

CROSS-BORDER ISSUES IN PRENUPTIAL AGREEMENTS AND ENFORCEMENT OF DIVORCE JUDGMENTS

Presented by

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1. OVERVIEW

a. Cross Border Enforcement

i. Will an agreement be enforced in another jurisdiction?

1. Perhaps. Does it offend their public policy? This is the key question in our jurisdiction and in others as well.
2. In England the courts have not recognized prenuptial agreements as having any binding effect until recently.
 - a. The landmark case of *Radmacher v. Granatino* [2010] UKSC42('RvG') held that while pre and post nuptial agreements are not binding because the court retains discretion and must be satisfied in each case, that if the terms agreed between the parties are "fair" the court will recognize that they are to be taken into account as expressing the wishes of the parties. Although the court warned against being paternalistic and not to override agreements "simply on the basis that the court knows best"
 - b. Follow up decisions recognize that the agreement can be binding even though they are "some distance from the order the court might have made". See *Hopkins v. Hopkins* [2015] EWHC 812 (Fam). This is important to understand for our case law is different. The agreement here does not necessarily have to be fair!
3. Other countries have different rules. The basic premise in New York is that we will enforce the foreign agreement if it would be binding where it was executed.
 - a. Commonwealth countries may have laws similar to England.
 - b. Code Civil countries such as France and Monaco have a different approach.
 - i. They have certain requirements in the form of statutory rules which the agreements cannot override
 1. Rights to the primary marital home

2. Right to get damages upon the divorce
 - ii. But prenuptial agreements are common in these jurisdictions to preserve family property— Separation des Biens is one of the regimes one can elect to preserve the property one brings into the marriage and inherits from his family.
- ii. Will a foreign judgment of divorce or a prenuptial agreement stand up in NY courts?
1. Comity is relatively discretionary and means that foreign judgments are not necessarily enforced here—not based upon Full Faith and Credit as per US Constitution. But they will generally be enforced if they do not offend the public policy of this jurisdiction and they were arrived at using a system which grants relatively understandable due process rights.
 2. Similar concept applies to whether a foreign agreement is going to be enforced here.
 - a. It is discretionary.
 - b. The overriding rule is that it will be if it is in conformance with the law of the jurisdiction where it was entered even if it does not conform exactly to what would be required here.
 - c. Comity is based upon the concept that generally foreign judgments should be recognized if they allow due process and do not violate a public policy here.
 - i. We will therefore not enforce a judgment directing stoning for adultery.
 - ii. But we recognize a foreign divorce decree where both parties appeared and had a fair hearing.
 - iii. Remember that New York allows equitable distribution after a foreign divorce if the foreign court did not do so. So if the divorce is in a jurisdiction which grants the divorce but does not divide up the property, the New York court may do it anyway.
- iii. It must be valid where made to be enforced elsewhere
1. For example, a NY agreement must be notarized. *Matisoff v. Dobi* 90 N.Y.2d 127 (1997). The exact requirements must be met—one was rejected that used the prior notarial certificate. It is interesting because other states which for example have the Uniform Act might not require notarization and that could cause a problem here.

2. Or, an agreement under the Uniform Act must have disclosure to be valid there. But same requirement is not part of our statute and could be waived under certain circumstances.
- b. Clients want a prenuptial agreement for a variety of very good reasons.
 - i. The primary reason is to protect or preserve assets which they now have or expect to have. These kinds of clients include
 1. Entrepreneurs
 2. Trust fund babies
 3. Persons with potential for
 - a. Inheritance, or
 - b. Increased income
 - ii. Prenuptial agreements used to be primarily for a 2nd marriage before the equitable distribution laws when the primary function was to protect against the compulsory distribution required by statutes benefitting the surviving spouse.
 1. The decedent wants to leave assets to the children by prior marriage
 2. Perhaps the person has a serial habit of poor choices in marriage—a bad track record
 - iii. Others who fear a corrupt system
 1. Enormous fees or potential settlements
 2. Disruptive discovery processes where private information can be made public. England even more so with no privacy but in New York we have DRL 235 which seals the files.
 - iv. Hopefully it is a way to achieve the avoidance of nasty matrimonial litigation
 - v. 236 B (3) Allows such agreements which can deal with the important issues arising out of divorce or death.
2. The New York Jurisdiction is an extremely desirable one for upholding all but the most egregious prenuptial arrangements.
 - a. New York has a statute which specifically permits agreements before and during marriage and the courts have basically said that it is a good thing for people to be able to consensually resolve their differences rather than to litigate them so that marital agreements are encouraged here.
 - b. *Gottlieb v. Gottlieb*, N.Y.L.J., Jan 29, 2016 (1st Dept)
 - i. This is hot off the press and very important to the message that prenuptials will be binding even if they are not on their face necessarily fair.
 1. If the parties understand the contract and knowingly entered into it.
 2. If they had legal advice even if, as here, the advice was to not sign the agreement.

