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ANALYSIS

Prenups: Recent Controversies Over Plans for Perpetuity

The case law surrounding the interpretation and enforcement of prenuptial agreements has become more profound and robust as time has worn on, making it interesting to and essential for family, estate and divorce law practitioners to review recent judicial precedents on a regular, periodic basis to look for guidance in assisting their clients seeking to engage in the private ordering of their new family's financial affairs as they enter into a marriage.

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Prospective brides and grooms wishing to protect their acquired or inherited wealth, whether existing or expected, and intending to order their financial affairs in the event of death or divorce increasingly more often in today's financially focused environment turn to the prenuptial agreement as an essential part of their wedding planning. The importance of the prenuptial agreement in this process became more notable and widespread in New York with the advent of the Equitable Distribution Law (Domestic Relations Law [DRL] Section 236B) on July 19, 1980, some 43 years ago. For quite some time afterwards, many prenuptial agreements contained so-called "sunset" clauses, which provided for the expiration of the agreement or a portion of its terms after the passage of a specified period of time. However, the vast majority of present day prenuptial agreements have avoided sunset provisions, concentrating instead on a process of planning for perpetuity in recognition that no one lives forever and that roughly half of all

marriages in the United States end in divorce prior to the death of one of the spouses.

The case law surrounding the interpretation and enforcement of prenuptial agreements has become more profound and robust as time has worn on, making it interesting to and essential for family, estate and divorce law practitioners to review recent judicial precedents on a regular, periodic basis to look for guidance in assisting their clients seeking to engage in the private ordering of their new family's financial affairs as they enter into a marriage. A review of some of the decisions of the past year follows.

Spiegel v. Spiegel, 206 A.D.3d 1178 (Third Dept. 2022), involved an appeal from a decision upholding a prenuptial agreement on the husband's motion for summary judgement and denying the wife's counterclaim seeking to set aside that agreement as invalid on her claim that it was the product of overreaching on the part of the husband. Although the parties had resided together for roughly 10 years prior to their marriage and were the parents of three of their four children at the time of the marriage in 2011, the agreement was signed a mere two days prior to the wedding. Eight years later in 2018, the husband sued for divorce on the grounds of irretrievable breakdown of the marital relationship. Justice Eddie J. McShan, writing for the unanimous court, found that the husband had met his initial burden on the summary judgment motion by submitting the agreement which contained the parties' representations that they had "entered into the agreement knowingly and intelligently and with the benefit of counsel," but then found that there were "various issues of fact raised by the circumstances

surrounding the execution of the agreement that precluded an award of summary judgment."

In *Spiegel,* Justice McShan found that there was a "pronounced financial disparity" between the parties at the time of the marriage; that the prenuptial agreement had been entered into at the husband's insistence; that the wife's lawyer had been recommended to the husband by his attorney; that the wife claimed to have had no input into the choice of counsel for her; that her lawyer sent her a retainer agreement and statement of client's rights that she was unable to open and never executed; that "earnest" negotiations took place over a three-day period; and, was executed two days prior to the wedding. The wife also claimed that she did not receive the initial draft of the agreement prior to consulting with her lawyer and had a single conversation with her attorney that lasted 30 to 45 minutes. The court held that the record failed to establish whether the wife had any meaningful discussions with her attorney during the negotiations; that the husband had advised his attorney that it was his understanding that the role of the wife's attorney was to be limited to explaining the agreement to her instead of representing her in the negotiations; that it was intended that the wife's lawyer would not cause friction between the parties, would not attempt to rewrite the agreement or investigate issues of which the attorney was not aware. The wife claimed that the husband had told her that the agreement was designed to protect his business, that he threatened that there would be no wedding in the absence of an agreement, that the husband had told her that the agreement was "fair," "that she should just sign it and not focus on every detail;" and that he reassured her "that he would always take care of her and that the agreement was 'no big deal.'"

Ultimately, the Appellate Division in *Spiegel* found that the court below had improperly granted summary judgment to the husband because the record raised issues of whether the wife was provided with meaningful representation during the "abbreviated negotiations, and also raised an inference that the husband did not intend on engaging in good faith negotiation … from the outset, which, if true, would be sufficient to establish overreaching on his part." (The Appellate Division also rejected the husband's claims of ratification of the agreement by the wife.)

In *Estate of Henry G. Miller,* NYLJ July 29, 2022, Westchester County Surrogate Brandon R. Sall granted the motion of the preliminary executors striking the notice of appearance of the decedent's widow for lack of standing based upon the provisions of the prenuptial agreement.

