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HOW TO DEFEAT A PRENUPTIAL AGREEMENT:

DRAFTERS BEWARE!

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For the past several months, at most any social gathering I attended, I found myself pressed by inquiries about “the Lotto case.” Like most, I read about the woman from Long Island who won \$25 million dollars in the New York State Lottery, and thought it said that she and her husband, two adults well into their seventies, would be divorcing over sharing lottery winnings.¹ My curiosity ended there and I really didn’t have the urge to delve further, chalking it up to an old proverb “that money can’t buy happiness.” However, after being asked one time too many about the matter without the specifics at my fingertips, and being a typical member of my profession, never for want of words or an opinion, I decided to read the legal decisions rendered in the matter.²

The New York Domestic Relations Law provides that *except where the parties have provided in an agreement for the disposition of their property*, the court in certain matrimonial actions shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment; “separate property” shall remain such and “marital property” shall be distributed equitably between the parties.³

Separate property is defined to include *inter alia* “property acquired before marriage, property acquired by bequest, devise, or descent, or gift from a third party other

¹ Her after tax winnings were approximately \$8.5 million.

² See *Parker v. Parker*, 196 Misc.2d 672, 766 N.Y.S.2d 315 (Supreme Court, Nassau Cty, Sept. 2003); *Parker v. Parker*, 2003WL2293980(N.Y.Sup), (Supreme Court, Nassau Cty-Dec.2003)

³ Domestic Relations Law (DRL) Sections 236(B)(5)(a),(b) and (c).

than the spouse as well as property described as separate property by written agreement of the parties.”⁴

The statutory definition of marital property “ ... is all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or before the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in an agreement...marital property shall not include separate property as hereinafter defined.”⁵

In effect, without a prenuptial agreement or a postnuptial agreement, it is the Court and not the individuals who decide how their assets are distributed upon the dissolution of the marriage. It is not unusual for those entering into second marriages who have children from prior relationships, to desire the preservation of their premarital assets for their respective children rather than their “newly acquired spouse” and to reserve to themselves the right to control their assets without spousal consent. While still smitten with cupid’s arrow, the prenuptial agreement allows individuals to “opt-out” of the equitable distribution laws and resolve in advance of a marital breakup the financial aspects of their new partnership thus removing the allocation of assets from the court’s domain when marital bliss has long vanished.

With those considerations in mind, and after full financial disclosure to their intended, the parties, preferably represented by independent counsel, enter into an agreement whereby, in the event of divorce, their assets are removed from the realm of “equitable distribution.”

⁴ DRL Section 236(B)(1) (d)

⁵ DRL Section 236(B)(1)(c)

Apparently, the wife who won millions in the lottery thought she had done just that. The husband disagreed and commenced an action for divorce.⁶

“TO THE TITLED OWNER BELONGS THE SPOILS”

By way of background, the couple prior to their marriage in June 1987, entered into a properly executed and acknowledged written agreement whereby they defined sole and separate property “to include any real or personal property individually owned by either party whether the same be acquired to or subsequent to the execution of this agreement and marriage of the parties” and “marital property”(to) include only such real or personal property held jointly or by the entirety. The agreement further provided in the event of a divorce, neither party shall make a claim against the other’s title and interest in his or her sole and separate property.⁷ By this agreement, the couple clearly opted out of the equitable distribution law and made title to the property the controlling factor in determining the ownership in the event of divorce.

The Court noted in its opinion that the couple lived a modest life together, each received social security and small pensions, occasionally vacationed together in Las Vegas and Atlantic City where they both gambled and the wife regularly played the New York Lottery using the same sets of numbers comprised of family birth dates and ages.

On February 12, 2003, the wife purchased her customary lottery ticket using her customary sets of numbers and with uncustomary luck was the only winner of the \$25 million jackpot. The New York State Lotto Commission check was made payable to

⁶ Motions were made for a restraint of the assets both marital and separate and a protective order, restraining husband’s dissemination of wife’s EBT testimony to the press. It was within the context of deciding these motions that the Court determined the nature of the lottery winnings pursuant to the terms of the parties’ prenuptial agreement.

