ANTENUPTIAL LAW IN NEW JERSEY

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INTRODUCTION

There are few areas of our law which are so emotionally charged and expose attorneys to such ominous risks as antenuptial agreements. The stakes are inordinately high, and one misstep can spell disaster for both client and attorney.

Because this area of law is intricate, the standards for formulating an antenuptial agreement that will withstand legal attack are not immutable. To the contrary, antenuptials have a chameleon quality as the standards for upholding them vary, depending on a multiplicity of factors. The relevant issues include the date the agreement was executed, the level of disclosure of the parties' assets, the nature of the legal representation, if any, the knowledge and the sophistication of the parties, and whether the agreement addresses divorce, death, or both. We shall embark on our journey into the realm of New Jersey antenuptial law by exploring the different categories of agreements and the critical elements that will ensure their validity.

I. OVERVIEW

On November 3, 1988, the New Jersey Legislature enacted the Uniform Premarital Agreement Act[1] (Uniform Act or Act), which attempted to provide uniform principles governing antenuptial agreements executed in New Jersey. The Act was expressly made prospective as it was made effective to antenuptial agreements "executed on and after its effective date."[2]

The interpretation and validity of antenuptial agreements executed before enactment of the Uniform Act turned on whether the agreement related to a divorce or a probate setting. Antenuptial agreements which came into effect at death were governed by another statute,[3] which is part of New Jersey's Uniform Probate Code. Antenuptial agreements resulting in divorce were governed by New

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1 N.J. STAT. ANN. §§ 37:2-31 to -41 (West Supp. 1992).

2 *Id.* § 37:2-41.

3 N.J. STAT. ANN. § 3B:8-10 (West 1983).

Jersey case law, and in particular by the chancery division's seminal holding in *Marschall v. Marschall*,[4] and its progeny.

This pre-Uniform Act case law continues to maintain its relevance because many, and probably most, of the existing antenuptial agreements in New Jersey were executed before enactment of the Uniform Act. The Uniform Act has also adopted many of the tenets in the prior antenuptial law, and this body of law has been integrated into the Uniform Act.

This Article will provide a comprehensive review and analysis of New Jersey antenuptial law. It will explore New Jersey antenuptial law in the context of both divorce and death for the periods before and after the enactment of the Uniform Act.

II. When an Antenuptial Agreement Is (and Is Not) Necessary

In order to resolve this seemingly simple (but in reality inordinately complex) issue, one must first focus on fundamentals.

A. *Divorce*

The starting point in the divorce context is the New Jersey statute governing equitable distribution.[5] This statute exempts from such distribution all property owned by either spouse before marriage. In the phraseology of the statute, equitable distribution applies only to the parties' "real and personal" property which was "legally and beneficially acquired by them or either of them during the marriage."[6]

An antenuptial agreement therefore is not needed to secure property that was obtained before the marriage. Moreover, assets "for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse."[7]

This having been said, there are many reasons which militate in favor of preparing an antenuptial agreement where one or both spouses wish to maintain sole ownership of certain assets. As a practical matter, after marriage many assets become intermingled. Further, it is often cumbersome, if not impossible, to trace proceeds back to premarital property. Even where such tracing could be achieved, certain monies earned, and certain asset appreciation

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4 195 N.J. Super. 16, 477 A.2d 833 (Ch. Div. 1984).

5 N.J. Stat. Ann. § 2A:34-23 (West 1987).

6 *Id.*

7 Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974).

which occurs during marriage, are subject to equitable distribution. The rules as to what assets are distributable upon divorce have become intricate, with courts groping to answer this issue by drawing distinctions between the nature of the property acquired, when it was acquired, and in whose name. These distinctions often become blurred and strained. For example, property acquired before the marriage can be deemed "passive" in nature and thus excluded from equitable distribution, or "active" and thus subject to distribution where the non-owner spouse contributed to the property's appreciation.[8]

In light of all this ambiguity, an antenuptial agreement is mandatory where substantial assets are involved and/or the parties desire to maintain separate ownership for themselves and in some instances ultimately for children of prior marriages. The need for a prenuptial agreement is heightened by the principle that the burden for the exclusion of an asset from equitable distribution "will rest upon the spouse who asserts it."[9]

B. Death

A properly drafted antenuptial agreement will also secure property in the event of death. Without an antenuptial agreement, a surviving spouse is statutorily guaranteed an elective share in the deceased spouse's property. And unlike the safeguards provided by the equitable distribution law, the decedent's premarital (as well as the postmarital) property is subject to the elective share.

The elective share essentially entitles the surviving spouse to a one-third share of the decedent's assets.[10] The estate is "augmented" by adding to the basic estate certain other assets, primarily consisting of various transfers made by the decedent.[11] The estate that is subject to the one-third elective share is also augmented by all gifts given to the surviving spouse by the decedent at any time before his/her death.[12] The estate is further augmented by life insurance proceeds and retirement and pension plans received by the survivor after the decedent's death.[13] Again, the sur-

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8 *See, e.g.*, Scavone v. Scavone, 230 N.J. Super. 482, 553 A.2d 885 (Ch. Div. 1988) (providing a multifaceted analysis of property acquisition and when it is subject to equitable distribution).

9 Landwehr v. Landwehr, 111 N.J. 491, 504, 545 A.2d 738, 744 (1988) (quoting *Painter*, 65 N.J. at 214, 320 A.2d at 493).

10 N.J. STAT. ANN. § 3B:8-1 (West 1983).

11 *Id.* § 3B:8-3.

12 *Id.* § 3B:8-6.

13 *Id.* § 3B:8-7

viving spouse receives a one-third elective share in these assets as well.

In some instances, the statutory scheme gives the surviving spouse "double" benefits. For example, where the surviving spouse invokes the elective share and is the named beneficiary in the deceased spouse's life insurance policy, then the survivor receives all the insurance proceeds and one-third of these proceeds again from the augmented estate. This result, however, is rectified somewhat by another provision in the statute which provides that the surviving spouse's elective share shall be satisfied by the value of property owned by the surviving spouse at the time of death.[14] It is irrelevant when or from whom this property was derived. For example, it could have been acquired before or after the marriage, from the spouse's own efforts, or inherited or received from the deceased. An elective share is also satisfied by property "succeeded to by the surviving spouse as a result of decedent's death," which would include property in joint names and presumably insurance proceeds.[15]

An antenuptial agreement is thus critical in certain circumstances to avoid calamitous results in the event of death. By way of illustration, the decedent may have had children from a prior marriage with whom he/she had established joint businesses or assets perhaps even before the decedent met the second spouse. Without an antenuptial agreement, the surviving spouse can lay claim to his/her elective share in these businesses and assets to the horror of the decedent's children and their own respective families. Indeed, the elective share statute specifically provides that the other beneficiaries of the decedent must each contribute and "make up" the elective share of the surviving spouse.[16] They must either give up part of the property transferred to them or pay the value of the elective share in the property to the surviving spouse.

III. Antenuptial Agreements and Divorce Before the Enactment of the Uniform Act

As improbable as it seems in an era when divorce is so rife, as late as 1970 antenuptial agreements contemplating divorce were considered to be void as against public policy. While that view is

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14 *Id.* § 3B:8-18; Matter of Estate of Holling, 263 N.J. Super 146, 149-50 (App. Div. 1993).

15 N.J. Stat. Ann. § 3B:8-18(a) (West 1983).

16 *Id.* § 3B:8-19.

now considered to be antediluvian, it was not until 1984 that this traditional view was renounced in New Jersey.

The decision disavowing the traditional view was enunciated in the hallmark case of *Marschall v. Marschall*,[17] decided by Judge Lesemann in the chancery division. *Marschall* remains the pivotal judicial pronouncement in this area of New Jersey law.

The *Marschall* court established for New Jersey a legal tenet which has been the *sine qua non* for the validity of an antenuptial agreement in a divorce context—the rule of full disclosure. The "full disclosure" concept has been carried on, with certain exceptions, by the Uniform Premarital Agreement Act.[18] The parameters of this rule can be gleaned from a review of the facts in the *Marschall* decision.

The court summarized the assets owned by the plaintiff and her husband before the marriage. The plaintiff's assets consisted of the proceeds of the sale of her home (approximately $200,000), annual interest and dividend interest of $20,000, and $200 per month in social security payments. The husband's net worth was $5 million and his annual income was $250,000.

