

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 577

Premarital Agreements

**SPONSOR(S):** Seiler

**TIED BILLS:**

**IDEN./SIM. BILLS:** CS/SB 624

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>8 Y, 0 N</u>	<u>Davis</u>	<u>Birtman</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u>Davis</u>	<u>Havlicak</u>
3) <u></u>	<u></u>	<u></u>	<u></u>
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### SUMMARY ANALYSIS

HB 577 codifies the application of premarital agreements. Specific terms are defined, requirements for enforceability created, and requirements for modification are addressed. The proposed bill adopts the Uniform Premarital agreement adopted by the National Conference of Commissioners of Uniform State Laws.

The bill codifies existing common law related to prenuptial agreements. Specifically, the bill adds the following new provisions by creating s. 61.079, F.S.:

- The definition of premarital agreements is defined and additional terms are created around the premise that a prenuptial agreement is to be an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.
- Enumerates the terms under which the parties to a premarital agreement may contract.
- Provides for the terms of amendment, revocation or abandonment of a premarital agreement.
- Provides for the terms of enforcement of a premarital agreement.
- Distinguishes affected parties requiring public assistance after dissolution of marriage.
- Provides for the enforceability of premarital agreements of marriages that are deemed void.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) advocates for the need for a uniform law on agreements and their enforcement through the Uniform Premarital Agreement Act (UPAA). The organization states that uniformity will assist in certainty regarding enforcement of specific provisions. The NCCUSL asserts the adoption of the UPAA permits partners to enter into valid premarital agreements, thus increasing availability of the agreements, and therefore encouraging marital partners to take their interests into account before marriage. The organization suggests that adoption of the act will result in better prepared marital partners and better marriages. The NCCUSL does not provide empirical evidence relating to the effectiveness of the provisions suggested.

It does not appear that the bill has a fiscal impact. The bill takes effect October 1, 2007 and applies to any premarital agreement executed on or after that date.

On March 21, 2007, the Committee on Constitution and Civil Law adopted a strike-all amendment. See Section IV of this analysis for an explanation of the amendment.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0577b.SSC.doc

**DATE:** 4/9/2007

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill creates s. 61.079, F.S., which provides for the statutory law relating to premarital agreements. With few exceptions, this bill codifies existing law.

Promote personal responsibility: The bill codifies the common law rules related to premarital agreements, which may assist parties in negotiating the terms of dissolution and decrease judicial intervention.

Empower families: The bill provides for uniformity with 26 other states relating to prenuptial agreements. The bill may serve to benefit a family as a social unit due to increased clarity with the negotiated terms of the agreement.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

A prenuptial agreement is a contract between prospective spouses made before marriage, which becomes effective upon marriage. Premarital agreements are entered into for the purpose of altering the legal effect marriage would have otherwise upon the property rights of the parties. To date, basic contract principles apply to prenuptial agreements<sup>1</sup>. Therefore, the agreement must have an offer, acceptance and consideration in order to be valid. That is, a man and woman may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself.

Current Florida law provides for the following:

- Current Florida case law states that the marriage is sufficient consideration to uphold the agreement.<sup>2</sup>
- The parties entering into an agreement are free to design the parameters of their dissolution relating to alimony and property rights.<sup>3</sup>
- Full financial disclosure and voluntariness are required for enforcement of the agreement.<sup>4</sup>
- Current Florida law states that the right to child support may not be adversely affected by a premarital agreement.<sup>5</sup>
- Provisions relating to prevailing party attorney fee awards are enforceable as a matter of contract law.<sup>6</sup>

##### Effect of HB 577

House Bill 577 creates the Uniform Premarital Agreement Act by creating §61.079 within the Florida Statutes. The National Conference of Commissioners on Uniform State Laws (NCCUSL) advocates for the need for a uniform law on agreements and their enforcement through the Uniform Premarital Agreement Act (UPAA). The organization states that uniformity will assist in certainty regarding

<sup>1</sup> Belcher v. Belcher, 271 So.2d 7, 10 (Fla. 1972).