⁷ See *Parker v. Parker*, 96 Misc.2d 672, 766 N.Y.S.2d 315, p. 316.

the wife . Subsequently, the wife established a trust, into which she deposited nearly all the winnings and title to a newly acquired condominium which her husband would receive if living in the residence at the time of her death (as well as income from \$500,000 segregated into a marital trust); the balance of the trust passed to the wife's children.⁸ Her conduct appeared to be in compliance with the parties' prenuptial agreement.

“THE ORAL DEAL”

The law is well established that a lottery prize won during a marriage is generally considered as property acquired during the marriage and subject to equitable distribution.⁹ However the parties by their prenuptial agreement had clearly opted out of the equitable distribution laws and accordingly, the Court rightly determined that the lotto winnings were the sole and separate property of the wife.¹⁰

How then did the husband plan to share in his wife's good fortune? What legal authority could be mustered to defeat the terms of the prenuptial agreement by which the couple had lived for nearly sixteen years? He did not attack the validity of the agreement based upon fraud due to undue influence, unconscionability or mutual mistake of fact; the potential cadre of defects that the drafter diligently seeks to avoid. *Instead the husband claimed that the lotto winnings were the product of the party's joint venture, and thereby constituted joint property subject to equitable distribution by the court.*

⁸ The facts are clear in the case that the wife proceeded in her actions as the parties contemplated in their prenuptial agreement made in 1987. Nevertheless, her husband filed for divorce and moved for an order restraining her from making any disposition of her separate and/or the marital assets including the lotto winnings during the pendency of the action..

⁹ Campbell v. Campbell, 213A.D.2d 1027, 624 N.Y.S.2d 493; Smith v. Smith, 162 A.D.2d 346, 557 N.Y.S.2d22 *leave denied* 77N.Y.2d805, 568N.Y.S.2d913

¹⁰Parker v. Parker, 2003 WL2Z93938 (N.Y.Sup.).

Eventually, at trial, the husband would first have the burden to prove that the parties made a specific oral agreement to share the lottery winnings, that the wife's purchase of the ticket was in furtherance of the parties' "joint venture," and that her failure to share the \$25 million prize breached the agreement.¹¹ Once the husband proved the lottery winnings were the fruit of the parties' joint venture and since the winnings were acquired during the marriage, the Court could then determine the nature of the property as marital or separate property and if marital, decide the distribution thereof.¹²

A creative argument and apparently one that the wife's counsel believed had merit.¹³

DRAFTING FOR THE FUTURE

In light of this case, what if anything should the drafter of a prenuptial agreement include in its terms and advise clients to subvert a subsequent "joint venture" claim by a disgruntled spouse?

At the very least, consider an express statement that lotto prizes won by either party during the marriage are not marital property and are the separate property of the ticket holder. In addition, include a provision that oral agreements or promises which could form the basis of a joint venture, whether express or implied are not enforceable, and a provision waiving, releasing, relinquishing and renouncing any right or claim from any oral agreement or promise irrespective of any reliance of the party upon such

¹¹ An oral agreement to share lottery winnings is valid and enforceable. See *Johnson v. Spence*, 286A.d.2d481, 730 N.Y.S.2d 334

¹² Court has the authority in an action for divorce to decide title question pursuant to Domestic Relations Law Section 234.

¹³ It is the writer understands that the case has been settled. Other factors influencing settlement may have been the age of the parties, the debilitating illness and deteriorating health of the husband and the fact that he did not have access to the newly acquired condominium.

agreement or promise. These provisions may serve to survive a “joint venture” challenge such as in the Parker case. Clients should be forewarned about subsequent postnuptial business arrangements with their spouse and the necessity for a written agreement.

Of course, it is always the option of the winner to share...