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Antenuptial and Postnuptial Agreements: Traps for the Unwary Practitioner

I. Introduction

An antenuptial agreement (also called a "prenuptial agreement") refers to a contract entered into by persons about to be married. By design, it addresses issues of support and the disposition of the respective property or estates of the parties upon the termination of the marriage by death or divorce. Such agreements are recognized in Ohio. See, e.g., *Hook v. Hook*, 69 Ohio St. 2d 234 (1982). General contract law applies, though the application is somewhat qualified due to the confidential nature of the agreements and the potential for a party, historically presumed to be the husband, to overreach. Id. at 235.

Postnuptial agreements are invalid in Ohio. See ORC 3103.06 which provides:

> A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

"This section has been held to prohibit postnuptial agreements contracting away property rights." *Logan v. Logan*, 1985 Ohio App. LEXIS 6561 (Ohio Ct. App. 8th Dist. Cuyahoga County 1985) (citing Dubois v. Coen (1919), 100 Ohio St. 17). However, if the agreement in question is merely a *memorandum* of an oral antenuptial agreement it may be permissible. Id. (citing In Re Estate of Weber (1960), 170 Ohio St. 567.

A. The State of Antenuptial Agreements in Ohio

As noted above, antenuptial agreements address issues of support and the disposition of property upon the termination of a marriage. Marriages terminate either by death or divorce. See *Langer v. Langer*, 123 Ohio App.3d 348 (Ohio App. 2 Dist., 09-26-1997). Ohio has recognized the validity of antenuptial agreements disposing property upon the death of a party since 1846, when the case of *Stilley v. Folger* was reported. 14 Ohio 610. However, it was not until *Gross v. Gross*, nearly 140 years later, that the Ohio Supreme Court considered the validity of such an agreement. 11 Ohio St. 3d 99.

The public policy supporting the validity of antenuptial agreements in contemplation of death (except in cases of fraud, duress, or undue influence) as far back as the nineteenth century was the promotion of domestic tranquility. It was reasoned that such agreements preserved a spouse's interest in his or her estate and that such agreements resulted in fewer disputes about property after a spouse died; such reassurance and precluding of potential disputes presupposed a lesser threat to marital bliss. Id. at 102-103.

The corollary was that an antenuptial in contemplation of divorce was contrary to the same public policy: forfeiting property or conjugal rights could be profitable for a party and as such, would promote divorce. Id. at 104.

Alot has changed in 140 years. While the law, as established in *Gross*, removed the categorical invalidity of antenuptial agreements with divorce provisions, the policy remains the same. *Gross* recognized that in light of the modern realties, i.e. increases in

divorce and the resulting subsequent marriages by spouses that may have already acquired significant assets and/or children, validating such agreements will in fact promote marriage, rather than to encourage divorce. Id. at 105.

The current state of the law, then, is that antenuptial agreements, provided they meet certain substantive requirements, are valid whether they are in contemplation of death or divorce.

II. The Three Essential Elements of an Enforceable Antenuptial Agreement

In *Gross*, the Ohio Supreme Court held that antenuptial agreements "are valid and enforceable if three basic conditions are met: one, if they have been entered into freely without fraud, duress, coercion or overreaching; two, if there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the prospective spouse's property; and, three, if the terms do not promote or encourage divorce or profiteering by divorce. Id.

A. Element One: Fraud, Duress, Coercion or Overreaching

The elements of fraud, duress, and coercion have those well construed meanings familiar to most attorneys, and will not be discussed here. Overreaching "is used in the sense of one party, by artifice or cunning, or by significant disparity to understand the nature of the transaction, seeks to outwit or cheat another." Id. The standard is a "totality of the circumstances." *Hook* at 236. In *Hook*, a spouse was taken to the other's attorney's office on the morning of the wedding. The spouse thought that she was simply signing wills, but when the antenuptial was placed before her, she questioned what it was. The

other spouse's response was "Never mind, just sign it. It just means what is mine is mine and what is yours is yours."

The Supreme Court upheld the agreement, dismissing the attacking spouse's argument that she did not comprehend the document. The court applied a decidedly commercial standard to the transaction, stating that "Ordinarily, one of full age in the possession of his faculties and able to read and write, who signs an instrument and remains acquiescent to its operative effect for some time, may not thereafter escape the consequences by urging that he did not read it or that he relied upon the representations of another as to its contents or significance." Id. at 238.

However, Ohio courts have held that the doctrine of constructive fraud, which does not require proof of intent to deceive where the parties are in a fiduciary relationship, applies to antenuptial agreements. *Cohen v. Estate of Cohen* (Ohio 1986) 23 Ohio St.3d 90.

