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# **JUSTICE FOR ALL**

Kentucky Bar Association ★ 2015 Annual Convention

## **DRAFTING, ATTACKING AND DEFENDING PRENUPTIAL AND POSTNUPTIAL AGREEMENTS**

Sponsor: Probate and Trust Law Section

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**DRAFTING, ATTACKING AND DEFENDING PRENUPTIAL AND  
POSTNUPTIAL AGREEMENTS**

Daniel M. Oyler

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**I. SURVIVING SPOUSE'S PROPERTY RIGHTS IN ESTATE**

Kentucky statutes and common law prevent the ability to disinherit a surviving spouse.

A. KRS 392.020 Surviving spouse's interest in property of deceased spouse; "dower" and "curtesy" defined

After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third (1/3) of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half (1/2) of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to "dower" or "curtesy" shall be deemed to refer to the surviving spouse's interest created by this section.

Attempts to disinherit or leave property interests to others have been prevented by the power to renounce a Will KRS 392.080 and the common law action of "Fraud on Dower."

B. Harris v. Rock, 799 S.W.2d 10 (Ky. 1990)

The Kentucky Supreme Court issued the leading fraud on dower case when a decedent placed approximately seven-eighths of his assets into joint accounts with his children. The Court held that such a disposition creates a presumption of fraud upon the surviving spouse. The Court's Opinion discusses at length the significance of the dower right in Kentucky, pointing out among other things, that,

The right to dower vests at the time of marriage or at the time of acquisition of subsequently acquired property.<sup>1</sup>

The Court also pointed out:

...it has long been the law of Kentucky...that a husband has no legal right to dispose of more than one-half of his property with intent to defeat a dower claim by his widow.<sup>2</sup>

We have held in many cases that the widow's right to dower cannot be defeated by a gift by her spouse of all, or more than one-half of his property to another in an attempt to defeat the claims to dower.<sup>3</sup>

Cited by the Court in Harris, and equally pertinent is Rowe v. Ratliff, 104 S.W.2d 437 (Ky. 1937) which contains the following powerful exposition of the weight accorded the dower right under Kentucky law:

There is no power on earth given to a husband by the exercise of which the inchoate right of dower of his wife could be taken from her without her consent. The right of dower has been recognized to be so sacred to the wife, even the potential right of dower, that the husband, or a prospective husband, cannot convey his real estate or even his personal property or give it to others for the purpose of taking from her her rights. The only way that the wife can lose her dower is to sell it, forfeit it, or die and leave it."

C. Renunciation is the Only Method for a Surviving Spouse to Challenge the Spouse's Will

Harlow v. Harlow, 551 S.W.2d 230 (Ky. 1977): The Supreme Court stated that if a widow does not approve of the provisions of her husband's will, she may renounce the will and take under the law; "that being **an exclusive remedy** by which she can obtain her legal rights as her husband's widow."

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<sup>1</sup> 799 S.W.2d at 11.

<sup>2</sup> 799 S.W.2d at 12.

<sup>3</sup> 799 S.W. 2d at 11.

## **II. DOMESTIC RELATIONS STATUTES VS. ESTATE DISTRIBUTION STATUTES**

KRS 403.190 – The "marital" or "non-marital" property distinction is a creation of statute that is indulged only in the context of "proceeding for dissolution of the marriage or for legal separation." See KRS 403.190(1) & (2). There is no provision in KRS 403.190 or any other law which applies this distinction to property in any context other than a divorce proceeding.

Kentucky law has long held that if a decree of "absolute divorce" is not entered, the spouse "still has her dower interest in the property standing in her husband's name." Stevens v. Stevens, 231 S.W.2d 49, 51 (Ky. 1950). Dower and curtesy rights in decedent's property are not affected or limited by the dissolution of marriage provisions regarding "marital" or "non-marital" property.

## **III. CHALLENGING AGREEMENTS POST-MORTEM & DRAFTING MARITAL AGREEMENTS TO WITHSTAND CHALLENGES**

### **A. Generally**

Numerous Kentucky cases have noted that antenuptial agreements disposing of the parties' property rights on death are favored by law. Luck v. Luck, 711 S.W.2d 860 (Ky. App. 1986). Such pre- or post-nuptial agreements are valid assuming that the parties make a full disclosure of assets and liabilities, and that there is no fraud or overreaching.

### **B. Validity of Oral Marital Agreements**

Applying the Kentucky Statute of Frauds, KRS 371.010(5) & (6) oral post-nuptial agreements are enforceable as to personal property, but oral antenuptial agreements are not enforceable.

KRS 371.010(5) & (6) provide:

No action shall be brought to charge any person:

...

(5) Upon any agreement made in consideration of marriage, except mutual promises to marry;

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year;

Jones' Adm'r v. Jones' Adm'r, 132 S.W.2d 509 (Ky. 1939) – Parol antenuptial contracts whereby each of the contracting parties renounces interest in the other's estate as survivor, and retains control of his or her separate estate is void, but such a post-nuptial contract is good so far as personalty is concerned.

C. Written Agreements Overcome Consent to Transfer of Asset Issues

Ladd v. Ladd, 323 S.W.3d 772, 779 (Ky. App., 2010). Summary judgment may be warranted regarding the issue of Fraud on Dower, unless factual issues exist regarding **knowledge of transfer of assets and consent to the transfer.**

"Significant factual issues also exist concerning the extent to which Mary's dower rights affected the determination of which assets were Trust assets. These issues involve Mary's knowledge of the terms of the Trust prior to her marriage to Jesse, and whether she consented to these terms, which would bar any claim of fraud on dower."

