

PREMARITAL AGREEMENTS

Their Future in Florida

By K. Dean Kantaras

FOR MANY YEARS, PREMARITAL or Prenuptial Agreements have been an important part of the legal and sociological landscape. Future spouses have signed such agreements for a variety of reasons. Mostly, Premarital Agreements safeguarded one of the party's assets and income for their children of previous relationships. Frequently, these agreements have been signed to shield assets and income from an intended spouse.

Premarital Agreements have not always been sanctioned by Florida courts. These agreements gained court approval only forty-five years ago, as prior to the Florida Supreme Court's decision that recognized their validity, these agreements were against the public policy of our state.

The law, however, is fluid and tends to change with the times. Thus, a body of law has developed over the years to guide lawyers and judges, and ultimately you, as to what is required for a Premarital Agreement to be declared valid. The Florida courts decide what the parties must do prior to the signing of a Premarital Agreement if the agreement is to be enforceable.

Generally, enforcement of a Premarital Agreement will depend on financial disclosure, so that the intended spouse is informed about the assets and income of the other, with regard to the fairness of the agreement. Issues have been raised by spouses who challenge the validity of their agreement, based upon a claim of coercion, duress, overreaching, or even undue influence. Some have claimed that "I didn't read the agreement;" or "he (she) told me if I didn't sign an agreement, there could be no marriage;" or "I had taken medication before I signed the agreement;" and, of course, "he/she forced me to sign the agreement." Fortunately, these "defenses" don't usually work.



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The law currently says that, as long as the parties' are married, the monied spouse cannot avoid payment of alimony during litigation despite a provision in an agreement to the contrary due to public policy. Until recently, agreements could not preclude a request for attorney's fees and costs during litigation. That has been altered, and attorney's fees may now be waived in Premarital Agreements.

A discussion of Premarital Agreements is necessary, as the Florida legislature has adopted new laws that have become effective as of October 1, 2007. It is called the Uniform Premarital Agreement Act. Florida is not alone. Twenty-five other states have adopted the same or similar laws. The new laws, however, do not apply to agreements signed before October 1, 2007, but do control every agreement signed on or after that date and is now governed by those laws.

The problem is that, in a discussion, a lawyer can tell you what the new statute says and how it differs or seems to change the existing law. But, in fact, until Florida's appellate courts have interpreted and ruled on the new laws, there are many questions that can't be answered.

For instance, we know Premarital Agreements were not enforceable until the parties were married. That hasn't changed. Likewise, the parties may still provide for disposition of their assets and income, either at the time of divorce or in probate proceedings. The new law continues to protect children, stating that the parties cannot contract away an obligation to pay child support.

It is often in the enforcement of these agreements that questions arise, many of which can't be answered with certainty. For example, previously the law was that a party could sign a "bad bargain," and they would have to honor it. Now, the statute provides that these agreements are not enforceable if they were unconscionable at the time of execution and no full or fair financial disclosure was made. However, a future spouse may now waive their right to disclosure. Could that mean that the "fairness" requirement, if there is a waiver, no longer applies?

I am not sure. What do you think? ■■■

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