issuance of such letters, the surrogate's court may relieve the spouse from such default and authorize the making of an election within the period fixed by the order, provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of letters. An application for relief from a default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of each county in which real property of the decedent is situated.

(3) The time limited in this paragraph for making an election is exclusive and shall not be suspended or otherwise affected by any provision of law, except that the surrogate may, in his discretion, permit an election to be made in behalf of an infant or incompetent spouse at any time up to, but not later than, the entry of the decree of the first judicial account of the permanent representative of the estate, made more than seven months after the issuance of letters.

(f) Waiver or release of right of election.

(1) A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b)(1), made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

(3) Such a waiver or release is effective, in accordance with its terms, whether:

(A) Executed before or after the marriage of the spouses.

(B) Executed before, on or after September first, nineteen hundred sixty-six.

(C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.

(D) Executed with or without consideration.

(E) Absolute or conditional.

Credits

(L.1966, c. 952. Amended L.1967, c. 686, §§ 31 to 42; L.1968, c. 168, §§ 1, 2; L.1968, c. 257, §§ 2, 3; L.1968, c. 853; L.1969, c. 773, §§ 1, 2; L.1971, c. 798; L.1972, c. 327, § 1; L.1975, c. 87, §§ 1, 2; L.1981, c. 115, § 42; L.1986, c. 246, § 1.)

Footnotes

1 So in original. No par. (2) has been enacted.

2 26 USCA § 664(d).

3 So in original.

McKinney's E. P. T. L. § 5-1.1, NY EST POW & TRST § 5-1.1

Current through L.2018, chapters 1 to 321.

End of Document

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 5. Family Rights
Part 1. Rights of Surviving Spouse

McKinney's EPTL § 5-1.1-A

§ 5-1.1-A Right of election by surviving spouse

Effective: August 24, 2018
Currentness

(a) Where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(1) For the purpose of this section, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b)(1).

(2) The elective share, as used in this paragraph, is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate. In computing the net estate, debts, administration expenses and reasonable funeral expenses shall be deducted, but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

(3) The term “testamentary provision”, as used in this paragraph, includes, in addition to dispositions made by the decedent's will, distributions of property pursuant to 4-1.1 and any transaction described as a testamentary substitute in subparagraph (b)(1).

(4) The share of the testamentary provisions to which the surviving spouse is entitled hereunder (the “net elective share”) is his or her elective share, as defined in subparagraphs (1) and (2), reduced by the capital value of any interest which passes absolutely from the decedent to such spouse, or which would have passed absolutely from the decedent to such spouse but was renounced by the spouse, (i) by intestacy, (ii) by testamentary substitute as described in subparagraph (b)(1), or (iii) by disposition under the decedent's last will.

(A) Unless the decedent has provided otherwise, if a spouse elects under this section, such election shall have the same effect with respect to any interest which passes or would have passed to the spouse, other than absolutely, as though the spouse died on the same date but immediately before the death of the decedent.

(B) For the purposes of this subparagraph (4), (i) an interest in property shall be deemed to pass other than absolutely from the decedent to the spouse if the interest so passing consists of less than the decedent's entire interest in that property or consists of any interest in a trust or trust equivalent created by the decedent; and (ii) an interest in property shall be deemed to pass absolutely from the decedent to the spouse if it is not deemed to pass other than absolutely.

(5) Where a decedent dies before September first, nineteen hundred ninety-four, paragraphs (c)(1)(D) through (c)(1)(K) of section 5-1.1 shall apply except that the words "fifty thousand dollars" shall be substituted for the words "ten thousand dollars" wherever they appear in such paragraphs.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred ninety-two and is survived by a spouse who exercises a right of election under paragraph (a), the transactions affected by and property interests of the decedent described in clauses (A) through (H), whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, shall be included in the net estate subject to the surviving spouse's elective right except to the extent that the surviving spouse has executed a waiver of release pursuant to paragraph (e) with respect thereto. Notwithstanding the foregoing, a transaction, other than a transaction described in clause (G), that is irrevocable or is revocable only with the consent of a person having a substantial adverse interest (including any such transactions with respect to which the decedent retained a special power of appointment as defined in 10-3.2), will constitute a testamentary substitute only if it is effected after the date of the marriage.

(A) Gifts causa mortis.

(B) The aggregate transfers of property (including the transfer, release or relinquishment of any property interest which, but for such transfer, release or relinquishment, would come within the scope of clause (F)), other than gifts causa mortis and transfers coming within the scope of clauses (G) and (H), to or for the benefit of any person, made after August thirty-first, nineteen hundred ninety-two, and within one year of the death of the decedent, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for such transfers; provided, however, that any portion of any such transfer that was excludible from taxable gifts pursuant to subsections (b) and (e) of section two thousand five hundred three of the United States Internal Revenue Code, [1] including any amounts excluded as a result of the election by the surviving spouse to treat any such transfer as having been made one half by him or her, shall not be treated as a testamentary substitute.

(C) Money deposited, together with all dividends or interest credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends or interest credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(E) Any disposition of property made by the decedent whereby property, at the date of his or her death, is held (i) by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety where the

disposition was made after August thirty-first, nineteen hundred sixty-six, or (ii) by the decedent and is payable on his or her death to a person other than the decedent or his or her estate.

(F) Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that the decedent (i) after August thirty-first, nineteen hundred ninety-two, retained for his or her life or for any period not ascertainable without reference to his or her death or for any period which does not in fact end before his or her death the possession or enjoyment of, or the right to income from, the property except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth; or (ii) at the date of his or her death retained either alone or in conjunction with any other person who does not have a substantial adverse interest, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this subparagraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death nor shall they impair or defeat any right which has vested on or before August thirty-first, nineteen hundred ninety-two.

(G) Any money, securities or other property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, except that with respect to a plan to which subsection (a)(11) of section four hundred one of the United States Internal Revenue Code [1] applies or a defined contribution plan to which such subsection does not apply pursuant to paragraph (B)(iii) thereof, only to the extent of fifty percent of the capital value thereof. Notwithstanding the foregoing, a transaction described herein shall not constitute a testamentary substitute if the decedent designated the beneficiary or beneficiaries of the plan benefits on or before September first, nineteen hundred ninety-two and did not change such beneficiary designation thereafter.

(H) Any interest in property to the extent the passing of the principal thereof to or for the benefit of any person was subject to a presently exercisable general power of appointment, as defined in section two thousand forty-one of the United States Internal Revenue Code, [1] held by the decedent immediately before his or her death or which the decedent, within one year of his or her death, released (except to the extent such release results from a lapse of the power which is not treated as a release pursuant to section two thousand forty-one of the United States Internal Revenue Code) or exercised in favor of any person other than himself or herself or his or her estate.

(I) A transfer of a security to a beneficiary pursuant to part 4 of article 13 of this chapter.

(2) Transactions described in clause (D) or (E) (i) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property described in clause (E) (i) was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution; provided, however, that where the surviving spouse is the other party to the transaction, it will be conclusively presumed that the proportion of the decedent's contribution is one-half. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(3) The property referred to in clause (E) shall include United States savings bonds and other United States obligations.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having

jurisdiction of the decedent's estate or by another court of competent jurisdiction. A corporation or other person paying or transferring any funds or property described in clause (G) of subparagraph one of this paragraph to a person otherwise entitled thereto, shall be held harmless and free from any liability for making such payment or transfer, in any action or proceeding which involves such funds or property. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his or her right of election under paragraph (a). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a defense, during the effective period of the order, in any action or proceeding which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1) of this paragraph, this paragraph controls.

(7) If any part of this section is preempted by federal law with respect to a payment or an item of property included in the net estate, a person who, not for value, received that payment or item of property is obligated to return to the surviving spouse that payment or item of property or is personally liable to the surviving spouse for the amount of that payment or the value of that item of property, to the extent required under this section.

(c) General provisions governing right of election.

(1) Where an election has been made under this section, the will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted, and the terms of such will or instrument remain otherwise effective so far as possible, subject, however, to the provisions of clause (a)(4)(A).

(2) Except as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the share to which the surviving spouse is entitled shall be made by the beneficiaries and distributees (including the recipients of any such testamentary provision), other than the surviving spouse, under the decedent's will, by intestacy and other instruments making testamentary provisions, which contribution may be made in cash or in the specific property received from the decedent by the person required to make such contribution or partly in cash and partly in such property as such person in his or her discretion shall determine.

(3) The right of election is personal to the surviving spouse, except that an election may be made by:

(A) The guardian of the property of an infant spouse, when so authorized by the court having jurisdiction of the decedent's estate.

(B) The committee of an incompetent spouse, when so authorized by the court that appointed the committee.

(C) The conservator of a conservatee spouse, when so authorized by the court that appointed the conservator.

(D) The guardian ad litem for the surviving spouse when so authorized by the court that appointed such guardian.

(E) A guardian authorized under Article 81 of the mental hygiene law, when so authorized by the court that appointed the guardian.

(4) Any question arising as to the right of election shall be determined by the court having jurisdiction of the decedent's estate in a proceeding brought for that purpose on notice to all interested persons in such manner as the court may direct, or in a proceeding for the judicial settlement of the accounts of the personal representative.

(5) Upon application by a surviving spouse who has made an election under this section, the court may make an order cancelling such election, provided that no adverse rights have intervened and no prejudice is shown to creditors of such spouse or other persons interested in the estate. Such application shall be made on notice to such persons and in such manner as the court may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of the county in which any real property of the decedent is situated.

(6) The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent has elected, under paragraph (h) of 3-5.1, to have the disposition of his or her property situated in this state governed by the laws of this state.

(7) The decedent's estate shall include all property of the decedent wherever situated.

(8) An election made by the surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(9) The references in this paragraph to sections of the United States Internal Revenue Code [1] are to the Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(d) Procedure for exercise of right of election.

(1) An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Such notice may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation

required by section 708 of the surrogate's court procedure act, to the domicile address of such nominated executor, or in such other manner as the surrogate may direct.

(2) The time to make such election may be extended before expiration by an order of the surrogate's court from which such letters issued for a further period not exceeding six months upon any one application. If the spouse defaults in filing such election within the time provided in subparagraph (1) of this paragraph, the surrogate's court may relieve the spouse from such default and authorize the making of an election within the period fixed by the order, provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of the letters, and two years have not elapsed since the decedent's date of death, in the case of initial application; except that the court may, in its discretion for good cause shown, extend the time to make such election beyond such period of two years. An application for relief from the default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of each county in which real property of the decedent is situated.

(3) The time limited in this paragraph for making an election is exclusive and shall not be suspended or otherwise affected by any provision of law, except that the surrogate may, in his or her discretion, permit an election to be made in behalf of an infant or incompetent spouse at any time up to, but no later than, the entry of the decree of the first judicial account of the representative of the estate, made more than seven months after the issuance of letters.

(e) Waiver or release of right of election.

(1) A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b)(1) made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

(3) Such a waiver or release is effective, in accordance with its terms, whether:

(A) Executed before or after the marriage of the spouses.

(B) Executed before, on or after September first, nineteen hundred sixty-six.

(C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.

(D) Executed with or without consideration.

(E) Absolute or conditional.

(4) If there is in effect at the time of the decedent's death a waiver, or a consent to the decedent's waiver, executed by the surviving spouse with respect to any survivor benefit, or right to such benefit, under subsection (a)(11) of section four hundred one or section four hundred seventeen of the United States Internal Revenue Code, [1] then such waiver shall be deemed to be a waiver within the meaning of this paragraph (e) against the testamentary substitute constituting such benefit.

Credits

(Added L.1992, c. 595, § 10, eff. Sept. 1, 1992. Amended L.1993, c. 515, § 3; L.2005, c. 325, § 6, eff. Jan. 1, 2006; L.2010, c. 545, § 1, eff. Jan. 1, 2011; L.2018, c. 228, § 1, eff. Aug. 24, 2018.)

Footnotes

1 For Internal Revenue Code provisions, see 26 USCA § 1 et seq.

McKinney's E. P. T. L. § 5-1.1-A, NY EST POW & TRST § 5-1.1-A

Current through L.2018, chapters 1 to 321.

End of Document

5-a. Temporary maintenance awards.

a. Except where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part, in any matrimonial action the court, upon application by a party, shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.

(4) "Income" shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act.

(5) "Income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(7) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(8) "Agreement" shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) if child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income pursuant to this subdivision and added to the payee's income pursuant to this subdivision as part of the calculation of the child support obligation.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of the payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph h of this subdivision; and

(3) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. Notwithstanding the provisions of this subdivision, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no temporary maintenance is awarded.

f. The court shall determine the duration of temporary maintenance by considering the length of the marriage.

g. Temporary maintenance shall terminate no later than the issuance of the judgment of divorce or the death of either party, whichever occurs first.

h. (1) The court shall order the guideline amount of temporary maintenance up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and

(m) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. Such decision, whether in writing or on the record, shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

i. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into agreements or stipulations as defined in subdivision three of this part which deviate from the presumptive award of temporary maintenance.
j. When a payor has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered evidence.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

m. In determining temporary maintenance, the court shall consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding.

n. The temporary maintenance order shall not prejudice the rights of either party regarding a post-divorce maintenance award.

6. Post-divorce maintenance awards.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action, the court , upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Income" shall mean:

(a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act; and

(b) income from income-producing property distributed or to be distributed pursuant to subdivision five of this part.

(4) "Income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(5) "Guideline amount of post-divorce maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(6) "Guideline duration of post-divorce maintenance" shall mean the durational period determined by the application of paragraph f of this subdivision.

(7) "Post-divorce maintenance guideline obligation" shall mean the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance.

(8) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of the action.

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(10) "Agreement" shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars.

(f) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

(g) maintenance shall be calculated prior to child support because the amount of maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's

income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars.

(f) if child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, post-divorce maintenance shall be calculated prior to child support because the amount of post-divorce maintenance shall be subtracted from the payor's income pursuant to this subdivision and added to the payee's income pursuant to this subdivision as part of the calculation of the child support obligation.

(g) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph e of this subdivision; and

(3) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. (1) The court shall order the post-divorce maintenance guideline obligation up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award before the termination of the maintenance award when

the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;

(m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

(n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(o) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and the court adjusts the post-divorce maintenance guideline obligation pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons that the court adjusted the post-divorce maintenance obligation. Such decision shall not be waived by either party or counsel.

f. The duration of post-divorce maintenance may be determined as follows:

(1) The court may determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage	Percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15%--30%
More than 15 up to and including 20 years	30%--40%
More than 20 years	35%--50%

(2) In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it shall consider the factors listed in subparagraph one of paragraph e of this subdivision and shall set

forth, in a written decision or on the record, the factors it considered. Such decision shall not be waived by either party or counsel. Nothing herein shall prevent the court from awarding non-durational maintenance in an appropriate case.

(3) Notwithstanding the provisions of subparagraph one of this paragraph, post-divorce maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this article.

(4) Notwithstanding the provisions of subparagraph one of this paragraph, when determining duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income shall be a basis for a modification of the award.

g. Where either or both parties are unrepresented, the court shall not enter a maintenance order or judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation.

h. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation.

i. When a payor has defaulted and/or the court makes a finding at the time of trial that it was presented with insufficient evidence to determine income, the court shall order the post-divorce maintenance based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of substantial newly discovered evidence.

j. Post-divorce maintenance may be modified pursuant to paragraph b of subdivision nine of this part.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such agreement.

m. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

n. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

o. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph e of this subdivision.

McKinney's DRL § 236

§ 236. Special controlling provisions; prior actions or proceedings; new actions or proceedings

Effective: January 23, 2016

Currentness

Except as otherwise expressly provided in this section, the provisions of part A shall be controlling with respect to any action or proceeding commenced prior to the date on which the provisions of this section as amended become effective[1] and the provisions of part B shall be controlling with respect to any action or proceeding commenced on or after such effective date. Any reference to this section or the provisions hereof in any action, proceeding, judgment, order, rule or agreement shall be deemed and construed to refer to either the provisions of part A or part B respectively and exclusively, determined as provided in this paragraph any inconsistent provision of law notwithstanding.

PART A

PRIOR ACTIONS OR PROCEEDINGS

Alimony, temporary and permanent. 1. Alimony. In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self supporting, the circumstances of the case and of the respective parties. Such direction may require the payment of a sum or sums of money either directly to either spouse or to third persons for real and personal property and services furnished to either spouse, or for the rental of or mortgage amortization or interest payments, insurance, taxes, repairs or other carrying charges on premises occupied by either spouse, or for both payments to either spouse and to such third persons. Such direction shall be effective as of the date of the application therefor, and any retroactive amount of alimony due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary alimony which has been paid. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by either spouse (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to either spouse in an action in which jurisdiction over the person of the other spouse was not obtained, or (2) by reason of the misconduct of the other spouse, unless such misconduct would itself constitute grounds for separation or divorce, or (3) by reason of a failure of proof of the grounds of either spouse's action or counterclaim. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to either spouse under this section with any amount payable to either spouse under section two hundred forty of this chapter. Upon the application of either spouse, upon such notice to the other party and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or by final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such support nunc pro tunc based on newly discovered evidence.

2. Compulsory financial disclosure. In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending. As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

PART B

NEW ACTIONS OR PROCEEDINGS

Maintenance and distributive award.

1. Definitions. Whenever used in this part, the following terms shall have the respective meanings hereinafter set forth or indicated:

a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this chapter.

b. The term "distributive award" shall mean payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts. Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

c. The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

d. The term separate property shall mean:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;

(2) compensation for personal injuries;

(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

e. The term "custodial parent" shall mean a parent to whom custody of a child or children is granted by a valid agreement between the parties or by an order or decree of a court.

f. The term "child support" shall mean a sum paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

2. Matrimonial actions.

a. Except as provided in subdivision five of this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part. Any application which seeks a modification of a judgment, order or decree made in an action commenced prior to the effective date of this part shall be heard and determined in accordance with the provisions of part A of this section.

b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or

upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

3. Agreement of the parties. An agreement by the parties, made before or 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. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

4. Compulsory financial disclosure.

a. In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending. As used in this part, the term “net worth” shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169) including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information as may be required by the court. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

b. As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

5. Disposition of property in certain matrimonial actions.

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) the loss of health insurance benefits upon dissolution of the marriage;

(6) any award of maintenance under subdivision six of this part;

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;

(8) the liquid or non-liquid character of all marital property;

(9) the probable future financial circumstances of each party;

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) any other factor which the court shall expressly find to be just and proper.

e. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

f. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property.

g. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

5-a. Temporary maintenance awards. a. Except where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part, in any matrimonial action the court, upon application by a party, shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) “Payor” shall mean the spouse with the higher income.

(2) “Payee” shall mean the spouse with the lower income.

(3) “Length of marriage” shall mean the period from the date of marriage until the date of commencement of action.

(4) “Income” shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of

paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act.

(5) "Income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(7) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(8) "Agreement" shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) if child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income pursuant to this subdivision and added to the payee's income pursuant to this subdivision as part of the calculation of the child support obligation.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of the payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph h of this subdivision; and

(3) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. Notwithstanding the provisions of this subdivision, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no temporary maintenance is awarded.

f. The court shall determine the duration of temporary maintenance by considering the length of the marriage.

g. Temporary maintenance shall terminate no later than the issuance of the judgment of divorce or the death of either party, whichever occurs first.

h. (1) The court shall order the guideline amount of temporary maintenance up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and

(m) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. Such decision, whether in writing or on the record, shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

i. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into agreements or stipulations as defined in subdivision three of this part which deviate from the presumptive award of temporary maintenance.

j. When a payor has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered evidence.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

m. In determining temporary maintenance, the court shall consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding.

n. The temporary maintenance order shall not prejudice the rights of either party regarding a post-divorce maintenance award.

6. Post-divorce maintenance awards. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action, the court , upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) “Payor” shall mean the spouse with the higher income.

(2) “Payee” shall mean the spouse with the lower income.

(3) “Income” shall mean:

(a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act; and

(b) income from income-producing property distributed or to be distributed pursuant to subdivision five of this part.

(4) “Income cap” shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(5) “Guideline amount of post-divorce maintenance” shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(6) “Guideline duration of post-divorce maintenance” shall mean the durational period determined by the application of paragraph f of this subdivision.

(7) “Post-divorce maintenance guideline obligation” shall mean the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance.

(8) “Length of marriage” shall mean the period from the date of marriage until the date of commencement of the action.

(9) “Self-support reserve” shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(10) “Agreement” shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars.

(f) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

(g) maintenance shall be calculated prior to child support because the amount of maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except

that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars.

(f) if child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, post-divorce maintenance shall be calculated prior to child support because the amount of post-divorce maintenance shall be subtracted from the payor's income pursuant to this subdivision and added to the payee's income pursuant to this subdivision as part of the calculation of the child support obligation.

(g) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph e of this subdivision; and

(3) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. (1) The court shall order the post-divorce maintenance guideline obligation up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;

(m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

(n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(o) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and the court adjusts the post-divorce maintenance guideline obligation pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons that the court adjusted the post-divorce maintenance obligation. Such decision shall not be waived by either party or counsel.

f. The duration of post-divorce maintenance may be determined as follows:

(1) The court may determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage	Percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15%--30%
More than 15 up to and including 20 years	30%--40%
More than 20 years	35%--50%

(2) In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it shall consider the factors listed in subparagraph one of paragraph e of this subdivision and shall set forth, in a written decision or on the record, the factors it considered. Such decision shall not be waived by either party or counsel. Nothing herein shall prevent the court from awarding non-durational maintenance in an appropriate case.

(3) Notwithstanding the provisions of subparagraph one of this paragraph, post-divorce maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this article.

(4) Notwithstanding the provisions of subparagraph one of this paragraph, when determining duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income shall be a basis for a modification of the award.

g. Where either or both parties are unrepresented, the court shall not enter a maintenance order or judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation.

h. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation.

i. When a payor has defaulted and/or the court makes a finding at the time of trial that it was presented with insufficient evidence to determine income, the court shall order the post-divorce maintenance based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of substantial newly discovered evidence.

j. Post-divorce maintenance may be modified pursuant to paragraph b of subdivision nine of this part.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such agreement.

m. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

n. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

o. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph e of this subdivision.

6-a. Law revision commission study. a. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples. Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes.

The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be undertaken. It

has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that the implementation of our maintenance laws have not resulted in equitable results compel the need for a review of these laws.

b. The law revision commission is hereby directed to:

(1) review and assess the economic consequences of divorce on the parties;

(2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and

(3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives.

c. The law revision commission shall make a preliminary report to the legislature and the governor of its findings, conclusions, and any recommendations not later than nine months from the effective date of this subdivision, and a final report of its findings, conclusions and recommendations not later than December thirty-first, two thousand eleven.

7. Child support. a. In any matrimonial action, or in an independent action for child support, the court as provided in section two hundred forty of this chapter shall order either or both parents to pay temporary child support or child support without requiring a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of either or both parents may be unavailable. Where such information is available, the court may make an order for temporary child support pursuant to section two hundred forty of this article. Such order shall, except as provided for herein, be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The court shall not consider the misconduct of either party but shall make its award for child support pursuant to section two hundred forty of this article.

b. Notwithstanding any other provision of law, any written application or motion to the court for the establishment of a child support obligation for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought. Unless the party receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

c. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:

(i) a substantial change in circumstances; or

(ii) that three years have passed since the order was entered, last modified or adjusted; or

(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.

8. Special relief in matrimonial actions. a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award. The court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award. A copy of such order shall be served, by registered mail, on the home office of the insurer specifying the name and mailing address of the spouse or children, provided that failure to so serve the insurer shall not affect the validity of the order.

b. In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by the other spouse.

c. Any order or judgment made as in this section provided may combine any amount payable to either spouse under this section with any amount payable to such spouse as child support or under section two hundred forty of this chapter.

9. Enforcement and modification of orders and judgments in matrimonial actions. a. All orders or judgments entered in matrimonial actions shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules, or in any other manner provided by law. Orders or judgments for child support, alimony and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of the civil practice law and rules. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules. For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a "default" shall be deemed to include amounts arising from retroactive support. The court may, and if a party shall fail or refuse to pay maintenance, distributive award or child support the court shall, upon notice and an opportunity to the defaulting party to be heard, require the party to furnish a surety, or the sequestering and sale of assets for the purpose of enforcing any award for maintenance, distributive award or child support and for the payment of reasonable and necessary attorney's fees and disbursements.

b. (1) Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this article. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

(2)(i) The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.

(ii) In addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due

shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as provided for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support.

c. Notwithstanding any other provision of law, any written application or motion to the court for the modification or enforcement of a child support or combined maintenance and child support order for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party ordered to pay child support to the other party. Unless the party receiving child support or combined maintenance and child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

d. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

Credits

(Added L.1962, c. 313, § 10. Amended L.1963, c. 685, § 6; L.1968, c. 699, § 1; L.1980, c. 281, § 9; L.1980, c. 645, §§ 2, 3; L.1981, c. 695, §§ 1, 2; L.1984, c. 790, § 2; L.1985, c. 809, § 6; L.1986, c. 884, §§ 1 to 4; L.1986, c. 892, §§ 2 to 4; L.1987, c. 815, §§ 6, 7; L.1989, c. 567, §§ 4, 5; L.1990, c. 818, §§ 4, 5; L.1992, c. 41, §§ 139, 140; L.1992, c. 415, §§ 1, 2; L.1993, c. 59, § 9; L.1993, c. 354, § 2; L.1994, c. 170, §§ 359, 360; L.1997, c. 398, §§ 4, 5, eff. Oct. 1, 1998; L.1997, c. 398, § 141, eff. Jan. 1, 1998; L.1997, c. 436, pt. B, §§ 105, 106, eff. Aug. 20, 1997; L.1998, c. 214, § 56, eff. Nov. 4, 1998; L.1998, c. 393, § 2, eff. July 22, 1998; L.1999, c. 275, § 2, eff. Sept. 18, 1999; L.2003, c. 595, § 1, eff. Sept. 22, 2003; L.2009, c. 72, § 1, eff. Sept. 1, 2009; L.2009, c. 229, §§ 1 to 3, eff. Sept. 14, 2009; L.2010, c. 32, § 1, eff. March 30, 2010, deemed eff. Sept. 1, 2009; L.2010, c. 182, §§ 7, 9, eff. Oct. 13, 2010; L.2010, c. 371, §§ 1, 2, 4, eff. Oct. 12, 2010; L.2010, c. 371, § 3, eff. Aug. 13, 2010; L.2015, c. 269, § 3, eff. Oct. 25, 2015; L.2015, c. 269, §§ 1, 2, 4, 5, eff. Jan. 23, 2016.)

Footnotes

1 July 19, 1980.

McKinney's D. R. L. § 236, NY DOM REL § 236

Current through L.2018, chapter 1.

Section 5-311 of the General Obligations Law provides that:

> § 5-311. Certain agreements between husband and wife void
>
> Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

N.Y. Gen. Oblig. Law § 5-311 (McKinney)

137 A.D.3d 583
Supreme Court, Appellate Division,
First Department, New York.

ANONYMOUS, Plaintiff–Appellant,
v.
ANONYMOUS, Defendant–Respondent.

March 22, 2016.

Synopsis

Background: In divorce action, the Supreme Court, New York County, Ellen Gesmer, J., denied wife's motion for partial summary judgment for reformation of deed and declaration that condominium was her sole and separate property under terms of parties' prenuptial agreement, and granted husband's motion for temporary maintenance. Wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

trust agreement was not valid;

fact issues precluded summary judgment on wife's claim for reformation of deed; and

broad and expansive language used in prenuptial agreement foreclosed husband from seeking any kind of spousal support.

Affirmed as modified.

Acosta, J., dissented in part and filed opinion.

Attorneys and Law Firms

****543** Aronson Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent.

FRIEDMAN, J.P., ACOSTA, ANDRIAS, RICHTER, JJ.

Opinion

***583** Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 4, 2015, which, to the extent appealed from, denied plaintiff wife's cross motion for partial summary judgment declaring that a condominium apartment located at 195 Hudson Street is the sole and separate property of plaintiff under the terms of the parties' prenuptial agreement, and granted defendant husband's motion for temporary maintenance, modified, on the law, to deny defendant's motion for temporary maintenance, and otherwise affirmed, without costs.

The parties executed a trust agreement that designates the parties, individually and collectively, as "Trustor" of a trust that purchased the apartment at issue. The agreement was not valid because the parties' signatures were never properly acknowledged. We agree with the wife that the agreement, which is unenforceable, cannot be considered as evidence (*Selinger v. Selinger,* 44 A.D.3d 341, 342, 844 N.Y.S.2d 198 [1st Dept.2007]). Nonetheless, issues of fact exist whether the parties intended to jointly own the apartment, and whether the husband was involved in any fraud in the preparation and execution of the trust agreement (*see generally* ***584** *Ta Chun Wang v. Chun Wong,* 163 A.D.2d 300, 557 N.Y.S.2d 434 [2d Dept. 1990], *lv. denied* 77 N.Y.2d 804, 568 N.Y.S.2d 912, 571 N.E.2d 82 [1991], *cert. denied* 501 U.S. 1252, 111 S.Ct. 2893, 115 L.Ed.2d 1058 [1991]). Thus, upon the motion court's invalidation of the trust agreement, it properly declined to decide whether the deed should be reformed to reflect the wife or both parties as the true owner (*U.S. Bank N.A. v. Lieberman,* 98 A.D.3d 422, 423–424, 950 N.Y.S.2d 127 [1st Dept.2012]).

Although the wife funded the purchase of the apartment and ordinarily would be considered the settlor (*see Guaranty Trust Co. of New York v. N.Y. Trust Co.,* 297 N.Y. 45, 50, 74 N.E.2d 232 [1947]), the husband avers that the parties had agreed that the apartment would be joint property, and that consistent with that intention, he made certain payments towards maintenance and renovations. The parties' prenuptial agreement is not dispositive of the issue, as it does not list the apartment as the wife's separate property. In addition, it merely defines joint property as that "titled in the joint names of the parties," and in this case the apartment is titled in the name of the invalidated trust. Reformation is an equitable remedy and the parties' intent, as well as any questions of unclean hands, are relevant to the court's determination. These issues must be

explored at a hearing. Thus, the wife's cross motion for partial summary judgment was properly denied.

After this action was commenced, the husband moved for an order awarding him temporary spousal support. The wife opposed the motion arguing, inter alia, that the parties' prenuptial agreement contains **544 a waiver of maintenance, both temporary and final. The court granted the husband's motion and awarded him interim support, finding that the agreement did not contain the statutory language for waiving temporary maintenance, purportedly required by Domestic Relations Law former § 236B(5–a)(f).

The motion court improperly granted the husband's application for temporary maintenance. At the outset, the court should not have applied the requirements of Domestic Relations Law former § 236B(5–a)(f) to the parties' prenuptial agreement. That subdivision, which mandated the inclusion of certain language about temporary maintenance, is not applicable because the parties' prenuptial agreement was entered into prior to the effective date of this statutory provision.

New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements" (*Matter of Greiff,* 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752 [1998]). "Duly executed prenuptial agreements are accorded the same presumption of legality as any other contract" (*585 *Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]), and like all contracts, "are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing" (*Van Kipnis v. Van Kipnis,* 11 N.Y.3d 573, 577, 872 N.Y.S.2d 426, 900 N.E.2d 977 [2008]). Thus, a waiver of temporary maintenance will be enforced as long as the parties' intent to do so is "clearly evidenced by the writing" (*Strong v. Dubin,* 75 A.D.3d 66, 68, 901 N.Y.S.2d 214 [1st Dept. 2010] [internal quotation marks omitted]).

Applying these principles, we find that the broad and expansive language used by the parties in their agreement forecloses the husband from seeking any kind of spousal support, including temporary support. After acknowledging and representing that they are "fully capable of being self supporting," the parties agreed to "waive any and all claims for spousal support and/or maintenance" "both now and in the future." By using the words "any and all," the parties, in this particular agreement, clearly signaled their intention that the waiver would encompass both temporary and final awards of spousal support. And the words "in the future" can only mean any time after the agreement was executed, which necessarily includes when the husband's present motion was made.

Further, in the agreement, the maintenance waiver appears below the heading "MAINTENANCE/ SPOUSAL SUPPORT UPON TERMINATION OF MARRIAGE." Under Article I of the agreement, the "termination of the marriage" is "deemed to have occurred," inter alia, "upon commencement or institution of any matrimonial action to dissolve or annul the marriage ... by either party." Thus, by tying the maintenance waiver to the "termination of the marriage," as that term is defined in the agreement, the parties clearly intended the waiver to cover any maintenance request made, as here, after the commencement of a divorce action (*see Valente v. Valente,* 269 A.D.2d 389, 389–390, 703 N.Y.S.2d 206 [2d Dept.2000] [temporary maintenance foreclosed where the parties, who were separated, agreed to waive maintenance in the event of separation, divorce or annulment]; *Clanton v. Clanton,* 189 A.D.2d 849, 850, 592 N.Y.S.2d 783 [2d Dept.1993] [denying request for temporary maintenance where the prenuptial agreement renounced all claims "under any circumstances" for maintenance in the event of the "breakup" of the marriage by "separation or otherwise"]).

**545 The parties' failure to use the terms "temporary support" or "interim support" does not warrant a different result. Although the dissent acknowledges that "no particular catechism is required to waive temporary maintenance claims," it nevertheless finds the agreement ambiguous and suggests that the parties may only have intended to waive a final award of maintenance. *586 No fair reading of the agreement supports that conclusion. When read as a whole, the agreement contains no ambiguity as to whether the parties intended to waive temporary maintenance. As noted, the agreement waives "any and all" maintenance claims, "now and in the future." Contrary to the dissent's view, there is nothing imprecise about the phrase " any and all." Indeed, this Court has repeatedly found the use of that phrase to be "clear" (*see e.g. Miller v. Miller,* 82 A.D.3d 469, 469, 918 N.Y.S.2d 417 [1st Dept.2011]; *Coby Group, LLC v. Kriss,*

63 A.D.3d 569, 570, 881 N.Y.S.2d 101 [1st Dept.2009]; *Broadcast News Networks, Inc. v. Loeb & Loeb, LLP,* 40 A.D.3d 441, 834 N.Y.S.2d 656 [1st Dept.2007]). Further, although minimized by the dissent, the agreement explicitly states that the parties are "fully capable of being self supporting," which is another indicia that neither intended to seek any kind of maintenance.

The dissent also discounts the heading above the maintenance waiver that makes clear that the parties intended to waive "any and all" spousal support claims that arise after the initiation of a divorce action, which necessarily includes temporary support. The definition in Article I of "termination of the marriage" shows that the parties, who were both represented by counsel, recognized that there is a difference between the filing of a divorce action and the issuance of a final judgment of divorce. They specifically provided that the agreement's broad maintenance waiver goes into effect upon the initiation of the divorce case, and not when the final judgment is rendered.

The cases relied upon by the dissent are distinguishable. In the prenuptial agreement in *Lennox v. Weberman,* 109 A.D.3d 703, 704, 974 N.Y.S.2d 3 (1st Dept.2013), the defendant waived any claim to a *final* award of maintenance, and there was no express agreement to exclude an award of temporary maintenance. Here, in contrast, the parties did not limit themselves to waiving final maintenance, but rather waived "any and all" maintenance "now and in the future." Thus, unlike *Lennox,* the prenuptial agreement here, especially when read in conjunction with the parties' definition of "termination of the marriage," reflects a clear intent to exclude temporary support. In *Tregellas v. Tregellas,* 169 A.D.2d 553, 553, 564 N.Y.S.2d 406 (1st Dept.1991), the Court merely found that the particular prenuptial agreement in that case did not bar an award of temporary support. There is no indication in *Tregellas* that the parties used the expansive language employed here or that they tied the waiver of maintenance to all support requests made after commencement of a matrimonial action. Finally, ***587** *McKenna v. McKenna,* 121 A.D.3d 864, 994 N.Y.S.2d 381 (2d Dept.2014) contains no facts as to the specific wording of the prenuptial agreement and does not resolve the issue presented here.

The dissent effectively holds that parties to a prenuptial agreement must include the terms "temporary maintenance" or "interim spousal support" if they wish to waive these claims. No case has ever held this, and it is inaccurate for the dissent to claim that such a requirement is not mandating a particular catechism. Counsel who represented the parties when they signed the agreement cannot be faulted, as the dissent implies, for failing to include ****546** these "magic words" because no court had ever required that they do so. Although the current dispute would have been obviated by the use of such language, the critical question is whether the waiver executed by the parties unambiguously encompassed both temporary and final maintenance, which it did.

Even though one of this Court's cases uses the word "express" when talking about waivers of temporary maintenance, in *Strong v. Dubin,* 75 A.D.3d 66, 901 N.Y.S.2d 214, we emphasized that when interpreting a prenuptial agreement " '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby' " (*id.* at 69, 901 N.Y.S.2d 214, quoting *Kass v. Kass,* 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174 [1998]). All that is required for an effective waiver is that the parties' intent to opt out of the statutory scheme be "clearly evidenced by the writing" (*Strong v. Dubin,* 75 A.D.3d at 68, 901 N.Y.S.2d 214 [internal quotation marks omitted]). [1] The maintenance provision here, read as a whole and in the context of the entire agreement, showed the parties' clear intent to waive all forms of spousal support. It is difficult to understand how a broad provision such as the one here could be interpreted in any way except as a complete waiver of all maintenance.

1 Although Domestic Relations Law § 236B(3) also provides that maintenance provisions be fair and reasonable at the time the agreement was entered into, and not unconscionable at the time of entry of final judgment, this case presents no challenge to the prenuptial agreement on either of these grounds.

This case presents a simple question of contractual interpretation, and has nothing to do with the court's discretion in fashioning maintenance awards. It involves the interpretation of a duly executed prenuptial agreement, which is given the same presumption of legality as any other contract (*Bloomfield v. Bloomfield,* 97 N.Y.2d at 193, 738 N.Y.S.2d 650, 764 N.E.2d 950), a principle that is well established in this state's jurisprudence. Here, both parties, represented by counsel, contracted to waive

all claims of ***588** spousal support, both temporary and final, and they should be held to their bargain.

All concur except ACOSTA, J. who dissents in part in a memorandum as follows.

ACOSTA, J. (dissenting in part).

In analyzing and interpreting a prenuptial agreement to determine the parties' intent, we must be guided by the plain language of the agreement. The majority eschews this basic principle of contract law in this matter, finding that an imprecise and murky waiver of maintenance in the prenuptial agreement nevertheless bars the defendant husband from an award of temporary maintenance. Since our precedent has long required waivers of temporary maintenance to be clear and unequivocal, and because the waiver here did not satisfy that standard, I respectfully dissent and part company with the majority's finding that the motion court abused its discretion by awarding temporary maintenance to defendant.

For a quarter century, our jurisprudence has adhered to the principle that "[a] prenuptial agreement waiving any right to maintenance does not bar temporary relief prior to dissolution of the marriage" (*Tregellas v. Tregellas,* 169 A.D.2d 553, 553, 564 N.Y.S.2d 406 [1st Dept.1991]; *see also Lennox v. Weberman,* 109 A.D.3d 703, 704, 974 N.Y.S.2d 3 [1st Dept.2013]; ****547** *Vinik v. Lee,* 96 A.D.3d 522, 522–523, 947 N.Y.S.2d 424 [1st Dept.2012]; *Solomon v. Solomon,* 224 A.D.2d 331, 637 N.Y.S.2d 728 [1st Dept.1996]; *accord McKenna v. McKenna,* 121 A.D.3d 864, 867, 994 N.Y.S.2d 381 [2d Dept.2014]). This Court recently reaffirmed that rule in *Lennox v. Weberman,* where it held that "the [motion] court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance" (109 A.D.3d at 704, 974 N.Y.S.2d 3). Although the majority acknowledges the general principle, it misapplies it by finding an express waiver of temporary maintenance where none was included in the agreement. Thus, while the motion court may have erred in applying Domestic Relations Law former § 236B(5–a)(f) to the parties' prenuptial agreement, it retained its discretion to award defendant temporary maintenance inasmuch as there was no clear waiver of that specific relief.

The majority ignores the significant distinction between maintenance and temporary maintenance, a distinction underlying the rationale of *Tregellas* and its progeny.[1] Indeed, the Domestic Relations Law and our case law treat these two ***589** types of monetary spousal support as fundamentally different forms of relief. The purpose of maintenance, on the one hand, "is to give the [less-monied] spouse economic independence" (*Cohen v. Cohen,* 120 A.D.3d 1060, 1065, 993 N.Y.S.2d 4 [1st Dept.2014] [internal quotation marks omitted], *lv. denied* 24 N.Y.3d 909, 2014 WL 6475220 [2014]) or "a sufficient period to become self-supporting" (*Sheila C. v. Donald C.,* 5 A.D.3d 123, 124, 773 N.Y.S.2d 22 [1st Dept.2004]) after a marriage has ended. The purpose of temporary maintenance, by contrast, is to provide for the reasonable needs of the less-monied spouse during the pendency of a matrimonial action, allowing him or her to adequately litigate the matter without being forced to capitulate to the demands of the other spouse because of financial pressures (*see Brenner v. Brenner,* 52 A.D.3d 322, 323, 860 N.Y.S.2d 58 [1st Dept.2008]; *see also* 2 New York Matrimonial Law and Practice § 17:15 [2015] [a temporary maintenance award is "designed to ensure the economic survival of the dependent spouse ... until the case is reached for trial and to prevent the economically stronger spouse from starving the dependent party into submission"]). The current Domestic Relations Law also reflects this distinction, by dividing the two types of relief into separate subdivisions, each containing its own calculations and factors to be used in determining the amount of maintenance or temporary maintenance to be awarded (*compare* Domestic Relations Law § 236B[5–a]*with* § 236B[6]).

1 The terminology used herein, "maintenance" and "temporary maintenance," reflects that which appears in the version of the Domestic Relations Law that was in effect when the parties executed their agreement and married in March 2010 (Domestic Relations Law former § 236B[6][a] [absent prenuptial agreement, "the court may order temporary maintenance or maintenance"]; *see also* Alan D. Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law C236B:35 ["Maintenance refers to the spousal support award made after trial; temporary maintenance is pendente lite spousal support."]).

The current version of the statute and the version in effect when this action was commenced use the terms "temporary maintenance" and "post-divorce maintenance" (Domestic Relations Law

§ 236B[5–a], [6]; Domestic Relations Law former § 236B[5–a], [6]). Although "maintenance" and "post-divorce maintenance" can technically be temporary, because they may be awarded for a definite period of time after a divorce, "temporary maintenance" continues to be used in reference to pendente lite maintenance awards.

****548** Affianced parties may opt out of the Domestic Relations Law's provisions of both maintenance and temporary maintenance awards, through the use of prenuptial agreements (Domestic Relations Law § 236B[3]), provided, of course, that such agreements are not "the product of fraud, duress, overreaching resulting in manifest unfairness, or other inequitable conduct" (*Gottlieb v. Gottlieb,* 25 A.D.3d 90, 96, 802 N.Y.S.3d 476 [1st Dept.2016], citing *Christian v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849 [1977]).

However, any waiver, including a waiver of temporary maintenance, must be clear. This standard, articulated most recently in this Court's decision in *Lennox,* 109 A.D.3d at 704, 974 N.Y.S.2d 3, mandates that a purported waiver of temporary maintenance ***590** be "express" in order to effectively deprive the court of its inherent discretion to award such relief. In light of the unique purposes of temporary maintenance discussed above, this is an appropriate and rational requirement. The question, then, is whether the prenuptial agreement here satisfies our standard of clarity; that is, does the provision in which the parties agreed to waive "maintenance" contain an express waiver of temporary maintenance? I say "no."

Black's Law Dictionary defines "express" as "[c]learly and unmistakably communicated; stated with directness and clarity" (Black's Law Dictionary [10th ed. 2014], express). Although the parties agreed to "waive any and all claims for spousal support and/or maintenance ... both now and in the future," their omission of the term "temporary maintenance" or other language referring to pendente lite relief signals their intent to limit the scope of that language to maintenance (and to exclude a waiver of temporary maintenance). Considering the distinct usage of the terms "maintenance" and "temporary maintenance" in former Domestic Relations Law § 236B (which was in effect at the time the parties executed their agreement) and in case law, the parties' use of the term "maintenance" does not "[c]learly and unmistakably communicate [ ]" that the waiver is meant to encompass temporary maintenance.

The use of the phrase "any and all" does not create the clear and unmistakable waiver of temporary maintenance that is needed. The term is imprecise, demonstrates an element of carelessness, and has been criticized by several commentators (*see* Bryan A. Garner, Garner on Language and Writing 316 [2009] [condemning as fallacious the argument "that superfluities seldom create unclarity"]; David S. Elder, "*Any and All": To Use Or Not To Use?,* 70 Mich. Bar. J. 1070, 1070 [Oct. 1991] ["any" can mean "one, some, or all," and " 'all' can mean any one"]). Yet, the majority's interpretation depends on an inference that the phrase necessarily incorporates pendente lite relief.

Nor does the agreement's temporal reference to "now and in the future" necessarily justify the inference that the parties intended to refer to temporary maintenance; the phrase could simply mean that neither spouse would seek an award for maintenance (i.e., what the current statute terms "[p]ost-divorce maintenance") at any point after the execution of the prenuptial agreement or upon the marriage's termination or dissolution.

The majority also makes much of the fact that the heading above the maintenance waiver mentions "termination of marriage" (emphasis omitted), which the agreement defines as occurring, ***591** inter alia, when divorce proceedings are commenced. This, however, does not change the analysis. The result of the parties' failure to expressly waive temporary maintenance, read together with the heading, only signifies ****549** that the parties agreed to refrain from raising claims for "maintenance" once these divorce proceedings were commenced. The provision's silence on whether temporary maintenance is also waived makes the definition of "termination of the marriage" immaterial here.[2] In addition, whether the parties stated their capability of being "self supporting" or whether they are in fact so capable is not dispositive, because any inequities in a temporary maintenance award are best resolved by a speedy trial (*see e.g. Tregellas,* 169 A.D.2d at 553, 564 N.Y.S.2d 406).

2 Moreover, I note that although the majority relies on two Second Department cases to support its contention on this point, those cases preceded that Department's more recent decision in *McKenna v. McKenna,* 121 A.D.3d 864, 994 N.Y.S.2d 381 (2d Dept.2014), a case that approvingly cited our decision in *Vinik,* among others, for the proposition that

> a prenuptial agreement that contains a waiver of maintenance does not automatically result in a waiver of pendente lite relief (*see id.* at 867, 947 N.Y.S.2d 424).

