Post-Nuptial Agreement Trap

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A recent Florida appellate court decision bears review by practitioners drafting post-nuptial agreements.

The case involved a husband who provided for assets to pass to his wife in his Last Will. After the Will was signed, the spouses entered into a post-nuptial agreement. The husband then died while the parties were still married. The probate court determined that the gift to the wife was waived by the wife under the agreement, and thus she could not inherit the gifted property. It appears that the husband had children from a prior marriage, and it was the husband's prior wife who challenged the gift to the surviving spouse in favor of her minor children with the decedent.

Let's assume that the terms of the agreement, in conjunction with Fla.Stats. §732.702(1), constituted a waiver of rights by the surviving spouse of her rights under the Will - this is what the probate court and the appellate court found. This is an interpretative issue.

The more interesting part of this case was the effect of the following common clause that was in the post-nuptial agreement:

Notwithstanding the terms of this Agreement, either party shall have the right to voluntarily transfer or convey to the other party any property or interest therein, whether Separate Property or other property, which may be lawfully conveyed or transferred during his or her lifetime, or **by will or otherwise upon death**. Neither party intends by this Agreement to limit or restrict in any way the right and power of the other to receive any such voluntary transfer or conveyance. Such gifts shall not constitute an amendment to or other change in this Agreement, regardless of the extent or frequency of such gifts. **Any gifts given by one party to the other hereafter shall constitute the receiving party's separate property.**

The first two sentences of this clause clearly authorized the husband to make a valid and effective gift to the wife in his Last Will. However, the courts found that the term "hereafter" in the last sentence meant that only a Will signed AFTER the post-nuptial agreement would be given effect.

This is a strained reading of that clause. The purpose of such clauses is to establish the property rights of the spouses in various property, but to allow for the parties to make their own voluntary transfers to the other spouse if they want. Whether those transfers are set out in a Will that predated the agreement seems irrelevant, and a trap for unwary spouses (and their counsel). That the Will doesn't take effect until the post-agreement death of the spouse further suggests that the date of the Will should not matter.

Further, all the last sentence appears to be doing here is characterizing gifts as "separate property" under the Agreement. This makes sense – if an *inter vivos* gift was made, it would be appropriate to treat that as the separate property of the recipient spouse that cannot be reached by the other spouse per the terms of the agreement relating to separate property. It does not appear to be designed to address any testamentary transfer issues – how would the label "separate property" in the hands of a surviving spouse have any relevance to anything?

How would this principle be applied to other testamentary transfers, such as a revocable trust or beneficiary designation made before the marital agreement? Would a post-agreement codicil addressing other dispositions or Will terms eliminate the pre-agreement character of the gift? Is this a narrow case that is dependent on the "hereafter" wording in the above clause, or is it of broader import that may have precedential value in all prenuptial and postnuptial situations?

Of course, in the future, agreements can be drafted with terms that specifically address pre-existing dispositions between the spouses. Alternatively, pre-existing dispositions can be redone post-agreement. However, such technical solutions are apt to be overlooked in many circumstances.

Steffens v. Evans, 4th DCA (Case No. 4D10-2467), October 5, 2011

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