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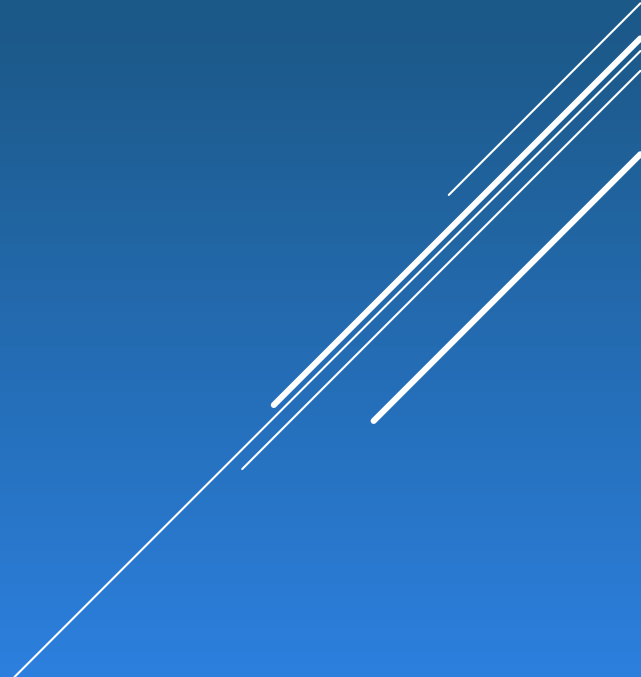
# *Preparing Good Prenups!*

**What you definitely need to know  
before drafting.**

**What an ESTATE PLANNING attorney  
wants a family law attorney to know**

**What a FAMILY LAW ATTORNEY wants  
an estate planning attorney to know**

# **IMPORTANT STATUTES AND CASE LAW APPLICABLE TO PRENUPTIAL AND POSTNUPTIAL AGREEMENTS**



# IMPORTANT STATUTES AFFECTING ESTATE PLANNING



# APPLICABLE LAW: ESTATE PLANNING

## RIGHTS OF THE SURVIVING SPOUSE

### HOMESTEAD – Fla. Const. art. X 4(a) & Fla. Stat. 732.401

Constitutional devise restriction if survived by a spouse or minor child

### SPOUSE'S SHARE OF INTESTATE ESTATE – Fla. Stat. 732.102

Intestate = No valid Will

All to spouse, unless either has a descendant that is not common to both (*then 50% to spouse and 50% to decedents*)

### ELECTIVE SHARE – Fla. Stat. 732.201 & 732.2065

Surviving spouse of a decedent domiciled in Florida has a right to a 30% share of the elective estate

A floor and not a ceiling

# APPLICABLE LAW: ESTATE PLANNING

## RIGHTS OF THE SURVIVING SPOUSE

### **PRETERMITTED SPOUSE – Fla. Stat. 732.301**

Surviving spouse has a right to an intestate share if a decedent's Will was executed before marriage, unless a nuptial or Will addresses

### **EXEMPT PROPERTY – Fla. Stat. 732.402**

Up to \$20,000 of household furnishings

Two (2) motor vehicles

Qualified Tuition programs (529 Plans)

### **FAMILY ALLOWANCE – Fla. Stat. 732.403**

Surviving spouse entitled to "reasonable allowance in money" not to exceed \$18,000

### **PREFERENCE IN APPOINTMENT OF PERSONAL REPRESENTATION – Fla. Stat. 733.301**

In an intestate estate, surviving spouse has first option to serve as the decedent's personal representative

# APPLICABLE LAW: ESTATE PLANNING

## WAIVER OF SPOUSAL RIGHTS – Fla. Stat. 732.702



A nuptial agreement which waives rights at the death of a spouse must be in writing, signed by the spouses in the presence of two subscribing witnesses



If executed before marriage, asset disclosure is *not necessary*, however, if executed after marriage “fair disclosure” *is required*

