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Florida Family Law Practice Manual

Publication 80643 Release 59 November 2007

HIGHLIGHTS

2007 Uniform Premarital Agreement Act

2007 Cases

- Paternity [*Parker v. Parker* (Fla. Sup. Ct.)]
- Bridge-the-Gap Alimony [*Price v. Price* (5th DCA)]

2007 Uniform Premarital Agreement Act

Chapter 1 has been substantially revised to reflect the enactment of the Uniform Premarital Agreement Act (UPAA) in Florida, where it has been codified as Florida Statutes Section 61.079. The UPAA governs premarital agreements executed on or after its effective date, October 1, 2007 [*see* 2007 Fla. Laws, ch. 2007-171, §§ 1, 3].

Under both the UPAA and prior Florida case law governing premarital agreements, prospective spouses are given considerable latitude in determining the content of a premarital agreement. Further, both the UPAA and previous Florida law provide that a premarital agreement is unenforceable if it is the product of fraud, duress, coercion, or overreaching [cf. § 61.079, FLA. STAT. *with* Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *vacated* 234 So. 2d 378; Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962)]. The UPAA also contains an unconscionability test for validity. How similar this test will be to the unfairness test for validity described in *Del Vecchio v. Del Vecchio* [143 So. 2d 17 (Fla. 1962)] and *Casto v. Casto* [508 So. 2d 330 (Fla. 1987)] is uncertain. However, the burden of proving nondisclosure or inadequate knowledge is on the party against whom enforcement is sought under the UPAA [*see* § 61.079(7)(a)3., FLA. STAT.], in contrast to the rebuttable presumption of concealment or inadequate knowledge that arises from unfairness under *Del Vecchio* and *Casto*. Further, the UPAA differs from Florida case law in that the Act includes a lack of express, written waiver of disclosure as a ground on which an unconscionable agree-

ment is rendered unenforceable. In other words, an express waiver of disclosure in writing is one of the grounds, in addition to disclosure or independent knowledge, on which an unconscionable agreement may be enforced under the UPAA [*see* § 61.079(7)(a)3., FLA. STAT.; *see also* National Conference of Commissioners on Uniform State Laws, Uniform Premarital Agreement Act, § 6 Comment (1983)]. In any event, unconscionability under the UPAA must be decided as a matter of law [*see* § 61.079(7)(c), FLA. STAT.].

Finally, the UPAA allows a court to refuse enforcement of a premarital agreement to the extent the 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. In such circumstances, the court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid the public assistance eligibility [*see* § 61.079(7)(b), FLA. STAT.]. Although this provision constitutes a limited basis on which enforcement may be denied, it departs from prior law, which did not provide such a basis on which to find the spousal support provisions of an agreement invalid.

2007 Cases

Paternity: Chapter 9, Child Support, has been updated with coverage of a Florida Supreme Court ruling that a wife's misrepresentation regarding paternity in a dissolution of marriage action constitutes intrinsic fraud. The Supreme Court noted that the distinction between extrinsic and intrinsic fraud is significant because Florida Rule of Civil Procedure 1.540(b) allows relief from judgment based on intrinsic fraud only if a motion for relief is filed within one year of the entry of judgment. In contrast, an action for extrinsic fraud may be brought more than one year from the date judgment is entered [*see* Parker v. Parker, 950 So. 2d 388, 393 (Fla. 2007)].

Bridge-the-Gap Alimony: A panel of the Fifth District Court of Appeal has stated that it is appropriate for the Fifth District to recede from its refusal to recognize or award bridge-the-gap alimony and join the other four district courts of appeal, which have expressly recognized such alimony. However, in the case before the panel, neither party had preserved the issue of whether bridge-the-gap alimony should have been awarded to the obligee-wife, who was awarded permanent periodic alimony. Therefore, the case did not present an opportunity for en banc consideration of the issue [Price v. Price, 951 So. 2d 55 (Fla. 5th DCA 2007); *see also* ch. 10, *Spousal Support*].

Modification of Alimony: The Fourth District Court of Appeal aligned itself with the Fifth District and held that all relevant alimony factors set forth in Florida Statutes Section 61.08(2) must be considered in an alimony modification proceeding [*see* Mirsky v. Mirsky, 474 So. 2d 9 (Fla. 5th DCA 1985)]. The Fourth District further opined that although not all the statutory factors will necessarily apply in modification actions, the following two will seemingly always be relevant: (1) the financial resources of each party, including the assets received by each in equitable distribution; and (2) the income available to each [*see* § 61.08(2)(d), (g), FLA. STAT.]. In addition, the Fourth District cautioned that the parties' standard of living during marriage is not a "super-factor" that trumps all others in determining alimony. Rather, the Fourth District indicated, the parties' standard of living during marriage must be considered in the context of their current financial circumstances in deciding its weight. That

is, regardless of the parties' marital standard of living, the obligor's current ability to pay and the obligee's current need prevail in deciding whether alimony should be awarded or continued, and if so, how much alimony should be ordered [*see* Donoff v. Donoff, 940 So. 2d 1221 (Fla. 4th DCA 2006); *see also* chs. 10, *Spousal Support*, 15, *Modification*].

Civil Procedure: A party is entitled to have his or her attorney present at a physical, psychiatric, or psychological examination requested by the other party unless the other party establishes (1) a case-specific reason why the examinee's attorney's presence would disrupt the examination, and (2) that no other qualified professional in the area would be willing to conduct the examination with an attorney present [*see* Byrd v. Southern Prestressed Concrete, Inc., 928 So. 2d 455 (Fla. 1st DCA 2006); *see also* ch. 7, *Discovery*].

Equitable Distribution: Determining an issue of first impression, the Second District Court of Appeal held that the date a prior, unresolved divorce action was filed does not necessarily constitute the cutoff date for identifying marital assets and liabilities in a later Florida action for dissolution of marriage [*see* Whittlesey v. Whittlesey, 954 So. 2d 1231 (Fla. 2d DCA 2007); *see also* ch. 10B, *Equitable Distribution of Marital Assets*].

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VOLUME 1

	Revision	
☐	Title page	Title page
	Chapter 1	
☐	25 thru 39	25 thru 40.5
	Chapter 7	
☐	29 thru 29b	29 thru 30.1
	Chapter 9	
☐	50.19 thru 50.23	50.19 thru 50.23
	Chapter 10	
☐	33 thru 38.5	33 thru 38.7

VOLUME 2

	Revision	
☐	Title page	Title page
	Chapter 10B	
☐	27	27 thru 28.1
	Chapter 15	
☐	43	43 thru 44.1

VOLUME 3

	Revision	
☐	Title page	Title page
	Florida Statutes	
☐	3 thru 4.1	3 thru 4.2(1)
☐	45	45 thru 46.3

VOLUME 4

	Revision	
☐	Title page	Title page

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