When is a premarital agreement unconscionable?

By Mitchell A. Jacobs and Navid Moshtael

In the recent case of *In re Marriage of Hill and Dittmer*, the Conrt of Appeal upheld the enforceability of a premarital agreement on various grounds, holding, in part, that the agreement was not unconscionable because husband had stated his wealth in the agreement, had offered wife the opportunity to investigate his finances and had acquired a knowing waiver of further disclosures from wife.

Sandra Hill and Thomas Dittmer are two "enormously successful" individuals. Prior to her marriage to Dittmer, Hill had been an editor of Mademoiselle and Brides magazines, and authored articles for Vogue, Allure, Traveler, Conde Nast Publications, USA Today and NBC News. In addition, she had her own television production company; was president of In Fashion, a division of RJR Nabisco; was the spokesperson for DuPont Lycra; and was a published author. The court observed in its opinion that "Hill is, by any measure, an accomplished business person who achieved enormous professional and economic success" and that "Dittmer was every bit her peer." Dittmer was founder and principal of Refco, a major independent commodities trading company.

Dittmer asked that the parties enter into a premarital agreement before their marriage and Hill agreed. Hill's attorney prepared all drafts of the agreement. Contained in the final agreement is a paragraph entitled "Disclosure of Property" which provides that "each party has disclosed to the other the general nature and extent of his or her assets, liabilities, and income," that the "parties acknowledge that Thomas has an approximate net worth of not less than $40,000,000, and that Sandy has an approximate net worth of not less than $10,000." The same paragraph provides that "each party voluntarily and expressly waives any further right to disclosure of the assets, liabilities, and income of the other party." The final agreement also states that Dittmer provided Hill's attorney with full and complete access to Dittmer's financial information and an opportunity to consult with him, any of his accountants and other representatives as to the nature, value and cash flow from any of his assets, and the nature and extent of his liabilities. Hill did not seek any financial disclosures from Dittmer.

Hill filed for dissolution of marriage and thereafter argued that the premarital agreement wherein she agreed to waive spousal support was invalid because she had not entered into the agreement volnntarily and because Dittmer, in his disclosures, had significantly understated his wealth (arguing that the agreement was unconscionable due to insufficient or inaccurate disclosures). Pursuant to Family Code Section 1615, in effect at the time Hill signed the agreement (2001), a premarital agreement would not be enforced if the party resisting enforcement could demonstrate that he or she did not enter into the contract voluntarily, or by demonstrating that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets and obligations. The current version of the Section 1615 still requires the agreement to be entered into voluntarily and requires that the agreement be conscionable (requiring full, fair and accurate financial disclosures unless there is a voluntary and express written waiver of disclosures).

The court held that Hill's contention that the agreement was tainted by fraudulent and inadequate disclosures was refuted by evidence that Hill, both in the agreement itself and in her conduct during the three-month period of negotiation, waived this claim. The court reasoned that Hill expressly waived any further disclosures by Dittmer in the agreement, and she did not take any steps to obtain financial disclosures from Dittmer during the negotiation period, although, pursuant to the recitals in the agreement, she was invited to do so. The opinion does not provide whether there were written disclosures exchanged between the parties outside of the disclosure in the agreement regarding the parties' net worth. Based on the Disclosure of Property paragraph, the assumptiou is that the only disclosure in this case was the statement within the agreement regarding the net worth of each party, coupled with a statement in the agreement that the parties had disclosed to each other the general extent and nature of his or her assets, liabilities and income.

The court also held that Hill had entered into the agreement voluntarily. The court noted that Hill had the advice of two attorneys specializing in family law and estate planning during the nine months the agreement was being negotiated. Hill's lawyer drafted the agreement and revised drafts in consultation with Dittmer and his attorney. These facts, coupled with Hill's professional background and evident skills, were sufficient to find that the agreement was voluntary.

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This case seems to support the proposition that once an individual has made a disclosure of wealth — limited only to a statement within the premarital agreement concerning the individual's net worth — coupled with the opportunity to investigate that person's financial circumstances and a waiver of further disclosure, it is sufficient to prevent the agreement from being found invalid on the grounds of a misrepresentation of wealth. The appendix of the *Marriage of Hill and Dittmer* case sets forth the provisions of the premarital agreement that resisted challenge and may just be part of a recipe for enforceability.

There are several lessons to be learned from *Marriage of Hill and Dittmer.*

First, while the take away from this case is that it is likely sufficient to state within the agreement the approximate net worth of your client, to offer the opportunity to the other side to investigate the financials of your client and to obtain a written waiver of further disclosures, it is prudent to attach to the agreement, to the extent possible, a fair, reasonable and full disclosure of the property and financial obligations of your client. While this may not be practical in every case, given that the current version of Section 1615, requires a "fair, reasonable and full disclosure," if the opposing party ever challenged the agreement on the basis that it was not voluntarily entered into, the agreement would be less likely to be held unenforceable if there were complete disclosures attached to the agreement coupled with a written waiver of further disclosures.

Second, advise your clients in writing to take the waivers set forth in premarital agreements seriously because there is a high likelihood the court will enforce them. The court noted: "Judicial erasnre of a competent adult's signature on an agreement does not serve the purpose of the law of contracts, i.e., to protect the reasonable expectations of the parties."

Third, what are often casually overlooked as boilerplate recitals or provisions can be used to defeat a challenge to prove that the challenging party signed the agreement voluntarily and had sufficient opportunity and access to the other party's financial information. If your client is going to sign a premarital agreement with a provision that he or she was given the opportunity to access to the financials of the other party, then advise your client in writing to take the opportunity to review those financials before he or she signs the agreement.

Fourth, the court in its decision notes that Hill was aware of the operative provisions of the agreement from the various drafts of the agreement that were negotiated, revised and exchanged prior to the final document. Accordingly, preserve all drafts, revisions, correspondence, emails, etc. which constitute a contemporaneous record of what transpired. Also, remember Evidence Code Section 622, which provides that the facts recited in a written instrument are conclusively presumed to be true as between the parties. Be careful of the recitals.

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