The antenuptial agreement provided that in the event of divorce, the wife would receive $100,000 "in full satisfaction of all claims" against her husband.[19] The agreement failed to include any description of the parties' respective assets. Plaintiff claimed in the litigation that she was without the "remotest idea" and did not have an "inkling" of her betrothed's vast wealth and that he was " 'very cleverly duping [her]' into an unfair agreement."[20]

The parties had signed the antenuptial agreement six weeks before their marriage. Plaintiff had been represented by independent counsel who had apparently participated in the negotiations on her behalf.

The husband contended that plaintiff's independent representation validated the agreement. The court disagreed and cogently expressed the rationale for the full disclosure rule:

> Thus, the claim by defendant here that plaintiff was represented by independent counsel is not enough. Such representation might support an argument that plaintiff knew the meaning of the agreement she was signing. Indeed, the agreement is rela-

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17 195 N.J. Super. 16, 477 A.2d 833 (Ch. Div. 1984).

18 For a discussion of the Uniform Act, see *infra* notes 103-129 and accompanying text.

19 *Marschall*, 195 N.J. Super. at 21, 477 A.2d at 835.

20 *Id.* at 22, 477 A.2d at 836.

> tively simple and there would seem no basis for a claim to the contrary. Awareness of the meaning of the words in the agreement, however, does not demonstrate that plaintiff knew she was marrying a man with assets of at least $5,000,000 and an annual income in excess of $250,000. It does not demonstrate that with such information she nevertheless expressed herself as willing to accept a total of $100,000 and (as defendant contends) no alimony of any kind if the marriage did not succeed. It is altogether possible that plaintiff might have rejected the proposed agreement if full disclosure had indicated to her that the proposal was blatantly unfair. It is even possible that full disclosure might have suggested such a lack of generosity on the part of her intended husband as to call into question her basic decision to marry.[21]

Judge Lesemann analogized antenuptial agreements to property settlement agreements which are executed as part of a divorce settlement and are premised on full disclosure and full awareness of the other party's financial status. Indeed, the court concluded that the need for full disclosure is even more compelling in the context of antenuptial agreements. A property settlement agreement has certain inherent safeguards lacking in an antenuptial agreement, and is executed at a time when relations have deteriorated. Discovery is available, the parties usually negotiate at arms length, and "the proceeding—almost by definition—is adversarial."[22] By comparison, an antenuptial agreement is usually entered into when the parties have forged a close bond, and mutual trust and confidence prevail. The court adopted a "full disclosure" standard for antenuptial agreements contemplating divorce, requiring disclosure of assets and their value. The burden of proving such full financial disclosure was imposed on the party seeking to enforce the agreement.[23]

The *Marschall* court also assisted practitioners by outlining a procedure for them to follow in crafting antenuptial agreements that would withstand attack in the future. The following procedure was posited:

> As a practical matter, and looking to the future use of antenup-

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21 *Id.* at 30, 477 A.2d at 840.

22 *Id.* at 29, 477 A.2d at 840.

23 *Id.* at 33, 477 A.2d at 842. The court reasoned:

> Thus, in this case, it is the defendant who knows what his income and assets were and are. It will be much easier for him to demonstrate what he told his wife and what the facts were, than it would be for her to establish the negative of that proposition: that her husband did have certain assets or income and failed to tell her about them.

Id.

> tial agreements, disclosure and proof thereof should be relatively simple. The easiest device would probably be a schedule annexed to the agreement setting out, at least in general terms and with approximate values, the assets of the parties as well as their income over the past few years. Normally such disclosure should be adequate although, of course, there may be cases where additional information would be required. With such a procedure, the presentation and attempted enforcement of the antenuptial agreement at a later date would automatically bring before the court the statement of disclosure (as part of the agreement) and the proponent thereof would need only to present evidence that such was indeed his or her condition at the time the agreement was signed.[24]

The *Marschall* decision spawned a famous trilogy of cases on antenuptial divorce agreements. The first of these was the case of *D'Onofrio v. D'Onofrio*.[25] In the *D'Onofrio* antenuptial agreement, the defendant acknowledged that he possessed a "substantial estate" and the plaintiff was "without a substantial estate of either realty or personalty."[26] The plaintiff received $1,000 for her agreement to relinquish any claims to defendant's property in the event of termination of the marriage. The parties also recognized in their antenuptial agreement that the consideration received by plaintiff "may be out of all proportion to that to which as a wife she would be entitled."[27]

In the *D'Onofrio* case, unlike the *Marschall* scenario, the prenuptial agreement was prepared solely by the husband's attorney who had advised the plaintiff to retain independent counsel. The court found that "such representation was waived."[28]

The appellate division first opined its approval of Judge Lesemann's "comprehensive exposition and analysis" on the enforceability of antenuptial agreements fixing post-divorce rights and obligations as stated in *Marschall*.[29] The appeals court further approved *Marschall*'s reversal of precedent which had granted "only grudging acceptance" to such contracts and declared that thereafter "courts should welcome and encourage such agreements."[30]

The *D'Onofrio* decision stands for the proposition that there is more than one way to provide the requisite "full disclosure." The fol-

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24 *Id.*

25 200 N.J. Super. 361, 491 A.2d 752 (App. Div. 1985).

26 *Id.* at 364, 491 A.2d at 754.

27 *Id.* at 364-65, 491 A.2d at 754.

28 *Id.* at 364, 491 A.2d at 753.

29 *Id.* at 366, 491 A.2d at 754.

30 *Id.* at 366, 491 A.2d at 754-55 (citing *Marschall*, 195 N.J. Super. at 28, 477 A.2d at 839).

lowing scenario fulfilled this standard even though the agreement was devoid of an inventory of assets with values: "Plaintiff knew of defendant's assets in detail prior to the marriage, since both prior to and during the marriage she acted as bookkeeper for her husband, noting the payment of rents and mortgages."[31]

The following year, the chancery division enunciated its opinion in *DeLorean v. DeLorean*.[32] In this case, the husband presented his intended with an antenuptial agreement only a few hours before the scheduled marriage ceremony. The agreement provided that any assets acquired by the other before and after the marriage would remain his/her sole property without any rights vesting in the other. Mr. DeLorean threatened to cancel the marriage if plaintiff did not sign.

Plaintiff did not have independent counsel of her own choosing. Before she signed the agreement, however, she privately consulted with an attorney selected by her husband who advised her not to sign. She rejected the attorney's advice and executed the agreement.

The husband was twenty-five years older than the plaintiff. His potential assets were $20 million or greater. The parties were married for thirteen years and had two children together. Absent the agreement, the wife could have anticipated receiving 50% of the marital assets at the time of the divorce.

Judge Imbriani examined several factors in determining the validity of the agreement. The Achilles heel of the agreement was, again, its lack of adequate disclosure. The following disclosure in the parties' agreement did not pass judicial muster: "Husband is the owner of substantial real and personal property and he has reasonable prospects of earning large sums of monies; these facts have been fully disclosed to Wife."[33]

The following additional disclosure (which apparently was made orally) was also not enough to validate the agreement under New Jersey law: "[H]e had an interest in a farm in California, a large tract of land in Montana, and a share in a major league baseball club."[34]

The particular agreement was upheld only because it recited that California law would apply and because of other conflict of laws rules which the court found applicable to this agreement. The *DeLorean* court addressed the issue "of how to avoid disputes of this nature in the future."[35] Following the *Marschall* lead, the court provided the

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31 *Id.* at 367, 491 A.2d at 755.
32 211 N.J. Super. 432, 511 A.2d 1257 (Ch. Div. 1986).
33 *Id.* at 438, 511 A.2d at 1260.
34 *Id.* at 440, 511 A.2d at 1261.
35 *Id.* at 438, 511 A.2d at 1260.

following guidance to practitioners:

> It is clear that we can ascertain with complete certainty whether there was a full and complete disclosure only by requiring a written list of assets and income be attached to the antenuptial agreement. Anything less will encourage a plethora of plenary hearings which would frequently be complicated by contradictory and conflicting testimony, often tainted by memory lapses.[36]

A recent and significant judicial pronouncement on the validity of antenuptial agreements, when divorce ensues, was the 1989 appellate division decision in *Orgler v. Orgler*.[37] The parties in *Orgler* began living together when defendant was separated from his first wife. Plaintiff suspended her psychiatric residency and moved in with defendant. The latter held partnership interests in several New Jersey Midas Muffler shops and possessed interests in several other properties. The plaintiff commenced to work three days a week at defendant's office.

The parties entered into an antenuptial agreement and waived their rights to any of the assets which either of the parties owned at the time of the marriage. They also waived their right to equitable distribution and alimony.

