

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 624

INTRODUCER: Judiciary Committee and Senator Aronberg

SUBJECT: Uniform Premarital Agreement Act

DATE: March 14, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.			CF	
3.				
4.				
5.				
6.				

I. Summary:

This bill substantially codifies the Uniform Premarital Agreement Act by the National Conference of Commissioners on Uniform State Laws. In effect, this bill, with some changes and additions, codifies existing Florida judicial opinions defining the permissible content and validity of premarital agreements.

This bill creates section 61.079, Florida Statutes.

II. Present Situation:

A premarital agreement, also known as a prenuptial agreement or antenuptial agreement, is an “agreement made before marriage usu[ally] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse.”¹ In this state, premarital agreements are generally permitted. However, case law, rather than statutory law, identifies what may constitute a valid agreement.²

¹ BLACKS LAW DICTIONARY (8th ed. 2004) (defining the term “prenuptial agreement”).

² The two statutes that directly address premarital agreements are ss. 61.052(5), and 732.301, F.S. Section 61.052(5), F.S., permits a court to “enforce [a premarital] agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties.” Section 732.301, F.S., permits a person to waive rights to a spouse’s estate through a premarital agreement.

Florida Law on Premarital Agreements

Subject Matter of Agreements

Under existing case law, premarital agreements are generally enforceable. Even unreasonable agreements are enforceable if they are entered into freely and voluntarily.^{3 4} “Whether the terms of the agreement are fair is of no consequence”⁵

Among other matters, premarital agreements can be used to waive rights to alimony, equitable distribution, homestead property, and rights to a spouse’s estate.⁶ Premarital agreements can also be used to secure attorney’s fees for the prevailing party litigating the validity and enforceability of an agreement.⁷

However, a premarital agreement generally may not waive child support.⁸ Nor may a premarital agreement “contract away a future obligation to pay attorney’s fees, as well as alimony and suit money, during a separation prior to dissolution of marriage.”⁹ The policy supporting this rule has been described as follows: “[i]t would be inequitable to deny a needy wife support from an able husband by reason of an earlier provision in an antenuptial agreement, thereby leaving her “the ward of the state” or dependent upon others or simply deprived.”¹⁰

Test for Validity

The Florida Supreme Court has identified:

two ways an otherwise enforceable nuptial agreement may be held invalid. . . .
First, the agreement may be set aside or modified by a court if it was “reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.” . . .
Second, if the agreement is “unfair or unreasonable . . . given the circumstances of the parties,” and the trial court finds the agreement “disproportionate to the means of the defending spouse,” then the rebuttable presumption is that “there was either

³ *Watson v. Watson*, 887 So. 2d 419, 421 (Fla. 4th DCA 2004) (stating that the former wife agreed to an unreasonable premarital agreement in which she waived all her rights to alimony and equitable distribution, leaving her husband with \$3 million in assets and a large salary).

⁴ Until 1970, Florida courts generally held that premarital agreements were “agreements to facilitate or promote divorce [and were] illegal as contrary to public policy.” *Lashkajani v. Lashkajani*, 911 So. 2d 1154, 1156 (Fla. 2005). At that time, no fault divorces were not permitted, and courts believed that premarital agreements:

“could induce a mercenary husband to inflict on his wife any wrong he might desire [with] the knowledge his pecuniary liability would be limited. In other words, a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a small fee less than he would otherwise have to pay.”

Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970) (quoting *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)).

⁵ *Dienstag v. Dienstag*, 864 So. 2d 9, 11 (Fla. 3d DCA 2003).

⁶ *Watson*, 877 So. 2d 419; *James v. James*, 843 So. 2d 304, 307 (Fla. 5th DCA 2003); *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962) (approving the use of premarital agreements to waive rights to a spouse’s estate).

⁷ *Lashkajani*, 911 So. 2d at 1160.

⁸ *Hahn v. Hahn*, 465 So.2d 1352, 1353-1354 (Fla. 5th DCA 1985).

⁹ *Balazs v. Balazs*, 817 So. 2d 1004, 1004 (Fla. 4th DCA 2002).

¹⁰ *Belcher v. Belcher*, 271 So. 2d 7, 11 (Fla. 1972).

concealment by the defending spouse or a ... lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached."¹¹

The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. 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.¹²

Agreements Regarding the Disposition of a Spouse's Assets upon Death

Under the Florida Probate Code, chs. 731-735, F.S., a spouse may make agreements with the other spouse regarding the disposition of assets upon the death of either spouse.¹³ These agreements must be signed by a spouse who surrenders rights to assets in the presence of two subscribing witnesses.

