

When and Under What Circumstances Can you Break a Prenup?

1) Has it ever happened where one of your clients had to break a prenup? If so, without giving anyone's name, of course, can you tell me the circumstance and what the result was?

One example in which a client wanted to break a prenup was due to a change in circumstances under which the prenup would have made enforcement of same unconscionable. In that case, the couple had been married for 20 years, then she became chronically ill during the marriage, and could not support herself. The Court determined that enforcing the prenup under the circumstance of her illness would be unconscionable.

Other clients had a combination of issues that made the prenup unconscionable: (1) some evidence of duress from the Husband (prenuptial agreement "forced" on the spouse the evening before the wedding), (2) the Husband did not disclose a certain amount of money which the trial judge determined to be a material fact (husband failed to disclose information about his income and assets), and (3) the parties subsequently had a child during the marriage. Although having a child during the marriage alone will not void a prenup, in combination with the other issues it may affect the outcome (waiver of alimony was affected since after the marriage, they had a child, the wife stayed home by agreement of the parties to raise their child, and none of that was anticipated at the time the prenup was signed).

2) I know there are some good reasons for breaking a prenup, such as bankruptcy, fraud etc. but where do most people draw the line? I'm assuming that if somebody disclosed their worth and was off by a few thousand dollars, not a big deal. But off by \$300,000, that's another story? (Although maybe it's all relative, if this is a couple divorcing worth millions of dollars.)

Yes, if there is knowledge of the standard of living being very high, you must be careful not to wear blinders. In other words, if a husband owned a horse farm, drove a Rolls Royce, and wore a gold Rolex, that would give obvious information to the person marrying him, and a missing \$300,000.00 on his financial disclosure may not be material; but if it's a person living in a condominium and working as a laborer who has \$300,000.00 that is not disclosed, then "bingo," that's a material misrepresentation. Reasons why someone may want to break a prenup are dependent upon the party and the terms of the prenup.

However, one of the main reasons for wanting to break a prenup is due to a change in financial circumstances of one party during the marriage. The argument is that because of the change in circumstances, it would be unconscionable to enforce the prenup. For example, if a party enters the marriage worth \$1M and at the time of divorce is worth \$20M, then the party may seek to get more money due to the increase in the financial circumstances of the other party. A Court may not agree with that reasoning because if a party came into the marriage with a high net worth, it is likely that the party's net worth may increase. This is a tricky issue, and cases might very well depend on your judge and the quality of the legal representation.

But in all cases, it's up to the Court to follow a test called the Scherer test to determine whether or not to enforce a prenup based on all the facts and circumstances of the case. To break or enforce a prenup, Georgia Courts have to follow the Scherer test which states a trial judge should

employ basically three criteria in determining whether to enforce such an agreement in each a particular case:

- (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts?
- (2) Is the agreement unconscionable?
- (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

One thing to remember is that a divorce is an equitable remedy and Courts who review such agreements sit in a Court of equity and have discretion to approve an agreement in whole or in part, or refuse to approve the entire agreement altogether.

3) In addition to, or other than a solid lawyer, what does it take to break a prenup? In other words, what do you need (i.e., paperwork, or what type of situation) to have in place to break a prenup?

It's not that there is a specific situation that breaks a prenup. A Court can deny enforcing a prenup, as stated above, if the Court applies the Scherer test and determines any of the factors apply. Or, a Court can deny enforcing a prenup due to an issue with the execution of the prenup. In Georgia, "[e]very marriage contract in writing, made in contemplation of marriage, shall be liberally construed to carry into effect the intention of the parties and no want of form or technical expression shall invalidate the same. The contract must be attested by at least two witnesses."

Prenups made settling alimony payments in the event of a future divorce were long deemed void as against public policy since they are in contemplation of a divorce (as opposed to in contemplation of marriage). They are now enforceable under some circumstances, but they must meet different requirements. Notably, contracts made in contemplation of divorce are not subject to the attestation requirement.