

FAMILY LAW AND GUARDIANSHIP

CS/CS/SB 624 — Uniform Premarital Agreement Act

by Children, Families, and Elder Affairs Committee; Judiciary Committee; and Senator Aronberg

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 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. Nevertheless, under existing case law, these contractual provisions likely will continue to be invalid 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 case 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.

Third, the bill eliminates the shifting burden under existing case law. Under existing case law, if a spouse shows that a premarital agreement is unfair or unreasonable, an evidentiary burden shifts to the defending spouse to prove that the challenging spouse had adequate knowledge of a defending spouse's assets. 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.

Void Marriages

The bill provides that if a marriage is void, a premarital agreement made in connection with the marriage is enforceable only to the extent necessary to prevent an inequitable result.

Written Agreements Required

The bill departs from existing case 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 UPAA provides that this provision may “avoid the potentially disruptive effect of compelling litigation between spouses.”

If approved by the Governor, these provisions take effect October 1, 2007, and apply to premarital agreements executed on or after that date.

Vote: Senate 37-0; House 116-0

CS/SB 122 — Child Custody/Not Modifying Child Custody

by Judiciary Committee and Senator Posey

This bill prohibits a court from permanently modifying a child custody order after a parent who is the primary caretaker of a minor child has been activated, deployed, or temporarily assigned to military service. In effect, the bill provides that a parent's military activation, deployment, or

temporary service is not a sufficient change in circumstances permitting a court to permanently modify a custody award.

The bill, however, permits a court to change custody temporarily, if clear and convincing evidence shows that the change is in the best interest of the child. If custody is changed, the prior custody order must be reinstated when the parent returns from military service. The bill also directs courts to provide for liberal visitation between the military parent and the child while the military parent is on leave from military service.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 37-0; House 115-0

HB 7111 — Guardians/Criminal History Record Checks

by Healthcare Council and Rep. H. Gibson and others (CS/SB 2040 by Judiciary Committee and Senators Storms and Crist)

The bill revises the statute governing criminal history record checks, background checks, and credit history investigations for guardians, to delineate requirements according to whether the guardian is a professional or nonprofessional guardian. Specifically, the bill:

- Provides requirements for a state and national criminal history record check for nonprofessional guardians when ordered by a court;
- Clarifies that the Statewide Public Guardianship Office and the court shall accept the satisfactory completion of a criminal history record check for professional guardians, while solely the court shall accept it for nonprofessional guardians;
- Specifies that the clerk of court shall maintain results of criminal history record checks for nonprofessional and professional guardians in the guardians' files;
- Limits the use of electronic fingerprinting to professional guardians. Deletes references to the network of electronic fingerprinting equipment developed for public employees, the associated fee, and duties of the agency operators, and instead directs the Statewide Public Guardianship Office to develop rules relating to acceptable methods for completing electronic fingerprint criminal history record checks;
- Clarifies that only professional guardians pay the fee associated with electronic fingerprinting;
- Clarifies that the requirements related to the completion of level 1 and level 2 background screenings apply to professional guardians and certain employees and are tied to the date of "registration" as a guardian not "appointment"; and
- Clarifies that the requirements related to the completion of a credit history investigation for professional guardians and certain employees are tied to the date of "registration" as a guardian not "appointment."

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 39-0; House 114-0

REAL PROPERTY, PROBATE, AND BUSINESS LAW

CS/SB 400 — Landlord/Possession of Dwelling Unit

by Judiciary Committee and Senator Margolis

The bill permits a landlord, under certain circumstances, to take possession of a dwelling unit and remove a deceased tenant's property 60 days after the tenant dies. A landlord's possession of the dwelling unit is permissible if rent remains unpaid and the landlord has not been notified in writing of the existence of a probate estate or the name and address of the personal representative. The bill, however, does not apply to a dwelling unit used in connection with federal housing programs.

If approved by the Governor, these provisions take effect upon becoming law.