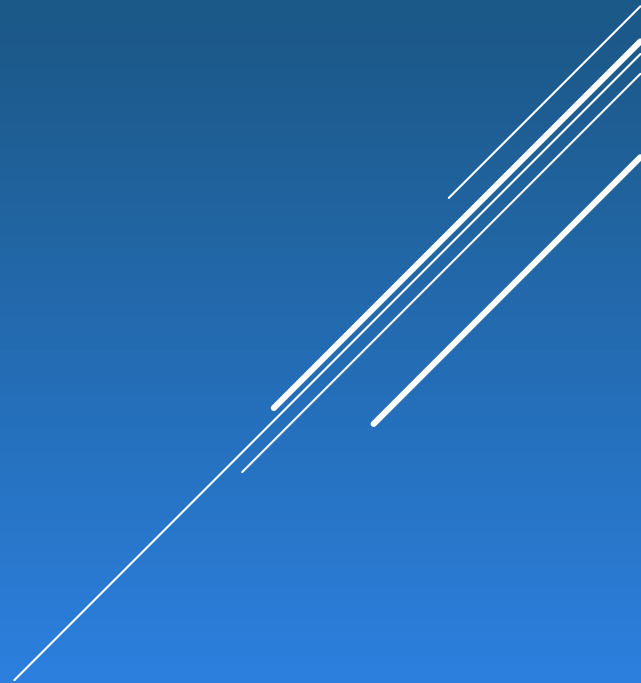


No additional consideration is necessary for the agreement



A waiver of “all rights” or equivalent language is a waiver of all rights to elective share, intestate share, permitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative

# IMPORTANT STATUTES AND CASE LAW RELATED TO DIVORCE





# REMEMBER: A PRENUP IS ONLY GOOD IF IT'S ENFORCED!

## 1. Contract Law applies!

- This means that parol evidence (evidence other than the “four corners” of the document) is admissible if there’s an ambiguity! *Taylor v. Taylor*, 1 So. 3d 348 (Fla. 1<sup>st</sup> DCA 2009)
- **DANGER: Witnesses (mom, friend, therapist, clergy, financial advisor), evidence (texts, notes, diaries, memos, photos), depositions, hearings, trials...**

## 2. Standard of review is de novo (starts anew at appeal level)

- *De novo* used because interpretation is a matter of law.
- See, e.g. *Murley v. Wiedamann*, 25 So. 3d 27 (Fla. 2nd DCA 2009)

# HOW ARE PRE-NUPS SET ASIDE?

It depends on if the agreement was executed before or after October 1, 2007.

## Before 2007

Follow *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987)

- **Option 1: Argue the agreement was entered into under fraud, duress, coercion or misrepresentation.**
  - Arises often with the “eve of the wedding” situation
  - *But see Francavilla v. Francavilla*, 969 So. 2d 522 (Fla. 4th DCA 2007)
    - The difference? Though it was signed the day before the wedding, the wife’s attorney drafted, was negotiated for months, and there was full disclosure of husband’s assets.
  - **Danger! Witnesses (mom, friend, therapist, clergy, financial advisor), evidence (texts, notes, diaries, memos, photos), depositions, hearings, trials...**

# HOW ARE PRE-NUPS SET ASIDE?

Before 2007


*Follow Casto v. Casto, 508 So. 2d 330 (Fla. 1987)*

- **Option 2:** Argue the agreement is “unreasonable” *Casto* at 333.
  - “To establish that an agreement is unreasonable, the challenging spouse must present evidence of the parties’ relative situations, including their respective ages, health, education, and financial status.”
  - “With this basic information, a trial court may determine that the agreement, on its face, **does not adequately provide for the challenging spouse** and, consequently, is **unreasonable**. In making this determination, the trial court must find that the agreement is ‘**disproportionate to the means of the defending spouse.**’”
- **Step 1: Challenging party demonstrates unreasonableness**
  - Not adequately provided for
  - Agreement is disproportionate to means of the other spouse (one got way less than the other)
- **Step 2: Presumption of lack of knowledge or concealment arises.**
  - Defending spouse must rebut this with evidence of financial disclosures or general and approximate knowledge
- The element of “fairness” or “reasonableness” is measured at the time of the execution of the agreement. *Delvecchio v. Delvecchio* 143 So. 2d 17 (Fla. 1962).