ORC 3103.05 provides:

> A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other.

In a technical sense, this statute applies to "husband and wife" and thus is in the "postnuptial" context. The courts prefer, however, to relate the standards back to the time of the execution of the document. See *Gross* at 108-109.

The takeaway is clear. In the negotiation and execution of an antenuptial agreement, a high standard of good faith should be applied.

B. Element Two: What Constitutes Adequate Disclosure?

Hook also illuminates what constitutes adequate disclosure. The Court was satisfied that where the attacking spouse had been apprised that the other spouse had property "in excess…$60,000" as well as insurance policies, there had been adequate disclosure. Id. at 238. In other words, it is not necessary to fully itemize one's assets in order to affect a "full disclosure."

Nevertheless, the wary practitioner should seek to have disclosed as much information as to debts and assets as is practical under the circumstances. As we will discuss shortly, there are simple steps that the *astute* attorney can take to ensure that the level of disclosure survives legal scrutiny. What constitutes *adequat*e disclosure is open to interpretation. The astute attorney should stage and document the disclosure process, knowing that this "adequacy" play may well be produced before a judicial tribunal. Carefully crafting the disclosure process will go a long ways towards protecting the validity of the agreement and therefore insulating *yourself* from legal scrutiny.

C. Element Three: "Profiteering" from Divorce? Really?

Gross does not explicate this element. It seems instead to be policy, stated in rule form. In its analysis in *Gross*, the Court found no evidence that the provisions encouraged or promoted divorce. The Court noted that the marriage lasted fourteen years, producing an offspring. Nothing in the facts suggested viewing the provisions in this manner.

I would view this element as a vestige, of the old policy that made antenuptial agreements 'in contemplation of divorce' invalid per se, as against public policy. The aim of the policy has remained the same. It is societal norms that have been turned on their

head. Given today's social realities, a sobering realization is that antenuptial agreements may actually promote marriage. As divorce is now so commonplace, many people have witnessed its devastating effects on their wealth accumulation and succession. The prospect of engaging in second or third marriages may dim for some, especially later in life when people have acquired more wealth and offspring, *but for*, the ability to privately and intentionally dispose of property, then owned or after acquired.

The net effect, in my view, is that a reasonable and valid antenuptial agreement actually promotes the public policy of encouraging marriage, even when it has been created in contemplation of termination of the marriage by divorce.

D. The Changed Circumstance Test or the "Fourth Prong"

The *Gross* test, as outlined above, has a fourth prong requiring conscionability of support provisions *as of the time of the separation or divorce*. Thus, changed circumstances may render a previously valid *sustenance or support* provision invalid. In effect, this is an area where the equitable principals of domestic relations law can be in tension with the more legalistic principals of contract law.

In *Gross*, the limitations of the agreement as to property and sustenance provisions were deemed reasonable at the time of the agreement. But things changed. Mr. Gross, who was already of significant wealth, became substantially wealthier. Accordingly, both he and Mrs. Gross developed a taste for the finer things in life. In light of the limitations set forth in the otherwise valid antenuptial agreement, maintaining such a lifestyle was thought impossible. Consequently, the court ruled the sustenance

provisions unconscionable and ruled that the trial court should review and make alternative provisions for Mrs. Gross' maintenance.

III. Tips to Ensure Enforceability of Antenuptial Agreement

There is no dispute about whether antenuptial agreements, whether created in contemplation of death or divorce, are valid. This is not in doubt. But whether any particular agreement will be enforceable requires one to be wary of some common pitfalls that, largely, apply to contracts in general. But as we have seen, these contracts are treated somewhat differently due to their nature as a part of, or as a condition precedent to, something as sanctified as matrimony.

That is, despite the apparently commercial standard applied in *Hook*, it would be a gamble to consider that standard sufficient to insulate a given agreement from attack. This is especially so considering that the agreement may make its court debut in either a domestic relations or probate court. We are all well aware of the potential for such courts to act in an idiosyncratic fashion to the panoply of facts before it.

A. Get It In Writing – Even If The Honeymoon Has Passed

ORC 1335.05 is Ohio's codification of The Statue of Frauds, and provides, in pertinent part:

> No action shall be brought whereby…to charge a person upon an agreement made upon consideration of marriage…unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

In so far as an antenuptial agreement is made in contemplation of marriage, it must be in writing to be enforceable. Lack of writing does not alter the *validity* of an agreement; rather it is an evidentiary requirement that goes to the agreement's *enforceability*. Thus, as alluded to earlier, a postnuptial memorandum takes an oral antenuptial agreement out of the statute. *In re Estate of Weber*, 170 Ohio St. 567, 574.