Effect of Oral Agreements

Florida law permits oral premarital "agreements in two instances: first, where they are fully performed by both parties, and second, where the contract is agreed upon prior to the marriage, but the writing is not prepared until after the marriage."¹⁴

Consideration for Agreements

Under Florida law, a marriage is sufficient consideration for a premarital agreement.¹⁵

Effect of Premarital Agreements in Connection With Void Marriages

Florida appellate opinions have not been located that directly address the validity of a premarital agreement made in connection with a void marriage. Some courts from other states, however, have held that if a marriage is void, then there is no consideration for a premarital agreement.¹⁶ Thus, the premarital agreement is void as well.

Marriages may be void for a number of reasons. The most common cause of void marriages discussed in Florida case law is bigamy or the failure of a party to have a divorce finalized before remarriage.¹⁷ Same sex marriages are also void in this state.¹⁸ Nevertheless, a premarital type of

¹¹ *Lashkajani*, 911 So. 2d at 1157 (internal citations omitted) (quoting *Casto v. Casto*, 508 So. 2d 330, 333 (Fla. 1987)).

¹² *Casto*, 508 So. 2d at 333.

¹³ Sections 732.701 and 732.702, F.S.

¹⁴ Doreen Inkeles, *The Uniform Premarital Agreement Act: Taking Casto to a New Level for Prenuptial Agreements*, FLA. B.J., MAR. 2007, at 32, 33 (footnotes omitted).

¹⁵ *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. 2d DCA 1996).

¹⁶ *Reitmeier v. Kalinoski*, 631 F.Supp 565, 568 (D. N.J. 1986); *Hosmer v. Tiffany*, 100 N.Y.S. 797, 799 (N.Y. App. Div. 1906).

¹⁷ *See, e.g., Lopes v. Lopes*, 852 So. 2d 402 (Fla. 5 DCA 2003).

¹⁸ *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. 2d DCA 2004).

agreement made in connection with a void same sex marriage may be enforceable if consideration independent of the marriage exists.¹⁹

Florida Family Law Rules of Procedure

The Florida Family Law Rules of Procedure apply to:

all actions concerning family matters, including actions concerning domestic, repeat, dating, and sexual violence, except as otherwise provided by the Florida Rules of Juvenile Procedure or the Florida Probate Rules. “Family matters,” “family law matters,” or “family law cases” as used within [the Family Law Rules of Procedure] include, but are not limited to, matters arising from dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, custodial care of or access to children (except as otherwise provided by the Florida Rules of Juvenile Procedure), adoption, proceedings for emancipation of a minor, declaratory judgment actions related to premarital, marital, or post-marital agreements (except as otherwise provided, when applicable, by the Florida Probate Rules), injunctions for domestic, repeat, dating, and sexual violence, and all proceedings for modification, enforcement, and civil contempt of these actions.²⁰

Uniform Premarital Agreement Act

In 1983, the National Conference of Commissioners on Uniform State Laws (NCCUSL)²¹ completed the Uniform Premarital Agreement Act (UPAA).²² According to NCCUSL, the UPAA permits adults to plan ahead, state what may or may not be enforced, and may assure

¹⁹ See *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. 5th DCA 1997) (holding that a nuptial-like personal services contract between unmarried lesbian partners was valid because it was not “inseparably based upon illicit consideration of sexual services”).

²⁰ FLA. FAM. L. R. P. 12.010(a)(1). In comparison, the Florida Probate Rules apply to probate and guardianship proceedings. FLA. PROB. R. 5.010.

²¹ The National Conference of Commissioners on Uniform State Laws describes itself as follows:

For more than a century, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has worked for the improvement of state laws by drafting uniform state laws on subjects where uniformity is desirable and practicable. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Now in its 115th year, the Conference is the oldest state governmental association and is the source of more than 250 uniform acts which seek to secure uniformity of state laws where diversity obstructs the interests of all the citizens of the United States.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS, FREQUENTLY ASKED QUESTIONS ABOUT THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (2002), <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

²² NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS, A FEW FACTS ABOUT THE... UNIFORM PREMARITAL AGREEMENT ACT (2002), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp. The final version of the Uniform Premarital Agreement Act by NCCUSL is available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upaa83.htm>.

individuals that a premarital agreement entered into in one state may remain valid in other states.²³

Further, under “the UPAA, couples can agree to almost anything from division of property at divorce to the division of household responsibilities. Nothing is excluded from the scope of the agreement, except those matters that are criminal or unconscionable.”²⁴ The UPAA has been adopted by at least 25 states and the District of Columbia.²⁵

III. Effect of Proposed Changes:

This bill substantially codifies the Uniform Premarital Agreement Act (UPAA) by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In effect, this bill, with some changes and additions, codifies existing Florida judicial opinions defining the permissible content and validity of premarital agreements.

