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'TIL DEATH DO US PART – THEN WHAT?

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Most estate planning attorneys (as well as family law attorneys) would agree that it makes good sense for a couple who has separate finances and who plan to marry, to enter into a prenuptial agreement, setting forth their respective rights (or limitation thereof) to each other's finances on divorce or death. Since couples who enter a marital relationship are immediately granted certain rights with respect to each other's assets, and since a properly drafted and executed prenuptial agreement can modify or even waive those rights, meeting the legal requirements of such an agreement can be of the highest importance. Despite this, the delicate negotiations, circumstances, and varying scenarios that typically accompany the process can sometimes interfere with the enforceability of the agreement. A recent Florida case involving the prenuptial agreement of a couple from Florida who was married in Massachusetts is the perfect illustration of an unfair result where the circumstances got in the way of the law. Although Florida law was held to apply in this case, we feel our report and commentary here might serve as a brief refresher/reminder of the importance of meeting the requirements of an enforceable prenuptial agreement in Massachusetts, as well as a warning to be aware of the huge variation of corresponding law among the states, as illustrated below.

In the subject case (*Arlene Williams Paris v. April Nelle Joseph et al.*, District Court of Appeal of the State of Florida – Fourth District, September 1, 2021, 2021 WL 3890371), the Florida court was asked to rule on the enforceability and scope of a prenuptial agreement executed hours before Florida residents Arlene and Calvin married while visiting Martha's Vineyard. According to the undisputed facts, during their relationship, Calvin advised Arlene that if they were to marry, he would insist on a prenuptial agreement. On the trip to Martha's Vineyard, it happened that Calvin's family would be visiting there at the same time, which caused Calvin to think that would be a good moment to have their wedding. Arlene agreed and began the last minute wedding plans.

On the day of the wedding, Calvin woke Arlene at 7 a.m. demanding that she locate an online form for a prenuptial agreement and sign it, threatening that if she refused to sign it the wedding would be off. They located a "form" agreement, filling in the blanks as directed by Calvin. They then drove to a nearby notary and executed the agreement, after which Arlene rushed home to get ready for the ceremony, the couple ultimately returning to Florida.

Four years later Calvin passed away, and Arlene petitioned the Florida court to invalidate the prenuptial agreement based on "fraud, deceit, duress, and coercion," among other things. Calvin's children moved for (and were granted!) summary judgement. Arlene asked the court to apply Massachusetts law, since the agreement was signed here and the marriage occurred here, but the Florida court held that the couple's connections to Massachusetts were "too meager" to justify that. Of course, had Massachusetts law applied, the prenuptial most likely would have been ruled patently unenforceable as Massachusetts case law requires a knowing waiver of rights

after disclosure of relevant facts and representation by counsel (or at least a meaningful opportunity to obtain counsel). In the instant case, Arlene was not represented by independent counsel, there was no meaningful disclosure of assets, and there was clearly duress in its preparation and execution. Interestingly, Florida is not as concerned with financial disclosures, as Florida Probate Code provides that "No disclosure shall be required for an agreement, contract, or waiver executed before marriage." (emphasis added) Fl. ST. 2019, section 732.702(2). As a result, having waived her rights by signing the prenuptial agreement, Arlene received only a token amount.

One is at a loss to understand why the Florida court did not address the issues of coercion and duress (perhaps the issue had not been presented by the parties), or the obviously disastrous affect of using an online form by two non-lawyers. For example, if they had the opportunity to exercise a "choice of law" option and opted to apply Massachusetts law, the outcome might have been just the opposite.

Massachusetts courts have been fairly strict in enforcing the requirements of a valid prenuptial agreement, and attorneys who draft such agreements are equally careful in adhering to the law. Once the requirements of enforceability are met, the Massachusetts courts will not opine on whether the bargain struck was a good one or not. Unfortunately, problems can (and usually do) arise when the couple waits until the last minute to execute the agreement, or one or the other "forgets" to tell the partner about a particular asset, or arranges to produce a significant undervaluation of property or business interest. In such cases, attorneys must be careful to do their due diligence, especially if the attorney signs the agreement certifying that full disclosure has been made, since a failure to reasonably verify the information on which his or her client is

relying could result in the attorney's exposure to liability if the court upholds (or voids) the prenuptial to the detriment of the attorney's client.

And speaking of the court, we must always be mindful that in the event of a dispute, the court may not see things as we see them. The fairly recent case of *Levitan v. Rosen*, 95 Mass. App. Ct. 248 (2019), is a perfect example where the court made an unusual interpretation of the law to reach its desired conclusion (See Trustworthy Advisor: *Are Courts Sidestepping Settled Trust Law – Again*, MLW August 15, 2019). That is something no amount of due diligence can combat.