THE EVOLUTION OF PRENUPTIAL AGREEMENTS in GEORGIA

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Prenuptial agreements have gained in popularity over the past decade and have greatly evolved from being void as against public policy, to being accepted only under specific circumstances, to being upheld so long as procedural safeguards are met.

The main purpose of a Prenuptial Agreement is to eliminate the mystery of what a judge or jury would do with division of property and in awarding alimony.

It is also helpful to protect as fully as possible a person's separate estate and to eliminate any argument about transmuting separate property into marital property by co-mingling or actively managing an asset. Prenuptial Agreements are authorized by Statute – O.C.G.A Section 19-3-60(a)

"Enforceable at the insistence of one spouse at anytime during the life of the other spouse SO LONG AS the rights of third persons, purchasers or creditors are not affected".

FIRST MAJOR CASE: Scherer v. Scherer 249 Ga. 635 (1982)

Established a 3 tier analysis set procedural fairness requirements. .

SECOND MAJOR CASE: Allen v. Allen 260 Ga. 777 (1991)

The validity of a prenuptial agreement is to be determined by a Judge, not a jury.

THIRD MAJOR CASE: Adams v. Adams, 603 S.E.2d 273 (2004), which clarifies and limits the unconscionability tier.

FOURTH MAJOR CASE: Mallen v. Mallen 622 S.E.2d 812 (2005), which placed marrying couples on the same footing as those entering into any commercial contract.

FIFTH MAJOR CASE: Corbett v. Corbett, 280 Ga. 369 (2006), which says that failure to disclose income to the Wife rendered the prenuptial agreement unenforceable. The parties' standard of living did not put Wife on notice that the Husband failed to disclose material facts.

SIXTH MAJOR CASE: Dove v. Dove, which, among other things, defines a prenuptial agreement that addresses the issue of alimony as "in contemplation of divorce" which eliminates the requirement under OCGA 19-3-63.

MOST RECENT: Sullivan v. Sullivan, S09A1295 (Sept. 28, 2009) and Lawrence v. Lawrence, S09A1370 (November 9, 2009).

SHERER v. SHERER

1) Was the agreement obtained through fraud, duress, mistake or misrepresentation or non-disclosure of material facts?

2) Is the agreement unconscionable?

3) Have the facts and circumstances changed since execution so as to make enforceability unfair and unreasonable?

TIER ONE

FRAUD, DURESS, MISTAKE, MATERIAL MISREPRESENTATION OR NON DICOLSURE

Although Georgia Courts have not set out the factors which should be considered

when determining whether a Prenuptial Agreement was obtained through fraud, duress, mistake or through misrepresentation or non-disclosure of material facts, the Courts should consider factors which have been applied by other Courts when considering this issue. These factors include:

(1) The timing of the execution of the Agreement,
(2) Whether the complaining party was represented by legal counsel, and
(3) The financial disclosures of the parties.

TIMING:

The timing between the negotiation and execution of the Agreement is critical when determining questions of fraud and duress. Courts will consider heavily whether or not the parties discussed entering into a Prenuptial Agreement prior to its signing.

Although most courts have not defined a specific time period which will validate or invalidate a Prenuptial Agreement, Prenuptial Agreements which were discussed by the parties farther away from the wedding ceremony will have a greater chance of being enforced. See e.g., Howell v. Landry, 386 S.E. 2d 610 (N.C. App. 1989) (enforced even though Agreement was only presented to Wife one day prior to marriage as the parties had extensively discussed its provisions and changes sought by Wife had been incorporated); and Marsh v. Marsh, 949 S.W. 2d 734 (Tex. App. 1997) (Prenuptial Agreement executed one day before the parties' wedding enforced as parties had previously discussed provisions of the Agreement notwithstanding Husband's allegation that he did not read the Agreement prior to signing same).

Likewise, Courts are not likely to enforce Agreements which have been formally

discussed only a few days before the marriage. Agreements which are signed under these circumstances will likely be deemed involuntary. See e.g., Lutgert v. Lutgert, 338 So.2d 1111 (Fla.App. 1976)(invalidating Prenuptial Agreement where the unrepresented party was presented with the Agreement close to the time of the wedding); and In re Estate of Crawford, 730 P.2d 675 (Wash. 1986)(holding Prenuptial Agreement unenforceable when Wife first learned of Agreement at her Husband's attorney's office three days before the wedding).

As these cases demonstrate, the timing of the execution of the Agreement will also have an impact on the claim that the Agreement was executed under duress and/or coercion. Therefore, to avoid allegations of coercion, fraud and duress, ample time should be allocated from the date the negotiations begin to the date the Agreement is executed by the parties.