3. If general financial disclosure exists albeit slightly defective
 - i. Here, for example, he told her he was worth \$103mm but didn't disclose his income which in 2011 was \$54 mm. However the court specifically noted that he did not mislead her or convey inaccurate information.
 - ii. Generally not disclosing income is a bad practice but the court was looking to support the agreement not for an excuse to set it aside.
 - iii. Make it a practice to include a tax return in the package and have it initialed at the closing.
 - b. The Court pointed to the fact that they had lived together and she knew he was rich and they lived luxuriously. Query how luxuriously you have to live to make it obvious that you have an income of over \$50mm.
4. *Gottlieb* says that DRL 236 b (3) does not require that an agreement be inherently fair in the distribution of marital property. The parties are free to negotiate a financial settlement with respect to the property acquired before or during the marriage. Being a tough negotiator is not overreaching and being pregnant is not being under duress. The facts of the case are themselves interesting such as the fact that over the course of the negotiation, the man reduced his offer twelve times in a row while still impregnating the woman with two children.
5. Maintenance is more closely monitored by the court since the statute says it must be fair and reasonable when made and not unconscionable at the time of the entry of the final judgment. Fairness is only an issue as to the amount of maintenance at the time of the making of the contract but not at the time of the divorce. The *Gottlieb* court said that manifest unfairness is only looked at if there was overreaching when the contract was made. Therefore if it is entered knowingly and without overreaching or duress, the court will accept the contract as fair. And the court makes an important finding with respect to the unconscionability holding that while there is a fiduciary duty to a prospective spouse to not overreach, the agreement will not be set aside because it is one-sided. The Concurrence rejects that there is any fiduciary duty to a person to whom you are not yet married.
6. Important *Gottlieb* facts:

- a. Husband worth \$103mm as at the date of marriage; worth \$188 at the date of divorce
 - b. Wife is a former finance major at U Penn but has a license as Yoga instructor
 - c. Wife gets \$300k per year of marriage. Now worth \$1.6 mm
 - d. Wife gets to live in a new apt (\$8.7mm) until 2 kids are 18
 - e. No maintenance paid if children over 4 (as here)
 - f. Wife has not worked since marriage
- c. Court of Appeals is undoubtedly next for *Gottlieb* as the dissent raises issues about whether the court should consider the unfairness of the bargain both as to equitable distribution and maintenance and as is explained below there are substantial arguments that the Court of Appeals in Grief and Christian are demanding a higher bar to vet a prenuptial agreement. That view is more parallel to the English view that divorcing parties can have an agreement that is an indication of their wishes but the state has an overriding interest to examine the agreement and not allow the parties to make an arrangement that is inherently unfair. Of course, this can mean nearly anything and takes away the right to knowingly negotiate the terms of a marriage acceptable to both parties.
- d. This is not the first case where the First Department has stood by a “one-sided” prenuptial agreement with respect to the division of property. See *Barocas v. Barocas*, 94 A.D.3d 551 (1st Dept 2012). There, the First Department had noted that “although application of the provisions would result in [the husband] retaining essentially all the property, courts will not set aside an agreement on the ground of unconscionability where inequitable conduct was lacking and simply because, in retrospect, the agreement proves to be improvident or one-sided.”
- e. The concurrence by Judge Saxe in *Gottlieb* makes the argument that prenuptial agreements by their nature are between someone who has money and someone who doesn’t and the person with the money is trying to protect what they have and that person is not exercising a fiduciary duty protecting the rights of the other party.
- f. A final note is that the Second Department has been more aggressive in setting aside an agreement it describes as “manifestly unfair”. See *Petracca v. Petracca*, 101 A.D. 695 (2d Dept. 2012). But the distinction there, and it is a very important one, is that the agreement was a postnuptial agreement where under the Christian case, a fiduciary duty was clearly owed and the court was willing to accept an argument that she was “bullied” by her husband into signing the agreement.
- g. Timing of the agreement signing can be an issue. In *Anonymous v. Anonymous*, 123 A.D.3d 581 (1st Dept. 2014) the Wife claimed that she was pressured into signing the agreement just hours before the rehearsal dinner on the night before the wedding. But evidence showed that she had received the agreement well

before and her experienced lawyer had exchanged drafts and modified the agreement. Also addressed in that case was the issue of incomplete financial disclosure which the court held, in light of her agreement to accept a limited amount, was “irrelevant” to her decision to enter into the agreement.