Vote: Senate 40-0; House 118-0

SJR 166 — Property Rights/Ineligible Aliens

by Senators Geller, Bullard, and Crist

The equal protection clause in s. 2, Art. I, State Constitution, generally requires the state to treat everyone equally. However, an exception within the equal protection clause permits the Legislature to regulate or prohibit the ownership of property by aliens ineligible for citizenship.

Laws restricting property ownership by aliens ineligible for citizenship originated in the early 1900s. At that time, Asians were ineligible for citizenship. Today, however, eligibility for citizenship is not based on racial classifications.

Senate Joint Resolution 166 amends s. 2, Art. I, State Constitution, to delete provisions authorizing the Legislature to regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship.

If approved by the electors during the 2008 General Election, these provisions take effect January 6, 2009.

Vote: Senate 39-0; House 83-31

CS/HB 311 — Probate

by Safety and Security Council and Rep. Hukill and others (CS/SB 1936 by Judiciary Committee and Senator Joyner)

This bill was designed by the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL) to update the Florida Probate Code. A number of the changes made by the bill are technical in nature. The effects of the provisions of the bill are described below.

Caveat

The bill integrates the language of Florida Probate Rule 5.260(f) into s. 731.110, F.S. As a result, the bill may clarify that a person who files a caveat is entitled to be served with a petition for administration before a will is admitted to probate. However, this provision of the bill read in conjunction with existing s. 733.2123, F.S., likely requires the caveator to challenge the will and the qualifications of the personal representative before a personal representative is authorized to take actions on behalf of an estate.

Arbitration of Disputes

The bill makes enforceable provisions of a will or trust requiring arbitration to resolve disputes between or among beneficiaries or beneficiaries and a fiduciary. A requirement for the use of arbitration will be interpreted to mean binding arbitration, unless specified otherwise.

Elective Share Laws

The bill conforms the value of property not subject to a spouse's elective share, which was given as a gift within a year of the decedent's death, to the current amount excludable from taxable gifts under s. 2503 of the Internal Revenue Code. As a result, this amount will increase to \$12,000 from \$10,000. Moreover, statute will track future changes in the amount excludable from taxable gifts resulting from the cost-of-living adjustment in s. 2503(b)(2) of the Internal Revenue Code.

The bill makes pensions, retirement or deferred compensation plans, or similar arrangements that were not subject to creditor claims during a decedent's life available to fund a spouse's elective share. As such, these funds, which are available under existing law to pay creditor claims on the death of the owner, may no longer be available to pay creditor claims under the bill.

This bill revises the definition of "elective share trust" in s. 732.2025(2)(b), F.S., to no longer include trusts "subject to the provisions of former s. 738.12, F.S." According to the RPPTL, the modification to the definition "ensures that an elective share trust will qualify for the Federal estate tax marital deduction."

The bill revises the description of a protected charitable interest in s. 732.2075(2), F.S. The changed description clarifies that certain transfers to protected charitable interests are not available for the payment of the elective share.

Exculpation of Personal Representative

The bill restricts the enforceability of a provision of a will which limits the liability of a personal representative for a breach of a fiduciary duty. Accordingly, under the bill, a personal representative cannot be relieved for a breach of a fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons. However, limitations on liability inserted in a will at the behest of a personal representative may be enforced if the limitation is fair and was communicated to the testator or the testator's attorney.

Definition of Descendant and Collateral Heir

The bill clarifies that the terms "descendant" and "lineal descendant" are synonymous. Moreover, the bill changes references in existing law to descendant from lineal descendant. The bill also provides a definition of collateral heir and makes other technical changes.

Foreign Personal Representatives

The bill increases the amount of time to 90 days from 60 days that a debtor to a decedent domiciled in another state must wait, in certain circumstances, to pay the debt to an out-of-state personal representative.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 39-0; House 114-0

CS/SB 2118 — Debts and Debtors

by Judiciary Committee and Senator Joyner

An assignment for the benefit of creditors is an alternative to bankruptcy. Under ch. 727, F.S., an assignor or debtor may assign his or her assets to an assignee to pay creditor claims.

