

Enforceability of Prenuptial Agreements

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With a divorce rate approaching fifty percent (50%) in the United States, it is no wonder that prenuptial agreements have become common place among consenting adults contemplating marriage. Historically, it was the man who would request that his prospective partner execute a prenuptial agreement. However, with the dramatic shift in the economic influence of women over the last twenty years, it is now just as likely that the woman will request her future partner to enter into a prenuptial agreement to protect her accumulated assets and future income.

While prenuptial agreement have been common place in other jurisdictions, it was not until 1982 that Georgia first recognized the validity of a couples right to enter into a premarital contact. Prior to 1982, prenuptial agreements were deemed to be against public policy and therefore null and void.

Scherer

A sharp reversal of this state's policy on prenuptial agreements occurred in 1982, when the Supreme Court of Georgia decided the landmark case of *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982). In *Scherer*, a Michigan couple executed a prenuptial agreement immediately prior to their marriage. The parties subsequently moved to Georgia and the Husband filed a Petition for divorce. Although the prenuptial agreement itself stated that it was to be construed in accordance with the laws of the State of Michigan, both parties sought to have the enforceability of the agreement determined under the laws of the State of Georgia. In holding that the prenuptial agreement was enforceable, the Supreme Court adopted a three (3) prong test used by other jurisdictions

for determining the enforceability of prenuptial agreements: (1) whether the agreement was obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts; (2) whether the agreement is unconscionable; and (3) whether the facts and circumstances have changed since the agreement was executed, so as to make its enforcement unfair and unreasonable.

Mallen

At first glance, it may appear that it would be very difficult to enforce a prenuptial agreement given the three (3) prong test that must be satisfied in *Scherer*. However, in *Mallen v. Mallen*, 280 Ga. 43, 662 S.E.2d 812 (2005), the supreme court severely limited the scope of *Scherer*, thus placing a heavy burden on any party challenging the validity of a prenuptial agreement. In *Mallen*, the parties had lived together unmarried for about four (4) years when the Wife got pregnant in 1985. While she was at a clinic to terminate the pregnancy, Husband called to ask her not to have the abortion and to marry him. The Wife agreed. About a week before their planned wedding, the Husband asked the Wife to sign a prenuptial agreement prepared by his attorney. Wife contended that the Husband told her the prenuptial agreement was just a formality and he would always take care of her.

Wife further claimed she took the prenuptial agreement to an attorney paid by the Husband who advised her that he did not have time to fully examine it in the days remaining before the wedding. The Wife did not consult with another attorney or postpone the wedding, but spoke with Husband and his counsel about the agreement more than once. She agreed to sign the agreement after a life insurance benefit was increased and the alimony provisions were modified to provide for increases for each year of marriage. At the time the agreement was executed, the Wife had a high school education and was working as a restaurant hostess, while Husband had a college degree and owned and operated a business. Wife had a net worth of approximately \$10,000 and Husband had a net worth of approximately \$8,500,000.

After eighteen (18) years of marriage, Husband filed for divorce in 2003 and filed an action to enforce the prenuptial agreement. At the time Husband filed the petition for divorce, the Husband had a net worth of approximately \$22,700,000. The trial court held the prenuptial agreement enforceable and incorporated that holding in its final judgment, ruling in accordance with the agreement that the wife was only entitled to \$2,900. per month in alimony for four (4) years and the Husband was entitled to all the assets with which he entered the marriage and all assets accumulated during the marriage.

In applying the three (3) prong test of *Scherer*, the supreme court noted that “whether an agreement is enforceable in light of these criteria is a decision made in the trial court’s sound discretion.” In other words, in order to overcome the trial court’s decision on appeal, the appellant must be able to show an abuse of discretion by the trial court. The difficulty a plaintiff may have challenging the validity of a prenuptial agreement is revealed in the supreme court’s analysis of the facts in *Mallen* using the three (3) prong test established in *Scherer*.

First, the Wife claimed that the first prong of the *Scherer* test was not satisfied because the Husband fraudulently misrepresented to her that “the agreement was just a formality and a he would always take care of her.” Probably, one of the most compelling findings in the *Mallen* decision was the court’s ruling that **no confidential relationship exists between persons who agree to marry**. Where a confidential relationship exists, the parties have the additional burden of acting with the “utmost good faith” toward each other. Without the existence of a confidential relationship, parties have a duty to exercise ordinary diligence in making an independent verification of contractual terms and representations. Since no confidential relationship existed between the parties, the court held that the Husband’s alleged statement could not serve as a basis for a claim of fraud since the Wife could ascertain from the clear terms of the agreement that her rights were extremely limited in the event of divorce.

Next, the Wife claimed duress was applied to compel her to execute the agreement because if she refused, the marriage would not have occurred and she would

have been left pregnant and unmarried. The court 280 Ga. at 46 citing *Tidwell v. Critz*, 248 Ga. 201, 203; 282 S.E.2^d 104 (1981) stated:

Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will... The threats must be sufficient to overcome the mind and will of a person of ordinary firmness.

As noted by the court, nothing in the record in *Mallen* indicated that the Wife's free will was overcome by the threat of not going through with the wedding. Contrary to her assertion, the court determined that there was evidence that the Wife actually exercised her free will because she refused to sign the agreement until certain changes were made improving her position in the event of divorce or the death of her Husband. The court further noted that because the Wife had already demonstrated her willingness to terminate the pregnancy, she could not credibly claim the pregnancy put such pressure on her as to overcome her will.

