

PRENUPTIAL AGREEMENTS: 'TIL DEATH DO US PART

Marital and Family Law Section

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Nearly 80,000 Florida residents file for divorce each year. Florida has the nation's highest percentage of residents over the age of 65. Many people enter into a second marriage with significant assets and adult children. Accordingly, it is often important for a prenuptial agreement to address both marital and estate planning issues.

Florida adopted the Uniform Premarital Agreement Act, which expressly provides that parties may reach a binding contract on the following issues: (i) the parties' rights and obligations concerning any assets and liabilities; (ii) the right to buy, sell, use, transfer, or dispose of property; (iii) the distribution of property upon separation, dissolution, death, or other event; (iv) the right to alimony; (v) the making of a will or trust; and (vi) the disposition

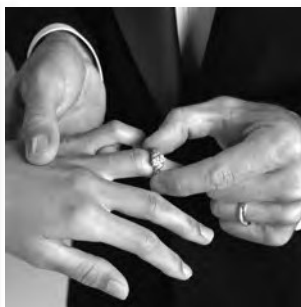
of life insurance proceeds.¹

It is imperative to understand the estate and probate rights that a spouse may waive.² For example, a surviving spouse normally has the right to receive an "elective share" of the deceased spouse's estate (under current law, 30% of the elective estate as defined in Chapter 732, Part II, Florida Statutes).

A surviving spouse also has special rights to homestead real property. A decedent may not freely devise homestead real property upon death if survived by a spouse or minor child.³ The surviving spouse is entitled to a life estate in the property or, upon election, an undivided one-half interest.⁴ The property is exempt from any claims by the decedent's creditors.⁵

Additionally, if a spouse dies intestate (*i.e.*, without a will), a surviving spouse is entitled to a specific share of the estate.⁶ If a person marries after making a will, the surviving spouse is entitled

to receive an intestate share of the estate.⁷ A surviving spouse also is entitled to receive up to \$20,000 in certain exempt property.⁸ A surviving spouse is separately entitled to receive up to \$18,000 in



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"family allowance" for support during the administration of an estate.⁹ Finally, a surviving spouse has preference in appointment to serve as personal representative of a decedent's intestate estate.

All of these rights may be waived in a prenuptial agreement.¹⁰ The prenuptial agreement, however, may include language requiring the parties to make a will or trust, to give a devise, or

not to revoke a will or devise.¹¹ A practitioner must be prepared to advise clients on any rights that are being waived and avenues to protect the client's interests.

¹ See Fla. Stat. § 61.079(4)(a) (2010).

² See Fla. Stat. § 732.702 (2010).

³ See Fla. Stat. § 732.4015 (2010).

⁴ See Fla. Stat. §§ 732.401 and 732.4015 (2010).

⁵ See Art. X, Sec. 4, Fla. Const.

⁶ See Fla. Stat. § 732.102 (2010).

⁷ See Fla. Stat. § 732.301 (2010).

⁸ See Fla. Stat. § 732.402 (2010).

⁹ See Fla. Stat. § 732.403 (2010).

¹⁰ See, *e.g.*, Fla. Stat. §§ 732.701 and 732.702 (to the extent the prenuptial agreement affects estate and probate rights, it must satisfy all other applicable formalities) (2010).

¹¹ See Fla. Stat. §§ 61.079(4)(a) and 732.702 (2010).

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