This bill revises the law related to assignments for the benefit of creditors. The bill also increases the amount of personal property owned by persons without homestead property that is exempt from creditor claims. A number of the changes are clarifying in nature. However, some changes were designed to reverse case law. The specific changes made by the bill are detailed below.

Property Exempt from Creditor Claims

The bill amends s. 222.25, F.S., to increase to \$4,000 from \$1,000 the amount of personal property owned by persons without homestead property that is exempt from creditor claims. The exemption for persons with homestead property will remain at \$1,000 as provided in the Florida Constitution. However, the bill provides that this exemption does not apply to debts for child or spousal support.

Publication of Foreclosure Notices

Under existing law, foreclosure notices may be advertised in newspapers that publish at least five days per week in counties with a population of greater than 1 million residents. However, the bill expands the group of newspapers in which a foreclosure notice may be advertised to include newspapers that normally publish at least five days per week except for weeks with legal holidays.

Consensual Lienholder/Actions against the Estate

The bill prohibits the levy, execution, or attachment by a judgment holder against any assets of the assignor's estate in the possession, custody, or control of the assignee, including real property. However, the bill provides that consensual lienholders may enforce their rights in personal or real property collateral.

The bill clarifies that causes of action are assets within an assignor's estate. Moreover, the bill clarifies that these causes of action may be assigned by the assignor to the assignee even if other law provides that they are not assignable. Under existing case law, some tort claims are not assignable.

Additionally, the bill provides that an assignee may further assign or sell the assignor's claims to others for enforcement. This provision of the bill appears to reverse *Champaign National Bank v. SOS Industries, Inc.*, 815 So. 2d 725 (Fla. 5th DCA 2002), which held that an assignee may not make a secondary assignment of claims.

Lastly, the bill prohibits those sued by an assignee or secondary assignee from asserting the assignor's misconduct as a defense. This provision of the bill codifies case law applicable to receivers.

Continuation of Business

Current law requires an assignee to have authorization from a court to run an assignor's business. The bill authorizes an assignee to operate an assignor's business for up to 14 days without authorization from a court. However, court authorization and notice to creditors are required to run the business for more than 14 days.

Rejection of Leases and Termination of Employment Contracts

Existing law does not address whether an assignee may reject an unexpired lease. The bill, however, permits an assignee to reject an unexpired lease. Whether approval of a court is required is unclear under the bill. Proposed s. 727.108(5), F.S., permits an assignee to reject an unexpired lease, but proposed s. 727.109(6), F.S., authorizes a court to approve the rejection of a lease.

If an assignee rejects a lease, damages are limited to the greater of one year of rent or 15 percent of the remaining rental payments and the landlord's attorney's fees, plus costs for reletting the property.

Currently, ch. 727, F.S., does not limit the damages resulting from the termination of an employment contract. Under the bill, an employee's damages are limited to wages for one year under his or her employment contract.

Filing of Claims

Under existing law, a court has no express authority to set a date after which claims against an assignor's estate are barred. Under the bill, a court may establish a claims bar date that is at least 30 days after creditors receive notice of the claim deadline.

The bill also establishes a deadline by which secured creditors may file deficiency claims if the disposition of the secured property fails to satisfy their claims.

Objection to Claims

According to the Business Law Section of The Florida Bar, many parties have litigated whether one creditor has standing to challenge the claims on an assignor's estate by another creditor. The bill clarifies that a creditor has standing to object to the claims of other creditors. The bill also requires assignees to create and make available a register of all claims against the assignor's estate.

Priority of Claims

Under existing law, secured creditors have the highest priority for the payment of claims by an assignor's estate. The expenses for the administration of the estate have the next highest priority for payment. The bill clarifies that rent for the premises occupied by an assignment estate is an administration expense.