<sup>2</sup> Akileh v. Elchahal, 666 So.2d 246, 249 (2<sup>nd</sup> DCA 1996).

<sup>3</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1157 (Fla. 2005).

<sup>4</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1157 (Fla. 2005).

<sup>5</sup> See Wendel v. Wendel, 852 So.2d 277, 285 (2<sup>nd</sup> DCA 2003).

<sup>6</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1158 (Fla. 2005).

enforcement of specific provisions. The NCCUSL asserts the adoption of the UPAA permits partners to enter into valid premarital agreements, thus increasing availability of the agreements, and therefore encouraging marital partners to take their interests into account before marriage. The organization suggests that adoption of the act will result in better prepared marital partners and better marriages. Excerpts of NCCUSL commentary on the various provisions of the statute are included in this analysis. The various sections of the bill will be referenced by the proposed statute number and subsection.

The bill provides definitions of specific terms to be applied to issues related to premarital agreements. The definitions are consistent with the common law application of current law with the exception of a provision relating to support obligations and enforcement after voiding of the marriage.

## **Definitions**

**"Premarital agreement"** as defined by the bill is "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." See §61.079(1)(a).

The act only applies to agreements between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together not contemplating marriage and postnuptial or separation agreements are outside the scope of the Act.

**"Property"** is defined by the bill to include, but is not limited to, an interest, present or future, legal or equitable, vested or contingent, in real or personal property, tangible or intangible, including income and earnings, both active and passive. See §61.079(1)(b).

## **Formalities**

A premarital agreement as stated in the bill must be in writing and signed by both parties. It is enforceable without consideration other than the marriage itself. See 61.079(2).

Current Florida law permits prenuptial agreements to be made orally.<sup>7</sup> However, such contracts are subject to the Statute of Frauds and without eventually reducing them to writing, oral prenuptial agreements are unenforceable.<sup>8</sup>

Effectively, the provision of the Act requiring a written agreement would nullify any oral agreements made by the parties prior to the marriage unless eventually reduced to writing.<sup>9</sup>

## **Content**

The bill expressly states the parties may contract with respect to:

- Rights and obligations of property whenever acquired.
- The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.
- The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.
- The establishment, modification, waiver, or elimination of spousal support.
- The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
- The ownership rights in a disposition of the death benefit from a life insurance policy.
- The choice of law governing the agreement.
- Any other matter, including their personal rights and obligations, not in violation of either the public policy of this state or a law imposing a criminal penalty.

<sup>7</sup> Flagship National Bank of Miami v. King, 418 So.2d 275, 279 (3<sup>rd</sup> DCA 1982).

<sup>8</sup> Flagship National Bank of Miami v. King, 418 So.2d 275, 279-280 (3<sup>rd</sup> DCA 1982).

<sup>9</sup> See Flagship National Bank of Miami v. King, 418 So.2d 275, 279-280 (3<sup>rd</sup> DCA 1982).

The commentary from the NCCUSL states the list is illustrative rather than exhaustive. The comment also suggests matters relating to choice of abode, freedom to pursue career opportunities, the upbringing of children, etc. are among the items that may be contemplated.

### **Effect**

A premarital agreement becomes effective upon marriage of the parties. That is, the agreement itself can be contemplated before the actual marriage but it does not become binding until the actual act of marriage occurs.<sup>10</sup>

### **Amendment, Revocation, Or Abandonment**

After marriage, a premarital agreement may be amended, revoked, or abandoned only by a written agreement signed by the parties. The amended agreement, revocation, or abandonment is enforceable without consideration.