Although no particular catechism is required to waive temporary maintenance claims, parties to a prenuptial agreement should use express language that includes terms such as "temporary maintenance" or "interim spousal support," as distinct from terms like "maintenance" and "post-divorce maintenance," if they wish to waive those claims. Only then will their intent be clear. The majority mischaracterizes my position by claiming that I would require the use of "magic words." I do no such thing. Instead, I recognize, as the majority does, that the existing standard is one of clarity (*see Strong v. Dubin,* 75 A.D.3d 66, 68, 901 N.Y.S.2d 214 [1st Dept.2010] [parties' intent "must be clearly evidenced by the writing"] [internal quotation marks omitted]), and provide above a nonexhaustive list of terms that may be used to expressly waive temporary maintenance. Rather than mandate a particular phrase, I would simply apply the standard of clarity, consistent with our precedent.

The majority essentially rewrites the parties' agreement by inferring the inclusion of temporary maintenance in a waiver that addresses only claims to "maintenance." Indeed, the final sentence of its opinion—stating that the parties "contracted to waive all claims of spousal support, *both temporary and final* " (emphasis added)—highlights how the majority strains to find express language that is not present in the agreement. Simply put, the parties, represented by able counsel, could have easily drafted their agreement to expressly include a waiver of ***592** temporary maintenance by employing the language that the majority now imputes to them.

Indeed, practitioners of matrimonial law ought to be aware of the standard of clarity that has been the law in the First Department since at least 1991 (*Tregellas,* 169 A.D.2d at 553, 564 N.Y.S.2d 406 ["The prenuptial agreement waiving *any right to maintenance* does not bar temporary relief prior to dissolution of the marriage"] [emphasis added]). Significantly, the supplementary practice commentaries accompanying Domestic Relations Law § 236 state that while parties may waive temporary maintenance in a prenuptial agreement, "the agreement must do so explicitly or else temporary maintenance will not be waived. Language waiving maintenance, as distinguished from maintenance and temporary maintenance, will only result in a waiver of maintenance and not of temporary maintenance" (Alan D. Scheinkman, Supp. Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law C236B:40 [2014]; 445 N.Y. Jur. 2d, Domestic Relations § 188, citing *Lennox,* 109 A.D.3d 703, 974 N.Y.S.2d 3 and *Tregellas,* 169 A.D.2d 553, 564 N.Y.S.2d 406).

****550** I agree with the majority that this appeal boils down to a simple matter of contract interpretation, and that a court interpreting a prenuptial agreement should consider " '[p]articular words ... not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby' " (*Strong v. Dubin,* 75 A.D.3d at 69, 901 N.Y.S.2d 214 [alteration added], quoting *Kass v. Kass,* 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174 [1998]). Nonetheless, the agreement must also be interpreted in light of our precedent holding that temporary maintenance is not waived absent express and unequivocal language to that effect. That the provision at issue is susceptible to more than one reasonable interpretation demonstrates a lack of clarity with respect to the parties' intent (*see Foot Locker, Inc. v. Omni Funding Corp. of Am.,* 78 A.D.3d 513, 515, 911 N.Y.S.2d 344 [1st Dept.2010]). Altogether, the purported waiver of temporary maintenance in the agreement before us was anything but clear and unmistakable.

I do not dispute our state's "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements" (*Matter of Greiff,* 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752 [1998]), but this policy does not direct courts to uphold prenuptial agreements (or other contracts) as unassailable when they employ language that fails to clearly express the intent of the parties. The majority unconvincingly attempts to distinguish our prior cases on their facts—for example, by stating that there is "no indication" that ***593** the parties used expansive language in *Tregellas,* despite our holding that the prenuptial agreement's waiver of "*any right* to maintenance" did not bar a temporary maintenance award in that case (169 A.D.2d at 553, 564 N.Y.S.2d 406 [emphasis added]). In doing so, it misapplies the broader principle first announced in *Tregellas* and followed by this Court until now (*see e.g. Solomon,* 224 A.D.2d at 331, 637 N.Y.S.2d 728; *Lennox,* 109 A.D.3d at 704, 974

N.Y.S.2d 3). The prenuptial agreement in this case failed to expressly waive temporary maintenance; consequently, the motion court was not stripped of its inherent discretion to award that form of pendente lite relief.

Accordingly, the order of Supreme Court should be affirmed in all respects.

All Citations

137 A.D.3d 583, 27 N.Y.S.3d 541, 2016 N.Y. Slip Op. 02016

58 N.Y.2d 108
Court of Appeals of New York.

Susan R. AVITZUR, Appellant,
v.
Boaz AVITZUR, Respondent.

Feb. 15, 1983.

Synopsis

Appeal was taken from an order of the Supreme Court, Appellate Division, 86 A.D.2d 133, 449 N.Y.S.2d 83, which modified and, as modified, affirmed an order of the Supreme Court, Special Term, Albany County, Aaron E. Klein, J., denying former husband's motion to dismiss complaint seeking an order compelling from husband's specific performance of requirement of parties' binding prenuptial agreement to arbitrate any postmarital religious obligations before a specified rabbinical tribunal and which also denied former wife's cross motion for summary judgment. The Court of Appeals, Wachtler, J., held that secular terms of parties' binding prenuptial agreement to arbitrate any postmarital religious obligations before a specified rabbinical tribunal, which was entered into as part of a religious ceremony, were enforceable.

Reversed.

Jones, J., filed dissenting opinion in which Jasen and Simons, JJ., joined.

Attorneys and Law Firms

***109** *****572** ****136** Richard A. Hanft, Troy, for appellant.

***110** Louis-Jack Pozner, for respondent.

Nathan Lewin, Dennis Rapps, Daniel D. Chazin and Ivan L. Tillem, New York City, for National Jewish Com'n on Law and Public Affairs, amicus curiae.

***111** Robert J. Jossen and Stanley J. Friedman, New York City, for Jewish Theological Seminary of America, amicus curiae.

OPINION OF THE COURT

WACHTLER, Judge.

This appeal presents for our consideration the question of the proper role of the civil courts in deciding a matter touching upon religious concerns. At issue is the enforceability of the terms of a document, known as a Ketubah, which was entered into as part of the religious marriage ceremony in this case. The Appellate Division, 86 A.D.2d 133, 449 N.Y.S.2d 83, held this to be a *****573** religious covenant beyond the jurisdiction of the civil courts. However, we find nothing in law or public policy to prevent judicial recognition and enforcement of the secular ****137** terms of such an agreement. There should be a reversal.

Plaintiff and defendant were married on May 22, 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed both a Hebrew/Aramaic and an English version of the "Ketubah". According to the English translation, the Ketubah evidences both the bridegroom's intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition. By signing the Ketubah, ***112** the parties declared their "desire to * * * live in accordance with the Jewish law of marriage throughout [their] lifetime" and further agreed as follows: "[W]e, the bride and bridegroom * * * hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

Defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment on May 16, 1978. Notwithstanding this civil divorce, plaintiff wife is not considered divorced and may not remarry pursuant to

Jewish law, until such time as a Jewish divorce decree, known as a "Get", is granted. In order that a Get may be obtained plaintiff and defendant must appear before a "Beth Din", a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law. Plaintiff sought to summon defendant before the Beth Din pursuant to the provision of the Ketubah recognizing that body as having authority to counsel the couple in the matters concerning their marriage.

Defendant has refused to appear before the Beth Din, thus preventing plaintiff from obtaining a religious divorce. Plaintiff brought this action, alleging that the Ketubah constitutes a marital contract, which defendant has breached by refusing to appear before the Beth Din, and she seeks relief both in the form of a declaration to that effect and an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss the complaint upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action, arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in ***113** impermissible consideration of a purely religious matter. Plaintiff, in addition to opposing the motion, cross-moved for summary judgment.

Special Term denied defendant's motion to dismiss, noting that plaintiff sought only to compel defendant to submit to the jurisdiction of the Beth Din, an act which plaintiff had alleged defendant bound himself to do. That being the only object of the lawsuit, Special Term was apparently of the view that the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue. The court also denied plaintiff's motion for summary judgment, concluding that issues concerning the translation, meaning and effect of the Ketubah raised factual questions requiring a plenary trial.

The Appellate Division modified, granting defendant's motion to dismiss. Inasmuch as the Ketubah was entered into as part of a religious ceremony and was executed, by its own terms, in accordance with Jewish law, the court concluded that the document constitutes a liturgical agreement. The Appellate Division held such *****574** agreements to be unenforceable where the State, having granted a civil divorce to the parties, has no further interest in their marital status.

****138** Accepting plaintiff's allegations as true, as we must in the context of this motion to dismiss, it appears that plaintiff and defendant, in signing the Ketubah, entered into a contract which formed the basis for their marriage. Plaintiff has alleged that, pursuant to the terms of this marital contract, defendant promised that he would, at plaintiff's request, appear before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a Get. It should be noted that plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.

Viewed in this manner, the provisions of the Ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a ***114** nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable (e.g., *Matter of Sunshine,* 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999, aff'g 51 A.D.2d 326, 381 N.Y.S.2d 260; *Matter of Davis,* 20 N.Y.2d 70, 281 N.Y.S.2d 767, 228 N.E.2d 768). Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity (*Hirsch v. Hirsch,* 37 N.Y.2d 312, 372 N.Y.S.2d 71, 333 N.E.2d 371; see *Bowmer v. Bowmer,* 50 N.Y.2d 288, 293, 428 N.Y.S.2d 902, 406 N.E.2d 760). This agreement—the Ketubah—should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State (*Hirsch v. Hirsch, supra,* at p. 315, 372 N.Y.S.2d 71, 333 N.E.2d 371).

Defendant argues, in this connection, that enforcement of the terms of the Ketubah by a civil court would violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice. It is urged that the obligations imposed by the Ketubah arise solely from Jewish religious

law and can be interpreted only with reference to religious dogma. Granting the religious character of the Ketubah, it does not necessarily follow that any recognition of its obligations is foreclosed to the courts.

It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine (*Presbyterian Church v. Hull Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658; *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 709, 96 S.Ct. 2372, 2380, 49 L.Ed.2d 151; *Jones v. Wolf,* 443 U.S. 595, 603, 99 S.Ct. 3020, 3025, 61 L.Ed.2d 775; see, e.g., *Reardon v. Lemoyne,* N.H., 454 A.2d 428 [1982]). In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with ***115** constitutional limitations (*Jones v. Wolf, supra,* 443 U.S. at p. 602, 99 S.Ct. at 3024). This approach contemplates the application of objective, well-established principles of secular law to the dispute (*id.,* at p. 603, 99 S.Ct. at 3025), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious *****575** principle. Consequently, defendant's objections to enforcement of his promise to ****139** appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony (Domestic Relations Law, § 11, subds. 1, 7). Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah's provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum (see *Ferro v. Bologna,* 31 N.Y.2d 30, 36, 334 N.Y.S.2d 856, 286 N.E.2d 244). The courts may properly enforce so much of this agreement as is not in contravention of law or public policy.

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way affect the civil divorce. To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. Consideration of other substantive issues bearing upon plaintiff's entitlement to a religious divorce, however, is ***116** appropriately left to the forum the parties chose for resolving the matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.

JONES, Judge (dissenting).

We are of the opinion that to grant the relief plaintiff seeks in this action, even to the limited extent contemplated by the majority, would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content. Accordingly, we would affirm the order of the Appellate Division.

We start on common ground. Judicial intervention in disputes with respect to religious and ecclesiastical obligation is constitutionally proscribed, save with respect to a narrow class of issues, as to which, under "neutral principles of law", the secular component of the religious and ecclesiastical rights and obligations may be resolved without impermissible trespass on or even reference to religious dogma and doctrine (pp. 114–115, 459 N.Y.S.2d 574, 446 N.E.2d 138). We depart from the conclusion of the majority that in this case the courts may discern one or more discretely secular obligations which may be fractured out of the "Ketubah", indisputably in its essence a document prepared and executed under Jewish law and tradition.

We are constrained, as is the majority, by the allegations of the complaint. Plaintiff therein alleges: that the parties were married on May 22, 1966 in a religious ceremony in accordance with Jewish law and tradition; that pursuant to the terms and conditions of the religious ceremony they entered into a contract known as a "Ketubah"; that under the Ketubah the husband declared and contracted with the wife to be her husband according to the law of Moses and Israel and to honor and support her, faithfully cherishing her and providing for her needs as Jewish husbands are required to do pursuant to Jewish religious law and tradition; that pursuant to the Ketubah the parties agreed to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America as having ****140** authority to summon either party at the *****576** request of the other ***117** and further agreed that in the event of any civil divorce decree the husband would grant and the wife accept a Jewish divorce ("Get") in accordance with the authority vested in the Beth Din; that under the law of Moses should the husband arbitrarily refuse to give a "Get" the wife, such as plaintiff in this case, is known and referred to as an "Aguna" which is a state of limbo wherein the wife is considered neither married nor divorced; that a judgment of civil divorce of the parties was entered on May 16, 1978 in the Albany county clerk's office; that the wife has requested and summoned the husband to appear before the Beth Din of the Rabbinical Assembly pursuant to the terms of the Ketubah but that he has willfully and intentionally refused to appear before the assembly in violation of his contractual obligations; that in consequence the wife is consigned to the status of "Aguna" and is barred from remarrying within the context of a Jewish religious ceremony. The wife demands judgment against the husband: declaring "the rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah), created by reason of the written instrument"; declaring that the husband specifically perform pursuant to the terms and conditions of the Ketubah in that he appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives pursuant to the wife's request; declaring that failure of the husband so to appear constitutes a breach of contract; and for other incidental relief.

Determination whether judicial relief may be granted the wife without constitutionally impermissible interjection of the court into matters of religious and ecclesiastical content requires examination of the English translation of the Ketubah in the context of the wife's allegation that this document was made and entered into as part of the religious ceremony in accordance with Jewish law and tradition:

"On the First Day of the Week, the 3rd Day of the Month Sivan, 5726, corresponding to the 22nd Day of May, 1966, Boaz Avitzur, the bridegroom, and Susan Rose Wieder, the bride, were united in marriage in Old Westbury, N.Y. The bridegroom made the following declaration to his bride: 'Be ***118** thou my wife according to the law of Moses and Israel. I shall honor and support thee, faithfully I shall cherish thee and provide for thy needs, even as Jewish husbands are required to do by our religious law and tradition.'

"In turn, the bride took upon herself the duties of a Jewish wife, to honor and cherish her husband, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.

"And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

"This Ketubah was executed and witnessed this day in accordance with Jewish law and tradition.

"Boaz Avitzur bridegroom Susan Wieder bride Melvin Kieffer rabbi Abraham Weisman witness Melvin Kieffer witness."

At the outset we observe that the complaint contains no allegation that the parties ****141** intended that the

Ketubah should manifest secular promises or have any civil or secular status or any legal significance independent of the religious ceremony between ***577 them of which it was an integral part. Nor is any such assertion advanced in the papers submitted by the wife in support of her cross motion for summary judgment.

Moreover, it appears evident to us that any determination of the content and particulars of the rights of the wife *119 or the obligations of the husband under this document cannot be made without inquiry into and resolution of questions of Jewish religious law and tradition. We think it inaccurate to identify the relief sought by plaintiff, as does the majority, as "simply to compel defendant to perform a secular obligation to which he contractually bound himself." (At p. 115, 459 N.Y.S.2d 575, 446 N.E.2d 139.)

The complaint's first request for relief paints with a broad brush, asking that the court "declare the rights and other legal relation of the plaintiff and defendant in the marriage contract" created by reason of the Ketubah. That such an all-encompassing declaration of rights exceeds the authority of the civil court seems to be implicitly conceded by the majority's attempt to limit its consideration to enforcement of an obligation characterized as "secular"—the alleged obligation of the husband to appear before the Beth Din.

The wife's pleading itself, however, not to mention the affidavits submitted by her, makes it clear that even a definition of the purported "secular obligation" requires an examination into the principles and practice of the Jewish religion. Although the English translation of the Ketubah attached to the complaint recites that the parties "recognize the Beth Din * * * as having authority * * * to summon either party at the request of the other", the complaint seeks a declaration that the husband specifically perform "in that he appear before the Beth Din * * * pursuant to the request of the plaintiff". Thus, the wife tenders her construction of the document, which in turn presumably is predicated on what she contends is tradition in the faith, i.e., that there is an obligation imposed by the agreement to appear before the Beth Din at the summons alone of the other party to the marriage despite the facial reference to a summons by the Beth Din. The husband, tendering his own construction of the document, denies that he is under any obligation to appear before the Beth Din because an earlier request by him for convocation of such a body was refused. Thus, it appears evident that any judicial determination whether the husband is obligated to appear before the Beth Din, or what nature of summons is required to call such *120 obligation into play, necessarily involves reference to substantive religious and ecclesiastical law. [*]

[*] The recital in the testimonium clause itself is indicative—"this Ketubah was executed and witnessed this day in accordance with Jewish law and tradition."

The unsoundness of the position espoused by the majority to justify judicial action to compel the husband to appear before the Beth Din, is revealed by projection of the course the continuing litigation will take in this case. The motion to dismiss and the cross motion for summary judgment having both been denied, the case will be set down for trial. The evidence which the wife may be expected to introduce is revealed by examination of the affidavits she submitted in opposition to the motion to dismiss and in support of her cross motion for summary judgment. Her affidavit conveys information furnished her by Rabbi Mordecai Kieffer who in his accompanying affidavit describes himself as "qualified to render an expert opinion concerning matters of Jewish laws and custom". She relies on his affidavit to support her claim that there was "good and legal consideration" for the Ketubah and that the Beth Din presently has no authority to compel the husband to submit to its jurisdiction. The rabbi, predicated on what he offers as a more accurate translation of the Ketubah into English, **142 expresses the opinion that "good and legal consideration" is to be found in the document itself. Then, describing in detail the procedures incident to the issuance of a "Get", the rabbi concludes that the husband was obligated to submit to the jurisdiction of the Beth Din without the issuance of any summons by it. Accordingly, it is evident ***578 that the wife and her counsel are themselves of the view that substantiation of her position will depend on expert opinion with respect to Jewish law and tradition.

The majority's reference to the fact that marriage relationships solemnized within a religious context are recognized by the civil law is not determinative of the question here presented where what is sought to be enforced is an aspect of the relationship peculiar to the religion within which the ceremony creating it took place. No authority is cited in which a civil court has enforced a concomitant undertaking required by

the ecclesiastical authority under which the marriage ceremony was solemnized. That no ***121** such civil enforcement of the obligation to appear before the Beth Din was contemplated either by the drafter of the Ketubah or by the parties as its signatories is evident from the inclusion of explicit authorization to the Beth Din "to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision". Nothing in the record suggests that it was the intention of the parties when they signed this religious document that the civil courts of the State of New York were to have jurisdiction to determine the substantive rights created thereby or to invoke civil procedures and remedies for the enforcement of such rights. Indeed, any conclusion on the part of our courts that this express provision was not intended by the parties as the exclusive remedy available to them for any breach of their obligations under the Ketubah would itself necessarily entail examination of Jewish law and tradition.

Finally, the evident objective of the present action—as recognized by the majority and irrefutably demonstrated by the complaint—even if procedural jurisdiction were to be assumed, is to obtain a religious divorce, a matter well beyond the authority of any civil court. (Again supplying her own interpretation of the Ketubah, the wife alleges: "That pursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and the wife accept a Jewish divorce decree in accordance with the authority vested in the Beth Din of the Rabbinical Assembly".) As was noted at the Appellate Division, the interest of the civil authorities of the State of New York in the status of the marriage between these parties was concluded when the final judgment of divorce was entered in 1978.

COOKE, C.J., and FUCHSBERG and MEYER, JJ., concur with WACHTLER, J.

JONES, J., dissents and votes to affirm in a separate opinion in which JASEN and SIMONS, JJ., concur.
Order reversed, etc.

All Citations

58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, 29 A.L.R.4th 736

127 Misc.2d 1013
Supreme Court, Queens County, New York,
Special Term, Part 5.

Shaukat AZIZ
v.
Patina AZIZ.

March 13, 1985.

Synopsis

In divorce action, the Supreme Court at Special Term, Queens County, Herbert J. Miller, Acting Justice, held that secular terms of mahr, against which parties were united in matrimony under Islamic law and which conformed to statutory requirements, was enforceable as contractual obligation in divorce action, notwithstanding that it was entered into as part of religious ceremony.

So ordered.

Attorneys and Law Firms

****124** ***1013** Weisberg & Weisberg by Joan L. Weisberg, New York City, for defendant.

Biller & Bachner by Larry E. Bachner, Kew Gardens, for plaintiff.

Opinion

HERBERT J. MILLER, Justice.

Sua sponte, the court withdraws its decision dated February 20, 1985 and publishes the following in its place and stead.

This action for a divorce was tried before the court on September 11, 1984. A judgment of divorce was granted to defendant on the ground of constructive abandonment.

The court reserved decision on the issues of whether an agreement between the parties was an enforceable contract and attorney's fees.

The parties were united in matrimony on May 30, 1981, as husband and wife, against a mahr of $5,032 ($5,000 deferred payment and $32 prompt payment) under Islamic law. A marriage certificate, signed by the parties, was issued under the signature of the religious leader, Qazi of the Islamic Center of Corona, who performed the ceremony. The plaintiff made $32 prompt payment at the time the marriage was celebrated.

Plaintiff contends that the mahr is a religious document and not enforceable as a contract and, particularly, in a matrimonial action.

Defendant contends the mahr is enforceable as a contract and that this court, as a court of general jurisdiction, may, in the interest of judicial economy, determine this claim. In the interest of judicial economy, this court will determine this claim.

The document at issue conforms to the requirements of section 5–701(a)(3) of General Obligations Law and its secular terms are ***1014** enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony. (*Avitzur v. Avitzur,* 58 N.Y.2d 108, 459 N.Y.S.2d 572, 446 N.E.2d 136.) As a secular document it calls for the payment of $5,000 now.

Accordingly, defendant shall have judgment against the plaintiff on her second counterclaim in the amount of $5,000.

On the issue of counsel fees on the matrimonial cause of action, the court awards defendant $2,050 as and for counsel fees and disbursements.

All Citations

127 Misc.2d 1013, 488 N.Y.S.2d 123

42 N.Y.2d 63
Court of Appeals of New York.

Henrietta G. CHRISTIAN, Respondent,
v.
William L. CHRISTIAN, Appellant.

June 9, 1977.

Synopsis

In action for divorce, Supreme Court, Suffolk County, declared that parties' separation agreement was null and void, dismissed husband's counterclaim for divorce based upon agreement and directed parties to resume their marital relationship, and husband appealed. The Supreme Court, Appellate Division, 47 A.D.2d 917, 367 N.Y.S.2d 40, reversed and granted divorce, nullifying property division paragraph of separation agreement, and husband appealed. The Court of Appeals, Cooke, J., held that under provision of separation agreement stipulating that if any provision of separation agreement be held invalid or unenforceable all others would nevertheless continue in full force, court could declare paragraph of separation agreement null and void without consequential effect on remainder of writing.

Reversed.

Attorneys and Law Firms

***64** *****819** ****851** Stephen W. Schlissel, Brooklyn, and Charles S. Sherman, Glen Cove, for appellant.

***65** George R. Hoffman, Babylon, for respondent.

Opinion

COOKE, Judge.

Marriage being a status with which the State is deeply concerned, separation agreements subjected to attack are tested carefully. "A court of equity does not limits inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract (between husband and wife) was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it" (***66** Hendricks v. Isaacs, 117 N.Y. 411, 417, 22 N.E. 1029, 1030; Hungerford v. Hungerford, 161 N.Y. 550, 553, 56 N.E. 117, 118).

We review here the grant by the Appellate Division of a divorce to one spouse, because of a living separate and apart by the marital parties pursuant to a separation agreement as provided by statute (Domestic Relations Law, s 170, subd. (6)), and, more particularly, the declaration that a portion of the agreement, which stipulated that there be an equal division of certain securities, was null and void.

Henrietta Christian and William Christian were married in 1958. Five years later a daughter was born and, about two years thereafter, a son. The husband, the holder of a degree in mechanical engineering, was the vice-president in charge of manufacturing for a metal fabricating concern. The wife in time had acquired a master's degree in social work and held a position at a school for girls. Unfortunately, differences arose and, following a bit of marriage counseling, they entered into a separation agreement on January 15, 1972. At that time, the husband's employment earnings were $40,000 a year and the wife's $10,000. In addition, both also had separate unearned income.

The agreement contained a section numbered "6", entitled "Division of Property". *****820** In it, provisions were made with reference to such items as the family residence, automobiles, household furnishings, hospital, medical and dental care policies and life insurance. The section concluded with the paragraph: "During the period of the separation assets held in individual name shall continue to be so held and all joint assets shall continue to be held jointly. In the event that the parties are divorced all assets held by the parties in their joint and individual names on January 1, 1972, a list ****852** of which properties is appended hereto as Schedule A, shall be divided equally between the parties so that the Husband shall take one-half of all assets held by the Wife in her individual name on January 1, 1972 and she shall take one-half of all assets held by the Husband on that date. It is the intent of the parties that so far as economic circumstances of the parties permit the money which each receives from the other shall be preserved and left by Will to the two children, Christine and Keith." No mention was made of support of the wife, but the husband covenanted to pay $100 a week for the children.

This action was commenced in August of 1972 by the plaintiff wife for divorce on the ground of cruel and inhuman ***67** treatment, pursuant to subdivision (1) of section 170 of the Domestic Relations Law. The defendant, in the following January, served an amended answer containing a counterclaim for divorce predicated on the living separate and apart by the parties since the execution of the separation agreement, a period in excess of one year, and the due performance by defendant of all of the agreement's terms and conditions. The answer also prayed that the separation agreement be incorporated but not merged in the judgment and for such other relief as would be just. For her reply, plaintiff denied the essential allegations of the counterclaim and asserted affirmative defenses to the effect that the agreement was procured as a result of fraud, misrepresentations and concealment, was the product of coercion and duress, was made without consideration and violated public policy.

During a nonjury trial, plaintiff's complaint was dismissed for failure to make out a prima facie case. Following full submission of proof, Supreme Court declared the separation agreement null and void for fraud, set it aside in its entirety, dismissed the husband's counterclaim, and ordered the parties to co-operate to effect a reconciliation and resumption of the marital relationship. The last paragraph of section "6" of the agreement was examined. Noting that the husband was aware that his stocks listed in the schedule were worth $200,000 while those of the wife had a value of $800,000 to $900,000, that the wife contended that she had no idea of the relative values of the securities, that the husband cleverly maneuvered the retention of the attorney who ostensibly represented the wife and drew the agreement, that neither party informed the attorney of the values of the stock being split, it was concluded that the husband's conduct in procuring the drafting of the agreement and in concealing from the attorney the details of the distribution of assets constituted such fraud as to vitiate the agreement completely.

The Appellate Division unanimously reversed, on the law and the facts, granted defendant husband's counterclaim for divorce and declared the last paragraph of provision "6" of the parties' agreement null and void. It was held that the record did not support Supreme Court's findings of fact to the effect that defendant was guilty of fraud or overreaching with regard to the formulation or signing of the agreement, that plaintiff failed to sustain her burden of proof as to her affirmative defense of fraud in the inducement. Insofar as the ***68** parties had lived separate and apart pursuant to the agreement, properly executed and filed, and adhered to its terms for more than a year, thus fulfilling the statutory requirements, defendant was held to be entitled to a decree of divorce. In the Appellate Division's view, the wife was not represented by an attorney acting solely in her interests *****821** and her knowledge of financial matters was not equal to that of her husband. In the light of these facts, the relative value of the listed securities to be divided and the high price plaintiff apparently was prevailed upon to pay for her husband's signature to the separation agreement, the last paragraph of provision "6" was held to be so unconscionable as to be unenforceable.

With the enactment of the Divorce Reform Law of 1966 (L.1966, ch. 254), New York abandoned its position as the only State in the union which regarded adultery as the sole ground for absolute divorce. Under a new section 170 of the Domestic Relations Law, an action for divorce may be ****853** maintained on any one of six grounds, including adultery, the scope of which was extended by definition (subd. (4)). Cruel and inhuman treatment, abandonment and imprisonment were joined as bases for the action (subds. (1), (2), (3)). Finally, under the last two subdivisions, two new grounds for absolute divorce were specified living apart pursuant to a separation decree or judgment and living separate and apart pursuant to a written separation agreement (subds. (5), (6)).

These last two bases have become known as the "no fault" grounds, since they were designed to make separation a ground for divorce, regardless of fault, as long as the authenticity of the separation is supported by a separation decree or agreement (see Foster & Freed, Matrimonial Law (rev. ed., 1973), p. 29). [1] "The decree (or agreement) is simply intended as evidence of the authenticity and reality of the separation" (Gleason v. Gleason, 26 N.Y.2d 28, 35, 308 N.Y.S.2d 347, 351, 256 N.E.2d 513, 516). This requirement as to a separation decree or agreement is peculiar to New York and reflects legislative concern over the fraud and collusion which historically infected divorce actions involving adultery. At the 1966 legislative session, the original broad proposal for a "living separate and apart" ground, as incorporated in the Wilson-Sutton Bill, at first rejected in the so-called " Leaders's ***69** Bill", was finally incorporated in the compromise bill, conditioned on the requirements that there be a formal and filed written agreement and that the party seeking to come within the embrace of such ground prove that "he or she

has duly performed all the terms and conditions of such agreement" [2] (1 Foster & Freed, Law and the Family, pp. 264, 333, n. 9; p. 337; Foster & Freed, The Divorce Law Reform (1970), p. 22; see Littlejohns v. Littlejohns, 76 Misc.2d 82, 86, 349 N.Y.S.2d 462, 467, affd. on opn. at Trial Term 42 A.D.2d 957, 348 N.Y.S.2d 959).

1 It is pointed out in Zett-Edmonds-Schwartz (vol. 11A, N.Y. Civ.Prac., Matrimonial Actions, s 21.01) that all of the grounds for a separation decree, with the exception of imprisonment, are based upon the fault of one spouse or the other.

2 Chapter 700 of the Laws of 1968 substituted "substantially" for "duly".

Divorces provided for in subdivisions (5) and (6) are also referred to as "conversion" divorces in that they permit the conversion of a judicial separation decree or separation agreement into an absolute divorce decree. In Gleason, an action under subdivision (5), it was held that "the statute, as a whole, points (to) the construction that all that has to be proved is that there is some kind of formal document of separation * * * that the plaintiff has complied with its terms and that the parties have lived apart" pursuant to the document for the statutory period (p. 37).

It was the legislative intent to provide these nonfault grounds for divorce where marriages are dead, based on a recognition that it was morally and socially desirable, to society and to the parties to such a union, to enable them " 'to extricate themselves from a perpetual state of marital limbo' " (Gleason v. Gleason, 26 N.Y.2d 28, 35, 37, 308 N.Y.S.2d 347, 351, 352, 256 N.E.2d 513, 516, 517, supra). The "vital and operative" fact, in subdivision (6) divorce cases, is the actual living apart of the ***822** parties pursuant to the separation agreement (cf. id., p. 37, 308 N.Y.S.2d p. 352, 256 N.E.2d p. 517). Put a bit differently, the function of the document is "merely to authenticate the fact of separation" (cf. id., p. 37, 308 N.Y.S.2d p. 353, 256 N.E.2d p. 518). Once there has been a separation for one or more years (L.1970, ch. 835, s 2) supported by the prescribed separation agreement with which there has been substantial compliance, the statute suggests no condition or restriction on the right of either party to commence the action (see Tantleff v. Tantleff, 60 Misc.2d 608, 611, 303 N.Y.S.2d 433, 436, affd. on limited grounds 33 A.D.2d 898, 307 N.Y.S.2d 198). A number of decisions, following in the wake of the 1966 reforms, have held that even though individual clauses in a separation agreement were void, the agreement supplied grounds for **854 divorce under subdivision (6) of section 170 of the Domestic Relations Law since such agreements survive for that purpose (see, e. g., *70 Bruno v. Bruno, 51 A.D.2d 862, 380 N.Y.S.2d 165, mot. for lv. to app. den. 39 N.Y.2d 706, 375 N.Y.S.2d 442; Seligman v. Seligman, 78 Misc.2d 632, 635, 356 N.Y.S.2d 978, 982; Hummel v. Hummel, 62 Misc.2d 595, 599, 309 N.Y.S.2d 429, 433; but see Markowitz v. Markowitz, 77 Misc.2d 586, 589, 592, 353 N.Y.S.2d 872, 878).

The cause of action in defendant's counterclaim is one for divorce under subdivision (6) of section 170, and the reply thereto asserts affirmative defenses. No cause is set forth by either party for enforcement or invalidation of the separation agreement. As to said counterclaim, it is the physical separation, rather than the writing, which constitutes the actual basis of the cause (Littlejohns v. Littlejohns, 76 Misc.2d 82, 86, 349 N.Y.S.2d 462, 468, affd. on opn. at Trial Term 42 A.D.2d 957, 348 N.Y.S.2d 959, supra; Hummel v. Hummel, 62 Misc.2d 595, 599, 309 N.Y.S.2d 429, 433, supra). The agreement is "simply intended as evidence of the authenticity and reality of the separation" (cf. Gleason v. Gleason, supra, 26 N.Y.2d p. 35, 308 N.Y.S.2d p. 351, 256 N.E.2d p. 516; Harris v. Harris, 36 A.D.2d 594, 318 N.Y.S.2d 361; see Martin v. Martin, 63 Misc.2d 530, 533, 312 N.Y.S.2d 520, 523). In Littlejohns the agreement was viewed as evidence of the parties' actual and continued separation (p. 86), and, in Markowitz, the instrument was said to be "merely documentary proof of a separation" (77 Misc.2d p. 591, 353 N.Y.S.2d p. 877). In Martin, a stipulation made in open court, the transcript of which was filed with the County Clerk, was held to carry no less weight than a written agreement, since the purpose of the filing provision in respect to separation agreements is to evidence the fact that the agreement was made before maintenance of the divorce action (but see Nitschke v. Nitschke, 66 Misc.2d 435, 436-437, 321 N.Y.S.2d 246, 247-248; Jacobs v. Jacobs, 55 Misc.2d 9, 284 N.Y.S.2d 326).

Although a written separation agreement is a sine qua non to a divorce under subdivision (6), it is evidentiary in nature and admissible under general rules of evidence (see Richardson, Evidence (Prince-10th ed.), s 643). By the same token, proof independent of the agreement would also be admissible on the question of whether or not the parties actually lived separate and apart for at least one year. Therefore, if the separation agreement

conforms to the statute but is otherwise found to be void and unenforceable insofar as its substantial provisions are concerned, generally it may still be accepted for the sole purpose of evidencing the parties' agreement to live separate and apart, thus satisfying the statutory requirement in respect to a separation agreement (see Henderson v. Henderson, 47 A.D.2d 801, 365 N.Y.S.2d 96 app. dsmd. 37 N.Y.2d 782, 375 N.Y.S.2d 99, 337 N.E.2d 607; 11A Zett-Edmonds-Schwartz, N.Y. Civ.Prac., Matrimonial Actions, s 21.05, p. 21-14; see, also, La Barge v. La Barge, 84 Misc.2d 523, 524-525, 377 N.Y.S.2d 372, 373-374; but see Cicerale v. Cicerale, 85 Misc.2d 1071, 1075, 382 N.Y.S.2d 430, 432). In this ***71** same vein, it was held, long before 1966, in *****823** Reischfield v. Reischfield (100 Misc. 561, 166 N.Y.S. 898), an action for separation based on abandonment and other grounds, that, even though void, a separation agreement negated an abandonment since the husband and wife separated voluntarily (see Matter of Brown, 153 Misc. 282, 284, 274 N.Y.S. 924, 930; 16 N.Y.Jur. Domestic Relations, s 886; see, also, Rosenbaum v. Rosenbaum, 56 Misc.2d 221, 224, 288 N.Y.S.2d 285, 288). Since, as the Appellate Division here stated, "(t)he parties have lived separate and apart from each other pursuant to their agreement, which was properly executed and filed, and each has adhered to the terms thereof for a period of more than one year", the requirements of subdivision (6) were fulfilled and that court properly granted a divorce on the counterclaim.

Said court was of the view, however, that the portion of the agreement which called for an equal division of the assets listed in the annexed schedule was ****855** "so unconscionable as to be unenforceable" and that the wife should not be required to pay such substantial sums to her husband "upon the advent of such divorce in compliance with a portion of the separation agreement which is tainted with unconscionability" citing Riemer v. Riemer (48 Misc.2d 873, 265 N.Y.S.2d 885, affd. 25 A.D.2d 956, 270 N.Y.S.2d 395, mot. for lv. to app. dsmd. 17 N.Y.2d 915, 272 N.Y.S.2d 140, 218 N.E.2d 904). In Riemer the word "unconscionable" does not appear, but, over the years, an unconscionable bargain has been regarded as one " 'such as no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other' " (Hume v. United States, 132 U.S. 406, 411, 10 S.Ct. 134, 136, 33 L.Ed. 393), the inequality being " 'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense' " (Mandel v. Liebman, 303 N.Y. 88, 94, 100 N.E.2d 149, 152). Unconscionable conduct is something of which equity takes cognizance, when warranted (see Weirfield Holding Corp. v. Pless & Seeman, 257 N.Y. 536, 178 N.E. 784; Graf v. Hope Bldg. Corp., 254 N.Y. 1, 4, 171 N.E. 884; Howard v. Howard, 122 Vt. 27, 163 A.2d 861; 27 Am.Jur.2d, Equity, s 24, pp. 549-550; cf. 2 Pomeroy's Equity Jurisprudence (4th ed.), s 873, p. 1804).

Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside (2 Foster & Freed, Law and the Family, p. 476; see, also, Schmelzel v. Schmelzel, 287 N.Y. 21, 26, 38 N.E.2d 114, 115; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts (rev. ed.), s 36, subd. 1, p. 36-3). Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection ***72** with the negotiation of property settlement provisions. Furthermore, when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided.

If voidable, such an agreement may be set aside under principles of equity in an action in which such relief is sought in a cause of action or by way of affirmative defense (Susquehanna S. S. Co. v. Andersen & Co., 239 N.Y. 285, 292-294, 146 N.E. 381, 383-384; 16 N.Y. Jur., Domestic Relations, s 715). Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith (Ducas v. Guggenheimer, 90 Misc. 191, 194-195, 153 N.Y.S. 591, 593, 594; affd. sub. nom. Ducas v. Ducas, 173 App.Div. 884, 157 N.Y.S. 801). There is a strict surveillance of all transactions between married persons, especially separation agreements (Hendricks v. Isascs, 117 N.Y. 411, 417, 22 N.E. 1029, 1030, supra; *****824** Benesch v. Benesch, 106 Misc. 395, 402, 173 N.Y.S. 629, 633; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts (rev. ed.), s 37, subd. 4, p. 37-9). Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to

vitiate an ordinary contract (Hungerford v. Hungerford, 161 N.Y. 550, 553, 56 N.E. 117, 118, supra; Cain v. Cain, 188 App.Div. 780, 782, 177 N.Y.S. 178, 179; Crowell v. Crowell, 135 Misc. 530, 532, 238 N.Y.S. 44, 45, affd. 229 App.Div. 771, 242 N.Y.S. 811). These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity. (Scheinberg v. Scheinberg, 249 N.Y. 277, 282-283, 164 N.E. 98, 99; Hungerford v. Hungerford, 161 N.Y. 550, 553, 56 N.E. 117, 118 supra; Matter of Smith, 243 App.Div. 348, 353, 276 N.Y.S. 646, 652; Ducas v. Guggenheimer, 90 Misc. 191, 194, 153 N.Y.S. 591, 593, affd. sub. nom. ****856** Ducas v. Ducas, 173 App.Div. 884, 157 N.Y.S. 801, supra; Montgomery v. Montgomery, 170 N.Y.S. 867, affd. 187 App.Div. 882, 173 N.Y.S. 915; see Validity of Separation Agreement As Affected by Fraud, Coercion, Unfairness or Mistake, Ann., 5 A.L.R. 823, 827).

To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching (2 ***73** Lindey, Separation Agreements and Ante-Nuptial Contracts (rev. ed.), s 37, subd. 5, p. 37-12; cf. Matter of Baruch, 205 Misc. 1122, 1124, 132 N.Y.S.2d 402, 404, affd. 286 App.Div. 869, 142 N.Y.S.2d 216; Pegram v. Pegram, 310 Ky. 86, 89-90, 219 S.W.2d 772). In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. If the execution of the agreement, however, be fair, no further inquiry will be made.

Whether a contract is entire or severable generally is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted (5 Williston, Contracts (3d ed.), s 767, p. 629). Here the parties had a right to and did, by expressly stipulating that if any provision of the separation agreement be held invalid or unenforceable all other shall nevertheless continue in full force, make the agreement within reasonable limits divisible, and there is little room for construction (New Era Homes Corp. v. Forster, 299 N.Y. 303, 306-307, 86 N.E.2d 757, 758-759; Coppedge v. Leiser, 71 Idaho 248, 251-253, 229 P.2d 977, see United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 62 S.Ct. 581, 86 L.Ed. 855). Courts were therefore, by contract terms, free to adjudge the validity of the last paragraph of provision "6" of the separation agreement without consequential effect on the remainder of the writing.

This case is of moment. Important it is, because separation agreements have assumed a new and greater legal dimension. Not only may they serve as " evidence of the authenticity and reality of the separation" which is a basis for absolute divorce but, even though a portion of the agreement, such as one dealing with the economics or property of the marital parties, be declared void because of overreaching in bringing about its execution, the separation agreement still retains vitality as an essential ingredient in such an action for dissolution of the marriage. Because of the law's purpose, to achieve its moral and social goals and to avoid a frustration of those aims, separation agreements must not be permitted to be employed as instruments for the improper exaction in the inducement of execution of unconscionable terms within a frame of inequitable conduct.

*****825** The order of the Appellate Division, insofar as appealed from, should be reversed, without costs, and the case remitted to the Supreme Court, Suffolk County, for further proceedings ***74** including a hearing and findings as may be appropriate in accordance with this opinion.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG, JJ., concur.

Order, insofar as appealed from, reversed, without costs, and the case remitted to Supreme Court, Suffolk County, for further proceedings in accordance with the opinion herein.

All Citations

42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817

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New York Official Reports

103 A.D.3d 766, 960 N.Y.S.2d 152, 2013 N.Y. Slip Op. 01057

**1 Elizabeth Cioffi-Petrakis, Respondent

v

Panagiotis Petrakis, Appellant.

Supreme Court, Appellate Division, Second Department, New York
February 20, 2013

CITE TITLE AS: Cioffi-Petrakis v Petrakis

HEADNOTE

Marriage
Prenuptial Agreement
Setting Aside Prenuptial Agreement—Fraudulent Inducement

Gassman Baiamonte Betts, P.C., Garden City, N.Y. (Stephen Gassman and Cheryl Y. Mallis of counsel), for appellant.
Weg and Meyers, P.C., New York, N.Y. (Dennis T. D'Antonio and Derek M. Zisser of counsel), for respondent.

In an action, inter alia, to set aside a prenuptial agreement, the defendant appeals, as limited by his brief, from so much of a ***767** judgment of the Supreme Court, Nassau County (Bennett, J.), entered February 6, 2012, as, upon a decision of the same court (Falanga, J.), dated December 12, 2011, made after a nonjury trial, is in favor of the plaintiff and against him setting aside the prenuptial agreement.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In general, New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]; *see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). "However, this right is not and has never been without limitation" (*Kessler v Kessler*, 33 AD3d 42, 45 [2006]). "[T]he State is deeply concerned with marriage and takes a supervisory role in matrimonial proceedings. . . . Indeed, in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general" (*id.* at 46 [citation omitted]). Thus, while "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties" (*Brassey v Brassey*, 154 AD2d 293, 295 [1989]), an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct (*see Christian v Christian*, 42 NY2d 63, 73 [1977]; *Petracca v Petracca*, 101 AD3d 695 [2012]; *Weinstein v Weinstein*, 36 AD3d 797, 798 [2007]; *Lombardi v Lombardi*, 235 AD2d 400 [1997]).

"In reviewing a trial court's findings of fact following a nonjury trial, this Court's authority is as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts, bearing in mind that due regard must be given to the decision of a trial judge who was in the position to assess the evidence and the credibility of witnesses" (*D'Argenio v Ashland Bldg., LLC*, 78 AD3d 758, 758 [2010]). ****2**

Here, the Supreme Court reasonably resolved credibility issues in favor of the plaintiff, and its determination that the defendant fraudulently induced the plaintiff to execute the prenuptial agreement was supported by the evidence. With respect to the material facts underlying the plaintiff's claim, the Supreme Court found that the plaintiff's testimony was "credible," "convincing," "unequivocal," and consistent with "additional corroborative evidence," and that any "inconsistencies" in her testimony related to "insignificant" matters. By contrast, the Supreme Court found the defendant's "credibility to be suspect," due in part, to his "patent evasiveness." The Supreme ***768** Court's credibility findings are supported by the record. The plaintiff's claim in this case rested largely on the credibility of the parties, and we decline to disturb the Supreme Court's determination with respect thereto (*see Reid v Reid*, 57 AD3d 960 [2008]). On the particular facts of this case, the Supreme Court correctly determined that the plaintiff sustained her burden of establishing grounds to set aside the prenuptial agreement (*cf. Petracca v Petracca*, 101 AD3d at 695).

The defendant's remaining contentions are without merit. Angiolillo, J.P., Sgroi, Cohen and Miller, JJ., concur.

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178 Misc.2d 764
Supreme Court, Nassau County, New York.

Herbert FREIMAN, Plaintiff,
v.
Ellen FREIMAN, Defendant.

Aug. 20, 1998.

Synopsis

Husband brought action for divorce, and wife brought counterclaims, seeking to set aside parties' antenuptial agreement. On husband's motion to dismiss counterclaims as untimely, the Supreme Court, Nassau County, Anthony L. Parga, J., held that: (1) wife's claims based on mutual mistake, coercion and duress, and fraud were time-barred, but (2) maintenance provisions in antenuptial agreement could be reviewed for conscionability at any time prior to entry of final judgment.

Granted in part and denied in part.

Attorneys and Law Firms

****798** ***765** Koopersmith & Brown, Lake Success (Kenneth Koopersmith, of counsel), for plaintiff.

Stephen Gassman, Garden City, for defendant.

Opinion

ANTHONY L. PARGA, Justice.

Motion by the plaintiff-husband for an order pursuant to CPLR 3211(a)(5), dismissing defendant-wife's four counterclaims on the ground that they are barred by the six-year Statute of Limitations (CPLR 213), is granted as to the first three counterclaims which seek to set aside the parties' antenuptial agreement based upon duress, fraud and mutual mistake, and is denied, as a matter of first impression, with respect to defendant's fourth counterclaim based upon the unconscionability clause applicable to antenuptial agreements contained in Domestic Relations Law § 236(B)(3). The Court holds that in a pre-judgment matrimonial action any claim that the parties' antenuptial agreement is unconscionable is: (a) time-barred as to any property distribution contained in the agreement by the six-year time limitation for equitable causes of action encompassed by CPLR 213(1); and (b) not barred by any durational limitation of time with respect to the maintenance provisions contained in the agreement since these provisions are governed by the statutory mandate of Domestic Relations Law § 236(B)(3) that "the amount and duration of ***766** maintenance ... not [be] unconscionable at the time and entry of final judgment".

