The Burden of Proof in Vacating Prenuptial Agreements[1]

Elliott Scheinberg

It is settled law that a duly executed prenuptial agreement is given the same presumption of legality as any other contract.[2] Public policy favors private agreements so that parties may arrange their own lives.[3] The document must be read as a whole to determine the parties' intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized.[4] The prenuptial agreement is controlling unless and until it is set aside.[5] In *Matter of Greiff,*[6] the Court of Appeals simultaneously elevated betrothed parties entering into prenuptial agreements to a fiduciary relationship[7] and reviewed the issue of who carries the burden of proof in prenuptial agreement contests.[8]

Actions to vacate prenuptial agreements are extremely popular, in fact, almost anticipated. But is it its challenger who must sustain the initial demonstration of wrongdoing by the agreement's proponent, as one would expect? Or must the agreement's proponent first prove its freedom from taint? Traditional principles instruct that the party seeking invalidation of a prenuptial agreement has the burden of coming forward in evidentiary fashion, wrongdoing will not be presumed.[9]

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[1] N.Y.L.J., April 2, 2004.

[2] Matter of Sunshine, 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999, affg. 51 A.D.2d 326, 381 N.Y.S.2d 260 (1976).

[3] Matter of Greiff, 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752 (1998).

[4] DelDuca v. DelDuca, 304 A.D.2d 610, 758 N.Y.S.2d 145 (2nd Dept., 2003).

[5] Rubin v. Rubin, 262 A.D.2d 390, 690 N.Y.S.2d 742 (2nd Dept., 1999); Edmonds v. Edmonds, 184 Misc.2d 928, 710 N.Y.S.2d 765 (N.Y.Sup., 2000).

[6] 92 N.Y.2d 341, 703 N .E.2d 752, 680 N.Y.S.2d 894 (1998).

[7] The Court reasoned that: (1) their inchoate bond does not stand them at arm's length to each other, (2) theirs is a relationship of the highest trust and confidence that must govern the determination of their rights thereunder, (3) their relationship, by its nature, is permeated with trust, confidence, honesty and reliance – synonyms for a fiduciary relationship, and (4) there is a reasonable expectation that such relationships are almost universally beyond the pale of ordinary commercial transactions.

[8] *Greiff*, thus, overruled prior law that held that there was no fiduciary relationship between an engaged couple. Eckstein v. Eckstein, 129 A.D.2d 552, 553, 514 N.Y.S.2d 47, 49 (2nd Dept.,1987), referred to the subsequent confidential relationship after their marriage.

[9] Matter of Estate of Garbade, 221 A.D.2d 844, 633 N.Y.S.2d 878 (3rd Dept., 1995), leave to appeal denied, 88 N.Y.2d 803, 668 N.E.2d 417, 645 N.Y.S.2d 446 (1996).

In *Greiff*, the Court of Appeals reviewed an appeal from a widow whose husband died three months after their marriage; he was 77, she 65. The wife signed a prenuptial agreement waiving her right of election against the estate. Learning upon his death that her husband left all of his possessions to his children., she challenged the will raising the standard allegations. The Surrogate invalidated the agreement on the ground that the husband exploited his "great influence and advantage" with his wife-to-be, and subordinated her interests to her prejudice and detriment. The husband was found to have exercised bad faith, unfair and inequitable dealings, undue influence and overreaching when he induced her to sign the agreement in also having selected and paid for her attorney. The Appellate Division reversed. The Court of Appeals reversed the Appellate Division.

The Court framed the issue as whether the special relationship between betrothed parties who execute a prenuptial agreement can warrant a shift of the burden of persuasion bearing on its enforceability. *Greiff* sought to harmonize variant precedent decisions across a century of evolving social climates.[10] The analysis throughout *Greiff* is unsteady and the outcome uncertain.

First, the Court stated that "a party challenging the judicial interposition of a prenuptial agreement, used to defeat a right of election, may demonstrate by a preponderance of the evidence that the premarital relationship between the contracting individuals manifested "*probable" undue and unfair advantage*. I*n these exceptional circumstances,* the burden should fall on the proponent of the agreement to show freedom from fraud, deception or undue influence." The contiguous placement of the term "probable undue advantage", an undefined and unquantified diminished evidentiary standard, to the limiting phrase, "in these exceptional circumstances", strongly urges that this relaxed standard is not to be embraced as a universal bellwether but rather confined to its facts, or other "exceptional circumstances."

Greiff cites *Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,*[11] wherein an estate administrator challenged the transfer of funds by the decedent to the nursing home in which she was a patient one month before her death, in support of the proposition that: "... *in analogous contractual contexts*... where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest) to disprove fraud or overreaching."

Greiff held that, like *Gordon*, the burden shifting is applicable to prenuptial agreements whenever the underlying facts between the parties appear to be of such a character as to render it certain that either on the one side, from superior knowledge of the matter derived from a fiduciary relation or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable. *Greiff* added that it is incumbent upon the stronger party [which in the grand scheme of prenuptial agreements means the wealthy spouse] to show affirmatively that no deception was practiced, no undue influence was used,

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[10] See, In re Phillips' Estate, 293 N.Y. 483, 58 N.E.2d 504 (1944) and Graham v. Graham, 143 N.Y. 573, 38 N.E. 722 (1894).