After administration expenses, the next highest priority under existing law is unsecured claims for taxes. The bill limits the claims under this priority level to those taxes that accrued within three years before the filing of an assignment for the benefit of creditors.

Following the claims for taxes, the next highest priority is unpaid wages and benefits of the assignor's employees. Current law limits these claims to wages and benefits that accrued within 90 days before the filing of the assignment for the benefit of creditors. The bill expands this period to 180 days before the assignment. The bill also increases to \$10,000 from \$2,000 per employee the amount of claims that may qualify at this priority level.

The next priority level following the claims for wages and benefits are claims for deposits paid to the assignor for an interest in property. The bill increases the amount available at this priority level to \$2,225 from \$900 per person.

Claims Arising Out of the Purchase of a Security

In *Moecker v. Antoine*, 845 So. 2d 904 (Fla. 1st DCA 2003), purchasers bought unregistered securities in a corporation that became insolvent and assigned its assets for the benefit of creditors. These purchasers sought to increase their priority for payment of claims against the corporation's estate. As stockholders, their payment would come after the satisfaction of all creditor claims. However, the stockholders were able to rescind their stock purchases and assert claims as unsecured creditors. This bill will effectively reverse *Moecker*. Under the bill, a person will not be able to become a creditor and thereby increase his or her priority for payment by rescinding a purchase of securities.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 39-0; House 116-0

ELECTRONIC RECORDING AND NOTARIZATION

CS/CS/SB 2038 — Real Property Electronic Recording

by Governmental Operations Committee; Judiciary Committee; and Senator King

This bill adopts the Uniform Real Property Electronic Recording Act, which begins the process of electronic recording of real property documents with county recorders. The bill provides county recorders the legal authority to prepare for electronic recording of real property instruments, and authorizes county recorders to begin accepting records in electronic form, storing electronic records, and setting up systems for searching for and retrieving these records. The bill equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality (paper document or manual signature) is satisfied by an electronic document and signature.

This bill creates an Electronic Recording Advisory Committee (Committee), with which the Department of State consults when adopting standards to implement electronic recording. The Committee shall consist of nine members: five members appointed by the Florida Association of Court Clerks and Comptrollers, one of whom must be an official from a large urban charter county where the duty to maintain official records exists in a county office other than the clerk of court or comptroller; two members appointed by the Florida Land Title Association; one member appointed by the Florida Bankers Association; and one attorney appointed by the Real Property, Probate, and Trust Law Section of The Florida Bar. The bill provides that the Committee shall terminate on July 1, 2010, and that the Florida Association of Court Clerks and Comptrollers shall provide administrative and technical support to the Department of State and the Committee.

Lastly, the bill provides that certain electronic documents are subject to the same excise tax as paper documents, and that the return that states the actual consideration paid for an interest in real property, which must be filed prior to the recordation of any deed transferring an interest in real property, may be filed electronically.

If approved by the Governor, these provisions take effect upon becoming law.

Vote: Senate 39-0; House 117-0

CS/HB 1305 — Notary Public/Electronic Notarization of Documents

by Economic Expansion and Infrastructure Council and Rep. N. Thompson and others
(CS/SB 2490 by Judiciary Committee and Senator Haridopolos)

This bill authorizes notaries public to use electronic notarization for documents requiring notarization. The bill implements standards for secure electronic notarization in order to receive the same level of credibility and reliability as paper-based notarizations. For example, the bill provides that the electronic signature of a notary public must be:

- Unique to the notary public;
- Capable of independent verification;
- Retained under the notary public's sole control; and
- Attached to or logically associated with the electronic document in such a manner that any subsequent alterations to the document render evidence of the change.

Additionally, when a signature is required to be accompanied by a notary public seal, the bill provides that this requirement is satisfied when the electronic signature of the notary public contains all of the following seal information:

- The full name of the notary public exactly as provided on the notary public's application for appointment;
- The words "Notary Public State of Florida";
- The date the commission of the notary public expires; and
- The commission number of the notary public.