The court focused its analysis on the acknowledgements and waivers contained in the agreement, the most significant being waivers of rights of intestacy and waivers of rights to an elective share of the estate, including a statement to the effect that "… it is the specific intention of the parties that their respective estates shall be administered and distributed in all respects as though there was no surviving spouse." Surrogate Sall noted that it is "well-settled practice in the Surrogate's Court to determine the status of a potential objectant before trying the issue of the validity of the [will], that a person who waives all future interests in an estate is "in essence a stranger to the estate and may not file objections to the probate of the will or seek to inherit in intestacy," and that SCPA Section 1410 requires that a person objecting to a will most be adversely affected—i.e., suffer pecuniary harm, which could not occur if the proposed objectant has no stake in the estate. The court went on to find that the decedent and his widow had clearly and explicitly

agreed to waive and release each of their rights to share in the estate of the other upon death following their marriage, that the widow had been represented by counsel, that she had not challenged the validity of the prenuptial agreement, that she did not "object to or question" its authenticity, that she had not sought to set aside the agreement, and that she had stated that her true purpose was to ascertain the nature and extent of the decedent's assets.

Kings County Surrogate Rosemarie Montalbano denied the in limine motion of the surviving spouse of the decedent to preclude the admission into evidence of their prenuptial agreement in *Estate of Kevelson*, NYLJ April 10, 2023. The prenuptial agreement contained waivers of the right of election, of the right to take through intestacy, and of the right to serve as a fiduciary with respect to the other's estate. The widow argued that the agreement had been rescinded due to the decedent's failure to perform his obligations under the agreement, that the agreement had been revoked and destroyed (even though she was aware of the continued existence of the original), that the original had not been timely produced, that it was irrelevant, that it could not be authenticated, that it was barred by waiver and laches, that it was incomplete, and that it contravened the statute of frauds and the best evidence rule. The court found that it was not disputed that there was no written revocation or modification of the agreement despite the clear terms of the agreement that such a writing executed with the same formalities would be required. Surrogate Montalbano also found that the widow was aware of the existence of the duplicate original of the agreement and that it had not been in the possession of the will's proponent at the time that a preclusion order had been issued, thereby

giving the Court the right to admit it into evidence at trial subject to authentication.

Fort v. Haar, 109 A.D.3d 466 (First Dept. 2022), harks back to the days when the sole ground for divorce in New York was adultery and plaintiffs oftentimes sought annulments of their marriage on the basis that it had not been sexually consummated. In this instance, the prenuptial agreement provided that "consummation of the anticipated marriage … is a condition precedent to the enforceability of this agreement. If [the parties] do not marry, this Agreement shall have no effect. …
This agreement is made in consideration of, and is conditioned upon, [the parties] entering into a valid ceremonial marriage with each other, and it shall become effective as of the date of that marriage." The agreement also required the groom to provide the bride with a car and a certain amount of money if they married, which he did. Five years after the marriage, the parties entered into a modification agreement that ratified the underlying prenuptial agreement to the extent that the terms of the two agreements were not in conflict. Thereafter, in seeking a divorce, the wife argued that she was entitled to a declaration that the agreement was unenforceable because the parties failed to consummate the marriage by engaging in sexual relations. Her motion was granted and the husband appealed. The Appellate Division concluded that the phrase "consummation of the … marriage" "clearly and unambiguously [referred] to the marriage ceremony" and not to sexual relations, noting the wife's failure to explain how the agreement could become effective on the date of the marriage, but not become enforceable in the absence of sexual relations subsequent to the marriage ceremony. Also noted by the Appellate Division was the wife's acceptance of benefits under the terms of the prenuptial agreement and the later ratification of the

prenuptial agreement by the parties when they entered into the modification agreement.

Present day case law involving the interpretation and enforcement of prenuptial agreements is infused with the concept of "equity" derived from the obvious legislative intent imbued in the title of the Equitable Distribution Law (DRL Section 236B). *Lek v. Lek*, 210 A.D.3d 504 (First Dept. 2022) is a prime example of an appellate court doing equity in order to provide for a fair result. In *Lek*, the prenuptial agreement provided that the primary marital residence should be treated as marital property as if titled in joint names and equally owned upon the occurrence of a "dissolution event" (i.e., the commencement of a matrimonial action in this instance). Despite the requirement that the home be listed for sale within 90 days of such an event, the husband leased the home to his father for a period of three years. The Appellate Division found that, since the parties intended that each would realize a 50% share of the sales proceeds and accepting the wife's argument that the lease impeded the immediate sale of the property, the wife was entitled to one-half of the rents for that property—i.e., "a common sense approach."

If there is an ultimate lesson to be gleaned from these decisions, it is that courts strive to ensure that prenuptial agreements are fairly and equitably interpreted and enforced, while giving deference to the express agreements of the spouses as specifically contained in those agreements or by gleaning their intent from the "four corners" of the agreement by looking at all of the provisions and platitudes that state the purpose and intentions of the parties when the agreement was created.

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