# HOW ARE PRE-NUPS SET ASIDE? (AFTER 2007)

- ▶ **Uniform Premarital Agreement (Fla. Stat. §61.079 – and Casto+) (effective 10/1/2007)**
- ▶ A premarital agreement is not enforceable if:
  - ▶ 1. The party did not execute the agreement voluntarily;
  - ▶ 2. The agreement was the product of fraud, duress, coercion, or overreaching;
  - ▶ 3. The agreement was **unconscionable** when it was executed and, before execution of the agreement, that party:
    - ▶ a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
    - ▶ b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
    - ▶ c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

## ▶ SOUND FAMILIAR?

- ▶ *Casto* + “unconscionable” instead of “unreasonable”
  - ▶ 61.079(7)(c): An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law
  - ▶ NO interpretive cases as to “unconscionability” meaning to date.
  - ▶ *Casto* is likely still good law (for now)
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▶ **UPAA ALSO Adds:**

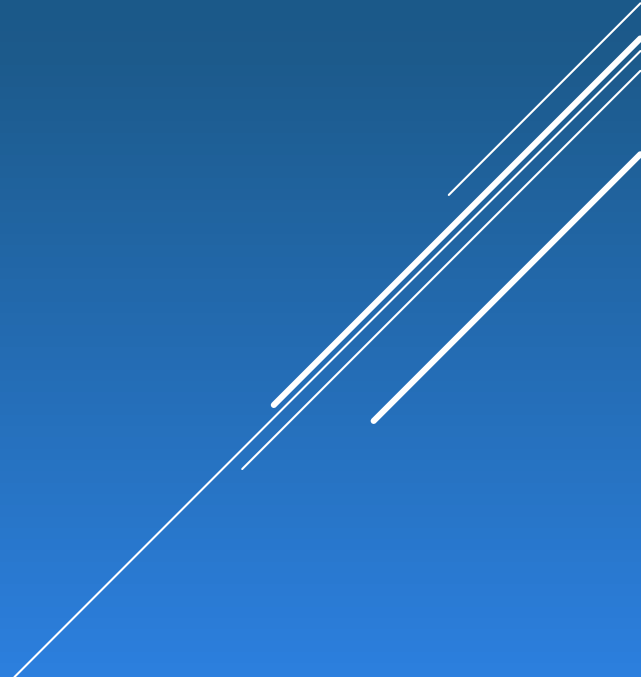
- ▶ Requirement that it be in writing, signed by both parties
- ▶ States parties may waive financial disclosures (**DANGER!! DO NOT DO THIS!**)

## ▶ 61.079(b)

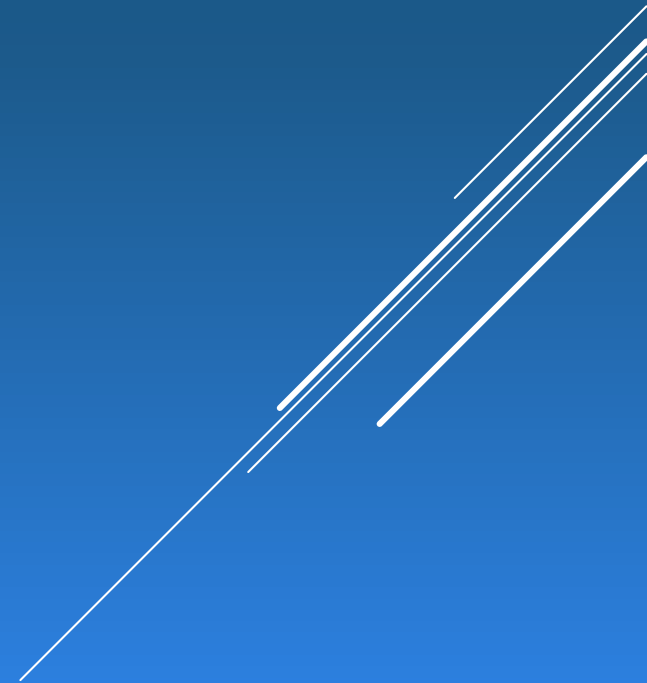
- ▶ If a provision of a premarital agreement **modifies or eliminates spousal support** and that modification or elimination **causes one party to the agreement to be eligible for support under a program of public assistance** at the time of separation or marital dissolution...
- ▶ a court, **notwithstanding the terms of the agreement**, may require the other party to provide support to the extent necessary to avoid that eligibility.