When arguing elements of a prenuptial agreement that are not clear from Georgia's case law, one must look to the laws of other jurisdictions.

a) Fletcher v. Fletcher, 1994 Ohio case: Execution of agreement on wedding day raises the rebuttable presumption of overreaching and coercion.

b) Zimmie v. Zimmie, another Ohio 1984 case: Wife first learned of Husband preparing a prenuptial agreement on the wedding day. Court found it was signed involuntarily and thus invalid.

HOWEVER;

c) Williams v. Williams. Texas 1986: Court found that being presented with Prenuptial Agreement shortly before a ceremony is not duress (parties discussed informally during the months before the marriage but W never saw

the finished product until near ceremony); and,

d) Lee v. Lee, Arkansas 1991 case: Wife was presented with Agreement one hour prior to wedding ceremony. The Court found the agreement valid and stated that being "rushed" does not amount to duress.

OPPORTUNITY OF REPRESENTATION:

With Prenuptial Agreements, the main focus is not necessarily on whether a party was represented by counsel, but rather whether or not he/she had the *opportunity* to retain counsel. Independent representation is strong evidence of entering the agreement voluntarily and that a challenging party is aware of his/her rights. Agreements where a party had ample opportunity to retain counsel but chose not to hire a lawyer are more likely to be enforced than those where the Agreement was presented to the other party with too little time to obtain an attorney.

Judges are far more likely to uphold a Prenuptial Agreement if there is any corroborating evidence that the party seeking not to enforce the Prenuptial Agreement fully understood his/her rights at the time of signing and knew what he or she was doing.

When counseling parties, we should not only provide enough time between the date of the signing and the wedding date, but also we must also inform the other party of their right to seek counsel and even encourage them to do so.

FINANCIAL DISCLOSURE/NON-DISCLOSURE:

All states require that the parties in a Prenuptial Agreement have reasonable

knowledge of the income, assets and liabilities of the other party. Although most Prenuptial Agreements contain a provision stating that each party is aware of the income, assets and liabilities of the other party, these provisions standing alone will not be deemed to constitute full disclosure. Accordingly, the practitioner should not only ensure that this provision is included but must also ensure that the Agreement includes a complete schedule of the financial disclosures of each party and preferably a recent filed IRS form 1040.

Attaching a financial disclosure in the form of an Exhibit decreases the possibility that a party seeking to set aside the Agreement can successfully argue that the Agreement was obtained through misrepresentation and fraud.

FULL DISCLOSURE DOES NOT MEAN ABSOLUTE PRECISION:

In Re: Hopkins, 1988 Illinois case, found that H's failure to disclose $24,500 out of $300k did not amount to lack of disclosure and that full disclosure can be full and fair even if it's not precise or exact.

TIER TWO

UNCONSCIONABILITY

Georgia defines unconscionability as being "such an agreement that no sane man not acting under delusion would make and that no honest man would take advantage of. R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962 (1975). Before Mallen v. Mallen, courts have made it expressly clear that the test for unconscionability in the context of Prenuptial Agreements should not be confused with the standard for unconscionability in commercial

contracts. This was because parties to a Prenuptial Agreement are involved in a confidential relationship that does not necessarily exist between two parties involved in a business relationship.

Further, most Prenuptial Agreements are inherently unfair since there will be a party with superior bargaining power and greater assets. Notwithstanding this inherent circumstance, it is important to recognize that an Agreement might be *unfair*, yet still be deemed conscionable. In other words, proving that an Agreement is unconscionable will be harder to establish than proving that an Agreement is unfair.

Courts will place an emphasis on factors such as a spouse's ability to obtain alternative means of support, and it will look at the assets which the contesting party possessed at the date of the execution of the Agreement when determining whether an Agreement is unconscionable. Other factors include the age of parties, their health, whether someone is foregoing income or potential income for the sake of the marriage, or whether the parties anticipate starting a family.

TIER THREE

HAVE THE FACTS AND CIRCUMSTANCES CHANGED SINCE THE EXECUTION SO AS TO MAKE ENFORCEABILITY UNFAIR AND UNREASONABLE?

The problem is that future circumstances are completely unpredictable. An important factor in this determination will undoubtedly revolve around the support provisions of the Agreement. The Courts usually consider the present fairness of a prenuptial agreement in light of any changes in the parties' financial positions since they executed the agreement.

Recent case law is pointing toward viewing "changes in circumstances" relevant only to alimony or child support and not property division. It is usually the alimony provisions in a Prenuptial Agreement that were most often found to be unconscionable.

