



PRACTICE FOCUS / FAMILY LAW



Post-nuptial Agreements, Unlike Marital Settlement Agreements, Survive Separations and Reconciliations

Commentary by
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There are two types of marital contracts that can be signed after a couple is already married. The first is a “post-nuptial agreement” and the second is a “marital settlement agreement.” Both types of contracts can be used to settle people’s affairs during times of marital strife. The distinguishing factor between the two types of agreements is the parties’ “intent” as to the future of their marriage at the time of execution. A “post-nuptial agreement” is an agreement for couples who intend, at least for the foreseeable future, to remain married. A “marital settlement agreement,” on the other hand, is an agreement for people who are contemplating an end to their marriage, meaning an imminent divorce. This raises the question: is there any importance to the above distinction? The answer is definitely “yes”—the distinction matters—because the two types of agreements are treated very differently in the event of “reconciliation” following a divorce filing.

The above question was recently presented to the Fourth District Court of Appeal in a case called *Stephanos v. Stephanos*. In that case, the parties had gone through a number of separations and reconciliations during their long-term marriage. Along the way, and following a rough patch in the relationship, the parties signed what they both acknowledged to be a post-nuptial agreement, meaning that, when they signed it,



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they intended to stay together. A number of years later, one of them filed for divorce, but, once again, the parties decided to stay together, resulting in a dismissal of the case and what is known in family law as a “reconciliation.” Unfortunately, things did not end there.

Over a decade after that reconciliation, one of the parties again filed for divorce. This time, they went through with it. During the divorce, a core question was whether their post-nuptial agreement was still in force (and whether it would therefore control the division of their property). The reason that this question came up is because of a rule—the abrogation rule—that applies in the context of marital settlement agreements. Specifically, if two people who are contemplating a divorce sign a settlement agreement, but then they abandon the di-

vorce and reconcile, the Florida Supreme Court, in a case called *Cox*, held that the “settlement agreement” should then be deemed unenforceable (at least to the extent it had not already been performed). This makes sense—if an agreement is intended to govern the parties’ affairs *after* a divorce, the entire point of the agreement is lost when the divorce case is abandoned.

The *Stephanos* case, with the parties’ multiple separations and reconciliations, called into question the limits of when the “abrogation rule” could be used to invalidate a marital agreement. On the one hand, it was undisputed that the parties intended for the agreement to be a post-nup, but there had certainly been ups and downs in the marriage at the time it was signed. For that reason, the wife made the argument that there should be no difference in the treatment

of a post-nup and a marital settlement agreement. If a divorce case is filed and abandoned, in her view, it meant that the parties intended to start their marriage afresh, without the protections of their previous marital agreement.

The trial court adopted the wife’s position, but the Fourth District disagreed with that result. The Fourth District reasoned that, when an agreement is a post-nuptial agreement (meaning that the parties intended to remain married when they signed it), it is *not* abrogated when the parties have a falling-out and later reconcile. Rather, post-nups, unlike marital settlement agreements, are designed to govern during *both* the intact marriage and the period following an intact marriage, whether the marriage ends as a result of death or divorce. For that reason, the “intent” of a post-nup is not undermined by reconciliation. To the contrary, the intent of the agreement is vindicated when it is enforced irrespective of what happens in the marriage.

The *Stephanos* case is an important development in the law in Florida because it draws a clear distinction between post-nups and marital settlement agreements, thereby eliminating, or at least reducing, the likelihood that a party can bring a successful challenge to his or her nuptial agreement. To the extent that an agreement appears to fall into some grey area, or the parties are ambivalent regarding the continued viability of their marriage, it will be imperative for practitioners to designate what type of agreement they are writing—either a post-nuptial agreement or a marital settlement agreement. Otherwise, the debate that occurred in the *Stephanos* case could rear its head again.

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