Evaluating Matrimonial Agreements in the Context of *Pacelli*

By Diana N. Fredericks and Sofia Ucles

This article takes a closer look at three types of agreements – prenuptial agreements, mid-marriage agreements (or reconciliation agreements), and marital settlement agreements. When can I use them? Are they binding? What should I be wary of? Although 23 years old, the case of *Pacelli v. Pacelli*[1] provides insight into the differences of these agreements and is something every family law practitioner needs to be aware of when advising clients. This article examines *Pacelli* and the few cases touching on these topics that have been issued in recent history.

Prenuptial Agreements

"A pre-nuptial agreement, however, is reached when the parties are not adversaries, 'when the relationship is at its closest, when the parties are least likely to be cautious in dealing with each other.'"[2] In 2013, New Jersey amended the statute governing prenuptial agreements, making it more difficult for a party to set aside an agreement at the time of enforcement.[3] For a prenuptial agreement to be enforceable, the agreement must be: (1) entered into voluntarily; and (2) the agreement also must be conscionable at the time of execution.[4] To set aside a prenuptial agreement based upon unconscionability, a moving party must show by clear and convincing evidence that they:

1. Were not provided full and fair disclosure of the earnings, property, and financial obligations of the other party;
2. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or the financial obligations of the other party beyond the disclosure provided;
3. Did not have, or reasonably could not have had, an adequate knowledge of the property or the financial obligations of the other party; or
4. Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.[5]

What can we do as practitioners to ensure that the above requirements are met?

- Attach copies of the documents exchanged as exhibits to the prenuptial agreement. While the statute only requires a statement of assets to be attached,[6] this makes it more difficult for a party to claim they did not receive certain information related to the other party's income, assets, or liabilities. In other words, even if it makes the agreement ridiculously lengthy, it will potentially save a lot of time and money if we attach everything as schedules to the prenuptial agreement. Too many times clients seek out another attorney, sometimes decades after a prenuptial agreement was executed, files have been destroyed and the referenced documents are lost which can present a huge problem for both sides. Bottom line: attach everything.
- Add footnotes to your client's schedules. For example, if a statement evidencing the value of a retirement asset is not available and this information was disclosed the other party, and the other party is waiving the right to obtain further documentation, this should be noted specifically in the agreement such that the other party cannot later assert that documentation was requested and never received. You can also note this for appraisals of real estate or pensions.
- If the other party is not obtaining independent counsel, make sure you indicate *in writing* you do not represent the other party's interest. For example, when you notify Party "A" that you represent Party "B," be clear you do *not* represent Party "A"'s interest and Party "A" should retain their own counsel to negotiate or review the prenuptial agreement. The agreement also must make sure to reference that the self-represented party had ample time and access to obtain their own counsel and are voluntarily waiving that right. When representing the monied future spouse, I encourage them to offer to pay for the other party's attorney fees, for an attorney of their choosing at a dollar amount equal to that of my retainer, and I make this offer in writing so that in the even that they choose to remain self-represented, they

cannot later claim they did not have the time or funds for counsel as to the prenuptial agreement.

What is a Mid-Marriage Agreement?

The primary case dealing with mid-marriage Agreements is *Pacelli v. Pacelli*7. Mid-marriage agreements occur at a unique time for the parties – when one party wishes for the marriage to stay intact and the other party wishes for the marriage to stay intact provided certain terms are met.[8] Unlike a divorce, the parties are *not* negotiating at arm's length – the purpose of the mid-marriage agreement (and the reconciliation agreement) is to *restore* the marriage based upon the satisfaction of certain terms.[9] And unlike a prenuptial agreement, the parties cannot just walk away from the marriage if they do not agree to the terms of the mid-marriage agreement.[10] The question is – when is it appropriate to enter into a mid-marriage agreement? Should practitioners engage in negotiating and drafting the terms of these types of agreements?

Mid-marriage agreements are difficult to enforce as the agreements are "inherently coercive."[11] If a party wants to negotiate a mid-marriage agreement, there should be evidence of a breakdown of the marital relationship, such as a complaint for divorce filed.[12] However, courts will view these types of agreements with heightened scrutiny.[13] Practitioners need to be wary of drafting these agreements.

A reconciliation agreement, that is fair and equitable and is supported by adequate consideration, may be enforceable where the consideration consists of one spouse promising to resume marital relations when the "marital relationship has deteriorated at least to the brink of an indefinite separation or a suit for divorce."[14] The court must make a finding that the "marital rift was substantial" to find that the promise of reconciliation is adequate consideration.[15]

Mid-marriage agreements closely resemble reconciliation agreements, not pre-nuptial agreements.[16] Before a mid-marriage agreement is enforced, the court must determine whether the promise to resume marital relations was made when the marital rift was substantial.[17]

In *Nicholson*, the Court held, "we must proceed with care" when enforcing reconciliation agreements "where the consideration for a spousal promise is said to be the willingness of the other spouse to continue the marriage."[18]

