PREMARITAL AGREEMENTS

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A. Introduction

Premarital agreements are also referred to as prenuptial agreements or antenuptial agreements. Regardless of the name used, they are legally identical. Premarital agreements are contracts entered into by prospective spouses to fix their property rights and spousal support obligations in advance of marriage. That is, they are executed prior to marriage and are enforceable after the wedding of the contracting parties. Premarital agreements generally are entered into because one or both parties wishes to establish and/or limit the economic rights and responsibilities of each party in the event of the death of a spouse or the dissolution of their marriage.

Premarital agreements can provide substantial economic protection for a spouse with significant assets by limiting or eliminating the amount of equitable distribution and/or alimony to which the other spouse would otherwise be entitled in the event of dissolution of the parties' marriage. For example, a premarital agreement may provide that a spouse is entitled to no distribution of any marital assets and no alimony regardless of the term of the marriage, or may limit the amount of equitable distribution and alimony regardless of the size of the marital estate. A premarital agreement might also be beneficial to the prospective spouse who is in a financially inferior position in the economic relationship. By setting forth the support rights of the spouse should the marriage fail, a premarital agreement may provide a sense of security that will be an inducement to entering into the marriage. This is especially important when one spouse intends to devote all or a large segment of time to the home at the risk of loss of wage-earning capabilities.

B. Enforceability

Presently, a prospective spouse has the right to freely choose to enter into a premarital agreement which may be disadvantageous and the agreement will be upheld if it satisfies the criteria for validity as provided by Florida law. *See* Casto v. Casto, 508 So.2d 330 (Fla. 1987).

A premarital agreement must be in writing in order to be enforceable. There are two exceptions to this general rule. First, an oral premarital agreement can be enforceable where it is fully performed by both parties. O'Shea v. O'Shea, 221 So.2d 223 (Fla. 4th

DCA 1969), *cert. den.* 225 So.2d 919 (Fla. 1969). This case upheld an oral premarital agreement based on clear and positive proof of performance of the contract which took the contract out of the statute of fraud requirement. The second exception is when the contract is agreed upon prior to the marriage, but the writing is not prepared until after the marriage. Trapani v. Gagliardi, 502 So.2d 957 (Fla. 2d DCA 1987), cert. den. 508 So. 2d 13 (Fla. 1987); Flagship National Bank of Miami v. King, 418 So.2d 275 (Fla. 3d DCA 1982).

The following rights are not subject to waiver by a premarital agreement:

a. Temporary support/alimony obligations. Belcher v. Belcher, 271 So.2d 7 (Fla. 1972);

b. Attorney's fees incurred up to the point of final dissolution of marriage cannot be conclusively waived. Hartman v. Hartman, 761 So.2d 429 (Fla. 5th DCA 2000) (Temporary attorney's fees and support and attorney's fees up to the point of the dissolution judgment cannot be waived in a prenuptial agreement); Blanton v. Blanton, 654 So.2d 1240 (Fla. 2d DCA 1995); Urbanek v. Urbanek, 484 So.2d 597 (Fla. 4th DCA 1986). *See also* Fernandez v. Fernandez, 710 So.2d 57 (Fla. 4th DCA 1998) and Mulhern v. Mulhern, 446 So.2d 1124 (Fla. 4th DCA 1984), Simmers v. Simmers, 851 So.2d 778 (Fla. 2d DCA 2003); *But see* Lashkajani v. Lashkajani, 911 So.2d 1154 (Fla. 2005) (Prevailing party provisions concerning litigation over the validity of the agreement are enforceable).

c. Child support, child custody and visitation. Ervin v. Chason, 750 So.2d 148 (Fla. 1st DCA 2000) (Parents cannot contract away obligation to support child); Feliciano v. Feliciano, 674 So.2d 937 (Fla. 4th DCA 1996) (The court has the final decision on any matters relating to child support, visitation and custody, and any agreement of the parties as to these issues is always subject to review by the court to protect the best interests of the children); Lane v. Lane, 599 So.2d 218 (Fla. 4th DCA 1992) (Trial court is not bound by agreement of parties when deciding child visitation rights under divorce decree).

d. Retirement benefits waived prior to marriage may not comply with ERISA requirements that *spouse* execute the waiver.