The bill also authorizes the Department of State to adopt rules to ensure the security, reliability, and uniformity of signatures and seals authorized by the legislation.

If approved by the Governor, these provisions take effect January 1, 2008.

Vote: Senate 39-0; House 112-0

JUDICIARY/LITIGATION

CS/CS/SB 448 — County Funding of Court Personnel

by Criminal and Civil Justice Appropriations Committee; Judiciary Committee; and Senators Fasano and Joyner

This bill clarifies the status of employees who are funded by the county to help with the operation of the circuit court under an agreement created pursuant to s. 29.0081, F.S. The bill deletes existing language stating that county-funded personnel are employees of the judicial circuit. It provides that the county shall be considered the employer for purposes of s. 440.10, F.S., of the Workers' Compensation Law and for purposes of the Unemployment Compensation Law. The bill also permits these county-funded employees to be aggregated with other county employees for purposes of a flexible benefits plan under s. 125 of the Internal Revenue Code. The bill clarifies that when a county provides personnel to the judicial circuit, the circuit shall supervise the employees, shall be responsible for compliance with all requirements of federal and state employment laws (e.g., Americans with Disabilities Act and Family Medical Leave Act), and shall indemnify the county from liability under those laws for acts or omissions of the circuit.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 39-0; House 118-0

CS/SB 174 — Practice of Law

by Judiciary Committee and Senator Geller

Current law prohibits a sheriff, clerk of court, deputy sheriff, or deputy clerk of court from practicing law in Florida, except when representing the agency in the course of his or her duties as an attorney. This bill narrows the prohibition to authorize a part-time deputy sheriff or part-time deputy clerk of court to practice law.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 40-0; House 116-0

CS/SB 2312 — Florida False Claims Act

by Judiciary Committee and Senators Oelrich, Crist, and Gaetz

The Florida False Claims Act (FFCA) authorizes civil actions by individuals and the state against persons who file or conspire to file false claims for payment or approval with a state agency. This bill generally amends the FFCA to bring it into closer conformity to the Federal False Claims Act.

This bill makes the following changes to the Florida False Claims Act:

- Amends multiple sections of the FFCA which provide that the act applies to claims that are “false,” to apply instead to claims that are “false or fraudulent”;
- Increases the statute of limitation for bringing actions against people who violate the FFCA;
- Increases the civil penalty for violating the FFCA to between \$5,500 and \$11,000 from between \$5,000 and \$10,000;
- Reduces to 60 days from 90 days the time that the court can stay actions of discovery by a private individual initiating an FFCA action when the Department of Legal Affairs shows that the discovery would interfere with an investigation by the state or the prosecution of another matter arising out of the same facts; and
- Provides that the FFCA pertains to false or fraudulent claims submitted electronically.

The provisions of this bill seem to satisfy provisions of federal law which specify that, if a state has in effect a law relating to false or fraudulent claims which meets certain requirements, the federal medical assistance percentage with respect to any amounts recovered under a state action brought under that law shall be decreased by 10 percentage points.

If approved by the Governor, these provisions take effect July 1, 2007.

Vote: Senate 39-0; House 117-0

SB 978 — Court-Ordered Nonbinding Arbitration

by Senator Aronberg

This bill revises procedures for court-ordered nonbinding arbitration. The bill also revises the threshold for the imposition of liability for an opponent’s attorney’s fees and costs after the rejection of an arbitrator’s award and a trial of an arbitrated matter. Specifically, the bill provides that arbitration must be informal; the presentation of evidence must be kept to a minimum; matters must be presented primarily through counsel; litigants must show good cause for the issuance of subpoenas; and courts may impose attorney’s fees and costs on a party who requests a trial if a judgment at trial varies by 25 percent or more from an arbitrator’s decision.

If approved by the Governor, these provisions take effect October 1, 2007.

Vote: Senate 39-0; House 114-1