They also identified six factors for courts to consider when deciding whether to enforce reconciliation agreements:

1. whether the marital rift was substantial when the promise to reconcile was made;
2. whether the agreement complied with the statute of frauds;
3. whether the circumstances under which the agreement was entered into were fair to the party charged;
4. whether the agreement's terms were conscionable when it was made;
5. whether the party seeking enforcement acted in good faith; and
6. whether changed circumstances rendered literal enforcement inequitable.[19]

In the recent case of *Kriss*, the Appellate Division voided a reconciliation agreement finding it was void due to its unconscionable terms.[20] In this case, the husband filed for divorce in 1998 but withdrew his complaint and thereafter decided that he and wife should become "financially separated."[21] In 2003, the husband filed a second complaint for divorce. The wife begged the husband stay in the marriage and the husband indicated he would do so if they signed an agreement.

In the agreement, drafted by the husband's attorney, the wife relinquished her interest in their family business as condition for maintaining the marriage and required a future waiver of alimony if there was a later divorce. The wife signed the agreement against the advice of her attorney and without fully reading it. In 2011, the husband again filed for divorce and sought to enforce the reconciliation agreement. The Court found that the terms of the agreement were unconscionable, that the wife was intimidated by the husband, and that the wife signed the agreement under duress as she testified, she "would have done anything to save the marriage." In total, the husband was ordered to pay the wife's legal fees of more than $120,000. The Appellate Division agreed.

Reconciliation and mid-marriage agreements are extremely complex and require not only the advice of good counsel but also assurances that the factors set forth above are thoroughly contemplated and addressed by both parties to the agreement. The consequences of failing to do so can be severe and quite expensive.

Recently, the Appellate Division issued a published decision, *Steele v. Steele*,[22] which addressed the aforementioned types of marital agreements: prenuptial agreements, mid-marriage agreements, and property settlement agreements. Notably, the Appellate Division determined that a marital agreement "deserves the heightened scrutiny we have applied to mid-marriage agreements, as in *Pacelli*. Much like other agreements between partners or

spouses, the [marital agreement] need not bear a specific label for us to address its enforceability."[23]

Ordinarily, "[p]re-nuptial agreements[24] establishing post-divorce obligations and rights should be held valid and enforceable."[25] Such agreements made in contemplation of marriage are enforceable if they are fair and just.[26] The public policy supporting enforcement of a pre-nuptial, as opposed to a post-nuptial, agreement is that one party remains free to walk away before the marriage takes place.

Conversely, mid-marriage agreements are generally unenforceable as they are "inherently coercive."[27] A mid-marriage agreement is "entered into before the marriage [has] lost all of its vitality and when at least one of the parties, without reservation, want[s] the marriage to survive."[28] Such agreements are carefully reviewed because they are "pregnant with the opportunity for one party to use the threat of dissolution 'to bargain themselves into positions of advantage.'"[29]

Property settlement agreements generally are enforceable, so long as they are "fair and equitable," as they assume the parties stand in adversarial positions and negotiate in their own self-interest.[30] Property settlement agreements are prepared in contemplation of divorce, "when relations have already deteriorated. Discovery is available, parties usually deal at arm's length and the proceeding - almost by definition is adversarial."[31]

In the *Steele* case, the parties did not negotiate a premarital agreement, but rather, after they were married and while the wife was pregnant with their child, they negotiated a marital agreement. Even though neither party was threatened with divorce or separation to prompt the signing of the agreement, the wife was married, left her job, and had given birth "a mere few weeks prior to signing the MA."[32] The wife testified that the husband asked her to sign three weeks after the birth of their daughter which felt, "a little confrontational and opportunistic."[33] The wife believed there would be consequences to not signing the MA and felt vulnerable, pressured, and concerned that the husband would "never [] let it go" if she did not sign.[34] These statements, coupled with the questions about the husband's financial disclosure, were significant to the Appellate Court and erroneously overlooked by the trial court, so much so that this case was remanded (sent back to the trial court) to be heard by a new judge.

Based on the foregoing, the Appellate Division had little difficulty concluding that the *Steele* MA was akin to a mid-marriage agreement and deserved the heightened scrutiny as in *Pacelli*. Importantly, the court noted that the wife was "not free to just walk away."[35] The Court found that the trial court improperly compared the *Steele* agreement to a premarital agreement, but that was erroneous not only because they were married when they signed, but for the reasons set forth in this article.

Despite their differences, an MA, mid-marriage agreement, prenuptial or property settlement agreement is not enforceable if it is not fair and equitable; however, the distinction noted in *Steele* is that the court should, "not approach the question of whether a mid-marriage is enforceable with a predisposition in favor of its enforceability, given the 'inherently coercive' nature of mid-marriage agreements."[36] This is the takeaway from this decision and noteworthy to clients and practitioners in consulting, drafting, and negotiating these types of agreements. There is also a larger question to ponder: should attorneys be involved in mid-marriage agreements at all and if so, how can they do so to meet the standards set forth in this decision and the law.