Defendant's attorney chose another lawyer to represent plaintiff. Plaintiff met this attorney for the first time on the date the agreement was signed and they consulted for less than an hour. The attorney did not advise her about her legal entitlement to equitable distribution and alimony. The attorney advised her not to sign the agreement. As in *DeLorean*, the plaintiff did not heed her attorney's advice and signed the agreement. Defendant, who described his wife as "fiercely independent," claimed that preparation of the prenuptial contract was plaintiff's idea.[38]

The amount of marital assets at issue, as evaluated at the trial, was over $4 million. On the issue of disclosure, the agreement stated that each party had complete knowledge of any and all assets owned by the other party. The parties did not append a list of their assets to the agreement. Defendant argued that the plaintiff was privy to his business dealings while working at his office.

The appellate division reiterated *Marschall*'s full disclosure rule

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36 *Id.*

37 237 N.J. Super. 342, 568 A.2d 67 (App. Div. 1989). The most recent court decision interpreting the validity of antenuptial agreements in a divorce setting is *Jacobitti v. Jacobitti*, 263 N.J. Super. 608 (App. Div. 1993), which followed the *Marschall-DeLorean-Orgler* analysis. *Id.* at 612-13.

38 *Id.* at 347, 568 A.2d at 69.

as well as that decision's direction to practitioners that the "easiest device" to demonstrate such disclosure is by "annexing to the agreement a list of assets with their approximate values."[39] *Orgler*, however, went one logical step further by providing that to uphold the validity of such an antenuptial agreement, two conditions must be fulfilled. The proponent must demonstrate that the agreement was waived not only after full disclosure of assets, but also after an explanation of the nature of the rights being renounced. The court declared that the "plaintiff did not understand the concepts of equitable distribution and alimony."[40] The court surmised that this "misunderstanding" was in no doubt due to the fact that her counsel met with her for only one hour on the date the agreement was executed.[41] The appellate division found that the attorney did not advise her of the "intricate factors" involved in equitable distribution or of "her potential entitlement to rehabilitative or even permanent alimony."[42]

Orgler poses some worrisome problems for practitioners. To what degree must an attorney extend herself to comply with the *Orgler* ruling? In the busy and pressured world of a work-a-day attorney, how much time can realistically be devoted to educating a lay person as to the basic rubrics of divorce and alimony and property settlement rights, not to mention the "intricacies" of the law alluded to in *Orgler*? How can a practitioner prove at a later date that the client was apprised of, let alone understood, these legal intricacies? The issue of whether *Orgler* is still viable after enactment of the Uniform Act will be discussed below.

IV. Can an Antenuptial Agreement Be Invalidated as Unconscionable?

The simple answer under New Jersey law before the Uniform Act was no. Many courts in other jurisdictions will validate an antenuptial agreement even where a full disclosure of assets is lacking so long as the spouse has been fairly treated in the agreement. The leading proponent of this position is the Florida Supreme Court as postulated in *Del Vecchio v. Del Vecchio*.[43]

New Jersey jurisprudence has adopted the obverse viewpoint—an antenuptial agreement will generally be upheld even where the

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39 *Id.* at 349, 568 A.2d at 70.

40 *Id.* at 350, 568 A.2d at 70.

41 *Id.*

42 *Id.*

43 143 So. 2d 17 (Fla. 1962). *See infra* footnotes 122-29 and accompanying text for a discussion of unconscionability under the Uniform Act.

spouse was left no property so long as a full disclosure of assets has been rendered. Thus, the *Marschall* court held that a spouse cannot demonstrate unconscionability "simply by showing a substantial difference between his or her rights under the agreement, and what might be awarded by a court in the absence of the agreement."[44]

Thus, our courts have engrafted a highly circumscribed definition to the term "unconscionable" when used in the context of prenuptial agreements. They have allowed only a few narrow exceptions to this stringent rule. For example, an agreement may be unconscionable in the rare instance where the spouse has been left destitute.[45]

Another subissue is whether an antenuptial agreement is unconscionable where it waives alimony or support payments to a spouse. The usual measure for awarding alimony to a spouse upon a divorce is the standard of living during the marriage. *Marschall* held, however, that an antenuptial agreement can adopt a lower standard of support or alimony to the spouse—such as his/her financial status before the marriage—and still be valid: "[T]here does not seem anything inherently 'unfair' in an antenuptial agreement which uses a different standard—perhaps the somewhat lower standard at which one spouse lived before the marriage."[46]

Indeed, the *Marschall* decision held that full disclosure obliterates any obligation to maintain a spouse at the level to which he/she has become accustomed during marriage:

> [A]ssuming full disclosure, if it were shown in the present case that the purpose and effect of the agreement was to hold plaintiff harmless from any loss, and permit her to again live at the reasonably comfortable standard she had enjoyed prior to marrying defendant (albeit somewhat less affluently than she lived during the marriage) it is difficult to see why the agreement

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[44] Marschall v. Marschall, 195 N.J. Super. 16, 31, 477 A.2d 833, 841 (Ch. Div. 1984).

[45] As Judge Imbriani explained in *DeLorean*:

> This is not to say that the agreement should be what a court would determine to be "fair and equitable." The fact that what a spouse receives under an antenuptial agreement is small, inadequate or disproportionate does not in itself render the agreement voidable if the spouse was not overreached and entered into the agreement voluntarily with full knowledge of the financial worth of the other person. . . . So long as a spouse is not left destitute or as a public charge the parties can agree to divide marital assets in any manner they wish.

DeLorean v. DeLorean, 211 N.J. Super. 432, 437, 511 A.2d 1257, 1259-60 (Ch. Div. 1986).

[46] *Marschall*, 195 N.J. Super. at 31, 477 A.2d at 841.

should not be enforced.[47]

In a significant caveat, however, *Marschall* carved out a major exception to this rule. In dicta, *Marschall* suggested that an antenuptial agreement which relegates a spouse to the premarital living standard may be "unconscionable" in "a long term marriage or one with children."[48] The *Marschall* caveat, which was stated almost as an afterthought, provides fruitful ground for creative lawyers to try to invalidate antenuptial agreements which provide for paltry or no support for a spouse in a long-term marriage and especially one with children.

V. Can "Changed Circumstances" Modify Antenuptial Agreements?

The *Marschall* court averred—somewhat cryptically and in a footnote—that "[a]ntenuptial agreements should, of course, be regarded as subject to modification by reason of 'changed circumstances' in the same manner as property settlement agreements."[49] This statement will come as a rude awakening to the drafters of antenuptial agreements and their clients who have the impression that the provisions of such an agreement are irrevocable so long as the proper procedures relating to disclosure and the like are followed. It is even more surprising that exposing antenuptial agreements to such a broadside attack would be relegated to a footnote.

The authority cited by *Marschall* in support of this footnote is the New Jersey Supreme Court's decision in *Lepis v. Lepis*,[50] which first announced the "changed circumstances" doctrine as applied to divorce property settlement agreements. Litigants who wish to invalidate an antenuptial agreement now have another linchpin on which to forge their strategy.

The concept of "changed circumstances" as applied to antenuptial agreements has been cited in just two other cases and has been applied only in one. The appellate division in *D'Onofrio* cited to Judge Lesemann's footnote in *Marschall* but demurred from deciding the issue of the applicability of "changed circumstances" to antenuptial agreements.[51] Judge Stephen J. Schaeffer, the Presiding Judge of the Chancery Division, Family Part, Hudson County,

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47 *Id.*

48 *Id.*

49 *Id.* at 28 n.3, 477 A.2d at 839 n.3 (citing Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980)).

50 83 N.J. 139, 416 A.2d 45 (1980).

51 D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 366, 491 A.2d 752, 754 (App. Div. 1985).

ruled on this issue in *Chrisomalis v. Chrisomalis*,[52] but found that it was not applicable to the facts in that case as we will see below.

In short, the applicability and potential parameters of the concept of "changed circumstances" as applied to antenuptial agreements are still in their embryonic stages. A review of *Lepis* and its progeny should provide some guidance to practitioners as well as highlight those issues which are fertile for future development in the antenuptial field.

The supreme court's landmark decision in *Lepis* recognized the courts' equitable power to modify the terms of a property settlement agreement which had been incorporated in a final judgment of divorce in response to changed circumstances. The *Lepis* court commenced with the basic principle governing support payments that the dependent spouse and children are entitled to be maintained at the standard of living to which they had become accustomed prior to the divorce.