The parties were married on June 20, 1985, in Oceanside, New York. On the night before the wedding, the parties executed an antenuptial agreement which had been negotiated by their respective attorneys, both of whom are highly respected professionals who specialize in the practice of matrimonial law. The parties filed joint tax returns from 1987–1996; their gross income was approximately 2.2 million dollars in 1987, and 1 million dollars in 1995. This action for divorce was commenced by the plaintiff-husband on July 16, 1996. One year later, on June 30, 1997, after the plaintiff served his complaint, the defendant served her amended verified answer and counterclaims seeking to set aside the parties' antenuptial agreement.

It appears that under the terms of the agreement, the defendant could now receive maintenance for a ten year period in the amount of $30,000 per year, plus a tax-free lump sum of $200,000. Such an agreement on its face does not appear to be unconscionable. However, the Court was not requested to decide said issue in this motion (*see, Christian v. Christian,* 42 N.Y.2d 63, 71–72, 396 N.Y.S.2d 817, 365 N.E.2d 849).

****799** Defendant contends that she felt undue pressure to execute the agreement since the plaintiff insisted on its execution prior to the wedding. She further complains that the plaintiff never provided her with the necessary documents relating to his financial status, and contends that "[i]t was not until in or about October, 1995, when [she] became aware that plaintiff ... possesses in excess of ten million [dollars] in assets and earns more than six hundred thousand dollars per year". Defendant maintains that if she knew this prior to the execution of the antenuptial agreement, she "would never have agreed to accept the paltry sums afforded to [her]" under the agreement.

"Domestic Relations Law § 236(B) was enacted in 1980 as part of the Equitable Distribution Law, which significantly reformed the New York statutory scheme

governing division of property, economic life and familial rights and obligations upon dissolution of a marriage (*see,* L.1980, ch. 281). In keeping with the strong public policy in favor of individuals resolving their own family disputes (*see,* Scheinkman, New York Law of Domestic Relations § 6.1, at 123), subdivision (3) authorizes spouses or prospective spouses to contract out of the elaborate statutory system and provide for matters such as inheritance, distribution or division of property, spousal support, and child custody and care in the event that the marriage ends." ***767** (*Matisoff v. Dobi,* 90 N.Y.2d 127, 132, 659 N.Y.S.2d 209, 681 N.E.2d 376; *see, Avitzur v. Avitzur,* 58 N.Y.2d 108, 459 N.Y.S.2d 572, 446 N.E.2d 136, cert. den. 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88).

The Appellate Division, Second Department has held that actions which seek to rescind the provisions of a prenuptial agreement which allocate property must be commenced within six years of the execution of the agreement since that is when the cause of action accrues (*Anonymous v. Anonymous,* 233 A.D.2d 350, 351, 650 N.Y.S.2d 589; *Pacchiana v. Pacchiana,* 94 A.D.2d 721, 462 N.Y.S.2d 256; CPLR 213). Thus, defendant's 1997 claim of mutual mistake in the execution of the 1985 contract is time barred (CPLR 213[1], [2]). Similarly, defendant's claim of coercion and duress is also time-barred since the right to rescind the agreement on either ground accrues upon the execution of the contract (*Pacchiana v. Pacchiana, supra*). Defendant's fraud claim is also untimely since (a) it was not commenced within six years after the commission of the fraud, (b) defendant could have discovered the purported fraud within a reasonable time after the marriage (*Pacchiana v. Pacchiana, supra;* CPLR 213[8]) and (c) defendant's conclusory, unsubstantiated statement that she discovered the fraud in October, 1995, twenty-one months prior to her assertion of fraud, is an insufficient basis to establish actual, timely discovery of the fraud (*see,* CPLR 203(g); *Garguilio v. Garguilio,* 201 A.D.2d 617, 618, 608 N.Y.S.2d 238; *Cucchiaro v. Cucchiaro,* 165 Misc.2d 134, 138–139, 627 N.Y.S.2d 224; *see, also, Kronos, Inc. v. AVX Corp.,* 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289). The Court notes that defendant did not allege sufficient facts which state a cause of action in fraud (CPLR 3016 [b]). The mere contention that the plaintiff failed to disclose the value of his assets "does not, standing alone, constitute fraud or overreaching sufficient to vitiate an antenuptial agreement" (*Panossian v. Panossian,* 172 A.D.2d 811, 813, 569 N.Y.S.2d 182; *Eckstein v. Eckstein,* 129 A.D.2d 552, 553, 514 N.Y.S.2d 47).

However, defendant's invocation and reliance upon Domestic Relations Law § 236(B)(3), in support of her fourth counterclaim that the subject agreement is unconscionable, is not barred by any time restriction as to the maintenance provisions in the agreement. The statute specifically preserves that kind of a claim and provides that in order for an antenuptial maintenance agreement to be enforceable it must "not [be] unconscionable at the time of entry of final judgment" (Domestic Relations Law § 236[B][3]). A judgment of divorce has yet to be entered in this action, nor are the parties scheduled for trial. Consequently, the maintenance provisions in the parties' antenuptial agreement may be reviewed for ****800** their conscionability at any time prior to the entry of final judgment, even if that ***768** date is well beyond six years after the execution of agreement (Scheinkman, New York Law of Domestic Relations, 1997 Pocket Part, § 6.8 at 14).

The Court notes that the modern trend, which has been expressed in Section 8 of the Uniform Premarital Agreement Act (9B ULA 379), and adopted by at least 18 states other than New York, is that the statute of limitations on a spouse's cause of action challenging the validity of any aspect of the antenuptial agreement is tolled during the marriage and does not begin to run until one party physically separates from the other, or commences an action for divorce or separation, or dies (*Lieberman v. Lieberman,* 154 Misc.2d 749, 753–754, 587 N.Y.S.2d 107). According to this reasoning, any judicial holding which "would require a spouse to take affirmative action to preserve claims to potential marital assets even before there had been any hint of marital discord ... flies in the face of logic and would be against public policy [since it] would critically undermine ... the vitality of marriages generally" (*Zuch v. Zuch,* 117 A.D.2d 397, 404–405, 503 N.Y.S.2d 343). The Court of Appeals cases relied upon by the plaintiff, *Scheuer v. Scheuer,* 308 N.Y. 447, 452, 126 N.E.2d 555 and *Dunning v. Dunning,* 300 N.Y. 341, 90 N.E.2d 884, for the broad proposition that marriage does not toll any statute of limitation pertaining to a cause of action one spouse may have against the other, do not compel a different result here since those cases were decided 25–30 years prior to the enactment of Domestic Relations Law § 236(B)[3] (*cf. Anonymous v. Anonymous, supra*).

680 N.Y.S.2d 797, 1998 N.Y. Slip Op. 98644

All Citations

178 Misc.2d 764, 680 N.Y.S.2d 797, 1998 N.Y. Slip Op. 98644

21 N.Y.3d 186
Court of Appeals of New York.

Michelle GALETTA, Appellant,
v.
Gary GALETTA, Respondent.

May 30, 2013.

Synopsis

Background: In matrimonial action, wife sought a determination that prenuptial agreement was invalid due to defective acknowledgment. The Supreme Court, Monroe County, John M. Owens, J., denied the motion. Wife appealed. The Supreme Court, Appellate Division, Fourth Department, 96 A.D.3d 1565, 947 N.Y.S.2d 260,affirmed, but granted husband leave to appeal certified question.

Holdings: The Court of Appeals, Graffeo, J., held that:

certificate of acknowledgment relating to husband's signature was defective, and

assuming defect could be cured, notary public's testimony did not establish the propriety of the original acknowledgment procedure.

Reversed; certified question answered in the negative.

Attorneys and Law Firms

*****827** Barney & Affronti, LLP, Rochester (Francis C. Affronti of counsel), for appellant.

Kathleen P. Reardon, Rochester, for respondent.

OPINION OF THE COURT

GRAFFEO, J.

****685** ***189** In this matrimonial action, plaintiff Michelle Galetta sought a determination that a prenuptial agreement she and defendant Gary Galetta signed was invalid due to a defective acknowledgment. Because we conclude that plaintiff was entitled to summary judgment declaring the agreement to be unenforceable under Domestic Relations Law § 236(B)(3), we reverse the order of the Appellate Division, which held there was a triable question of fact on that issue.

Michelle Galetta and Gary Galetta were married in July 1997. About a week before the wedding, they each separately signed a prenuptial agreement. Neither party was present when the other executed the document and the signatures were witnessed by different notaries public. The agreement had apparently been prepared by Gary's attorney; Michelle elected not to be represented by counsel. In substance, the parties agreed that their separate property, as listed on attached addenda, would remain separate and not subject to equitable distribution in the event of dissolution of the marriage. They also decided that neither would seek maintenance from the other. It is undisputed that the signatures on the document are authentic and there is ***190** no claim that the ****686** *****828** agreement was procured through fraud or duress.

The parties' signatures and the accompanying certificates of acknowledgment are set forth on a single page of the document. The certificates appear to have been typed at the same time, with spaces left blank for dates and signatures that were to be filled in by hand. The certificate of acknowledgment relating to Michelle's signature contains the boilerplate language typical of the time. However, in the acknowledgment relating to Gary's signature, a key phrase was omitted and, as a result, the certificate fails to indicate that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document. The record does not reveal how this error occurred and apparently no one noticed the omission until the issue was raised in this litigation.

In 2010, defendant husband filed for divorce. Plaintiff wife subsequently commenced this separate action seeking a divorce and a declaration that the prenuptial agreement was unenforceable. The wife moved for summary judgment on the request for declaratory relief, contending that the agreement was invalid because Domestic Relations Law § 236(B)(3) compels that prenuptial agreements be executed with the same formality as a recorded deed and the certificate of acknowledgment relating to the husband's signature did not comport with Real Property Law requirements. The husband opposed

the motion, asserting that the prenuptial agreement was enforceable because the language of the acknowledgment substantially complied with the Real Property Law. He submitted an affidavit from the notary public who had witnessed his signature in 1997 and executed the certificate of acknowledgment. The notary, an employee of a local bank where the husband then did business, averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the signer and assure that the signer was the person named in the document. He stated in the affidavit that he presumed he had followed that practice before acknowledging the husband's signature.

Supreme Court denied the wife's motion for summary judgment, reasoning that the acknowledgment of the husband's signature substantially complied with the requirements of the Real Property Law. In a divided decision, the Appellate Division affirmed the order denying summary judgment on a different rationale (96 A.D.3d 1565, 947 N.Y.S.2d 260 [2012]). The majority held that the certificate of acknowledgment was defective but determined ***191** that the deficiency could be cured after the fact and that the notary public affidavit raised a triable question of fact as to whether the prenuptial agreement had been properly acknowledged when it was signed in 1997. A two-justice dissent would have reversed and granted plaintiff summary judgment declaring the prenuptial agreement to be invalid because the acknowledgment was fatally defective. The dissent reasoned that the issue of whether a defect in an acknowledgment can be cured had not been preserved in the motion court but concluded, in any event, that such a deficiency cannot be cured, nor was the notary public's affidavit sufficient to raise a question of fact if a cure had been possible. The Appellate Division granted defendant leave to appeal to this Court, certifying the question: "Was the order of this Court ... properly made?" Because plaintiff was entitled to summary judgment declaring the prenuptial agreement to be unenforceable, we answer that question in the negative.

Prenuptial agreements are addressed in Domestic Relations Law § 236(B)(3), which provides:

> *****829** ****687** "An agreement by the parties, made before or 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."

We interpreted this statute in *Matisoff v. Dobi,* 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997), where we held that an unacknowledged postnuptial agreement was invalid. We observed that the statute recognizes no exception to the requirement that a nuptial agreement be executed in the same manner as a recorded deed and "that the requisite formality explicitly specified in Domestic Relations Law § 236(B)(3) is essential" (*id.* at 132, 659 N.Y.S.2d 209, 681 N.E.2d 376).

Real Property Law § 291, governing the recording of deeds, states that "[a] conveyance of real property ... on being duly acknowledged by the person executing the same, or proved as required by this chapter, ... may be recorded in the office of the clerk of the county where such real property is situated." Thus, a deed may be recorded if it is either "duly acknowledged" or "proved" by use of a subscribing witness. Because this case involves an attempt to use the acknowledgment procedure, we focus on that methodology.

The acknowledgment requirement fulfills two important purposes. First, "acknowledgment serves to prove the identity ***192** of the person whose name appears on an instrument and to authenticate the signature of such person" (*Matisoff,* 90 N.Y.2d at 133, 659 N.Y.S.2d 209, 681 N.E.2d 376). Second, it necessarily imposes on the signer a measure of deliberation in the act of executing the document. Just as in the case of a deed where the law puts in the path of the grantor "formalities to check haste and foster reflection and care ... [h]ere, too, the formality of an acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care" (*id.* at 136, 659 N.Y.S.2d 209, 681 N.E.2d 376 [internal quotation marks and citation omitted]).

We noted in *Matisoff* that the acknowledgment requirement imposed by Domestic Relations Law § 236(B)(3) is onerous and, in some respects, more exacting than the burden imposed when a deed is signed (*id.* at 134–135, 659 N.Y.S.2d 209, 681 N.E.2d 376). Although an unacknowledged deed cannot be recorded (rendering it invalid against a subsequent good faith purchaser for

value) it may still be enforceable between the parties to the document (i.e., the grantor and the purchaser). The same is not true for a nuptial agreement which is unenforceable in a matrimonial action, even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress (*id.* at 135, 659 N.Y.S.2d 209, 681 N.E.2d 376).

With these general principles in mind, we turn to the first issue presented in this case: whether the certificate of acknowledgment accompanying defendant husband's signature was defective. Three provisions of the Real Property Law must be read together to discern the requisites of a proper acknowledgment. Real Property Law § 292 requires that the party signing the document orally acknowledge to the notary public or other officer that he or she in fact signed the document. Real Property Law § 303 precludes an acknowledgment from being taken by a notary or other officer "unless he [or she] knows or has satisfactory evidence[ ] that the person making it is the person described in and who executed such instrument." And Real Property Law § 306 compels the notary or other officer to execute "a certificate ... ****688** *****830** stating all the matters required to be done, known, or proved" and to endorse or attach that certificate to the document. The purpose of the certificate of acknowledgment is to establish that these requirements have been satisfied: (1) that the signer made the oral declaration compelled by Real Property Law § 292; and (2) that the notary or other official either actually knew the identity of the signer or secured "satisfactory evidence" of identity ensuring that the signer was the person described in the document.

***193** At the time the parties here signed the prenuptial agreement in 1997,[1] proper certificates of acknowledgment typically contained boilerplate language substantially the same as that included in the certificate accompanying the wife's signature: "before me came (name of signer) to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that s/he executed the same." The "to me known and known to me to be the person described in the document" phrase satisfied the requirement that the official indicate that he or she knew or had ascertained that the signer was the person described in the document. The clause beginning with the words "and duly acknowledged" established that the signer had made the requisite oral declaration.

1 At about the same time this agreement was executed, the legislature enacted Real Property Law § 309–a which codified model language to be used in a certificate of acknowledgment involving a signer who was not acting on behalf of a corporation (*see* L. 1997, ch. 179). That new statute, which remains in effect, indicated that an acknowledgment should read as follows (or "conform substantially" with the following):

> "On the [insert date] before me, the undersigned, personally appeared [insert name of signer], personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument" (Real Property Law § 309–a [1]).

The new language did not become mandatory until September 1999. It was intended to clarify existing law and encourage uniformity in filed deeds; it did not alter the substantive requirements for a valid acknowledgment that appear elsewhere in the Real Property Law, as discussed above.

In the certificate of acknowledgment relating to the husband's signature, the "to me known and known to me" phrase was inexplicably omitted, leaving only the following statement: "On the 8 [sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same." Absent the omitted language, the certificate does not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective (*see Fryer v. Rockefeller,* 63 N.Y. 268 [1875] [applying predecessor to Real Property Law § 303, ***194** held that acknowledgment of deed that did not establish signer's identity and relationship to document was invalid]; *Gross v. Rowley,* 147 App.Div. 529, 132 N.Y.S. 541 [2d Dept.1911], *appeal denied* 148 App.Div. 922, 132 N.Y.S. 1131 [1912] [acknowledgment deficient because it failed to certify that signer was person described in the instrument]; *see generally People ex rel. Sayville Co. v. Kempner,* 49 App.Div. 121, 63 N.Y.S. 199 [1st Dept.1900] [same]). Thus, we agree with the Appellate Division,

which unanimously concluded that the certificate of **689 ***831 acknowledgment did not conform with statutory requirements.

The husband continues to dispute that the acknowledgment is defective because he claims that it substantially complied with the Real Property Law. In support of this argument, he relies on a line of substantial compliance cases including *Weinstein v. Weinstein,* 36 A.D.3d 797, 830 N.Y.S.2d 179 (2d Dept.2007). *Weinstein* involved a prenuptial agreement that was signed after Real Property Law § 309–a set forth specific language to be included in an acknowledgment (*see* n. 1, *supra*), yet the certificates of acknowledgment contained the former boilerplate language that had commonly been used prior to the statute. Although the acknowledgment did not track the preferred text, the Appellate Division concluded that it was nonetheless valid because the language was in substantial compliance with the new statute—which is all the statute required. There is no indication in *Weinstein* that any of the substantive elements of an acknowledgment were lacking—rather, in that case the parties merely used different verbiage to establish that the Real Property Law had been followed, a deviation in form (in light of Real Property Law § 309–a) but not substance. The same is not true here where a core component of a valid acknowledgment was not referenced in the certificate.

Because we conclude that the certificate of acknowledgment was defective, we address the question of whether such a deficiency can be cured and, if so, whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question of fact precluding summary judgment in the wife's favor. [2] In *Matisoff,* a case where the parties had not attempted to have their signatures acknowledged, defendant *195 husband similarly contended that the lack of certificates of acknowledgment had been cured by testimony both the husband and wife presented at the matrimonial trial admitting that the signatures were authentic and that the postnuptial agreement had not been signed under fraud or duress. We determined that it was unnecessary to decide whether the absence of an acknowledgment could be cured because, even if it could, the testimony from the parties was not the functional equivalent of an acknowledgment, which involves both the oral declaration of the signer and the written certificate of the official establishing that certain prerequisites were met.

2 The wife argues that this issue was not preserved in the motion court but we agree with the Appellate Division majority that such an argument was evident from the husband's submission of the notary public affidavit in response to the wife's motion for summary judgment, a submission that was cited by Supreme Court in the oral decision denying summary judgment. Since the parties admitted in Supreme Court that their signatures were authentic and made no claims of fraud or duress, there was only one reason for the husband to proffer the notary public affidavit—to cure the purported deficiency in the certificate of acknowledgment. The fact that Supreme Court did not reach the "cure" argument because it concluded (incorrectly) that the acknowledgment was not defective does not render the issue unpreserved for review.

Since *Matisoff,* the Appellate Divisions have grappled with the "cure" issue, which has largely arisen in cases where a signature was not accompanied by any certificate of acknowledgment—not in situations like this where there was a contemporaneously prepared certificate of acknowledgment but it is defective. In any event, the weight of Appellate Division authority is against permitting the absence of an acknowledgment to be cured after the fact, unless both parties engaged in a mutual "reaffirmation" of the agreement (*see* ***832 **690 *D'Elia v. D'Elia,* 14 A.D.3d 477, 788 N.Y.S.2d 156 [2d Dept.2005] [where postnuptial agreement was not properly acknowledged, defendant's attempt to cure the defect by submitting a duly-executed certificate of acknowledgment at trial was not sufficient]; *Filkins v. Filkins,* 303 A.D.2d 934, 935, 757 N.Y.S.2d 665 [4th Dept.2003] [where antenuptial agreement was not acknowledged, plaintiff's attempt to cure defect by having agreement notarized and filed after divorce action had commenced failed "because the agreement was never reacknowledged"]; *Schoeman, Marsh & Updike v. Dobi,* 264 A.D.2d 572, 694 N.Y.S.2d 650 [1st Dept.1999], *lv. dismissed* 94 N.Y.2d 944, 709 N.Y.S.2d 502, 731 N.E.2d 158 [2000], *lv. dismissed* 97 N.Y.2d 721, 740 N.Y.S.2d 691, 767 N.E.2d 148 [2002], *lv. denied* 100 N.Y.2d 508, 764 N.Y.S.2d 385, 796 N.E.2d 477 [2003] [legal malpractice action related to *Matisoff* litigation] [parties to divorce action cannot obtain retroactive validation of postnuptial agreement]; *Anonymous v. Anonymous,* 253 A.D.2d 696, 677 N.Y.S.2d 573 [1st Dept.1998], *lv. dismissed* 93 N.Y.2d 888, 689 N.Y.S.2d 430, 711 N.E.2d 644 [1999] [where prenuptial agreement was not acknowledged, defect could

not be cured by production of ***196** acknowledgment that surfaced after matrimonial action had commenced and some 12 years after agreement was signed]). [3]

[3] Several of the cases the husband relies on for the contrary proposition involve proving a signature through use of subscribing witnesses, a different procedure governed by other provisions of the Real Property Law (*see Matter of Maul,* 287 N.Y. 694, 39 N.E.2d 301 [1942] [where wife signed waiver of right of election in presence of two subscribing witnesses, who also signed the document, fact that signatures of subscribing witnesses were not acknowledged at that time did not render document unenforceable]; *Matter of Saperstein,* 254 A.D.2d 88, 678 N.Y.S.2d 618 [1st Dept.1998] [where wife executed waiver of right of election in presence of subscribing witness, who signed the document at that time attesting to that fact, subscribing witness could secure document evidencing proof of execution later on, after the husband died]). These cases neither involve Domestic Relations Law § 236(B)(3) nor the acknowledgment method of validating a document. Moreover, the precedent suggests that there may be a distinction between the absence of an acknowledgment relating to the signature of a party and the absence of an acknowledgment relating to the signature of a subscribing witness (*compare Matter of Warren,* 16 A.D.2d 505, 229 N.Y.S.2d 1004 [2d Dept.1962], *affd.* 12 N.Y.2d 854, 236 N.Y.S.2d 628, 187 N.E.2d 478 [1962], *with Matter of Maul,* 287 N.Y. 694, 39 N.E.2d 301 [1942], *supra*).

When there is no acknowledgment at all, it is evident that one of the purposes of the acknowledgment requirement —to impose a measure of deliberation and impress upon the signer the significance of the document—has not been fulfilled. Thus, a rule precluding a party from attempting to cure the absence of an acknowledgment through subsequent submissions appears to be sound.

But this case does not involve the complete absence of an acknowledgment; rather, there was an attempt to secure an acknowledged document but there was an omission in the requisite language of the certificate of acknowledgment. A compelling argument can be made that the door should be left open to curing a deficiency like the one that occurred here where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete. Although neither party submitted evidence concerning how the error occurred, we can infer from the fact that the signatures and certificates of acknowledgment are contained on a single page of the document in the same typeface ****691** *****833** that the certificates were typed or printed by the same person at the same time. Since one acknowledgment included all the requisite language and the other did not, it seems likely that the omission resulted from a typographical error. Thus, the deficiency may not have arisen from the failure of the notary public to ***197** engage in the formalities required when witnessing and acknowledging a signature. To the contrary, it may well be that the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact. Thus, the husband makes a strong case for a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgment when that evidence consists of proof that the acknowledgment was properly made in the first instance—that at the time the document was signed the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate. By considering this type of evidence, courts would not be allowing a new acknowledgment to occur for a signature that was not properly acknowledged in the first instance; instead, parties who properly signed and acknowledged the document years before would merely be permitted to conform the certificate to reflect that fact.

In this case, however, we need not definitively resolve the question of whether a cure is possible because, similar to what occurred in *Matisoff,* the proof submitted here was insufficient. In his affidavit, the notary public did not state that he actually recalled having acknowledged the husband's signature, nor did he indicate that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and that he had been employed at a particular bank at that time (corroborating the husband's statement concerning the circumstances under which he executed the document). As for the procedures followed, the notary had no independent recollection but maintained that it was his custom and practice "to ask and confirm that the person signing the document was the same person named in the document" and he was "confident" he had done so when witnessing the husband's signature.

We have held that a party can rely on custom and practice evidence to fill in evidentiary gaps "where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances" (*Rivera v. Anilesh,* 8 N.Y.3d 627, 634, 838 N.Y.S.2d 478, 869 N.E.2d 654 [2007] [internal quotation marks and citation omitted]), thereby creating a triable question of fact as to whether the practice was followed on the relevant occasion. But the averments presented by the notary public in this case are too conclusory to fall into this category.

Custom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure ***198** involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation. For example, in *Rivera,* a dentist who did not recall the procedure that allegedly gave rise to plaintiffs dental malpractice action —a second injection of anesthesia—was able to avoid summary judgment in plaintiff's favor by supplying a detailed description of the multistep protocol she always followed when administering such injections, coupled with proof that this protocol, if followed, comported with generally accepted medical standards.

*****834** ****692** In contrast, the affidavit by the notary public in this case merely paraphrased the requirement of the statute—he stated it was his practice to "ask and confirm" the identity of the signer—without detailing any specific procedure that he routinely followed to fulfill that requirement. There are any number of methods a notary might use to confirm the identity of a signer he or she did not already know, such as requiring that the signer display at least one current form of photo identification (a driver's license or passport). It is also possible that a notary might not employ any regular strategy but vary his or her procedure for confirming identity depending on the circumstances (for example, a notary who works in a bank, law firm or other similar institution might occasionally rely on another employee who knew the signer to vouch for the signer's identity). If the notary actually remembered having acknowledged defendant's signature, he might have been able to fill in the gap in the certificate by averring that he recalled having confirmed defendant's identity, without specifying how. But since he understandably had no recollection of an event that occurred more than a decade ago, and instead attempted to proffer custom and practice evidence, it was crucial that the affidavit describe a specific protocol that the notary repeatedly and invariably used—and proof of that type is absent here. As such, even assuming a defect in a certificate of acknowledgment could be cured under Domestic Relations Law § 236(B)(3), defendant's submission was insufficient to raise a triable question of fact as to the propriety of the original acknowledgment procedure. Plaintiff was therefore entitled to summary judgment declaring that the prenuptial agreement was unenforceable.

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiff's motion for summary judgment ***199** determining that the parties' prenuptial agreement is invalid should be granted, and the certified question should be answered in the negative.

Chief Judge LIPPMAN and Judges READ, SMITH, PIGOTT and RIVERA concur; Judge ABDUS–SALAAM taking no part.

Order reversed, with costs, plaintiffs motion for summary judgment determining that the parties' prenuptial agreement is invalid granted, and certified question answered in the negative.

All Citations

21 N.Y.3d 186, 991 N.E.2d 684, 969 N.Y.S.2d 826, 2013 N.Y. Slip Op. 03871

138 A.D.3d 30
Supreme Court, Appellate Division,
First Department, New York.

Jacob GOTTLIEB, Plaintiff–Appellant–Respondent,
v.
Alexandra Lumiere GOTTLIEB,
Defendant–Respondent–Appellant.

Jan. 28, 2016.

Synopsis

Background: Husband brought divorce action against wife. Wife asserted counterclaims and sought to set aside prenuptial agreement. The Supreme Court, New York County, Ellen Gesmer, J., granted husband summary judgment in part, denied summary judgment for wife, and granted wife interim counsel fees. Both parties appealed.

Holdings: The Supreme Court, Appellate Division, Richter, J., held that:

husband did not engage in overreaching during negotiations leading to agreement;

fact that wife was unaware of husband's exact income at time she executed agreement was not basis to set aside agreement;

husband's behavior during wife's two pregnancies did not warrant setting aside agreement;

terms of agreement were not manifestly unfair;

spousal maintenance provisions of agreement were not unconscionable; and

wife's waiver of fees in agreement did not bar award of interim fees related to child-related issues in separate motion sequence.

Affirmed as modified, and remanded.

Saxe, J., issued concurring opinion.

Feinman, J., issued dissenting opinion.

Attorneys and Law Firms

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JOHN W. SWEENY, J.P., RICHARD T. ANDRIAS, DAVID B. SAXE, ROSALYN H. RICHTER, PAUL G. FEINMAN, JJ.

Opinion

RICHTER, J.

***32** In anticipation of their planned marriage, plaintiff Jacob Gottlieb (the husband) and defendant Alexandra Lumiere Gottlieb (the wife) entered into a prenuptial agreement. The agreement was the product of months of negotiations among the parties and their attorneys, and provided for, in the event of a divorce, the distribution of assets, spousal maintenance and health insurance, inheritance rights, and the purchase by the husband of a luxury apartment in which the wife and children would reside. Prior to the agreement's execution, the wife's counsel, an ****93** experienced matrimonial practitioner, advised her not to sign it, but the wife ignored that advice.

After the parties' marriage broke down, the husband filed this divorce action and the wife moved to set aside the agreement, claiming it was the product of overreaching resulting in manifestly unfair terms. The motion court dismissed the wife's claim that the entire agreement is unenforceable, but reserved for trial the limited issue of whether the agreement's maintenance provisions could be enforced. For the reasons that follow, we reject all of the wife's challenges to the agreement, and issue declarations in the husband's favor upholding the agreement and all its provisions. We also vacate the court's award of interim counsel fees to the wife and remand the matter for further proceedings on that issue.

The wife, now 37 years old, was born in New York City, attended private schools in Manhattan and Connecticut, and received a bachelor's degree in economics from the University of Pennsylvania. After working for several

years in advertising and finance, she decided to pursue a real estate career, and obtained a salesperson's license and a position with Brown Harris Stevens, Inc. She later obtained a certification enabling her to teach yoga classes, but has not worked outside the home for several years. The husband, now 44 years old, also grew up in New York City, and obtained a bachelor's degree from Brown University and a medical degree from New York University School of Medicine. After working as a portfolio manager for various financial firms, he started a hedge fund, of which he is currently majority owner.

The parties met in September 2003, began living together in the beginning of 2004, and became engaged in September 2005. Prior to the engagement, the husband told the wife that he would not marry her unless there was a prenuptial agreement, ***33** and the parties began to discuss terms. In October 2005, while negotiations were ongoing, the wife learned that she was pregnant. She told the husband that she did not want to have a child out of wedlock, and asked to finalize the prenuptial agreement so that they could marry before the child was born.

The parties discussed the terms of the prenuptial agreement many times during the wife's pregnancy, but no agreement was reached. In mid–March 2006, after consulting with a number of attorneys, the wife retained the services of a partner in a prominent New York matrimonial firm. The husband, however, told the wife that, on the advice of his attorney, he would not finalize the prenuptial agreement, or marry her, until after the child was born. In May 2006, the wife gave birth to a daughter, and the negotiations temporarily abated.

In the fall of 2006, the wife asked her attorney to resume negotiations and finalize the terms of the agreement. In early 2007, the husband's counsel sent a draft agreement to the wife's counsel. In a letter dated March 2, 2007, the wife's attorney proposed changes to the draft, many of which were incorporated into the final agreement. The letter states that the wife "understands all that she is potentially giving up by virtue of this Agreement."

In April 2007, the wife learned that she was pregnant again, and told her counsel that she wanted to execute a prenuptial agreement as soon as possible. Counsel for both parties continued negotiating. In a letter dated April 20, 2007, the husband's counsel sent the wife's counsel a list of revisions to the draft agreement, incorporating many of the changes that had been proposed by the wife's counsel. The husband's counsel also sent a statement outlining ****94** the husband's financial circumstances. On April 27, 2007, the wife went to her counsel's office and signed the agreement. The wife concedes that she ignored her counsel's advice not to sign the agreement. Several days later, the husband executed the agreement. The parties were married in May 2007 and their second daughter was born in November 2007.

The prenuptial agreement states that each party had legal counsel of his or her own choosing "who advised him or her fully with respect to his or her rights in and to the property and income of the other and with respect to the effect of this Agreement and that such party understands such advice." Each party acknowledged that the agreement was "fair and reasonable and not unconscionable," and was entered into "freely and ***34** voluntarily and not as a result of fraud, duress, coercion, pressure or undue influence exercised by the other." The agreement also stated that the parties had been advised that they might acquire other rights granted to divorcing spouses, but that such rights could be limited or forfeited by the terms of the agreement.

The agreement defines marital property as (i) all property held jointly by the parties; and (ii) any property agreed to by the parties in writing. Separate property is defined in the agreement as all other property, including business interests, retirement benefits, professional licenses and educational degrees, income earned during the marriage, and any interest in the increase in value of the parties' separate property. Although each party waived any right to equitable distribution, the agreement provided for the following in lieu of a distributive award. First, for each year of the marriage (up to a maximum of 15 years), the husband agreed to deposit into an investment account the sum of $300,000. In the event of divorce, the wife would receive these funds along with any accrued interest. Next, the parties agreed to divide equally all wedding gifts, and real property and financial accounts registered in both parties' names. Any other marital property would be divided in proportion to each party's financial contribution to the asset.

Further, if there were minor children of the marriage at the time of divorce, the husband agreed to purchase, at his total cost and expense, an apartment for the use of the wife and the children. The apartment was

required to be in a full-service doorman building located between 60th and 80th Streets and Third Avenue and Broadway, above the third floor and with one bedroom each for the wife and the children.[1] The husband agreed to pay the maintenance charges, utilities, and other expenses of the apartment, until all of the children reached the age of majority, at which point the wife would vacate the apartment. The husband also is obligated to pay the wife's and children's moving expenses to the apartment. The agreement also provides that two specified Manhattan apartments, including the residence occupied by the parties during their relationship, shall remain the husband's separate property.

[1] The agreement also provided that if the marriage lasted 10 years, and there were no living issue of the marriage at the time of divorce, the husband would purchase, in the wife's name, a one-bedroom apartment in the same location and with the same attributes.

***35** With respect to spousal support, the parties each acknowledged that in light of his or her assets, education, employment history, and rights under the agreement, he or she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Nevertheless, in the event of divorce, the husband ****95** agreed to pay the wife, as taxable maintenance, the sum of $12,500 per month, as long as there is a child of the marriage under the age of four. This amount was in addition to the husband's agreement to purchase, and pay all costs for, an apartment for the wife to live in. The husband also agreed to pay, as nontaxable maintenance, the wife's health insurance, until the parties' children are emancipated. Aside from these provisions, the parties waived any additional spousal maintenance and acknowledged that such waiver was fair and reasonable. In addition, in the spousal support section of the agreement, the wife waived any right to counsel fees, both interim and final.

The agreement also provided for certain inheritance rights for the wife and children. The parties agreed that if the marriage was still intact at the time of the husband's death, the wife would receive her elective share of the husband's estate. In the event of divorce, the husband agreed to leave, either outright or in trust, a specified percentage of his estate to the children of the marriage. Finally, financial statements annexed to the agreement list each parties' assets, liabilities and net worth, although the parties' incomes were not included. The husband and the wife explicitly acknowledged that, upon being advised by counsel, each fully understood the financial information provided by the other, and recognized that their financial circumstances could be considerably different at the time of dissolution of the marriage.

The marriage ultimately broke down, and in August 2012, the husband brought this action for divorce. In her answer, the wife asserts four counterclaims. The first counterclaim seeks a declaration that the entire prenuptial agreement is invalid and unenforceable. The fourth counterclaim seeks rescission of the agreement based on a purported mutual mistake concerning the cost of the apartment the husband was obligated to purchase for the wife. The second and third counterclaims, asserted in the alternative to the first and fourth counterclaims, seek, respectively, declarations that the agreement's maintenance provisions were unfair when the agreement was executed and are currently unconscionable, and that the agreement's ***36** property distribution provisions were unfair as of the execution date.

The wife moved for partial summary judgment on her first counterclaim seeking a declaration that the entire prenuptial agreement is invalid. The wife argued that the agreement was not enforceable because it was the product of overreaching by the husband that resulted in manifestly unfair terms. In her affidavit in support of the motion, the wife expressly acknowledged that she does not seek to invalidate the agreement based on unconscionability, coercion, duress or fraud. The husband cross-moved for partial summary judgment dismissing the wife's four counterclaims.

The motion court denied the wife's motion, and granted the husband's cross motion to the extent of dismissing the wife's first counterclaim attacking the validity of the entire agreement and the third counterclaim challenging the property distribution provisions. The court, however, denied dismissal of the wife's second counterclaim seeking to invalidate the maintenance provisions, and reserved for trial the issues of whether those provisions were fair and reasonable when entered into and whether they are unconscionable today.[2] Both parties now appeal.

[2] The wife withdrew the fourth counterclaim during oral argument before the motion court.

**96 The wife, on her appeal, contends that the motion court erred in denying her motion to set aside the prenuptial agreement. The standards for assessing the validity of a prenuptial agreement are well-settled. A strong public policy exists in favor of parties deciding their own interests through premarital contracts, and a duly executed prenuptial agreement is given the same presumption of legality as any other contract (*Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]; *Matter of Greiff,* 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752 [1998]). Thus, a prenuptial agreement "is presumed to be valid and controlling unless and until the party challenging it meets his or her very high burden to set it aside" (*Anonymous v. Anonymous,* 123 A.D.3d 581, 582, 999 N.Y.S.2d 386 [1st Dept.2014]).

Despite the presumption of validity, an agreement between prospective spouses can be set aside where it is shown to be the product of fraud, duress, overreaching resulting in manifest unfairness, or other inequitable conduct (*see Christian v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849 [1977]). In the absence of such inequitable conduct, however, courts should not redesign the bargain *37 reached by the parties merely because in retrospect the provisions might be viewed as improvident or one-sided (*id.*). Rather, judicial review should be "exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions" (*id.* at 71–72, 396 N.Y.S.2d 817, 365 N.E.2d 849). The setting aside of a prenuptial agreement is "the exception rather than the rule," and the burden of establishing fraud, duress or overreaching is on the party seeking to set aside the agreement (*Anonymous,* 123 A.D.3d at 582, 999 N.Y.S.2d 386).

Here, the wife's motion did not challenge the prenuptial agreement on the ground that it is the product of coercion, duress or fraud. Nor did the wife argue that the agreement's terms as a whole are unconscionable. Rather, her only claim was that the agreement is manifestly unfair due to the husband's overreaching (*see Christian,* 42 N.Y.2d at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). Although no actual fraud need be shown to set aside the agreement on this ground, the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception (*see id., Stawski v. Stawski,* 43 A.D.3d 776, 777, 843 N.Y.S.2d 544 [1st Dept.2007]; *Matter of Baruch,* 205 Misc. 1122, 1124, 132 N.Y.S.2d 402 [Sur.Ct., Suffolk County 1954], *affd.* 286 App.Div. 869, 142 N.Y.S.2d 216 [2d Dept.1955]). In addition, the challenging party must show that the overreaching resulted in terms so manifestly unfair as to warrant equity's intervention (*see Levine v. Levine,* 56 N.Y.2d 42, 47, 451 N.Y.S.2d 26, 436 N.E.2d 476 [1982] [to set aside agreement, both overreaching and manifest unfairness must be demonstrated]; *Christian,* 42 N.Y.2d at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Barocas v. Barocas,* 94 A.D.3d 551, 942 N.Y.S.2d 491 [1st Dept.2012], *appeal dismissed* 19 N.Y.3d 993, 951 N.Y.S.2d 468, 975 N.E.2d 914 [2012]; *Bronfman v. Bronfman,* 229 A.D.2d 314, 315, 645 N.Y.S.2d 20 [1st Dept.1996] [challenger of agreement bears "very high burden" of showing that it is manifestly unfair and that such unfairness was the result of overreaching]).

**97 Judged by these standards, the wife has failed to meet her heavy burden to set aside the prenuptial agreement. No issue of fact exists as to whether the husband engaged in overreaching during the negotiations leading up to the execution of the agreement. The agreement was the product of on-and-off discussions that took place over the course of more than a year and a half. Although initially the parties negotiated by themselves, about midway through, the wife retained the services of a partner in a prominent matrimonial firm. Negotiations continued by the parties and their attorneys, with draft agreements *38 exchanged and terms modified. Both the fact that the wife was an active participant in the negotiations, and was the one who was pushing to get the agreement signed, are hard to reconcile with her current claim of overreaching.

There is no basis to conclude that the wife did not have sufficient time to review the agreement, or that she did not understand its terms. Although the wife maintains that she suffered from depression and anxiety at the time the agreement was signed, no showing has been made that she lacked the mental capacity to understand the agreement, or that she suffered from a psychological impairment that prevented her from making a reasoned decision. Indeed, the motion court noted that the wife's counsel, in the papers below, stated that she was not claiming any medical or psychological disability at the time she signed the agreement. In addition, neither of the

medical professionals who submitted affidavits expressed the opinion that the wife was incapable of understanding the agreement or the consequences of executing it. And when it came time to execute the agreement, the wife admittedly ignored the advice of her own independent counsel and signed it. In view of all these circumstances, we conclude that no inference of overreaching exists (*see Barocas,* 94 A.D.3d at 551–552, 942 N.Y.S.2d 491 [execution of prenuptial agreement not the result of inequitable conduct where, inter alia, agreement was knowingly entered into against counsel's advice]; *Strong v. Dubin,* 48 A.D.3d 232, 232–233, 851 N.Y.S.2d 428 [1st Dept.2008] [prenuptial agreement enforceable where, inter alia, counsel told the defendant that the agreement appeared one-sided, and the defendant responded "It's okay. I just want to get married"]).

The wife complains that she was unaware of the husband's exact income at the time she executed the agreement. However, the mere fact that the husband did not include his income in his financial disclosure, standing alone, is not a basis to set the agreement aside (*see Strong,* 48 A.D.3d at 233, 851 N.Y.S.2d 428 ["A failure to disclose financial matters, by itself, is not sufficient to vitiate a prenuptial agreement"]). Notably, there is no claim by the wife that the husband concealed or misrepresented his income (*see id.*; *Cohen v. Cohen,* 93 A.D.3d 506, 940 N.Y.S.2d 250 [1st Dept.2012]). Further, as the motion court noted, the wife lived with the husband and was aware of the luxurious lifestyle his income and assets afforded, even if the precise amount of the income was unknown to her (*see Matter of Fizzinoglia,* 118 A.D.3d 994, 996, 988 N.Y.S.2d 648 [2d Dept.2014], *affd.* 26 N.Y.3d 1031, 22 N.Y.S.3d 151, 43 N.E.3d 361 [2015] [record indicates that the ***39** petitioner-wife was personally acquainted with the nature of the decedent-husband's assets before signing the agreement, and there was no indication that the decedent had at any time attempted to conceal or misrepresent the nature or extent of his assets]; *Strong v. Dubin,* 48 A.D.3d at 233, 851 N.Y.S.2d 428). Moreover, the substantial financial disparity between the parties was fully disclosed at the time the agreement was executed ****98** (*Smith v. Walsh–Smith,* 66 A.D.3d 534, 535, 887 N.Y.S.2d 565 [1st Dept.2009], *lv. denied* 14 N.Y.3d 704, 2010 WL 606404 [2010]). Contrary to the dissent's suggestion that there was inadequate financial disclosure, a statement attached to the agreement lists the husband's assets, liabilities and net worth, and the wife, who has a degree in economics and has worked in the finance field, specifically acknowledged in the agreement that she fully understood the information provided.

The wife claims on appeal that the agreement was procured through two instances of fraudulent conduct on the husband's part. At the outset, we note that in her submissions below, the wife explicitly disclaimed that her motion was based on fraud. Thus, her current claims of fraud are not properly before us. In any event, they provide no basis to set aside the agreement. The first alleged fraud centers around the apartment the husband was obligated to purchase for the wife. During negotiations, the parties agreed that the purchase price for the apartment would not exceed 120% of the mean price of a comparable apartment. Due to an apparent typographical error, however, the agreement mistakenly stated "20%" instead of "120%."

The wife states that she did not notice this error prior to execution of the agreement, but alleges that the husband did and he failed to correct it. The record, however, contains no evidentiary support for these allegations. The husband readily admits that the parties had agreed on the 120% figure and that the agreement contains an error, and acknowledges his present obligation to purchase an apartment within that price range. It is hard to understand how the husband's alleged conduct would amount to fraud in light of the wife's acknowledgment that she did not even notice the error (*see Lemle v. Lemle,* 92 A.D.3d 494, 499, 939 N.Y.S.2d 15 [1st Dept.2012] ["an essential element of fraud is justifiable reliance upon the representations made"]). In any event, even if the husband failed to correct the error before the agreement was signed, the equitable remedy would not be to invalidate the entire agreement, but to require ***40** the husband to abide by the 120% cost cap, an obligation he fully accepts. [3]

3 Although not in record on appeal, subsequent motion practice in this Court reveals that, in compliance with his obligation under the agreement, the husband purchased an $8.7 million apartment for the wife and children to live in.

The wife fares no better with her second claim of alleged fraud, which centers around the inheritance rights contained in the agreement. The agreement provides that, in the event of divorce, the children of the marriage will receive a portion of the husband's estate, either outright or in trust. The wife alleges that the husband

deceptively included the "in trust" language contrary to the parties' prior understanding. However, the record does not support the wife's contention that the parties had agreed that the children would receive their inheritance outright. In fact, the parties' communications on this point addressed only the amount of the inheritance, and not the form in which it would be conveyed. [4] Moreover, it is difficult to understand how this would constitute grounds sufficient to invalidate the agreement. The provision only governs the husband's financial obligations to his children ****99** in the event of his death, and does not involve any issues related to the wife's financial welfare if the marriage is dissolved during his lifetime.

4 The wife also complains that her counsel was ineffective for failing to notice both the trust provision and the error about the cost of the apartment. Even if true, that would have no bearing on whether the husband engaged in overreaching. We also reiterate that the wife ignored her counsel's advice not to sign the agreement.

There is no merit to the wife's contention that the husband's behavior during her two pregnancies warrants setting aside the agreement. According to the wife, the husband told her that he would not enter into a prenuptial agreement, and thus would not marry her, until after the birth of their first child. The wife further alleges that the husband told her that he would end their relationship if she terminated her second pregnancy. This Court has held, however, that similar behavior is insufficient to invalidate a prenuptial agreement. For example, in *Cohen,* 93 A.D.3d at 506, 940 N.Y.S.2d 250, we held that a threat to a pregnant woman to cancel the wedding if she refused to sign the agreement provided no basis to set the agreement aside. Likewise, in *Barocas,* 94 A.D.3d at 551, 942 N.Y.S.2d 491, we declined to invalidate a prenuptial agreement where the wife believed that there would be no wedding if she did not sign the agreement (*see* ***41** *also Weinstein v. Weinstein,* 36 A.D.3d 797, 799, 830 N.Y.S.2d 179 [2d Dept.2007]; *Colello v. Colello,* 9 A.D.3d 855, 858, 780 N.Y.S.2d 450 [4th Dept.2004]). We cannot set aside the agreement here merely because the husband's repeated refusal to marry his then-pregnant fiancee without a prenuptial agreement might be viewed by some as callous. The wife's argument that she had no meaningful choice due to the husband's actions is belied by the fact that she knowingly entered into the agreement against the advice of her counsel (*see Barocas,* 94 A.D.3d at 552, 942 N.Y.S.2d 491).

