

**A CALL TO GEORGIA COURTS TO EXPOUND UPON  
THE FACTORS ENUMERATED IN *SCHERER* v. *SCHERER***

by:  
**Marvin L. Solomiany**

KESSLER | SCHWARZ, P.C.  
ATTORNEYS AT LAW

**I. INTRODUCTION**

Throughout the past decade, the number of Prenuptial Agreements being entered into by marrying couples has significantly increased. As a direct result of the increase in Prenuptial Agreements, a large volume of case law exists throughout the country governing the enforceability of such Agreements and has also resulted in more than 15 states adopting the Uniform Premarital Agreement Act (UPAA) which includes provisions relating to the enforcement of Prenuptial Agreements.

Unfortunately, Georgia has not followed the lead of other states and has not elaborated upon the factors enumerated by the Supreme Court in Scherer v. Scherer, 249 Ga. 635 (1982). In Scherer, the Court enumerated the following three (3) criteria which must be applied when determining the enforceability of Prenuptial Agreements:

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

Although Georgia has not adopted the UPAA, it is interesting to note that the criteria enumerated by the Court in Scherer is similar to the provisions contained in the UPAA governing the enforceability of Prenuptial Agreements which is as follows:

## § 6. Enforcement

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- (1) that party did not execute the agreement voluntarily; or
- (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

UPAA. § 6.

Arguably, Georgia Courts have not sufficiently elaborated upon the factors enumerated in Scherer to allow the practitioner to gain a clear understanding of the factors which will be considered when determining the enforceability of a Prenuptial Agreement. While the Georgia Supreme Court has considered the enforceability of Prenuptial Agreements in a limited number of cases, it is still not clear which factors will be analyzed by Georgia Courts when determining the enforceability of a Prenuptial Agreement. Due to the lack of elaboration by Georgia Courts

on these issues, it is necessary to review the analysis performed by other state Courts which have expounded upon factors similar to those enumerated by the Court in Scherer.

**A. Prenuptial Agreements Will Not Be Enforced If Obtained Through Fraud, Duress, Mistake Or Through Misrepresentation and Nondisclosure of Material Facts.**

Although Georgia Courts have not enumerated the factors which should be considered when making the determination whether a Prenuptial Agreement was obtained through fraud, duress, mistake and through misrepresentation and nondisclosure of material facts, Georgia Courts should consider factors which have been applied by other Courts when considering this issue. These factors include : (1) the timing of the execution of the Agreement, (2) the significance of legal counsel, and (3) the financial disclosures of the parties. See e.g., McMullin v. McMullin, 926 S.W.2d 108 (Mo. Ct. App. 1996); In Re Marriage of Bonds, 83 Cal.Rptr.2d 783 (1999)(on appeal before the Supreme Court of California); and Posner v. Posner, 233 So.2d 381 (Fla. 1970).

1. The timing of the execution of the Agreement.

The timing between the negotiation and execution of the Agreement is critical when determining questions of fraud and duress. Within this analysis, Courts will heavily weigh whether the parties discussed entering into a Prenuptial Agreement prior to its signing. Although most courts have not defined a specific time period which will be deemed sufficient, it is likely that those Agreements which have been discussed by the parties at least a couple of weeks prior to their signing will have a greater chance of being enforced. See e.g., Howell v. Landry, 386 S.E. 2d 610 (N.C. App. 1989) (enforced even though Agreement was only presented to wife one day prior to marriage as the parties had extensively discussed its provisions and changes sought

by Wife had been incorporated); and Marsh v. Marsh, 949 S.W. 2d 734 (Tex. App. 1997) (Prenuptial Agreement executed one day before the parties' wedding enforced as parties had previously discussed provisions of the Agreement notwithstanding Husband's allegation that he did not read the Agreement prior to signing same).

Likewise, Courts are not likely to enforce Agreements which have been formally discussed only a few days before the marriage. Agreements which are signed under these circumstances will likely be deemed involuntary. See e.g., Lutgert v. Lutgert, 338 So.2d 1111 (Fla.App. 1976)(invalidating Prenuptial Agreement where the unrepresented party was presented with the Agreement close to the time of the wedding); and In re Estate of Crawford, 730 P.2d 675 (Wash. 1986)(holding Prenuptial Agreement unenforceable when wife first learned of Agreement at her husband's attorney's office three days before the wedding).

As these cases demonstrate, the timing of the execution of the Agreement will also have an impact on the claim that the Agreement was executed under duress and/or coercion. Therefore, to avoid allegations of coercion, fraud and duress, ample time should be allocated from the date the negotiations begin to the date the Agreement is executed by the parties.

