

The Prenuptial Agreement from Creation to Destruction By *Magnolia D. Levy*

Prenuptial agreements - What is your strategy? Every attorney who has prepared or litigated a prenuptial agreement has one. On December 5, 2012, members of the Matrimonial and Family Law Committee gathered at the offices of Blank Rome, LLP for a lively and engaging discussion on "*The Art of The Prenuptial Agreement: Construction & Destruction.*"

The program featured *Hon. Laura E. Drager*, one of New York County's Matrimonial Part Justices; *Eric Wrubel*, a partner in the Matrimonial Department of McLaughlin & Stern, LLP; and *Laurie S. Ruckel*, a partner in the Trusts and Estates Department at Loeb & Loeb, LLP. Each panelist brought a different perspective to the table, and the program evolved into a spirited roundtable discussion among the panelists and audience. *Magnolia D. Levy*, a partner in the Matrimonial Department at McLaughlin & Stern, LLP, moderated the evening.

The discussion opened with a question directed to Ms. Ruckel, the lone trusts and estates practitioner in a room packed with matrimonial lawyers. When asked to give her top objectives for a prenuptial agreement, Ms. Ruckel noted that for many clients and T&E attorneys, an important goal is to avoid litigation. This immediately sparked debate. While staying out of a courtroom may be the goal, some seasoned practitioners noted that they have had clients, who, blinded by love, are prepared to accept a deal that is less than fair.

What to do when the intractability of a spouse (or your adversary) results in a one-sided agreement? While your initial goal may be to tie down the language, if the parties are unable to agree to terms, sometimes leaving it more ambiguous might be helpful. This way, if divorce follows, your client's divorce counsel has leverage with which to negotiate a more favorable deal, rather than just accepting the relatively unfavorable terms in the prenuptial agreement. From the court's perspective however, the existence of a prenuptial agreement (ambiguous or not) is often a welcome sight, since it significantly limits issues to be litigated. This topic fostered a fair amount of debate among members of the audience, who were invited to participate in the discussion and pose questions to the panelists.

The panelists also discussed how to proceed when a client expresses a desire to sign an agreement notwithstanding your legal counsel to the contrary. Virtually every attorney in the room agreed that they have discussed with clients the wisdom of marrying someone who insists on a one-sided agreement. Notably however, almost no one had represented a client who refused to walk down the aisle based solely on the attorney's advice. For those practitioners who choose to continue with the representation in this situation, it is essential that they write a letter to the client identifying the problematic areas and confirming that the agreement is being signed against the advice of counsel. In many cases, this letter will prompt the client to reflect on what is important to them and lead them to reassess their position. The letter also has the added benefit of ensuring that there are no memory lapses later (either by the client or the attorney).

New York Women's Bar Association
 Working Parents Committee

"Brown Bag Lunch Meeting"

Under the leadership of Co-Chairs **Christine Harman, Melanie Chieu** and **Victoria Turchetti**, the Committee will discuss topics of interest to members and make further plans for 2013. All NYWBA members and prospective members are welcome.

Date: **Wednesday, January 16, 2012, 12:30 p.m.**
 Place: **Berkman Bottger Newman & Rodd, LLP**
 521 Fifth Avenue, 31st fl (at 43rd Street), NYC
 RSVP: WPChairs@nywba.org

If you cannot attend but are interested in joining the Committee, send your contact info and any ideas for future programs and events to the Co-Chairs at WPChairs@nywba.org.

The Committee thanks **Berkman Bottger Newman & Rodd, LLP** for hosting.

The panelists also highlighted the apparent contradiction between the decisions in Barocas v. Barocas, 94 A.D.3d 551, 942 N.Y.S.2d 491 (1st Dept. 2012) on the one hand, and E.C.-P.v. P.P., 33 Misc.3d 1233(A); 2011 WL 6155727 at *1 (N.Y. Sup. Dec. 12, 2011) and A.N. v. E.N., 37 Misc.3d 1201(A), 2012 WL 4335245 at *1 (N.Y. Sup. Sept. 18, 2012), on the other. Though the Court in Barocas reaffirmed the difficulty of setting aside prenuptial agreements, the decisions in E.C.-P. v. P.P. and A.N. v. E.N. both found enough evidence to set agreements aside. (Note that E.C.-P. v. P.P. is on appeal. The Second Department issued a stay, and oral argument is expected in January 2013.)

Barocas is an important decision for practitioners for another reason. There, the First Department found that a spousal support waiver must be both fair and reasonable at the time the agreement is executed, as well as at the time of the divorce. From a drafter's perspective therefore, counsel should be mindful of the potential pitfalls of a spousal support waiver. It was suggested by one panelist that, where such a waiver exists, perhaps a more generous distributive award might help to avoid this issue. Alternatively, omitting spousal support from the agreement might be the more prudent path.

The unique format of this well-attended program provided attendees with an opportunity to participate in a high level, academic colloquy. Kudos to the NYWBA Matrimonial & Family Law Committee, and many thanks to the panelists and to Blank Rome LLP for hosting and providing refreshments.

Magnolia D. Levy is a partner at McLaughlin & Stern, LLP and advises clients in all aspects of matrimonial and family law including pre- and post-nuptial agreements, divorce negotiation and litigation, equitable distribution, spousal support, custody and visitation issues. She is a member of the Matrimonial and Family Law Committee.