3. The distinction of Separate Property from Marital Property is not universally recognized.
 - a. Not all states/countries share our view
 - i. England divides property without regard to where it came from.
 1. Interestingly it also has other provisions not like ours. For example it approaches the division of accumulated assets with a view towards whether one party has made unique or extraordinary contributions which gives the other party a much smaller percentage. Here, that concept is indeed foreign.
 - ii. France or Monaco and the Code Civil
 1. Patrimonial property
 2. Separate property
 3. Specific rights to damages and the home
 - iii. Some U.S. states such as Connecticut do not recognize a distinction between the two classes of property which we take for granted in New York
4. The Uniform Prenuptial Agreement Act
 - a. You can look this up but there are rules and processes but many states have adopted the Act with amendments.
 - b. There are differences between UPAA and New York and they could be significant if parties travel between states when it comes to whether the other state will enforce the agreement.
 - c. Not passed in New York—but has been adopted in 29 states
 - i. Some have different versions
5. The Uniform Marriage Agreement Act is recent and has not been adopted if at all.
6. Movement between domiciles can affect the Enforceability.
 - a. Choice of Law provisions are important
 - b. Choice of forum can eliminate unfortunate result
 - c. There must be significant contacts with the forum whose law you choose. If not, the divorcing court may just ignore the choice.
7. To understand the law in New York you must be aware of certain important cases which are summarized here.
 - a. *Christian v. Christian*, 42 N.Y.2d 63 (1977)—involved a challenge to the validity of a separation agreement where the court explored the fiduciary relationship which it said existed between the parties and which requires heightened exercise of good faith by both parties. Of course, the relationship after a marriage is

different from the relationship of parties contemplating marriage and who may never marry depending upon the outcome of the negotiation.

- i. With that in mind the “courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity.” at 72.
- ii. Therefore if a settlement is “manifestly unfair to a spouse because of the other’s overreaching” the court’s intervention is warranted even without actual fraud being shown. *Id.*
- iii. So how does all this apply to a prenuptial where the parties are strangers and not yet married? *Gottlieb* explores this at length. The majority says that there is a fiduciary duty but in that case there is no overreaching. The David Saxe concurrence is better reasoned as it says there is no such duty per *Christian*.
- iv. Definition of Unconscionability as per *Christian*: “an unconscionable bargain is one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of a person of common sense.” *Id.* at 71.
- v. What exactly is expected of the spouse with a fiduciary duty. We all hold funds in escrow and otherwise exercise fiduciary duties. In divorce or especially in a prenuptial agreement there is a certain element of self-interest motivating each party. Not a concern to protect the interests of the other party. If I told a client that I was really interested in protecting the other party, I would probably have a shortened engagement.
 1. *Gottlieb* says there is such a duty but the hurdle is low.
 2. How do you effectively exercise the fiduciary duty
 - a. Give full disclosure
 - b. Give time to consider options
 - c. Make sure other side has counsel
 - d. Give a reasonable package—whatever that means.
- b. *Gottlieb* says that you can negotiate with a pregnant girlfriend and it is not overreaching to say you won’t get married unless she signs the agreement. See also *Barocas v. Barocas* 94 A.D.3d 551 (1st Dept 2012) and *Cohen v. Cohen* 93 AD3d 506 (1st Dept 2012).
- c. But the 2nd Department has ruled otherwise in a peculiar decision *Petrakis* which held that the Husband had unduly pressured the wife by getting her to sign an agreement 2 weeks before the wedding telling her he wouldn’t marry her if she didn’t sign. See *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2nd Dept 2013). She managed to testify that he had promised that the agreement wouldn’t be binding, which is an extraordinary departure from our concept of parole evidence.

