

# 1

## OVERVIEW

- I.     [§1.1] INTRODUCTION
  
- II.    PRELIMINARY CONSIDERATIONS
  - A.   [§1.2] In General
  - B.   [§1.3] Interest Of State
  - C.   [§1.4] Legally Imposed Duty Of Support
  - D.   [§1.5] Rights Of Third Parties
  
- III.   APPLICABLE GUIDELINES AND STANDARDS
  - A.   [§1.6] Antenuptial Agreements
  - B.   [§1.7] Postnuptial Agreements
  - C.   [§1.8] Policies In Conflict
  
- IV.    PROBLEM AREAS
  - A.   [§1.9] Ethical And Professional Considerations
  - B.   [§1.10] Full Disclosure And Fair Provisions
  - C.   [§1.11] Problem-Oriented Checklist

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## I. [§1.1] INTRODUCTION

This chapter presents introductory information on marital contracts to establish a context for the more detailed treatment that follows in the remaining chapters of this manual. Discussed here are fundamental considerations that should underlie the negotiation and drafting of all marriage contracts.

Marriage contracts traditionally have been divided into two categories: antenuptial agreements and postnuptial agreements. As the names imply, the former designates those entered into in contemplation of marriage while the latter refers to those executed after marriage, usually in contemplation of separation or dissolution of marriage. Antenuptial agreements are treated in Chapter 2 of this manual and postnuptial agreements in Chapter 3.

A third type of marriage contract, the “midnuptial,” is mentioned in several cases. See *Flowers v. Flowers*, 334 So.2d 856 (Ala. 1976); *Conley v. Conley*, 340 N.E.2d 430 (Ohio Ct.App. 1975); *Capps v. Capps*, 219 S.E.2d 901 (Va. 1975). Midnuptial contracts are postnuptial in the sense that they are entered into after marriage, but the cases illustrate that they are entered into with somewhat less contemplation of dissolution than are typical postnuptial agreements. In fact, they resemble antenuptial agreements executed by way of afterthought. The similarities to antenuptial and, to some degree, postnuptial agreements make it unlikely that a separate body of law will develop around the midnuptial agreement.

Aside from questions of terminology, the purpose of all marriage contracts is the same — to facilitate contracting and free expression of the judgment and will of the parties, *Ryland v. Ryland*, 605 So.2d 138 (Fla. 4th DCA 1992), *receded from on other grounds* 740 So.2d 1181, and to achieve certainty and predictability with respect to the many matters that arise from the marital relationship. To accomplish these objectives, the lawyer must produce a tailor-made contract that

- anticipates future events such as birth, death, illness, remarriage, and changed financial circumstances;
- properly labels and defines the types of payments provided;
- limits the circumstances under which there may be modifications, see, e.g., *Urbanek v. Urbanek*, 484 So.2d 597 (Fla. 4th DCA 1986);

- clearly provides for the transfer of property;
- takes advantage of the best available tax planning, see, *e.g.*, *Margulies v. Margulies*, 491 So.2d 581 (Fla. 3d DCA 1986); and
- can withstand challenges at a later date.

Well-drafted agreements incorporating these elements can reduce the uncertainty and expense incident to dissolution of marriage, as well as limit or eliminate costly unanticipated litigation. The law of marriage contracts is not static. Attorneys have a clear duty and unrivaled opportunity to protect their clients and themselves from unfortunate future contingencies. It should be obvious that the malpractice specter lies in wait for those not mindful of this responsibility.

## II. PRELIMINARY CONSIDERATIONS

### A. [§1.2] In General

Almost every leading case makes the broad statement that general contract law applies to marriage contracts. Proceeding on that statement of law alone, however, the practitioner easily could draft an unenforceable agreement. The broad statement does not recognize the special confidential relationship of the parties to a marital contract and the legal duties arising from the marital relationship. Factors of particular significance are discussed in §§1.3–1.5.

### B. [§1.3] Interest Of State

In *Posner v. Posner*, 233 So.2d 381 (Fla. 1970) (*Posner I*), the Supreme Court restated the established principle that in every divorce proceeding the state is a third party whose interest takes precedence over the private interests of the spouses. When this case came back to the court on a subsequent appeal, the court observed that a spouse's right to make a bad bargain is limited by the public interest in marriage and marriage contracts. *Posner v. Posner*, 257 So.2d 530 (Fla. 1972) (*Posner II*).

Exactly what the court intended when it made such broad policy statements is not entirely clear. It appears, however, that the court was referring to those provisions and agreements that would pauperize one party

or shift the responsibility for that party's welfare from the spouse to the public. But see *Baker v. Baker*, 622 So.2d 541 (Fla. 5th DCA 1993) (pre-nuptial agreement in which wife waived all right to alimony and equitable distribution and was left with only modest social security benefits on dissolution was not void as against public policy).

The concept of the state as a third party is applicable particularly when children are involved. See *Serio v. Serio*, 830 So.2d 278 (Fla. 2d DCA 2002).

C. [§1.4] Legally Imposed Duty Of Support

In 1972 the Florida Supreme Court reaffirmed the husband's duty to support his wife during the marriage and held that the husband could not contract away that duty because to do so would be contrary to the public policy served by the support obligation. *Belcher v. Belcher*, 271 So.2d 7 (Fla. 1972). This duty was extended to the husband's duty to pay the wife's attorneys' fees in *Young v. Young*, 322 So.2d 594 (Fla. 4th DCA 1975). See also *Blanton v. Blanton*, 654 So.2d 1240 (Fla. 2d DCA 1995); *Veiga v. Veiga*, 563 So.2d 1089 (Fla. 5th DCA 1990); *Fechtel v. Fechtel*, 556 So.2d 520 (Fla. 5th DCA 1990). Both of these obligations are measured by ability to pay and need.

The increasing number of regulations addressing sexual discrimination renders doubtful the continuing validity of rulings cast in the form of *husband's* duties and *wife's* rights. Indeed, the Supreme Court has issued a series of opinions clearly suggesting a balanced approach to rights and duties that focuses on needs and abilities without regard to gender. See, e.g., *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).

The shift to the mutuality of spouses' rights and obligations first became clear with cases such as *Cummings v. Cummings*, 330 So.2d 134 (Fla. 1976), and *Potter v. Collin*, 321 So.2d 128 (Fla. 4th DCA 1975). That trend has continued and lawyers should not overlook it when advising clients or negotiating in their behalf. In accordance with the principles established in *Belcher*, the district court in *Lang v. Lang*, 551 So.2d 547, 548 (Fla. 4th DCA 1989), reversed the trial court's denial of temporary support, stating that "*neither* party can contract away the duty of support existing during the marriage" [emphasis added]. The court also found error in the trial court's failure to consider the parties' financial positions outside of the settlement agreement in determining the need for temporary support.