The section requires the same formalities of execution for an amendment, revocation, or abandonment of a premarital agreement as are required for its original execution should the act be adopted. The UPAA model act does not include the term "abandonment." Such an addition does not appear to bear any significance. Common law provides for abandonment of a contract as an affirmative defense.<sup>11</sup>

### **Enforcement**

The bill provides that a premarital agreement is not enforceable in an action proceeding under the Florida Family Law Rules of Procedure if the party against whom enforcement is sought proves that:

- The party did not execute the agreement voluntarily;
- The agreement was the product of fraud,<sup>12</sup> duress,<sup>13</sup> coercion,<sup>14</sup> or overreaching;<sup>15</sup> or
- The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

The above provisions embody the current state of the law.<sup>16</sup> The bill provides that unconscionability is to be determined as a matter of law.

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<sup>10</sup> *Akileh v. Elchahal*, 666 So. 2d 246, (Fl. DCA, 2d Dist. 1996).

<sup>11</sup> *American Enviro-Port v. Williams*, 489 So.2d 839 (1<sup>st</sup> DCA 1986).

<sup>12</sup> *Black's Law Dictionary* (6<sup>th</sup> ed.) defines **fraud** as a crime or offense of deliberately deceiving another in order to damage them – usually, to obtain property or services unjustly. Fraud can be accomplished through the aid of forged objects. In the criminal law of common law jurisdictions it may be called "theft by deception," "larceny by trick," "larceny by fraud and deception" or something similar.

<sup>13</sup> *Black's Law Dictionary* (6th ed.) defines **duress** as "any unlawful threat or coercion used... to induce another to act [or not act] in a manner [they] otherwise would not [or would]."

<sup>14</sup> *Black's Law Dictionary* (6th ed.) defines **coercion** is the practice of compelling a person to involuntarily behave in a certain way (whether through action or inaction) by use of threats, intimidation or some other form of pressure or force. Coercion may typically involve the actual infliction of physical or psychological harm in order to enhance the credibility of a threat. The threat of further harm may then lead to the cooperation or obedience of the person being coerced.

<sup>15</sup> *Black's Law Dictionary* (6th ed.) defines **over-reaching** as to reach or extend over or beyond limitations.

<sup>16</sup> *Belcher v. Belcher*, 271 So.2d 7, 10 (Fla 1972).

## **Avoidance of Public Assistance**

The bill adds to existing law that if a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

Even when the parties agree to a provision that expressly states an agreed amount of spousal support, but the amount leaves one party eligible for support under a program of public assistance, the court may require the other party to provide support to the extent necessary to avoid the eligibility. See §61.079(6)(b).

Similar to the proposed statute, current law provides that an agreement that purports to apply in the event of dissolution of marriage may be upheld on two grounds: first, when a fair and reasonable provision is made for the less financially secure party, it is presumptively valid.<sup>17</sup> Secondly, if the less secure party entered into it with an understanding of the rights being waived, such an understanding can be assumed if the less secure party had knowledge of the assets of the wealthier party, even if the less secure party will be left a “pauper”.<sup>18</sup>

That knowledge may be secured either directly from the wealthier party or indirectly, from other sources.<sup>19</sup> However, the Florida Supreme court has stated in dicta, “Although contract principles play a role in dissolution proceedings, courts must remember that proceedings under chapter 61 are in equity and governed by basic rules of fairness as opposed to the strict rule of law. See §61.011, F.S. The legislature has given trial judges wide leeway to work equity in chapter 61 proceedings. See, e.g. §61.001, F.S.”<sup>20</sup>

The proposed statute attempts to prevent the spouse without sufficient assets to maintain a lifestyle free from public assistance. This provision expressly permits the expansion of the law to invite judicial interference into the contract between the two parties. In so far as previously discussed, this provision is a departure from the status quo which permits judicial determination of equitable results.<sup>21</sup>

An issue of unconscionability (overreaching) of a premarital agreement shall be decided by the court as a matter of law. See §61.079(6)(c). This provision may give both parties in the agreement the motivation to fairly and equitably construct the agreement in fear that the courts will equitably interpret the agreement if it is inequitable.

