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Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2776

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Subject: Marc Soss on *Wilson v. Wilson* - Let the Victor Be the Couple's Prenuptial Agreement

"In Wilson v. Wilson as Trustee of Paul C. Wilson Living Trust, the Fourth District Court of Appeals addressed whether the language contained in a subsequently executed estate plan (Will and Revocable Trust) would control over the terms of the couples prenuptial agreement. In affirming the lower court, the appellate court found that the 'prenuptial agreement could be modified only in writing with the signature of both parties' and the decedent's estate planning documents were not executed by both spouses.

In Florida, if you intend to over-ride the provisions of your prenuptial or postnuptial agreement through a testamentary device, it is best not to utilize the exact or very similar verbiage that you have specifically agreed to waive your rights to under the agreement. Alternatively, have both parties sign or modify their agreement to allow for the testamentary devise."

Marc Soss provides members with his analysis of *Wilson v. Wilson.*

Marc Soss' practice focuses on estate planning, probate and trust administration, litigation, and corporate law in Southwest Florida. Marc is a frequent contributor to **LISI** and has published articles in the Florida Bar, Rhode Island Bar, and North Carolina Bar. Marc is also a retired United States Navy Supply Corps Officer.

Here is Marc's commentary:

EXECUTIVE SUMMARY:

In *Wilson v. Wilson as Trustee of Paul C. Wilson Living Trust*, the Fourth District Court of Appeals addressed whether the language contained in a subsequently executed estate plan (Will and Revocable Trust) would control over the terms of the couples prenuptial agreement. In affirming the

lower court, the appellate court found that the “prenuptial agreement could be modified only in writing with the signature of both parties” and the decedent’s estate planning documents were not executed by both spouses.

FACTS:

In *Wilson*, prior to their marriage in 2011, a couple entered into a prenuptial agreement. The terms of the agreement waived each of their rights to an elective share from the others estate. The prenuptial agreement further provided that any changes to the prenuptial agreement must be in writing and signed by both parties. However, the agreement did provide each with the right to make a testamentary gift by Last Will and Testament or Codicil to the other. In 2013, the husband executed a Last Will and Testament and Trust agreement (he subsequently amended it in 2014), that directing the trustee, upon his death, to set aside "as much property as is necessary to satisfy the Wife’s elective share" pursuant to the elective share statute. After the husband’s death, the Wife filed a notice of election to take the elective share in accordance with the terms of the trust agreement. The trial court struck down the wife’s notice of election to take elective share. The wife appealed the trial court ruling.

On appeal, the Fourth District Court of Appeals addressed whether the language of the prenuptial agreement, that waived each spouse’s rights to an elective share, was modified by the Trust agreement which requested the setting aside of property to satisfy the same elective share ("*There shall be set aside from the property of this trust as much property as is necessary to satisfy the Wife’s elective share pursuant to Section 732.201, et seq., of the Florida Statutes, provided the requirements thereunder are satisfied and a timely election is filed*"). In affirming the trial court, the Appellate Court found “the language of the prenuptial agreement unambiguously waived the wife’s elective share and that the trust agreement could not modify the prenuptial agreement under the terms of the prenuptial agreement itself and the applicable statute.” Under §61.079(6), Fla. Stat. (2014) the modification of a prenuptial agreement is valid only if signed by both parties ("After marriage, a premarital agreement may be amended, revoked, or abandoned only by a written agreement signed by the parties.").

The Appellate Court further found that “any testamentary gifts, by will or codicil, envisioned by the prenuptial agreement would not invalidate any of the provisions of the prenuptial agreement. Therefore, even if the decedent gave the wife a testamentary gift, the waiver of the elective share would still be effective. Thus, if the decedent intended to give the wife a testamentary gift, he could have done so by will or codicil without relying on an elective share and specifically the requirements of the elective share statute.”

COMMENT:

In Florida, if you intend to over-ride the provisions of your prenuptial or postnuptial agreement through a testamentary device, it is best not to utilize the exact or very similar verbiage that you have specifically agreed to waive your rights to under the agreement. Alternatively, have both parties sign or modify their agreement to allow for the testamentary devise.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Marc Soss

CITE AS:

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CITES:

Wilson v. Wilson of *Wilson v. Wilson as Trustee of Paul C. Wilson Living Trust*, 44 Fla.L.Weekly D 2076, 279 So.3d 160, (4 Dist. 2019); §61.079(6), Fla. Stat.; §*732.201*, Fla. Stat.