## 2. Significance of legal counsel.

In the context of Prenuptial Agreements, the main focus is not necessarily on whether a party was represented by counsel, but rather on the *opportunity* afforded to that party to retain counsel. Agreements where a party had ample opportunity to retain counsel, but elected to continue unrepresented are more likely to be enforced than those where the Agreement was presented to the party only several days before its signing, thereby not affording that party ample opportunity to consult with an attorney. Therefore, the practitioner should not only allot ample

time between the date of the signing of the Agreement and the wedding date, but must also clearly inform the other party of their right to seek counsel. Compare Greenwald v. Greenwald, 454 N.W. 2d 34 (Wis. App. 1990) (Agreement enforced when wife refused to retain counsel despite husband's attorney's advice for her to retain counsel); and Ferry v. Ferry, 586 S.W. 2d 782 (Mo. Ct. App. 1979) (Agreement not enforced when advice to unrepresented party to retain counsel was not made clear).

Although the presence of independent counsel is not a requirement to enforce a Prenuptial Agreement, the significance of legal counsel in the Premarital Agreement context cannot be overemphasized. Despite the holding in In Re Marriage of Bonds 83 Cal.Rptr.2d at 783 being on appeal, its reasoning on the importance of legal counsel is noteworthy as follows:

Within the family law context, ready and available access to legal representation has long been considered to one of the most important safeguards in ensuring fair settlements. . . *citations omitted*. . . Questions of fundamental fairness arise most particularly in the premarital contract context when the Agreement is between two people with unequal bargaining power and business expertise. Nothing raises the warning flag of unfairness more often than when an unrepresented party contracts with another party who is represented by an attorney and the unrepresented party waives statutory rights.

The importance of retaining legal counsel in the Prenuptial Agreement context is demonstrated by the fact that numerous jurisdictions have adopted a standard of review which *closely scrutinizes* the circumstances surrounding the execution of a Prenuptial contract when only one party has legal counsel and/or where one party has substantial unequal bargaining power. See Matter of Marriage of Foran, 834 P.2d 1081 (Wash Ct. App. 1992)(applying a test of reviewing with closer scrutiny those Prenuptial Agreements where the unrepresented party is at a negotiation and business disadvantage); Fletcher v. Fletcher, 628 N.E. 2d 1334 (Ohio 1994) (stating that when an Agreement provides disproportionately less to the party who had no

meaningful opportunity to consult with legal counsel, the burden shifts to the represented party seeking the enforcement of the Agreement); and Matter of Estate of Lutz, 563 N.W.2d 90 (N.D. 1997)(the lack of legal counsel is a significant factual factor when determining whether a party voluntarily entered into a Prenuptial Agreement).

### 3. Nondisclosure of Material Facts / Financial Disclosures.

A review of the case law from other jurisdictions indicates that all states require the parties in a Prenuptial Agreement to have reasonable knowledge of the assets, liabilities, and income of the other party. Therefore, Prenuptial Agreements have not be enforced unless they are entered into freely, knowingly, fairly, understandingly, in good faith and with *full disclosure*. Whitenton v. Whitenton, 659 S.W. 2d 542 (Mo.App. 1983)(emphasis supplied). Although most Prenuptial Agreements will contain a standard provision stating that each party is aware of the assets, liabilities, and income of the other party, these types of provisions by themselves will not be deemed to constitute full disclosure. Accordingly, the practitioner should not only ensure that this provision is included, but must also ensure that the Agreement includes a complete schedule of the financial disclosures of each party.

Attaching a financial disclosure to the Agreement decreases the possibility that a party seeking to set aside the Agreement can successfully argue that the Agreement was obtained through misrepresentation and fraud. An accurate financial disclosure of the parties is necessary to ensure that both parties have knowledge of the separate property of the other. See Lutgert, 338 So.2d at 1111.

A majority of Courts have refused to enforce Prenuptial Agreements where a party did not properly and completely disclose his/her assets. See McMullin, 926 S.W.2d at 108 (not

enforcing Prenuptial Agreement where Agreement listed all of Husband's property but failed to place a value on any of those assets and where wife was not given enough time between presentation of final draft and wedding to reasonably consider whether she should have sought legal advice prior to signing). "Full disclosure requires *both* parties to reveal the *nature* and *extent* of their property so that each spouse may make a meaningful decision to waive all or part of those rights . . . . In order to make an informed decision, a spouse should be substantially advised of the other spouse's property or have knowledge of those facts." In Re Marriage of Lewis, 808 S.W.2d 919, 923 (Mo.App. 1991)(emphasis supplied).

Nonetheless, it is important to note that in the absence of a full disclosure, an attorney seeking the enforcement of the Agreement is likely to inquire as to whether the party seeking to set aside the Agreement had independent knowledge of the financial assets of the other party. This argument will be made for the purpose of proving that the lack of full disclosure was nonprejudicial to the other party. See e.g., In Re Palamara, 513 N.E. 2d 1223 (Ind. Ct. App. 1987).