- d. The Dissent in *Gottlieb* asserts that agreements have to be interpreted in light of whether they achieve manifest fairness and whether the non-monied spouse gets a “fair share” to use the phrase of the moment.
 - e. *Matter of Greiff*, 92 N.Y.2d (1998) when it was decided caused practitioners to take a closer look at prenuptial agreements. There, the Court of Appeals recognized that “a special burden may be shifted to the party in whom trust is reposed ...to disprove fraud or overreaching” due to the “relationship of trust and confidence” between the parties to a prenuptial agreement. There the Court of Appeals spoke of the “unique character of the inchoate bond between prospective spouses—a relationship by its nature permeated with trust, confidence, honesty and reliance”. Id at 341. There should not be a “presumption of fraud” the court said but the potential for “extra leverage” should not be ignored. Courts have wrestled with how this case should impact the assessment of the validity of prenuptial agreements. It has led to an exploration of overreaching as a concept looked at in determining if an agreement is manifestly unfair. The remedy to a claim of overreaching is available however in the form of disclosure and making sure the other side has adequate legal representation and a chance to ask questions and negotiate before the agreement is signed. And the law according to *Gottlieb* is that if you can show that there was no overreaching, you never reach the point of deciding if the agreement is “manifestly unfair”.
 - f. How might the agreement be interpreted if the parties move to Conn; NJ; Fla; or California? This of course depends upon the laws of those jurisdictions but if there is a properly conceived and executed agreement which adopts New York law, the changes are your client will be okay.
8. Important considerations for your next agreement:
- a. The general scheme of the agreement can cover many areas which should be broken down to reflect the changing circumstances from time to time.
 - i. Following the marriage, parties may wish to have clauses dealing with the following subjects
 1. Support during marriage
 2. Activities: Golf, politics, sex, children, residences
 3. Is there to be an Allowance paid? If so, is that a credit to the distributive amount?
 4. Some cases provide for payment of a Wedding gift
 5. Payments during the term of the marriage can be conditional such as if there are children.

- ii. Upon the happening of a “Termination Event” the payments and rights usually change
 - 1. A Termination Event is often defined to include the following
 - a. Start of an action
 - b. Physical separation other than schooling, hospitalization
 - c. Giving notice in a form annexed to the agreement
 - 2. In one case however the death benefits exceeding the rights upon a termination event and when the spouse was upstairs on her death bed, the children served the other spouse with the notice of termination. So you might want to have a period of time between the notice and the effective date provided that both are still alive and provide exactly how it has to be served.
 - 3. A termination event is a better inflection point to rely on than the divorce as it doesn’t allow for manipulation of the divorcing process.
 - a. It should be deemed the effective termination of the marriage
 - b. There is then no incentive to lengthy litigation
 - c. Accumulation of rights ceases
 - d. It can trigger the divorce terms
 - 4. Types of issues covered in the typical prenuptial agreement:
 - a. Possession of homes after the divorce
 - b. Support including how much and how long
 - c. Division of property rather than allowing equitable distribution or community property laws to dictate
 - d. Provision that the division of property will be tax free under IRC Section 1041 which must be incident to a divorce
 - e. Maintenance to be deductible—must be paid pursuant to an agreement or decree and married filing separately, not living together during calendar year.
 - 5. Having Children can change the parameters
 - 6. What can you say about children
 - a. Custody—joint custody provision?
 - b. Live within 25 miles of Times Square?
 - c. Attend parochial [or private or public schools?
 - d. Financial benefits
 - i. Cannot be less than guidelines but can be more
 - ii. College, health insurance
 - iii. Vacations
 - iv. Use of the private plane
 - v. Security for the spouse and for the children
 - e. Use of primary residence or