# NOTE: I AM NOT SAYING ALL PRENUPS WILL BE SET ASIDE.

- ▶ Plenty of prenuptial agreements are upheld or are never challenged.
  - ▶ BUT, if it happens to you, it happens 100% of the time.
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# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW



# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

1. Petition filing Date Provision Trigger
  - If death after filing but BEFORE dissolution final
2. Waiver of Spousal Rights
  - Discuss rights and decide which are to be specifically waived
    - If waiving ALL rights, use the “all rights” waiver language AND include (*without limiting*) rights intended to be waived
  - Fair Disclosure of Assets
    - Not required for pre-nup but required for post-nup



# FAIR DISCLOSURE OF ASSETS OPPOSITE RULES FOR FAMILY LAW WAIVERS

## BEST PRACTICE

Always provide full, detailed, and complete disclosure of  
all assets and liabilities

*(vested or contingent, present or future)*

# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## 3. Homestead

- TBE, JTROS, and life estate deeds not subject to devise restriction
  - NOTE: Does not include Lade Bird Deeds
- Florida Irrevocable Grantor Homestead Trust

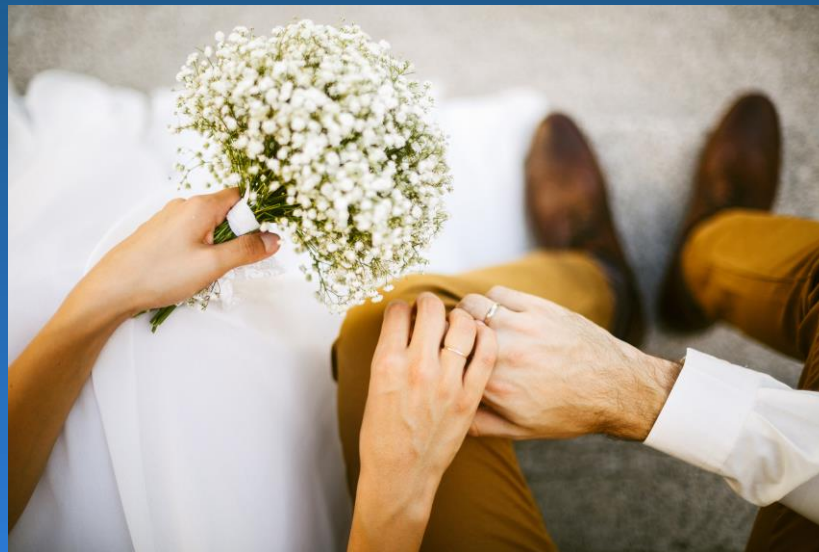
## 4. Elective Share

- Elective Share Election
  - Must be exercised within the earlier of (A) 6 months of service of notice of administration of probate OR (B) 2 years from the date of death
  - May be exercised by Surviving Spouse, or by the attorney-in-fact or guardian of the property with Court Approval if in the surviving spouse's best interest
- Elective Share Trust

# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## 5. Power of Appointments