Changed circumstances warranting a modification in the parties' settlement agreement include: "an increase in the cost of living, . . . [an] increase or decrease in the supporting spouse's income, . . . subsequent employment by the dependent spouse," an illness or disability to one of the spouses and the maturation needs of children.[53] Future events which may result in a finding of changed circumstances are not limited to those which were not foreseeable.[54]

As suggested by the examples enumerated above, changed circumstances could result in either a decrease or increase in support payments. An increase will be awarded whenever changed circumstances "substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement."[55] Conversely, *Lepis* held that "a decrease is called for when circumstances render all or a portion of support received unnecessary for maintaining that standard."[56]

The concept of "changed circumstances" is thus a double-edged sword which can be utilized both to decrease and increase maintenance from the supporting spouse. Of course, in most instances, this concept has been invoked to increase support.

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[52] No. 251907, slip op. (Ch. Div. July 26, 1991), *aff'd*, 260 N.J. Super. 50, 615 A.2d 266 (App. Div. 1992).

[53] *Lepis*, 83 N.J. at 151, 416 A.2d at 51-52 (citations omitted).

[54] *Id.* at 152, 416 A.2d at 52.

[55] *Id.* at 152-53, 416 A.2d at 52.

[56] *Id.* at 153, 416 A.2d at 52.

Marschall suggested that this doctrine would not be applicable to an antenuptial agreement relating to a childless marriage of short duration. As noted above, *Marschall* indicated that an antenuptial agreement could confine a spouse in such a marriage to his/her premarital financial status. As set forth above, however, *Marschall* also suggested that this may be unconscionable in the case of a long-term marriage or one with children. Thus, in the majority of marriages—those of long duration or with children—*Marschall* can be cited to modify antenuptial agreements when changed circumstances have occurred.

In light of the nature of most antenuptial agreements and recent cases interpreting *Lepis*, however, many open questions exist regarding whether the principle of "changed circumstances" can effectively be applied to modify most antenuptial agreements. The reason for this stems from the appellate division's holding that *Lepis*'s "changed circumstances" standard applies only to the modification of alimony and support and not to provisions in an agreement dealing with equitable distribution.[57] The appellate division has made it clear that "[a] later change in a party's financial life is essentially irrelevant" to the issue of equitable distribution and provides "no basis for modification."[58]

Some antenuptial agreements specifically provide for support payments to the dependent spouse in the event of a divorce. The changed circumstances concept would apparently be applicable to these provisions of the antenuptial agreement, at least in a long-term marriage or one with children as suggested by *Marschall*. Many antenuptial agreements, however, provide a lump-sum award upon divorce. It would seem to be a matter of significant debate whether such a payment represents support, equitable distribution or a hybrid of both. It may be argued that a lump-sum payment resembles equitable distribution because it presumably represents some preconceived notion of division of assets. If this argument prevails, there would be no modification of the agreement. On the other hand, one may argue that such a lump-sum payment represents support and not equitable distribution because equitable distribution is an allocation of assets amassed by the joint efforts of both spouses, and not just the efforts of one spouse as is usually the

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[57] Rosen v.Rosen, 225 N.J. Super. 33, 35-36, 541 A.2d 716, 718 (App. Div. 1988), *certif. denied.*, 111 N.J. 649, 546 A.2d 558 (1988).

[58] Connor v. Connor, 254 N.J. Super. 591, 602, 604 A.2d 158, 163 (App. Div. 1992).

case with a lump-sum payment set forth in an antenuptial agreement.

Further complicating this area, and making it yet more fertile for the imaginative practitioner, is the courts' recognition that "support payments" are often "intimately related to equitable distribution."[59]

In sum, the applicability of changed circumstances to antenuptial agreements is essentially an undeveloped area of our law and one that is potentially complex depending on the particular marriage and the provisions in the agreement. It can provide a litigator with an invaluable opening with which to attack an antenuptial agreement.

VI. ANTENUPTIAL AGREEMENTS AND DEATH BEFORE ENACTMENT OF THE UNIFORM ACT

New Jersey's Uniform Premarital Agreement Act[60] was enacted effective November 3, 1988 and governs all antenuptial agreements after its effective date. The Act was expressly made effective to antenuptial agreements "executed on and after its effective date."[61] This Act will be discussed in detail below. Until its enactment, antenuptial agreements that came into effect at death were governed by another statute,[62] which was part of the Uniform Probate Code adopted by New Jersey in 1980 with an effective date of May 28, 1980.[63]

The standards governing antenuptial agreements at the time of death are significantly different under the Uniform Premarital Agreement Act and the Uniform Probate Code. Antenuptial agreements which are enforceable under one statute may be invalid under the other statute. The date of execution of an antenuptial agreement is therefore critical.

In short, antenuptial agreements which were executed after November 3, 1988, whether divorce or death ensues, are governed by the standards of the Uniform Premarital Agreement Act. Antenuptial agreements resulting in divorce which were executed before this date are governed by the principles in *Marschall* and its progeny (many of which the Uniform Act has adopted). Antenup-

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59 *Lepis*, 83 N.J. at 147, 416 A.2d at 49 (quoting Smith v. Smith, 72 N.J. 350, 360, 371 A.2d 1, 6 (1977); *Connor*, 254 N.J. Super. at 598, 604 A.2d at 161-62).

60 N.J. STAT. ANN. §§ 37:2-31 to -41 (West Supp. 1992).

61 *Id.* § 37:2-41.

62 N.J. STAT. ANN. § 3B:8-10 (West 1983).

63 L.1979, c.483, §§ 4, 8.

tial agreements resulting in death which were executed before the Uniform Act are governed by section 3B:8-10. We shall proceed to analyze this latter statute and the case law interpreting it and highlight some of the differences between this statute and the statutes or legal principles governing other antenuptial agreements.

A. *Burden of Proof*

The case law interpreting section 3B:8-10 uniformly holds that the party contesting the antenuptial agreement bears the burden of proof as to its illegality. *In re Estate of Lopata*[64] interpreted the identical Uniform Probate Code "fair disclosure" statute codified in section 3B:8-10.[65]

New Jersey law requires that when a party asserts a claim against an estate, that party bears the burden of proving the case by "clear and convincing" evidence.[66] There is also case law which holds that when a spouse makes a claim against his/her deceased spouse's estate in contravention of their antenuptial agreement, that spouse also bears the heavy burden of proving the invalidity of the agreement by "clear and convincing" evidence.[67]

This should be contrasted with the burden of proof governing antenuptial agreements in divorce cases before enactment of the Uniform Act. As we saw in *Marschall*, the burden of proving the invalidity of an antenuptial agreement in the divorce context was on the proponent of the agreement. Interestingly, the Uniform Act, as discussed below, adopted the approach of the Probate Code as to the burden of proof.

B. *Fair Disclosure*

The pivotal characteristic of section 3B:8-10 is that it requires

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64 641 P.2d 952 (Colo. 1982).

65 The court specifically held that under this statute:

> It is well settled that once the proponent of an antenuptial agreement has established the existence of the agreement itself, the party contesting the validity of the antenuptial agreement has the burden of proving fraud, concealment or failure to disclose material information.

Id. at 955.

66 N.J. STAT. ANN. § 2A:81-2 (West 1976). Section 2A:81-2 provides:

> When 1 party to any civil action . . . sues or is sued in a representative capacity, any other party who asserts a claim . . . against such . . . representative, supported by oral testimony of a promise, statement or act . . . of the decedent, *shall be required to establish the same by clear and convincing proof.*

Id. (emphasis added).

67 *In re* Borton's Estate, 393 P. 2d 808, 812 (Wyo. 1964).

only "fair" (as opposed to "full") disclosure to uphold an antenuptial agreement falling within its ambit.[68]

C. *Fair Disclosure Law in Other Jurisdictions*

Until recently, there was no New Jersey case interpreting section 3B:8-10. The leading out-of-state case was *In re Estate of Lopata*,[69] which involved the identical Uniform Probate statute codified at section 3B:8-10 in New Jersey. In *Lopata*, the husband was ten years older than his wife. Both the husband and the wife had children from previous marriages. The antenuptial agreement in *Lopata* provided that each party "has full knowledge of the other's assets."[70] The agreement further stated that even if the knowledge of the parties was inaccurate or incomplete, "the requirement to know the extent of the other's property is hereby waived and stated to be of no consequence in the performance and preparation of this contract."[71] The agreement also provided that each party "had full opportunity to counsel with the attorney of his or her choice and each is fully satisfied with the terms and conditions contained herein."[72] There was no other evidence that either party had made disclosure to the other of his or her assets prior to the signing of the agreement. Nor was there any evidence that

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[68] N.J. STAT. ANN. § 3B:8-10 (West 1983). This section, which is part of the elective share statute, provides in pertinent part:

> The right of election of a surviving spouse and the rights of the surviving spouse may be waived, wholly or partially, before or after marriage before, on or after May 28, 1980, by a written contract, agreement or waiver, signed by the party waiving after fair disclosure.