Because the circumstances surrounding the execution of the agreement raise no issue of fact as to whether there was overreaching, we need not inquire into whether the terms of the agreement are manifestly unfair (*see Christian,* 42 N.Y.2d at 73, 396 N.Y.S.2d 817, 365 N.E.2d 849 ["If the execution of the agreement [is] fair, no further inquiry will be made"]; *Barocas,* 94 A.D.3d at 551, 942 N.Y.S.2d 491). However, because the dissent addresses this issue, we note that the wife has also failed to make the requisite showing that the agreement's terms are manifestly unfair. Under the agreement, the wife is entitled to, in lieu of equitable distribution, the sum of $300,000, along with interest, for each year of the marriage. Further, the agreement provides that all real property and financial accounts in both parties' names would be equally divided, and other marital property would be divided in proportion to each party's financial contribution to the asset.

With respect to spousal support, the agreement provided the wife with $12,500 per month until the youngest child reached the age of four. Although there was no provision for a regular monthly payment thereafter, the agreement provided the wife with free luxury housing (including maintenance, utilities and other expenses) until the youngest child turns 18, along with free health insurance during that time. And, if the parties had no living children at the time of the divorce, the husband would be obligated, if the marriage lasted 10 years, to purchase an apartment for the wife in her own name. The agreement also ensured that, if the marriage was intact at the time of the husband's death, the wife would receive her elective share of his estate. Finally, although not inuring to the wife's benefit, the agreement provided inheritance rights for the children.

Viewing the parties' prenuptial agreement in its entirety, it cannot be said that its terms are manifestly unfair. This Court cannot invalidate the agreement ****100** merely because the husband has more than enough assets to give the wife additional funds. Although, at the end of the day, a significant financial disparity ***42** will exist between the parties to this relatively short marriage, any such inequality is simply not a basis for vitiating their freely-negotiated agreement (*see Barocas,* 94 A.D.3d at 551, 942 N.Y.S.2d 491 [upholding agreement where wealthier spouse retained essentially all of the assets acquired during the marriage]). The wife bargained for the benefits she would receive in the event of a divorce, and we decline

to undo the agreement merely because she may now, in retrospect, view her choices as having been improvidently made (*see Barnes–Levitin v. Levitin,* 131 A.D.3d 987, 988 [2d Dept.2015] ["A[ ] [prenuptial] agreement will not be overturned merely because, in retrospect, some of its provisions were improvident or one-sided"]; *Herr v. Herr,* 97 A.D.3d 961, 963, 949 N.Y.S.2d 786 [3d Dept.2012], *lv. dismissed* 20 N.Y.3d 904, 956 N.Y.S.2d 476, 980 N.E.2d 525 [2012] ["[the wife] was fully aware of the rights she was waiving at the time she signed the agreement and, ... an agreement will not be set aside simply because a party relinquished more than the law would have provided"]). Moreover, neither the wife nor the dissent cites to any case in which a premarital agreement has been found to be manifestly unfair where it provides a spouse with the financial benefits the wife is receiving in this case.

Although the dissent concludes that it is premature to rule on the validity of the parties' prenuptial agreement because there are triable issues of fact, it fails to identify any specific facts that would, under the case law, require invalidation of the agreement after a trial. Contrary to the dissent's view, our decision upholding the agreement does not turn on the parties' credibility. Rather, for the purpose of this decision, we accept as true the wife's description of the circumstances underlying the execution of the agreement, and conclude that her claims do not support a finding of overreaching.

The wife's description of herself as being in the "precarious position of negotiating as an unmarried mother," a view impliedly adopted by the dissent, is at odds with the fact that she was represented by experienced matrimonial counsel who negotiated the agreement over an extended period of time. Likewise, the dissent all but ignores the fact that the wife, an educated college graduate, signed the agreement against the express advice of her own counsel. Although the dissent decries the husband's negotiation style, the fact that he may have modified his initial offers can hardly be seen as overreaching where the wife was represented by counsel, who might have been able to continue negotiations if the wife had followed her advice not to sign the agreement.

***43** In questioning the fairness of the separate property provisions of the agreement, the dissent states that the parties intended the wife to raise the children full-time as a stay-at-home spouse. In fact, the record suggests just the opposite. In the agreement, the wife explicitly acknowledged that in light of her assets, education, employment history, and her rights under the agreement, she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Further, the husband's maintenance obligations, if the parties did not stay together, remained only so long as there is a child under the age of four. This is a strong indicator that the parties intended the wife to return to the workforce when the children started school.

As noted earlier, the husband is obligated to provide a luxury apartment for the ****101** wife and children until the last child reaches the age of majority. The dissent finds this provision manifestly unfair because the wife could lose the apartment in the event she decided to give full custody to the husband such that the children would no longer live with her even part of the time. However, the parties voluntarily settled the issue of legal custody and parenting time, and agreed that the wife would have primary residential custody of the children. The dissent engages in pure speculation by suggesting that the parties plan to change their current custody arrangement, or that the children will not be residing at all with the wife going forward. [5]

5 Contrary to the dissent's view, the fact that the wife oversaw the renovations of the apartment in which the parties ultimately resided has no bearing on the parties' intent at the time the prenuptial agreement was signed. Nor does it call into question the validity of the clear and unequivocal separate property provisions of the agreement.

We do not share the dissent's view that the terms of a prenuptial agreement are manifestly unfair merely because a party may enjoy a less lavish lifestyle upon divorce than existed during the marriage. It appears that the dissent presupposes that the purpose of a prenuptial agreement is to equitably divide up the parties' assets, and to maintain the marital standard of living for the lesser-monied spouse. That, however, is the purpose of the statutory scheme (*see* Domestic Relations Law § 236[B][5], [6]), and is not the reason why most prospective spouses enter into prenuptial agreements. We also disagree with the dissent's position that a prenuptial agreement can be set aside if its terms do not match "the degree of economic interdependence" the parties shared during the marriage. That ***44** standard, which the dissent does not support with any case law, could result in the undoing of the vast majority of marital agreements. The dissent fails to recognize that a party may

have legitimate reasons for not wanting to give assets to an ex-spouse, regardless of how the couple managed their money during the marriage. For example, in many cases, prenuptial agreements are used to preserve assets so that they are available for children of the current, or a former, marriage.

It goes without saying that premarital agreements often involve substantial financial disparities between the parties, with the more-monied party seeking to protect his or her assets and business interests. If the unequal division of assets, or the failure to maintain the marital lifestyle, were to be the test used to determine validity, it would inevitably result in the setting aside of many, if not most, prenuptial agreements. The criteria focused on by the dissent include some of the statutory factors used to determine equitable distribution and maintenance awards in a contested divorce proceeding, but here the parties decided not to avail themselves of that statutory scheme. We recognize that there comes a point when the imbalance is so extreme that it is appropriate for equity to intervene. This, however, is not such a case.

Contrary to the dissent's implication, the Court of Appeals' decision in *Christian,* 42 N.Y.2d at 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 does not hold that a prenuptial agreement is manifestly unfair when it does not result in a continuation of the marital standard of living. According to the dissent, that test finds support in *Ducas v. Guggenheimer,* 90 Misc. 191, 153 N.Y.S. 591 (Sup.Ct., N.Y. County 1915), *affd sub nom. Ducas v. Ducas,* 173 App.Div. 884, 157 N.Y.S. 801 (1st Dept.1916), a trial level decision from 1915. Although *Christian* cited to *Ducas,* it did so for an entirely ****102** different proposition with which we agree-that agreements between spouses involve a fiduciary relationship requiring the utmost of good faith. In no way does *Christian* support the dissent's position that prenuptial agreements are manifestly unfair merely because there is an appreciable reduction in the marital standard of living or a significant disparity in the allocation of assets.

Petracca v. Petracca, 101 A.D.3d 695, 956 N.Y.S.2d 77 (2d Dept.2012), a case cited by the dissent, is distinguishable on its facts. In *Petracca,* the court set aside a postnuptial agreement where there were gross inaccuracies in the husband's financial disclosures, and the wife had only a few days to review the agreement, did not understand it, and did not have counsel, all factors not present ***45** here. Although the court also discussed the disparity in the parties' net worth, it did not establish any bright-line rule mandating the invalidation of marital contracts based solely on financial imbalances. We note too that, unlike here, there is no indication that the wife in *Petracca* was entitled to distributive payments or free housing and health insurance.

Matter of Greiff, 92 N.Y.2d at 341, 680 N.Y.S.2d 894, 703 N.E.2d 752, relied upon by the wife, does not require a different result. In *Greiff,* the Court of Appeals, while affirming the principle that prenuptial agreements are not subject to any special evidentiary burdens, recognized that in "exceptional circumstances," the special relationship between engaged parties may shift the burden of persuasion to the proponent of the agreement to show freedom from overreaching (*id.* at 343, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752). In order for the burden to shift, however, the spouse contesting a prenuptial agreement must establish "a fact-based, particularized inequality" and must demonstrate that the "premarital relationship between the contracting individuals manifested 'probable' undue and unfair advantage" (92 N.Y.2d at 343, 346, 680 N.Y.S.2d 894, 703 N.E.2d 752). Here, no burden shifting is warranted because, for the reasons already discussed, the wife has failed to show any such inequality or undue and unfair advantage (*see Matter of Barabash,* 84 A.D.3d 1363, 1364, 924 N.Y.S.2d 544 [2d Dept.2011]; *Strong,* 48 A.D.3d at 232, 851 N.Y.S.2d 428; *Matter of Greiff,* 262 A.D.2d 320, 321, 691 N.Y.S.2d 541 [2d Dept.1999], *lv. denied* 93 N.Y.2d 817, 697 N.Y.S.2d 564, 719 N.E.2d 925 [1999]).

We disagree with the concurrence's view that because the parties were not married at the time the agreement was executed, the manifest unfairness standard set forth in *Christian,* 42 N.Y.2d at 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 has no applicability here. In *Matter of Greiff,* 92 N.Y.2d at 341, 680 N.Y.S.2d 894, 703 N.E.2d 752, the Court of Appeals spoke of "the unique character of the inchoate bond between prospective spouses—a relationship by its nature permeated with trust, confidence, honesty and reliance" (*id.* at 347, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see also Rosenzweig v. Givens,* 13 N.Y.3d 774, 775, 886 N.Y.S.2d 845, 915 N.E.2d 1140 [2009] [recognizing that a couple can have a fiduciary relationship before marriage]; *Robinson v. Day,* 103 A.D.3d 584, 585, 960 N.Y.S.2d 397 [1st Dept.2013] [romantic companions of 14 years were in confidential

relationship of trust and confidence]; *Colello v. Colello,* 9 A.D.3d 855, 858–859, 780 N.Y.S.2d 450 [4th Dept.2004] ["[the] defendant had a fiduciary relationship with [the] plaintiff both as her fiancé and as her spouse"]).

Recognizing the nature of this special relationship, courts have specifically applied *Christian's* manifest unfairness standard to prenuptial agreements (*see e.g.* ****103** *Lombardi v. Lombardi,* 127 A.D.3d 1038, 1041, 7 N.Y.S.3d 447 [2d Dept.2015]; ***46** *Bibeau v. Sudick,* 122 A.D.3d 652, 654–655, 996 N.Y.S.2d 635 [2d Dept.2014]). Here, the undisputed facts show that the parties shared a fiduciary relationship. At the time the prenuptial agreement was entered into, the parties were engaged, had been living together for more than three years, had a child together, and were expecting another.[6] Thus, their relationship was "permeated with trust, confidence, honesty and reliance" (*Greiff,* 92 N.Y.2d at 347, 680 N.Y.S.2d 894, 703 N.E.2d 752) sufficient to make them fiduciaries.[7] We do not share the concurrence's belief that the husband's negotiating style and his behavior during the engagement negates the existence of a fiduciary relationship between the parties. That position would make it difficult to ever find a fiduciary relationship between couples with significant assets whose marital agreements are sharply negotiated.

6 We need not decide whether a fiduciary relationship would exist where an affianced couple had little or no relationship prior to executing a prenuptial agreement.

7 The concurrence also questions the significance of *Christian* in light of the subsequent enactment of the Equitable Distribution Law. This argument was not raised by either party on appeal. Moreover, trial and appellate courts throughout the State have consistently applied *Christian* to marital agreements entered into after the Equitable Distribution Law became effective.

On his appeal, the husband challenges the motion court's decision to order a trial on the validity of the agreement's maintenance provisions. Domestic Relations Law § 236(B)(3) provides that a prenuptial agreement may include provisions governing maintenance provided they "were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment" (Domestic Relations Law § 236[B][3][3]; *see Anonymous,* 123 A.D.3d at 584, 999 N.Y.S.2d 386).[8] For the reasons already discussed, and as the parties explicitly acknowledged in the agreement, the maintenance provisions here were neither unfair nor unreasonable at the time the agreement was entered into (*see Barocas,* 94 A.D.3d at 552, 942 N.Y.S.2d 491 [in light of the wife's knowing and voluntary execution of prenuptial agreement with benefit of counsel, waiver of spousal support was not unfair or unreasonable at time agreement signed]; *Markovitz v. Markovitz,* 29 A.D.3d 460, 461, 816 N.Y.S.2d 419 [1st Dept.2006] [agreement upheld where, inter alia, the parties represented that they considered the agreement fair]).

8 That statutory provision also makes maintenance provisions subject to the requirements of section 5–311 of the General Obligations Law, which prohibits agreements that relieve either spouse of the support obligation such that the other is likely to become a public charge. Here, there is no claim that the wife runs the risk of becoming a public charge.

***47** Nor are the maintenance provisions unconscionable as applied to the present circumstances. An agreement will be viewed as unconscionable only "if the inequality is so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*McCaughey v. McCaughey,* 205 A.D.2d 330, 331, 612 N.Y.S.2d 579 [1st Dept. 1994] [internal quotation marks omitted]; *see also Christian,* 42 N.Y.2d at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849 [an unconscionable agreement is one which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other]). Judged by these standards, no unconscionability exists. Although the wife is not currently entitled to a specific monthly maintenance payment, ****104** she effectively is receiving nontaxable maintenance by way of other benefits provided for in the agreement. She gets a shelter allowance until the children reach majority (i.e., for the next 10 years), in the form of rent-free, expense-free luxury housing, and she is also entitled to, during that same period, free health insurance.

Moreover, under the agreement, the wife, after only five years of marriage, will receive a monetary distribution from the investment account set up and funded by the husband. The value of that account, as of January 2013, was approximately $1.6 million. This amount is in addition to the wife's listed net worth, as of that same date, of approximately $1.5 million. Thus, the wife will

have at her disposal at least $3.1 million in assets, with no housing or health insurance costs, because those costs are being paid by the husband. In addition, although no final child support order had been issued at the time this appeal was heard, the husband has proposed paying $9,000 per month in child support, plus 100% of reasonable child care, health insurance, unreimbursed medical, dental and optical expenses, private school, Hebrew school, tutoring, summer camp, extracurricular activities and college tuition, room and board.

In view of the wife's current financial circumstances, along with the $1.6 million and other benefits she will be receiving in the future from the husband, it cannot be said that the agreement's maintenance provisions shock the conscience. The wife is only 37 years old, and has an economics degree from the University of Pennsylvania and prior experience in real estate and finance. In the agreement, she explicitly acknowledged that in light of, inter alia, her education and employment ***48** history, she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Thus, there is no reason why she cannot in the future reenter the workforce to supplement the benefits she will receive under the agreement.

The husband's appeal also challenges the court's award of interim counsel fees to the wife. In a motion sequence separate from the one involving the prenuptial agreement, the husband sought exclusive occupancy of the marital residence, an order setting the amount of his child support obligation, and a protective order limiting further discovery. The wife opposed the motion and cross-moved for exclusive occupancy, temporary child support and an award of interim counsel fees. The affidavits in support submitted by the wife and her counsel made clear that the fee request was not made in connection with the litigation involving the validity of the prenuptial agreement. Rather, the wife sought fees of $30,000 for litigating the current motion sequence as well as $20,000 for unspecified additional legal work purportedly unrelated to issues involving the prenuptial agreement. As relevant here, the motion court granted the wife's motion and awarded interim counsel fees in the amount of $50,000. [9]

[9] The parties do not challenge on this appeal the court's determination of the child support, exclusive occupancy or discovery issues raised in the motion.

We reject the husband's contention that the wife's waiver in the prenuptial agreement of interim and final counsel fees bars any fee award. On appeal, the wife maintains that she is entitled to these counsel fees, which she says were awarded for litigating child-related matters. Because the prenuptial agreement does not cover child-related matters, the waiver does not preclude an award of counsel fees connected to litigating the child support issues raised in the motion (*see* ****105** *Vinik v. Lee,* 96 A.D.3d 522, 523, 947 N.Y.S.2d 424 [1st Dept.2012]). Likewise, legal fees related to the exclusive occupancy aspect of the motion are recoverable because the heart of that dispute is the children's best interests, and the place where the children will be living, which are child-related matters. However, because it is not clear what portion of the $50,000 sought is connected to child-related issues, the matter is remanded for further development of the ***49** record as to how much of the fee request involves those issues. [10]

[10] Because our decision in *Anonymous,* 123 A.D.3d at 581, 999 N.Y.S.2d 386 was issued after this case was argued, the parties have not addressed the question of whether, despite the waiver, counsel fees for non-child-related matters can be awarded "as justice requires" (*id.* at 585, 999 N.Y.S.2d 386).

We have considered the wife's remaining contentions and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered October 31, 2013, which, to the extent appealed from as limited by the briefs, denied defendant wife's motion for partial summary judgment on the first counterclaim, granted plaintiff husband's cross motion for partial summary judgment dismissing the first and third counterclaims and denied the cross motion to the extent it sought dismissal of the second counterclaim, and granted defendant's cross motion for interim counsel fees, should be modified, on the law and the facts, to deny the cross motion to dismiss the first and third counterclaims, to declare that the parties' prenuptial agreement is valid and enforceable, that the agreement's maintenance provisions were fair as of the date of execution and are not currently unconscionable, and that the agreement's property distribution provisions were fair as of the date of execution, to deny the cross motion for interim counsel fees, to vacate the award of such fees, to remand the matter for proceedings consistent herewith, and otherwise affirmed, without costs.

All concur except SAXE, J. who concurs in a separate Opinion, and FEINMAN, J. who dissents in an Opinion.

SAXE, J. (concurring).

I agree with the result reached by the majority, and with much of the reasoning of that opinion. I write separately to suggest that the standard enunciated in *Christian v. Christian,* 42 N.Y.2d 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 (1977), relied on by both the majority and the dissent to assess the enforceability of the parties' prenuptial agreement, is not the correct analytical framework to use when considering prenuptial agreements, especially their property division provisions. Property division provisions of prenuptial agreements may be set aside only on grounds that would warrant the invalidation of any contract.

Facts

The drawn-out process by which Mr. Gottlieb proposed and re-negotiated the prenuptial agreement at issue here is fully laid out in my colleagues' writings, and need not be reiterated at length. It is enough to say that after first insisting on a ***50** prenuptial agreement, he then repeatedly reduced his offered terms, then declined to enter into an agreement while Ms. Lumiere Gottlieb was pregnant with the parties' first child, and only finally acceded to the execution of an agreement when Ms. Lumiere Gottlieb was pregnant with their second child.

The final agreement, executed by Ms. Lumiere Gottlieb against her attorney's advice, listed Ms. Lumiere Gottlieb's net worth as $610,817 and Mr. Gottlieb's net worth as $103,894,476. It limited the ****106** property to be treated as marital property as property titled in both parties' names as joint tenants or tenants by the entirety, along with any property agreed in writing by the parties to be marital property, and defined all other property as separate property, including income earned during the marriage, business interests, and the two apartments Mr. Gottlieb purchased before the marriage. Ms. Lumiere Gottlieb waived any interest in the increase in the value of Mr. Gottlieb's separate property, along with any rights under the Equitable Distribution Law. The only property distribution provided for by the agreement was that Ms. Lumiere Gottlieb would be entitled to payment of $300,000 for each year of the marriage, plus interest compounded annually at the rate of five percent. Pursuant to the agreement, Mr. Gottlieb was required to deposit sums into an account for this purpose during the marriage. The current value of that account is approximately $1,586,219.

Ms. Lumiere Gottlieb also waived spousal maintenance, except that if any minor children resided with Ms. Lumiere Gottlieb at the time of divorce, during the period in which a child of the marriage was under four years old Mr. Gottlieb would pay spousal maintenance of $12,500 per month, and except that as long as a minor child resided with her, Mr. Gottlieb agreed to pay the carrying costs and utilities for an apartment (of a specified size, location and type) for Ms. Lumiere Gottlieb until the youngest child attained the age of majority, with all such payments to be treated as child support. Mr. Gottlieb also agreed to provide health insurance for Ms. Lumiere Gottlieb until the emancipation of the parties' children.

Mr. Gottlieb commenced this action for divorce in 2012, some five years after their marriage. In her answer, Ms. Lumiere Gottlieb interposed four counterclaims, the first seeking to declare the entire prenuptial agreement unenforceable, the second to set aide the maintenance provisions and the third to set aside the property distribution provisions. Her fourth ***51** counterclaim concerned an error in a provision about the price of the apartment Mr. Gottlieb agreed to purchase for her and the children.

Ms. Lumiere Gottlieb moved, and Mr. Gottlieb cross-moved, for partial summary judgment on Ms. Lumiere Gottlieb's counterclaims. Ms. Lumiere Gottlieb contended that as a matter of law, the prenuptial agreement was unenforceable as the product of overreaching causing manifest unfairness.

The motion court dismissed Ms. Lumiere Gottlieb's first and third counterclaims, but denied dismissal of her second cause of action, which challenged the enforceability of the agreement's maintenance provisions. The majority now holds that the dismissal of the first and third counterclaims was correct, and that the second counterclaim should have been dismissed as well. I agree, although for other reasons. The dissent adopts Ms. Lumiere Gottlieb's suggestion that a prenuptial agreement may be set aside if it is the product of overreaching causing manifest unfairness, and would require a hearing to determine whether to set aside the agreement based on

that standard. I strongly take issue with dissent's analysis and its conclusion.

Discussion

Both the majority and the dissent quote *Christian v. Christian* for the proposition that "[t]o warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching" (*id.* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849), relying on that statement to hold that prenuptial agreements may be set aside (1) if they are the product of ****107** "overreaching" and, if so, (2) if they are "manifestly unfair." Unlike my colleagues, I submit that it is not appropriate to look to *Christian* for the current standard for judging the enforceability of prenuptial agreements' property division provisions.

There are two important points to recognize about the *Christian* decision. First, *Christian* was issued in 1977, so its analysis of this issue must, of necessity, be informed by the provisions of the subsequent Equitable Distribution Law, enacted in 1980, which provides its own approach for judging the enforceability of marital agreement provisions. While the dissent repeatedly characterizes my position as advocating that the statute "supersedes" the *Christian* ruling, I simply point out that instead of automatically applying the *Christian* standard, we should recognize that in Domestic Relations Law § 236(B)(3)—enacted after *Christian* was decided—the ***52** legislature explicitly and implicitly provided standards by which to determine the enforceability of the various components of prenuptial agreements.

Second, *Christian* was concerned only with separation agreements between spouses, and its reasoning applied only to married couples who enter into separation agreements; it was not intended to apply to not-yet-married, affianced couples, and there is scant support for extending its application in that way.

Domestic Relations Law § 236(B)(3) creates a different standard than the rule stated in *Christian.* In contrast to *Christian's* requirement of special scrutiny for separation agreements between a married couple, the statute explicitly authorizes and approves of agreements made both before and during a marriage, setting a baseline by which such agreements are deemed valid and enforceable as long as they are "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (*id.*).

Importantly, while section 236(B)(3) requires additional scrutiny for particular types of provisions in marital agreements, specifically, maintenance and child-related provisions, the statute makes no provision at all for heightened scrutiny of property division aspects of marital agreements. By imposing a specified heightened standard for support provisions, but not affirmatively imposing any such standard for property division provisions, we may infer, through the principle of *expressio unius est exclusio alterius,* that the legislature intended *not* to apply any such heightened standard to property division provisions of marital agreements (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240).

So, while Domestic Relations Law § 236(B)(3) sets special standards by which to review maintenance and child support provisions of prenuptial agreements, the absence of a heightened standard in the statute for property provisions indicates that a heightened standard should not be applied when judging property provisions. The *Christian* analysis, which looks for overreaching and then manifest unfairness, creates a standard similar to the § 236(B)(3) standard for judging maintenance provisions, with *Christian's* "manifest unfairness" component approximating the "fair and reasonable" component of the statute's maintenance standard, while *Christian's* "overreaching" component approximates the (procedural) "unconscionability" prong of the statute's standard for judging maintenance provisions. Since *Christian's* analysis imposes a ***53** heightened standard, while § 236(B)(3) requires that property provisions be judged by ordinary standards for contract enforcement, the use of *Christian's* ****108** standards for judging property provisions is incorrect.

In insisting that the *Christian* standard must be employed here, the dissent relies on *Goldman v. Goldman,* 118 A.D.2d 498, 500 N.Y.S.2d 111 (1st Dept.1986), which does not provide any support for its point. *Goldman* involved an action to set aside a reconciliation agreement, which is not an agreement to which Domestic Relations Law § 236(B)(3) applies, so its facts were virtually the converse of the situation presented here, and its use of the analysis provided by *Christian v. Christian* was therefore uniquely appropriate there, as opposed to the circumstances of this appeal.

Even if the *Christian* pronouncement survived the Equitable Distribution Law, it would have no applicability to prenuptial agreements. It was the spousal relationship of the parties that prompted the *Christian* Court to explain that "separation agreements subjected to attack are tested carefully" (42 N.Y.2d at 65, 396 N.Y.S.2d 817, 365 N.E.2d 849) and that "a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract" (*id.* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). In support of its premise regarding the special treatment of separation agreements, it quoted a 1889 Court of Appeals decision for the proposition that " '[a] court of equity ... inquires whether the contract [between husband and wife] was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it' " (*id.* at 65, 396 N.Y.S.2d 817, 365 N.E.2d 849, quoting *Hendricks v. Isaacs,* 117 N.Y. 411, 417, 22 N.E. 1029 [1889]).

Indeed, when the Court of Appeals has discussed the *Christian* decision, it has explained that "because of the *fiduciary relationship between husband and wife,* separation agreements generally are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" (*Levine v. Levine,* 56 N.Y.2d 42, 47, 451 N.Y.S.2d 26, 436 N.E.2d 476 [1982] [emphasis added], citing *Christian v. Christian,* 42 N.Y.2d at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849, and *McGahee v. Kennedy,* 48 N.Y.2d 832, 834, 424 N.Y.S.2d 343, 400 N.E.2d 285 [1979]). Similarly, cases of this and other Departments applying *Christian's* standard for setting aside marital agreements on the ground that they are "manifestly unfair to a spouse because of the other's overreaching" have most often involved agreements between spouses (*see e.g.* ***54** *Petracca v. Petracca,* 101 A.D.3d 695, 698, 956 N.Y.S.2d 77 [2d Dept. 2012] [internal quotation marks omitted]; *Kleinman v. Kleinman,* 289 A.D.2d 18, 733 N.Y.S.2d 417 [1st Dept.2001], *lv. denied* 98 N.Y.2d 610, 749 N.Y.S.2d 2, 778 N.E.2d 553 [2002]; *Gibson v. Gibson,* 284 A.D.2d 908, 726 N.Y.S.2d 195 [4th Dept.2001]).

It is the fiduciary nature of the marital relationship that has prompted the law to apply intense scrutiny to separation agreements between married couples. In contrast, the circumstances of unmarried parties who are negotiating prenuptial agreements are virtually the converse of a marital relationship. Typically, a monied prospective spouse, like Mr. Gottlieb here, will refuse to proceed with the marriage unless the non-monied prospective spouse accedes to the proposed terms; that is, the parties will never marry, and therefore never undertake the fiduciary obligations that status entails, unless and until the proposed agreement is signed.

The distinction between how the law treats the two situations is illustrated by the very fact that despite the inherent duress of a threat not to marry unless the ****109** proposed agreement is accepted, such a threat does not invalidate a prenuptial agreement (*see Barocas v. Barocas,* 94 A.D.3d 551, 942 N.Y.S.2d 491 [1st Dept.2012], *appeal dismissed* 19 N.Y.3d 993, 951 N.Y.S.2d 468, 975 N.E.2d 914 [2012]; *Cohen v. Cohen,* 93 A.D.3d 506, 940 N.Y.S.2d 250 [1st Dept.2012]).

The differentiation between married spouses and non-married couples for purposes of imposing a fiduciary duty is consistent with the law's general approach to marriage. As the U.S. Supreme Court recognized in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), marriage fundamentally alters the legal status of the couple, creating new legal rights and obligations that are not present for a non-married couple. Among those rights and obligations is the obligation to give, and the right to receive, the utmost good faith, fairness and loyalty that is the essence of a fiduciary duty.

My colleagues' view that established law imposes the same fiduciary duty owed in marital relationships on engaged couples entering into prenuptial agreements is not well founded. I would not rely on *Matter of Greiff,* 92 N.Y.2d 341, 680 N.Y.S.2d 894, 703 N.E.2d 752 (1998) as does the majority writer, because it is an explicitly narrow ruling; it does not support a broad extension to prenuptial agreements generally of the rule imposing a fiduciary duty on separation agreements between spouses. Unlike *Greiff,* there is nothing extraordinary about Ms. Lumiere ***55** Gottlieb's challenge to the prenuptial agreement at issue here. And, while there are circumstances in which a non-married romantic relationship may correspond closely enough to a married relationship to make imposition of a fiduciary duty appropriate (*see e.g. Rosenzweig v. Givens,* 13 N.Y.3d 774, 775, 886 N.Y.S.2d 845, 915 N.E.2d 1140 [2009]; *Robinson v. Day,* 103 A.D.3d 584, 585, 960 N.Y.S.2d 397 [1st Dept.2013]), in my view the relationship

between these parties at the time they entered into the prenuptial agreement does not present such a situation.

A rule that a fiduciary duty arises by virtue of a couple's engagement would clearly be unworkable; the mere label and plan to become married in the future, is not enough in itself to create a duty of loyalty. And, barring such a bright-line rule, it would be difficult to pinpoint the moment in time, or particular circumstances that would cause a fiduciary duty to spring into being between fiancés. While some might suggest that having children together should be viewed as a viable basis for imposing a fiduciary duty, it is important to note that the law limits the obligations of unmarried parents to the support and care of the children, and does not impose a duty of support and care toward the partner. By the same token, the law should not be extended to impose a fiduciary duty solely by virtue of a couple's having children together.

A fiduciary relationship "may arise where a bond of trust and confidence exists between the parties and, hence, the defendant must be charged with an obligation not to abuse the trust and confidence placed in him or her by the plaintiff" (*Rocchio v. Biondi,* 40 A.D.3d 615, 616, 835 N.Y.S.2d 401 [2d Dept.2007]). The essence of a fiduciary relationship is the expectation that the fiduciary will, and should, be guided by the interests of the other party. No such expectation could have reasonably arisen here.

From nearly the outset of their relationship, Mr. Gottlieb indicated to his fiancée that he was not prepared to be generous with her in any way with respect to the emoluments of marital distribution—that marriage to him required her to accept a hard bargain, given his considerable ****110** wealth. But he laid these cards on the table, and, in fact, when the prenuptial agreement was finally negotiated and ready for execution, Ms. Lumiere's counsel urged her not to sign it—advice she refused to take. Ms. Lumiere could have had no expectation that Mr. Gottlieb was protecting her interests as his fiancée; his treatment ***56** of her demonstrated the converse, the complete absence of a relationship of trust and confidence. [1]

[1] It is not merely Mr. Gottlieb's negotiating style that negates the existence of a fiduciary relationship between the parties at the time they entered into the agreement. Rather, it is the entire constellation of events in the premarital life of this couple, as reflected in the record, that overwhelmingly demonstrates that Ms. Lumiere Gottlieb could not reasonably have reposed trust in Mr. Gottlieb when she executed the agreement.

The dissent suggests that the court should provide legal protection to a party who from the beginning of her relationship with her future spouse refused to acknowledge what was always there to be seen—that her fiancé was never going to meet the most basic tenet of a fiduciary relationship. Marriage was a business to him, and he let her know that, not in so many words, but by his conduct. The dissent disagrees, asserting that Mr. Gottlieb did not make any such statements in his submissions to the court, and in fact took the position that the agreement provides Ms. Lumiere Gottlieb with a "luxurious and secure life." However, the record strongly supports the inferences I draw, with regard to how Mr. Gottlieb treated his fiancée at the time they entered into the agreement; assertions made by a party in court papers do not disprove those inferences.

Therefore, in a case such as this, when considering property distribution provisions of prenuptial agreements, we must look to the common-law standards for setting aside any type of contract, such as fraud, duress and unconscionability. Under this general common law rule,

> "[p]eople should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where is turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability"

(8 Lord, Williston on Contracts § 18:1 at 8 [4th ed.] [internal quotation marks omitted]).

***57** "[A]n unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*King v. Fox,* 7 N.Y.3d 181, 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184 [2006]). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v. Chase Manhattan Bank,* 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 [1988] [internal quotation marks omitted]). The term "unreasonably favorable" is sometimes referred to as ****111** "substantive" unconscionability, while the "absence of meaningful choice" is referred to as "procedural" unconscionability (*see* 1 Farnsworth on Contracts § 4.28 at 583 [3d ed. 2004]). Generally, both are necessary for unconscionability to be established as grounds to set aside a contract (*Gillman* at 10, 537 N.Y.S.2d 787, 534 N.E.2d 824).

Procedural unconscionability is essentially equivalent to the term "overreaching." Both concepts focus on the process of arriving at the agreement. The definitions of "overreaching" offered by my colleagues here include "the concealment of facts, misrepresentation or some other form of deception" (*Stawski v. Stawski,* 43 A.D.3d 776, 777, 843 N.Y.S.2d 544 [1st Dept.2007]) and "cunning, cheating, [and] sharp practice" (*see Matter of Baruch,* 205 Misc. 1122, 1124, 132 N.Y.S.2d 402 [Surr.Ct., Suffolk County 1954], *affd.* 286 App.Div. 869, 142 N.Y.S.2d 216 [2d Dept.1955]).

Of course, here, Ms. Lumiere Gottlieb explicitly conceded when moving for summary judgment that she was not claiming fraud, duress, or unconscionability. Therefore, her challenge to the property division provisions of the prenuptial agreement must be rejected without further discussion.

In any event, like the majority, I reject any suggestion of overreaching or procedural unconscionability here, because as this Court observed in *Barocas v. Barocas,* 94 A.D.3d at 552, 942 N.Y.S.2d 491, "meaningful choice is not an issue inasmuch as defendant knowingly entered into the agreement against the advice of counsel." In concluding otherwise, the dissent employs terms such as "shrewd manipulations" (citing *Ducas v. Guggenheimer,* 90 Misc. 191, 199, 153 N.Y.S. 591 [Sup.Ct., N.Y. County 1915], *affd sub nom. Ducas v. Ducas,* 173 App.Div. 884, 157 N.Y.S. 801 [1st Dept.1916]) and exploitation of trust. However, there was no trickery or subterfuge involved here; Mr. Gottlieb's negotiating strategy ***58** was entirely clear and apparent. Ms. Lumiere Gottlieb knew what she was getting into, and was advised not to, but ultimately decided to accept the offered terms because she wanted to get married. Willingness to enter into an agreement known to be one-sided, against the advice of counsel, because of the desire to get married, cannot establish the type of "absence of meaningful choice" that constitutes overreaching or procedural unconscionability (*see Strong v. Dubin,* 48 A.D.3d 232, 232–233, 851 N.Y.S.2d 428 [1st Dept.2008]).

In the absence of a showing of procedural unconscionability or overreaching in the formation of the prenuptial agreement, even under the *Christian* standard there is no basis to go on to examine the agreement for "manifest unfairness," as the dissent does at length.

Even if further examination were appropriate, that examination should concern whether the terms of the agreement were substantively unconscionable. This would entail considering whether the financial terms were so extreme and one-sided as to appear unconscionable (*see Gillman,* 73 N.Y.2d at 12, 537 N.Y.S.2d 787, 534 N.E.2d 824; 1 Corbin on Contracts, § 128). While a one-sided agreement leaving the parties with substantial disparities of wealth may strike some observers as unfair, that does not make it substantively unconscionable, since the facts were disclosed at the time the parties entered into the agreement (*see Smith v. Walsh–Smith,* 66 A.D.3d 534, 535, 887 N.Y.S.2d 565 [1st Dept.2009], *lv. denied* 14 N.Y.3d 704, 2010 WL 606404 [2010]), and particularly since Ms. Lumiere Gottlieb is not being left destitute.

It is possible that the use in *Christian* of the concepts of "overreaching" and "manifest unfairness" may simply have been new ****112** terminology essentially recapitulating the concepts of procedural and substantive unconscionability. However, the dissent's discussion expands substantially beyond considerations

of substantive unconscionability, emphasizing the word "fairness" in the term "manifest unfairness" to suggest that the enforceability of a prenuptial agreement may be addressed by reference to the concept of adequacy, and by consideration of the marital standard of living.

This turns the law on its head. Indeed, if most prenuptial agreements were to be examined by the standards proposed by the dissent, most if not all of them would be found manifestly unfair. In general, the purpose of such agreements is not to achieve fairness, but to protect the assets of the monied party from being turned over to the other, and to strictly limit what ***59** the non-monied spouse will receive in the event of a divorce. In particular, such agreements are geared toward avoiding any claim of entitlement to a distributive award or spousal support in proportion to the parties' standard of living during the marriage. The law imposes minimum requirements for certain types of financial provisions, but even accepting the applicability of the *Christian* standard, and even assuming there were a question of fact as to whether there was overreaching here, the question would not be whether the amounts being received by the non-monied spouse under the agreement approximates the parties' standard of living during the marriage. The " manifest unfairness" standard is not met by a failure to provide for an approximation of the marital standard of living after a divorce. If it did (assuming *Christian's* applicability), the very purpose of prenuptial agreements would be eviscerated. There would be no reason to opt out of the Equitable Distribution Law if the very same considerations used to enforce the statute were applied in the event the parties opted out of the statute.

There is no dispute that the maintenance provisions of the parties' agreement must be judged by the standard expressed in Domestic Relations Law § 236(B)(3), which only allows enforcement of maintenance provisions "provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment." I agree with the majority that as a matter of law Ms. Lumiere Gottlieb failed to satisfy that standard. Ms. Lumiere Gottlieb's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement. She has a degree in economics, and has been employed in finance; while her absence from the field while the children were young may impact her job search, she certainly has the ability to ultimately be self-supporting. Nor is that waiver unconscionable inasmuch as she will receive approximately $1.5 million, as well as an all-expenses-paid apartment up until the couple's children reach the age of 18.

In conclusion, I believe that coursing through the dissent is a not-so-veiled hostility to prenuptial agreements. All prenuptial agreements are in essence one-sided, and may seem unfair to those who believe fairness must be the guiding principal in financial distribution resulting from divorce. But the law gives parties the right to opt out of the Equitable Distribution Law and to order their own affairs. While the law still provides certain minimum standards to protect non-monied parties who ***60** sign off on opting out in order to make their own arrangements, none of those protections offer economic recompense measured by the marital standard of living; imposing such a standard would eviscerate the right to opt out. One wonders, after reading our dissenting colleague's opus, whether prenuptial agreements ****113** should now be relegated to the dust bin.

FEINMAN, J. (dissenting).

Resolution of this appeal and cross appeal requires us first to determine whether it is appropriate to decide this dispute on summary judgment, and second to clarify the difference between the defenses of "unconscionability" and "manifest unfairness." In this proceeding, each party to this marriage moved for partial summary judgment: plaintiff argued that the prenuptial agreement in question should be enforced as written; defendant argued that the agreement should be declared unenforceable because, among other reasons, it was the product of overreaching and is "manifestly unfair."

In the order appealed from, the motion court dismissed defendant's first and third counterclaims, which challenged the agreement as a whole and the property distribution provisions in particular, because it found "no dispute over material facts." However, the motion court ordered a trial on the second counterclaim, which challenged the maintenance waiver, on the ground that "not enough facts [had been] presented" to grant either party summary judgment. All three counterclaims, however, turn on the same set of facts, and in order to resolve these three counterclaims in a coherent manner, this Court must first determine whether any material issues of fact are in dispute.

I agree with the majority that all three counterclaims need to be decided on the same facts, but I disagree with its assessment that there are no triable issues at all. While it is certainly possible to cast defendant as impetuous and the negotiations as sober and deliberate, as the majority does, there is a sufficiently compelling alternative reading of the record to warrant a trial on the circumstances surrounding the formation of the prenuptial agreement and whether its enforcement is permissible. By summarily deciding this dispute based on the extant record, there is no real opportunity to evaluate whether any overreaching occurred during the negotiations. The negotiations contained several instances of highly questionable conduct on the part of plaintiff, and given the duty to negotiate marital agreements with the "utmost of good faith" (*Christian* ***61** *v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849 [1977]), we should not be so quick to excuse such conduct as simply "callous." In addition to plaintiff's conduct during the negotiations, the agreement also contains many troubling terms. On the surface, the agreement provides defendant with a handsome settlement estimated at $1.6 million, plus other benefits. However, the amount of the settlement is only part of the story, and a review of the agreement reveals numerous difficulties that could well support a finding of overreaching and manifest unfairness.

As a threshold matter, we must first resolve whether any overreaching has occurred in the execution of this agreement, and if so, whether the agreement is manifestly unfair as a result. The record does not offer a plain and clear answer to this question, or to whether the maintenance waiver is enforceable, and this case should not be disposed of summarily. Accordingly, I would deny summary judgment and remand the matter for trial so that the court may evaluate the credibility of the parties and decide all three counterclaims consistently and coherently on a more fully developed record.

The Parties

Plaintiff, now 44, is the founder, Chief Investment Officer, and majority shareholder of a biotechnology hedge fund, Visium Asset Management, with an estimated $3.8 billion of funds under management. ****114** He graduated from Brown University with a B.A. in economics and earned a medical degree from New York University. After completing an internship in internal medicine, he pursued a career in finance and worked at three investment firms before founding his hedge fund in 2005. At the time he filed for divorce in 2011, plaintiff earned $54 million in income, and he reported a net worth of $188 million in 2013.

Defendant, now 37, is the full-time caregiver of the parties' two young children, one of whom has special needs. She has been out of the workforce since 2007. She received a B.A. in economics from the University of Pennsylvania and worked at an internet marketing company for one year and then as an analyst at a financial services firm for two years. She later obtained a real estate license, earning commissions on a handful of transactions, and then pursued a teaching certificate in yoga. Defendant is generally in good health but has an autoimmune disorder and suffers from anxiety, depression, and attention deficit disorder. In 2013, defendant earned no income and reported a net worth of $1.5 million.

***62** *Background*

In September 2003, the parties were introduced at defendant's 25th birthday party and started dating in December of that year. They soon began living together, and after a brief hiatus, they resumed their relationship in November 2004 with the intention of marrying. As discussions of marriage ensued, plaintiff indicated he would not marry without a prenuptial agreement. Defendant did not object, and the parties began discussing the parameters of an agreement based on preliminary terms proposed by plaintiff. The parties later became engaged in September 2005 but did so without an agreement.

One month after the engagement, defendant learned she was pregnant with the parties' first child and told plaintiff she did not want to have children until the parties were married. In response, plaintiff assured defendant that it would not be necessary to terminate the pregnancy because "there was no question" the parties were going to marry, and sign an agreement, by the time the baby was born.

However, after learning that defendant was pregnant, plaintiff modified his proposal and made defendant a new, and lower, offer. After some discussion, defendant

accepted. But this reduction by plaintiff was only the first of many more reductions to come, and each time defendant accepted a new lower offer, plaintiff would lower his offer again and ask defendant to agree to his latest terms. As this pattern repeated itself and the baby's delivery date neared, defendant suggested that the parties separately retain counsel and arranged for the parties to jointly see a licensed clinical social worker. The counseling, however, did not help and the negotiations continued to stall following delays caused by plaintiff and his attorney. Then, when defendant was in the third trimester of the pregnancy, plaintiff unexpectedly announced he would not sign any agreement until after the baby was born, despite his earlier promise to defendant. As a result, the parties did not marry in time, and their first child was born in May 2006.

Several months after the birth of the first child, defendant asked plaintiff to revisit the agreement so that the parties could finally marry. Their discussions resumed, and plaintiff continued to reduce his obligations under the agreement, presenting lower and lower offers to defendant, each less favorable than the last. As the months passed, defendant learned she was pregnant with a second child, despite her use of birth control. Once again, defendant told plaintiff she did not ****115** want ***63** any more children until the parties married. This time, plaintiff strongly opposed the suggestion of an abortion and threatened to end their relationship. Plaintiff then presented defendant with yet another offer —his 12th—with even less favorable terms. Throughout these discussions, defendant never made a full financial disclosure or produced financial statements indicating his income. As the second pregnancy progressed and the negotiations wore on, defendant instructed her attorney to finalize an agreement in order to end "the nightmare," in spite of her attorney's advice. Within three weeks of learning that defendant was pregnant with a second child, the parties finally executed an agreement and were married a week later at the Office of the City Clerk in May 2007.

The Agreement

The terms of the agreement are described in detail by the majority, and on the surface, the provisions hardly seem unfair or problematic. For example, defendant receives, in the event of divorce, a distributive award of $300,000 for every year of marriage, $150,000 in "spousal support" for every year a child of the parties is under the age of four at the time of divorce, the use of an apartment for as long as a minor child of the parties lives with defendant, and health insurance until the children of the parties are emancipated. However, beneath the surface are many questionable provisions which should be examined at trial.

