**PREMARITAL AGREEMENTS CAN BE EFFECTIVE**

**BY: WILLIAM G. MORRIS, ESQ.**

People contemplating marriage later in life often have a greater appreciation for the economics of marriage and divorce than those marrying at an early age. Accumulation of assets is a hoped-for benefit of age, and it is only natural to want to protect those assets. That is particularly true if one has already been married and divorced.

Florida recognizes marriage as both a financial and emotional partnership. There are laws which provide for distribution of marital assets in the event of divorce, support for the former or current spouse, and even laws which provide that a spouse has the right to claim part of the other spouse’s assets when the spouse dies. When the parties contemplating marriage want to have more control over what happens at divorce or death, they often enter a contract between them before they are married. That contract is known as a premarital agreement.

Premarital agreements were not favored in the early years of the United States. It was thought that such agreements would interfere with marriage and would encourage divorce. That mindset was in part a product of the fact that in many states women did not even have the right to own property. Florida did not adopt statutes confirming married women had the right to deal freely with their own property until 1943.

Premarital agreements gained increasing acceptance from the 1920s. In 1970, Florida’s Supreme Court issued its decision in the divorce case of *Posner v. Posner*. The court said that premarital agreements are consistent with public policy as actually “conducive to marital tranquility.” The court explained that the concept of “sanctity of marriage” had eroded over the previous few decades. The court went on to comment that it knew of no society in which public policy condemned a husband and wife to a lifetime of misery as the alternative to the harshness of divorce.

Florida’s Supreme Court ruled that a premarital agreement has to either be fair and reasonable or if one sided the party against whom the agreement is to be applied had been provided with full, fair and open detail of the other parties property and resources before signing the agreement. Full financial disclosure remains an important part of an enforceable premarital agreement.

Florida courts addressed premarital agreements with a hodgepodge of decisions over the next few decades. In 2007, Florida adopted the Uniform Premarital Agreement Act. Although the Act governs premarital agreements, the agreements are still subject governed by case law and Florida statutes addressing such issues as alimony and property distribution.

A premarital agreement must be written and signed by both parties. Alimony and support may be limited or eliminated in the agreement, but temporary alimony and temporary attorney fees cannot be prohibited. If a ban on alimony results in the waiving spouse qualifying for government assistance if separated or divorced, the judge can order alimony be paid.

Child support is another potential expense that cannot be waived. Support is the right of the child and not of the parent. The statute prohibits enforceability of a premarital agreement which provides less child support than would be provided under Florida’s statutory child support guidelines.

Parties have more ability to control property ownership and distribution in the event of divorce or death in a premarital agreement. Florida law provides that if a couple gets divorced, marital assets are distributed equitably. The starting point for equitable distribution is 50/50. Marital assets are generally considered those which are earned or acquired during marriage with assets that were earned or acquired during marriage and assets which the parties voluntarily owned jointly. Premarital agreements can completely change the rules for property distribution in divorce.

Florida law provides that a surviving spouse has the right to an elective share from the estate of the first spouse to die, even if the first spouse leaves nothing in a Will or Trust for distribution to the surviving spouse. Elective share is approximately 30% of the net worth of the first spouse to die. A surviving spouse also has a life estate in homestead property owned by the first spouse to die, even if it was in the first spouse’s name alone and the life estate can be converted into a 50% ownership.

Laws providing the right of a surviving spouse to claim assets from the estate of their spouse are intended to protect the surviving spouse and promote public policy of avoiding homelessness. But, the right to establish rights by contract overrides that public policy and the parties to a premarital agreement can generally set any rules they want with respect to distribution of assets at divorce or death.

The Act requires a premarital agreement be entered voluntarily and without fraud, duress, coercion or overreaching. The Act does not mandate financial disclosure, but provides that if the agreement is unconscionable, it will be enforceable as long as there was “fair and reasonable disclosure of the property or financial obligations of the other party.” Alternatively, a party to a premarital agreement may voluntarily and expressly waive, in writing, financial disclosure beyond what the other party actually provides, when the signer had or reasonably could have had adequate knowledge of the property or financial obligations of the other party.

From time to time, the person with substantially more assets wants to keep those assets secret and not to close them to a future spouse, have to rely on the statutory allowance of waiver to make a premarital agreement enforceable. That later results in a shocking decision by a judge that the agreement was not entered freely and voluntarily as the absence of financial disclosure is considered evidence of fraud, duress, correction or overreaching.

Premarital agreements can be an important part of the decision to marry, especially for those who have accumulated assets and have already been divorced. A good agreement can actually encourage marriage. The minefield of enforceability makes it important that the agreement actually be good and not merely the product of a hoped-for result.

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