Id. Section 3B:8-10 adopted the language of the Uniform Probate Code § 2-204. *See* A. CLAPP, 5A NEW JERSEY PRACTICE, WILLS AND ADMINISTRATION § 459 (Rev. 3d ed. 1982). By its terms, it applies to all antenuptial agreements waiving rights to an elective share, including antenuptial agreements entered into before as well as after the statute's effective date of May 28, 1980. N.J. STAT. ANN. § 3B:8-10 (West 1983).

The Official Comment to this section of the Uniform Probate Code can be invoked, where applicable, to protect the property which a decedent willed to children of a prior marriage. The Official Comment provides, in part:

> The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse.

A. CLAPP, *supra*, § 459 (quoting UNIFORM PROBATE CODE § 2-204 official cmt.).

[69] 641 P.2d 952 (Colo. 1982).

[70] *Id.* at 953.

[71] *Id.*

[72] *Id.*

either party had actual knowledge of the nature and extent of the other's assets.

The court found that the decedent husband's net worth at the time of the antenuptial agreement was approximately $1 million. By the terms of the antenuptial agreement, Mr. Lopata was required to, and did, bequeath $100,000 to the plaintiff at the time of his death.

The trial court found that the wife had one year of college education and also had previously consulted professionals, including lawyers. The trial court also found that the plaintiff was "well versed in day-to-day business affairs" and had operated a retail business with her first husband until his death.[73] She had also been appointed administratrix to her first husband's estate and worked with an attorney-accountant in selling the business and closing the estate.

The court concluded that the evidence failed by any standard to establish fraud, concealment, material misrepresentation or undue influence by the deceased husband. The *Lopata* court found that the wife failed to meet her burden, and it therefore denied her request to have the antenuptial agreement set aside.[74]

Similarly, in *Ruzic v. Ruzic*,[75] the Supreme Court of Alabama recently interpreted the same "fair disclosure" statute of the Uniform Probate Code codified at section 3B:8-10. In *Ruzic*, the par-

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[73] *Id.* at 954.

[74] *Id.* at 955. The Supreme Court of Colorado in *Lopata* held that:

> Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income. The mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement. Where the agreement was freely executed, the fact that one party did not disclose in detail to the other party the nature, extent, and value of his or her property will not alone invalidate the agreement or raise a presumption of fraudulent concealment. Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage.
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> In estate proceedings, where there is a claim that the surviving spouse has waived his or her rights, the legislature has codified the fair disclosure requirement by adopting section 2-204 of the Uniform Probate Code. This section provides that rights acquired incident to marriage may be waived, "before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure."

Id. (citations omitted).

[75] 549 So. 2d 72 (Ala. 1989).

ties were both previously married. They entered into an antenuptial agreement in which they waived any right to the other person's property. The agreement in *Ruzic* did not set forth any of the parties' assets. The court found that the spouse did not know the "value of Mr. Ruzic's real property or his net worth."[76] The court further found that plaintiff had personal knowledge of some (but not all) of decedent's property before their marriage. The court held that "[s]he may have not known the precise number of acres he owned, but she knew that he owned an interest in these properties."[77] The court also found that the wife knew that one of decedent's properties was worth approximately $180,000. The court concluded that "Mrs. Ruzic may not have known Mr. Ruzic's net worth to the dollar, but she clearly knew, before she executed the [antenuptial agreement], that he owned a substantial interest in real estate and other property."[78] According to the Alabama Supreme Court, the fact that the document was witnessed and notarized indicated that the spouse had considered the matter seriously.[79]

Notwithstanding plaintiff's lack of full knowledge of decedent's assets and her lack of knowledge of his net worth, the court ruled that the "fair disclosure" standard in the statute had been fulfilled. The court held that the facts of the case conformed to the standard in the statute and constituted "fair disclosure."

In *In re Estate of Hill*,[80] the Supreme Court of Nebraska also interpreted the same "fair disclosure" statute codified at section 3B:8-10. Again, it was held that fair disclosure "is not synonymous with detailed disclosure such as a financial statement of net worth and income."[81] The Nebraska Supreme Court explained that "the fact that one party did not disclose in detail to the other party the nature, extent and value of his or her property will not alone invalidate the agreement or raise a presumption of fraudulent concealment."[82]

D. Fair Disclosure in New Jersey: Chrisomalis v. Chrisomalis

The seminal case in New Jersey interpreting section 3B:8-10 is

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76 *Id.* at 73.
77 *Id.* at 76.
78 *Id.*
79 *Id.*
80 335 N.W.2d 750 (Neb. 1983).
81 *Id.* at 753 (citing *In re* Estate of Lopata, 641 P. 2d 952, 955 (Colo. 1982)).
82 *Id.*

Chrisomalis v. Chrisomalis.[83]

The unpublished decision rendered by the chancery judge was affirmed by the New Jersey Superior Court, Appellate Division. In a tribute to the trial judge, the appeals court commended Judge Schaeffer for his "thorough and thoughtful" opinion.[84]

In *Chrisomalis,* the plaintiff widow sought to invalidate an antenuptial agreement executed in 1982 which waived her right to an elective share in her decedent husband's estate. The decedent's last will and testament bequeathed all his real and personal property to his two sons from his first marriage.

The Chrisomalises had met on two occasions over a period of eleven days with the attorney who prepared the antenuptial agreement before their marriage. The attorney had represented each of them on previous occasions in independent matters. He advised the couple to disclose to each other the various assets which each owned. Appended to the antenuptial agreement was a document which purported to list all of the assets of the respective parties. The trial court noted that "noticeably absent" from this document was "the valuation of each of the stated assets, as well as any liabilities attributed to either of the parties."[85]

At the time of the agreement's execution, the plaintiff asked the attorney's secretary who was present, "Should I do this?" The court found from the testimony that the plaintiff maintained the option to execute the agreement. Plaintiff testified that she loved and trusted the decedent and therefore chose to sign the agreement.

The decedent told his two sons about the antenuptial agreement just before it was executed. He assured them that their inheritance would be protected and that they would continue to own the family business in which they had worked since childhood. The court found that it was the decedent's desire to secure the family assets from any claim by the plaintiff or her three sons from a prior marriage.

The evidence demonstrated that the plaintiff "began to enjoy a lifestyle far greater than the one she had prior to the marriage."[86] In a seven-year marriage, plaintiff received from decedent several

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[83] 260 N.J. Super. 50, 615 A.2d 266 (App. Div. 1992). The Honorable Stephen J. Schaeffer, Presiding Judge of the Chancery Division, Family Part, Hudson County sat below. Chrisomalis v. Chrisomalis, No. 251907, slip op. (Ch. Div. July 26, 1991).

[84] *Id.* at 58, 615 A.2d at 271.

[85] *Chrisomalis,* No. 251907, slip op. at 2-3.

[86] *Id.* at 4.

parcels of real property, various stock and securities, jewelry, numerous fur coats and other assets. The court found that the plaintiff had "a comfortable and secure marriage" and that "she has been left comfortable since decedent's death."[87]

Decedent was also generous to plaintiff's three sons. He provided numerous gifts such as automobiles and two cooperative apartments for them, and paid for their college education, including medical school in the Caribbean for one of the plaintiff's sons.

After her husband's death, Mrs. Chrisomalis sued his estate and his two sons and attacked the antenuptial agreement on several grounds.

First, she contended that she was deprived of independent counsel. There were a myriad of facts, however, which militated against her position. First, plaintiff was well-educated with several postgraduate degrees and held a responsible position with the Jersey City Board of Education. Second, plaintiff had been previously divorced. As part of these prior proceedings, she was represented by counsel and agreed to the waiver of alimony and the division of property. Third, her brother-in-law was a retired superior court judge who had previously rendered legal advice to her. Fourth, although the decedent initiated the drawing of the antenuptial agreement with the attorney, both parties had independently used his professional services prior to the antenuptial agreement. Fifth, the agreement was executed over a week and a half period after the parties had exchanged financial information, giving the plaintiff time to contemplate the agreement. As Judge Schaeffer observed: "This agreement was not signed on the 'doorsteps of the church.' "[88]

The court contrasted this case with *DeLorean*, where the spouse "was presented with an antenuptial agreement only a few hours before the wedding."[89] Nonetheless, as noted above, the *DeLorean* court upheld the agreement.[90]

Judge Schaeffer also pointed out that the case law had established that "[t]he lack of independent counsel is certainly not dispositive in determining the validity of an antenuptial agreement."[91]

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87 *Id.* at 4-5.

