

Prenuptial Agreements in Michigan – Can a Uniform Act Help?

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Take-Away: Michigan currently is looking into the adoption of the Uniform Premarital and Marital Agreements Act with the intent to provide a level of consistency when it comes to the enforcement of prenuptial and postnuptial agreements. The hope is that if this Act is adopted there will be a higher level of predictability when a prenuptial agreement will be enforced in a future divorce setting.

Background: Several years ago, there were a series of Michigan court decisions that cast some doubt on the enforceability of a prenuptial agreement in a divorce. One response to these *Allard* decisions was for the Michigan Legislature to consider the adoption of the Uniform Premarital and Marital Agreements Act (the Act.). That Act has not yet been adopted in Michigan, but it is now being considered by the Legislature. This is important because assets that come to an individual by gift or inheritance are presumptively their *separate property* which a prenuptial agreement is often used to protect in the event of the inheritor's future divorce. Probably a much better way to protect an inheritance in the event of a future divorce is to 'hold' that inheritance in a discretionary Trust where the beneficiary is not treated as holding a *property* interest in the Trust that can be 'invaded' by a divorce judge. [MCL 700.7505; 700.7815(1).]

Allard Decisions: In a series of court decisions from both the Michigan Supreme Court and the Michigan Court of Appeals, collectively known as the *Allard* decisions, it was determined that a divorce judge has the discretion to award support and invade a spouse's *separate property* under two Michigan statutes, regardless of what the terms of a prenuptial agreement might require to the contrary. [*Allard v. Allard*, 318 Mich App 583 (2017).] In effect, the *Allard* decisions held that the parties to a prenuptial agreement cannot contractually limit the divorce judge's ability to exercise his or her equitable authority to award

support or invade the other spouse's *separate* property under two Michigan statutes. The *Allard* decisions concluded, in part:

“[parties] do not have the right to contract to bind the equitable authority granted to the trial court under these statutes, and any attempt to do so necessarily voids such an agreement. A trial court cannot be prohibited from exercising its equitable powers under MCL 552.23(1) and MCL 552.401, regardless of the parties’ antenuptial agreement. But these two statutes do not give ‘parties to a divorce any statutory right to petition for invasion of separate assets....Rather, the statutes simply empower the circuit court’ to invade separate property if equity demands it. In other words, the parties cannot use their prenuptial agreement to force a trial court to order an inequitable property settlement. If a trial court concludes that a prenuptial agreement’s distribution of property is fair and equitable, it does not need to utilize its equitable powers under MCL 552.23(1) and MCL 552.401.”

MCL 552.401 (Contribution): This statute permits divorce judge to make a property award that ‘invades’ one spouse’s *separate* property when *“equitable under all the circumstances of the case, if it appears from the evidence in the case that the [other] party contributed to the acquisition, improvement, or accumulation of the property.”* If the divorce judge applies this statute, he/she must initially find that the spouse who requests the invasion of the other spouse’s *separate* property to have ‘significantly assisted in the acquisition or growth of that *separate* property.’ Under those circumstances the divorce judge may consider the one spouse’s contribution as having a ‘distinct value deserving of compensation.’

MCL 552.23(1) (Need): This statute allows the divorce judge to ‘invade’ one spouse’s *separate* property, but it is based on a judicial finding of a spouse’s *need* when statutory requirements are met. This ‘invasion’ of *separate* property is permitted after the division of the marital estate and the divorce judge then determines the continuing *need* of one spouse after his/her share of the marital estate is identified and considered. *“Upon*

entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.”

In short, the *Allard* decisions cast a cloud on how effective a prenuptial agreement will be to protect one spouse’s *separate* property if the divorce judge has the ‘final say’ as to whether what the agreement provides for in the event of a future divorce is ‘fair and equitable’ at the time of the divorce.

Uniform Act: The Act is intended to provide more certainty, or predictability to the parties, regarding the enforcement of their prenuptial agreement in a future divorce. That Act provides, in part:

“ Section 9(f): A court may refuse to enforce a term of a premarital agreement or a marital agreement if, in the context of the agreement taken as a whole: (1) the term was unconscionable at the time of signing; or (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.”