- f. A substitute residence—*See Gottlieb* where he bought wife an \$8.7mm apartment which she got to occupy rent free until children were 18.
- 7. Use of the homes and vacating within fixed time
- 8. Division of personal property
- 9. Waiver of Equitable Distribution
 - a. Some provision should be made to avoid any claim of overreaching or unconscionability
 - i. *Gottlieb* gave wife \$300k per each year of marriage into her account at 5% interest.
 - ii. Doesn't have to be what she might have been entitled to under equitable distribution or community property laws
 - iii. Courts like to see some benefit
 - iv. It is helpful to have changes made to agreement at suggestion of other spouse's lawyers.
- 10. Waiver of Maintenance
 - a. Cannot waive maintenance in violation of GOL 5-311
 - b. Must be fair and reasonable when made and not unconscionable when judgment is entered.
 - i. *See* discussion of *Gottlieb, Christian, etc.*
- 11. Waiver of Estate Rights
 - a. Obviously there is a statutory right to a minimum of one third
 - b. The share can be put into trust by the agreement
 - c. This is a signed and notarized document so that it can terminate or waive estate rights.
 - d. This too may change if there are children
 - e. Also, the parties may not want waivers of rights in each other's estates if there has not been a Termination Event.
 - f. One billionaire husband wanted my client to release all her rights in exchange for \$100,000 per year. He left when she wouldn't do that.
- 12. Divorce can follow to preserve possible tax deductibility
 - a. Cannot contract to divorce
 - b. But can make certain payments within a time after the entry of a non-appealable judgment terminating the marriage.
- 13. Counsel fee paragraphs in the agreement (not necessarily enforceable in New York)
 - a. Legal and other fees should be paid by the defaulting party particularly if the party is breaching the no-contest clause (in *terrorem* clause)
 - b. Don't hire and pay the other party's lawyer directly

9. Death occurring after marriage can create rights which in turn can be altered by a prenuptial or postnuptial agreement.
- a. There are rights of the surviving spouse which may be changed by the prenuptial agreement which is executed in a proper fashion (i.e. notarized, or two witnesses).
 - b. There are practical issues to consider in addition to the financial benefit payable upon the death of the decedent and we address these in most of our prenuptial agreements.
 - i. Who gets to live in the homes following the death and what happens if there are multiple homes.
 1. Children may change the locks while the widow is at the cemetery and leave her bags on the front porch. Probably, in a second marriage, if the primary home is not going to be in joint names, it is worth addressing this issue in the agreement.
 2. Perhaps the right to occupy a home should be dependent upon there being surviving children of the marriage under the age of 21.
 3. If no children are living there the consensus might be that the widow still should get use of the primary residence.
 4. What if it's not in his or her name—e.g. titled held by an LLC? Perhaps the agreement must bind the LLC, or at least commit the owner to execute the necessary documents. Or it could be in a trust or other entity which would need attention from the draftsman.
 5. The agreement might also address who pays the maintenance, insurance, and other expenses of the house during this period of possession
 6. And for how long
 7. Does it matter to decedent if the home is
 - a. The ancestral home
 - b. Mega estate
 - c. Owned by trust or other entity
 - ii. Support for the widow and children of the marriage is usually something which must be in the divorce decree; but with respect to the prenuptial agreement, these provisions are somewhat speculative. This is addressed elsewhere but speculation is the nature of a prenuptial agreement. That is one reason why my retainer agreement provides that any future services including testifying about the agreement will be compensated at my then prevailing rates.
 - iii. The prenuptial agreement might deal with the release of an interest in businesses or some participation in their growth.

- iv. Will the agreement name the executors and trustees who might be important to the spouses?
- v. Will the spouse release the legal right to administer the estate?
- vi. Finally, don't forget that the use of cars, planes, boats are all fair game for the prenuptial agreement.
- c. The statutory share may be a fair way to deal with the rights following death and relatively tax efficient, particularly if it is put into a trust.
- d. The statutory share should allow credits for lump sum payments and assets passing thru operation of law
- e. Lump sum payments can accrue over course of marriage and be paid upon divorce or death.
 - i. Is there a variable amount?
 - ii. Extra credit for years in service
 - 1. For having children
 - 2. For having extra children
 - iii. Stops accumulating upon the happening of a Termination Event

10. Cross Border High Net Worth Agreements

- a. Applying the law of a foreign jurisdiction
 - i. New York will apply NY law unless the agreement was executed in a foreign jurisdiction or specifies the law of a foreign jurisdiction. *See Karg v. Kern*, 129 A.D.620, (1st Dept.2015) where the prenuptial was executed in Germany in German. Wife was not proficient in German, didn't get a copy of the agreement in advance of the execution, was not permitted to contact an attorney and the husband told wife that she was only signing to waive claims against her father-in-law's assets. Under German law the agreement was declared invalid. Perhaps under NY law as well.
 - ii. But the court will enforce foreign agreements which do not conform to New York's substantive or procedural standards if they comply with local laws.
 - 1. In *Van Kipnis v. Van Kipnis*, 11 N.Y.3573, New York's highest court held that a French *contrat du mariage* entered into before a *notaire* in France by a U.S. citizen and a Canadian citizen then studying in Paris would be enforced notwithstanding that the parties did not have separate representation since the agreement conformed to French but not New York standards.
 - 2. In *Stawski v. Stawski* 43 A.D.3d 776 (1st Dept 2007) upheld a German marriage contract entered into before a local *notar* whose obligation was to ensure that everything was handled fairly, failed to confirm that the wife understood the concept of the property regime she purportedly had elected or that she had had any kind of independent legal advice or the opportunity to review the document in advance.