[11] 45 N.Y.2d 692, 385 N.E.2d 285, 412 N.Y.S.2d 593 (1978).

and that all was fair, open, voluntary and well understood. Exceptional, or even superior, economic position alone, seems sufficient, as a matter of law, to universally laminate a spouse-to-be in an aura of sinister virtue and negative legal presumption, immediately suspect of wrongdoing, perhaps even enough to warrant a shift of the burden of proof.[12]

The puzzling thorn pricks from within the Court's reasoning in its having *analogized Greiff* and *Gordon*.[13] Medical testimony in *Gordon* revealed that the patient, following a stroke, was "confused, drowsy and at times semicomatose, partially paralyzed, unresponsive and uncooperative, sometimes required to be restrained for her own safety and of impaired hearing, not coherent, could not be understood and was not capable herself of understanding. There was little change in her condition during the entire period of her stay at the hospital." It was under those circumstances that the Court shifted the burden to the nursing home. A far cry from *Greiff.*

However, although *Greiff*'s analysis throughout the decision appeared imprecise with questionable value towards predicting future outcomes in prenuptial contests,[14] focus on the underlying facts in *Gordon* immediately confirms its philosophical consonance with *Greiff* as well as with the general rule regarding the burden of proof. The illumination becomes instantly apparent when analogized to a sister principle in tort law, *res ipsa loquitur,* to wit, that circumstances attendant on an occurrence may establish the plaintiff's *prima facie* case, in light of common sense, taken with the surrounding circumstances, and past experience, to present a question of fact for the defendant to meet with an explanation.[15] It is, therefore, obvious that there is no epiphany in *Gordon* because the patient's condition in and of itself established a *prima facie* case of the impossibility of a lucid transfer of funds to the home. Having presented her condition before the court, the patient's administrator immediately sustained his burden of proof to the extent possible, consistent with the principle of *res ipsa loquitur,* thereby warranting a shifting of the burden unto the nursing home to defend itself. Thus, despite the dramatically divergent factual settings between *Gordon* and *Greiff* there remains an underlying commonality of thinking and application of the same principle.

Although *Greiff* is rife with cautionary statements against an overly broad reading, it has, nevertheless, been erroneously interpreted as the watershed case that automatically shifts the burden unto the proponent of the agreement in prenuptial contests to establish that it was free from any impropriety. *Greiff* repeatedly and vigorously emphasized that although burden shifting may be

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[12] This reasoning has less bearing to parties who are similar economic circumstances.

[13] Sepulveda v. Aviles, 308 A.D.2d 1, 762 N.Y.S.2d 358 (1st Dept., 2003), noted that burden shifting is most typically applied to evaluate transactions which, at least on the surface, appear to involve the exploitation of elderly or mentally incapacitated persons by those intent on violating the trust reposed in them.

[14] It is noteworthy that in Matisoff v. Dobi, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997), the Court stressed the importance of providing the bench and bar with a predictable result.

[15] See, Black's Law Dictionary (7th ed. 1999).

valuable to prenuptial agreements under appropriate circumstances,[16] it is neither presumptively applicable nor precluded because absolutist rubrics may ill serve the interests of fair conflict resolution of these kinds of ordinarily useful agreements:

a. "A party seeking to vitiate a contract on the ground of fraud bears the burden of proving the impediment attributable to the proponent seeking enforcement...This rubric also applies generally to controversies involving prenuptial agreements... This Court has eschewed subjecting proponents of these agreements to special evidentiary or freighted burdens", citing *Gordon*; and

b. "Indeed, the law starts marital partners off on an equal plane. Thus, whichever spouse contests a prenuptial agreement bears the burden of establishing a fact-based, particularized inequality before a proponent of a prenuptial agreement suffers the shift to disprove fraud or overreaching."

Greiff stressed that burden shifting must be determined on an individualized fact based review when a particularized and exceptional scrutiny may obtain, it is not an absolute; that the dispositive test
of the legitimacy of prenuptial agreements need not pivot on legalism or the concept of presumptiveness. The analogy to *Gordon* underscores that the burden of proof does not shift to the proponent of the agreement unless the opponent establishes a *prima facie* case either under *res ipsa loquitur* or traditional principles.

***Greiff* on Remand**

On remand the Second Department[17] adhered to its original decision that the wife, at the trial level, had failed to meet her burden by a preponderance of the evidence to show that: (1) the premarital relationship between her and the decedent manifested 'probable' undue and unfair advantage, (2) her execution of the agreement whereby she waived her right to an elective share was procured through the decedent's fraud or overreaching, and (3) she was not advised of the effect of the prenuptial agreement, failed to comprehend it, or entered into it unwillingly.

Furthermore, a cursory comparison between the Appellate Division's decision on remand

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16. "Whenever * * * the relations between the contracting parties appear to be of such a character as to render it certain that * * * either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, * * * it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood... This enduring, nuanced balance of fair assessment can be applicable in the context of prenuptial agreements." In Matter of Greiff, 92 N.Y.2d 341, 703 N.E.2d 752, 680 N.Y.S.2d 894 (1998)

17. In re Greiff, 262 A.D.2d 320, 691 N.Y.S.2d 541 (2nd Dept., 1999).

and its first decision[18] readily shows that the last two sentences in both are virtually identical, including the cited decisional authority.[19] Even the preliminary statements of law are the same except that on remand the Second Department incorporated the word “probable” into its ruling. Interestingly, despite the Court of Appeals' complex trek through a century of emerging social outlook, Mrs. Greiff was denied leave to appeal her loss on remand.[20]

In sum, *Greiff* has neither expanded nor abridged any existing evidentiary standards and remains consistent with traditional principles. It has, in effect, pronounced nothing beyond that which does not already exist in the body of the rules evidence.

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[18] In Matter of Greiff, 242 A.D.2d 723, 663 N.Y.S.2d 45 (2nd Dept., 1997).

[19] The lone difference is meaningless: the earlier decision refers to the agreement as “the subject antenuptial agreement” and the latter one refers to it as “the prenuptial agreement.”

[20] In re Greiff, 93 N.Y.2d 817, 719 N.E.2d 925, 697 N.Y.S.2d 564 (1999)