Section 9(f)(2) above is an optional provision in the Act that an adopting state might elect to add to its adoption of the Act. This Section empowers the divorce judge to take a ‘second look’ at whether the prenuptial agreement is ‘fair and equitable,’ or unconscionable, at the time that it is being enforced, meaning at the time of the divorce. This Section presents the challenge with a prenuptial agreement, along with Michigan’s common law, in that the ‘fairness’ of the prenuptial agreement’s provisions are determined *both* when it is negotiated and signed by its parties, and at the time of their future divorce, when decisions made

during the marriage can easily impact the perception of the fairness of the agreement's terms, which can often be triggered by the decisions made by one spouse that lead to that spouse's apparent financial *need*.

Example: Fred and Ethel are on their second marriage. They entered into a prenuptial agreement to protect the assets that each took from their prior divorce, classified as their *separate* property. Fred came into the marriage with \$3.8 million in *separate* property assets. Ethel came into the marriage with \$3.5 million in *separate* property assets. Their prenuptial agreement clearly states 'what is mine is mine, what is yours is yours' regarding their respective *separate* property assets. Over their ten years of their marriage Fred's *separate* property, which was not commingled with Ethel's and held in a revocable Trust, has grown in value to \$5.5 million. Ethel decided early into the marriage to make large gifts to her children from her prior marriage amounting to \$750,000 to help them purchase homes and to educate her grandchildren with prefunded 529 accounts. These decisions were solely made by Ethel, who may have been motivated (a bit) by guilt since her then-teenage children suffered during her first divorce. The marital estate grew by \$400,000 in the marriage which is to be divided equally between Fred and Ethel per the prenuptial agreement. Thus, under the prenuptial agreement, Fred walks from his second divorce with \$5.7 million in assets. After 10 year's Ethel's *separate* property did not grow like Fred's *separate* property since she invested exclusively in bonds; Ethel's *separate* property at the time of their second divorce is worth \$2.85 million. Under the prenuptial agreement Ethel walks from the second divorce with \$3.05 million. Consequently, a spread of \$300,000 in *separate* property at the beginning of the marriage when the prenuptial agreement was signed is now a \$2.45 million difference at the time of the divorce, when the prenuptial agreement's terms provide that each party walks from the divorce with their own *separate* property and 50% of the marital estate. Add to that disparity in *separate* property the fact that Ethel is now 10 years older and starting to have some health issues. What looked 'fair and equitable' when the prenuptial agreement was initially negotiated and signed no longer looks 'fair and equitable.' Ethel's litigation position is that

the divorce judge should ignore the prenuptial agreement's terms and 'invade' Fred's *separate* property. Is the divorce judge free to 'invade' Fred's *separate* property to address the perceived 'unfairness' now that Fred and Ethel are in a divorce ten years later?

Comment: If Michigan moves forward and adopts the Act, there is a good chance that it will also adopt the version that adds Section 9(f)(2) which requires the divorce judge to consider the fairness of the terms of the prenuptial agreement at the time of the future divorce, since that provision is consistent with Michigan's common law under the *Allard* decisions, and it seems to be in accord with the public policy of Michigan that is reflected in the *invasion-for-need* statute, *need* being a relative term. In short, , adopting the Act may not provide much comfort to those spouses who enter into a prenuptial agreement if there is uncertainty that a future divorce judge will find its terms years later, taking a 'second look,' to still be fair and equitable.

Conclusion: While the adoption of the Act may help to provide some certainty in some situations mainly short-term marriage, to protect a spouse's *separate* property in the event of a future divorce, it will not provide the spouses with assurance that their *separate* property will be protected by a prenuptial agreement, since it is hard to predict far into the future what might appear as 'fair' when it is signed will not appear to be 'fair' when the circumstances presented at the time of the divorce are considered. If *separate* property comes to an individual by an inheritance, thought should be considered to leaving that inheritance in a discretionary Trust, since presumably because the trust beneficiary possesses no *property* interest in the Trust, and accordingly there is nothing for the divorce judge to 'invade.'