88 *Id.* at 6.

89 *Id.*

90 DeLorean v. DeLorean, 211 N.J. Super. 432, 445, 511 A.2d 1257, 1264 (Ch. Div. 1986). *See* footnotes 32-36 and accompanying text for a discussion of the *DeLorean* decision.

91 *Chrisomalis*, No. 251907, slip op. at 6.

In support of this proposition Judge Schaeffer referred to, *inter alia*, the appellate division's pronouncement in *D'Onofrio*.

The court determined that plaintiff "had every opportunity to be represented by independent counsel," that she was "not thwarted or discouraged by the decedent from obtaining" independent counsel and that "in fact, she chose to be dually represented" by the attorney.[92] Accounting for these circumstances, and the extant legal principles, the court concluded that the plaintiff "made an intelligent and informed waiver of independent counsel."[93]

Mrs. Chrisomalis next attacked the antenuptial agreement for alleged inadequacy of disclosure of the decedent's assets. It was undisputed that the agreement listed the decedent's assets but did not assign any values to them. Plaintiff believed that this was the fatal flaw to the agreement. She cited to what appeared to be the uniform dogma of all the New Jersey cases which had applied New Jersey law to antenuptial agreements up to that time. Those cases all held that under New Jersey law an antenuptial agreement would be stricken unless it provided full disclosure, which required specifying values.[94] To make her case seemingly ironclad, plaintiff invoked the Uniform Premarital Agreement Act which unequivocally required "full" disclosure.[95]

The decedent's sons countered that none of this law was controlling on the issue of disclosure with respect to the antenuptial agreement at issue. They pointed out that the Uniform Premarital Agreement Act did not become effective until 1988, several years after execution of the agreement. Further, the new Act was expressly made prospective in its application.[96]

The sons also argued that the full disclosure rule adopted by *Marschall* and its progeny applied only to divorce cases and not to antenuptial agreements which become effective at death—at least for agreements executed before the passage of the Uniform Premarital Agreement Act. They maintained that the controlling law was section 3B:8-10, which was enacted as part of the Uniform Probate Code and applied to all agreements waiving an elective share

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92 *Id.* at 5.

93 *Id.*

94 *See, e.g.*, Marschall v. Marschall, 195 N.J. Super. 16, 477 A.2d 833 (Ch. Div. 1984); DeLorean v. DeLorean, 211 N.J. Super. 432, 511 A.2d 1257 (Ch. Div. 1986); D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 491 A.2d 752 (App. Div. 1985); Orgler v. Orgler, 237 N.J. Super. 342, 568 A.2d 67 (App. Div. 1989).

95 N.J. STAT. ANN. § 37:2-38(c)(1) (West Supp. 1992).

96 *Id.* § 39:2-41.

which were executed before the 1988 enactment of the Uniform Premarital Agreement Act. As set forth above, this enactment required "fair" and not "full" disclosure. The sons maintained that the "fair disclosure" requirement of this statute had been fulfilled.

Judge Schaeffer first agreed that the "full" disclosure requirement of the Uniform Premarital Agreement Act was not applicable because the Act was not ratified until August 5, 1988 and did not become effective until ninety days thereafter.[97] Similarly, Judge Schaeffer found that the "full disclosure" case law did not apply because these cases were concerned only with divorce proceedings. Judge Schaeffer explained:

> This court does not find that New Jersey case law requiring "full and complete disclosure of . . . financial worth" for there to be a valid antenuptial agreement applicable to this matter. *Orgler v. Orgler*, 237 N.J. Super. 342, 350 (App. Div. 1989); *DeLorean v. DeLorean*, 211 N.J. Super. 432, 438 (Ch. Div. 1985). The above cases involved divorce proceedings and were concerned with the waiver of one's statutory rights under N.J.S. 2A:34-23 as it pertained to alimony and equitable distribution. Therefore, the waiver of one's elective share right was not at issue in the cases cited above, and N.J.S. 3B:8-10 is controlling in this case.[98]

Insofar as the subject agreement was executed in 1982, and involved waiver of the elective share, Judge Schaeffer determined that section 3B:8-10 with its "fair disclosure" waiver provision was the controlling statute.

Because this was a case of first impression in New Jersey, Judge Schaeffer looked to the cases in other jurisdictions which had defined "fair disclosure" under this statute. The court relied in part on the Colorado Supreme Court's decision in *In re Estate of Lopata*,[99] which held that disclosure of value was not required under the Uniform Probate Code. Judge Schaeffer also found that the case law distinguished between the disclosure necessary in antenuptial agreements which take effect at death and those which become operative upon divorce.[100] The court further found that the plaintiff had a general and

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97 *Chrisomalis*, No. 251907, slip op. at 6.

98 *Id.* at 9.

99 641 P.2d 952 (Colo. 1982).

100 *Chrisomalis*, No. 251907, slip op. at 7. The court ruled:

> Additionally, the case law that reflects the standard for disclosure during the time of the execution of the antenuptial in question, distinguishes between agreements made in contemplation of death versus agreements made in contemplation of divorce. *See* Marschall v. Marschall, 195 N.J. Super 16 (Ch. Div. 1984) (cited favorably in D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 366 (App. Div. 1985)). Antenuptial

approximate knowledge of the decedent's property prior to the marriage. This knowledge, the court observed, was garnered during the couple's four-year courtship.

Finally, the court addressed plaintiff's attempt to invalidate the agreement based on the "change of circumstances" doctrine. At decedent's death, a substantial mortgage remained on one of the properties he had gifted to her. Judge Schaeffer held that this was "an insufficient basis for setting aside the agreement when the facts are reviewed in their entirety."[101]

The facts at trial had revealed that plaintiff's equity from decedent's many gifts of real and personal property far exceeded her debts and that plaintiff was left with considerable assets by decedent. The court therefore readily disposed of plaintiff's changed circumstances claim:

> Based on the facts and testimony presented, it is evident that the decedent provided handsomely for the plaintiff based on his reliance of the validity of the antenuptial agreement. The plaintiff had knowledge of the decedent's assets, and there was fair disclosure of those assets. The plaintiff is a sophisticated individual. The fact that plaintiff now believes she should have received more from the decedent or to be debt free does not justify setting aside the antenuptial agreement.[102]

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agreements executed in contemplation of death have always been viewed with favor whereas those in contemplation of divorce have not. The court in *Marschall* stated: "Antenuptial or so-called 'marriage settlement' contracts by which the parties agree upon and fix the property rights which either spouse will have in the estate of the other upon his or her death have . . . long been recognized as being conducive to marital tranquility and thus in harmony with public policy."

Id.

The court elaborated on the public policy underpinning this distinction as expressed in the Official Comment to N.J. STAT. ANN. § 3B:8-10:

> The New Jersey legislature and the numerous jurisdictions (including those previously cited) are all in agreement that antenuptial agreements executed in contemplation of death are only natural and proper. It is understandable and logical that a parent provide for and protect the children of his or her first marriage.

Id. at 8 (citations omitted).

The *Chrisomalis* court acknowledged that the decedent had made the requisite fair disclosure: "Decedent's disclosure may not have had valuations for each asset, but an inventory was attached to the agreement, which revealed in full every asset owned by the decedent." *Id.* Ironically, the only party who had not listed all her assets on this inventory turned out to be the plaintiff. *Id.* at 6.

101 *Id.* at 10.

102 *Id.* at 10-11.

VII. UNIFORM PREMARITAL AGREEMENT ACT

The Uniform Premarital Agreement Act[103] was enacted on August 5, 1988, and became effective ninety days thereafter on November 3, 1988. The Uniform Act codified under one statutory scheme the legal principles that apply both to antenuptial agreements which take effect at divorce (or separation) and those that become effective at death. For the first time, the provisions that control the validity of all antenuptial agreements were made uniform regardless of whether the agreement concerns division of marital property or a decedent's estate.[104]

That having been said, however, does not vitiate from the continued relevance of the pre-Uniform Act antenuptial law discussed in detail above. This conclusion is based on a number of factors. As noted, the Uniform Act is prospective in its application, and therefore all antenuptial agreements executed before November 3, 1988 are governed by the prior law. It is fair conjecture that most of the antenuptial agreements which are presently in effect were executed before the enactment of this Act.

Further, the Uniform Act specifically permits the parties to decide the "choice of law governing the construction of the agreement."[105] The parties can therefore agree to choose the fair disclosure law standard of another state to control the validity and interpretation of their agreement. This is exactly what occurred in the *DeLorean* case.

