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AMENDMENT, REVOCATION, OR ABANDONMENT OF PRENUPTIAL AGREEMENTS IN PROBATE CASES

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Recently, our firm handled a fascinating case that was won by our clients in the trial court and the appellate court proceedings and established legal precedent in Florida. Our clients' father and his second wife executed a prenuptial agreement that waived elective share. Nevertheless, after the death of our clients' father, his wife filed for an elective share claiming that the prenuptial agreement was modified because the husband had left a conditional gift of the elective share under his Trust.

Under *Taylor v. Taylor*, 1 So. 3d 348 (1st DCA 2009), the trial court was first required to determine whether the premarital agreement was valid and was not subsequently amended or revoked. If the trial court determined that the premarital agreement was not valid or was amended or revoked, then the trial court could look to the issue of whether the wife was entitled to the elective share.

Since the wife had claimed that the prenuptial agreement was modified because her husband had left a conditional gift to her under his trust, I researched amending a prenuptial agreement. After several hours of researching probate caselaw and statutes, I was unable to find a case providing how to determine whether a prenuptial agreement had been modified. The only authority I could find was a family law statute under

Chapter 61, *Florida Statutes*, which deals with "Dissolution of Marriage; Support; Time-Sharing." Specifically, 61.079(6), *Florida Statutes*, provides,

> AMENDMENT; REVOCATION OR ABANDONMENT. –After marriage, a premarital agreement may be amended, revoked, or abandoned only by a written agreement signed by the parties. The amended agreement, revocation, or abandonment is enforceable without consideration.

Since section 61.079, *Florida Statutes*, stated that "this section applies only to proceedings under the Florida Family Law Rules of Procedure" we were concerned that that statute only applied to Chapter 61, *Florida Statutes*, and family law matters. Because our case dealt with the elective share, it was a probate matter. Since it was a probate matter, initially, we thought that *Florida Family Law Rules of Procedure* would not apply. I read through the staff analysis of section 61.079, *Florida Statutes*, to determine why the legislature had limited its application to cases where *Florida Family Law Rules of Procedure*. Finally, I read the applicability of *Florida Family Law Rules of Procedure*.

Rule 12.010(a)(1), *Florida Family Law Rules of Procedure*, states, "These rules apply to all actions concerning family matters. . . . 'Family matters,' . . . . as used within these rules include, but are not limited to. . . . declaratory judgment actions related to premarital, marital, or postmarital agreements (except as otherwise provided, when applicable, by the Florida Probate Rules). . . ." Since the elective share issue was based on the fact that the husband and wife had executed a prenuptial

agreement and *Taylor* requires that the court first determine that the prenuptial agreement is valid and was not subsequently amended or revoked, the elective share proceedings required a declaratory judgment related to premarital agreements.

As a result, *Florida Family Law Rules of Procedure* applied. Further, section 61.079(10), *Florida Statutes,* which provided, "APPLICATION TO PROBATE CODE.—This section does not alter the construction, interpretation, or required formalities of, or the rights or obligations under, agreements between spouses under s. 732.701 or s. 732.702" did not apply since the husband and wife had not made any agreement concerning succession as provided in section 732.701, *Florida Statutes,* and since section 732.702, *Florida Statutes,* applied to with waiver of elective share rights, not amendment, revocation, or abandonment of a premarital agreement. Further, there are no contradictory *Florida Probate Rules* that would render the *Florida Family Law Rules of Procedure* inapplicable. As a result, since *Florida Family Law Rules of Procedure* applied and section 61.079, *Florida Statutes* applied, the prenuptial agreement was only able to be modified or revoked by a written agreement signed by the husband and the wife. Since the wife had not signed the husbands trust, the prenuptial agreement had not been amended and she was not entitled to the elective share.

The trial court held that the premarital agreement was a clear and unambiguous waiver of elective share and that no document was produced by the wife which

modified the prenuptial agreement. The Fourth District Court of Appeal agreed with our argument that the family law statute applied, holding,

> . . . . the language of the prenuptial agreement unambiguously waived the wife's elective share. The agreement clearly stipulates that each party has waived their right to the estate of the other, including the right to an elective share. The creation of the trust agreement could not modify the prenuptial agreement since it was not signed by both parties as required by the prenuptial agreement. The controlling Florida Statute also states that modification of a prenuptial agreement is valid only if signed by both parties. See § 61.079(6), Fla. Stat. (2014) ("After marriage, a premarital agreement may be amended, revoked, or abandoned only by a written agreement signed by the parties.").

This case sets the precedent that, in probate cases involving a waiver of rights under a prenuptial agreement, a spouse claiming amendment, revocation, or abandonment of a prenuptial agreement must present a written agreement of the amendment, revocation, or abandonment that is signed by both parties.