

THE ANTENUPTIAL AGREEMENT

By K. Dean Kantaras and Jennifer H. Cavill

ONE OF THE MANY QUESTIONS couples face prior to marriage is whether they should enter into a prenuptial agreement or antenuptial agreement to protect certain premarital assets and address the treatment of any assets, liabilities and/or income acquired during the marriage, and the rights and responsibilities the parties might owe to one another as a result of their contemplated marriage, among other things. The decision of whether to enter into an antenuptial agreement is a personal one. Each antenuptial agreement is fact specific and should be prepared by competent counsel after exchange of fair and reasonable disclosure of property or financial obligations of each party. See §61.079, Florida Statute, regarding the enforcement of antenuptial agreements executed after October 1, 2007. Likewise, one should not enter into an antenuptial agreement without seeking advice from competent counsel regarding the terms and consequences of the proposed antenuptial agreement.

Although it is generally believed that you can waive your rights to any and all assets, liabilities, and responsibilities in an antenuptial agreement, there are a few things that cannot be waived. First, the parties cannot waive the duty to support a spouse prior to the entry of the Final Judgment of Dissolution of Marriage. Such a waiver is against public policy. See *Khan v. Khan*, 79 So.3d 99 (Fla. 4th DCA 2012) and *Lashkajani v. Lashkajani*, 911 So.2d 1154 (Fla. 2005).

Similarly, the court in *Khan* relied on the Florida Supreme Court Case of *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972) which held "pending dissolution of marriage, public policy and the statutory obligation of support permits the award of temporary attorney's fees to a spouse even where an agreement provides that the parties will each pay their own attorney's fees or that the prevailing party is entitled to fees in any litigation over the validity of the agreement".



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However, prevailing party provisions in an antenuptial agreement are enforceable. Therefore, while one spouse may be required to pay the other temporary attorney's fees during the pendency of the dissolution of marriage case, the prevailing party provision of the antenuptial agreement may still be enforceable and the prevailing party may be entitled to a fee award at the conclusion of the matter.

Furthermore, parents cannot contract away the child's right to child support from the parent. See *Budnick v. Silverman*, 805 So. 2d 1112, 1113 (Fla. 4th DCA 2002). The Court also has discretion to reject a proposed timesharing schedule if the Court finds that such schedule is not in the child's best interest.

Aside from the rights addressed above, certain rights to retirement benefits cannot be waived prior to marriage. The Employee Retirement Income Security Act of 1974 (E.R.I.S.A.) and the Retirement Equity Act of 1974 (R.E.A.) provide a surviving spouse benefits to a qualified retirement plan in which a deceased spouse participated, even if the death occurs prior to the participant's retire-

ment. Such qualified plans are defined under the Internal Revenue Code. Waivers of survivor benefits from qualified plans executed prior to marriage are not enforceable since the party executing the waiver has not acquired any rights to the qualified retirement plan prior to the marriage. Such waiver is only valid and enforceable after the marriage.

Therefore, it is important that any antenuptial agreement attempting to waive such rights includes a requirement that the parties shall, at some defined time after the contemplated marriage takes place, execute a consent of the spousal waiver of the Qualified Joint and Survivor Annuity and consent set forth in the then existing IRS Code, E.R.I.S.A. and R.E.A. ■■■

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