- A spouse may be beneficiary of trusts which provide a power of appointment
- Consider addressing (A) spouse with POA has no restriction OR (B) Requirement of exercise (some or all)



# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## 6. Tax Benefits



### **STATE** – Save Our Homes Tax Cap Division & Portability Upon Divorces

- Homestead has a 3% annual assessment limitation for homestead property
- Benefit can be transferred (Fla. Stat. 193.155(8))



### **FEDERAL** – Lifetime Exclusion Portability

- Current exemption \$12.9M (will drop to about \$6.5M in 2026 without Congressional action)
- Current law allows a deceased spouse's estate to transfer any unused exemption to the surviving spouse for future use
- Consider provisions whereby spouses are required to include specific directions to their personal representative consistent with the nuptial agreement



### **FEDERAL** – Annual Gift Tax Exemption

- Annual gifting is a common estate planning technique to reduce a taxable estate
- A tax-free gift may be made annually for up to \$17K per recipient (*no limit to the number of people*)
- Married couples can elect for "gift splitting"

# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## 7. Irrevocable Trusts – non-marital asset

- Very common in estate planning, especially high-net worth estate planning
  - SLATs and Irrevocable gift trusts for children
- Equitable Division
  - Assets once gifts (even marital) lose status as a marital asset and are therefore not subject to equitable division (See *Nelson v. Nelson*, 206 So.3d 818 (Fla. 2d DCA 2016))
  - While it may not be subject to division, it may be considered to make an unequal distribution of marital assets
    - If a distribution is condition to spouse waiving any rights or claims to trust assets – it *may* avoid the issue



# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## 7. Irrevocable Trusts – non-marital asset (*continued*)

- Alimony and child support
  - May consider for determining alimony and child support obligations (See *Bacher v. Vacher*, 520 So.2d 299 (Fla. 3d DCA 1988) & Fla. Stat. 61.08 and 61.046)
  - An irrevocable trust may be pierced to collect unpaid alimony and/or child support (see *Bacardi v. White*, 463 SO.2d 218 (Fla. 1985) & *Berlinger v. Casselberry*, 133 So.3d 961 (Fla. 2d DCA 2013))



# WHAT ESTATE PLANNING ATTORNEYS WANT FAMILY LAW ATTORNEYS TO KNOW

## UNDERSTANDING THE NEW FLORIDA COMMUNITY PROPERTY TRUST, PART I

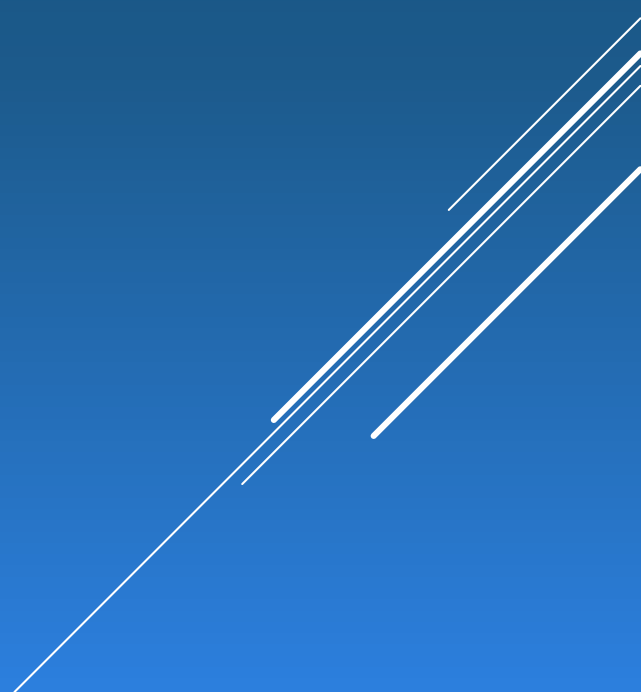
Vol. 96, No. 4 July/August 2022 Pg 16 Joseph M. Percopo Featured Article