Many of the concepts incorporated in the Uniform Act had precursors in the prior law. Thus, one must look to this prior body of law for guidance on the interpretation of some of the most salient provisions of the Uniform Act. The continued relevance of the prior law is further buttressed by the fact that as of this writing there have been no New Jersey cases decided pursuant to any of the provisions of the Uniform Act.

A. *Burden of Proof*

The Uniform Act essentially adopted the standard of proof utilized in the fair disclosure cases decided under the Uniform Probate Code, section 3B:8-10, and the correlative burden of proof statute.[106] The Uniform Act specifically provides that the "burden of proof to set aside a premarital agreement shall be upon the

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103 N.J. STAT. ANN. §§ 37:2-31 to -41 (West Supp. 1992).
104 *Id.* § 37:2-34(c).
105 *Id.* § 37:2-34(g).
106 N.J. STAT. ANN. § 2A:81-2 (West 1976 & Supp. 1992).

party alleging the agreement to be unenforceable."[107] This was the same standard applied by the prior case law which had been applicable to waiver of elective shares.[108] Similarly, the Uniform Act adopted the level of proof set forth in section 2A:81-2 and requires that the evidence attacking the antenuptial agreement must be "clear and convincing."[109] The Uniform Act thus overruled *Marschall*'s edict that the burden of proof is placed on the proponent of the antenuptial agreement.

B. Full Disclosure

One section of the Uniform Act, entitled "Formalities," provides that a premarital agreement shall have "a statement of assets annexed thereto."[110] Another section of the Act, governing general enforcement of premarital agreements, provides a multi-level test to determine whether the disclosure is adequate.[111] This section provides that, generally, an antenuptial agreement will be set aside if the spouse "was not provided full and fair disclosure of the earnings, property and financial obligations of the other party."[112] It is somewhat perplexing why the Legislature would juxtapose the words "full and fair" in this phrase because presumably the term "fair" is subsumed under the rubric "full." There may be an opening here for an ingenious litigator to claim that the Legislature intended some distinction between the two terms because otherwise the term "fair" would be surplusage. However, in light of the definition of "full" disclosure enunciated in *Marschall* and its progeny, it seems a foregone conclusion that this subsection of the statute will be interpreted to require an inclusion of the value and amounts of the spouse's income, assets and debts, thus permitting a ready calculation of each spouse's net worth.

This is the heart of the Uniform Act. It has established, with very important exceptions to be discussed, that the *Marschall* standard of full disclosure will in the future be relevant to all antenuptial agreements, whether relating to divorce or death. It also demarcates the task for practitioners in this area. The primary work for lawyers where this provision is applicable is to ensure that such full disclosure takes place. Most clients are strongly disin-

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107 *Id.* § 37:2-38.

108 *See supra* notes 68-102 and accompanying text (discussing N.J. STAT. ANN. 3B:8-10).

109 N.J. STAT. ANN. § 37:2-38 (West Supp. 1992).

110 *Id.* § 37:2-33.

111 *Id.* § 37:2-38(c).

112 *Id.* § 37:2-38(c)(1).

clined to make such full disclosure of their assets and net worth. The success one achieves in convincing one's client of the strict command of the law in making such disclosure will determine the subsequent susceptibility of the agreement to attack.

An investigation should be conducted to ensure compliance. Reviewing a client's personal income tax and all business tax returns may reveal other assets owned and debts incurred by the client. Other financial statements, bank deposit books, bank and checking account statements, statements as to IRA, KEOGH, and other pension plans, deeds, appraisals, and other financial records should also be reviewed. In some instances, especially where substantial assets are at issue, new appraisals and business valuations should be conducted. Certified public accountants might be retained by both sides to participate in formulating an agreed upon list of all assets and liabilities with amounts. Copies of the tax returns, bank statements, appraisals, business valuations, the accountants' statement of the assets, liabilities and net worth of each party and other financial records might be appended as exhibits to the antenuptial agreement.

Of course, not every antenuptial agreement may warrant this degree of work and concomitant fees. A judgment call will have to be made by the client and attorney working in tandem. At the very least, however, where an attorney is not satisfied with the extent or quality of the financial information supplied by the client, the attorney should protect herself by incorporating in a writing her advice to the client as to the full disclosure requirements of the Uniform Act.

It is important to underscore that the legal requirement to make full disclosure falls equally on both parties. While the onus of ensuring full disclosure primarily rests on the attorney representing the client with the most assets (simply because there is more to disclose), the attorney for the other spouse cannot ignore this obligation. She too must be vigilant to ensure full disclosure by the client with the fewer assets. The disclosure requirement is neutral in its application and can benefit either party. It can be invoked by the party attacking the agreement by alleging that the party with the greater assets failed to make full disclosure. The party defending the agreement, however, may well be able to preclude an attack on the agreement by alleging the spouse's unclean hands in failing to make the requisite full disclosure.

Lest one conclude that the latter argument is merely theoretical, with no practical applicability, the practitioner is referred to

the recent pronouncement by the New Jersey Superior Court, Appellate Division, in *Chrisomalis v. Chrisomalis*.[113] There, the court declared that unclean hands will bar a litigant from trying to invalidate an antenuptial agreement:

> The basic equitable maxim of unclean hands provides that "[a] suitor in equity must come into court with clean hands and . . . must keep them clean after his entry and throughout the proceedings." A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246, 66 A.2d 319, 324 (1949); *accord* Johnson v. Johnson, 212 N.J. Super. 368, 384, 515 A.2d. 255, 263 (Ch. Div. 1986); Pollino v. Pollino, 39 N.J. Super. 294, 298-99, 121 A.2d 62, 65 (Ch. Div. 1957). "In simple parlance, it merely gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511, 427 A.2d 1105, 1107 (1981). While "[u]sually applied to a plaintiff, this maxim means that a court of equity will refuse relief to [any] party who has acted in a manner contrary to the principles of equity." *Johnson*, 212 N.J. Super. at 384, 515 A.2d at 263.[114]

C. *Other Disclosure*

Although the grammatical conjunctions used in the Uniform Act are somewhat ambiguous in their placement, the Act apparently provides that an antenuptial agreement which gives less than "full" disclosure is still valid so long as certain conditions are met. Parties apparently are at liberty under the Act to waive any disclosure. The Uniform Act provides that the parties can "voluntarily and expressly waive . . . any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided."[115] The only requirement is that such waiver be "in writing."[116]

Although given little attention by practitioners, this provision grants far-reaching power to the party in a proposed antenuptial agreement who owns the bulk of the premarital property and who is usually the party insisting on such an agreement. This provision goes a long way in eviscerating the "full" disclosure requirement first proclaimed by the *Marschall* court. Presumably, the party who owns the bulk of the assets will be able to pressure the spouse to go along with such a waiver of disclosure for fear of sabotaging the

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113 260 N.J.Super. 50 (App. Div. 1992).
114 *Id.* at 53-54.
115 N.J. STAT. ANN. § 37:2-38(c)(2) (West Supp. 1992).
116 *Id.*

marriage. This essentially happened in many of the "full disclosure" cases discussed above where the antenuptial agreement was invalidated. In this very significant respect, the Uniform Act has come full circle by giving the monied spouse powers which *Marschall* seemingly had abolished long ago. The force of the provision may be mollified somewhat by a separate clause in the Act which states that an agreement will be invalidated where the party "executed the agreement involuntarily."[117]

Finally, in its multi-level approach to disclosure, the Uniform Act apparently will also uphold an agreement where the party had "an adequate knowledge of the property or financial obligations of the other party."[118] By this provision, the Legislature ostensibly intended to make it clear that an antenuptial agreement will not be invalidated even where full disclosure is not rendered and where the spouse had personal knowledge of the other spouse's assets independent of the disclosures in the agreement itself. This provision in effect incorporated the appellate division's holding in the *D'Onofrio* case discussed above.

What remains unclear is the definition of "adequate knowledge." It does not appear that this can be equated with the same financial information required under the definition of "full disclosure" because the word "adequate" obviously denotes a lower standard of disclosure, perhaps along the lines of the disclosure approved in the prior "fair disclosure" law under the Uniform Probate Act. If so, the rationale for giving a spouse less disclosure based on personal knowledge than that contemplated by full disclosure is problematic.

D. Independent Legal Counsel

Whether a party to an antenuptial agreement consulted with independent counsel is an issue which courts have factored into their overall assessment as to the validity of an agreement. Before enactment of the Uniform Act, however, this was not a dispositive issue, and antenuptial agreements were upheld where the spouse had no opportunity to consult with her own counsel of choice or where no such legal consultation occurred.[119]

The Uniform Act eliminated this uncertainty by providing clear and irrevocable rules as to the procedure one must follow if

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117 *Id.* § 37:2-38(a).

