THE ENFORCER

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PRENUPTIAL AGREEMENTS: PURPOSE AND ENFORCEMENT

Many couples, prior to their marriage, enter into prenuptial agreements. Attorneys may assume that a prenuptial agreement only designates ownership of assets as between the parties. However, a prenuptial agreement, or "prenup," may address any issue contemplated by the parties. In the end, a prenup is a contract; however, enforcement of a prenup can be effected by a variety of issues, including bankruptcy.

As a contract, a prenuptial agreement is enforceable where there is an offer, acceptance, and consideration. For prenuptial agreements, contemplation of marriage is sufficient consideration.[1] Also, divorce may, but need not, be a condition precedent to an agreement's enforceability. For example, Michigan law favors prenuptial agreements relating to one of the parties' rights upon the death of the other.[2]

If a prenup has no conditions precedent, it becomes effective upon mutual consent of the parties. However, like any contract, when the validity or contents are questioned, the dispute is brought before the court. But where? And which court? Parties can dictate venue through a forum selection clause, but they cannot choose jurisdiction. Typically, domestic relations matters are brought before state courts, and not federal courts.[3] Sometimes, a case regarding a prenup comes before the federal court if its subject falls under federal jurisdiction.[4] However, domestic relations cases usually cannot come before the federal court by diversity jurisdiction because of the Domestic Relations Exception.

The Domestic Relations Exception mandates that federal courts dismiss cases even if they meet all elements of diversity jurisdiction. Courts have not fully explored the contours of the Domestic Relations Exception. However, the Supreme Court has acknowledged the Exception and its application to the issuance of divorce, alimony, and child custody decrees.[5] Few courts have ruled as to whether prenuptial agreement issues come within the Domestic Relations Exception.

Michigan law expressly validates prenuptial agreements.[6] In 1983, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (UPAA). The UPAA addresses a wide variety of issues related to prenups, including their enforcement. It mandates that prenups are not enforceable if a party did not execute it voluntarily. The prenup was unconscionable, or no fair and reasonable disclosure was provided. Michigan has not adopted the UPAA, and Michigan prenuptial agreements are governed by contract law.[7] However, similarly to the UPAA, Michigan prenups will not be enforced if:

1. it was obtained through fraud, duress, mistake or misrepresentation or nondisclosure of a material fact;

2. it was unconscionable when executed, or;

3. the facts and circumstances are so changed since its execution that enforcement would be unfair and unreasonable.

The party contesting the validity bears the burden of proof and persuasion.[8]

Bankruptcy and Pre-Nuptial Agreements

Long time readers of this column are aware that I never miss the opportunity to consider the effect of a possible bankruptcy by a spouse. In an interesting case out of the District of Columbia, the bankruptcy court considered the dischargeability of a prenup when it was incorporated but not merged into the Judgment of Divorce (*In re Yelverton*, Slip Copy, 2012 WL 4434087 (Bkrtcy. D. Dist. Col., 2012). In *Yelverton*, the prenup was analyzed as a contract and not as an order of the court. It is important to recall that under 11 USC § 365(d)(1), an executory contract which is not assumed by the trustee within 60 days of a chapter 7 filing is deemed rejected. A creditor under a rejected contract generally has an unsecured claim for damages. However, if there are no funds in the bankruptcy estate, the unsecured creditors will not be paid anything.

As a result, it was important that Ms. Yelverton demonstrate that her claim was non-dischargeable under the listed exceptions set forth in §523(a). The *Yelverton* court first analyzed whether the marital support provisions of the prenup constituted an obligation: "...in the nature of alimony, maintenance, or support (without regard to whether such debt is expressly so designated) (11 USC §101(14A). Mr. Yelverton had contended that because the prenup was a contract which was not merged, it did not fall within the dictates of a "domestic support obligation". The *Yelverton* court held that regardless as to whether the obligation was a domestic support obligation or not, because Mr. Yelverton had filed for chapter 7, the debt was still non-dischargeable under §§ 523(a)(5) or (a)(15).

> In any event, even if the marital support and alimony obligations were not domestic support obligations under § 523(a)(5) and § 101(14A), these obligations would be, within the meaning of § 523(a)(15), debts incurred by Yelverton "in the course of a divorce or separation or in connection with a separation agreement, [or] divorce decree...."
> *Id* at 10.

With regard to the other property provisions of the prenup, Mrs. Yelverton was not so lucky. Because the prenup had not been merged and the other obligations sprang from Mr. Yelverton's other businesses, the bankruptcy court held them to be not of the kind described in §§ 523(a)(5) or (a)(15).

> Although it was contained within the prenuptial agreement, that agreement served dual purposes, serving both as a separation agreement (addressing what obligations Yelverton would have upon a separation and divorce) as well as issues relating to the parties engaging in business activities, including placing Yelverton into a landlord tenant relationship with Senyi [Mrs. Yelverton] incident to those business activities.

Conclusion

Prenups can be effective tools for property distribution and to simplify complicated issues. However, their enforcement depends largely on the quality and specificity of their provisions. It goes without saying that to be effective, a prenuptial agreement must be carefully worded and drafted. Finally, the scrivener must consider how the agreement is to be enforced and the impact of a bankruptcy filing.

Endnotes

1. *Richard v. Detroit Trust Co.*, 269 Mich. 411, 413-414 (1934).

2. *Turner v. Sheffield*, 191606, 1997 WL 33354510 (Mich. App. 1997). In *Scherba v Scherba*, 340 Mich 228 (1954), a couple signed an antenuptial agreement providing that when one party died, the other would receive $1,000 cash and a life estate in the marital home. Further, in *Woodington v Shokoohi*, 288 Mich App 352 (2010), the prenuptial agreement in question stated that it was not made in contemplation of divorce. In that case, the Defendant argued that this section meant the agreement was made *strictly* in the event of the death of one the parties, and was totally unrelated to divorce

3. As a general matter, '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *In re Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 853, 34 L.Ed. 500 (1890)." *Boggs v. Boggs*, 520 U.S. 833, 848 (1997)

4. *Id.*

5. *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992)

6. MCLA 557.28 states, "A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."

7. *In re Hepinstall's Estate*, 323 Mich. 322, 327–328, 35 N.W.2d 276 (1948).

8. *Reed v. Reed*, 693 N.W.2d 825, 834 (Mich. App. 2005)