### 8. Florida Community Property Trust

- a. Provides for 50/50 division of all assets transferred into trust regardless of who contributed them to the trust and specifically states that Fla. Stat. 61.075 does not apply (Fla. Stat. 736.1508)
- b. Statutes do not directly contemplate nuptial agreements, and seem to imply the division must be 50/50 of the aggregate value of the assets
  - Unsure if provisions in a nuptial agreement could provide for a different division after the distribution and division of the trust)

# WHAT A MARITAL AND FAMILY ATTORNEY WANTS AN ESTATE PLANNING ATTORNEY TO KNOW



- FINANCIAL DISCLOSURES ARE KEY.

- **Don't just give a "statement of net worth" that was prepared by their financial guy!!!**

## UPAA

- ▶ Before execution, the party
  - ▶ a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party,
  - ▶ b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - ▶ c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

# BEST PRACTICE

1. Statement of net worth (I do a FULL LONG FORM FAMILY LAW FINANCIAL AFFIDAVIT – FORM 12.902(c))

## 2. BACK UP DOCUMENTS!

- ▶ 3 years of income tax returns
- ▶ 3 months of pay stubs
- ▶ any loan applications from last year?
- ▶ Deeds and leases
- ▶ Bank statements for at least 3 months
  - ▶ **YES - THIS INCLUDES IRREV. TRUSTS**
- ▶ Credit card and other loan statements for last 3 months
- ▶ Brokerage and retirement statements for 3 months/last quarter and current
- ▶ Life insurance policies – dec page and most recent statement
- ▶ Business and trust tax returns for last 3 years
- ▶ Business and trust bank statements and balance sheets for 3 months/last quarter and current
- ▶ Business P&L for last year and most recent
- ▶ Copies of trusts, operating agreements

**IF YOUR CLIENT DOES NOT  
WANT TO DO THIS DO NOT  
REPRESENT THEM!**

- May bring to signing and reference as exhibit with a **COURT REPORTER**
- Include an itemized and notarized acknowledgment of receipt in the prenup



- **Sloppy Drafting = Unintended Consequences. Just ask Mrs. Famiglio.**
  - *Famiglio v. Famiglio*, 44 F.3d 1145, 1147 (9th Cir. 2019), *Weekly D1260d* (May 10, 2019)
  - Prenuptial agreement said
    - 7 years = 2.7 million
    - 10 years = 4.2 million
    - Determined “at the time a Petition for Dissolution of Marriage is Filed”
    - Filed petition #1 at year 7.
    - Reconciled. Petition dismissed.
    - Filed petition #2 at year 10.



# ALLOWED IN FLORIDA – YES OR NO?

1. Prevailing party attorneys fees clause for challenging a prenup (whoever wins has to pay the other's fees)

- **YES!** See *Lashkajani v. Lashkajani* 911 So. 2d. 1154 (Fla. 2005).

2. If we divorce, we will share time equally with our future children

- **NO! “Best interests” standard cannot be waived or contracted away.**

3. Both parties waive all types of alimony, including permanent, durational, bridge-the-gap, rehabilitative, and *pendente lite* (temporary, while litigation pending)

- **YES AND NO – Everything is permitted EXCEPT waiver of temporary alimony.** *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972); *Aguilar v. Montero*, 992 So. 2d 872 (Fla. 3d DCA 2008)



4. Both parties waive the right to seek temporary attorneys' fees from the other party.

- **NO! See *Lord v. Lord*, 993 So. 2d 562 (Fla. 4th DCA 2008). But, may agree to limited amount of fees. *Niazi v. Niazi*, 179 So. 3d 365 (Fla. 5<sup>th</sup> DCA 2015).**

5. Both parties waive the right to child support.

- **NO. Not permitted – ever.** *Dechant v. Florida Department of Revenue ex. Rel. Rees*, 915 So. 2d 215, 216 (Fla. 3d DCA 2005) (“Child support is a right that belongs to the child and may not be contracted away by the parents... it is a dual obligation imposed on the parents by the