- 3. My Turkish/German case citing *Stawski*, the court held that they were bound to the prior agreement even though the circumstances 30 years later were vastly different.
- iii. Enforcement of a foreign decree in which both parties have appeared and conferred jurisdiction will be granted here. There was a French case where she appeared at the conciliation conference then ignored everything else and was bound to the French judgment when she sought equitable distribution in New York
- b. *Meng v. Allen*, NYLJ May 30, 2012 (Sup. Ct. New York County, May 23, 2012) (Drager, J.) is also interesting in that the parties sign prenuptial agreement in New York selecting New York law, then reside in Malaysia, California and Singapore. Husband tried to commence a divorce action in New York but it is dismissed for lack of subject matter jurisdiction. However, in their Singapore divorce action, wife asks Singapore court to set aside the prenuptial agreement, claiming it was procured by fraud. A New York court therefore allows Husband to proceed with a contract action in New York, based on wife's breach of the prenuptial agreement. The New York Court finds that New York is not an inconvenient forum to determine whether agreement was procured by fraud since it was drafted, negotiated signed in New York, etc.
 - i. Also note re: convenience of forum, that New York courts have said that if you select a particular forum in your prenuptial agreement, you cannot then claim that forum is an inconvenient one. See *Shah v. Shah*, 215 A.D.2d 287 (1st Dep't 1995).

11. Child Support may be addressed in prenuptial agreements but the attorney should be aware that there are restrictions.

- a. the CSSA guidelines apply
- b. Note that DRL 236 does allow provision for the "custody, care, education and maintenance of any child"...
- c. Can be born before or after marriage
- d. Only limited to DRL §240.
- e. It can be overridden but may not be.

12. Disclosure

- i. Required in most jurisdictions
- ii. High Net Worth individuals may not want to make disclosure. One imperfect solution is to use generalizations
 - 1. Saying it is "over" a large sum
 - a. Does it really matter whether the net worth is \$600 mm or \$800mm? Or \$1 bn or \$2bn?
 - b. The purpose is to put the other side on notice. The *Gottlieb* case did not include a disclosure of income. So a

- rough estimate might be relevant only if the settlement would presumably have been materially different.
- c. If the settlement is 50% of his then net worth and he says its \$1bn when it is really \$3bn might create a problem for him. So don't use a percentage. But if the spouse will get a million dollars for every year of marriage or upon death get \$100mm, it doesn't matter if the net worth is "over \$500mm" or \$800mm. But I wouldn't take that to extremes.
2. Different jurisdictions require different disclosure.
 3. What is marital property for division is a key question
 - a. Not separate property in NY
 - b. No difference between the nature of one or the other in England or Conn.
 - c. It depends in a lot of jurisdictions
 - d. Community property states address the community but usually exclude assets outside the community—but income may not be outside.
13. If there is no designation of the forum or the law in the prenuptial agreement the question of which jurisdiction controls is very important.
- a. Residency is going to be very relevant
 - b. The problem is many of our clients have homes in four or five jurisdictions.
 - c. In New York, there are requirements in DRL§170 as to how long you must live in New York to get jurisdiction here.
 - i. New York jurisdiction is not based upon domicile as it may be elsewhere
 - ii. It is based upon residency
 - iii. Having a residence here for a continuous time combined with other factors may be enough. However personal jurisdiction requires service within New York or a reason the state will assert long arm jurisdiction.
 - d. Getting jurisdiction in the right foreign jurisdiction can be crucial.
 - i. Monaco for example has a default position that separate property remains separate.
 - ii. England does not.
 - iii. New York will enforce either one with proper jurisdiction.
 - e. Generally choice of law and choice of forum clauses are honored, but what happens when they are absent or ambiguous:
 - i. *M v. M*, 997 N.Y.S.2d 669 (Sup. Ct. New York County, July 3, 2014) (Gesmer, J.) Parties sign prenuptial agreement in Madrid, Spain selecting separation of property regime. No forum selection or choice of law provisions discussed in the decision. They get married in Dominican Republic, then buy a residence in NY, move here, live here for 4 years, and ultimately commence a divorce action here. Under a conflict of laws analysis the NY Court concludes that for the purposes of considering the prenuptial agreement the parties' contacts with Spain outweigh their