Consideration

The only consideration required for a premarital agreement is the marriage itself. O'Shea v. O'Shea, 221 So.2d 223 (Fla. 4th DCA 1969), *cert. den.* 225 So.2d 919 (Fla. 1969). If no marriage occurs, then the premarital agreement is not valid. As a form of contract, a premarital agreement is governed by the general principles of contract law. Thus, it will not be enforced when it is shown to have been procured by fraud, mistake, coercion, or duress, or when there is a lack of adequate consideration. However, the relationship between the parties to a premarital agreement is one of mutual trust and confidence and they do not deal at arm's length. Therefore, each party must exercise a high degree of good faith and candor in all matters bearing on the premarital agreement.

If the agreement is unfair or unreasonable, given the circumstances of the parties, and if the trial court finds that it is disproportionate to the means of the spouse defending the agreement, then a rebuttable presumption arises that there was concealment by the defending spouse or a lack of knowledge by the challenging spouse of the defending spouse's finances at the time of the agreement. Casto v. Casto, 508 So.2d 330 (Fla. 1987).

The burden then shifts to the defending spouse, who can rebut this presumption upon a showing that (a) that the defending spouse has made a full, frank financial disclosure relative to the value of the marital property and the income of the parties, or (b) that the challenging spouse has a general knowledge of the character and extent of the parties' assets and income. The test in this regard is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether the challenging spouse is prejudiced by the lack of information. A determination of whether a premarital agreement makes fair and adequate provision for the supported spouse requires looking beyond the face of the instrument. Generally, pursuant to Casto and DelVecchio v. DelVecchio, 143 So.2d 17 (Fla. 1962), the courts will consider the following to determine whether the agreement is fair in light of the parties' circumstances:

a. The parties' relative situations, including ages, health, education, financial status and experience;

b. Whether the provisions made in the agreement would enable both parties to maintain a standard of living consistent with that established during the marriage;

c. Whether the provision for the less affluent spouse is disproportionate to the means of the more affluent spouse;

d. A comparison of the provisions of the agreement versus what each party would get without the agreement;

e. An examination of the property each party brought into the marriage.

General Knowledge

In Hjortaas v. McCabe, 656 So. 2d 168 (Fla.2d DCA 1995), *rev. den*. 662 So.2d 342 (Fla. 1995), a premarital agreement was set aside in part on the basis of duress and coercion and in part due to the husband's failure to provide sufficient disclosure of his financial net worth at the time of the agreement's execution. Pursuant to the premarital agreement, the wife was to leave the marriage with a lump sum of $48,000, even though the husband's net worth totaled approximately $2 million at the time of the premarital agreement and wife had zero net worth. Husband argued that wife was familiar with husband's properties and, therefore, had a proximate knowledge of the character and extent of his marital property. The court held that even though the wife worked for the husband at one of his businesses, she did not have the financial sophistication to interpret the figures she saw into an appraised value of the husband's net worth at the time the agreement was executed.

In Cladis v. Cladis, 512 So. 2d 271 (Fla. 4th DCA 1987), the agreement was held to be valid although it was unfair and inequitable to the wife, because she had full and complete knowledge of the husband's finances prior to signing. *See also* Brighton v. Brighton, 517 So.2d 53 (Fla. 4th DCA 1987) (husband's attempt to set aside agreement on claim that agreement was unreasonable was defeated by wife's showing that husband had adequate knowledge of marital property and income at the time the agreement was reached).

Full and Frank Disclosure

The actual form and manner of disclosure is not significant so long as the party provides their financial net worth and income. Del Vecchio. The information can be exchanged orally or it can be in writing; it can be part of the agreement or independent of the agreement. In addition to providing a disclosure of the assets and liabilities, a party must also supply an approximate value. O'Conner v O'Conner, 435 So.2d 344 (Fla. 1st DCA 1983) (The disclosure need only be full and fair, not minutely detailed nor exact.); Baker v. Baker, 622 So.2d 541 (Fla. 5th DCA 1993) (Unfair antenuptial agreement was valid and enforceable in both Florida and Pennsylvania as there had been full and fair financial disclosure prior to execution, and there was no fraud, misrepresentation, or duress involved.); Doig v Doig,

787 So.2d 100 (Fla. 2d DCA 2001) (Upholding agreement despite fact that agreement was not presented to wife until ten days before wedding, where husband had fully disclosed financial condition to wife prior to signing premarital agreement by giving her his financial affidavit at time of execution, especially where parties had lived together for five years prior to marriage).