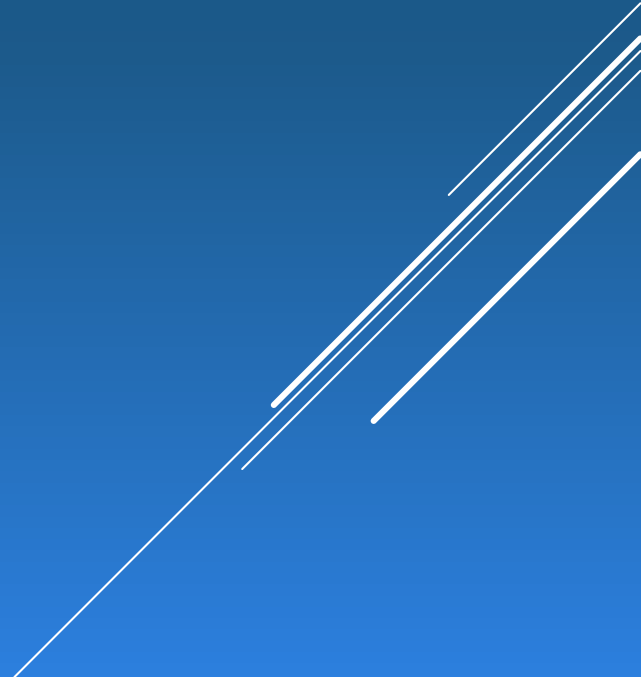
# TRADITIONAL METHOD OF PREPARATION

- ▶ 1. John and Shari get engaged!
- ▶ 2. Shari, John's mom, and Shari's mom engage in months of wedding planning.
- ▶ 3. Two months before the wedding, John's family lawyer recommends a prenup.
- ▶ 4. John retains his family lawyer to prepare it.
- ▶ 5. John tells Shari. Shari feels there's no choice.
- ▶ 6. John's lawyer merges his standard form from Lawgic with "what's mine is mine", attaches John's net worth chart from John's financial planner, and emails it to Shari.
- ▶ 7. Shari goes to a lawyer, who looks at it for an hour.
- ▶ 8. Awkwardness ensues.
- ▶ 9. MINIMAL (if any negotiation) occurs.
- ▶ 10. They sign one week before wedding.

# MUCH BETTER OPTION: THE COLLABORATIVE PROCESS

- Each party has an attorney
  - Open and honest communication (Practice for marriage! MARRIAGE RARELY INVOLVES SECRET NEGOTIATION!)
- One Neutral Mental Health Professional
  - CALM ANXIETY! Facilitate hard conversations never had during dating
- One Neutral Financial Professional
  - Compile and make sense of financial information
  - Help equalize parties' knowledge base on finances
  - Make statements of net worth and budgets, guide in marriage plan
- Series of team meetings (and offline meetings – possibly with family)
  - Set goals - identify what does marriage mean and why is it important!
  - Together, prepare options for divorce, death, and even for during marriage

# BENEFITS OF COLLABORATIVE PROCESS

- **ROBUST PROTECTION OF AGREEMENT**
    - Thorough negotiation
    - LOTS of financial disclosure
  - Open, honest, and confidential
  - Addresses emotions
  - Forces a type of “premarital counseling”
  - Requires conversations not often had pre-marriage
  - No drafting until the end!
  - Less awkward
  - Not adversarial – team based approach
  - Allows very specific “if \_\_\_\_\_, then \_\_\_\_\_”s.
  - Addresses “shadow people” head on.
- 

▶ **Collaborative Family Law Group of Central Florida**

▶ [www.cfl-cfl.com](http://www.cfl-cfl.com)

▶ **Florida Academy of Collaborative Professionals**

▶ [www.collaborativepracticeflorida.com](http://www.collaborativepracticeflorida.com)

# QUESTIONS?