Subject Matter of Agreements

The bill provides a nonexclusive list of matters that may be addressed in a premarital agreement. For example, property rights, spousal support, life insurance, choice of law, and any other matter, including personal rights and obligations, not in violation of public policy or criminal laws may be governed by a premarital agreement. The bill further provides that child support may not be waived by agreement.

However, the bill does not expressly state whether one may waive by agreement a future obligation to pay attorney’s fees, as well as alimony and suit money, during a separation prior to dissolution of marriage. Nevertheless, these waivers likely will continue to be invalid under existing case law as a violation of public policy.

Test for Validity

The test for determining the validity of a premarital agreement under the bill is similar to existing case law but with some subtle changes. First, the bill omits deceit and misrepresentation as potential grounds for the invalidation of a premarital agreement. However, these grounds may be redundant with fraud as a potential ground for invalidity under the bill.

Second, existing law provides that a premarital agreement is invalid if it is “unfair or unreasonable” and there was a concealment of assets on the part of the defending spouse or a lack of knowledge of the defending spouse’s assets on the part of the challenging spouse. The bill seems to subsume the elements of unfairness and unreasonableness into a new standard of unconscionability.²⁶

²³ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS, WHY STATES SHOULD ADOPT THE...UNIFORM PREMARITAL AGREEMENT ACT (2002), http://www.nccusl.org/Update/uniformact_why/uniformacts-why-upaa.asp.

²⁴ *Id.*

²⁵ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 22.

²⁶ Inkeles, *supra* note 14, at 34.

Third, the bill eliminates the shifting burden under existing law. Under the bill, the party challenging a premarital agreement has the burden to prove the lack of disclosure or knowledge of the defending spouse's assets. Lastly, the bill permits a party to an agreement to waive the right to disclosure of another party's assets and financial obligations.

Notwithstanding the foregoing, a court may require a party to a premarital agreement to support the other party to the extent necessary to make the party ineligible for public assistance.²⁷

Void Marriages

The bill provides that if a marriage is void, a premarital agreement made in connection with the marriage is enforceable unless specified otherwise by the agreement.²⁸

Written Agreements Required

The bill diverts from existing law in that it requires premarital agreements to be in writing and signed by the parties. Oral premarital agreements entered into after the bill takes effect will no longer be enforceable. The bill further permits premarital agreements to be amended, abandoned, or revoked upon a written agreement signed by the parties. As such, the same formalities for creating a premarital agreement are required for amendment, abandonment, and revocation.

Interaction with the Florida Probate Code

The bill expressly provides that it “does not alter the construction, interpretation, or required formalities of, or the rights or obligations under, agreements between spouses under s. 732.701 or s. 732.702,” F.S. This provision appears to require premarital agreements determining the disposition of a spouse's assets upon death to be attested by two witnesses. However, the bill does not appear to require other premarital agreements to be witnessed.

Limitation of Actions

The bill tolls statutes of limitations that apply during a marriage to claims for relief under a premarital agreement, but certain equitable defenses to the claim may apply. The Comment to Section 8 of the UPA provides that this provision may “avoid the potentially disruptive effect of compelling litigation between spouses.”²⁹

The bill takes effect on October 1, 2007, and applies to premarital agreements executed on or after that date.

²⁷ See the heading Subject Matter of Agreements under the Present Situation of this staff analysis.

²⁸ This provision of the bill differs from the Uniform Premarital Agreement Act by the National Conference of Commissioners on Uniform State Laws. The corresponding section of the uniform act, section 7, states: “[i]f a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.” The Comment to the uniform act explains that the provision “substantially limit[s] the] enforceability” of premarital agreements made in connection with void marriages. The Comment further explains that courts will have the discretion to avoid an inequitable result caused by the invalidation of the agreement if the parties to the agreement lived together for a substantial amount of time and have relied on the agreement.

²⁹ The Comments are included with the Uniform Premarital Agreement Act at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upaa83.htm>.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill eliminates the shifting burden in existing law that requires a spouse defending a premarital agreement to prove that the challenging spouse had knowledge of the defending spouse's assets. Thus, under the bill, the burden to prove the invalidity of a premarital agreement remains on the challenging spouse at all times. As a result, premarital agreements may be more difficult to challenge.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