It is critical that the memorandum refer to the otherwise valid, oral antenuptial agreement. The postnuptial memorandum in Weber was sufficient because it expressly referred to and embodied the antenuptial agreement between the parties.

B. Consider More Consideration

Where an antenuptial agreement failed to mention consideration to support the promisor's obligation, and where the promisor's assertion to that effect went unanswered, the agreement was properly held to be unenforceable. Conley v. Conely (Hamilton 1975) 45 Ohio App.2d 1. Additional consideration, such as annuities and insurance policies, are also highly recommended to serve as sufficient consideration, besides the marriage itself, when the marriage ends in divorce, annulment or dissolution, rather than in death.

C. Tailor the Terms of the Agreement

1. Terms Must Be Specific

The animating idea behind antenuptial agreements is to control the property rights of the parties in the event of death or divorce. Various property rights, such as a surviving spouse's statutory share in the decedent spouse's estate, are granted by statute. While the courts will allow the parties to contract around these rights, they may require exacting

language in order to do so. "[S]trong and unmistakable language in a prenuptial agreement is necessary to deprive a surviving spouse of the special benefits conferred by statute." *Roseman v. Glanz*, 2010-Ohio-680, 93628 (OHCA8) at ¶ 20 (citing, quoting *Troha v. Sneller (1959)*, 169 Ohio.St. 397, 402).

In *Roseman*, the couple had an antenuptial agreement providing: "[a]s surviving spouse, [David] hereby waives his rights, benefits, and privileges of whatever kind or nature conferred upon him by law, to share or participate in Shirley's estate." *Roseman*, ¶ 21. Before she died, Mr. Roseman's wife, Shirley Glanz, received a substantial medical malpractice judgment; Mr. Roseman received an award for loss of consortium. Id. at ¶ 5. Her will was submitted to probate and Mr. Roseman filed a complaint to have the antenuptial agreement declared invalid. Id. at ¶ 6. Mr. Roseman argued that the above language was simply boilerplate and should have been superseded by the more specific language from a later paragraph stating: "Notwithstanding any of the provisions to the contrary contained in this Agreement, the parties may, during marriage acquire property, or an interest therein, in both names with or without rights of survivorship. Entry into such arrangement shall in no way be deemed a waiver of or abandonment of this Agreement or any parts thereof." Id. at ¶23. Mr. Roseman's argument was not well taken; the court saw no reason not to give effect to the governing paragraph waiving benefits, in lieu of the subsequent "notwithstanding" language.

It is not necessary to reinvent the wheel with every agreement. Language may be of a "standard" or "boilerplate" type, provided that the language is applicable to the particular situation and provided that the language is "strong and unmistakable."

2. Terms Must Address Death and Divorce

Though the courts have now accepted the antenuptial contractual disposition of property upon the termination of the marriage both by death and by divorce, it is necessary to provide language as to the effect of each potentiality. For example, where an agreement addressed the disposition of property in the event of death, but was silent concerning divorce, the appellate court found it was error to apply the agreement in determining issues of property disposition in a divorce proceeding. *Devault v. Devault* (Franklin 1992) 80 App.3d 341.

3. Terms Should Anticipate Change in Property Values

Any agreement meant to define and dispose of property should contemplate whether any appreciation that takes place should be retained by the original property owner and thus waived by a party entitled to same under ORC 3105.171. Language to this effect should be included, for example, when one party wishes to maintain a house as separate property. However, if significant marital property is used to increase the value of the home, you may want to consider some apportioning of the appreciated value. See *Walkup v. Walkup* (Brown 1986) 31 Ohio App.3d 248.

D. Adequate Disclosure and Increased Scrutiny

Various provisions in the agreement may operate as red flags which may cause the court to increase its scrutiny of the disclosure of operative facts to the burdened spouse, beyond the level of "adequate" For example, an agreement that makes a disproportionate disposition in favor of the surviving spouse may raise the level of scrutiny. Accordingly, to the extent that an agreement appears to be disproportionate,

extra efforts should be made to demonstrate there was a full disclosure of each party's assets. In other words, be careful not to give the court an excuse as to why an agreement could be found to be invalid. The drafting attorney should consider using the *following methods* to insure adequate disclosure and to document these disclosure efforts.

1. Orally Question the Parties

The obvious place to start is to question the parties about the nature and extent of their respective holdings. This will get them thinking about assets that they may have forgotten about and also give you a sense of their financial acumen. Often times the process may require more than one visit.