First, the agreement contains a number of sweeping waivers. Under the agreement, defendant waived her right to spousal maintenance, equitable distribution, counsel fees, interim counsel fees, a distributive award, any pension and retirement benefits, and the right to contest the agreement. The extent of these waivers cannot be overstated. Moreover, the waivers do not even seem to comport with the reality of the party's relationship. Such waivers, especially the waiver to spousal maintenance, "essentially declare [ ] that [defendant did not need support in case of divorce and would not be] economically disadvantaged by the years of marriage" (Robert Leckey, Contextual Subjects: Family, State, and Relational Theory at 118 [2007]). Here, the parties do not dispute that plaintiff was to be the sole source of family income while defendant raised the children full-time and managed the family's household affairs. In fact, plaintiff actively discouraged defendant from pursuing a career outside the home, going so far as to call her real estate ***64** career "a joke" and mocking that he could earn far more in one day than she could in one year. With defendant as the stay-at-home parent and full-time caregiver of the children, it simply cannot be taken at face value that defendant would not be in need of support in case of divorce and would not be economically disadvantaged by the years of marriage. These waivers are difficult to reconcile with the respective roles of the parties during their relationship, and in light of plaintiff's conduct during the negotiations, there are legitimate concerns that the waivers were procured by overreaching and are manifestly unfair.

Second, the agreement contains an expansive definition of separate property that applies to nearly all property acquired by the parties during their marriage, including income. Even assets that are commingled and pooled during the marriage are to be treated as separate property based on the amount deposited or invested by the party. Moreover, any contribution by a spouse that increases the value of the other's separate property is to be considered a "gift." The agreement also expressly designates the matrimonial home, which plaintiff purchased in ****116**

his own name for $9.7 million, after the parties had married, as his separate property. While this expansive separate property provision suggests that the parties were self-supporting and would lead financially independent lives, this was never the case, and the agreement fully excludes defendant, the stay-at-home spouse, from sharing in any income earned by plaintiff during the marriage. It is therefore difficult to make sense of the fact that the agreement treats income, which only plaintiff earned, as separate property in light of the distinct family responsibilities assumed by the parties. As for the treatment of non-income property, such as the matrimonial home, the agreement similarly suggests that defendant would not contribute to increasing the value of plaintiff's assets. But here too, the conduct of the parties is entirely at odds with this provision's apparent intention. After plaintiff acquired two adjacent apartment units for $9.7 million, defendant spent more than one year overseeing the combination and renovation of the units. The newly combined units, which became the matrimonial home of the parties, now has an estimated value of $30 million. In spite of defendant's efforts, the agreement leaves her without any property interest in the matrimonial home, let alone to an increase in value equivalent to her contribution, all of which raises doubts as to whether the agreement ***65** actually reflects the intentions of the parties at the time of execution.

Third, a significant, and troubling, condition attaches to the housing provision. As the majority notes, defendant is eligible for "rent-free, expense-free luxury housing." However, this entitlement is conditioned on any minor children of the parties residing with defendant. Otherwise, defendant loses the housing benefit and is given 30 days to vacate the apartment. As much as defendant may want the children to reside with her, this provision does not give her a choice in the matter, unless she is willing to give up the housing. This is no real choice, and it would come at a great cost to defendant if, at a later date, she ever wanted to change roles with plaintiff and have the children live with him. As a result of this requirement, defendant will also have less time to devote to her career than plaintiff will have to his. Ultimately, even though defendant benefits from the housing provision (for as long as the children live with her), it is the children of the marriage who are the primary beneficiaries, not defendant.

Fourth, and similar to the housing provision, the payment of what the agreement refers to as "spousal support" is conditional on there being children of the parties under the age of four at the time of divorce. The agreement does not provide any spousal support that is not contingent on the parties having children under a certain age. Since plaintiff filed for divorce eight months after the parties' youngest child turned four, defendant receives no "spousal support" under the agreement. This provision is far less generous than it appears, and in view of the other terms of the agreement and the manner in which it was negotiated, further scrutiny is warranted.

Finally, even when dealing with a distributive award amounting to $300,000 per year of marriage, context is everything. It is important to remember that the purpose of a distributive award is to facilitate the distribution or division of property between divorcing parties. It should not be seen or considered as a form of income or support (*see* Domestic Relations Law § 236[B][1][b] ["Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code"]; *see also* ****117** *Holterman v. Holterman,* 3 N.Y.3d 1, 11, 781 N.Y.S.2d 458, 814 N.E.2d 765 [2004]). Here, the distributive award was accorded in lieu of equitable distribution, which defendant was required to waive. As mentioned earlier, plaintiff reported a net worth of $188 ***66** million in 2013, and even if the distributive award totals $1.6 million after four years of marriage, it is a mere fraction of plaintiff's property. At this stage of the proceeding, we do not need to decide whether equity must intervene, but an imbalance of this magnitude must not be treated lightly, and a trial should determine whether there was any overreaching in the formation of this agreement that led to manifestly unfair terms.

In isolation, no one issue necessarily invalidates the agreement. Prenuptial agreements often include various waivers, custom definitions of separate and marital property, and arrangements tailored to the particular circumstances and needs of the parties. In this instance, however, because it is certainly possible to draw an inference of overreaching that resulted in manifestly unfair terms based on the totality of the circumstances, defendant's counterclaims should not be dismissed at this stage.

Proceedings in the Motion Court

The proceedings in the motion court are summarized by the majority. It must be highlighted, however, that the parties presented starkly different versions of the negotiations in their motion papers.

On the one hand, plaintiff argued that the parties participated in a fair and thorough process which resulted in a generous agreement. He emphasized that the parties had negotiated for well over a year, were each assisted by experienced and independent counsel, had been advised of their rights, fully understood the agreement, executed it voluntarily, and acknowledged in the agreement that the terms were fair and reasonable.

Defendant, on the other hand, described the process as deeply flawed. She alleged that plaintiff substantially changed the bargaining position of the parties, that he put her in the unwanted, precarious position of negotiating as an unmarried mother, and that she relied on plaintiff's assurances in deciding to continue the first pregnancy. She also argued that plaintiff took advantage of her diminished emotional and physical state during both pregnancies, as she was not taking certain medications, and that the negotiations were tainted by plaintiff's "bait and switch" offers, numerous insults and threats, and failure to make a full financial disclosure.

As previously mentioned, the motion court dismissed defendant's first and third counterclaims, but not the second counterclaim ***67** challenging the maintenance waiver. On this issue, the motion court decided it would "require evidence and testimony to determine whether the waiver of maintenance was fair and reasonable at the time of execution, when [defendant] was expecting the parties' second child, and/or is unconscionable now. Therefore, this issue can be addressed at trial." In addition, the court awarded defendant $50,000 in interim counsel fees to defend against plaintiff's motion for exclusive possession of the matrimonial home, and allowed defendant to affirmatively move for exclusive possession of the matrimonial home and for temporary child support.

Arguments on Appeal

Plaintiff appeals to the extent the motion court granted a hearing on the maintenance waiver, awarded interim counsel fees, and denied his motion to dismiss defendant's second counterclaim, and primarily argues that there are no grounds to invalidate any part of the agreement given the waivers it contains.

****118** Defendant cross-appeals to the extent the motion court dismissed her first and third counterclaims seeking to invalidate the prenuptial agreement. In particular, she argues the motion court misapprehended the equitable standard under which she seeks to invalidate the agreement, namely, manifest unfairness, and failed to shift the burden of proving the validity of the agreement onto plaintiff. Defendant also raises arguments related to a fourth counterclaim concerning the purchase price of the apartment in which defendant would reside with the children in case of divorce; however, because defendant disclaimed that her motion is based on fraud and expressly withdrew the fourth counterclaim below, I agree with the majority that these arguments are not properly before us.

Analysis

The majority concludes that there are no substantial issues of fact and resolves this appeal on summary judgment. It finds that defendant has not shown that the agreement is manifestly unfair or that plaintiff engaged in overreaching during the negotiations, and that the maintenance waiver was "fair and reasonable at the time of the making of the agreement" and would "not [be] unconscionable at the time of entry of final judgment" (Domestic Relations Law § 236[B][3][3]).

The extant record does not permit any such determination. As already discussed, there is significant controversy concerning ***68** the formation of the agreement, and indeed, the motion court ordered a trial on this issue in connection with the second counterclaim. No factfinder has yet evaluated the credibility of either party's version of the facts surrounding the making of the agreement, and it may well be that a factfinder would find that there was overreaching in the formation of a manifestly unfair agreement or that the maintenance waiver is not enforceable.

As the majority resolves this appeal on summary judgment, its decision reaches the merits. Throughout its

analysis, the majority asserts that "manifest unfairness" is distinct from the defense of unconscionability. I fully agree with those assertions, but the difference between these defenses is not readily discernable from the majority's application of "manifest unfairness" to this case. The distinction is relevant in this appeal because defendant expressly does not challenge the agreement on the basis of unconscionability, but rather contends that it is manifestly unfair to her as a result of plaintiff's overreaching. This issue has broad implications and deserves further discussion.

The meaning and significance of the manifest unfairness defense has been the subject of long-standing commentary among members of the bar. Manifest unfairness and unconscionability are terms that are sometimes used interchangeably (*see e.g. Luftig v. Luftig,* 239 A.D.2d 225, 227, 657 N.Y.S.2d 658 [1st Dept.1997] ["the agreement was not unconscionable ... [Its] terms are not so manifestly unfair that equity must intervene to prevent an injustice"], citing *Christian v. Christian,* 42 N.Y.2d at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849), and the resulting ambiguity has left some wondering if manifest unfairness is simply "legal literature" that is "repeated in deference but without consequence" (Elliot Scheinberg, Contract Doctrine and Marital Agreements in New York § 24.2[1] at 799 [2011]), and others observing that "it seems difficult to distinguish between an agreement that is 'unconscionable' and an agreement which is 'plainly inequitable' " (Alan D. Scheinkman, 9PT2 West's McKinney's Forms Matrimonial and Family Law § 4:8 at 41), "inequity" being a term *Christian* employs ****119** alongside manifest unfairness (*see e.g. Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849 [in reference to agreements "subsisting in inequity"] and *id.* at 72 and 73, 396 N.Y.S.2d 817, 365 N.E.2d 849 [in reference to "inequitable conduct" of the parties]) that has also been applied in subsequent decisions of this and other courts (*see e.g. Cron v. Cron,* 8 A.D.3d 186, 187, 780 N.Y.S.2d 121 [1st Dept.2004], *lv. dismissed* 7 N.Y.3d 864, 824 N.Y.S.2d 608, 857 N.E.2d 1139 [2006], ***69** *lv. denied* 10 N.Y.3d 703, 854 N.Y.S.2d 104, 883 N.E.2d 1011 [2008] ["the agreement's housing provisions ... are plainly inequitable"]).

Arguably, it may be time to abandon the pretense that a distinction exists at all between unconscionability on the one hand and manifest unfairness (or "inequity") on the other. However, I would not favor moving in that direction as the distinction is not a matter of mere semantics. What is fundamentally at issue is whether there is a distinct standard of vacatur that uniquely applies to marital agreements (Scheinberg § 24.2), and rather than allow this equitable defense, which we refer to as "manifest unfairness," to be subsumed into the general defense of unconscionability, it is critical that the distinction be clarified and not permitted to vanish. Manifest unfairness serves an important and useful purpose in the matrimonial context, in which "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). It ensures that married and affianced parties participate in a fair process, and it provides relief when agreements are "manifestly unfair to a spouse because of the other's overreaching" (*id.*).

The difference between unconscionability and manifest unfairness was carefully examined by the Court of Appeals in *Christian,* an appeal which concerned a separation agreement between two parties whose marriage had broken down. At the time, parties in New York could not divorce under then § 170(6) of the Domestic Relations Law without a valid separation agreement. Although both parties in *Christian* wanted to divorce and needed their separation agreement to be recognized as valid to do so, the plaintiff still challenged a portion of the agreement "which stipulated that there be an equal division of certain securities" (*Christian* at 66, 396 N.Y.S.2d 817, 365 N.E.2d 849). Supreme Court declared that the agreement was invalid in its entirety, finding the defendant husband guilty of fraud and overreaching, and in the absence of a valid agreement, the court reasoned it could not grant a divorce and ordered the parties to resume their marital relationship. The Appellate Division reversed and granted a divorce, finding no evidence of fraud or overreaching in the record to invalidate the agreement, but declared that the impugned property provision was "so unconscionable as to be unenforceable" (*id.* at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849). Although the Court of Appeals expressed similar concerns, it reversed the determination of unconscionability by the Appellate Division and remanded the ***70** matter to Supreme Court for a full trial on the property provision in accordance with the equitable standard established by the Court, namely, "manifest unfairness."

In its discussion, the Court noted that the term unconscionability does not actually appear in the case

cited by the Appellate Division for that proposition (*id.*; *see also Riemer v. Riemer,* 48 Misc.2d 873, 265 N.Y.S.2d 885 [Sup.Ct., Kings County 1965], *affd.* 25 A.D.2d 956, 270 N.Y.S.2d 395 [2d Dept.1966], *lv. dismissed* 17 N.Y.2d 915, 272 N.Y.S.2d 140, 218 N.E.2d 904 [1966]). As a result, the Court defined unconscionability in these terms:

> ****120** "over the years, an unconscionable bargain has been regarded as one 'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other' (*Hume v. United States,* 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393), the inequality being 'so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense' (*Mandel v. Liebman,* 303 N.Y. 88, 94, 100 N.E.2d 149). Unconscionable conduct is something of which equity takes cognizance, when warranted (see *Weirfield Holding Corp. v. Pless & Seeman,* 257 N.Y. 536, 178 N.E. 784; *Graf v. Hope Bldg. Corp.,* 254 N.Y. 1, 4, 171 N.E. 884; *Howard v. Howard,* 122 Vt. 27 163 A.2d 861; 27 Am. Jur. 2d, Equity, § 24, pp. 549–550; cf. 2 Pomeroy's Equity Jurisprudence [4th ed.], § 873, p. 1804)"

(*Christian* at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849).

It is worth noting that nearly all the cases cited by the Court in its review of unconscionability concern commercial transactions (*see e.g. Hume v. United States,* 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 [1889] [reasonableness of government contractor costs]; *Mandel v. Liebman,* 303 N.Y. 88, 100 N.E.2d 149 [1951] [compensation agreements between agents and principals]; *Weirfield Holding Corp. v. Pless & Seeman Inc.,* 257 N.Y. 536, 178 N.E. 784 [1931] [unconscionable conduct in mortgage foreclosure proceedings]; *see also Graf v. Hope Bldg. Corp.,* 254 N.Y. 1, 171 N.E. 884 [1930]; *Howard v. Howard,* 122 Vt. 27, 163 A.2d 861 [1960] [Vermont action to rescind a settlement agreement in a filiation proceeding]).

The Court then turned to the marital context and discussed separation agreements. The Court observed that "[g]enerally, separation agreements which are regular on their face are binding on the parties," that "[j]udicial review is to be exercised circumspectly," and that where there has been full disclosure and "an absence of inequitable conduct, ... courts should not intrude so as to redesign the bargain" (*Christian* at 71, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). ***71** The inquiry, however, does not end there, and the Court outlined a set of equitable principles that also apply in the course of reviewing transactions between spouses. As the Court acknowledged on more than one occasion, conjugal parties are not commercial actors: "Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849, citing *Ducas v. Guggenheimer,* 90 Misc. 191, 153 N.Y.S. 591 [Sup.Ct., N.Y. County 1915], *affd. sub nom. Ducas v. Ducas,* 173 App.Div. 884, 157 N.Y.S. 801 [1st Dept.1916]). As a result, "[t]here is a strict surveillance of all transactions between married persons, especially separation agreements," and such agreements may be set aside under principles of equity (*Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). It noted that "[e]quity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract" (*Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849). The Court summarized these principles in these terms:

> "[t]hese principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity"

****121** (*Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849).

Having considered the equitable principles relevant to the marital context, the Court then established manifest unfairness as a defense to the enforcement of separation agreements:

> "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching. In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution.

If the execution of the agreement, however, be fair, no further inquiry will be made" (internal citations omitted)

(*Christian* at 73, 396 N.Y.S.2d 817, 365 N.E.2d 849).

In contrast to unconscionability, manifest unfairness is rooted in a long line of matrimonial cases which are cited by the Court (*Hendricks v. Isaacs,* 117 N.Y. 411, 22 N.E. 1029 [1889] [equity may intervene in transactions between married parties]; *Benesch v. Benesch,* 106 Misc. 395, 402, 173 N.Y.S. 629 [N.Y.Mun.Ct.1918] ["there is a ***72** distinction to be drawn between contracts of separation between husband and wife and strictly business contracts. The same strict principles or the same considerations that are applied to or govern the duties of parties to business contracts cannot always govern or be applied to the enforcement of every provision of a separation agreement"]; *Hungerford v. Hungerford,* 161 N.Y. 550, 553, 56 N.E. 117 [1900] [contracts between spouses must be "just and fair" and equity intervenes as required]; *Cain v. Cain,* 188 App.Div. 780, 177 N.Y.S. 178 [4th Dept.1919] [spousal support agreement may be set aside upon grounds otherwise insufficient to set aside an ordinary contract]; *Scheinberg v. Scheinberg,* 249 N.Y. 277, 282, 164 N.E. 98 [1928] [settlement agreement between divorcing spouses unenforceable at equity if one party "acts unfairly and the other yields to the pressure of circumstances"]; *Matter of Smith,* 243 App.Div. 348, 353, 276 N.Y.S. 646 [4th Dept.1935] [agreements between divorcing spouses must be " fair and equitable"]; *Ducas v. Guggenheimer,* 90 Misc. at 194, 153 N.Y.S. 591 ["[courts] have thrown around separation agreements the cloak of their protection to the end that they shall be free from the taint of fraud or duress and that they shall be fair, equitable, and adequate, considering the husband's circumstances"]; *Montgomery v. Montgomery,* 170 N.Y.S. 867, 869 [Sup.Ct., N.Y. County 1918] ["contracts between husband and wife are only upheld [in equity] where they are fair and equitable"], *affd.* 187 App.Div. 882, 173 N.Y.S. 915 [1st Dept.1919] and *affd.* 188 App.Div. 965, 176 N.Y.S. 912 [1st Dept.1919]).

It is clear that *Christian* intended to distinguish manifest unfairness and to establish a standard that is appropriate for reviewing marital agreements. Indeed, many decisions of this Court follow *Christian* in this regard (*see e.g. Goldman v. Goldman,* 118 A.D.2d 498, 500, 500 N.Y.S.2d 111 [1st Dept.1986] ["In *Christian,* the Court of Appeals held that separation and property settlement agreements are reviewable in equity and may be set aside if 'manifestly unfair to a spouse because of the other's overreaching' "]; *see also Cron v. Cron,* 8 A.D.3d at 187, 780 N.Y.S.2d 121 [1st Dept.2004] [finding that while a prenuptial was not unconscionable, other provisions were invalid as "plainly inequitable"]). Nevertheless, other decisions simply rely on *Christian* for the principle of unconscionability and do not apply the manifest unfairness standard or the ****122** equitable principles established therein (*see e.g. Rowley v. Amrhein,* 46 A.D.3d 489, 489, 848 N.Y.S.2d 645 [1st Dept.2007] ["Plaintiff contends that even if the agreement is valid, it is unconscionable. However, nothing in the agreement shocks the conscience"], citing *Christian* at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849; ***73** *Kojovic v. Goldman,* 35 A.D.3d 65, 69, 823 N.Y.S.2d 35 [1st Dept.2006], *lv. denied* 8 N.Y.3d 804, 831 N.Y.S.2d 106, 863 N.E.2d 111 [2007] ["the concept of unconscionability is reserved for the type of agreement so one-sided that it 'shock[s] the conscience' such that 'no [person] in his [or her] senses and not under delusion would make [it] on the one hand, and ... no honest and fair [person] would accept [it] on the other' "], quoting *Christian* at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Smith v. Walsh–Smith,* 66 A.D.3d 534, 534, 887 N.Y.S.2d 565 [1st Dept.2009], *lv. denied* 14 N.Y.3d 704, 2010 WL 606404 [2010] ["We reject defendant's contention that the prenuptial agreement is unconscionable ... [W]e cannot say that the agreement is so unfair 'as to shock the conscience and confound the judgment of any [person] of common sense' "], quoting *Christian* at 71, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Leighton v. Leighton,* 46 A.D.3d 264, 267, 847 N.Y.S.2d 64 [1st Dept.2007, Nardelli J., concurring in part, dissenting in part], *appeal dismissed* 10 N.Y.3d 739, 853 N.Y.S.2d 281, 882 N.E.2d 894 [2008] ["the 1986 prenuptial agreement is manifestly not unconscionable, for it cannot be said that it was so unfair as to shock the conscience"], citing *Lounsbury v. Lounsbury,* 300 A.D.2d 812, 814, 752 N.Y.S.2d 103 [3d Dept.2002]). In some ways, *Christian* is the buffet option of matrimonial cases. There is something for everyone —many cases cite *Christian* for the principle of judicial restraint; many others invoke it for the principle of judicial review (*compare Golding v. Golding,* 176 A.D.2d 20, 22, 581 N.Y.S.2d 4 [1st Dept.1992] *with Kojovic v. Goldman,* 35 A.D.3d at 71, 823 N.Y.S.2d 35). However, *Christian* should not be reduced to mean all things to all people, and this appeal highlights the need to review and revisit the meaning and application of "manifest unfairness."

"Manifest unfairness" involves a two-pronged inquiry into the execution and substance of the agreement. First, the contestant must show that the other party overreached in the execution of the agreement. *Christian* did not define overreaching but referred to two cases. The first, *Matter of Baruch,* 205 Misc. 1122, 1124, 132 N.Y.S.2d 402 (Sur.Ct., Suffolk County 1954), *affd.* 286 App.Div. 869, 142 N.Y.S.2d 216 (2d Dept.1955), a dispute over a prenuptial agreement, defined overreaching in these terms: "we come to the charge of overreaching, which means to overdo matters, or get the better of one in a transaction by cunning, cheating, or sharp practice." The other, *Pegram v. Pegram,* 310 Ky. 86, 90, 219 S.W.2d 772, 774 (1949), noted that "the court will not suffer the wife to be over-reached. It will not sustain a contract that is unfair or prejudicial to her when obtained while she is under her husband's domination." *Christian* also asserted that overreaching does not require a showing of fraud, and that courts ***74** may look at the terms of the agreement to draw an inference or a negative inference of overreaching in the execution.

This first prong is essentially a procedural inquiry and encompasses the entire duration of the negotiations; it is not limited to the period immediately preceding the conclusion of the agreement. Overreaching may be viewed in terms of bargaining abuses, such as "shrewd manipulations" (*Ducas,* 90 Misc. at 199, 153 N.Y.S. 591), as well as threats, intimidation, unfair surprises, exploitation of trust, and deceit ****123** (*see* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations,* 5 Harv. Negot. L. Rev. 1, 29 [2000]). Moreover, overreaching may include tactics which, though permissible in the commercial arena, do not belong in negotiations between parties who owe fiduciary duties to each other (*see e.g. Ducas,* 90 Misc. at 196, 153 N.Y.S. 591, cited by *Christian* at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849 ["The courts should require the contract to be the free act of the parties rather than the product of shrewd bargaining by astute intermediaries, however free these bargainings may be from the taint of fraud or duress"]). Compared to unconscionability, manifest unfairness subjects the negotiating process between conjugal parties to a higher degree of scrutiny and does not sanction unscrupulous methods.

If the first step shows an absence of overreaching, the inquiry ends and enforcement cannot be avoided under this defense. However, if the contestant establishes overreaching, the inquiry proceeds to the second step in which the contestant must then show that the agreement is manifestly unfair.

What, then, is manifestly unfair in the context of marital agreements? On this point, *Christian* does not provide all the answers. As a general principle, the fairness of an agreement ought to correspond to the intention of the parties as expressed in an agreement. The function of contract is to "structure a relationship and channel parties' expectations forward in time" (Leckey at 117), and ordinarily, the intention of the parties is found in the four corners of an agreement (*Laurence v. Rosen,* 228 A.D.2d 373, 374, 645 N.Y.S.2d 773 [1st Dept.1996]; *see also Van Kipnis v. Van Kipnis,* 11 N.Y.3d 573, 577, 872 N.Y.S.2d 426, 900 N.E.2d 977 [2008] ["As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing"]). However, where there has been overreaching, an agreement may not reliably reflect the intentions of the parties, making it more difficult to evaluate whether the parties considered their agreement to be fair.

***75** In the absence of a reliable writing to indicate the intention of the parties, the common law has developed alternatives for determining the fairness of an agreement. In the cases cited by *Christian,* one method of measuring the fairness of an agreement is the "test of adequacy." For instance, in *Ducas,* "[t]he test of adequacy is not what constitutes the minimum upon which a person can live. The question is whether the sum is in itself a reasonable one and will permit of a standard of living commensurate with the husband's income and the mode adopted by him when the parties lived together" (90 Misc. at 200, 153 N.Y.S. 591). Under this approach, fairness is measured against the marital standard of living and is based on the financial means of the overreaching party. Another approach, followed by the Second Department, determines fairness according to the nature and magnitude of any rights waived in light of the disparity in net worth and earnings of the parties (*Petracca v. Petracca,* 101 A.D.3d 695, 698, 956 N.Y.S.2d 77 [2d Dept.2012]). These methods of determining the fairness of a prenuptial agreement can be helpful; however a better approach would be one that also considers how well the terms of an agreement align with the conduct of the parties over the course of their

relationship as a means of determining what the parties themselves consider to be fair. Terms that may appear to be objectively unfair may nevertheless be considered fair to the parties of an agreement, especially by parties ****124** who do not wish to have an economically interdependent relationship. For example, a prenuptial agreement that waives maintenance, narrowly defines marital property, and discourages the commingling of assets would suggest that the parties do not intend to have a relationship of economic interdependence, and if the conduct of the parties is generally consistent with the terms of an agreement, this would support that an agreement is fair to them. But where the expressed terms of an agreement are so divorced from the reality of a party's relationship, such as where there is a severe disconnect between the degree of economic interdependence expressed by the terms of an agreement compared to the conduct of the parties, as may be the case here, it is appropriate for equity to intervene to the extent a party's overreaching has caused the inconsistency. Indeed, in *Van Kipnis,* the Court of Appeals similarly considered whether the terms of a prenuptial agreement were consistent with the conduct of the parties during their marriage and upheld the prenuptial agreement because ***76** they were consistent. [1] Contrary to what the concurrence asserts, I am not suggesting that the marital standard of living or the concept of adequacy be the *sole* criteria for evaluating the fairness of marital agreements.

1 "[W]ith the exception of two jointly owned residences (which were distributed as marital property), the parties did not commingle their separately owned assets throughout their 38–year marriage. We therefore agree with the courts below that the agreement constitutes an unambiguous prenuptial contract that precludes equitable distribution of the parties' separate property, rendering it unnecessary to resort to extrinsic evidence" (*Van Kipnis* at 579, 872 N.Y.S.2d 426, 900 N.E.2d 977).

This review of *Christian* highlights the distinction between manifest unfairness and unconscionability and seeks to clarify certain ambiguities. However, while agreeing that manifest unfairness is the appropriate standard, the majority, by adopting a much more deferential approach, seems to apply an unconscionability standard instead, which in my view is not correct. But notwithstanding this disagreement, there is no dispute between the majority and the dissent concerning the applicability of *Christian's* manifest unfairness standard to prenuptial agreements.

My concurring colleague, on the other hand, comes to the novel conclusion, on the basis of "*expressio unius est exclusio alterius,*" and a series of doubtful inferences, that the Equitable Distribution Law essentially superseded the manifest unfairness standard in *Christian* by "explicitly and implicitly provid[ing] standards by which to determine the enforceability of the various components of prenuptial agreements." There is simply no support for this premise. The interplay between the standards contained in *Christian* and the Equitable Distribution Law has already been considered by this Court in the past, and in cases where the statutory standard did not apply, the *Christian* standard of manifest unfairness has been applied instead (*see e.g. Goldman v. Goldman,* 118 A.D.2d at 500, 500 N.Y.S.2d 111 ["Although the statutory standard in Domestic Relations Law § 236(B)(3) is inapplicable here, traditional common-law standards do apply to test the validity and enforceability of the agreement. In *Christian,* the Court of Appeals held that separation and property settlement agreements are reviewable in equity and may be set aside if 'manifestly unfair to a spouse because of the other's overreaching'... In our view, it is appropriate to take into account these common-law equitable factors, notwithstanding the inapplicability here of the broader 'fair and reasonable [when made] and not unconscionable ****125** ***77** at final judgment' statutory standard" (internal citations omitted)], citing *Christian*). The concurrence contends that the reliance on *Goldman* is misplaced because it was an action to set aside a "reconciliation agreement" to which Domestic Relations Law § 236(B)(3) allegedly does not apply. However, this is incorrect. In *Goldman,* it was not the type of *agreement* that made the Domestic Relations Law inapplicable. Rather, it was the type of *action* that precluded the application of the statute, and since the action brought in *Goldman* was not a "matrimonial action" as defined by the statute, it was not subject to Domestic Relations Law § 236(B)(3). [2] Either way, it is well settled that to the extent the Domestic Relations Law does not apply to particular provisions of a marital agreement, the traditional common-law standard established in *Christian* applies instead. Not only is the view of the concurrence not the law, but it also does not follow that the establishment of a statutory standard for certain provisions voids the common-law standard applicable to all other provisions. The Equitable Distribution Law has never been read as superseding *Christian,* and I see no reason to start reading it that way now.

2 As this Court decided in *Goldman,* "We agree with Special Term that the second cause of action as couched is legally insufficient. Domestic Relations Law § 236(B)(3) expressly applies to the validity and enforceability of certain agreements "in a matrimonial action," which is defined in Domestic Relations Law § 236(B)(2). This is not a matrimonial action since plaintiff does not seek separation, divorce, annulment, a declaration of the validity or nullity of a marriage, maintenance or a distribution of marital property" (*Goldman* at 500, 500 N.Y.S.2d 111).

The concurrence also claims that there is "scant support" for extending *Christian,* which concerned a separation agreement, to prenuptial agreements, and that the cases that apply *Christian* "most often" involve separation agreements. There is simply no support for this generalization. Basic research on any legal database clearly shows that for nearly 40 years, *Christian* has been consistently applied to prenuptial agreements and separation agreements alike by courts at every level, including the Court of Appeals. Indeed, the Court of Appeals has just recently cited *Christian* in a probate action in which a petitioner contested a prenuptial agreement (*see Matter of Fizzinoglia,* 26 N.Y.3d 1031, 22 N.Y.S.3d 151, 43 N.E.3d 361 [2015]). Nevertheless, the concurrence still concludes that *Christian* does not apply to prenuptial agreements or to affianced parties, notwithstanding the overwhelming case law to the contrary.

***78** I agree with the concurrence to the extent it asserts that " when considering property distribution provisions of prenuptial agreements, we must look to the common-law standards." However, I simply do not agree with the common-law standards my colleague applies or the authorities on which he relies. Even though courts at every level have applied the equitable principles established in *Christian* to premarital and separation agreements for nearly 40 years, the concurrence reaches the conclusion that "it is not appropriate to look to *Christian* for the current standard for judging the enforceability of prenuptial agreements[ ]" and that "the use of *Christian's* standards for judging property provisions is incorrect." Instead, the concurrence would apply the standards applicable for setting aside "any type of contract." To do so would be incompatible with *Christian* and 40 years of matrimonial law and would abandon the power of the court to do equity when required. And rather than apply matrimonial standards to matrimonial disputes, the concurrence applies commercial standards to matrimonial disputes. ****126** For example, my colleague relies extensively on classic contract law treatises such as *Williston on Contracts, Farnsworth on Contracts,* and *Corbin on Contracts* and virtually ignores the authorities in the field of matrimonial law. My colleague also relies extensively on commercial cases such as *Gillman v. Chase Manhattan Bank,* 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 [1988] in support of the unconscionability standard he advances. However, *Gillman* involved a dispute between Chase Manhattan Bank, N.A. and the creditors of the Jamaica Tobacco and Sales Corp. over a security agreement. This case could not be more removed from the matrimonial context. Nevertheless, the concurrence quotes certain passages from *Gillman* in which the Court addresses the issue of unconscionability. What the concurrence fails to ever mention is that *Gillman* involved the application of the Uniform Commercial Code, and the passage quoted by the concurrence concerns § 2–302 of the Uniform Commercial Code, "Unconscionable Contract or Clause." Never before has the Uniform Commercial Code been applied to the matrimonial context. And while the concurrence strongly opposes applying *Christian,* and four decades of matrimonial case law, to this case because the former concerns a separation agreement and the latter a prenuptial agreement, it is seemingly undisturbed by importing the Uniform Commercial Code and applying *Gillman,* a commercial dispute over a security agreement, to a prenuptial agreement.

***79** Indeed, there is little support for the views expressed by the concurrence among the departments of the Appellate Division. Most notably, *Cioffi–Petrakis,* a leading decision of the Second Department that my colleague does not cite, expressly held that "agreements addressing matrimonial issues have been subjected to limitations and scrutiny *beyond that afforded contracts in general* " (*Cioffi–Petrakis v. Petrakis,* 103 A.D.3d 766, 767, 960 N.Y.S.2d 152 [2d Dept.2013], *lv. denied* 21 N.Y.3d 860, 971 N.Y.S.2d 251, 993 N.E.2d 1273 [2013] [emphasis added] [internal quotation marks omitted]). It describes the heightened scrutiny applicable to marital agreements in these terms: "an agreement between *spouses or prospective spouses* may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable

conduct" (*Cioffi–Petrakis* at 767, 960 N.Y.S.2d 152 [emphasis added], citing *Christian* at 73, 396 N.Y.S.2d 817, 365 N.E.2d 849).

At this stage of the proceedings, it is premature to make any findings of fact as to whether plaintiff engaged in overreaching, and similarly premature to find that there are no issues as to whether the spousal maintenance waiver is unconscionable as applied to present circumstances. Even in *Barocas,* a case cited several times by the majority which involves similar issues, the split majority there remanded the spousal support waiver for trial and did not decide that issue summarily (*Barocas v. Barocas,* 94 A.D.3d 551, 552, 942 N.Y.S.2d 491 [1st Dept.2012], *appeal dismissed* 19 N.Y.3d 993, 951 N.Y.S.2d 468, 975 N.E.2d 914 [2012] ["Although defendant's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement, given her knowing and voluntary execution thereof with benefit of counsel, factual issues exist as to whether the waiver would be unconscionable as applied to the present circumstances"]). I agree with the majority that certain factors, such as the presence of independent counsel, militate against a finding of overreaching. Moreover, the majority correctly points out that "the mere fact that [plaintiff] did not include his income in his financial disclosure, standing ****127** alone, is not a basis to set the agreement aside" and that an agreement cannot be set aside "merely because" it may have been improvident or one-sided. However, far from standing alone, plaintiff's failure to make a full financial disclosure is just one of many indicia of either overreaching or manifest unfairness, including his conduct during the negotiations, the use of dilatory tactics, the many questionable provisions and lopsided distribution under the agreement, the conflicting versions of events surrounding the negotiations, and the inconsistency ***80** between the conduct of the parties with the terms of the agreement. In short, there are sufficient indicia in the record to support defendant's defenses and counterclaims to preclude summary judgment.

I strongly disagree with the concurrence's assertion that the relationship between the parties here did not give rise to any mutual fiduciary duties. As the majority highlights, "the parties were engaged, had been living together for more than three years, had a child together, and were expecting another." However, my concurring colleague, who recognizes that "[a] fiduciary relationship 'may arise where a bond of trust and confidence exists between the parties,' " would hold that this particular relationship does not "correspond closely enough to a married relationship." If the relationship between these parties does not "correspond closely enough to a married relationship," I cannot imagine what would. Moreover, rather than conclude that plaintiff was in breach of his fiduciary duties to defendant, the concurrence takes the extraordinary and troubling position that defendant essentially should have known better than to trust plaintiff, that plaintiff's treatment of her demonstrated the absence of a relationship of trust and confidence, and that the harsh consequence of defendant's allegedly misguided judgment is to deny the recognition of any fiduciary relationship whatsoever. This reasoning puts the cart before the horse and is decidedly out of step with the jurisprudence on fiduciary relationships cited by the majority. It is a mistake of law to assert, as the concurrence seems to reason, that conduct in breach of a fiduciary duty proves the absence of a fiduciary relationship altogether. The obligations attendant to fiduciary duties arise out of the particular nature of the relationship of the parties and are imposed by law. The parties did not have an obligation to enter into a prenuptial agreement, but they did, as fiduciaries, have an obligation of loyalty to each other and an obligation to negotiate with the utmost good faith.

The concurrence also reaches the conclusion that the agreement is not substantively unconscionable because "the facts were disclosed at the time the parties entered into the agreement." However, defendant expressly argues that plaintiff did not make a full financial disclosure. Because there are triable issues concerning the adequacy of plaintiff's disclosure, the concurrence should not be drawing any resulting legal conclusions at this stage.

***81** There is also no basis whatsoever in the record for the concurrence's assertion that "Mr. Gottlieb indicated to his fiancée that he was not prepared to be generous with her in any way with respect to the emoluments of marital distribution," that "marriage to [plaintiff] required [defendant] to accept a hard bargain," and that he "laid these cards on the table." These arguments were never raised by the parties nor do they even come close to their respective versions of events. On the contrary, plaintiff has contended all along in his submissions that the settlement generously provides for defendant. Plaintiff has never alleged that he "required [defendant] to accept a hard bargain." Also ****128** without support in the record is the concurrence's claim that "[m]arriage was a

business to [plaintiff], and he let her know that" or the concurrence's unfounded inference that plaintiff somehow communicated this alleged sentiment "not in so many words, but by his conduct." Nowhere in the record is there any support for these claims or inferences. Although this version of events and colorful language may make for interesting reading, it views the record through a prism that examines the record only in the light most favorable to plaintiff.

The concurrence also claims to find a "not-so-veiled hostility to prenuptial agreements" coursing through this dissent. To be clear, I harbor no such sentiment. Rather, the question is simply whether, on the extant record, summary judgment should be denied so that the facts in dispute surrounding the making of the agreement may be determined at trial. I fully agree with my colleague that "the law gives parties the right to opt out of the Equitable Distribution Law," but opting out of the statutory scheme does not also entail opting out of the common law. If it is found that plaintiff did not overreach, that the terms are not manifestly unfair in spite of any overreaching, or that the maintenance waiver is permissible, then those terms should be declared enforceable. The concurrence, however, prefers to exaggerate my position and wonders "whether prenuptial agreements should now be relegated to the dust bin." Such hyperbole is unnecessary. The defense of manifest unfairness intervenes only where the execution of an agreement is tainted by overreaching, and in the absence of overreaching, courts do not inquire further.

Finally, the award for interim counsel fees should not be vacated, and a hearing should not be required to determine what portion of the $50,000 sought by defendant is connected ***82** to child-related issues. Plaintiff primarily argues that the agreement bars any award of counsel fees and that defendant provided no documentation in support of her application. "The purpose of interim counsel fees is to level the playing field while litigation is ongoing" (*Saunders v. Guberman,* 130 A.D.3d 510, 511, 14 N.Y.S.3d 334 [1st Dept.2015], citing *O'Shea v. O'Shea,* 93 N.Y.2d 187, 190, 689 N.Y.S.2d 8, 711 N.E.2d 193 [1999] ["The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet"]), and it is clear that the playing field between these parties is far from level. Courts possess the discretion to award interim counsel fees, "as justice requires," under Domestic Relations Law § 237(a). The court determined that defendant "lacks sufficient funds of her own to compensate counsel without depleting her assets" and it was well within the discretion of the court to award interim counsel fees to defendant. In the absence of any finding that the motion court abused its discretion, the award should not be disturbed, especially since this award is interim and subject to adjustment in any final determination.

Conclusion

For the reasons set forth above, I would modify the order of the Supreme Court, to the extent appealed from, by denying plaintiff's motion for summary judgment, reinstating defendant's first and third counterclaims, and remanding for trial on whether the prenuptial agreement should be declared unenforceable in whole or in part.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered October 31, 2013, modified, on the law and the facts, to deny the cross motion to dismiss the first and third counterclaims, to declare that ****129** the parties' prenuptial agreement is valid and enforceable, that the agreement's maintenance provisions were fair as of the date of execution and are not currently unconscionable, and that the agreement's property distribution provisions were fair as of the date of execution, to deny the cross motion for interim counsel fees, to vacate the award of such fees, to remand the matter for proceedings consistent herewith, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur except Saxe, J. who concurs in a separate Opinion and Feinman, J. who dissents in an Opinion.

All Citations

138 A.D.3d 30, 25 N.Y.S.3d 90, 2016 N.Y. Slip Op. 00613

13 A.D.3d 12
Supreme Court, Appellate Division,
First Department, New York.

K., Plaintiff–Respondent,
v.
B., Defendant–Appellant.

Nov. 9, 2004.

Synopsis

Background: In proceedings for divorce and ancillary relief, the Supreme Court, New York County, Marylin Diamond, J., entered order granting divorce and supplemental judgment dividing marital property. Husband appealed.

Holdings: The Supreme Court, Appellate Division, Marlow, J., held that:

evidence was sufficient to support grant of divorce on grounds of cruel and inhuman treatment;

pre-marriage agreement requiring equal division of all mutually held assets upon divorce was unenforceable and inadmissible as evidence;

distribution of marital property which granted wife greater share of marital assets was not inequitable;

wife's one-time liquidation of mutual fund and acquisition of millions of dollars of tax liability in her business did not amount to financial misconduct affecting equitable distribution;

trial court properly imputed annual income of $60,000 to husband for purposes of calculating child support; and

husband failed to demonstrate judicial bias.

Affirmed.

Ellerin, J., concurred with opinion.

Saxe, J., dissented in part with opinion in which Gonzalez, J., joined.

Attorneys and Law Firms

****78 *13** Ronald Cohen, New York, for appellant.

Katten Muchin Zavis Rosenman, New York (Bernard E. Clair of counsel), for respondent.

JOHN T. BUCKLEY, P.J., DAVID B. SAXE, BETTY WEINBERG ELLERIN, GEORGE D. MARLOW, LUIS A. GONZALEZ, JJ.

Opinion

MARLOW, J.

This appeal presents an unusual set of facts, whose most pertinent aspects are substantially set forth in the dissent. The parties' marriage was unconventional in certain ways, but that lack of convention does not, as the defendant-husband would have it, trump the settled equitable distribution principles which have evolved in New York since 1980. For that reason we most respectfully disagree with our dissenting colleague(s) and affirm the trial court.

*****79 CRUEL AND INHUMAN TREATMENT***

Without citing any legal authority, the husband argues that the wife could not establish cruel and inhuman treatment as a ground for divorce since the parties did not cohabit, but rather maintained separate residences-the wife in Manhattan and the husband in Putnam County. However, in considering a cause of action for cruel and inhuman treatment, the fact-finder ***14** should focus primary attention on the nature of the interaction between a husband and wife, rather than on the type of living arrangement they have.

After trial, the court made express findings of fact in favor of the wife's claim of cruel and inhuman treatment. Specifically, the court found sufficient proof that the husband committed "marital rape" more than once; that the husband wiretapped and monitored the wife's telephone conversations without her knowledge; that the husband accused the wife of adultery; that the husband threatened to ruin the wife's business; that the husband refused to discuss his finances with the wife, some of which involved projects which the wife was financing; that the husband engaged in "various financial maneuvers" which involved "surreptitiously" withdrawing money from joint

accounts, selling stock and liquidating assets, including taking for his own benefit a $35,000 federal income tax refund check; that the husband suggested to the wife that she was mentally unstable and incapable of making decisions; that the husband wrote a "manipulative and intimidating" letter [1] to the wife's therapist; that the husband engaged in a pattern of anger followed by withdrawal when the wife wanted to talk about her feelings concerning the parties' marriage and family; that the husband continually gave the wife "mean and frightening" stares; that the husband yelled at the wife, demeaned her and berated the wife when she tried to discuss serious issues with him; that the husband engaged in a long pattern of intimidation; [2] and that when the wife was feeling "pressured" by her mounting, severe business problems, the husband remained upstate, refusing to spend any more time in New York City with her and their three children, despite her repeated requests. These incidents, evincing a long-standing pattern of emotional neglect and abuse, are ***15** amply supported by the record and they well establish the wife's cause of action for cruel and inhuman treatment (*see e.g. Allwell v. Allwell,* 252 A.D.2d 683, 675 N.Y.S.2d 248 [1998]; *Gascon v. Gascon,* 187 A.D.2d 955, 590 N.Y.S.2d 369 [1992]; *Richardson v. Richardson,* 186 A.D.2d 946, 589 N.Y.S.2d 624 [1992], *lv. dismissed in part denied in part* 81 N.Y.2d 867, 597 N.Y.S.2d 928, 613 N.E.2d 960 [1993]; *Birnbaum v. Birnbaum,* 177 A.D.2d 367, 576 N.Y.S.2d 514 [1991], *lv. dismissed* 79 N.Y.2d 1040, 584 N.Y.S.2d 449, 594 N.E.2d 943 [1992]; ****80** *Rieger v. Rieger,* 161 A.D.2d 227, 554 N.Y.S.2d 613 [1990]). Thus, no basis exists to disturb the trial court's finding, largely one of credibility (*see Eschbach v. Eschbach,* 56 N.Y.2d 167, 173–174, 451 N.Y.S.2d 658, 436 N.E.2d 1260 [1982]), that the wife proved the stated ground for divorce.

1 In the letter, the husband purported to express concern about his wife's allegedly deteriorating mental health, but urged that, since the therapist could be tired at the end of a full day at the office and therefore not totally "in touch," the therapist should possibly involve a psychiatrist in evaluating the wife's state. This letter was attached to a copy of a news article that described a case where a therapist was held liable for mis-diagnosing a patient who subsequently killed two people. At the bottom of the article was written, "Professional Responsibility." The therapist testified that he found the husband's correspondence "quite manipulative."

2 In particular, the husband manipulated the wife into writing a letter at his direction, indicating that he did not treat her cruelly. The letter was to be shown to the parties' children in the event they learned of a prior divorce action which the wife had commenced, but discontinued after the husband threatened to destroy her, their family and her law practice.

65%–35% DISTRIBUTIVE AWARD

The husband also maintains that the court erred in distributing the marital property 65%–35% in the wife's favor since the parties had a pre-marriage agreement requiring a 50%–50% division of all mutually held assets. [3] Although the parties signed the "agreement," it was not acknowledged or proven in the manner required to entitle a deed to be recorded (*see* Domestic Relations Law § 236[B][3]; *Matisoff v. Dobi,* 90 N.Y.2d 127, 130, 659 N.Y.S.2d 209, 681 N.E.2d 376 [1997]). Therefore, the "agreement" is unenforceable, and the trial court properly rejected it as evidence.

3 Ironically, the agreement also provides that "[a]ll child rearing shall be a joint responsibility if both [husband and wife] are working full time."