Courts have been extremely careful in enforcing Agreements which limit a party's obligation to support the other. In Buettner v. Buettner, 505 P.2d 600, 602-603 (Nev. 1973) (and cited by the Georgia Supreme Court in Scherer), the court stated that the majority of the cases wherein Prenuptial Agreements were not enforced were those where the Husband sought to "relieve himself of his duty to support the Wife in the event of divorce, or to limit his liability for such support to a small fraction of that which a court would be likely to decree in light of the Wife's needs and the Husband's ability to pay." Notwithstanding any changed circumstances, courts will also consider whether the change in circumstances was foreseeable and discussed by the parties when entering into the Agreement. If so, it is likely that a Court will enforce the Agreement. See e.g., Warren v. Warren, 433 N.W. 2d 295 (Wis. Ct. App. 1988) (enforcing Prenuptial Agreement notwithstanding Wife's retirement because parties had discussed and anticipated her retirement); and Gant v. Gant, 329 S.E.2d 106 (W.Va. 1985)(stating that as a general rule "Prenuptial Agreements will be enforced in their explicit terms only to the extent that circumstances at the time the marriage ends are roughly what the parties foresaw at the time they entered into the Prenuptial Agreement").

As a drafting tip, make sure the agreement is severable, such that if one paragraph is invalid or not upheld, it doesn't tank the entire agreement. If the support provision is deemed unconscionable, the Court would then have latitude to alter it without altering the property division section or any other section.

It is also a good idea to keep child support and other child-related issues completely out of a prenuptial agreement and let that be governed by Georgia law. The Court will always have the right to examine any issue concerning the children to ensure that it is in their best interests.

Finally, make sure the Agreement accurately reflects the expectations of the parties with respect to the anticipated appreciation or depreciation of the assets and the potential income growth.

Adams v. Adams, 603 S.E.2d 273 (2004), came out on September 27, 2004 and defined more fully what the Court would consider as unconscionable. In Adams, the Husband had about $4.5 million, and the Wife had $30,000.00. In the prenuptial agreement, the Wife agreed to accept $10,000 of alimony for each year of marriage, capped at $100,000.00 and she waived claims to Husband's premarital property. Wife filed and sought alimony and equitable division. Husband sought to enforce the prenuptial agreement, and he won. Wife appealed on the ground of unconscionability of the agreement, specifically, that it was unconscionable when comparing the financial benefits, she would receive under the Prenuptial Agreement and what she may have received based on Husband's increased financial status at the time of the seeking of enforcement of the Agreement. Judgment was affirmed. The court went through the Scherrer analysis and found that both parties were previously married and divorced, so that they should have anticipated the prospect of divorce; to seek to protect their individual assets; and to establish their respective property rights by contract in the event of divorce. The court found that the disparity of the assets

does not render a prenuptial agreement unconscionable when there was a *full and fair disclosure of the assets prior to signing*, and that the agreement was entered into freely and voluntarily, and that the Wife was given the opportunity to consult with counsel. The prenuptial agreement was declared fair, both at the time it was executed and in light of subsequent events (Husband's net worth remained relatively the same).

Corbett v. Corbett, 280 Ga. 369 (2006) upheld the trial court's refusal to uphold a prenuptial agreement because there was not a full and fair disclosure of the assets prior to signing. The Husband failed to disclose his income which was found to be a material omission.

In Mallen v. Mallen 622 S.E.2d 812 (2005), the Supreme Court of Georgia took a renewed view at the elements of enforceability. In Mallen, the parties lived together for four years. The Wife became pregnant and decided to terminate the pregnancy. While at the abortion clinic, the Husband asked her not to terminate the pregnancy, but to marry him. She agreed. Before the marriage, the Husband presented the Wife with a prenuptial agreement. She took it to an attorney who advised her that he did not have the time to review it. She signed it nonetheless after some modifications were made. At the time of marriage, she had a net worth of $10,000.00 and a high school education, and he had a college education, owned a business, and was worth $8,500.000.00. After an 18-year marriage and four children, Husband filed for divorce and sought enforcement of the Agreement. The trial court enforced it and incorporated it into the Final Decree of Divorce. Wife appealed, claiming that the Agreement was unfair under Scherer. The Court upheld it, but the court's reasoning was a departure from Sherer and its progeny.

The Court held that Sherer did not impose a duty on engaged couples to act in "utmost good faith." Mrs. Mallen had argued that her Husband fraudulently induced her to sign the Agreement as just a formality, and that he would "always take care" of her. While older cases and other jurisdictions recognized the existence of a special relationship between engaged couples, Georgia now rejected this protective stance, stating that persons who are engaged are not in a confidential relationship, and that, legally, they are now on the same footing as those entering into any other commercial contract.