As with the other factors a Court will analyze when ruling upon the enforceability of a Prenuptial Agreement, it is unlikely that an improper financial disclosure will, by itself, be sufficient to set aside a Prenuptial Agreement. However, the absence of a full financial disclosure may give a Court more reason to closely scrutinize the other relevant factors.

**B. Agreements Which Are Unfair May Still be Deemed Conscionable and Therefore Enforced.**

The issue of whether a Prenuptial Agreement is unconscionable will be hard to determine not only because of the different interpretations of unconscionability, but also because most Prenuptial Agreements are inherently unfair (since in most instances there will be a party with

superior bargaining power and greater assets). Notwithstanding this inherent circumstance, it is important to recognize that an Agreement might be unfair, yet still be deemed conscionable. In other words, proving that an Agreement is unconscionable will be harder to establish than proving that an Agreement is unfair.

A majority of Courts have made it expressly clear that the test for unconscionability in the context of Prenuptial Agreements is not to be confused with the standard for unconscionability in commercial contracts. This reasoning is based on the fact that parties in a Prenuptial Agreement are involved in a confidential relationship that does not necessarily exist between two parties involved in a business relationship.

Prenuptial Agreements have been considered unconscionable when the “inequality is so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.” McMullin, 926 S.W.2d at 110 (citing Peirick v. Peirick, 641 S.Q.2d 195, 197 (Mo.App. 1982)). Courts will place an emphasis on factors such as a spouse’s ability to obtain alternative means of support and assets which they possessed at the date of the execution of the Agreement when determining whether an Agreement is unconscionable.

Those Agreements which provide for reasonable support and property division are more likely to be enforced than those which are one-sided. Likewise, those Prenuptial Agreements which provide for a lesser share to a spouse than what the party would be generally entitled to will be deemed unconscionable. See e.g., Hill v. Hill, 356 N.W. 2d 49 (Minn. Ct. App. 1984) (holding Agreement which included a waiver of alimony unconscionable as wife was a long-term homemaker with limited job skills).

Full disclosure is also an important factor when determining the conscionability of the Agreement as an adequate financial disclosure will justify the substantive unfairness of an Agreement. In other words, Courts will be more likely to enforce a Prenuptial Agreement in spite of its unfairness as long as it is established that the party against whom the Agreement is enforced had a full understanding of the property rights the party was waiving. Thus, some courts will determine whether the substantive terms of a Prenuptial Agreement are unfair or disproportionate before determining if there was adequate financial disclosure and whether the party contesting the Agreement entered into it freely and voluntarily. See Norris v. Norris, 419 A.2d 982 (D.C. 1980).

**C. Have The Facts and Circumstances Changed Since The Agreement Was Executed So As To Make Its Enforcement Unfair and Unreasonable.**

A review of whether the facts and circumstances have changed since the Prenuptial Agreement was executed makes it obvious that Courts will also have to determine whether the Agreement is fair at the time a party is seeking its enforcement. An important factor in this determination will undoubtedly revolve around the support provisions of the Agreement.

For example, in Gross v. Gross, 464 N.E. 2d 500 (Ohio 1984), the Court listed situations which would be considered when determining whether the support provisions of a Prenuptial Agreement were unfair. These included, but were not limited to: a health problem requiring considerable care and expense; change in the employability of the spouse; and changed circumstances of the standard of living of a spouse resulting by the marriage.

Courts have also considered the ability of a spouse to pay support to the other and a party's ability to obtain alternate means of support when ruling upon the enforceability of Prenuptial Agreements. For example, the Prenuptial Agreement in Tomlison v. Tomlison, 352

N.E.2d 785 (Ind. App. 1976) did not preclude the Wife's ability to receive support from Husband and was therefore enforced. Likewise, in Valid v. Valid, 286 N.E.2d 42 (Ill. App. 1972), the Court upheld a Prenuptial Agreement which prevented the Wife from receiving alimony mainly because she was trained, healthy, and employable. Consistent with Georgia law, these Courts recognized the importance of a spouse receiving support and only enforced those Agreements where a party was able to support himself/herself in the absence of receiving support from the other.

Courts have been extremely careful in enforcing Agreements which limit a Husband's obligation to support his wife. For example, in Buettner v. Buettner, 505 P.2d 600, 602-603 (Nev. 1973) (and cited by the Georgia Supreme Court in Scherer), the court stated that the majority of the cases wherein Prenuptial Agreements were not enforced were those where the husband sought to "relieve himself of his duty to support the wife in the event of divorce, or to limit his liability for such support to a small fraction of that which a court would be likely to decree in light of the wife's needs and the husband's ability to pay."