118 *Id.* § 37:2-38(c)(3).

119 *See* DeLorean v. DeLorean, 211 N.J. Super. 432, 511 A.2d 1257 (Ch. Div 1986); D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 491 A.2d 752 (App. Div. 1985).

independent counsel is to be waived. Failure of counsel to adhere to the Act's statutory provision on waiving independent counsel is malpractice *per se*, as the agreement will automatically be invalidated on this failure alone no matter what disclosure was made or what property was provided to the spouse.

The Uniform Act requires that each spouse consult with "independent" counsel. Thus, the typical situation where the husband foists an attorney of his own choosing on his fiancee at the eleventh hour, such as occurred in *DeLorean*, or the situation where no consultation occurred, as in *D'Onofrio*, can no longer receive judicial sanction. As with other sections of the Uniform Act, the spouse with the assets is afforded a recourse to eschew this mandate. Independent legal counsel can be waived so long as this waiver is "in writing"—in other words, the agreement must contain a specific clause in which the independent counsel is waived.[120] Such waiver must also be made "voluntarily."[121] It is probable, however, that there will be a strong presumption that the waiver was "voluntary" in light of the express written waiver.

E. Unconscionability Under the Uniform Act

The Uniform Act established that the issue of unconscionability will be exclusively within the purview of the court and not the jury. The Uniform Act provides that "[t]he issue of unconscionability of a premarital agreement shall be determined by the court as a matter of law."[122]

The Uniform Act expressly provides that an antenuptial agreement will be unenforceable if it is "unconscionable."[123] Interestingly, the Act provides that the issue of unconscionability must be determined as of "the time enforcement was sought."[124] This would allow for another level of investigation quite different from that raised by the issue of disclosure. A determination of whether the provided disclosure comported with the Uniform Act entails review of the assets which were owned by each party at the time of the agreement's execution. An assessment of whether an agreement was "unconscionable" will usually entail analysis of the parties' relative assets many years thereafter.

Thus, a spouse's assets, both those owned before and after the

120 N.J. STAT. ANN. § 37:2-38(c)(4) (West Supp. 1992).
121 *Id.*
122 *Id.* § 37:2-38(d).
123 *Id.* § 37:2-38(b).
124 *Id.*

marriage, become relevant whenever an antenuptial agreement is attacked under the Uniform Act. The attacker of an antenuptial agreement can thus level a two-pronged assault on the antenuptial agreement—the first based on the alleged inadequacy of the disclosure provided at the time of the execution of the agreement, and the second based on the alleged unconscionability of the effect of the antenuptial agreement at the time when it is attacked.

The Uniform Act defines an agreement as unconscionable where one of three conditions are caused "due to a lack of property or unemployability."[125] One of the three conditions which would make the agreement unconscionable occurs where enforcement would "make a spouse a public charge."[126] This is a reiteration of the law already established by the *DeLorean* court.

The second condition that would render an agreement unconscionable occurs when the agreement provides a standard of living "far below that which was enjoyed before the marriage."[127] Again, this standard was alluded to in prior case law, specifically in the *Marschall* case discussed above. The Uniform Act, however, did not specifically adopt *Marschall*'s dicta that this before-marriage standard of living may be unconscionable in a long-term marriage or a marriage with children. Thus, subject to what will be stated immediately below, the Uniform Act arguably may afford less protection to a spouse than prior case law.

The last condition that will cause an antenuptial agreement to be "unconscionable" is if it renders a spouse "without a means of reasonable support."[128] This obviously affords a spouse more protection than the other two conditions discussed above. This provision points to another instance where the Uniform Act seems to contain surplusage. For example, there is no need for the provision prohibiting the spouse from being rendered a public charge in light of the provision requiring that the spouse be left with a means of reasonable support. It may be that such seemingly unnecessary language was intended by way of clarification and an adoption of prior court rulings.

The Uniform Act does not define "reasonable support," but it is obvious that it will afford a spouse dissatisfied with the antenuptial agreement considerable leeway to attack the agreement. A determination of what constitutes such reasonable support would

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125 *Id.* § 37:2-32(c).
126 *Id.* § 37:2-32(c)(2).
127 *Id.* § 37:2-32(c)(3).
128 *Id.* § 37:2-32(c)(1).

be particularly fact sensitive. A spouse in a long-term marriage with children who gave up a career will certainly be in a position to argue, in line with *Marschall*, that her level of support must be greater than a short-term marriage or a marriage where the spouse continued his/her career.

A spouse who is left to care for minor children may be in a position under the Uniform Act to augment her argument as to the unconscionability of the antenuptial agreement. The Uniform Act expressly provides that a premarital agreement "shall not adversely affect the right of a child to support."[129] The proponent of the agreement, however, can argue that this provision will not invalidate the antenuptial agreement. The proponent can contend that failure to provide adequately for the children of the marriage in the antenuptial agreement will be resolved by the court under this section but does not relate to the provisions in the Uniform Act on unconscionability. If this argument prevails, then the antenuptial agreement will not be voided and any failure to provide adequately for the children of a marriage will be rectified by section 37:2-35.

To avoid a successful attack on grounds of unconscionability, a well-drafted agreement must provide for reasonable support for a spouse and minor children in the event of divorce or death. The agreement may be crafted to take account of contingencies including different payments or awards of assets depending on the length of the marriage, the number of minor children, and their ages and the like.

F. The Applicability of Orgler *After the Uniform Act*

The *Orgler* decision, discussed above, invalidated an antenuptial agreement on two grounds.[130] First, *Orgler* invoked the *Marschall* principle of full disclosure of assets. The Uniform Act's provisions on such disclosure, including their modifications of the *Marschall* principle, have already been delineated.

Orgler also invalidated the antenuptial agreement based on the spouse's failure to make an informed waiver of her property rights and alimony entitlement. An important issue is therefore raised: Did the Uniform Act preserve the second *Orgler* principle as a basis to attack a prenuptial agreement?

Orgler was decided after enactment of the Uniform Act. How-

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129 *Id.* § 37:2-35.

130 See *supra* notes 37-42 and accompanying text for a discussion of the *Orgler* decision.

ever, the Uniform Act did not govern the Orglers' antenuptial agreement because it had been executed before the effective date of the Uniform Act. The drafters of the Uniform Act therefore did not have the benefit of the *Orgler* decision. Accordingly, it might be argued that the *Orgler* holding was not integrated in the Act's provisions.

Those wishing to attack an antenuptial agreement are not without refuge. They can invoke a section of the Uniform Act which provides that an antenuptial agreement will be set aside if a party "executed the agreement involuntarily."[131] The Act does not define the term "involuntarily," thus suggesting the application of common law principles, as espoused in *Orgler* and other cases, to this section.

In *Orgler*, the future wife's attorney had been selected by Mr. Orgler. She met him for the first time on the day the agreement was signed and consulted with him for less than an hour. An open issue is whether the courts will delve into the advice received by a party from her attorney if that party had been represented by an attorney of her own choosing and had consulted with her attorney in advance. Also unresolved is the effect of a party's waiver of independent counsel under the Uniform Act (pursuant to section 37:2-38(c)(4)) on the question of whether the agreement was entered into "involuntarily" under section 37:2-38(a). Does a party's written waiver of independent counsel absolutely bar a claim of involuntary execution? If our courts answer this question in the affirmative, then, the Uniform Act has substantially (and perhaps unwittingly) retracted additional safeguards enunciated in New Jersey decisional law.

CONCLUSION

This Article has surveyed antenuptial law in New Jersey. A framework has been provided as a guide to comprehend the intricacies of this complex area of law. The Uniform Probate Code and decisional law govern antenuptial agreements before enactment of the Uniform Act, which became effective on November 3, 1988. The Uniform Act has abandoned the dichotomy in the principles between agreements pertaining to divorce or an elective share which existed before its passage. The practitioner, however, must still be cognizant of the pre-Uniform Act law for those agreements executed before its enactment because the Uniform Act's applica-

[131] N.J. STAT. ANN. § 37:2-38(a) (West Supp. 1992).

bility is prospective. Moreover, although the Act clarified certain areas of the law, it also incorporated provisions which require a revisiting of the prior case law. Finally, in certain important respects, New Jersey antenuptial law has come full circle insofar as the Uniform Act has created certain openings which may allow for less protection to the unwary and for the inclusion of provisions in antenuptial agreements which hearken back to the pre-*Marschall* era.