Moreover, while the husband may have contemplated an unconventional marriage in which the parties make unequal financial and emotional contributions, but, upon dissolution, the parties are nonetheless awarded an equal distribution of marital assets, the law does not contemplate such an arrangement; especially in a two-decade-long marriage like this, where time, a variety of difficult circumstances, and the arrival of three children have together created a life the parties likely never anticipated when they wrote a so-called "agreement." That writing-created in a pre-equitable distribution context-carries no legal force save for the minor impact of its historical voice.

Under the current law, this husband cannot escape accountability for his ever-increasing family obligations simply because these otherwise intelligent parties—20 years earlier and yet to be faced with the demands of parenthood and other unanticipated challenges—had agreed to live in separate counties. While originally the wife did agree to that unorthodox arrangement, she nevertheless continued to work full time, provided the lion's ***16** share of the family's financial support, and reared their three children virtually alone. While the dissent maintains that neither party "contemplated

altering their lives so the children would have both parents around on a daily basis," they did agree that if both parents were working full time, they would jointly share responsibility for child rearing. Here, the wife worked full time and assumed virtually all child-rearing responsibility, while the husband dabbled in his projects and assumed virtually none of the child-rearing responsibility. The unexpected evolution of this couple's joint and separate lives bespeaks, with crystal clarity, the wisdom of the Equitable Distribution Law, designed so that the experience a couple endures and the contributions each spouse makes foretell the character of a marriage's end.

We therefore respectfully disagree with the dissent's position that the husband's inaction during the parties' most financially difficult periods was justified based on their pre-marriage "agreement" two decades earlier. During the time the wife was earning an excellent living, even though she was simultaneously and almost singlehandedly raising the children, the husband's lack of interest or help may arguably be considered of lesser importance than more recent events only because some of his proven indifference ****81** occurred earlier in their marriage. However, over the long haul, the record is clear that the husband gave very little, both financially and domestically, to his marriage and his family.

Thereafter, the family's size and financial health dramatically changed. After her law partner was suddenly killed in 1996, the wife became solely responsible for the operation of the debt-ridden law firm. Under the enormous pressure of trying to salvage the firm by herself in the wake of her partner's death and, further, upon the consequential discovery that the firm had other significant liabilities, all while at the same time raising and trying to nurture their three children, the wife asked her husband for help. He refused to step up to the plate and offer any assistance, be it financial, emotional or otherwise.

The husband's reliance on the parties' pre-marriage agreement became increasingly indefensible and illogical with the birth of each of his three children. We can reach no other conclusion than that the husband's indifference clearly justifies the unequal distribution of marital assets awarded by the court, not as a punitive consequence, but, rather, as a factually supported reflection of the actual contributions each spouse made to the ***17** existence and survival of the marriage and in fulfillment of their respective roles as parents and partners.

The Domestic Relations Law contemplates an equitable, not necessarily equal, division of marital assets based on the parties' respective contributions to the marriage (*see* Domestic Relations Law § 236[B][5][d][6]). Equitable Distribution is "based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker" (*O'Brien v. O'Brien,* 66 N.Y.2d 576, 585, 498 N.Y.S.2d 743, 489 N.E.2d 712 [1985]; *accord Price v. Price,* 69 N.Y.2d 8, 14, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]). The distribution of marital assets depends not only on the financial contribution of the parties "but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home [citations omitted]" (*Brennan v. Brennan,* 103 A.D.2d 48, 52, 479 N.Y.S.2d 877 [1984]; *accord Price,* 69 N.Y.2d at 14, 511 N.Y.S.2d 219, 503 N.E.2d 684). The evidence is abundant that the wife contributed significantly in every single category, and the husband hardly at all. Therefore, we affirm the trial court's unequal distribution of marital property, as amply supported by the record, even were we not to consider any economic fault (*see* Domestic Relations Law § 236[B][5][d]).

The wife was the principal wage earner for most of the marriage. As conceded by the husband, during the second half of the marriage the wife provided nearly all of the entire family's financial support. In addition to paying all the New York City household and child care expenses, she contributed substantial sums to the husband's various real estate projects. Indeed, the husband admitted that the wife contributed between 1.5 and 2 million dollars for his projects, which, with abundant consistency, failed to produce reliable or substantial income. For example, one venture, a cattle farm in Vermont, produced "a couple of thousand dollars a year." However, the husband later testified that this project "throws off some money, but it's a much bigger loss" and with the exception of one year it never made a profit. Beyond that, the evidence unquestionably establishes that the wife undertook the ****82** herculean combined roles of full-time lawyer, primary homemaker and primary parent of the three children, all with, at best, marginal help and support from

their father. As the family grew and the professional and personal demands on the wife increased, the husband—rather than pitching in more—refused to spend additional ***18** time in New York City to help his wife with their three children.

When her law practice was failing and she needed her husband, he once again refused. This husband's telling response during these trying times was to complain that his wife was too exhausted to go out with him during the one or two evenings each week that he would journey about 60 miles to New York City. His reaction was, as the trial court put it, "selfish and self-centered," as during these "extremely stressful" events "a married person would be expected to look to her spouse at such time for emotional, if not financial support." This record depicts a husband who gave neither.

The husband also criticizes the court's determination that economic fault warranted a greater distribution of marital assets to the wife.[4] The dissent says that the court's consideration of fault is punitive. However, while most often, where a marriage is of long duration, a court does not distribute marital property unequally unless there is a finding of marital or economic fault. Here, based on these most unusual circumstances, the record fully supports an unequal distribution of assets based solely on the parties' respective, unequal contributions to the marriage. Indeed, the court specifically and correctly cites, in addition to the wife's financial contributions, her "contributions as the primary homemaker and caretaker, particularly her assumption of almost all responsibility for child-rearing" as a basis for awarding the wife the greater share of marital assets (*see* Domestic Relations Law § 236[B][5][d][6]; *cf. Greenwald v. Greenwald,* 164 A.D.2d 706, 565 N.Y.S.2d 494 [1991], *lv. denied* 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443 [1991]; *Granade–Bastuck v. Bastuck,* 249 A.D.2d 444, 671 N.Y.S.2d 512 [1998]).

4 The husband also argues that the court improperly found that his "conduct constituted 'egregious' marital fault." However, this is a gross and disingenuous distortion of the court's findings of fact and conclusions of law. The court acknowledged defendant's argument that marital fault is ordinarily not a factor in equitable distribution, but then observed that "economic misconduct, as distinct from marital fault, may properly be considered."

In any event, the court's finding concerning that the husband's relentless appropriation of money, including money set aside for his children's education, and conversion of personalty, for his own purposes while ignoring his wife's pleas for financial and emotional assistance, further supports the trial court's conclusion that an unequal distribution of property is fair and legally justified (*see* Domestic Relations Law § 236[B][5][d][11] and § 236 [B] [5][d][13]; *Davis v. Davis,* 175 A.D.2d 45, 573 N.Y.S.2d 162 [1991]). In addition, the husband ***19** refused the wife's request to sell off some real estate holdings to produce some much needed cash. The husband also admitted that he withdrew money from an escrow account in violation of a court order. Against this backdrop of financial misconduct, it is of no moment whether the husband's actions in filing a claim for Innocent Spouse Relief was inappropriate, as the trial court found, and as challenged by the dissent as a basis for a finding of economic misconduct.

Contrary to the dissent's conclusion that defendant liquidated marital assets, including ****83** his children's investment funds, in an attempt to earn income from developing properties, defendant admitted that he sold marital property to "fend for himself" as he understood that no money would be coming his way from his wife or her law firm. There is no evidence in the record that the husband used any of the money from the liquidated marital assets for his family's ultimate benefit. On the contrary, the husband incessantly invaded marital property for his own purposes, as he was earning no appreciable income to support either himself or his family.

This behavior stands in stark contrast to his wife's one-time liquidation of a mutual fund which she used solely to preserve the major family asset—her law practice from which the husband benefitted for many years. The wife used this money to repay investors who had placed a lien on the firm. While the husband also complains that the wife incurred millions of dollars of tax liability in her business, the firm made a business decision to pay several million dollars it owed to investors instead of paying payroll taxes. Had the firm paid the payroll taxes, it would still have owed its investors. Either way, the firm would still have significant debt, with virtually identical financial consequences for this family. Accordingly, we affirm the trial court's distribution of marital property as fairly representing the parties' lopsided contributions to the marriage.

VALUATION OF WIFE'S BUSINESS

The husband also challenges the court's finding that the wife's firm had no value. However, there is no dispute that at the time the wife commenced this action, her firm's tax liabilities and other debt far outweighed any assets. Consequently, when the husband offered no evidence to the contrary, the court correctly found that the firm had no value whatsoever. That the court-appointed independent accountant did not perform an ***20** analysis of the value of those contingency-fee cases, which the firm possessed on the valuation date, does not warrant a different result. Although given the opportunity to do so, the husband, as the spouse claiming entitlement to marital property, did not offer any evidence to show that the value of those cases exceeded the firm's liabilities (*see Davis v. Davis,* 128 A.D.2d 470, 513 N.Y.S.2d 405 [1987]). Accordingly, the husband failed to meet his burden to prove that the wife's business had any value.

CHILD SUPPORT

The husband argues that the court improperly imputed a $60,000 annual income to him for child support purposes. Child support is based on a parent's ability to provide for his or her children, not necessarily the parent's current economic situation (*see* Family Court Act § 413[1][a]; *Matter of Zwick v. Kulhan,* 226 A.D.2d 734, 641 N.Y.S.2d 861 [1996]). Since the trial court considered the credible proof—specifically, the husband's possession of both an architect's and real estate broker's license and his extensive training and experience in both fields—and rendered a decision based on the proven facts and applicable law, we find no basis to disturb its reasoned and reasonable imputation of income to the husband (*see Chervin v. Chervin,* 264 A.D.2d 680, 695 N.Y.S.2d 565 [1999]).

WIFE'S LAW LICENSE

Although at the end of his main brief and in a conclusory fashion the husband asserts that the matter must be remanded, among other reasons, to value the wife's law license, he makes no specific substantive argument which focuses on the merits of this claim. We therefore decline to consider it.

****84** ***JUDICIAL BIAS***

To begin with, the husband's claim of judicial bias is unavailing, since he both failed to interpose an objection when he had an opportunity to do so, and, in the absence of a mandatory statutory basis for disqualification, he failed to demonstrate bias affecting the result (*see Schrager v. New York Univ.,* 227 A.D.2d 189, 191, 642 N.Y.S.2d 243 [1996]; *Melnik v. Melnik,* 118 A.D.2d 902, 904, 499 N.Y.S.2d 470 [1986]). Furthermore, the judge violated no controlling ethics opinion or rule (see Advisory Comm. on Jud. Ethics Op. 02–06 [2002]). Moreover, not only does the credible evidence overwhelmingly ***21** support the results, but, indeed, in some respects, the court's economic determinations are generous to the husband.

Accordingly, the judgment of the Supreme Court, New York County (Marylin Diamond, J.), entered April 4, 2000, granting the wife a divorce on the ground of cruel and inhuman treatment, and Supplemental Judgment of Divorce, same court and Justice, entered October 19, 2001, inter alia, dividing the parties' marital property 65%–35% in the wife's favor, finding that the wife's law firm has no value, and finding the husband 50% responsible for those debts of the wife's business for which she may be held personally liable, should be affirmed, without costs.

***36** Judgment, Supreme Court, New York County (Marylin Diamond, J.), entered April 4, 2000, and Supplemental Judgment of Divorce, same court and Justice, entered October 19, 2001, affirmed, without costs.

BUCKLEY, P.J. and ELLERIN, J. concur. ELLERIN, J. also concurs in a separate Opinion. SAXE and GONZALEZ, JJ. dissent in part in an Opinion by SAXE, J.

ELLERIN, J. (concurring).

I reluctantly concur in the majority result herein notwithstanding my belief that the distribution of marital assets is inequitably generous to defendant-appellant.

While the dissent predicates its rationale on the invalid agreement the parties signed some 26 years ago, this case is controlled by the laws governing equitable distribution as set forth by the Court of Appeals in *Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986].

As has been repeatedly held, the overriding consideration in equitable distribution is the contribution each party makes to the marriage, the success of which depends "not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home" (*id.* at 14, 511 N.Y.S.2d 219, 503 N.E.2d 684 [citation omitted]). In this case, appellant's contribution to the marriage essentially consisted of taking the children to school one day a week. Respondent, on the other hand, not only assumed almost the entire responsibility for rearing the couple's three children, but also overwhelmingly provided the financial support for the family, to the extent of 90%. She not only paid all the New York City household and child care expenses, but also contributed substantial sums to appellant's various projects, which do not appear to have resulted in any benefit to the marriage beyond appellant's own personal gratification. Moreover, the egregious conduct by the husband, detailed in the majority opinion, which amply supports the finding of cruel and inhuman treatment, is the very antithesis of the "emotional and moral support" contemplated by the equitable distribution ****85** law, both in adversely affecting the wife's personal mental well- ***22** being and in interfering with her pursuit of the professional activities that provided the financial support for the family.

Clearly, based on their respective contributions, in my opinion, an award of 20% would be overly generous to appellant, and I would so find were I considering this matter at the trial level.

Most puzzling is the dissent's reference to respondent's egregious "financial misconduct" in deciding (with her partner) to pay millions of dollars owed to the debt-plagued firm's investors instead of paying payroll taxes. Respondent was trying to save the firm from dissolution, and subsequently negotiated settlements in satisfaction of the firm's debt with the taxing authorities, albeit with the exception of the IRS. In any event, as the majority points out, had the firm paid the payroll taxes, it still would have owed its investors and still would have had significant debt, and the financial consequences for the family would have been virtually the same. More significantly, notwithstanding the dissent's harsh condemnation of respondent's attempt to save the firm, it is difficult to understand by what rationale any claim that the government might have for "tax-avoidance improprieties" should inure to the benefit of appellant.

SAXE and GONZALEZ, JJ. dissent in part in an Opinion by SAXE, J.

SAXE, J. (dissenting in part).

In litigated divorces, the parties often express numerous grievances and disappointments concerning the conduct of the other spouse, which may range from uncooperative and thoughtless, to cruel and shameful, to criminal. Seldom do the combatants mention good or happy times, positive experiences or past loving, caring conduct. As a result, the court is often left with a one-sided, skewed negative image of one or both parties. But, regardless of the trial court's disagreement with or disapproval of an individual's approach to the marriage or treatment of his or her spouse, unless that individual's conduct rises to the level of egregious marital fault or serious economic misconduct, in a long-term marriage the Equitable Distribution Law generally requires an essentially even distribution of the marital estate (*see e.g. Granade–Bastuck v. Bastuck,* 249 A.D.2d 444, 671 N.Y.S.2d 512 [1998]).

Here, the conduct of the defendant-husband did not rise to the level of egregious fault or serious economic misconduct. More importantly, the limited nature of his participation in the family's day-to-day life, for which the trial court found him blameworthy, was primarily due to his separate residence in another county, which was precisely in keeping with the framework ***23** of the marriage, specifically agreed upon by the parties, in writing, prior to the marriage. Within their written agreement, in which both parties stated that they intended and wanted to live primarily in separate households in separate counties, is the implicit assumption that neither of them should be penalized for arranging their lives in accordance with that agreement.

With this background in mind, I disagree with the highly skewed equitable distribution award directed by the trial court and approved by the majority here, in which the defendant-husband received just 35% of the marital assets, while being saddled with half the wife's enormous personal debt liability. In the parties' unique

circumstances, defendant's conduct does not warrant such a disproportionate, punitive award, especially when plaintiff's own serious financial improprieties are taken into account. In my view, a 55%–45% distribution takes into account the agreed- **86 upon structure of the parties' marriage while recognizing the wife's greater burden in caring for the family.

I disagree even more strongly with the concurring justice's suggestion that the distributive proportion was not punitive enough, and should be 80/20. But, a debate of just how punitive the distributive award ought to be is not necessary, because this is not a situation where a punitive distributive award is warranted. Ultimately, determination of the proper and reasonable equitable distribution award must be based upon a thoughtful weighing of the complete factual picture within the legal framework of the Equitable Distribution Law, rather than by suggesting, or averaging, a variety of alternative percentages.

Before proceeding to discuss the reasoning behind my conclusions, I note that I agree with the majority's affirmance of the judgment of divorce itself, since plaintiff-wife's testimony established grounds for divorce based upon cruel and inhuman treatment (Domestic Relations Law § 170[1]).

FACTS

The plaintiff wife, "K," and defendant husband, "B," [1] were married on October 8, 1978. K is an attorney who, prior to the marriage, was employed as an associate at the firm of Skadden *24 Arps. B is an architect and real estate broker who also buys and renovates properties. During the marriage they had three children, born in 1982, 1984 and 1989. This divorce action was commenced after almost twenty years of marriage, in June 1998.

1 The trial court's adoption of this anonymous form of caption and reference to the parties was employed for the protection of plaintiff's law firm, many of whose clients may not know the financial straits it is in. It is notable that inasmuch as the husband was awarded no interest in the firm, the anonymity benefits only the wife.

It is undisputed that one week prior to the marriage, the parties agreed, in writing, to an unusual marital living arrangement, by which each of them would maintain his or her own residence, the wife's in New York City, the husband's in Putnam County, New York, and would spend weekends together in one or the other location according to an agreed-on schedule, depending on the season. It also contained financial provisions, including one providing for an equal division of marital property upon divorce. Despite limits to its enforceability, this agreement should have been admitted into evidence inasmuch as it contained the fabric and the prism through which their marital expectations could be understood and evaluated.

Because the document pre-dated the Equitable Distribution Law, having been executed on October 2, 1978, the absence of the formalities specified by Domestic Relations Law § 236(B)(3) does *not* invalidate it (*see Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 194, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]). Under the law as it stood at the time the agreement was executed, it was largely valid. [2] Had the husband properly and timely proceeded to seek enforcement of its property-division provision, he would have been entitled to rely on that term of the agreement. It was his failure to raise the existence of the agreement until the date he took the stand at the trial of the financial issues that precluded him from seeking enforcement of its financial provisions. Nevertheless, **87 the agreement still had evidentiary value because it accurately reflected *both* parties' understanding of the nature of their marriage and their responsibilities toward one another. In any event, it is undisputed that the parties agreed to their non-traditional arrangement of maintaining separate households, even in the event that they had children, and they lived in accordance with this agreement for many years, even after they had children.

2 Certain provisions of the agreement, such as those promising particular sexual acts as well as specifying their frequency, are unenforceable, but this would not invalidate the entire contract (*see generally* 22 N.Y. Jur. 2d Contracts § 211).

At about the time of the parties' marriage, K left her position at Skadden Arps in order to start a new type of law practice. In the wake of the United States Supreme Court decision allowing lawyers to advertise (*see* *25 *Bates v. State Bar of Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 [1977]), and after extensive discussion with Steve M., one of the partners of a California law

firm (J & M), K decided to join J & M and open East Coast offices, with the understanding that the firm would begin aggressively marketing itself as a provider of general legal services to ordinary people. Initially, she obtained investors and opened up 11 firm offices in New York.

J & M expanded aggressively at first, continuing to open additional branch offices during the 1980s. In 1983 the firm had 15–16 branch offices in New York, and K became a full one-third partner in the firm. However, K and her law partner Steve M., who served as the firm's chief financial officer, ultimately found that the branch offices generated insufficient revenue, and they began to retreat from providing general legal services and to focus the firm's practice on personal injury cases, in an attempt to become profitable. By the early 1990s they were struggling to keep the firm afloat economically.

As between the parties, the pattern of conduct that had evolved during the first years of their marriage regarding their responsibility for expenditures was that K paid for her expenses in New York, and B paid for his expenses in Putnam. Then, as K became a partner at J & M and began to earn a greater income from the firm, and especially after 1989 when the real estate market collapsed, along with B's real estate development partnership, B regularly sought financial contributions from K toward his "projects," the properties in which he invested and developed for resale. Additionally, the couple had purchased a Vermont farm in 1986, on which B raised cattle; while this property sometimes earned a small profit, in some years it engendered losses of many thousands of dollars, and funds from K were required for its upkeep.

By the late 1980s, K was providing 90% of the financial support for the family. For his part, B contributed toward the costs of his projects to the extent he was able, with his contribution to the rest of the family's expenses limited to periodic payments of a relatively small portion of the three children's private school tuition.

Even after they had children, the couple continued to maintain their separate residences, and the children resided with the wife in Manhattan. At first, B came to visit one weekday in addition to their scheduled weekend visits. But, after K gave birth to their second child, B acceded to her request that he come in and stay over in Manhattan for two weeknights. By the mid–1990s, K asked B to come into the city early enough ***26** on Tuesdays so as to participate in the children's evening activities, but he did not arrive until 8:30 or 9:30 P.M., which she felt was too late to be helpful. Similarly, he did not visit on weekends any earlier than Saturday night, explaining that he had to work. K asserted that once the children were older, they no longer wanted to spend weekends in the ****88** Putnam County home, so she and the children stayed in Manhattan.

Sometime around 1989, when the couple's third child was born, K moved to a bigger rental apartment in the same building, over the husband's objections that they could not afford the increase in rent. K emphasized that she had spent years accommodating his wishes and that, in fact, she paid for almost everything, and she made the move despite his disapproval, causing him to became furious. Indeed, it was around this time that, according to the wife's testimony, B became sullen, angry and withdrawn, treating her rudely and discourteously, refusing to discuss things and calling her stupid.

The firm's problems with debt intensified in the early 1990s. K acknowledged that in 1991 or 1992, faced with investors demanding repayment, she and her partner Steve M. decided to use "a couple of million dollars" that would normally have been used for payroll taxes, and pay back investors to whom they owed money. There was no explanation provided as to how they intended to resolve the tax debt.

In October 1995, in response to steps taken by Steve M. and K which allegedly had a negative impact on the firm's west coast offices, Len J., the J & M partner in California, sued Steve M. and K, alleging various business torts. In December 1995 they settled the claim by agreeing to buy out Len J.'s interest in the firm by paying him $1.5 million over a period of ten years, while leaving him with a 1% limited partnership interest and certain rights to the firm's name.

Also in 1995, the firm adopted a new limited liability partnership structure in an attempt to prevent further losses to J & M for expenses attributable to the branch offices.

Then, in April 1996, Steve M. was killed in an automobile accident, and K became solely responsible for all the firm's financial woes. She discovered that the firm had substantial additional tax liabilities, and that its debts

came to approximately $30–40 million. In 1996, after Steve M. died, the New York State taxing authority placed a $700,000 lien on both J & M and on the parties' house in Cold Spring, New York, based upon the firm's non-payment of payroll taxes.

***27** K began to concentrate on saving the firm from being put out of business. She began negotiations with the many taxing authorities, federal, state and local, to which the firm owed money; for most of these debts, she successfully negotiated a pay-out deal providing that a partial payment, over time, would satisfy the debt. However, negotiations with the IRS were not as successful; at the time of trial, no such settlement had been reached with the federal authorities. The claimed debt to the IRS at that time was over $4 million.

K also began to search for, and after commencement of this action she ultimately found, another firm that could take over the legal practice of processing J & M's personal injury cases, in exchange for two-thirds of the proceeds from those cases.

Under the enormous pressure caused by the mounting evidence of overwhelming debt and her responsibility for arriving at a resolution without dissolving the firm, K complained to B that she was "drowning" and needed his help and support. His reply was unsympathetic: he said he had his own problems and needed money from her for his projects, which properties he refused to sell because they would eventually be worth a lot more money; he also blamed her for causing the problems by doing such an incompetent job at J & M.

In 1996, at B's request, K gave him a final check for $100,000, from her savings. ****89** After that, she was unable any longer to contribute toward his projects, given her own precarious financial situation. She subsequently discovered that he had liquidated approximately $130,000 worth of their mutual funds, his explanation being that he needed to spend it on different projects for the farm and on part of the children's school tuition. Also in 1997, K discovered that B had cashed a $35,000 tax refund from their 1995 joint tax return without mentioning it to her. He explained that he used the money to pay expenses on the farm. The husband also sold other items in order to obtain the funds he continued to need in order to maintain his properties and projects; some of these items were marital property, some he claimed were his separate property.

Notably, K, too, took possession of marital property: specifically, she acknowledged having cashed $135,627 of jointly owned stock to pay off J & M investors after Steve M. died; although she referred to (and treated) the stock as her own, she did not demonstrate that it was her separate property.

In concluding that defendant-husband should receive only 35% of the marital estate, the trial court concluded that B had ***28** failed to make a significant contribution to the marriage, and remarked that the marriage was not the full partnership contemplated under the Equitable Distribution Law (citing *Price v. Price,* 69 N.Y.2d 8, 13–16, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]). The court also held that he had committed financial misconduct, such as his unilateral taking of marital funds and property, and his filing of an "innocent spouse tax relief" form with the IRS.

DISCUSSION

This case is highly unusual. Normally, in distributing marital assets the court need only consider and judge parties' conduct in the framework of the Equitable Distribution Law (Domestic Relations Law § 236[B]), particularly the factors listed in section 236(B)(5)(d). Here, however, defendant's conduct must also be viewed in the context of the couple's pre-nuptial agreement, in which they set forth their mutual understanding of the unique nature of the relationship they both sought. The marriage envisioned by these two highly educated, sophisticated individuals, one of whom was an attorney, involved their maintaining wholly separate homes and separate weekday lives.

Viewed in this light, defendant's failure to take part in family life, even when the crisis in plaintiff's life would have made his participation invaluable, cannot serve as the basis for the 65/35 split of marital assets directed by the trial court. Nor is the concept of misconduct applicable here to justify a skewed distribution of the marital estate.

Financial Misconduct

It is well established that marital fault, that is, misconduct on the part of one spouse toward the other, generally does not warrant a punitive distribution of marital

property, unless "the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship-misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties" (*see Blickstein v. Blickstein,* 99 A.D.2d 287, 292, 293, 472 N.Y.S.2d 110 [1984], *appeal dismissed* 62 N.Y.2d 802 [1984]). The rule enunciated in *Blickstein* precludes the punitive disproportionate distribution of marital assets based upon such misconduct as adultery, alcoholism, verbal abuse and even physical attacks (*see McCann* ***29** *v. McCann,* 156 Misc.2d 540, 547, 593 N.Y.S.2d 917 [1993]), at least barring the type of vicious assault discussed in ****90** *Havell v. Islam,* 301 A.D.2d 339, 751 N.Y.S.2d 449 [2002], *lv. denied* 100 N.Y.2d 505, 763 N.Y.S.2d 811, 795 N.E.2d 37 [2003]. No such shocking conduct is established here, nor did the trial court find such egregious marital fault. Plaintiff's testimony regarding conduct which plaintiff denominated "marital rape" was relied upon in part to establish grounds for divorce, but, properly, was *not* relied upon to support an uneven distribution of marital property.

In addition to "egregious" marital fault, a party's financial misconduct may serve as grounds for adjusting the distribution of the marital estate, where it falls within the category of "wasteful dissipation of assets" under Domestic Relations Law § 236(B)(5)(d)(11) (*see Blickstein, supra; Havell v. Islam,* 301 A.D.2d at 344, 751 N.Y.S.2d 449; *Southwick v. Southwick,* 202 A.D.2d 996, 612 N.Y.S.2d 704 [1994]). However, defendant's conduct toward plaintiff and toward their assets, although perhaps blameworthy in some respects, does not rise to the level of wasteful dissipation of assets contemplated by the statute, and did not warrant the punitively disproportionate award made by the trial court.

The financial misconduct by defendant upon which the trial court relied in so unevenly dividing the marital estate consisted of (1) defendant's liquidation of the parties' brokerage and money market accounts, valued at approximately $135,000; (2) his recovery of the cash surrender value of life insurance policies, equaling approximately $60,000; (3) his taking sole possession of a joint tax refund of $35,000; (4) his selling of artwork and antiques at below-market values and use of the funds; and (5) his filing of an "innocent spouse" tax relief form with the IRS in an effort to prevent the enormous tax liability of plaintiff's law firm to be visited upon him.

The trial court termed defendant's cited conduct a dissipation of marital assets. However, the term "dissipation" is not generally applied to a spouse's use of marital funds to pay for the upkeep of marital property that the other spouse would prefer to be sold. Rather, the term is generally used to characterize such types of wasteful expenditures as gambling, the purposeful destruction of assets or a business, secreting assets, or squandering large amounts of money on completely separate concerns. For instance, in *Maharam v. Maharam,* 245 A.D.2d 94, 666 N.Y.S.2d 129 [1997], this Court increased an equitable distribution award in the wife's favor from 55% to 65%, where the defendant husband "secreted [marital] assets in a foreign bank account" and ***30** "squandered sizable sums on luxury items and in admitted adulterous affairs" (*id.* at 95, 666 N.Y.S.2d 129). In *Davis v. Davis,* 175 A.D.2d 45, 46, 573 N.Y.S.2d 162 [1991], when the defendant-husband wanted to close the family-owned business, and the plaintiff-wife assumed the full responsibility of running it, the defendant-husband affirmatively sought to frustrate her efforts by attempting to dissuade clients from utilizing the company's services. These actions, along with the husband's transfers of funds without fair consideration to third parties, were found to support the court's 60%–40% distribution of the marital estate in the wife's favor (*id.* at 48, 573 N.Y.S.2d 162). Interestingly, while in *Contino v. Contino,* 140 A.D.2d 662, 529 N.Y.S.2d 14 [1988] the Second Department remarked that secreting assets supports a finding of economic fault, such misconduct did not prompt the Court to change the proportions in which the marital estate was divided. Rather, it awarded to the defendant the amount secreted by the plaintiff, then divided the remainder of the estate evenly (*id.* at 662–663, 529 N.Y.S.2d 14).

****91** When marital funds are used in the maintenance and upkeep of marital property, as the funds in question were used by defendant, those expenditures simply do not fall into the same category as the foregoing dissipations of assets. The parties may have disagreed as to whether they should continue to use marital funds to pay for the upkeep of property rather than simply sell it. However, even if one party's unilateral decision to continue to pay this type of upkeep cost is a bad idea, it simply does not rise to the level of the type of financial misconduct that warrants a punitive, skewed distribution of the entire marital estate.

B's continued demands for financial support for his projects when K had no money left to give, and had more pressing demands for the funds to which she had access, were certainly self-centered and immature. But, the critical point here is that B's use of marital funds for the maintenance of properties and projects was not an improper seizing of family funds for his private use, but was in keeping with his approach throughout the marriage to earning money. He was never employed in a manner that resulted in a weekly paycheck, but rather, sought to periodically turn a large profit, an approach which requires infusions of cash for upkeep up to the point of ultimate sale.

Additionally, it is far from clear that K's use of $135,627 of jointly owned stock to pay off J & M investors after Steve M. died was any more useful or valuable to the family's economic well-being than B's use of marital funds for his ventures.

***31** It is worth noting that in the divorce arena, where a fund of support available during the marriage has dried up, it is an everyday occurrence for one spouse to unilaterally take possession of funds that properly belong equally to both. These steps may be inadvisable, and may warrant charging the party who took marital funds with a preliminary distribution to him of the funds lost by that decision. Such an adjustment, or its equivalent, is far less drastic, and more appropriate, than a punitive alteration of the proportions in which the entire marital estate is distributed.

Another fact which the trial court considered as financial misconduct was B's filing with the IRS for "innocent spouse" tax relief. The court asserted that this constituted an attempt to sabotage the firm's settlement with the IRS, based upon the judge's conclusion that B could not have been viewed as potentially liable for the firm's tax liability. However, inasmuch as a tax lien had already been placed upon B's home in Cold Spring, New York, and he was discovering that his wife's law firm owed millions more in unpaid taxes which could, presumably, result in liens on more of the parties' assets, it was entirely reasonable for him to conclude that he might have further liabilities imposed on him for other tax debts. Filing for innocent spouse tax relief presumably appeared to B as a way he might protect such assets as he possessed from being foreclosed upon due to the debts of his wife's law firm. While the filing may have put the firm at an additional disadvantage with the IRS, it simply is not a proper basis for a finding of financial misconduct and a disproportionate distribution of the marital estate.

Finally, but perhaps most importantly, K committed financial misconduct of her own, and hers was more egregious than B's, in that it was more extensive and farther-reaching. As a result of the decision not to pay millions of dollars in payroll taxes, in order to pay off other debts of the firm, K (and her partner) injured the firm's employees and had the effect of making the government an unwilling creditor of the firm. And, every deal she made ****92** with a state or municipal government to settle the firm's tax debt by making part payment placed an extra financial burden on other taxpayers.

Seen in this light, defendant's taking and use of funds that were at least partially his, seems, even if inadvisable, far from shocking. The relatively limited extent to which B failed to accurately disclose assets or income appears minuscule in ***32** comparison to K's tax-avoidance improprieties, which are not, as the concurring justice would have it, irrelevant to a determination of her husband's share of the marital estate. Equitable distribution must be, by definition, equitable. K's misconduct amounted to a misuse of marital property, and her choice of continuing to sink the firm deeper in debt, rather than close it down, ultimately saddled both herself and B with marital debt of millions of dollars.

My colleague, in her concurring opinion, questions why K's tax-avoidance improprieties should inure to B's benefit. My point, however, is that the conduct which the trial court deemed financial misconduct on B's part is not only insignificant in itself, but that relative to K's conduct, *which saddled B with millions of dollars in liabilities,* it is non-existent.

All in all, the claim of financial misconduct on B's part does not warrant an uneven distribution of marital assets.

Significant Contribution

The trial court, and my colleagues here, also emphasize that an uneven distribution of the marital estate is justified based upon the parties' uneven contributions to the marriage and the family. In this unique case, however, this factor alone is insufficient to justify the clearly punitive, skewed 65/35 distribution.

Normally, an approximately equal distribution of the marital estate is generally warranted "in a marriage of long duration, [where] both parties have made significant contributions to the marriage" (*Granade–Bastuck v. Bastuck,* 249 A.D.2d at 445, 671 N.Y.S.2d 512, citing *Marcus v. Marcus,* 135 A.D.2d 216, 525 N.Y.S.2d 238 [1988][subsequently revised and republished at 137 A.D.2d 131, 525 N.Y.S.2d 238 (1988)]). Indeed, new bills currently under consideration in the State Senate (S3740) and State Assembly (A7867), if enacted, would create a statutory *presumption* that marital property should be evenly distributed (*see* <www.senate.state.ny.us>; <www.assembly.state.ny.us>).

While the lack of "significant contributions" by one spouse may possibly warrant some adjustment, we should not assume that such a "contribution" requires either earning money or raising children. There are many kinds of couples and many types of marital arrangements. There are couples in which one provides the financial support, and the other appears to spend full time maintaining a youthful, attractive, and fashionable appearance, and socializing. Whatever a couple's mutual understanding is as to their respective roles in the marriage, we ***33** should not second guess them by negating the "contribution" of the non-earning spouse who is living completely in accordance with the other spouse's wishes and the couple's implicit or explicit arrangement.

Here, the couple's explicit mutual arrangement was that B would remain in the Cold Spring area and continue to purchase and develop properties, with the expectation that at least some of these projects would ultimately result in a substantial profit (indeed, one year B earned almost $500,000), while K would remain in Manhattan with the intent and hope of achieving great financial and professional success at a widely renowned law firm. Both of them lived in accordance with that plan. ****93** Even when the couple had children, as they had always intended, *neither* of them contemplated altering their lives so the children would have both parents around on a daily basis. Given that K firmly established herself and the children's lives in Manhattan under that plan, B's decision to continue living according to the couple's agreed-upon pattern, instead of giving up his established life to assist K with hers, should not affect the proportions in which the marital estate is distributed.

It appears that both K and the trial court believed that B should have sold properties and used the funds to contribute to the family's expenses, moved to Manhattan and spent more time with K and the children, and generally been a source of emotional support through the law firm's financial crisis. But, it is unfair to penalize B financially, in the context of a divorce, for failing to sufficiently contribute to the marriage because he did not uproot his life to relocate to Manhattan, or otherwise spend the quantity of time with his family there as would have amounted to relocating. He merely continued to attempt to earn income from developing properties, as he had done successfully earlier in the marriage, *and as the couple had agreed he would do,* and his failure to earn profits during this critical period did not warrant punishing him for making the attempt. Nor should B's relative lack of financial success during the time period at issue justify K's, or the court's, expectation that he would completely alter his life because he was the spouse earning less.

Essentially, the trial court placed undue blame on B's continued maintenance of his life in Cold Spring while his wife lived with the children in Manhattan, and on his failure to respond to her needs. *The court should have taken into account, rather than rejecting out of hand, the established fact that the parties agreed to an "unconventional" marriage in which the* ***34** *spouses would reside apart, even in the event they had children, and it should not have so severely punished defendant for conduct that both parties had defined as the foundation of the marriage.* The wife's indisputably greater contributions to the children's rearing notwithstanding, the nature of the marriage was exactly that which the parties planned for. While a spouse's failure to be present for the day-to-day activities of family life might in other circumstances warrant an uneven distribution of assets, here the couple's fundamental agreement as to how they would live precluded punishing defendant for living in accordance with their understanding.

The blame that K placed on B for failing to be sufficiently helpful to her is understandable. Rearing children is difficult in the best of circumstances, and when a parent is under enormous stress, and her partner is there only infrequently, it may come close to being impossible. Indeed, dealing with such severe financial pressures is extremely stressful even without children, and a married person would be expected to look to her spouse at such a

time for emotional, if not financial, support. Nevertheless, in view of how the couple defined their marriage, and the choices *they both* made along the way, B's failure to provide K with the emotional and financial support she desired does not warrant limiting him to a 35% share of the marital assets.

The majority writer employs lofty rhetoric concerning the wisdom of the Equitable Distribution Law. I agree that this Law wisely leaves open to the courts the determination of exactly what manner of distribution is most equitable, considering all relevant facts, including the couple's respective contributions to the family as a whole. However, I believe that the majority is wrong in minimizing and ignoring the ****94** existence of the couple's agreed-upon approach to their marriage.

Because these two people, together, agreed that their unique marriage would entail maintaining separate households, and then proceeded to live in accordance with that agreement, B's absence from the day-to-day household should not in itself serve as a factor which results in the diminution of his share of the marital estate. The majority criticizes as indefensible B's continued reliance on the agreement to maintain his lifestyle, but K also made the choice to continue maintaining her household in Manhattan, apart from B.

This is not to say we should ignore the fact that K shouldered most of the burden of raising the family; that fact is highly relevant. We simply should not, overtly or covertly, penalize B for ***35** doing what *both* spouses did: to live in accordance with their marital arrangement.

Furthermore, while courts often uphold a reduction in a spouse's distributive share of *particular assets* to which that spouse made only minimal contributions (*see e.g. Arvantides v. Arvantides,* 64 N.Y.2d 1033, 489 N.Y.S.2d 58, 478 N.E.2d 199 [1985]; *Orofino v. Orofino,* 215 A.D.2d 997, 627 N.Y.S.2d 460 [1995], *lv. denied* 86 N.Y.2d 706, 632 N.Y.S.2d 500, 656 N.E.2d 599 [1995]), here the court even reduced the husband's distributive share of those assets for which he had been primarily responsible. This overall 65–35 proportion, applicable to each asset in the marital estate, was clearly not based upon B's contribution to each of those assets, but rather, amounted to punishment for what the court viewed as misconduct.

The punitive nature of the court's equitable distribution award here is made even more egregious by the provision burdening B with 50% of any personal liability ultimately assumed by K for the law firm's debts, while at the same time finding that the wife's law firm has no value. So, B, having had no part in the decision to incur millions in tax liabilities, is burdened with that debt, while he receives no countervailing benefit from the ongoing payments the firm receives from the many hundreds of personal injury cases undertaken during the marriage which were referred to be handled by another firm, which payments are the source of K's yearly draw. While the only expert who was able to provide a valuation for the firm concluded that for purposes of valuation of the firm, this source of funds could not be valued meaningfully, in practice this award burdens B disproportionately with the firm's debts while giving him no share of the actual value K receives from marital property. It is especially inequitable to severely skew the distribution of the rest of the marital estate while B is also being so disproportionately burdened.

In view of the foregoing, I disagree with the punitive 65/35 split of assets. In recognition of K's substantially single-handed shouldering of the burdens of her family, I would modify the equitable distribution award to reflect a 55%–45% distribution of the assets.

Bias

Finally, although it is the foregoing considerations that require an adjustment of the equitable distribution award, rather than defendant's claims of bias, in one respect there is ***36** some credence to the claim. The contribution by the wife's attorney to the trial judge's re-election campaign fund, during the course of the litigation, serves to create the type of impression which our ethical rules seek to discourage (*see* New York State Bar Association Adv. Op. 73–289[A][3]). We may presume that the trial judge had no knowledge of the contribution, since the applicable rules require that contributions be made not to the person but to the ****95** campaign fund (DR 7–110 [22 NYCRR § 1200.41]), and the person in charge of the campaign fund must not disclose to the candidate the identities of contributors to the fund (*see* New York State Bar Assn. Adv. Op. 73–289[A][4]; New York City Bar Adv. Op. 882 [1973]). Nevertheless, this unfortunate circumstance only adds to the impression that the trial court was excessively critical of the husband and insufficiently critical of the wife.

All Citations

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109 A.D.3d 703
Supreme Court, Appellate Division,
First Department, New York.

Roy W. LENNOX, Plaintiff–Appellant,
v.
Joan E. WEBERMAN, Defendant–Respondent.

Sept. 3, 2013.

Synopsis

Background: In divorce action, the Supreme Court, New York County, Deborah A. Kaplan, J., granted wife's motion for pendente lite relief. Husband appealed.

Holdings: The Supreme Court, Appellate Division, held that:

court properly calculated wife's temporary spousal maintenance award;

pendente lite relief was appropriate; and

award of interim counsel and expert fees was warranted.

Affirmed as modified.

Decision, 103 A.D.3d 550, 960 N.Y.S.2d 89, recalled and vacated.

Attorneys and Law Firms

****4** Stein Riso Mantel, McDonough, LLP, New York (Allan D. Mantel of counsel), for appellant.

Kenneth David Burrows, New York, for respondent.

FRIEDMAN, J.P., SWEENY, RENWICK, DeGRASSE, JJ.

Opinion

***703** Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 30, 2012, which, to the extent appealed from, upon plaintiff's motion for reargument and renewal, adhered to a prior order, entered February 10, 2012, granting defendant's motion for pendente lite relief to the extent of awarding her tax-free maintenance in the amount of $38,000 per month, directing plaintiff to pay, inter alia, defendant's unreimbursed medical expenses up to $2,000 per month, interim counsel fees of $50,000, and expert fees of $35,000, and holding plaintiff's cross motion for summary judgment and for counsel ****5** fees in abeyance, unanimously modified, on the facts, to provide that one half of the aforesaid pendente lite relief shall be treated as an advance on the 50 percent of the parties' Joint Funds (as defined in the parties' prenuptial agreement) to which defendant is entitled pursuant to the prenuptial agreement, and otherwise affirmed, without costs. Appeal from the February 10, 2012 order, unanimously dismissed, without costs, as superseded by the appeal from the subsequent order.

We find that the court properly applied the formula set forth in Domestic Relations Law § 236(B)(5–a)(c)(2)(a) (*see Khaira v. Khaira,* 93 A.D.3d 194, 938 N.Y.S.2d 513 [1st Dept.2012]) in calculating defendant's temporary spousal maintenance award. Specifically, the court listed all 19 of the enumerated factors, explained how 7 of them supported an upward deviation to $38,000 per month from the $12,500 a month in guideline support, and found that $38,000 per month was not "unjust or inappropriate."

We further find that the court properly imputed an annual income to plaintiff of $2.29 million when it computed maintenance, since this was his income on the most recent tax return. A court need not rely upon the party's own account of his or ***704** her finances, but may impute income based upon the party's past income or demonstrated earning potential (*see Hickland v. Hickland,* 39 N.Y.2d 1, 382 N.Y.S.2d 475, 346 N.E.2d 243 [1976], *cert. denied* 429 U.S. 941, 97 S.Ct. 357, 50 L.Ed.2d 310 [1976]). The court properly took into account plaintiff's income from his investments, voluntarily deferred compensation, and substantial distributions (*see* Domestic Relations Law §§ 236[B][5–a][b][4]; 240[1–b][b][5][i], [iv]), which was $50.5 million the previous year.

We reject plaintiff's argument that defendant waived temporary maintenance in the parties' prenuptial agreement. Notwithstanding that defendant waived any claim to a final award of alimony or maintenance in the prenuptial agreement, the court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance (*see Tregellas v. Tregellas,* 169 A.D.2d 553,

564 N.Y.S.2d 406 [1st Dept.1991]; *see also Vinik v. Lee,* 96 A.D.3d 522, 947 N.Y.S.2d 424 [1st Dept.2012]). Under the circumstances of this case, however, we deem it appropriate to charge one half of the interim awards against the one-half share of the marital property to which defendant is entitled under the prenuptial agreement. In so doing, we find it significant that the parties provided in the agreement that each waived any right to the separate property of the other, that living expenses were to be paid out of the marital property, and, as previously noted, that the marital property would be equally divided in the event of divorce. We also find it significant that, here, the equal division of the marital property to which the parties agreed will leave each of them with substantial wealth.

Domestic Relations Law § 237(a) authorizes the court in its discretion to direct either spouse to pay counsel fees to the other spouse "to enable the other [spouse] to carry on or defend the action or proceeding" (*see also Charpié v. Charpié,* 271 A.D.2d 169, 172, 710 N.Y.S.2d 363 [1st Dept.2000]). The court's award of interim counsel fees of $50,000 and expert fees of $35,000 was warranted under the circumstances where the parties' assets appear to be anywhere from $77 million to $90 million. In any event, the amounts awarded were significantly less than the $200,000 and $75,000 amounts defendant requested for interim counsel and expert ****6** fees, respectively. While there are some funds in defendant's possession, plaintiff is in a far better financial position than defendant (see *Prichep v. Prichep,* 52 A.D.3d 61, 66, 858 N.Y.S.2d 667 [2d Dept.2008]), and defendant should not have to deplete her assets in order to have legal representation comparable to that of plaintiff (*see Wolf v. Wolf,* 160 A.D.2d 555, 556, 554 N.Y.S.2d 521 [1st Dept.1990]).

We have considered plaintiff's remaining contentions and find ***705** them unavailing.

The Decision and Order of this Court entered herein on February 26, 2013 is hereby recalled and vacated (*see* M–1841 decided simultaneously herewith).

