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Don't let love get in the way with premarital agreements

Premarital agreements executed in Illinois after 1990, when the Uniform Premarital Agreement Act was adopted, became a little easier to enforce under a recent ruling by the 2nd District Appellate Court.

In the case of *In re Marriage of Solano*, 2019 IL App (2d) 180011, the court held that an agreement which was executed approximately 20 days prior to the wedding, and where the nondrafting party merely had the opportunity to speak with an attorney about the agreement, was valid and enforceable because the husband voluntarily executed the document and he had voluntarily waived further disclosure of the wife's assets and financial situation.

While these facts themselves may not seem out of the ordinary, there are two anomalies to this case which matrimonial law practitioners — and any lawyer asked to preview a premarital agreement — need to understand.

The agreement had three schedules of assets attached to it as exhibits which included one for each party and a third which referred to wife's interest in her family's business as her nonmarital property.

The language in the agreement stated that the exhibits set forth were substantially all of the parties' individual assets and liabilities valued as of Dec. 1, 2000. And they were to remain each party's nonmarital property; that the values shown on the exhibits were

based on market quotes, appraisals or estimates; and that the parties understood that certain assets were difficult to value, but notwithstanding that, the exhibits were adequate disclosures of the other's assets, liabilities and income, and that the parties expressly waived any right to disclosure of the property of the other party beyond the disclosure provided.

The wrinkle is that Exhibits A and B, which were each party's individual assets and liabilities, did not actually list a schedule of assets as the language in the agreement indicated. Instead, each exhibit had the word "None" written in the space where the assets typically would be listed. Exhibit "C" was the only schedule which listed an asset and stated that certain "Family Business Property" was to remain wife's nonmarital property.

The wife filed a petition for declaratory judgment asking the trial court to enforce the agreement and took the position that the document settled all of the parties' property classification issues.

The husband took the position that the agreement was unenforceable for three reasons: (1) Exhibit B was improper because the wife owned extensive assets and property that were not properly disclosed; (2) he was not informed of the legal effect of signing the agreement; and (3) the agreement was unconscionable and unfair.



MODERN FAMILY

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The husband's position was that the parties only intended for the agreement to apply to the wife's interest in her family business and that they had agreed to not disclose any other assets for that reason.

Trial court can narrow issues to key factors

The husband argued for his ability to engage in full discovery, including investigation into what assets the wife had at the time the agreement was exe-

cuted, so he could show the agreement was unconscionable, the disclosure was unfair and unreasonable and he lacked knowledge of the property and financial obligations of the other party at the time the document was signed.

These elements are all necessary under Section 7(a) of the Premarital Agreement Act to block enforcement of a post-act premarital agreement.

The trial court, however, decided to limit the initial inquiry, both in discovery and testimony, to whether the husband had voluntarily executed the agreement and whether he had voluntarily waived further disclosure beyond the disclosure of assets provided in the agreement.

Under Section 7(a) of the Premarital Agreement Act, if either of these two factors were true, the agreement would be valid. The trial court ultimately validated the agreement. This led the husband to appeal.

The 2nd District held that the trial court had the authority to initially limit its consideration to the dispositive issues of whether the husband had executed the agreement voluntarily and whether he voluntarily and expressly waived further disclosure of the wife's assets.

This is important because at the time a petition for declaratory judgment is filed, if one party challenges the enforceability of the agreement, it is often customary for discovery to commence on all prongs of

Section 7(a) of the act in order for an attorney to assess his or her best argument to challenging the validity of the agreement.

This case allows the trial court to limit discovery and focus the hearing on the prong of the statute on which the court wishes to focus.

A waiver of further disclosure is voluntary

The husband took the position that unless a party has made a fair and reasonable disclosure of his or her assets, the other party could not be deemed to have voluntarily waived the right to disclosure beyond the disclosure made.

This concept was flatly rejected by the court. The court held that nothing in the plain language of the act sug-

gests that there must be a certain degree of disclosure or knowledge of the party's undisclosed assets before a party can waive the right to further disclosure.

In sum, a waiver can be voluntary even where the other party has disclosed no assets at all.

The court seemed to give weight to the fact that the husband had met with a family member who was a criminal attorney to discuss the agreement, even though the testimony indicated that no advice was given with respect to the content of the agreement. Nevertheless, husband was deemed to have voluntarily waived his right to further disclosure of wife's assets.

There are several takeaways for all attorneys, both those

that practice matrimonial law and those who do not but may be called upon to review such an agreement for a friend or family member.

While representation by counsel by both parties is not a requirement for the agreement to be enforceable under the act, under Solano, meeting with someone to review an agreement that is ultimately signed can have some weight on whether the court deems the agreement was signed voluntarily.

If a practitioner who is not familiar with matrimonial law is asked an opinion on the contents of a premarital agreement, it would be prudent to refer the matter to a matrimonial attorney.

Second, trial courts now

have the authority to limit the initial hearing (and discovery) to what it believes is the dispositive issue. Therefore, practitioners should carefully craft strategies and present them to the court as soon as possible.

Finally, if a party does not disclose any assets in the agreement, but there is a waiver of further disclosure, the waiver very well may be valid.

The lesson here is buyer beware. Signing a premarital agreement should not be done without the advice of competent counsel, the understanding of each party's rights and responsibilities under any agreement and understanding that courts will enforce what may appear to be a less than fair agreement.