contacts with NY because most of their assets are in Spain, the agreement was negotiated, drafted and signed in Spain, and the parties lived there at the time, plus Husband is a Spanish citizen. The NY court recites the principle that duly executed prenuptial agreements are generally valid and enforceable, citing *Van Kipnis* and *Stawski*. However, applying Spanish law, the court voids the agreement because the parties did not marry within 1 year of signing the agreement and they did not register the agreement in the place the marriage occurred, the Dominican Republic, which are both requirements of Spanish law. These requirements are totally unknown to NY law.

- ii. *J.R. v. E.M.*, NY Slip Op 51094(U) (Sup. Ct. New York County, July 21, 2014) (Gesmer, J.) Husband was Spanish citizen and Wife a Peruvian citizen, both working for the UN. They were married in NY and the day after went to the Spanish Consulate in NYC and signed a marital agreement before a Notaire who was a Consul at the Spanish Consulate. The agreement has references to articles of the Spanish civil code but the NY court finds these don't constitute a choice of law as to all aspects of the Agreement, and the parties disagree about which law governs, which the court says is an indication that the Agreement is ambiguous as to choice of law. So the Court goes through a conflict of laws analysis and finds that New York law governed the validity and enforceability of the agreement, since the parties and their children resided in NY and assets were in NY, and therefore NY had the most significant relationship to the parties. NY Court ruled that execution was invalid because a consul is not one of the persons enumerated in the real property law to take acknowledgements of real property situated in New York. Husband claimed that consular office constituted Spanish territory and therefore the agreement was valid because it was acknowledged in compliance with Spanish law, citing *Stawski* and *Van Kipnis*. NY Court rejected husband's claim because Spanish consular office is located in New York not a foreign country. The court looked at the 1963 Vienna Convention on Consular Relations which does not provide that a sending state's consular office situated within the borders of a receiving state is the sovereign territory of the sending state.

14. What is the effect of Moving away from New York or to New York
- a. Moving here is easy
 - b. Moving away is complicated
 - i. What if they have a house in Conn and an apartment in New York
 - 1. She files first in Conn
 - 2. He files in New York
 - 3. How does inconvenient forum fit in
 - 4. In Europe, Brussels 2 provides that the jurisdiction in the EU is determined by the first to file.

- i. But many people don't want to file in a country where they may have not fully disclosed their assets.
 - ii. London filing is okay unless you are a resident and they want now to tax your worldwide property.
 - ii. Requiring that New York is the only place with jurisdiction
 - 1. Steiner case in UK was enforced where they agreed to New York as the sole forum. Forum Non Conveniens does not override that choice
 - 2. Depending on how the clause is worded, it may convey personal jurisdiction here
 - a. What is basis of jurisdiction?
 - b. Is jurisdiction in rem over the marital res or personal over the money?
 - c. New York only has the power if the residency statute is met to grant a divorce.
- c. Enforcement formalities are obviously crucial in every jurisdiction.

H.S. v. M.S. NYLJ August 11, 2015 (Sup. Ct. Westchester County).
 Acknowledgement of foreign prenuptial agreement in the manner required by the foreign nation will be accepted by New York where the agreement was executed in the foreign nation. But you also need, along with the agreement, a certificate stating the acknowledgment conformed with the foreign nation's laws, made by a person that New York finds qualified. Here the prenuptial agreement was German and the certificate of conformity was provided by a German lawyer. The New York court granted summary judgment enforcing the agreement based on the translation of the agreement, the apostille, and the certificate of conformity.
- d. It is obviously somewhat of an art to decide where you will want to litigate a marital agreement in the future and largely speculative.

15. Confidentiality is an important aspect of disclosure.
 - a. Consider having a simple letter agreement to keep preliminary disclosure confidential even if the parties do not marry.
 - b. Consider clauses in the agreement like those annexed in case the relationship breaks down.