Notwithstanding the existence of changed circumstances, it is important to recognize that Courts will also consider whether the change circumstance was foreseeable and discussed by the parties when entering into the Agreement. If these circumstances were foreseeable and/or discussed, it is likely that a Court will enforce the Agreement. See e.g., Warren v. Warren, 433 N.W. 2d 295 (Wis. Ct. App. 1988) (enforcing Prenuptial Agreement notwithstanding wife's retirement because parties had discussed and anticipated her retirement); and Gant v. Gant, 329 S.E.2d 106 (W.Va. 1985)(stating that as a general rule "Prenuptial Agreements will be enforced

in their explicit terms only to the extent that circumstances at the time the marriage ends are roughly what the parties foresaw at the time they entered into the Prenuptial Agreement”).

**D. No Single Factor Is Likely to Determine the Enforceability of A Prenuptial Agreement.**

A review of the case law on the enforceability of Prenuptial Agreements makes it obvious that no single factor will determine whether an Agreement is enforced or not. However, the absence of one factor has led Courts to closely scrutinize the remaining factors. This becomes evident as further review of case law indicates that similar facts in different cases have led to different results depending on which of the aforementioned factors is weighed more heavily.

For example, although the Agreements in Scherer, 249 Ga. at 635 and Curry, 260 Ga. at 302 were enforced, it is helpful to point out the important factors which were apparently considered by the Court. For example, in Scherer, both parties were represented by counsel and the Agreement did not bar the Wife from seeking alimony from Husband. The Agreement in Curry was enforced notwithstanding the fact that it barred the Wife from a future claim for alimony or equitable division of property. The fact that (1) the parties had been previously married; (2) husband was filing for divorce for the third time throughout the course of the parties’ relationship; (3) wife received certain payments from Husband upon execution; (4) but for Agreement the marriage would have terminated in a divorce; and (5) that the parties were represented by counsel and dealt at “arm’s length and bargained for what they received” is an example of how a single factor (i.e., Wife waiving her right to support) will not be determinative on the enforceability of a Prenuptial Agreement.

## II. BAR TO ALIMONY AND ATTORNEY'S FEES *PENDENTE LITE* IN PRENUPTIAL AGREEMENTS.

Georgia Courts have not considered the issue of whether a spouse waives the right to temporary alimony and attorney's fees during the pendency of the litigation by executing a Prenuptial Agreement containing a clause waiving alimony and attorney's fees. A majority of Courts which have considered this issue have refused to enforce such provisions as it would change the duty of support during the marriage. See e.g., Boyer v. Boyer, 925 P.2d 82 (Okla. Ct. App. 1996); and Solomon v. Solomon, 224 A.D. 2d 331 ( N.Y. App. Div. 1996). Courts have reasoned that regardless of a waiver or limitation included in a Prenuptial Agreement, a spouse's obligation of support, including the spouse's obligation to pay attorney's fees, continues while the parties are still married and cannot be contracted away. Belcher v. Belcher, 271 So.2d 7 (Fla. 1972).

Therefore, a spouse's obligation to support the other spouse continues until the moment the marriage is actually dissolved by a final judgment (regardless of any contract or Prenuptial Agreement to the contrary). Mulhern v. Mulhern, 446 So.2d 1124, 1125 (Fla.App. 4 Dist. 1984) (referring to Belcher, 271 So.2d at 7). See also Trowbridge v. Trowbridge, 674 So. 2d 928 (Fla.App. 4 Dist. 1996) and Lawhon v. Lawhon, 583 So.2d 776 (1991). Likewise, in Farrell v. Farrell, 149 Ill.App. 47, a wife was not barred from seeking attorney's fees for services rendered to her in an action for separate maintenance by an antenuptial Agreement waiving such right where she was without funds and was challenging the validity of the antenuptial Agreement. Nonetheless, some courts have refused to award alimony and/or temporary attorney's fees when the Prenuptial Agreement specifically provides that no maintenance will be awarded *pendente*

*lite* (during the pendency of the litigation). See e.g., Arizin v. Covello, 669 N.Y.S. 2d (N.Y. Sup. Ct. 1998).

The reasoning applied by the aforementioned cases is consistent with Georgia's policy of allowing a party to obtain attorney's fees during the pendency of litigation. Thus, it is fair to assume that a Georgia Court would not enforce such a provision as it would change the duty of one spouse to support the other during the marriage. In Georgia, the allowance of attorney's fees in divorce cases is necessary to enable a spouse to properly protect her interests, to ensure that both spouses are effectively represented so that all issues can be fully and fairly resolved. See Brady v. Brady, 228 Ga. 617 (1972); and Johnson v. Johnson, 260 Ga. 443 (1990).

### **III. CONCLUSION**

Georgia should follow the approach adopted by other states and expound upon the principles established in Scherer relating to the enforceability of Prenuptial Agreements. Although the principles enumerated in Scherer are certainly good starting points when considering whether a Prenuptial Agreement will be enforced, the lack of case law elaborating on these principles makes it difficult to determine the likelihood that an Agreement will be enforced.