It is also important to question the parties as to their understanding of the antenuptial agreement's import and effect. That is, their responses to your questions should evince a clear understanding that signing the agreement may alter their current property rights and even divest them of some statutory rights, such as a spouse's right to elect against spousal provisions in a will.

Currently, the disclosure standard in Ohio is encapsulated in the *Gross* proviso of "what's mine is mine, what's yours is yours." However, astute attorneys should anticipate the possibility that some modern day court might unpredictably dispense with such glib treatment of a spouse's rights.

2. Document and Incorporate the Disclosure

As we all know, time and circumstance can have a profound effect on people's memories. Thus, it is always prudent to have independent corroboration of the "nature and extent of assets" discussion.

Though the case law shows that a written itemization is not necessary to establish that a party was aware of the extent of the other's assets, why take the risk? The easiest way to document a disclosure is to require a written inventory of assets, and a declaration as to their value, certified by the property owner as to accuracy, and countersigned by the non-holding party.

A potent motivation fueling an antenuptial agreement is to effect a *private* disposition of property and support. Private means it stays out of the courts. Keeping it out of the courts means making it as bullet proof as possible. The wary practitioner should not be lulled into a false sense of security by the apparent blithe standard espoused in *Hook*. Documentation protects you, as well as your client.

3. Recommend Independent Counsel

In the likely event that you are only representing one spouse, you should inform the other party that you are representing *your* client's interests and that he or she should seek independent counsel. The Ohio Rules of Professional Conduct may be implicated here, specifically Rule 4.3: Dealing With Unrepresented Person, which provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in

> the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

Be advised, however, that equipping the parties with independent counsel does not necessarily inoculate the agreement from ending up in court. In *Gross*, the attacking party was represented by counsel, who, though he made several changes to the initial provisions, recommended against the execution of the document. The client chose not to follow her attorney's advice, but nevertheless, subsequently attacked the agreement.

IV. Modification of Agreement

The law regarding modification of antenuptial agreements in Ohio is not settled.

ORC 3103.05 provides:

> A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other.

A modification of a contract is a contract in itself. ORC 3103.05 appears to provide a statutory basis for altering a prenuptial agreement during a marriage with the proviso that the actions of the parties will be held to a higher standard (those occupying confidential relations.) Thus disproportionate agreements are likely to be set aside.

However, ORC 3103.06 provides:

> A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate

> separation and make provisions for the support of either of them and their children during the separation.

At least one court has interpreted this to mean that an attempted amendment to an antenuptial agreement violated ORC 1303.06. See *Hoffman v. Dobbins*, 2009-Ohio-5157, C.A. 24633 (OH CA 9).

V. Setting Aside an Antenuptial Agreement

A. On Occasion of Death

Chapter 21 Rights of Surviving Spouse, ORC 2106.22 provides that:

> Any antenuptial or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate of the decedent, or unless, within the four-month period, the validity of the agreement otherwise is attacked.

This section puts the statute of limitations for attacking the validity of an antenuptial agreement at four months.

B. On Occasion of Fraud, Duress, Coerciono or Overreaching

An antenuptial agreement can also be set aside on the basis of fraud, duress, coercion or overreaching. The Supreme Court in *Fletcher v. Fletcher*, 68 Ohio St. 3d 464, held that one who seeks to set aside an antenuptial agreement on the basis of fraud, duress, coercion or overreaching has the burden of proof in establishing the claim. The court further held that if the party challenging the agreement is too receive disproportionately less under the agreement than he or she would have under an equitable distribution, then the party seeking to enforce the agreement has the burden of proving that there has been full disclosure and a meaningful opportunity for independent counsel.

VI. Transfer of Assets Is Likely

An antenuptial agreement is a governing agreement that establishes the intentions of the parties as to how they wish to have their property distributed in the events of death and divorce. However, the document itself is without animation. It needs the engine of wills and probably trusts and perhaps preparation of new deeds, and the purchase of annuities and life insurance to fund and to supplement the antenuptial agreement.

For example, wills and trusts can be executed to leave property to a spouse, in exchange for that spouse's relinquishment of some statutory rights as spousal inheritances. The attorney should also assist the clients in drawing up a checklist of client to-do items, required by the antenuptial agreement, such as joint promises to save money for a particular purpose, or to fund joint expenses into a specified account.

VII. Conclusion

Termination of a marriage by death or divorce can cause chaos in the lives of your clients. However, a well-honed antenuptial agreement that expresses your client's well thought out wishes can be a comforting road map during this time of turbulence.

So take the time to insure that this document is handcrafted on your client's behalf, to serve well in the carrying out of his wishes and in the leaving of his legacy. It is your sacred duty to do so.