Next, the court took up the issue of Wife's claim that the Husband's failure to disclose his actual income on the financial disclosure forms attached to the prenuptial agreement constituted the nondisclosure of a material fact which would render the agreement void. Again, the court noted that because no confidential relationship exists, the Wife had an independent duty to make some inquiry to ascertain the full nature and extent of the Husband's financial resources. Although the financial statement did not include income, it did reveal that the Husband was a very wealthy individual with significant income producing assets, including an eighty percent (80%) ownership share of a business in his name. The Wife was also aware from the standard of living they enjoyed that he received significant income from his business and other sources. Based on the aforementioned, the court held that the failure to disclose income on the prenuptial agreement would not render it unenforceable.

Next, the court addressed the second prong of *Scherer* and Wife's claim that the disparity in their financial situation and business experience rendered the prenuptial

agreement unconscionable when executed. The court 280 Ga. at 47 quoting *William J. Cooney, P.C. v. Rowland*, 240 Ga. App. 703, 704; 524 S.E.2^d 730 (1999), stated:

An unconscionable contract is one abhorrent to good morals and conscience...where one of the parties takes a fraudulent advantage of another[.] an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of.

The court noted that absence a conclusion that the agreement was obtained by fraud or that the Wife suffered from any delusion, the disparities between the Wife and Husband in financial status and business experience do not demand a conclusion that the agreement was unconscionable.

Finally, the court considered the third prong of *Scherer* and Wife's argument that because Husband's net worth had increased from \$8,500,000 at the time that the prenuptial agreement was executed to \$22,700,000. At the time the petition was filed, Wife argued there had been a change in the facts and circumstances, so as to make the agreements enforcement unfair and unreasonable. Although the court had not had the opportunity to consider what would constitute a change in circumstances since their decision in *Scherer*, they did note that other jurisdictions had recognized "foreseeability" at the time the agreement was executed as a key element in consideration of changed circumstances. 280 Ga. at 48 citing the Michigan case of *Reed v. Reed*, 265 Mich. App. 131, 147; 693 N.W.2^d 825 (2005), in which the court held that a significant growth of assets over many years can hardly be considered an unforeseeable changed circumstances that justifies voiding the ...prenuptial agreement. The court in *Mallen* concluded that "[s]ince the continued disparity in their financial situations was plainly foreseeable from the terms of the prenuptial agreement, Wife cannot rely on that as a change in circumstances which renders the agreement unfair." 280 Ga. at 48.

Corbett

In *Corbett v. Corbett*, 280 Ga. 369 (2006), the supreme court affirmed the trial court's refusal to enforce a prenuptial agreement under the first prong of *Scherer*. The

trial court concluded that the agreement failed under all three prongs. The supreme court looked at the first prong and determined that Husband's failure to disclose his income was a material fact and could have been a critical factor in Wife's decision to waive alimony. 280 Ga. at 370. The supreme court noted that Wife had no knowledge independent or otherwise as to the amount of Husband's income. The court distinguished *Mallen* in which the court said Wife was deemed to be aware of Husband's "significant income" from high standard of living before marriage. 280 Ga. at 370. Since the court found the agreement was unenforceable under the first prong, it did not review the other prongs.

Blige

In *Blige v. Blige*, 283 Ga. 65 (2008), Chief Justice Sears writing for the court rejected Husband's assertion that a party had a duty to inquire into the financial status and absent such an inquiry, a challenge to the enforceability of the prenuptial agreement is barred. In *Blige*, the parties did not live together prior to the marriage. On the day before the wedding, Husband took his fiancée to an attorney he had hired for her. The attorney provided a fully drafted prenuptial agreement to the bride-to-be and read through it with her. He asked her to sign it and she did. The agreement provided that Husband would retain 19.5 acres of land in Bryan County that he had previously purchased "together with any house or structure which may be situated upon said property." There was no house on the property when the parties married but Husband had \$150,000 hidden away in cash and Wife had no knowledge of the money. After the parties married, Husband constructed a home that costs approximately \$280,000 to construct. At the time of the divorce trial, the value was \$375,000 to \$400,000. The supreme court in finding the agreement unenforceable reasserted the three prong test of *Scherer*. The court also noted that the prenuptial agreement must meet the usual contract requirements of offer, acceptance, and consideration and there is often implied a requirement of fundamental fairness. Furthermore, if the circumstances change beyond the parties' contemplation at the time they entered the agreement, it may not be enforceable. Both parties must fully disclose their assets at the time of the agreement. Absent full disclosure of the parties'

financial condition prior to the execution, enforcement of the agreement would violate Georgia public policy. The court distinguished *Mallen* finding that in *Mallen* the trial court exercised its discretion to uphold the agreement and the trial court in *Blige* did the opposite. In *Mallen*, the parties attached financial disclosure statements. In *Mallen*, the parties lived together for four years prior to executing the agreement. The Bliges did not live together prior to entering the prenuptial agreement and there was nothing in Mr. Blige's lifestyle to indicate he had the cash hidden away. The court made clear that there was an affirmative duty of disclosure and not a duty of inquiry. The court explained that *Mallen* was not based upon the Wife's failure to inquire but instead the court in *Mallen* concluded that the omission of the income from the financial statement was not material under the unique circumstances.