

Is your prenup worth the paper it's written on?

Years ago, prenuptial agreements were something reserved for the rich and famous. As times have changed, these agreements have become more commonly used among "regular" people. The reasons for this change vary. One explanation is that people are marrying later in life and therefore have more pre-marital time with which to accumulate assets. Another is that with the divorce rate so high, a greater number of people are entering their second and third marriages with a cautious eye toward protecting their assets. Whatever the reason, the question still remains - Is my prenuptial agreement enforceable?

Early on, courts in New Jersey looked upon prenuptial agreements with a jaundiced eye. The concept of one fiance presenting a contract to the other as a condition of the marriage raised immediate concerns of coercion, duress, fraud and unfair advantage. In more recent years, the courts have accepted these agreements as a legitimate planning technique should the marriage unfortunately fail.

The first case in New Jersey that set forth the specific criteria for the enforceability of a prenuptial agreement was Marshall v. Marshall. In that case, the court stated that it would be mandatory that the parties engage in full disclosure of their respective assets and financial conditions. Further, the disclosure had to include any and all items that might influence the other party's decision regarding the ultimate fairness of the agreement. To enforce the agreement, the party seeking enforcement bears the burden of proof as to whether full disclosure was made.

Subsequent to the Marshall case, courts in New Jersey solidified the concept that they would not enforce an agreement that was "unconscionable" meaning one that was so inherently one sided that it would shock the conscience. In the high profile DeLorean case, the Court found that John DeLorean had gotten his wife to sign an unfair agreement. The Court however drew the distinction between an "unfair" agreement and one that was "unconscionable." It reiterated that it would not enforce an unconscionable agreement but would not disturb an agreement just because it was "unfair."

Like many areas of the law, the enforceability of a prenuptial agreement is fact sensitive. The courts will look at the entirety of the circumstances in determining the validity and enforceability of any such agreement. Was there full

disclosure? Did both parties have ample time and opportunity with which to consult with counsel? Are the terms of the agreement one-sided and if so, are they merely unfair or do they rise to the level of unconscionable? These are all questions a court will ask in deciding whether or not to enforce a prenuptial agreement.

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