There is no duty to hire an expert to determine the value of an asset for purposes of full disclosure. Waton v. Waton, 887 So.2d 419 (Fla. 4th DCA 2004) (where Husband listed his business interest with an "exact value unknown," the court held that an appraised value would have made no difference where Wife accepted that she would receive nothing from the business).

C. Other Defenses to Enforcement

a. Abandonment and rescission

McMullen v. McMullen, 185 So.2d 191 (Fla. 2d DCA 1966) (Abandonment of contract is effected where one party acts inconsistent with the existence of the agreement and the other party acquiesces in the inconsistent conduct. This is tantamount to a rescission of the contract by mutual assent); Gustafson v. Jensen, 515 So.2d 1298 (Fla. 3d DCA 1987) (Act of tearing up agreement with intent to destroy, effect was abandonment and rendered agreement void); Maruri v. Maruri, 582 So.2d 116 (Fla. 3d DCA 1991); Painter v. Painter, 823 So.2d 268 (Fla. 2d DCA 2002).

b. Reformation

Kartzmark v. Kartzmark, 709 So.2d 583 (Fla. 4th DCA 1998) (Reformation is appropriate when there has been a mutual mistake in the way the instrument is drawn which does not accurately express the true intention or agreement of the parties.); Howard v. Howard, 467 So.2d 768 (Fla. 1st DCA 1985); Mills v. Mills, 339 So.2d 681 (Fla. 1st DCA 1976) (In order to reform contract, it must be demonstrated that there was a definite prior agreement to which the instrument can be made to conform.

c. Acceptance of the benefits

Generally, a person may not retain the benefits of a settlement while attacking its

validity, however, where the person is entitled to at least the amount accepted, he or she is not estopped from claiming a greater amount. Brackin v. Brackin, 182 So.2d 1 (Fla. 1966); Rund v. Rund, 215 So.2d 763 (Fla. 3d DCA 1968) (wife's acceptance of payments from husband which were directed to be made by final judgment of dissolution did not preclude her from bringing appeal where there was no showing of prejudice to husband as payments were not alimony, but return of wife's own money).

d. Representation of Counsel not required

Incompetent legal advice or the absence of counsel is not, standing alone, a basis to vacate an agreement. Casto, *supra*; *see also* Cladis, *supra*; Tenneboe v. Tenneboe, 558 So.2d 470 (Fla. 4th DCA 1990); McGuire v. McGuire, 385 So.2d 151 (Fla. 3d DCA 1980) (Holding that agreement would not be set aside on grounds of overreaching, duress or coercion where agreement was not unreasonable and only basis for husband's claim was that he was unrepresented by counsel). However, the fact that a party was unrepresented by counsel underscores the necessity for full compliance with the fiduciary responsibilities inherent in the marital relationship. Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981), *citing* DelVecchio. Thus, while not solely determinative, the lack of legal representation is a factor to consider together with all other circumstances when there is a claim of fraud, duress, or other actionable misconduct. *See* Thomas v. Thomas, 571 So.2d 499 (Fla. 1st DCA 1990); Micale v. Micale, 542 So.2d 415 (Fla. 4th DCA 1989).

D. Interpretation

If the language of an agreement is subject to more than one reasonable interpretation, the rules of contract construction should be used to advocate a certain interpretation or application. Ordinarily, the words of a contract are to be given their plain and simple meaning, unless the context of the contract indicates that an unusual meaning was intended. Berry v. Berry, 550 So.2d 1125 (Fla. 3d DCA 1989); McIlmoil v. McIlmoil, 784 So.2d 557 (Fla. 1st DCA, 2001). Furthermore, it is well established that when an agreement is ambiguous, it should be interpreted against the interests of the party responsible for having it drafted. Critchlow v. Williamson, 450 So.2d 1153 (Fla. 4th DCA 1984); McIlmoil, *supra*; Johnson v. Johnson, 848 So.2d 1272 (Fla. 2d DCA 2003) (Settlement agreements are to be interpreted in accordance with laws governing contracts and absent evidence of the parties' to the contrary, the ambiguous language of the agreement should be interpreted according to its plain meaning).