But any marital agreement that is unconscionable or the product of fraud or overreaching, particularly where it exploits the confidential relationship between spouses, may be set aside.[37] Further, a settlement agreement "will be reformed . . . where a party demonstrates that the agreement is plagued by 'unconscionability, fraud, or overreaching in the negotiations of the settlement.'"[38] Accordingly, a trial court has a "duty to scrutinize marital agreements for fairness."[39]

These concepts are crucial to fairly and equitably representing clients in the preparation, negotiation, and settlement of these types of agreements. ■

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Endnotes

1. 319 *N.J. Super.* 185, 190-91 (App. Div. 1999).
2. *Pacelli*, 319 *N.J. Super.* at 190 (quoting *Marschall v. Marschall*, 195 *N.J. Super.* 16, 29 (Ch. Div. 1984)).
3. *See N.J.S.A.* 37:2-31 et. seq.
4. *N.J.S.A.* 37:2-38 (emphasis added).
5. *N.J.S.A.* 37:2-38(c) (1-4).
6. *N.J.S.A.* 37:2-33(2).
7. 319 *N.J. Super.* 185 (App. Div. 1999)
8. *Pacelli*, 319 *N.J. Super.* at 190.
9. *See Id.* at 193 (citing 17 *C.J.S. Contracts* § 236 (1963)).
10. *Steele v. Steele*, 467 *N.J. Super.* 414, 436 (App. Div. 2021) (citing *Pacelli*, 319 *N.J. Super.* at 189-90).
11. *Id.*, at 436 (citing *Pacelli*, 319 *N.J. Super.* at 191).
12. *See id.* at 438.
13. *Id.* at 437.
14. *Nicholson v. Nicholson*, 199 *N.J. Super.* 525, 531 (App. Div. 1985).
15. *Id.* at 532.
16. *Compare N.J.S.A.* 37:2-31 et. seq. and *Pacelli*, 319 *N.J. Super.* 185.
17. *Pacelli*, 319 *N.J. Super.* 185 (App. Div. 1999).
18. *Ibid.*
19. *Id.* at 532.
20. *Kriss v. Kriss*, No. A-3255-15T3, 2018 WL 1145753 (N.J. App. Div. Mar. 5, 2018).
21. *Id.* at *1.
22. *Steele*, 467 *N.J. Super.* 414 (App. Div. 2021).
23. *Id.* at 436.
24. In 1988, New Jersey enacted its version of The Uniform Premarital Agreement Act (UPAA). In 2013, the New Jersey State Legislature amended the Premarital Agreement Statute which in essence, makes it more difficult to vacate such agreement at the time of enforcement. The new statute provides that in order to set aside a premarital agreement, the party seeking to set aside the agreement must prove by clear and convincing evidence that (a) they executed the agreement involuntarily, (b) the agreement was unconscionable when it was executed because (1) they were not provided with a full and fair disclosure of the earnings, property and financial obligations of the other party, (2) did not voluntarily and expressly waive in writing the right to disclosure of the property or financial obligations of the other party beyond that disclosed at the time, (3) did not have adequate knowledge of the property or financial obligations of the other party, or (4) did not consult with independent legal counsel and did not voluntarily and expressly waive in writing the opportunity to consult with independent legal counsel. In the prior statute, in addition to the above reasons, a premarital agreement could be set aside if it was determined by a Court that the agreement was unconscionable at the time of enforcement.
25. *Hawxhurst v. Hawxhurst*, 318 *N.J. Super.* 72, 80 (App. Div. 1998) (citing *Marschall v. Marschall*, 195 *N.J. Super.* 16, 27 (Ch. Div. 1984))
26. *Pacelli*, 319 *N.J. Super.* at 189. *See also DeLorean v. DeLorean*, 211 N.J. Super. 432, 435 (Ch. Div. 1986); *Marschall*, 195 *N.J. Super.* at 28, 31.
27. *Pacelli*, 319 *N.J. Super.* at 191.
28. *Id.* at 190.
29. *Id.* at 195 (quoting *Mathie v. Mathie*, 363 P.2d 779, 783 (Utah 1961)).
30. *Lepis v. Lepis*, 83 *N.J.* 139, 148-49 (1980).
31. *Pacelli*, 319 *N.J. Super.* at 190 (quoting *Marschall v. Marschall*, 195 *N.J. Super.* 16, 29 (Ch. Div. 1984)).
32. *Steele v. Steele*, 467 *N.J. Super.* 414, 439 (App. Div. 2021).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 440.
37. *Massar v. Massar*, 279 *N.J. Super.* 89, 93 (App. Div. 1995); *Guglielmo v. Guglielmo*, 253 *N.J. Super.* 531, 541 (App. Div. 1992).
38. *Weishaus v. Weishaus*, 180 *N.J.* 131, 143-44 (2004) (quoting *Miller v. Miller*, 160 N.J. 408, 419 (1999))
39. *Dworkin v. Dworkin*, 217 *N.J. Super.* 518, 523 (App. Div. 1987).