



6 Considerations When Considering Entering Into A Prenuptial Agreement

A prenuptial agreement is essentially a contract entered into by two parties prior to their marriage. This contract attempts to govern each individual's rights and obligations should the marriage eventually terminate. The rationale for why individuals enter into these agreements can vary widely, and are usually utilized to clarify both individuals' expectations, help avoid uncertainties and help alleviate fears of either party prior to entering into the marriage. However, most often, a party desiring a future spouse execute a prenuptial agreement typically wants to protect something, and that, more often than not, is money.

CONSIDERATION ONE – WHEN IS THE ANTICIPATED WEDDING TAKING PLACE?

When dealing with this timing consideration, it is extremely important to note that Courts do not have a bright-line rule as to how much time is necessary to provide prior to the execution of the agreement. Courts routinely focus on whether the time provided allowed the other party to review the terms and conditions of the agreement. Therefore, when contemplating entering into a prenuptial agreement, it is of the utmost important to ensure that your spouse will have enough time to read, review and consider the overall agreement.

CONSIDERATION TWO – DOES THE OTHER PARTY HAVE THE ABILITY TO RETAIN AN ATTORNEY?

It is imperative to understand not only the time frame that you may possess in having a prenuptial agreement drafted and provided to your spouse, but also what effect this time frame has upon your spouse's ability to retain counsel of their own choosing to review this agreement. The more time provided, the greater ability to retain counsel to review the agreement, and the more likely an prenuptial agreement will be enforced.

CONSIDERATION THREE – ADVISE THE OTHER PARTY TO SEEK INDEPENDENT COUNSEL

Relevant into whether a Court will deem a prenuptial agreement valid is whether the other party was affirmatively informed to seek independent counsel. When a party has been affirmatively encouraged to retain independent counsel of their own choosing to review the agreement, it is more likely that they will be deemed to have been afforded the ability and opportunity to seek independent counsel.

In the New Jersey case of *D'Onofrio v. D'Onofrio*, the Court found that the Husband's attorney affirmatively informed the wife that she should retain independent counsel. The Court therefore

concluded that as Wife waived her right to seek independent counsel, that the prenuptial agreement would be upheld.

CONSIDERATION FOUR – PRODUCTION OF FINANCIAL DISCLOSURE

Two New Jersey cases also analyzed the amount of disclosure necessary to satisfy the full disclosure standard. In the case of *Marschall v. Marschall*, the Court stated that the easiest way to ensure full disclosure is to annex to the agreement a schedule setting for the approximate values of the assets involved.

Two years later in the case of *De Lorean v. De Lorean*, the Court confirmed that full and complete disclosure means detailed disclosure. In holding that full disclosure means detailed disclosure, the Court stated that the only sure way to ensure full compliance with full financial disclosure when a prenuptial agreement is executed, would be to require a written list of assets and income which would be annexed to the agreement.

CONSIDERATION FIVE – DO THE TERMS OF THE AGREEMENT HAVE TO BE FAIR AND REASONABLE?

When dealing with notions of fairness and reasonableness, a standard often utilized is that of “unconscionability”, namely, agreements whose terms are extremely harsh and unfair. Unconscionability is typically defined as an agreement that no sensible person would offer and no sensible person, free from duress or delusion, would accept.

The one provision that will not be found to be valid and will be unenforceable in all scenarios is any agreement that attempts to be binding on issues of custody. No matter how much an individual wants to avoid the costs associated with protracted custody litigation, individuals cannot agree in advance as to how to resolve custody. The Court is ultimate decider as to the issue of custody and the best-interests of the children, and do not want to promote a bargaining away of what is best for the child(ren). Likewise, an agreement attempting to resolve child support issues is not binding on the Court.

What remains relatively constant is that if an agreement is neither one-sided nor unreasonable, most Court’s will uphold the terms and conditions of the prenuptial agreement.

CONSIDERATION SIX – IS THE AGREEMENT A RESULT OF FRAUD, DURESS OR UNDUE INFLUENCE

During the drafting stage, fraud, duress and undue influence can often take shape as inequitable clauses in the agreement, as seen above in Consideration Five. Likewise, an agreement is likely to be invalidated if one person makes a deliberate and fraudulent statement as to their financial condition, as seen above in Consideration Four.

It is important to understand the completely symbiotic relationship between these factors when attempting to determine whether an agreement may have been obtained via fraud, duress or undue influence. By analyzing the terms of the agreement (consideration five) in connection with

the overall time frame in which the agreement is provided to the non-drafting spouse and their subsequently ability to retain independent counsel (considerations one and two), the possibility of an agreement being the result of fraud, duress or overreaching can be minimized.

CONCLUSION

Although these six considerations do not contain actual language or provisions that should often be contained in a standard prenuptial agreement, these six considerations provide general guidance to best ensure that a prenuptial agreement will withstand Court analysis and will hopefully be deemed both valid and enforceable.