A "whereas" clause in a premarital agreement is non-binding on the parties to the agreement and is not an "operative" provision of an otherwise unambiguous agreement, but rather a "recital" provision. In Johnson v. Johnson, 725 So.2d 1209 (Fla. 3d DCA 1999), *rev. den'd* 735 So. 2d 1285, the parties' premarital agreement provided, in a "whereas" clause, that the wife accepted the provisions of the agreement in lieu of all marital rights to property presently owned or thereafter acquired by the husband. However, the remaining provisions of the agreement did not address the issue of property acquired in the sole name of either person, and stated only that property acquired by the parties jointly would be subject to equitable distribution by the court. The trial court found that the agreement was silent on the subject of property which was acquired individually during the marriage, and therefore, such property was marital. The District Court affirmed, holding that prefatory recitations contained in the "whereas" clauses are not binding, operative provisions to an otherwise unambiguous contract. The Court noted that an operative clause prevails over the recital clause of an agreement where there is a discrepancy between the two clauses. The Court further stated that courts may resort to the language of recital clauses if the operative provisions of a contract are ambiguous, in order to ascertain the meaning of its operative provisions.

The Court also denied the husband's attempt to classify a debt on a non-marital asset as marital simply because said debt had been acquired after the marriage. The court held that where husband's corporate entities were excluded as marital assets under the premarital agreement, any debt incurred by such entities must similarly be deemed non-marital in nature despite the personal guarantee by husband of such debt during the marriage. *See also*, Walker v. Walker, 827 So.2d 363 (Fla. 2d DCA 2002).

The court cannot ignore the overall intent of the agreement and should interpret any ambiguity in separate provisions so that it does not ignore the clear operative clauses of the agreement. In Hannon v Hannon, 740 So.2d 1181 (Fla. 4th DCA 1999), the premarital agreement effectively shielded each party's separate property and specifically gave up any right to share in the other's estate in any way, even for support after the death of the other party. Thus, even though alimony was not barred by the premarital agreement, it was improper for the trial court to award the wife lump sum alimony, which would in fact have the effect of transferring the separate property of the husband after his death. The alimony award should be limited to the husband's lifetime in order to be consistent with the intent of the agreement.

E. Uniform Premarital Agreement Act

Florida has adopted the Uniform Premarital Agreement Act, effective October 1, 2007, and applicable to any premarital agreement executed on or after that date. It does not appear that the Act modifies the existing case law as related by the Lashkajani Court in any significant way. The Act appears to largely track previous case law regarding waivers of support, except that it allows a trial court to refuse to enforce alimony provisions of a premarital agreement if enforcing them would result in a spouse being eligible for public assistance at the time of separation or divorce. Thus, if the parties' premarital agreement provides for no alimony in the event of divorce, or alimony that is extremely limited in amount, this statute may lessen the protective effect the contractual limitation on support would otherwise have, because the spouse who anticipates requesting alimony can be more assured that he or she will not be bound by the limitation if he or she would otherwise be threatened with indigency in the event of divorce.

However, the Uniform Act merely allows the court to order support "to the extent necessary" to avoid eligibility for public assistance. Therefore, the usual criteria of need, ability to pay, and statutory factors such as the parties' standard of living will not necessarily be applied, or may not be applied in the same manner, and the support ordered will likely be only a modest amount required to keep the recipient-spouse off the welfare rolls. The higher the parties' standard of living, the less likely it is that the statute's public-assistance standard will provide solace to a prospective obligee that is sufficient to lessen the apprehension instilled in him or her by an alimony limitation in the parties' premarital agreement.

E. Conclusion

Under both the Uniform Premarital Agreement Act and prior Florida case law governing premarital agreements, prospective spouses are given considerable latitude in determining the content of a premarital agreement. The basic rule that governs the contract is merely that its terms will be enforced when it does not contravene public policy, and when its negotiation and execution have met all the legal requirements. Therefore, prospective spouses may fix, waive, or modify property and support rights. Although most premarital agreements contain provisions that either waive, or provide for, property distributions and/or support upon the termination of the

marriage by death or divorce, the contents of each agreement will vary depending upon the individual circumstances of each couple. The waiver of support and property rights must be clear and specific to be enforceable.