All Citations

109 A.D.3d 703, 974 N.Y.S.2d 3, 2013 N.Y. Slip Op. 05766

New York
Official Reports

12 N.Y.3d 415, 909 N.E.2d 62, 881
N.Y.S.2d 369, 2009 N.Y. Slip Op. 03629

**1 Patricia A. Mahoney-Buntzman, Respondent
v
Arol I. Buntzman, Appellant.

Court of Appeals of New York
Argued March 31, 2009
Decided May 7, 2009

CITE TITLE AS: Mahoney-Buntzman v Buntzman

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 13, 2008. The Appellate Division modified, on the law, the facts, and in the exercise of discretion, a judgment of the Supreme Court, Westchester County (William J. Giacomo, J.; op 13 Misc 3d 1216[A], 2006 NY Slip Op 51852 [U]), entered after a nonjury trial, which had dissolved the parties' marriage, directed defendant to pay plaintiff maintenance, directed defendant to pay plaintiff child support, terminated defendant's pendente lite obligation to pay all of the children's college tuition and expenses, directed defendant to provide health insurance coverage for the children and pay all uncovered medical expenses, directed defendant to obtain life insurance, and directed defendant to pay plaintiff the sum of $2,467,151.43 as her distributive award. The modification consisted of increasing plaintiff's distributive award from the sum of $2,467,151.43 to the sum of $2,524,005.40, and adding a provision directing defendant to pay for the children's college tuition and expenses until they reach the age of 21.

Mahoney-Buntzman v Buntzman, 51 AD3d 732, modified.

HEADNOTES

Husband and Wife and Other Domestic Relationships
Equitable Distribution
Marital Funds Used to Pay Maintenance to Prior Spouse

(1) Plaintiff was not entitled to an equitable distribution credit for marital funds used to pay defendant's spousal maintenance obligation to his former wife. Expenditures made during the life of the marriage towards maintenance to a former spouse, as well as payments made pursuant to a child support order, are obligations that do not enure solely to the benefit of one spouse. Such payments, even if made pursuant to court order, are not the type of liabilities entitled to recoupment.

Husband and Wife and Other Domestic Relationships
Equitable Distribution
Marital Funds Used to Pay Student Loan Incurred by Spouse during Marriage

(2) Plaintiff was not entitled to an equitable distribution credit for marital funds used to pay defendant's student loan. Defendant incurred the student loan during the parties' marriage, and had his degree conferred an economic benefit, plaintiff would have been entitled to a share in its value. The loan, which was both incurred and fully paid for during the marriage, was a marital obligation for which responsibility was to be shared between the parties. ***416**

Husband and Wife and Other Domestic Relationships
Equitable Distribution
Valuation of Assets—Valuation Date

(3) In determining the value for equitable distribution purposes of defendant's stock and stock options in the company formed by defendant and another individual during the parties' marriage, the trial court providently exercised its discretion by setting the valuation date for the stock and options as the date of trial. The trial court found that although defendant had played a substantial role in changing the direction of the company and in its expansion, the appreciation in the value of the stock was not due solely to his efforts.

Husband and Wife and Other Domestic Relationships
Equitable Distribution
Estoppel—Prior Income Tax Return

(4) In determining the equitable distribution of funds defendant received from the sale of his corporate interests to his father and reported as business income on the parties' joint tax return, the trial court properly exercised its discretion when it classified the funds as marital property. Defendant was estopped from claiming that the funds were proceeds from the sale of stock he owned prior to the marriage and therefore separate property. Parties cannot, as a matter of policy, be permitted to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.

RESEARCH REFERENCES

Am Jur 2d, Divorce and Separation §§ 473, 477–488, 493, 515–520, 539–544, 548.

Carmody-Wait 2d, Spousal Support, Counsel Fees, Child Support, and Property Distribution in Matrimonial Actions §§ 118:179, 118:190–118:196, 118:208, 118:211–118:213, 118:216, 118:219, 118:221, 118:222, 118:227.

3 Law and the Family New York (2d ed) §§ 2:1–2:3; 3B Law and the Family New York (2d ed) §§ 15:2–15:7.

NY Jur 2d, Domestic Relations §§ 2609–2614, 2626, 2630–2634, 2639.

ANNOTATION REFERENCE

Proper date for valuation of property being distributed pursuant to divorce. 34 ALR4th 63.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: equitable /2 distribution & recoup! /p maintenance support /p former earlier

POINTS OF COUNSEL

Berman Bavero Frucco & Gouz P.C., White Plains (*Howard Leitner* of counsel), and *Collier, Halpern, Newberg, Nolletti & Bock, LLP,* for appellant.

I. Because of defendant's significant contribution to the postcommencement appreciation of the EVCI stock, the stock should have been valued as of the date of commencement for purposes of equitable distribution. (*Breese v Breese,* 256 AD2d 433; *Barbuto v Barbuto,* 286 AD2d 741; *Scharfman v Scharfman,* 19 AD3d 474; *McSparron v McSparron,* 87 NY2d 275; *Grunfeld v Grunfeld,* 94 NY2d 696; *Ferraioli v Ferraioli,* 295 AD2d 268; *Trivedi v Trivedi,* 222 AD2d 499; *Price v Price,* 69 NY2d 8; *Hale v Hale,* 16 AD3d 231; *Heine v Heine,* 176 AD2d 77, 90 NY2d 753.) II. Plaintiff should not have received a credit based on marital funds used to pay maintenance to defendant's first wife. (*Johnson v Chapin,* 49 AD3d 348; *O'Brien v O'Brien,* 66 NY2d 576.) III. Plaintiff wife should not have received a credit in equitable distribution for defendant's educational expenses incurred solely during their marriage. (*Johnson v Chapin,* 49 AD3d 348.) IV. The application of the doctrine of quasi-estoppel to preclude defendant from proving that certain property was his separate property was an unprecedented extension of that doctrine. (*Zemel v Horowitz,* 11 Misc 3d 1058[A], 2006 NY Slip Op 50276 [U]; *Naghavi v New York Life Ins. Co.,* 260 AD2d 252.)

Farrauto & Berman, Yonkers (*John P. Farrauto* of counsel), and *Gretchen Mullins Kim, P.C.* (*Gretchen Mullins Kim* of counsel), for respondent.

I. The trial court's decision as to the valuation dates to be used for equitable distribution of appellant's EVCI stock and options was not erroneous. (*McSparron v McSparron,* 87 NY2d 275, 88 NY2d 916; *Greenwald v Greenwald,* 164 AD2d 706, 78 NY2d 855; *Grunfeld v Grunfeld,* 94 NY2d 696, 96 NY2d 894; *Breese v Breese,* 256 AD2d 433; *Barbuto v Barbuto,* 286 AD2d 741; *Scharfman v Scharfman,* 19 AD3d 474; *Price v Price,* 69 NY2d 8; *Filkins v Filkins,* 303 AD2d 934; *Murphy v Murphy,* 193 AD2d 1068; *Soule v Soule,* 252 AD2d 768.) II. The Appellate Division properly reversed the trial court's decision not to credit respondent with one half of the monies paid during the marriage by appellant as maintenance to appellant's first wife. (*Dewell v Dewell,* 288 AD2d 252; *Micha v Micha,* 213 AD2d 956; *Gaccione v Gaccione,* 212 AD2d 574; *Jonas v Jonas,* 241 AD2d 839; *Feldman v Feldman,* 204 AD2d 268; *Newman v Newman,* 35 AD3d 418; *Markopoulos v Markopoulos,* 274 AD2d 457; *Carney v Carney,* 202 AD2d 907; *Johnson v Chapin,* 49 AD3d 348; *Hartog v Hartog,* 85 NY2d 36.) III. The Appellate Division properly reversed the trial court's decision not to credit respondent with one half of appellant's student loan debt. (*Corless v Corless,* 18 AD3d 493; ***418** *Helen A.S. v Werner R.S.,* 166 AD2d 515; *Basos v Basos,* 243 AD2d 932; *Jonas v Jonas,* 241 AD2d 839; *Lewis v Lewis,* 6 AD3d 837; *McKeever v McKeever,* 8 AD3d 702; *Kuhn v Kuhn,* 134 AD2d 900; *Godfryd v Godfryd,* 201 AD2d 927; *Dashnaw v Dashnaw,* 11 AD3d 732; *Chamberlain v Chamberlain,* 24 AD3d 589.) IV. The trial court and the

Appellate Division properly determined that the doctrine of estoppel against inconsistent positions and/or quasi-estoppel barred appellant from asserting that the $1.8 million received during the marriage was from his sale of stock owned prior to the marriage. (*Zemel v Horowitz,* 11 Misc 3d 1058[A], 2006 NY Slip Op 50276[U]; *Naghavi v New York Life Ins. Co.,* 260 AD2d 252; *Di Costanzo v Allstate Ins. Co.,* 68 AD2d 834, 50 NY2d 832; *Thomas v Scutt,* 127 NY 133; *Braten v Bankers Trust Co.,* 60 NY2d 155; *Price v Price,* 69 NY2d 8; *Ford Motor Credit Co. v Colonial Funding Corp.,* 215 AD2d 435; *Environmental Concern v Larchwood Constr. Corp.,* 101 AD2d 591; *Crespo v Crespo,* 309 AD2d 727; *Perkins v Perkins,* 226 AD2d 610.)

OPINION OF THE COURT

Pigott, J.

In this divorce action, we are asked to resolve several equitable distribution issues. For the reasons that follow, we hold that plaintiff wife is not entitled to a 50% credit for payments made during the marriage towards defendant's maintenance obligation to his first wife nor for payments made towards husband's student loan, and thus we modify. ****2**

The parties were married in New York on September 24, 1993 and have two daughters. Wife has an adult child from a previous relationship. Husband was married once before, and has two adult children from that marriage. Pursuant to a divorce judgment, husband was obligated to pay his first wife maintenance.

During the present marriage, husband and another individual formed Educational Video Conferencing Inc. (EVCI), a New York corporation that went public in 1999. At the time of the instant action, husband owned a number of shares and options of EVCI stock, all of which were acquired during marriage.

Prior to his marriage to plaintiff, husband had an interest in Arol Development Corporation (ADC), a real estate development company he founded with his father in 1971. In 1983, husband founded another company, Big Apple Industrial Buildings, Inc., 80% of which he sold to ADC in 1989. In 1998, ***419** husband entered into an agreement with his father whereby he agreed to relinquish his stock ownership in both corporations in exchange for a lump sum payment. The agreement provided that the payment would be reported on a "1099" form issued to him by the purchasing company. In order to account for the increased tax liability that husband would incur as a consequence of treating the payment as ordinary income rather than as a sale of stock, the payment was increased by 17%. This money, amounting to $1.8 million, was received by husband during the marriage and reported on the parties' joint income tax return as self-employment business income.

In May 1996, husband obtained a doctorate in education from Fordham University for which he had taken out a student loan that was repaid two years later.

On May 19, 2003, wife commenced the instant divorce action and an 18-day trial ensued.

Supreme Court granted wife a divorce on the grounds of abandonment and in a detailed decision, dated October 3, 2006, considered and distributed the various assets and debts of the parties' marriage (13 Misc 3d 1216[A], 2006 NY Slip Op 51852[U] [Sup Ct, Westchester County 2006]).

As it pertained to the EVCI stock and options, the court found that husband played a substantial role in changing the direction of the company and in its expansion. Nevertheless, the court rejected husband's claims that the appreciation in the value of the EVCI stock was due solely to his efforts, holding that there were significant contributions of others to the operations of EVCI and no evidence directly linking the increase in the value of its stock solely to husband. Consequently, the court used the date of trial for valuation purposes of the EVCI stock and options.

With respect to maintenance paid by husband to his first wife during the marriage, the court declined to give wife credit for one half of that amount. The court noted that both parties had used marital assets to assist other relatives. For instance, wife had used marital sums to provide support for her daughter and her father. The court stated "neither party may be heard ****3** to complain about the other's use of marital funds to pay for their own obligations or to aid other family members, when that approach was evidently an accepted part of their lifestyle" (2006 NY Slip Op 51852[U] at *70).

For the same reasons, the court declined to give wife a credit for monies used to repay the student loan.

***420** Supreme Court further held that husband is estopped from arguing that the funds received from the sale of his corporate interests to his father were proceeds from the sale of stock and thus, separate property, because he had reported the

funds as business income on the parties' joint tax returns. The court also noted that in his 1993 judgment of divorce from his first wife, husband represented that he owned no stock at the time.

On appeal, the Appellate Division modified the judgment of Supreme Court by, among other things, holding that wife was entitled to an equitable distribution credit of one half of the amount of court-ordered maintenance paid by husband to his former wife from marital funds (51 AD3d 732 [2008]). The court held that the maintenance obligation to his first wife constituted debt incurred by him prior to the parties' marriage and is therefore his sole responsibility. The Appellate Division also awarded wife a 50% credit—or $24,081.45—for the student debt incurred by husband during the marriage to attain his degree, concluding that because a court-appointed expert had determined that husband's advanced degree did not enhance his earnings, wife received no benefit from it, and therefore, the student loan was incurred to satisfy husband's separate property interest making the loan his sole obligation. As modified, the Appellate Division affirmed.

We granted leave (11 NY3d 706 [2008]) and now modify the order of the Appellate Division.

The Domestic Relations Law recognizes that the marriage relationship is an economic partnership. As such, during the life of a marriage spouses share in both its profits and losses. When the marriage comes to an end, courts are required to equitably distribute not only the assets remaining from the marriage, but also the liabilities. A trial court considering the factors set forth in the Domestic Relations Law has broad discretion in deciding what is equitable under all of the circumstances. Indeed, when it comes to the equitable distribution of marital property, Domestic Relations Law § 236 (B) (5) (d) (13) authorizes the trial court to take into account "any other factor which the court shall expressly find to be just and proper." Consequently, the trial court has substantial flexibility in fashioning an appropriate decree based on what it views to be fair and equitable under the circumstances.

However, during the life of any marriage, many payments are made, whether of debts old or new, or simply current expenses. ***421** If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred. As a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, ****4** in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the nontitled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end. With this holding in mind, we review the four issues raised on this appeal.

Prior Maintenance

(1) In this case, wife seeks to recoup money that was expended during the marriage to pay husband's obligation to his former spouse for maintenance. We hold that wife is not entitled to such recoupment. Expenditures made during the life of the marriage towards maintenance to a former spouse, as well as payments made pursuant to a child support order, are obligations that do not enure solely to the benefit of one spouse. Payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not the type of liabilities entitled to recoupment.

This is not to say that every expenditure of marital funds during the course of the marriage may not be considered in an equitable distribution calculation. Domestic Relations Law § 236 (B) (5) (d) (13) expressly and broadly authorizes the trial court to take into account "any other factor which the court shall expressly find to be just and proper" in determining an equitable distribution of marital property. There may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property (*see e.g. Micha v Micha*, 213 AD2d 956, 957-958 [3d Dept 1995]; *Carney v Carney*, 202 AD2d 907 [3d Dept 1994]). Further, to the extent that expenditures are truly excessive, the ability of one party to claim that the other has accomplished a "wasteful dissipation of ***422** assets" (Domestic Relations Law § 236 [B] [5] [d] [11]) by his or her expenditures provides protection. The payment of maintenance to a former spouse, however, does not fall under either of these categories.

Student Loan

(2) Nor is wife entitled to a credit for payments made during the marriage towards husband's student loan. Husband incurred the student loan during the parties' marriage, and had his degree conferred an economic benefit, wife would have been entitled to a share in its value (*see O'Brien v O'Brien*, 66 NY2d 576 [1985]). Thus, the loan, which was both incurred and fully paid for during the marriage, was a marital obligation for which responsibility was to be shared ****5** between the parties. *

EVCI Stock

(3) We further hold that the trial court providently exercised its discretion by setting the valuation date for the EVCI stock and options as the date of trial (*see generally McSparron v McSparron*, 87 NY2d 275 [1995]).

Estoppel

(4) Similarly, the trial court properly exercised its discretion when it classified the money received by husband pursuant to the settlement agreement as marital property, given the fact that husband made representations that the money was business income for tax purposes. A party to litigation may not take a position contrary to a position taken in an income tax return (*see Meyer v Insurance Co. of Am.*, 1998 WL 709854, 1998 US Dist LEXIS 15863 [SD NY 1998]; *Naghavi v New York Life Ins. Co.*, 260 AD2d 252 [1st Dept 1999]; *Zemel v Horowitz*, 11 Misc 3d 1058[A], 2006 NY Slip Op 50276[U], *5 [Sup Ct, NY County 2006]). Here, husband does not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.

***423** Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Judges Ciparick, Graffeo, Read, Smith and Jones concur; Chief Judge Lippman taking no part.

Order modified, etc.

FOOTNOTES

* If the student loan debt was still outstanding, however, it may have been appropriate for the trial court to conclude that defendant alone was required to bear the obligation of repayment of the balance of his student loan.

90 N.Y.2d 127
Court of Appeals of New York.

Louise MATISOFF, Appellant,
v.
Stephen DOBI, Respondent.

May 8, 1997.

Synopsis
Wife initiated divorce proceedings. The Supreme Court, New York County, Friedman, J., granted divorce, but refused to enforce unacknowledged postnuptial agreement. Former husband and wife appealed. The Supreme Court, Appellate Division, 228 A.D.2d 200, 644 N.Y.S.2d 13, reversed and remanded. Appeal was permitted. The Court of Appeals, Kaye, C.J., held that: (1) unacknowledged agreement was unenforceable, and (2) admission in open court that signatures on agreement were authentic was not proper acknowledgment.

Reversed, case remitted, and certified question answered in negative.

Attorneys and Law Firms

***210 *128 **377 Clair & Daniele, New York City (Bernard E. Clair and Karen Golden, of counsel), for appellant.

*129 Shays, Kemper, New York City (Stanley D. Heisler, of counsel), and Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P. (Neal M. Goldman, of counsel), for respondent.

***130 OPINION OF THE COURT**

KAYE, Chief Judge.

Domestic Relations Law § 236(B)(3) states that a nuptial agreement made before or during the marriage must satisfy three requirements to be "valid and enforceable in a matrimonial action." First, the agreement must be in writing. Second, it must be subscribed by the parties and third, it must be "acknowledged or proven in the manner required to entitle a deed to be recorded." At issue here is the validity of a written postnuptial agreement that was signed by the parties but not acknowledged. Because neither the statute's unambiguous language nor its history suggests that the Legislature intended the acknowledgment prerequisite to be dispensable, we conclude that the unacknowledged agreement here is unenforceable.

I.

Plaintiff Louise Matisoff and defendant Stephen J. Dobi were married on April 13, 1981. Because of defendant's two prior unsuccessful marriages, plaintiff wished to protect her real property and other assets in the event that their marriage failed. Thus, at plaintiff's urging, the parties entered into a postnuptial agreement one month later. At the time, plaintiff was a real estate salesperson in the New York cooperative apartment market, and defendant was an advisor to the Commissioner of the New York City Department of Cultural Affairs. Each earned approximately $40,000 annually.

The agreement provided that the parties waived any rights of election pursuant to the Estates, Powers and Trusts Law "and other rights accruing solely by reason of the marriage" with regard to property presently owned or subsequently acquired by either party. It further specified that "neither party shall have nor shall such party acquire any right, title or claim in and to the real and personal estate of the other solely by reason of the marriage of the parties." The agreement was drafted by an attorney friend of ***211 **378 plaintiff and signed by both plaintiff and defendant. It is undisputed, however, that the document was not acknowledged by the parties or anyone else.

Throughout their 13–year marriage, plaintiff and defendant maintained substantially separate finances. They kept separate bank accounts; divided household, vacation and entertainment costs; borrowed money from one another; reimbursed each other for occasional purchases made on the other spouse's *131 credit card; and either filed individual tax returns or separately paid proportional shares of a joint return.

During the first few years of marriage, defendant, who had previously fulfilled most of the requirements for a Ph.D. in film, completed his dissertation and received his Ph.D. After working in the performing arts and film fields for several years, defendant decided to attend business school.

He received a Masters in Business Administration in 1987 and subsequently worked as a stock market research analyst in a New York City investment firm.

This divorce action was commenced on September 17, 1992. By that time, defendant's annual salary had risen to over $400,000, while plaintiff continued to earn approximately $40,000. Defendant sought to enforce the postnuptial agreement as a bar to any claim of entitlement by plaintiff to his property acquired before or during the marriage. Plaintiff, however, contended that the agreement was invalid because it was not acknowledged as required by Domestic Relations Law § 236(B)(3). Both parties testified at trial that they had signed the agreement, and neither made any allegation of fraud or duress.

Supreme Court deemed the agreement unenforceable, concluding that admissions by the parties, during a divorce trial 13 years later, that the signatures on the agreement were genuine failed to validate the unacknowledged agreement. The court granted the divorce, divided the marital property and awarded plaintiff monthly maintenance and attorney's fees.

The Appellate Division reversed, one Justice dissenting. The majority held that failure to comply with the statutory requirement of acknowledgment did not constitute an absolute bar to enforcing a nuptial agreement. Noting that the purpose of the statute was to prevent fraud and overreaching in marital contracts, the court found that here there was no allegation by plaintiff of fraud, duress or misunderstanding. To the contrary, it was plaintiff who had insisted upon the agreement to protect her property interests, and the agreement had been drafted by an attorney selected by her. The Court further concluded that the terms of the postnuptial agreement "were acknowledged and ratified in the daily activities and property relations of the parties throughout [the] marriage" (228 A.D.2d 200, 202, 644 N.Y.S.2d 13). The Appellate Division thus determined that, in these particular circumstances, the nuptial agreement should be enforced.

We disagree. Under the Appellate Division analysis, the enforceability of an unacknowledged nuptial agreement would ***132** vary with the original motivation of the party challenging the agreement and whether the couple's behavior during the marriage was consistent with the terms of the agreement. Such uncertainty is contrary to the plain language of Domestic Relations Law § 236(B)(3), which recognizes no exception to the requirement of formal acknowledgment. We therefore reverse, holding that the requisite formality explicitly specified in Domestic Relations Law § 236(B)(3) is essential. Because the Appellate Division never reached the trial court's equitable distribution and maintenance determinations, we remit to that court for review of Supreme Court's award in light of our determination.

II.

Domestic Relations Law § 236(B) was enacted in 1980 as part of the Equitable Distribution Law, which significantly reformed the New York statutory scheme governing division of property, economic life and familial rights and obligations upon dissolution of a marriage (*see,* L. 1980, ch. 281). In keeping with the strong public policy in favor of individuals resolving their own family disputes (*see,* Scheinkman, New York Law of Domestic Relations § 6.1, at 123), subdivision ****379** *****212** (3) authorizes spouses or prospective spouses to contract out of the elaborate statutory system and provide for matters such as inheritance, distribution or division of property, spousal support, and child custody and care in the event that the marriage ends.

Domestic Relations Law § 236(B)(3) provides that such "[a]n agreement by the parties, made before or 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"* (emphasis added).

Pursuant to the Real Property Law, proper acknowledgment or proof is an essential prerequisite to recording a deed in the office of the county clerk (*see,* Real Property Law § 291). Such acknowledgment or proof, moreover, must meet various specifications. The Real Property Law dictates who may make an acknowledgment or proof (*see,* Real Property Law § 292); before whom such acknowledgment or proof may be made (*see,* Real Property Law §§ 298, 299); that an officer taking an acknowledgment must "know[ ] or [have] satisfactory evidence, that the person making it is the person described in and who executed such instrument" (Real Property Law § 303; *see also,* Real Property Law § 304 [concerning proof by subscribing witness] ***133**); that the person taking

the acknowledgment or proof must attach a certificate of acknowledgment (*see,* Real Property Law § 306); and the contents of that certificate (*see, id.*).

The agreement here is concededly unacknowledged and, therefore, does not comply with the terms of Domestic Relations Law § 236(B)(3). Defendant argues that literal compliance with the statutory requirement of acknowledgment is not required so long as the purpose of that requirement is satisfied. Plaintiff, on the other hand, urges that the statute mandates strict compliance with its terms.

Generally, acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person. According to defendant, acknowledgment is thus essential only where fraud, duress or mistake is alleged with regard to a nuptial agreement. He contends that where, as here, the party seeking to void an agreement admits having signed the agreement, the agreement was entered into at that party's behest, and the couple conducted its economic affairs in a manner consistent with the terms of the agreement, there is no issue of fraud or overreaching and the absence of acknowledgment does not undermine the validity of the agreement.

We are thus faced with a not-unfamiliar dilemma for courts charged with interpreting statutes: should we be guided by the apparent rationale underlying a statute or by its actual terms? Indeed, more than a century ago this Court observed that

> "we are warned on the one side that the strict letter of the law is not to master its obvious spirit and intent; and on the other that we are judges and not legislators, and must not assume to make exceptions or insert qualifications, however justice may seem to require it. Both warnings are just and sanctioned by authority, and must have their influence upon our judgment" (*Chamberlain v. Spargur,* 86 N.Y. 603, 606).

Most often, the letter and spirit of the law are congruent, or any alleged disparities can be reconciled. Thus, where a statute's language is capable of various constructions, the "obvious spirit and intent" of a statute necessarily informs the meaning and import to be accorded that language. Likewise, the use of unequivocal language sheds light on a law's purpose and intent. Here, the statute is clear and precise. Domestic Relations Law § 236(B)(3) requires acknowledgment for a valid, ***134** enforceable marital contract, excepting no agreement. The statute itself thus provides no support for defendant's contention that the Legislature intended some agreements, though unacknowledged, to be enforceable.

Nor does the history of Domestic Relations Law § 236(B)(3) reflect such an intent. Prior to adoption of section 236(B)(3), the validity of an antenuptial agreement was determined by the Statute of Frauds, which provides that an agreement "made in consideration *****213 **380** of marriage," other than mutual promises to marry, is void unless "some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith" (General Obligations Law § 5–701[a][3]; *see, Matter of Goldberg,* 275 N.Y. 186, 9 N.E.2d 829; Scheinkman, New York Law of Domestic Relations, § 6.4, at 124). As noted by defendant, oral agreements that violate the Statute of Frauds are nonetheless enforceable where the party to be charged admits having entered into the contract (*see, Cohon & Co. v. Russell,* 23 N.Y.2d 569, 574, 297 N.Y.S.2d 947, 245 N.E.2d 712). Defendant urges that an admitted marital agreement should likewise be enforceable.

Domestic Relations Law § 236(B), however, does not incorporate the safeguards of the Statute of Frauds. Rather, it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In particular—by contrast to the Statute of Frauds–Domestic Relations Law § 236(B)(3) mandates that the agreement be acknowledged. We have concluded that, under a similar statute specifically requiring a writing to be acknowledged, admission to the contract does not save an unacknowledged agreement. Thus, where the statute governing a spouse's waiver of elective share required that the waiver be in writing, subscribed and acknowledged, an unacknowledged agreement was held invalid even though the challenging party conceded having signed the agreement (*see, Matter of Warren,* 16 A.D.2d 505, 229 N.Y.S.2d 1004, *affd* 12 N.Y.2d 854, 236 N.Y.S.2d 628, 187 N.E.2d 478; *see also, Matter of Henken,* 150 A.D.2d 447, 540 N.Y.S.2d 886).

Defendant further points out that, with regard to deeds, the lack of acknowledgment may not be fatal to enforcement between the parties or their heirs and representatives (*see, Strough v. Wilder,* 119 N.Y. 530, 23 N.E. 1057). To be sure, under both statute and common

law, an unacknowledged deed is ineffective only "as against a subsequent purchaser or incumbrancer" (*see,* Real Property Law § 243; *Strough v. Wilder,* 119 N.Y. at 535, 23 N.E. 1057 [construing former Rev. Stat. of N.Y., part II, ch. I, tit. 2, § 137 (1st ed)]).

***135** It does not follow, however, that an unacknowledged postnuptial agreement is likewise valid between the parties. Domestic Relations Law § 236(B)(3) refers only to the recordation requirements for deeds. Under Real Property Law § 291, which deals with recording of conveyances, an unacknowledged deed simply cannot be recorded. Real Property Law § 291 goes even further, explicitly voiding unrecorded conveyances as to certain nonparties—those who subsequently purchase or acquire the property. Real Property Law § 243 similarly specifies that unacknowledged grants are ineffective only "as against a subsequent purchaser or incumbrancer." These Real Property Law restrictions are unrelated to the necessary steps for recording a deed in the first instance and thus are not incorporated into section 236(B)(3). Furthermore, Domestic Relations Law § 236(B)(3), in contrast to these provisions, broadly provides that acknowledgment is required in order for a nuptial agreement to be enforceable *in any matrimonial action*—which necessarily involves the parties to the agreement.

Manifestly, the unambiguous statutory language of section 236(B)(3), its history and related statutory provisions establish that the Legislature did not mean for the formality of acknowledgment to be expendable.

True, arguments can be made in support of the subjective standard espoused by the Appellate Division. Most notably, a flexible rule would allow courts to examine all the circumstances and overlook the absence of acknowledgment where that result most comports with the parties' intent and behavior during the marriage. Such facts may well be present here—where it was plaintiff who originally insisted upon the postnuptial agreement, maintained a financial existence independent of defendant, and admitted signing the document. "It is not novel in the law, however, to find a harsh result where statute or public interest requires strict and full compliance with certain formalities before rights may be predicated" (*Matter of Warren,* 16 A.D.2d at 507, 229 N.Y.S.2d 1004, *supra*).

In any event, persuasive policy arguments can also be made in favor of a rule that *****214** ****381** mandates compliance with the formality required by the statute.

Primarily, a bright-line rule requiring an acknowledgment in every case is easy to apply and places couples and their legal advisors on clear notice of the prerequisites to a valid ***136** nuptial agreement.[1] Consequently, spouses or prospective spouses will not need to speculate as to whether the enforceability of their agreements will be supported by their original motivation or subsequent economic relationship during the marriage. Certainly, consistent and predictable enforcement is desirable with regard to such important marital agreements. Furthermore, many of the equitable factors highlighted by defendant and the Appellate Division will continue to be relevant to the trial court's award of property, maintenance and the like, as well as to appellate review of such award.

1 While it might have been useful to have the additional perspective of the current practice of the domestic relations bar concerning acknowledgment of marital agreements, no *amicus curiae* briefs were submitted in this case.

Acknowledgment, moreover, serves a valid purpose apart from prevention of fraud. Marital agreements within section 236(B)(3) encompass important personal rights and family interests. As we explained with regard to the similar prerequisites for proper execution of a deed of land:

> "When [the grantor] came to part with his freehold, to transfer his inheritance, the law bade him deliberate. It put in his path formalities to check haste and foster reflection and care. It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation" (*Chamberlain v. Spargur,* 86 N.Y. at 607, *supra*).

Here, too, the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care.

In the end, it was for the Legislature, not the courts, to weigh these policy interests and choose between a flexible or bright-line rule. Here, by clearly prescribing acknowledgment as a condition, with no exception, the Legislature opted for a bright-line rule. We therefore hold that an unacknowledged agreement is invalid and unenforceable in a matrimonial action.

III.

Defendant alternatively argues that, even if strict compliance with the formality of acknowledgment is required, ***137** plaintiff's "oral acknowledgment" at trial that the parties signed the agreement cured any deficiency in the postnuptial agreement.

Domestic Relations Law § 236(B)(3) and the Real Property Law do not specify when the requisite acknowledgment must be made. It is therefore unclear whether acknowledgment must be contemporaneous with the signing of the agreement.

While this Court has affirmed determinations allowing parties to provide the requisite acknowledgment under similar statutory requirements at a later date, we have never directly addressed the question whether and under what circumstances the absence of acknowledgment can be cured (*see, Matter of Maul,* 176 Misc. 170, 26 N.Y.S.2d 847, *affd* 262 App.Div. 941, 29 N.Y.S.2d 429, *affd* 287 N.Y. 694, 39 N.E.2d 301 [unacknowledged waiver of elective share valid where acknowledgment subsequently supplied]; *Matter of Palmeri,* 75 Misc.2d 639, 348 N.Y.S.2d 711, *aff'd* 45 A.D.2d 726, 356 N.Y.S.2d 348, *affd* 36 N.Y.2d 895, 372 N.Y.S.2d 646, 334 N.E.2d 595 [same]; *see also, Matter of Stegman,* 42 Misc.2d 273, 247 N.Y.S.2d 727 [antenuptial agreement valid where acknowledged several years after its execution]).[2] We note that other courts have refused to allow subsequent acknowledgment (*see,* *****215 **382** *Rose v. Rose,* 167 Misc.2d 562, 637 N.Y.S.2d 1002 [shareholder's agreement that was not acknowledged could not form basis of conversion divorce and could not be subsequently acknowledged]; *see also, Pacchiana v. Pacchiana,* 94 A.D.2d 721, 721–722, 462 N.Y.S.2d 256, *appeal dismissed* 60 N.Y.2d 586 [unacknowledged waiver of elective share "void and of no effect at its inception"]).

2 Under EPTL 5–1.1(f)(2), a spouse's waiver of release of right to elective share must also be "in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." Likewise, in order for a separation agreement to constitute grounds for divorce under Domestic Relations Law § 170(6), the agreement must be "acknowledged or proved in the form required to entitle a deed to be recorded."

We need not resolve this issue today. Even assuming, without deciding, that the requisite acknowledgment could be supplied at the time of the matrimonial action, each party's admission in open court that the signatures were authentic did not, by itself, constitute proper acknowledgment under section 236(B)(3).

The statute prescribes acknowledgment "in the manner required to entitle a deed to be recorded." This requires both that an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment be attached (*see,* Real Property Law §§ 291, 306). As this Court has explained, "[a]n instrument is not 'duly acknowledged' unless ***138** there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subject" (*Rogers v. Pell,* 154 N.Y. 518, 529, 49 N.E. 75). Because no proper certificate of acknowledgment was attached to the agreement—indeed, defendant never even requested the requisite certification—the postnuptial agreement here is invalid.

Nevertheless, defendant is entitled to intermediate appellate review of the trial court's award to plaintiff. This has not yet occurred due to the Appellate Division's erroneous determination that the agreement was valid, and we therefore remit to that court. Although the equitable factors raised by defendant cannot save the unacknowledged agreement, they may be relevant to the Appellate Division's review of the award.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to the Appellate Division for further proceedings in accordance with this opinion. The certified question should be answered in the negative.

TITONE, BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.
Order reversed, etc.

All Citations

90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209, 1997 N.Y. Slip Op. 04435

92 N.Y.2d 341
Court of Appeals of New York.

In the Matter of Herman GREIFF, Deceased.
Helen GREIFF, Appellant,
v.
Wallace J. GREIFF et al., Respondents.

Oct. 27, 1998.

Synopsis

Wife sought to exercise right of election against husband's estate. The Surrogate's Court, Kings County, Bernard M. Bloom, S., invalidated husband and wife's prenuptial agreements and granted wife's petition. Husband's children from prior marriage appealed. The Supreme Court, Appellate Division, reversed, 242 A.D.2d 723, 663 N.Y.S.2d 45. Wife appealed. The Court of Appeals, Bellacosa, J., held that Appellate Division's failure to correctly apply controlling legal principles required reversal and remittal to that court.

Appellate Division's decision reversed and remitted.

Attorneys and Law Firms

***895 *342 **753 Miller and Korzenik, L.L.P., New York City (Jeffrey Craig Miller, of counsel), for appellant.

Ronnie M. Schindel and Stanley M. Nagler, New York City, for respondents.

***343 OPINION OF THE COURT**

BELLACOSA, Judge:

This appeal raises the question whether the special relationship between betrothed parties, when they execute a prenuptial agreement, can warrant a shift of the burden of persuasion bearing on its legality and enforceability. A party challenging the judicial interposition of a prenuptial agreement, used to defeat a right of election, may demonstrate by a preponderance of the evidence that the premarital relationship between the contracting individuals manifested "probable" undue and unfair advantage (*Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,* 45 N.Y.2d 692, 699–700, 412 N.Y.S.2d 593, 385 N.E.2d 285). In these exceptional circumstances, the burden should fall on the proponent of the prenuptial agreement to show freedom from fraud, deception or undue influence.

The reversal by the Appellate Division of the Surrogate's Court's decree reflects a misapprehension of governing law, in that the Appellate Division reached its conclusion without factoring or finding facts relevant to fixing the evidentiary burden for this kind of case. Thus, this Court should remit for plenary consideration of the particular legal issue, and all others explicitly bypassed but raised at the intermediate level of appellate review.

Appellant Helen Greiff married Herman Greiff in 1988 when they were 65 and 77 years of age, respectively. They had entered into reciprocal prenuptial agreements in which each ***344** expressed the usual waiver of the statutory right of election as against the estate of the other. The husband died three months after the marriage, leaving a will that made no provision for his surviving spouse. The will left the entire estate to Mr. Greiff's children from a prior marriage. When Mrs. Greiff filed a petition seeking a statutory elective share of the estate, Mr. Greiff's children countered with the two prenuptial agreements which they claimed precluded Mrs. Greiff from exercising a right of election against her husband's estate (*see,* EPTL 5–1.1[f]).

A trial was held in Surrogate's Court, Kings County, on the issue of the validity and enforceability of the prenuptial agreements. The Surrogate explicitly found that the husband "was in a position of great influence and advantage" in his relationship with his wife-to-be, and that he was able to subordinate her interests, to her prejudice and detriment. The court further determined that the husband "exercised bad faith, unfair and inequitable dealings, undue influence and overreaching when he induced the petitioner ***896 **754 to sign the proffered antenuptial agreements," particularly noting that the husband "selected and paid for" the wife's attorney. Predicated on this proof, the credibility of witnesses and the inferences it drew from all the evidence, Surrogate's Court invalidated the prenuptial agreements and granted a statutory elective share of decedent's estate to the surviving spouse.

The Appellate Division reversed, on the law, simply declaring that Mrs. Greiff had failed to establish that her execution of the prenuptial agreements was procured

through her then-fiancé's fraud or overreaching. This Court granted the widow leave to appeal. We now reverse.

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 (*see, Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,* 45 N.Y.2d 692, 698, 412 N.Y.S.2d 593, 385 N.E.2d 285, *supra*). This rubric also applies generally to controversies involving prenuptial agreements (*see, Matter of Phillips',* 293 N.Y. 483, 488, 58 N.E.2d 504). Indeed, as an incentive toward the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements (*see, Matter of Davis',* 20 N.Y.2d 70, 74, 281 N.Y.S.2d 767, 228 N.E.2d 768; *Matter of Phillips', supra,* at 491, 58 N.E.2d 504; EPTL 5–1.1, formerly Decedent Estate Law § 18), this Court has eschewed subjecting proponents of these agreements to special evidentiary or freighted burdens (*see, Matter of Sunshine,* 40 N.Y.2d 875, 876, 389 N.Y.S.2d 344, 357 N.E.2d 999).

***345** Importantly, however, neither *Sunshine* in 1976 (*supra*) nor *Phillips'* in 1944 (*supra*) entirely insulates prenuptial agreements from typical contract avoidances. That proposition includes the kind of counterpoint advanced by the surviving spouse in this case to offset her stepchildren's use of the prenuptial agreements against her claim for her statutory elective share (*see, Matter of Davis, supra,* at 76, 281 N.Y.S.2d 767, 228 N.E.2d 768; Rhodes [editor], New York Actions and Remedies, Family Law, Wills and Trusts, Marriage and Dissolution, § 2.10; 3 Lindey, Separation Agreements and Antenuptial Contracts §§ 90.03, 90.06).

This Court has held, in analogous contractual contexts, that where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest, as in this case) to disprove fraud or overreaching (*see, e.g., Matter of Gordon v Bialystoker Ctr. & Bikur Cholim, supra,* at 698–699, 412 N.Y.S.2d 593, 385 N.E.2d 285; *Christian v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Sharp v. Kosmalski,* 40 N.Y.2d 119, 121–122, 386 N.Y.S.2d 72, 351 N.E.2d 721; *see also,* I Farnsworth, Contracts § 4.11, at 452 [2d ed.]).

As an illustration, in *Gordon* (*supra*), the administrator of the decedent's estate challenged the transfer of funds by the decedent, one month before her death, to the nursing home in which she was a patient. The Court restated its applied guidance, as part of the invalidation of the transfer, as follows:

> "Whenever * * * the relations between the contracting parties appear to be of such a character as to render it certain that * * * either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, * * * *it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood* " (*Gordon v Bialystoker Ctr. & Bikur Cholim,* at 698–699, 412 N.Y.S.2d 593, 385 N.E.2d 285 [emphasis added], quoting *Cowee v. Cornell,* 75 N.Y. 91, 99–100).

This enduring, nuanced balance of fair assessment can be applicable in the context of prenuptial agreements (*see, Matter of Sunshine, supra,* at 876, 389 N.Y.S.2d 344, 357 N.E.2d 999; *Matter of Davis', supra,* at 76, 281 N.Y.S.2d 767, 228 N.E.2d 768; *Matter* ***346** *of Phillips', supra,* at 491, 58 N.E.2d 504; *****897** ****755** *Graham v. Graham,* 143 N.Y. 573, 579–580, 38 N.E. 722). We emphasize, however, that the burden shift is neither presumptively applicable nor precluded. We eschew absolutist rubrics that might ill serve the interests of fair conflict resolution as between proponents or opponents of these kinds of ordinarily useful agreements.

This Court's role here is to clarify, harmonize and find a happy medium of views reflected in the cases. For example, *Graham* has been read as holding that prenuptial agreements were presumptively fraudulent due to the nature of the relationship between prospective spouses. *Phillips',* on the other hand, has been urged to suggest that prenuptial agreements may never be subject to burden-shifting regardless of the relationship of the parties at the time of execution and the evidence of their respective conduct.

Graham was decided in 1894 and indicated that prospective spouses stand in a relationship of confidence which necessarily casts doubt on or requires strict scrutiny concerning the validity of an antenuptial agreement. Its

outdated premise, however, was that the man "naturally" had disproportionate influence over the woman he was to marry (*Graham v. Graham, supra,* at 580, 38 N.E. 722; *see,* 3 Lindey, Separation Agreements and Antenuptial Contracts § 90.03).

A century later society and law reflect a more progressive view and they now reject the inherent inequality assumption as between men and women, in favor of a fairer, realistic appreciation of cultural and economic realities (*see, e.g.,* Domestic Relations Law § 236[B]; *O'Brien v. O'Brien,* 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712). Indeed, the law starts marital partners off on an equal plane. Thus, whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based, particularized inequality before a proponent of a prenuptial agreement suffers the shift in burden to disprove fraud or overreaching. This rule is less rigid than *Graham's* presumptive equation.

Phillips' tugs in the opposite direction from *Graham.* On close and careful analysis, however, *Phillips'* does not upset the balanced set of operating principles we pull together by today's decision. While holding that antenuptial agreements are not enveloped by a presumption of fraud, the Court in *Phillips'* indicated that some extra leverage could arise from the "circumstances in which the agreement was proposed" (*Matter of Phillips', supra,* at 491, 58 N.E.2d 504). This language does not turn its back entirely on *Graham.* Rather, it is generous enough to encompass ***347** the unique character of the inchoate bond between prospective spouses—a relationship by its nature permeated with trust, confidence, honesty and reliance. It allows further for a reasonable expectation that these relationships are almost universally beyond the pale of ordinary commercial transactions. Yet, the dispositive tests of legitimacy and enforceability of their prenuptial agreements need not pivot on the legalism or concept of presumptiveness. Instead, a particularized and exceptional scrutiny obtains.

The Appellate Division's approach here did not allow for the calibration and application of these legal principles. Therefore, this Court is satisfied that the most prudent course for the fair resolution of this case is a remittal of the case to that court for its determination. A specific frame of reference for that court should be whether, based on all of the relevant evidence and standards, the nature of the relationship between the couple at the time they executed their prenuptial agreements rose to the level to shift the burden to the proponents of the agreements to prove freedom from fraud, deception or undue influence. Additionally, since the Appellate Division expressly declined to reach other issues raised by the parties in that court, it will now have that opportunity. We note finally that this Court's reversal and remittal reflect and imply no view of or preference concerning the ultimate factual evaluation and fair resolution by the Appellate Division within its plenary intermediate appellate court powers.

Accordingly, the order of the Appellate Division should be reversed, with costs to all parties appearing and filing separate briefs payable out of the estate, and the matter *****898** ****756** should be remitted to that court for further proceedings in accordance with this opinion.

KAYE, C.J., and SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.
Order reversed, etc.

All Citations

92 N.Y.2d 341, 703 N.E.2d 752, 680 N.Y.S.2d 894, 1998 N.Y. Slip Op. 09251

201 Misc. 104
Domestic Relations Court of the City of New York, Family Court Division, Bronx County.

MENGAL
v.
MENGAL. *

* The names as they appear, of the petitioner and respondent, are flctitious.

April 17, 1951.

Synopsis

Action by Victoria Mengal against Harry Mengal. The Domestic Relations Court of the City of New York, Family Court Division, County of Bronx, Panken, J., held that where husband at time of hearing was unemployed and wife was also unemployed but received unemployment insurance, wife was not entitled to support but without prejudice to her right to make a further application in the future.

Order in accordance with opinion.

Attorneys and Law Firms

****993** ***105** Perl, Hackmyer & Tishelman, New York City, for petitioner.

Jac M. Wolff, New York City, for respondent.

Opinion

PANKEN, Justice.

The petition herein alleges that respondent and petitioner were married. That is not disputed. The petition alleges that the respondent has failed to provide adequately for the support of the petitioner.

The testimony in this case presents two questions to be determined by the Court:

1. Is respondent justified in refusing to live with his wife because of an alleged ante-nuptial agreement which, in effect, the respondent claims provided that the two children born to the petitioner by a prior marriage and of whose existence the respondent knew, were not to live in the household maintained by the parties herein.

2. Is the petitioner herein entitled to support in face of the evidence submitted to the Court, and if she is entitled to support, is she entitled to such support on the basis of the respondent's means or only on the basis of her being a public charge, or likely to become a public charge.

It is argued in part by the respondent that petitioner would be entitled to support, if at all, on the basis of being a public charge, or likely to become a public charge, because of her conduct with regard to the alleged ****994** provisions in the alleged ante-nuptial agreement, to wit, that she insisted that her children live with her and her spouse.

***106** In Manufacturers Trust Co. v. Gray, 278 N.Y. 380, 16 N.E.2d 373, 375, 117 A.L.R. 1176, the late Mr. Justice Lehman said: 'In the absence of proof that his wife abandoned him, or, by other misconduct, relieved the defendant of his obligation to support her, that obligation still continues and may be enforced by appropriate application to the court. That obligation continues even though the wife has means sufficient to pay for her own support.'

The law as it now stands also takes into consideration the income or financial status of the parties and orders are made as the circumstances and justice require.

The principal enunciated by the Court of Appeals in Manufacturers Trust Co. v. Gray, supra, is imbedded in our law. Hardship may result to a spouse when the other member to the marital relationship is well able to look after herself and out of her own earnings or means provide for her own necessities.

This Court is bound by the definitive determinations and the principles of law until modified or changed as enunciated by the Court of Appeals of the State of New York.