The current law proscribes the same result.<sup>22</sup> Effectively, the judge may determine if one party has taken advantage of another party to such a degree the law should not enforce the contract provision. Ruling as a matter of law permits an appellate court to review the matter “de novo,” (without deference to the lower court’s ruling).<sup>23</sup>

## **Enforcement: Void Marriage**

The bill provides that if a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable. See §61.079(7).

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<sup>17</sup> Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20-21 (Fla. 1962).

<sup>18</sup> Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) and Baker v. Baker, 622 So.2d 541, 543 (5<sup>th</sup> DCA 1993).

<sup>19</sup> Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962).

<sup>20</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1159 (Fla. 2005).

<sup>21</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1159 (Fla. 2005).

<sup>22</sup> Peacock Hotel v. Shipman, 103 Fla. 633, 641 (1931).

<sup>23</sup> Lashkajani v. Lashkajani, 911 So.2d 1154, 1159 (Fla. 2005).

This provision relates to marriages that are deemed void. A marriage may be deemed void if at least one of the parties was legally or mentally incapable of entering into the marriage.<sup>24</sup> A marriage may also be invalid because consent was wrongfully procured by force, duress, fraud, or concealment.<sup>25</sup> Currently, contract principles proscribe that an annulment would deem the marriage void therefore lacking the consideration required to consummate the prenuptial agreement. Further, current law provides that a marriage deemed void for fraud would permit the marital agreement to be avoidable.<sup>26</sup> Under the bill such a premarital agreement is enforceable.

The commentary states the premarital agreement will not be completely invalidated. However its enforceability will be substantially limited. "Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agreement, the failure to enforce the agreement will be inequitable. The NCCUSL adds, "the provision provides for court discretion to enforce the agreement to the extent necessary to avoid an inequitable result." However, use of the language "is enforceable" rather than "may be enforceable" may diminish court discretion.

### **Limitations of Actions**

The bill provides that any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches<sup>27</sup> and estoppel<sup>28</sup>, are available to either party. See s.61.079(8).

#### **C. SECTION DIRECTORY:**

Section 1: Provides for a title.

Section 2: Creates Section 61.079, F.S, relating to premarital agreements.

Section 3: Provides for severability, provides that if any section held invalid, the invalidity does not affect the other provisions.

Section 4: Provides an effective date of October 1, 2007 and applies to any premarital agreement executed on or after that date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

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<sup>24</sup> Kuehmsted v. Turnall, 103 Fla. 1180, 1186 (1932).

<sup>25</sup> Savini v. Savini, 58 So.2d 193, (Fla. 1952) and See Cooper v. Cooper, 163 So. 35, (Fla. 1935).

<sup>26</sup> Beidler v. Beidler, 43 So.2d 329, 330 (Fla. 1949).

<sup>27</sup> Laches is an equitable defense, or doctrine, in an action at law. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, that other party is no longer entitled to its original claim. Put another way, failure to assert one's rights in a timely manner can result in claims being barred by laches. Laches is a form of estoppel for delay. Black's Law Dictionary 8th ed, (West Group, 2004).

<sup>28</sup> Estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied. Black's Law Dictionary 8th ed, (West Group, 2004).

2. Expenditures:

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

2. Expenditures:

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

D. FISCAL COMMENTS:

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenue; or reduce the percentage of a state tax shared with counties or cities.

3. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 21, 2007, this bill was considered by the Committee on Constitution & Civil Law. An amendment was adopted that does 3 things:

- Clarifies that the bill applies only to proceedings under the Florida Family Law Rules of Procedure;

- Provides that a premarital agreement made in connection with a void marriage is enforceable unless otherwise provided in the agreement; and
- Provides that the bill does not alter the construction, interpretation, or required formalities of, or the rights or obligations under, agreements between spouses under ss. 732.701 or 732.702, F.S.