Mid-Marriage Agreements: Is it possible to re-negotiate a Prenuptial Agreement or pre-negotiate a separation agreement during marriage?

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In a newly released book "The Art of Her Deal: The Untold Story of Melania Trump," *Washington Post* reporter Mary Jordan discloses that first lady Melania Trump capitalized on her delayed move from New York to the White House, in part, as leverage for renegotiating her prenuptial agreement with President Trump. In 2017, it was widely reported that Melania Trump did not want to interrupt their then-10-year-old son's school year in New York, which seemed to make sense. However, new revelations in Jordan's book uncover Melania Trump's less publicized, shrewder and more calculating instincts to protect herself and her son's financial security.

Whether one accepts the reporting in this new book, as it pertains to Melania Trump, it raises questions for many women or men:

1. Can anyone re-negotiate the terms of a prenuptial agreement during a marriage?
2. Or, in the absence of a prenuptial agreement, can married partners make an enforceable mid-marriage agreement, while they are still married and not in the throes of inevitable divorce?

The answer is somewhat complicated and, as with most family law questions, revolves around an equitable analysis of the specific facts.

This article will discuss these types of agreements that we see in family law:

1. agreements made prior to marriage, called premarital or prenuptial agreements
2. agreements between spouses that are made during a viable marriage, often referred to as "mid-marriage agreements"
3. agreements made during the marriage, called reconciliation agreements

And of course, agreements that are made at the end of a marriage, are called separation or divorce agreements.

Can I renegotiate a prenuptial agreement during my marriage?

In New Jersey, a validly executed premarital (prenuptial) agreement will generally be enforced unless the agreement is held to be unconscionable as a matter of law. Unconscionability is a high bar. The burden of proof to set aside or negate a premarital agreement rests with the party who is seeking to avoid the terms of the agreement. Moreover, by statute, the standard of proof is that of "clear and convincing evidence," a higher standard than a "preponderance of the evidence."

It is not difficult to imagine a scenario where a couple might want to set aside or negate a premarital agreement. Imagine that a starry-eyed couple signs off on a premarital agreement during the months leading up to their much-anticipated wedding day. While both the bride and groom are represented by their own attorneys who consider the facets of their anticipated partnership, it is impossible to know every situation that will occur over the course of what they hope will be a long and blissful union. Ten, twelve, fifteen or more years later, the "bloom is off the rose," and the once idyllic couple have developed some recurring arguments that always end the same way, i.e., with one spouse throwing the premarital agreement in the other's face. At this point in their marriage, any number of issues are different than they were prior to the wedding. For example, one of the parties may have health concerns; perhaps they had more children than they planned, or the pregnancies were difficult; maybe they have a child with special needs, or there are other terms in the premarital agreement that simply feel unfair now. Businesses may have been built or failed. Careers may have flourished or been stalled. Maybe one party invested all of her separate assets into the marital relationship during good times, and now the other party refuses to contribute his separate assets, when money is tight. Even though the premarital agreement was originally intended to remove doubt, there are infinite examples of how the premarital agreement can become a wedge. The challenge to the couple is whether they can resolve this issue, so that they can strengthen or save their marriage.

Permission to Modify During the Marriage

Many premarital agreements include a clause that permits the parties to modify the agreement after they are married, provided that the agreement is executed voluntarily and with the same formality as the original premarital agreement. Even without this clause, the premarital agreement is their private agreement, and presumptively they can also agree to modify its terms, provided that the result is a fair and equitable agreement, negotiated and executed voluntarily.

If they are unable to agree, and the parties ultimately divorce, the party who still seeks to invalidate the premarital agreement must demonstrate, by clear and convincing evidence, the following:

1. The party executed the agreement involuntarily; or
2. The agreement was unconscionable when it was executed because that party, before execution of the agreement;
3. Was not provided full and fair disclosure of the earnings, property, and financial obligations of the other party;
4. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party; or
5. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or
6. Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.

Needless to say, meeting the burden of invalidating a properly executed premarital agreement, is a daunting task that will be costly, time consuming, and involve an element of risk, depending on the terms of the premarital agreement that may be intended to discourage such litigation. For example, many premarital agreements provide that if a party seeks to set aside the agreement, that party will be responsible for the other party's attorneys' fees.

For all the above reasons, anyone finding themselves in such a predicament should explore the possibility of renegotiating the premarital agreement before the relationship has broken down to the point of no return. The modified agreement may be the subject of some scrutiny if divorce follows, however, the modified agreement may also be what is necessary to rebalance the energy and control in the partnership, saving it from demise. In the latter case, divorce will have been obviated.

Will an agreement made during the marriage, between married partners, be enforced?

A mid-marriage agreement could occur in a situation where there is no premarital agreement and during the course of the marriage, one spouse begins to contemplate the economic consequences of a divorce and desires to use whatever leverage they have while the marriage is still viable. However, our courts look very closely at such agreements, which are distinct from premarital or post-marital agreements, as the mid-marriage agreement is inherently coercive. This is because a spouse who has already committed to the marriage, had children, and desires to preserve the family unit is in an emotionally compromised position. A court that is called upon to determine the validity of such an agreement will scrutinize the facts carefully to identify any coercive tactics.

In certain circumstances, the court will uphold what is referred to as a "reconciliation agreement." However, such an agreement will not be considered a reconciliation agreement, unless the marital relationship has deteriorated to the brink of indefinite separation or a suit for divorce. Under these specific circumstances, promises that induce reconciliation will be enforced if they are fair and equitable and the following factors are present:

1. The promise must have been made when the "marital rift was substantial."
2. In the event of a promise to convey real estate, there must be compliance with the statute of frauds (i.e., the conveyance in writing).
3. Whether the circumstances under which the agreement was entered into were fair to the party charged.
4. Whether the terms were conscionable when the agreement was made.
5. Whether the party seeking enforcement is acting in good faith.
6. Whether changed circumstances have rendered literal enforcement inequitable.

Thus, while a true reconciliation agreement will generally be upheld, as it promotes the renewal and stability of the marital relationship, a mid-marriage agreement that does not qualify as a "reconciliation agreement" is fraught with inherent coercion against a party who does not wish to dissolve the marriage, and who may sacrifice their own financial well-being for a hollow promise that the marriage will continue indefinitely. While mid-marriage agreements, *per se*, may be upheld, New Jersey courts have held that they must be closely scrutinized and carefully evaluated for fairness. In other words, the

enforceability of a mid-marriage agreement, which does not fall under the narrow category of a reconciliation agreement, is a veritable minefield.

What should I do if my spouse asks me to revise our pre-nuptial agreement or enter into an agreement during our marriage?

The simple and all-too-obvious answer is that although the issue is raised during a presumably intact marriage, experienced legal advice is going to be critical for anyone faced with this dilemma. It may feel counter-intuitive to seek counsel for a "mutual" agreement, but by the very fact that the issue is raised, each of the parties should be advised of their legal rights. It is not much different than when spouses in blended families undertake to perfect their estate planning arrangements. There are times when individual interests diverge, whether the marriage is rocky or the picture of stability. This is a heavily nuanced area of the law and one that requires factual analysis by an experienced family law attorney.