Sometimes it is difficult for a justice to follow the determination of the Court of Appeals handed down during a period in which social relationships, social needs and economic development were different from what they have now come to be. Courts of original jurisdiction are sometimes constrained to distinguish one set of facts from another, and interpret the facts in the light of new social conditions, so that the Appellate Courts may in the light of the new social conditions modify the determinations made, and possibly sometimes lay down principles of law to govern the relationships between man and man and between man and government as modern or new conditions command and as sometimes Appellate Courts do.

In the instant case, respondents sought to introduce in evidence an oral ante-nuptial agreement. I questioned the admissibility of such an agreement. Counsel for the respondent insisted that such an ante-nuptial agreement is admissible in evidence and is controlling as to the rights of the parties.

The ante-nuptial agreement sought to be introduced was to the effect that upon the marriage between the respondent and the petitioner and their setting up a home for themselves, the two children born to the petitioner by a prior marriage were not to live in the household set-up. Such an ante-nuptial agreement, I should hold, would not be binding because in effect it threatens the relationship between parent and children and ***107** hence would controvert public policy. Mothers should have their ****995** children live with them. Children are entitled to the love, affection, guidance, care and inspiration which mothers should and often accord their offspring.

The two children referred to were born to the petitioner by a prior marriage and are respectively aged 21 and 18. One boy had reached the age of maturity. Yet, a good mother can influence even a 21 year old son, and that influence sometimes helps a young man. Where there are close ties in a family a divorce of parent from child or child from parent cannot be countenanced either in law or in ethics. The petitioner herein, in her testimony, said: 'I would not want to leave my boys behind, especially now, in view of the war situation. I would not leave them at any time because now they need me more than ever.'

The relationship between mother and sons seems to be very close.

Section 31, of Personal Property Law, reads:

'Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; * * *.

'3. Is made in consideration of marriage, * * *.'

Cited and approved in Matter of Goldberg's Estate, 275 N.Y. 186, at page 191, 9 N.E.2d 829, at page 831.

The evidence sought to be introduced and to be deemed binding upon the court is a promise or an agreement or undertaking orally made in contemplation and in consideration of a marriage to be consummated between the petitioner and the respondent herein.

A spouse who is entitled to support by virtue of the relationship created by marriage is not to be denied her rights because she is gainfully employed and thus maintained a measure of independence and human dignity,—of self-respect, in devoting herself to some occupation in which she earns small or large sums of money. That often redounds to the welfare of the spouse materially and spiritually as well. It strengthens the ties which the love and respect were the motivating factors for the marriage. That cannot be the basis to excuse the husband who is chargeable in law for the support of his wife for failure to discharge the duties imposed upon him by law, and which he assumed voluntarily by his marital vows.

The Domestic Relations Law, enacted in response to social needs, and which is pregnant with social significance provides, ***108** as a matter of public policy, that a wife may not, by contract, relieve a husband from liability for her support, or to so do permanently.

The law does not permit agreements between parties whereby what the law commands is to be set aside. The force and purposes of law cannot be set aside by a private agreement. That provision of the ****996** statute is responsive to social needs. Laws are a consummation of accepted conventions by society and unless a law reflects common sense, which is the composite of all conventions accepted by society, that law is bad. Often it dies by obsolescence or is repealed because of the inability of enforcement of the law which does not have its roots in common sense and reflects the accepted conventions of the people.

In the course of the hearing before me, my impression was that the respondent would be chargeable only with the support of the petitioner if she became a public charge, or when she is likely to become a public charge. The responsibility for the maintenance of a wife is primarily that of the spouse. The community is only secondarily chargeable with the support of indigent who may not obtain help or support from one chargeable in law for the indigent's support. It is good law; it is good sense. In most cases it is right that it should be so, for it is the result of the accumulated experience of man.

In the course of the trial I gained some impressions, but after reading the record in the case, the cold black on white brought back a complete picture of the parties, their reactions and mode of testifying. That impression no longer exists.

Decisions must reflect and be made upon the facts as established by testimony and the law applicable to such facts.

The facts in this case show that the bone of contention between these parties was the petitioner's two children. The respondent did not want them to live in his household. The mother, on the other hand, wanted her children with her. The testimony established, without question in my mind, that had respondent agreed to have the children live in the household, the marriage would not have gone on the rocks.

The fact that an annulment proceeding had been instituted by the petitioner, whether at the instigation of the respondent, or with his consent or not, does not militate against her rights to support from him on the basis of his means.

A person may not be required to contribute more than his means warrant. The needs of the dependent is to be met only ***109** to the extent that the person chargeable can afford, with due regard for his needs too. Domb v. Domb, 176 Misc. 409, 27 N.Y.S.2d 601.

Section 92, subdivision 1, of the Domestic Relations Court Act, provides that 'To order support of a wife or child or both, irrespective of whether either is likely to become a public charge, as justice requires having due regard to the circumstances of the respective parties.'

Margolies v. Margolies, 277 App.Div. 1120, 101 N.Y.S. 243, does not as a matter of law hold contrary to the determination in the case of Manufacturers Trust Co. v. Gray, supra, It appears to me that the Court, in affirming a determination made by one of my esteemed colleagues, dismissing ****997** a petition by a wife for support from her spouse, had in mind Section 92, subdivision 1, hereinabove set forth.

The evidence in the case shows that the respondent at the time of the hearing was unemployed. The petitioner at the time was also unemployed, but received $26 weekly unemployment insurance. Due regard for the circumstances of the parties before me, so that justice may be done to both, does not permit an order to be made requiring the respondent to contribute at this time any support for the petitioner without prejudice to her right to make application hereafter for an order for her support.

All Citations

201 Misc. 104, 103 N.Y.S.2d 992

Footnotes

101 A.D.3d 695
Supreme Court, Appellate Division,
Second Department, New York.

Janine PETRACCA, respondent,
v.
Eugene PETRACCA, appellant.

Dec. 5, 2012.

Synopsis
Background: Wife brought action against husband for divorce and ancillary relief. The Supreme Court, Nassau County, Brown, J., granted wife's motion to set aside parties' postnuptial agreement. Husband appealed.

The Supreme Court, Appellate Division, held that terms of postnuptial agreement were manifestly unfair to wife and were unfair when agreement was executed.

Appeal dismissed.

Attorneys and Law Firms

****78** Glenn S. Koopersmith, Garden City, N.Y., for appellant.

Goldman & Greenbaum, P.C., New York, N.Y. (Sheldon M. Greenbaum of counsel), for respondent.

RANDALL T. ENG, P.J., ANITA R. FLORIO, SANDRA L. SGROI, and ROBERT J. MILLER, JJ.

Opinion
***695** In an action for a divorce and ancillary relief, the defendant appeals (1) from a decision of the Supreme Court, Nassau County (Brown, J.), dated June 22, 2011, made after a hearing, and (2) from an order of the same court dated December 13, 2011, which, upon the decision, granted the plaintiff's cross motion to set aside the parties' postnuptial agreement.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509, 472 N.Y.S.2d 718); and it is further,

ORDERED that the order is affirmed; and it is further,

ORDERED that the plaintiff is awarded one bill of costs.

The parties were married on December 16, 1995. In March 1996, the parties entered into a postnuptial agreement. The agreement provided that the jointly-owned marital residence, which had been purchased for approximately $3.1 million after the parties were married, and which was subsequently renovated ***696** at a cost of between $3 million and $5 million, was the defendant's separate property.

The agreement further provided that if the parties divorced, the plaintiff, who had not been employed other than as a homemaker since October 1995, would waive her interest in any business in which the defendant had an interest, including any appreciation in the value of such interests accruing during the marriage. At the time the agreement was entered into, the defendant valued his interests in these business entities at over $10 million. The plaintiff also waived any and all rights she had to the defendant's estate, including her right to an elective share. At the time the agreement was entered into, the defendant valued his net worth at more than $22 million.

Finally, the agreement provided that if the parties divorced, the plaintiff would waive any right to maintenance except as provided in schedule "C" of the agreement, which indicated that the plaintiff could receive maintenance in the sum of between $24,000 and $36,000 per year, for varying lengths of time, depending on the duration of the marriage. The defendant's obligation to pay the limited maintenance enumerated in the agreement was contingent upon his receipt of certain visitation with any children that the parties might have, and upon certain residency requirements imposed upon the plaintiff.

In 2008, the plaintiff commenced this action, inter alia, for a divorce on the ground of constructive abandonment. In his answer, the defendant, among other things, sought enforcement of the postnuptial agreement. The defendant subsequently ****79** moved for a protective order in response to the plaintiff's discovery demands, and the plaintiff cross-moved to set aside the postnuptial agreement.

A hearing was held at which both parties testified. The plaintiff testified that the defendant had presented the

postnuptial agreement to her for signature days after her 42nd birthday, and shortly after she had suffered a miscarriage. She testified that the defendant had "bullied" her into signing the agreement by threatening that they would not have any children and that the marriage would be over if she did not consent to the postnuptial agreement. The plaintiff testified that she and the defendant had agreed to have children prior to the marriage, and that their agreement to have children had been an important factor in her decision to marry him. She signed the agreement within days of receiving it and, although she reviewed some portions of it, she did not understand its terms and did not consult an attorney. The plaintiff also adduced evidence demonstrating that the statement of the defendant's net ***697** worth contained in the agreement was inaccurate at the time it was made in that it was undervalued by at least $11 million.

When the defendant testified, he denied any knowledge of the plaintiff's miscarriage and stated that he had wanted the postnuptial agreement in order to protect his son from a prior marriage. The defendant testified that the parties had discussed the issue of entering into a postnuptial agreement prior to the marriage and that they had negotiated the postnuptial agreement over the course of many weeks. The defendant testified that his attorney had drafted the agreement and that he believed that the plaintiff had consulted with her own attorney, although she had not disclosed her attorney's name to him. The defendant explained that the marital residence had been purchased in both parties' names because the plaintiff said she wanted to have her name on it "for perception purposes, for other people," but that she had been willing to sign the agreement converting it into the defendant's separate property shortly after its purchase.

In a decision made after the hearing, the Supreme Court expressed doubts as to the defendant's veracity and credited the plaintiff's testimony over conflicting portions of the defendant's testimony. The court found that the plaintiff had not been represented by counsel and had been precluded from effectively analyzing the financial impact of the postnuptial agreement due to the inaccuracies contained in the financial disclosures that had been incorporated into the agreement. The court determined that the terms of the agreement were "wholly unfair" and, after examining the totality of the circumstances, concluded that it was unenforceable. In a subsequent order, made upon the decision, the court granted the plaintiff's cross motion to set aside the postnuptial agreement.

In general, a postnuptial agreement "which is regular on its face will be recognized and enforced by the courts in much the same manner as an ordinary contract" (*Levine v. Levine,* 56 N.Y.2d 42, 47, 451 N.Y.S.2d 26, 436 N.E.2d 476; *see Rauso v. Rauso,* 73 A.D.3d 888, 889, 902 N.Y.S.2d 573; *Cioffi–Petrakis v. Petrakis,* 72 A.D.3d 868, 869, 898 N.Y.S.2d 861; *Whitmore v. Whitmore,* 8 A.D.3d 371, 372, 778 N.Y.S.2d 73). However, "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849; *see Matter of Greiff,* 92 N.Y.2d 341, 345, 680 N.Y.S.2d 894, 703 N.E.2d 752; ****80** *O'Malley v. O'Malley,* 41 A.D.3d 449, 451, 836 N.Y.S.2d 706; *Manes v. Manes,* 277 A.D.2d 359, 361, 717 N.Y.S.2d 185). Accordingly, "courts have thrown their cloak of protection" over postnuptial agreements, "and made it their business, when confronted, to see to it that they are arrived at ***698** fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity" (*Christian v. Christian,* 42 N.Y.2d at 72, 396 N.Y.S.2d 817, 365 N.E.2d 849; *see Infante v. Infante,* 76 A.D.3d 1048, 1049, 908 N.Y.S.2d 263).

Because of the fiduciary relationship between spouses, postnuptial agreements "are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" (*Levine v. Levine,* 56 N.Y.2d at 47, 451 N.Y.S.2d 26, 436 N.E.2d 476; *see Kabir v. Kabir,* 85 A.D.3d 1127, 1127, 926 N.Y.S.2d 158; *Manes v. Manes,* 277 A.D.2d at 361, 717 N.Y.S.2d 185; *Cardinal v. Cardinal,* 275 A.D.2d 756, 757, 713 N.Y.S.2d 370). "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching" (*Christian v. Christian,* 42 N.Y.2d at 72–73, 396 N.Y.S.2d 817, 365 N.E.2d 849; *see Infante v. Infante,* 76 A.D.3d at 1049, 908 N.Y.S.2d 263; *O'Malley v. O'Malley,* 41 A.D.3d at 451, 836 N.Y.S.2d 706; *Frank v. Frank,* 260 A.D.2d 344, 345, 686 N.Y.S.2d 309; *see also Levine v. Levine,* 56 N.Y.2d at 47, 451 N.Y.S.2d 26, 436 N.E.2d 476).

In determining whether a postnuptial agreement is invalid, "courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution" (*Christian v. Christian,* 42 N.Y.2d at 73, 396 N.Y.S.2d 817, 365 N.E.2d 849; *see Terio v. Terio,* 150 A.D.2d 675, 675–676, 541 N.Y.S.2d 548; *Stern v. Stern,* 63 A.D.2d 700, 700–701, 404 N.Y.S.2d 881). A spouse seeking to set aside a postnuptial agreement initially "bears the burden to establish a fact-based, particularized inequality" (*Matter of Greiff,* 92 N.Y.2d at 346, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see Matter of Barabash,* 84 A.D.3d 1363, 1364, 924 N.Y.S.2d 544; *D'Elia v. D'Elia,* 14 A.D.3d 477, 478–479, 788 N.Y.S.2d 156; *accord Brennan–Duffy v. Duffy,* 22 A.D.3d 699, 700, 804 N.Y.S.2d 399; *Chambers v. McIntyre,* 5 A.D.3d 344, 345, 772 N.Y.S.2d 530). Where this initial burden is satisfied, a proponent of a postnuptial agreement "suffers the shift in burden to disprove fraud or overreaching" (*Matter of Greiff,* 92 N.Y.2d at 346, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see Matter of Barabash,* 84 A.D.3d at 1364, 924 N.Y.S.2d 544; *D'Elia v. D'Elia,* 14 A.D.3d at 478–479, 788 N.Y.S.2d 156).

Here, the plaintiff demonstrated that the terms of the postnuptial agreement were manifestly unfair given the nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in the marital residence and her waiver of all of her inheritance rights, in light of the vast disparity in the parties' net worth and earnings (*see Manes v. Manes,* 277 A.D.2d at 361, 717 N.Y.S.2d 185; *Frank v. Frank,* 260 A.D.2d at 345, 686 N.Y.S.2d 309; *Terio v. Terio,* 150 A.D.2d at 675–676, 541 N.Y.S.2d 548; *Stern v. Stern,* 63 A.D.2d at 700–701, 404 N.Y.S.2d 881; *see also O'Malley v. O'Malley,* 41 A.D.3d at 451, 836 N.Y.S.2d 706; *Pisano v. Pisano,* 71 A.D.2d 670, 670, 419 N.Y.S.2d 15; *cf. Levine v. Levine,* 56 N.Y.2d at 47, 451 N.Y.S.2d 26, 436 N.E.2d 476). Furthermore, inasmuch as the terms of the agreement were manifestly unfair to the plaintiff and were unfair when the ***699** agreement was executed, they ****81** give rise to an inference of overreaching (*see Christian v. Christian,* 42 N.Y.2d at 73, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Terio v. Terio,* 150 A.D.2d at 675–676, 541 N.Y.S.2d 548; *Stern v. Stern,* 63 A.D.2d at 700–701, 404 N.Y.S.2d 881). This inference of overreaching is bolstered by the evidence submitted by the plaintiff, including her testimony, regarding the circumstances which led her to give her assent to the postnuptial agreement (*see Kabir v. Kabir,* 85 A.D.3d at 1127, 926 N.Y.S.2d 158; *Cardinal v. Cardinal,* 275 A.D.2d at 757, 713 N.Y.S.2d 370; *Terio v. Terio,* 150 A.D.2d at 675–676, 541 N.Y.S.2d 548). The defendant's testimony which tended to show that he did not engage in overreaching raised an issue of credibility, and we decline to disturb the Supreme Court's determination with respect thereto (*see Northern Westchester Professional Park Assoc. v. Town of Bedford,* 60 N.Y.2d 492, 470 N.Y.S.2d 350, 458 N.E.2d 809; *Reid v. Reid,* 57 A.D.3d 960, 870 N.Y.S.2d 455).

The defendant's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the plaintiff's cross motion to set aside the parties' postnuptial agreement.

All Citations

101 A.D.3d 695, 956 N.Y.S.2d 77, 2012 N.Y. Slip Op. 08294

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34 N.Y.S.2d 100
Domestic Relations Court of the City of New York, Family Court Division, Richmond County.

* This opinion as here published substitutes fictitious surnames in accordance with the spirit of Domestic Relations Court Act, Sec. 52.

RAMON *
v.
RAMON.*

March 12, 1942.

Synopsis

Proceedings in the matter of Flora Ramon, petitioner, against James Ramon, respondent, wherein petitioner sought support from respondent for petitioner and a child of the parties.

Judgment in accordance with opinion.

Opinion

***102** O'BRIEN, Justice.

This is a proceeding wherein the petitioner wife seeks from the respondent-husband support for herself and the child of the parties.

Respondent admits his liability for the support, but asserts that the child of the parties is not being reared and educated in the Catholic religion, all in violation of an ante-nuptial contract and agreement made between the parties. The petitioner is a Protestant. The respondent is a Roman Catholic.

The child now eight years of age is baptized a Roman Catholic. Up to recently the child attended a Roman Catholic Parochial school and had been brought up in the Catholic religion.

Differences having recently arisen between the parties, the petitioner left the home of the respondent and went to live with her mother. Simultaneously she removed the child from the Catholic school, entered her in a public school and sent her to a Protestant Church, which she attended at the time of this hearing and also to the Sunday school connected with it.

The respondent objects to this upon the ground that this is a violation of a contract and agreement made by the respondent with the petitioner prior to their marriage, by which the petitioner, formally and in writing, agreed that any children of the marriage would be brought up in the Catholic religion.

The petitioner concedes that the petitioner and respondent prior to their marriage and in the presence of witnesses signed a written agreement, in conformity with the rule and the Canon Law of the Roman Catholic Church, the substance of which agreement was as follows: 'All children of either sex born of the proposed marriage would be baptized and educated in the Catholic religion,' and that she, the petitioner, 'would not hinder nor obstruct in any manner whatsoever the respondent in the exercise of his religion.'

Upon this agreement the respondent married the petitioner with a Catholic ceremony performed by a Catholic priest. Under the Canon Law of the Catholic Church no priest, in the absence of such an agreement, can officiate at a marriage between a Catholic and a non-Catholic. Canon 2319–2375.

Subsequent to the birth of the child, the petitioner consented to its Catholic baptism. Accordingly, the child was prepared, godparents were selected, and with the knowledge and consent of the petitioner the child was taken to the Catholic Church where the baptismal ceremony was performed.

The godparents, in accordance with the Canon Law of the Catholic Church, assumed the obligation and personally pledged themselves to see to it that their godchild would be instructed in the Catholic religion ***103** and that they would take an interest in the spiritual welfare of the child 'in perpetua', and that they would see to it that during its whole life the child would live up to the principles of the Catholic faith. Canon 769.

Following the ceremony the godparents returned to the home of the petitioner and respondent, where the godparents and the child's parents dined together, the repast having been prepared for the occasion by the petitioner.

The question now before the Court is whether this pre-nuptial agreement contains all the elements of an enforceable valid contract.

The Domestic Relations Court is not vested with jurisdiction in divorce or separation actions. By reason of its broad summary powers, however, its decisions in effect, in some cases and under some circumstances, can relieve the husband or wife of practically all marital obligations except the actual severance of the matrimonial status.

The decisions heretofore regarding the religious education of children have been mainly in cases following the death of one or both parents, where contests have arisen between relatives over the religious education of the surviving children.

In the Domestic Relations Court, the care, education, home surroundings and religious training of children are frequently the subject of bitter parental controversy in cases of 'mixed marriages'.
Section 81 of the Domestic Relations Law gives both parents equal powers, rights and duties in regard to them.

Hence, by reason of the importance of the issues it becomes not only appropriate but indeed imperative to review briefly the nature, primary purposes and obligations of marriage, its historic direction and control, as well as the legal and enforceable aspects of such individual rights of the parties, as may retain their contractual character, as property rights during the existence of the matrimonial status.

In the Harvard Law Review, Volume 29, page 498, in an article entitled 'The Parental Right to Control the Religious Education of a Child,' appears this timely and critical observation: 'Our Courts have been remarkably free from litigation over the religious education of children. It is only in very recent years that it is beginning to make its appearances.'

'Most of the States—even a State so important as New York—are still without any decisions on the subject from a court of last resort. Such litigation as has arisen has either been decided by sidestepping the religious aspects of the controversy altogether, and resting the decision on some other grounds entitling one or the other party to custody of the infants or, too often in more or less slip-shod fashion, the court has treated the matter as if it were a novel issue to be decided as law of the first impression or has fallen into an undiscriminating citation of an English authority to justify some particular disposition of the case under consideration.' Harvard Law Review, Vol. 29, page 498.

'In England, * * * as early as 1590,' continues the Harvard Law Review, at page 485, 'the Elizabethian government aimed at the suppression ***104** of Catholic education by enacting that only schoolmasters who repaired to the Established Church might be maintained.'

'From time to time further laws were passed to render more effectual the suppression of Catholic education, until by 1699, it was a crime punishable by perpetual imprisonment for any Papist to keep school or assume the education of youth.'

'Naturally, during this period, in the face of such public sentiment and of such laws there was little or no litigation in the courts of England on the part of the Catholic parents to protect any parental rights in relation to their children.' Harvard Law Review, Vol. 29, page 485.

It is apparent, therefore, that the decisions of the English Courts can furnish no helpful guide to American jurisprudence in the determination of cases involving the religious rights of either parents or children.

Our New York courts have issued a caution against reliance upon a foreign law in cases involving the rights of parents over infants. 'Any foreign system of law is always to be invoked with discretion. Positive law, or the law of *this time and place*, is in practice always paramount in the administration of justice, and there is great danger in exploiting a legal theory by reference to the law of *other times and places* which, if *ingeniously used*, may furnish justification for the most opposed jurisdical rules.' (Italics those of the Court) Matter of Wagner, 75 Misc. 419, at page 429, 135 N.Y.S. 678, at page 686.

The ante-nuptial agreement made by respondent and petitioner clearly contemplated the preservation of the spiritual rights and status of the respondent and those of his prospective children. These rights though spiritual and intangible became for all purposes just as real, protective and enforcible as pertained to any physical property.

In an article entitled 'The Right of Privacy' (Harvard Law Review, Vol. IV, page 193), Mr. Justice Brandeis and Mr. Samuel Warren, on developing growth of the law of intangible property, make these observations: '* * * there came a recognition of man's spiritual nature, of his feelings and his intellect. * * * and the term 'property' has grown

to comprise every form * * * intangible as well as tangible. * * * From corporeal property arose the incorporeal rights arising out of it, and then there opened the wide realm of intangible property in the products and processes of the mind.'

'This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to me that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions and sensations demanded legal recognition.' Harvard Law Review, Vol. IV, p. 193, at p. 195.

In the Michigan Law Review, Vol. 14, page 177, Professor Roscoe Pound, in his article entitled 'Individual interests in the Domestic Relations,' writes, 'two elements must be taken into account in securing interests in domestic relations. On the one hand there is an individual spiritual existence * * * on the other hand, there is the individual economic existence. * * * These are interests of personality * * * peculiarly related to the mental and spiritual life of the individual.'

***105** Marriage is a natural right. It was not created by law. It existed before all law. Marriage is a right of personality. By the marriage ceremony these obligations became the vested rights of the personality of the respondent embraced in the law of the land, and defined as the rights of personality.

The reciprocal duties of husband and wife constitute property. 'These reciprocal rights may be regarded as the property of the respective parties, in the broad sense of the word property, which includes things not tangible or visible, and applies to whatever is exclusively one's own.' Jaynes v. Jaynes, 39 Hun 40, at page 41.

An epitome of the decisions heretofore made by the courts of this State limited and detailed only to the extent necessary to make clear the general policy appears appropriate to this memorandum.

In the case of Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429, 430, an infant-plaintiff sued upon an agreement that if the custody of the infant, then residing in Holland, was surrendered and the infant brought to New York where the defendant would be permitted 'to direct his education and control his religious and moral upbringing, the defendant would, during his natural life, support him and direct his moral education and training —the defendant at all times to have access to the infant so that he might enjoy his companionship and society.' The Court said: 'Suit may be maintained under the contract by plaintiff. * * * Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country.'

In Matter of Mancini, 89 Misc. 83, 151 N.Y.S. 387–389, a Catholic orphaned child was placed by its elder sister, then residing in Italy, in charge of a Protestant minister in New York, under a pledge that the child would be brought up a Catholic. The oldest brother applied for custody, alleging that this pledge was violated by placing the child in a Presbyterian home and while there the child attended the Presbyterian Church.

The physical well being of the child was properly and excellently maintained, but the Surrogate declared: 'Of course, this conduct, however well meant, is incompatible with the discipline of the Catholic Church, and it is regarded by the infant's family as a breach of the compact before mentioned.' The minister agreed to correct that course of conduct and the child's own wishes were to remain with him and his wife. It was pointed out that the child had been taken from poor surroundings and want, to greater physical comfort and more affluent environment. 'But,' declared the Surrogate, 'I will not forget that the religious status of the child before me is that of a Catholic child, and I think the law governing the action of the courts, under such circumstances as those now disclosed to me, is fairly well determined. * * *'

'To Catholics, in particular, the education of an infant,' said the Court, 'leading as it does to their indissolvable marriage law, and their family relations founded on a subordination and respect to elders, the education [I say] of their infants in their own way is regarded by them as of paramount importance. It is evident that the preference of a Catholic family in regard to the education of a Catholic child cannot be ***106** overlooked by the court in the selection of a guardian for a Catholic child. * * *' Matter of Mancini, 89 Misc. 83, 151 N.Y.S. 387.

In the case of People ex rel. Rich v. Lackey, 139 Misc. 42, 248 N.Y.S. 561, 577, the Court declared that the Catholic education of children at the wish of their Catholic parents was not a sectarian view *but a matter of sound public policy*. In that case two children were placed in the care and custody of a third person of good character, who,

inadvertently, failed to continue their Catholic education. The Court said: '* * * It is important that the spiritual education of children of such an impressionable age should be properly safeguarded. It is conceded that the wishes of their parents to have them brought up in the religion of their ancestors must be respected. And this is also the view which the law takes. It does so, not as a matter of sentiment or out of deference to narrow sectarian views, *but as a matter of sound public policy*.' (Italics those of the Court.)

'The family is the institutional unit in which infants, in co-operation between the home, the school, and the Church or other spiritual agency, can best be prepared as members of society and as good citizens. Even though the infant be *physically separate from the family, it is still constructively a part of it*,' declared the Court, 'and entitled to be brought up in the religious faith professed by its parents. These principles are entirely consistent with the American view of religious liberty.' People ex rel. Rich v. Lackey, 139 Misc. 42, 248 N.Y.S. 561, 577. (Italics those of the Court.)

In the Matter of Jacquet, 40 Misc. 575, 82 N.Y.S. 986, 987, the mother formerly a Catholic subsequently became a Protestant. Subsequently she became mentally incapacitated. A non-Catholic relative was appointed guardian of the two Catholic children. Application was made by the Catholic father to revoke this appointment. The Court said:

'Both parties [the father and mother] were Catholics. They were married in the Catholic faith. The ancestry of the children, so far as shown, is Roman Catholic. * * *

'The cases in the books are not numerous. Fortunately, questions of religious faith are but seldom subjects of legal issues. * * * Upon the preponderance of the evidence as presented here, principle and authority impel this court to commit these children to Catholic guardianship until maturity shall give to each that absolute freedom of choice of a religious belief that his judgment and conscience approves, which is the birthright of his American citizenship.'

In the Matter of De Marcellin, 24 Hun 207, at page 209, the Appellate Division unanimously upheld the ruling of the Surrogate of Kings County, and affirmed the rule that mere material well being of a child in a non-Catholic home cannot offset, counter-balance or destroy the right of the child to be brought up in the religion, associations and background of its Catholic parents. In that case a nine year old orphan girl came before the Surrogate upon an application of a stepmother for guardianship of the infant. The child's paternal aunt challenged the appointment on the ground that she was in better circumstances than the stepmother, owned some property and could give the child a better home, ***107** surroundings and education. The father a day or two before his death, and when he was beyond recovery, wrote these words upon a piece of paper and handed it to his wife: 'Keep the children. Be a good Catholic, live a good Catholic and die a good Catholic, and pray, pray for me when I am dead.' In denying the application of the non-Catholic aunt the Court said: 'It is quite true that in the ordinary view it seems more desirable that the child should reside with the aunt and enjoy the comforts of a home in her family, but this consideration cannot overcome the dying wishes of her father. His declared will in relation to the custody and religious education of his child should be followed * * *. He had the power to dispose of the custody of this child if he had exercised it in a legal manner, and * * * his * * * wishes should now control and be carried out, and that the surrogate exercised his discretion well.'

In re Lamb's Estate, Sur., 139 N.Y.S. 685, 686, there was no antenuptial agreement, the mother was a non-Catholic. There was no Catholic ceremony, yet, the Court decided that the Catholic father's wish for a Catholic upbringing of the child should be enforced. The Court said:

'* * * the father was born a Catholic, and is, no doubt, now seriously anxious that his only child should be of the faith of his fathers. Yet the father himself consented to be married by a Baptist minister, and was so married. This was not a Catholic observance on his part. * * * The father had the child baptized in the church of his own youthful faith and upbringing, and thus the child is in name and faith made a Catholic. * * * the father, belongs by submission, at least, to a great, historic, and disciplined faith, coming down all the ages of our era. * * *

'The father is most sincere in his contention that the whole future well-being of his child depends solely on its conformity with the Catholic faith. Certainly this is a natural conviction in his case, as his own mother, his family, and all the traditions of his life and race are Catholic. We, none of us, even if not religiously inclined, can cast aside such sacred associations.'

In the Matter of Crickard, 52 Misc. 63, 102 N.Y.S. 440, 441, a Catholic aunt, who by a non-Catholic ceremony

had married an Episcopal minister, sought the custody of a Catholic child. Her application was denied, the Court saying: 'the parents * * * were both Roman Catholics. * * * [the aunt] is a Roman Catholic. She has recently married an Episcopalian, and was married by a clergyman outside the pale of the Roman Catholic Church. * * *' The Court further said: 'It is refreshing in these days of iconoclasm to find people to whom their religion is of some vital moment, who earnestly believe that their children should be brought up in their religion; and we consider that it is the duty of the courts, as far as it consistently can be done, to see to it that guardians who have charge of the custody of infants should be of the same religion as the deceased parents, and should be earnest in leading said infants to follow the religion of their deceased parents.'

The recognition by our American courts of the right of the Catholic party as a matter of sound public policy to determine the religious upbringing ***108** of the children, with or without an ante-nuptial agreement, may arise from an instinctive and tacit recognition of three fundamental concepts, to wit: (1) Ante-nuptial agreements providing for the religious education of children, are exclusively a Catholic rule. (2) The Roman Catholic Church is the only Christian Church which holds marriage, and has always held it to be indissoluble and a Sacrament. Ency. Brit. Sacrament; also Methodism, Presbyterians, and other denominations, Book of Common Prayer, Art. XXV; Koresic v. Grand Carniolian Slovenian Catholic Union of United States of America, 138 Kan. 261, 25 P.2d 355; Madden on Divorce and Separation, page 256. (3) The procreation of off-spring under the natural law being the object of marriage, its permanency is the foundation of the social order.

Indissolubility of marriage and prohibition of 'mixed marriages' are not mere sectarian rules but are deeply rooted in the consciousness and history of mankind. Indeed, it would be a challenging omission in this memorandum if reference were not made to their age old historic origin and enforcement.

It must be borne in mind that the ante-nuptial contract in issue was founded upon and rooted in a living system of jurisprudence ante-dating even the common law, that all embracing system known as the Canon Law.

The Canon Law was founded on the Bible; on the writings of the Fathers in which was contained the authorized interpretation of the Biblical texts and the tradition of the Church; on the custom of the Church which was always recognized as a source of law and which down to the end of the 18th Century was the constituent element of the Common Law. Sir William Holdsworth's History of English Law, Pub. Little Brown Co. 1938.

It was the Canon Law which made Christian States of European nations, directly or indirectly modified their constitutions, and profoundly inspired and motivated international and civil law throughout Christendom. Moreover, it made Christianity the law of the land in many European countries, in England and partly in the United States. New International Ency. Vol. IV, 2nd Ed.

'The elevated condition of woman is due to the Canon Law, prescriptions which the Church enforced in all nations converted to Christianity.' International Ency. 1906 Ed.

'The history of the law of marriage in this Country traces its origin back to the ancient Canon Law, which consisted of the decrees of the various Popes and was the basis of the matrimonial law in England, and has been recognized there ever since the establishment of Christianity in the year 605'. Reaves v. Reaves, 15 Okl. 240, 82 P. 490, 2 L.R.A.,N.S., 353 at page 359.

'In the earliest Hebrew history endogamy prevails.' Jewish Ency. 'Marriage' From Father Abraham to Pope Pius XII, from the dawn of Israel to modern Jewry a consistent and inflexible prohibition of 'Mixed Marriages' is recorded upon the pages of Holy Writ, the history of Christendom and of Jewish history.

***109** The book of Genesis records the command of Abraham to his favorite and trusted servant, whom he sent out to seek a wife for his son Isaac: 'And I will make thee swear by the Lord, the God of Heaven and the God of the earth, that thou shalt not take a wife unto my son of the daughters of the Canaanites among whom I dwell. But thou shalt go unto my country and to my kindred, and take a wife unto my son Isaac.' Genesis Ch. XXIV, 3, 4.

And the bitter protest of Rebekah: 'And Rebekah said to Isaac, I am weary of my life, because of the daughters of Heth; if Jacob takes a wife of the daughters of Heth * * * what good shall my life do me?' Genesis XXVII, 46.

Later came the law of Moses, a peremptory interdiction of marriage with the Canaanites: 'Neither shalt thou make marriages with them; thy daughter thou shalt not give

unto his son, nor his daughter shall thou take unto thy son.' 'For they will turn thy son from Me.' Deuteronomy VII, 3, 4.

And as further and increasingly frequent intermarriage threatened to disintegrate and even to destroy Israel, the alarmed Priest and Prophet Ezra denounced this practice: 'And Ezra the priest stood up and said unto them, 'Ye have transgressed, and have taken strange wives to increase the trespass of Israel." Ezra X, 10, 11.

'Now therefor give not your daughters unto their sons, neither take their daughters unto your sons.' Ezra IX, 12. 'And they entered * * * into an oath to walk in God's law * * * and that we would not give our daughters unto the people of the land, nor take their daughters for our sons.' Nehem. X, 29, 30.

This sound principle has been recognized and maintained until this day and is clearly expressed in these words: 'Intermarriage is not countenanced by modern Judaism * * * due * * * to a conviction that unity of religion is essential to the happiness of the home.' Jewish Ency. Vol. 5, page 626.

The Roman Catholic Church likewise from the very inception of her existence forbade the marriage of Catholics to non-Catholics. At the Council of Elvira, A. D. 305, the early Christian Fathers adopted this Canon: 'Haeretici si se transferre noluerint ad ecclesiam catholicam, nec ipsis catholicas dandas esse puellas.' ('It has pleased us to decree that if heretics are unwilling to become members of the Catholic Church, Catholic girls need not be given them.')

The dogma of indissolubility of the marriage required for its supporting foundation a unity of belief by both parties in its sacramental character. A necessary corollary was the rule forbidding the marriage between Christians and heretics, i. e., one accepting but part of the Christian doctrine.

From the Council of Elvira, 305 A. D., more than 1600 years have rolled on. In unbroken continuity two hundred and sixty two Popes have consistently maintained this rule. On December 31, 1930, Pope Pius XI, in his encyclical on Christian marriage, reaffirmed the age old rule concerning mixed marriages. 'Everywhere and with the greatest ***110** strictness the Church forbids marriage between baptized persons one of whom is a Catholic and the other a member of a schismatical or heretical sect,' declared the Pontiff, 'And if there is added to this, the danger of falling away of the Catholic party and the perversion of the children, such a marriage is forbidden also by Divine Law.' Encyclical Pope Piux XI, on Christian Marriage; 62 Cod. Jur. Can. c. 1060.

This dogma enters into the very essence of the ante-nuptial agreement, for the reason that a Catholic ceremonial marriage binds the Catholic party for life. Matthew XIX, 6; Corinthians VII, 10–27; Mark X, 9; Catholic Encyclopedia—Marriage; Canon Law.

But the non-Catholic party is not bound for life, since the non-Catholic Churches do not hold marriage to be a Sacrament, holding it but a union, which, even though entered into with a religious ceremony, may be dissolved by the non-Catholic spouse for many causes, without any religious, and with little social disability.

The Catholic party is not only forbidden to remarry under pain of excommunication, but the Sacramental bond of matrimony of the Catholic party remains undissolved notwithstanding the civil freedom granted to him by a divorce court. Matthew XIX, 9; Canon Law.

And, where the non-Catholic party obtains a divorce, the Catholic married with a Catholic ceremony still remains bound. He or she cannot marry during the lifetime of her first spouse. Mark X, 11, 12; Luke XVI, 18; Catholic Ency. on Divorce.

By a Catholic ceremony the non-Catholic attains the safety and permanence of a life union and the resulting stability and unity of the family, the husband, the wife and the children, shielded from the lure and peril of divorce now eating its corroding destruction into the vitals of America.

To every Catholic ex-communication among other things means the instant severance of membership in the Catholic Church. It involves the loss of its multifarious ministrations and rituals, the deprivation of all of its Sacraments, ostracism from the Catholic society and exclusion from 'Christian burial'. This last drastic penalty the Catholic contemplates with dread. Indeed, even under the Jewish law, 'to be denied burial was the most humiliating indignity that could be offered to the deceased.' Jewish Ency. Vol. III, page 432.

'Marriage is regarded by the law as a valuable consideration and marriage or promise of marriage is

sufficient consideration for a promise.' Williston on Contracts, 1936 Ed., Vol. 1, Sec. 110, page 376; New York Law Contracts, Clark, Vol. 1, page 458.

'A contract is a promise or set of promises, for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.' Williston on Contracts, 1936 Ed., Vol. 1, Sec. 1, page 1.

'In its original application the term 'Consortium' was used to designate a right which the law recognizes in a husband growing out of a marital union, to have performance by the wife of all duties and obligations in respect to him which she took on herself when she entered ***111** into it.' Hence, the ante-nuptial agreement of petitioner became upon the respondent's marriage to her, an inseparable part of the 'Consortium', a duty the fulfillment of which lay in the mind and will of the petitioner. Jaynes v. Jaynes, 39 Hun 40.

'Agreements between parents relating to the religious training of their children are generally upheld.' Williston on Contracts, Sec. 1744a note, page 4939; Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429.

The respondent had the legal, equitable and constitutional right to protect, to preserve and to maintain inviolate his membership in the Roman Catholic Church. He had the undoubted right to enter into any agreement which would insure to him the continued enjoyment of its privileges and its protection, the religious and moral inspiration and the spiritual tranquility which he felt it inspired.

He had the right to determine that in his married life he would continue as formerly to abide by its rules, obligations and discipline. He had the right to seek to preserve this advantage for his children, the issue of the marriage, the same privileges, contacts and inspiration which he as a father considered essential to his and to their happiness and well being. In People ex rel. Rich v. Lackey case, 139 Misc. 42, 248 N.Y.S. 561, this latter principle developing into the sanction of law is clearly impregnate.

He had the right to choose for a spouse one who, though not a Catholic, would at least agree not to interfere in the exercise by him of his solemn religious duties, the most important of which would be to *see that his children were brought up in the Catholic faith*, and to see that they would attend Mass, to partake of the Sacraments, and to faithfully undertake and discharge all of the Catholic duties, inseparable in a Catholic home. For it is important to note that *it was only by a concurrence with these obligations, that the respondent's membership in the Catholic Church* could be insured and continued. Canon 2316–2319. 'A Practical Commentary on the Code of the Canon Law,' Paragraphs 1284–1285; Woywood, Vol. II, pp. 59, 60, 467, 471, 472; Canon 1258, 2316–2319, 2229.

Relying on this solemn promise by which the petitioner agreed to protect and preserve this right, respondent married the petitioner and irrevocably and for life changed his status from the single to the married state.

Not only was the status of the respondent changed, but the godparents, under the provisions of the Canon Law, assumed also a new and irrevocable spiritual status and impediments, the details of which need not be outlined here. Canon 768.

The law favors ante-nuptial agreements and they will be enforced in equity according to the intention of the parties. Strebler v. Wolf, 152 Misc. 859, 273 N.Y.S. 653.

In Johnston v. Spicer, 107 N.Y. 185, at page 191, 13 N.E. 753, 755, the Court said: 'Antenuptial contracts * * * are favored by the ***112** courts, and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises.'

In the case of De Cicco v. Schweizer, 221 N.Y. 431, at page 438, 117 N.E. 807, at page 810, L.R.A.1918E, 1004, Ann.Cas.1918C, 816, as said by Mr. Justice Cardozo: 'The very formality of the agreement suggests a purpose to affect the legal relations of the signers.' (Mr. Justice Crane concurred in the same case) 'the marriage having taken place, the settlement (contract) became binding. * * * 'if he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised." (221 N.Y. pages 440, 441, 117 N.E. pages 810, 811) (Parenthesis those of Court.)

Section 53 of the Domestic Relations Law provides, 'a contract made between persons in contemplation of marriage, remains in full force after the marriage takes place.'

This deep-rooted allegiance of the vast numbers of Catholics toward the Roman Catholic Church and the general attitude and determination not to leave its embracing and protective shelter is a matter of common knowledge.

The growth of liberty has frequently experienced a powerful acceleration through some controversy, the profound and far-reaching importance of which is entirely beyond the thought of those immediately involved.

The instant case is one of those. In it is involved the relation of the law and the Constitution in preservation of the right of freedom of religious worship. It happens that the respondent seeking herein the protection of the right to the exercise of religious freedom contained in the ante-nuptial contract is a Catholic. But the principle invoked operates to bulwark the right to the exercise of religious freedom of persons of all religions, for its application extends to all.

Since the courts, as already pointed out, have repeatedly decreed the Catholic education of a child with or without an ante-nuptial agreement and without any formal direction on the part of the deceased Catholic parent, with what greater force should such judicial direction issue, where there is a written agreement and a living parent stands before the Court demanding its fulfillment.

From a consideration of the case, and the decisions herein cited, these rules of law are clearly established: (a) An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a Catholic has thereby irrevocably changed the status of the Catholic party, is an enforceable contract having a valid consideration; (b) the Court will take judicial notice of the religious and moral obligations of the parties; (c) the spiritual and Catholic training of a child amid religious persons or institutions of its own faith is paramount over any material considerations; (d) a holding that religious training of children may be dispensed with until they reach ***113** maturity upon the theory that they then may adopt any or no religion as they deem fit, is repugnant to our American background and traditions; (e) a court and especially the Domestic Relations Court is bound to approve the demand of a Catholic parent that its child be given a Catholic education and a Catholic upbringing in a Catholic home or institution, Domestic Relations Court Act, Art. 3, Sec. 88; (f) the Court will take judicial notice that the Roman Catholic Church is the only church whose members are bound by its laws even to the penalty of excommunication of the Catholic party who permits non-Catholic training and education of their children; (g) the fact that a child, in violation of the ante-nuptial contract, has for a period of time been brought up in some other religion than that fixed in the ante-nuptial agreement, is not sufficient ground to deprive the respondent of his rights to have the child educated in the religion fixed by the ante-nuptial contract.

It is clear that the respondent is entitled to have the child brought up in the religion agreed upon in the ante-nuptial contract. It is equally apparent that the child being baptized Catholic is entitled to and must receive the training and education of that faith.

The Court is informed that since the beginning of this proceeding the parties have placed the child in a Catholic boarding school and the respondent has assumed the obligation of paying for the child's maintenance and tuition therein. This arrangement of the petitioner and respondent is submitted to this Court for approval.

Accordingly, the said arrangement is hereby approved and the respondent is ordered and directed to pay the child's board, tuition and maintenance at the said Catholic boarding school as aforesaid. Judgment accordingly.

All Citations

34 N.Y.S.2d 100

New York
Official Reports

271 A.D.2d 427, 706 N.Y.S.2d 890
(Mem), 2000 N.Y. Slip Op. 03515

Abraham Rosenbaum, Appellant,
v.
Rachel Rosenbaum, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
(April 3, 2000)

CITE TITLE AS: Rosenbaum v Rosenbaum

In an action for a divorce and ancillary relief, the plaintiff husband appeals from an order of the Supreme Court, Nassau County (Mahon, J.), dated September 7, 1999, which denied his motion to dismiss the counterclaim of the defendant wife, in effect, to rescind the parties' post-nuptial agreement.

Ordered that the order is reversed, on the law, with costs, the motion is granted, and the counterclaim is dismissed.

The parties executed a post-nuptial agreement on October 9, 1985, which provided, *inter alia,* that they would maintain their separate property and waived certain statutory inheritance rights. When the plaintiff commenced this action for a divorce in 1998, the defendant asserted a counterclaim seeking to rescind the post-nuptial agreement on the ground that it had been "procured through fraud, deceit and overreaching".

The Supreme Court should have granted the plaintiff's motion to dismiss the counterclaim. A cause of action to rescind the provisions of a marital agreement which allocates property must be commenced within six years of the execution of the agreement (*see,* CPLR 213 [1]; *Djavaheri-Saatchi v Djavaheri-Saatchi,* 236 AD2d 583; *Anonymous v Anonymous,* 233 AD2d 350; *Pacchiana v Pacchiana,* 94 AD2d 721). Contrary to the ***428** defendant's contention, the Statute of Limitations was not tolled during the marriage (*see, Scheuer v Scheuer,* 308 NY 447; *Dunning v Dunning,* 300 NY 341).

To the extent that the defendant's counterclaim is based on fraud, she failed to plead that claim with sufficient particularity (*see,* CPLR 3016 [b]). In any event, that claim is also untimely since it was not raised within six years after the alleged fraud was committed, or within two years of when it reasonably could have been discovered (*see,* CPLR 213 [8]; 203 [g]; *Garguilio v Garguilio,* 201 AD2d 617; *Pommer v Trustco Bank,* 183 AD2d 976; *Freiman v Freiman,* 178 Misc 2d 764).

Bracken, J. P., O'Brien, Sullivan and Luciano, JJ., concur.

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