



## PRACTICE FOCUS / FAMILY LAW

# Prenuptial Agreements Really Do Stick Nowadays

Commentary by  
**Jeffrey A. Weissman and  
 Tova N. Verchow**

The freedom of contract transcends family law through the creation and enforcement of premarital agreements.



Weissman



Verchow

"A primary purpose of a [prenuptial] agreement is to modify or shrink the general discretion of a judge in doing equity between the parties. The agreement itself is intended to define the mutual equities," the Fourth District Court of Appeal wrote in a 2009 opinion.

Prenuptial agreements are effective mechanisms for the proactive resolution of issues that arise when a marriage ends in divorce or death. Prenuptial agreements should be viewed positively because they afford parties with the ability to avoid costly litigation.

One of the most interesting aspects of law is its constant fluid nature. Noteworthy advancements enhancing the sanctity of prenuptial agreements have occurred through Florida's adoption of the Uniform Premarital Agreement Act in 2007 and the Florida Supreme Court ruling in *Hahamovitch*. Before these recent developments, the legal standard for attacking prenup-

tial agreements was set forth in *Casto*. Stated succinctly, the challenging party had to show that either there was fraud or a total absence of free will when that party executed the agreement, or that the agreement was unfair based upon the circumstances of the parties.

*Casto* still applies to agreements executed before Oct. 1, 2007. Florida adopted the UPAA in October 2007, which sets forth a slightly different legal standard. Under the UPAA, a premarital agreement will not be upheld if the challenging party proves that the agreement was not executed voluntarily, or was unconscionable. The UPAA also suggests that a party may waive all financial disclosure rights.

The difference is linguistic, but impactful. While *Casto* uses the word "unfair," the UPAA uses "unconscionable." Certainly, challenging an agreement based upon an unconscionable standard would be more difficult than the lower standard of "unfairness." Further, the ability to waive disclosure reinforces a freedom of contract approach to the interpretation of prenuptial agreements.

When a couple executes a prenuptial agreement, they are exercising their freedom of contract rather than relying on Florida's statutory scheme for dissolution of marriage. "Pre-nuptial agreements shall be construed and interpreted in the same manner as other contracts, with the court resorting to rules of construction and extrinsic evidence

only where contract language is ambiguous." Within the realm of contract law, it is well-established that "the language itself is the best evidence of the parties' intent, and its plain meaning controls." Although seemingly straightforward, this principle was not faithfully applied. Case law predating *Hahamovitch* followed an approach that required surgically precise language.

Take the following provision as an example:

The parties agree that each party would keep and retain sole ownership, control and power of disposition with respect to all property, now owned or hereby acquired by each of them respectively, free and clear of any claim by the other.

The parties clearly intended to waive all rights to the other's assets. However, according to the Second District Court of Appeal, the agreement did not specifically reserve the husband's "marital earnings" as his separate property, and thus did not exclude the wife's claim to share in the value of assets purchased with those earnings. This provision was also insufficient to waive the wife's claim to the enhanced value of the husband's separate property.

Let's look at another provision:

Neither party shall make any claim or acquire any interest in the other party's separate property if it increases in value during the marriage.

Still not specific enough. The court found that this provision addressed a

waiver of passive appreciation but did not waive any appreciation attributable to marital labor or funds.

Palm Beach Circuit Judge Martin Colin, presiding in the Delray Beach courthouse, cleared up this confusion when he had the courage to depart from the above precedent. Judge Colin's decision in *Hahamovitch*, which was upheld by the Fourth District Court of Appeal and the Florida Supreme Court, confirms the trend toward enforcing prenuptial agreements pursuant to their plain meaning. No longer is special language required in order to afford protection. Rather, the intent can be gleaned and enforced from the plain language of the contract.

*Hahamovitch* is significant because it promotes a freedom of contract approach to the interpretation of prenuptial agreements. This opinion, in addition to Florida's adoption of the UPAA, collectively strengthens prenuptial agreements by holding adults to the benefit of their bargains. No longer are the days when a court will rescue those who enter into unfair prenuptial agreements. The bar has been raised. Prenuptial agreements will be enforced absent the most exceptional of circumstances.

**Jeffrey A. Weissman is a principal of marital and family law firm Gladstone & Weissman. He is based in Boca Raton and can be reached at [jaw@gwpa.com](mailto:jaw@gwpa.com). Tova N. Verchow is an associate with the firm. She practices family law and can be reached at [tv@gwpa.com](mailto:tv@gwpa.com).**

### BOARD OF CONTRIBUTORS