Wife also argued that, despite the financial disclosure listing Husband's assets, it did not list his income, as required by the first prong in Sherer. The Supreme Court disagreed, saying that such omission was not non-disclosure of material facts, since the financial disclosure clearly showed that the Husband was wealthy with significant income producing assets, and that the Wife knew of this income, having enjoyed a high standard of living and knew her Husband received a large income.

Finally, the Wife claimed duress, as she would have been left pregnant and unmarried had she not signed the Agreement. The Court pointed out the Wife's willingness to abort the pregnancy and that she even made changes to the Agreement, eliminating any allegations of fraud and showing that she entered into it under her own free will.

With respect to foreseeability, Wife argued that, because Husband's net worth increased by $14,000.000.00, that constituted a significant change of circumstances from when the Agreement was executed. The Court noted, however, that Wife was familiar with Husband's financial circumstances, and that she must have anticipated that his wealth would

increase over the marriage.

Dove v. Dove, 285 Ga. 647 (June 2009), came out this year and reconciled O.C.G.A. Section 19-3-63 with its requirement of any contract in contemplation of marriage be attested to by two witnesses and that contracts in contemplation of divorce were void *ab initio* as being against public policy prior to Sherer. The distinction in the Dove court was that if a prenuptial agreement contains language pertaining to alimony upon the filing of a divorce, that is clearly in contemplation of a divorce, and nowhere in Sherer is there language requiring anything other than complying with Sherer's three tiers.

Justice Carley disagreed and saw this case as granting a special status to prenuptial agreements in contemplation of marriage that ends in divorce and finds the distinction between agreements in contemplation of marriage that ends in divorce vs. those simply "in contemplation of divorce" as being a disingenuous semantics-based argument that misinterprets OCGA 19-3-63. He further stated that this was an open question of the bench and bar as t the applicability of OCGA 19-3-63.

Sullivan v. Sullivan , S09A1295, came out in September which involved a prenuptial agreement that did not comport with OCGA 19-3-63 and was challenged. The Supreme Court decided that this was clearly in contemplation of marriage and that the agreement failed because the requisite attestation requirements were not met. There was no alimony language, no division of property language in the event of divorce, and it simply defined each party's respective estates.

Most recently, in Lawrence v. Lawrence, S09A1370 (November 9, 2009) the parties entered into a prenuptial agreement a month before their marriage that was not in compliance

with OCGA 19-3-63 and, according to the Wife, did not contain a proper disclosure of the parties' respective assets. The trial court found that it complied with Sherer and Dove and was enforceable. The Lawrence court admitted that the distinction in Dove between contracts in contemplation of marriage vs. divorce is somewhat semantic; however, it is now established law in Georgia and the rest of the country. The Lawrence agreement addresses alimony and the possibility of divorce. Regarding the second contested issue of the Agreement not complying with tier one of Sherer, it is true that despite there being language of a full and fair disclosure of the assets, there were not, in fact, financial exhibits attached to the Agreement. The Court said that such written disclosures are not required but are merely the most effective method of satisfying the statutory disclosure obligation. Ms. Lawrence knew that Mr. Lawrence had extensive wealth, she knew about his real estate transactions and that he owned the building where she worked, that she vacationed in his Florida condo and his cabin, rode in his 38 foot Bayliner boat, she received jewelry from him, he bought her a Mercedes, etc. The court found that the trial court did not abuse its discretion in concluding that she knew the extent of the finances. Justices Hunstein and Williams both dissented on that issue.

DRAFTING PRENUPTIAL AGREEMENTS

Aside from ensuring that the agreement is upheld, you also need to write a good Agreement that benefits your client. They should never be regarded as 'boilerplate.'

Prenuptial Agreements must be thorough and detailed to accomplish your goal of

establishing the rights of the parties and providing a clear-cut distinction between separate and marital property.

LIST OF ISSUES TO BE ADDRESSED

-Purpose of the agreement (the consideration is the going through with the ceremony or mutual waivers or mutual promises)

-Intention of the parties

-Financial disclosure

The Agreement must define:

a. Separate property
b. Marital property
c. Separate debt
d. Marital debt

-Discuss what rights are being waived and by whom

-Discuss the distribution of tax benefits and burdens

-Discuss the distribution of marital assets

-Alimony- Either defines, set amounts, durations, etc. based on the length of marriage, or leave it out and let a judge or jury decide.

-Discuss mechanisms for modification or rescission of the Prenup

-Discuss the treatment of Gifts and Inheritances (usually considered separate).