D. Gentry v. Gentry – The Three Criteria

Although antenuptial agreements providing for disposition of property on divorce are permitted, particular agreement may be invalid or void if it fails to meet three criteria:

1. Agreement may not be obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts;
2. Agreement may not be unconscionable; and
3. Enforcement of agreement may not be unfair and unreasonable as result of changed facts and circumstances since agreement was executed.<sup>4</sup>

E. Full Disclosure of Assets

The law is clear that the burden of proof regarding the question of full disclosure of assets at the time of the agreement rests on the party relying on the agreement. Lawson v. Loid, 896 S.W.2d 1 (Ky. 1995).

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<sup>4</sup> 798 S.W.2d 928 (Ky. 1990).

F. Court's Ability to Invalidate an Unconscionable Agreement:

Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990). "The ingenuity of persons contemplating marriage to fashion unusual agreements, particularly with the assistance of counsel, cannot be overestimated. We will observe the tradition whereby the law develops on a case by case basis. It should be recognized, however, **that trial courts have been vested with broad discretion to modify or invalidate antenuptial agreements.** Parties and their counsel should be **admonished to refrain from entering into agreements lacking mutuality and without a rational basis.** Courts reviewing antenuptial agreements and faced with a claim of unconscionability should not overlook the wisdom, which is fully applicable to both spouses, expressed in this Court's decision rendered in Clark v. Clark, 192 S.W.2d 968, 970 (Ky. 1946): 'It must appear that the husband exercised the utmost good faith; that there was a full disclosure of all material facts, including the husband's circumstances and any other fact which might affect the terms of the contract; and that the provisions made in the agreement ... were fair, reasonable, just, equitable, and adequate in view of the conditions and circumstances of the parties.....'

G. Court's Modification or Refusal to Enforce Agreement due to Changed Circumstances

The trial court may modify or invalidate all or part of an antenuptial agreement where enforcement is unconscionable in its application, which includes cases where the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable. Lane v. Lane, 202 S.W.3d 577 (Ky. 2006).

While it is the good practice to have both parties to the agreement represented by independent counsel, separate counsel will not always overcome claims of unconscionability. The dissent in Lane v. Lane expressed concerns with the ability to invalidate portions of an agreement where the parties "signed the antenuptial agreement; they signed the agreement with the assistance and advice of independent counsel and with full knowledge that the agreement substantially altered their marital and property rights, claims, or interests that they would have had but for the execution of the agreement..."

#### **IV. DRAFTING PRE- AND POST-NUPTIAL AGREEMENTS**

As a matter of public policy, prenuptial and postnuptial agreements are enforceable upon both death and divorce (including legal separation) in Kentucky at this time. Until November 1990, they were enforceable upon death, but not in contemplation of divorce. The focus of these materials is regarding enforcement upon divorce; however, the provisions are largely applicable to death as well.

Whether applicable to death, divorce, or both, prenuptial and postnuptial agreements ("Agreement") are similar. The Agreement is a contract between the parties, and is governed by basic contract law as well as applicable family law. In this contract, the parties may define their rights, regardless of the rights otherwise excluded or conferred by statute. The agreement, provided it is otherwise a valid contract, is entitled to enforcement upon dissolution of the marriage if certain criteria are met.

The key criteria for enforcement are as follows:

- Was the Agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts?
- Is the Agreement unconscionable?
- Have the facts and circumstances changed since the Agreement was executed so as to make its enforcement unfair and unreasonable?

While every situation is unique, there are certain provisions which all such Agreements should include. The Agreement should include:

- Recitals (preliminary statements);
- Disclosures of existing law;
- Provisions specific to the parties;
- Miscellaneous/boiler-plate provisions;
- Schedules of Assets/Liabilities, and proof or acknowledgment of income;
- Signatures at the end for both counsel and parties (preferably notarized signatures for the parties); and
- Initials at the bottom of every page (and on any hand-written changes).

A. Recitals.

The recitals lay the background or foundation for the Agreement. They are informative when the terms of the contract are unclear, and may be considered in resolving an ambiguity. They may include the following:

1. Name and address of each party, including a statement of whether they are "married" or "unmarried";
2. Ages of each party;
3. Date or approximate time of anticipated marriage, or reflection of the parties' current marriage;
4. The reason(s) for entering into the Agreement (*i.e.*, both have children or other heirs for whom they wish to provide freely; one has a family-owned business which he/she wishes to remain in the family free of any claim or interruption by the spouse; etc.)
5. The intent of the parties in executing the Agreement (*i.e.*, application to death, divorce, or both);
6. The wishes of the parties regarding the extent of rights impacted by the Agreement (*i.e.*, if applicable to divorce, whether it is to cover property rights only, or all rights);
7. A statement reflecting that both parties have had the opportunity to verify and seek independent advice regarding all representations made by the other party, all rights available if the Agreement were not executed, and all rights being waived;
8. A statement that each has had adequate time to obtain the professional advice they desire (or that they are waiving/declining the right to obtain advice).

These are not "mandatory;" however they do provide background information regarding the intentions of the parties. This information serves the purpose of educating both parties regarding the purpose of the Agreement and the intentions of the other party, and also give guidance to the court in the event of an ambiguity.

B. Disclosures and waiver of existing law.

Kentucky's statutes set forth comprehensive rules for the division and allocation or assignment of marital and non-marital property; the entitlement to, amount and duration of maintenance; the entitlement to an attorney fee award; and the custody and support of children (an Agreement is not enforceable with respect to custody or time-sharing, and may not limit a child's rights to support). It is advisable to include a detailed disclosure of the rights provided by the law, along with a clear and express waiver of those rights. These same disclosures and waivers regarding rights upon death should be included when the Agreement is applicable to death. If the parties are waiving some, but not all, rights, the Agreement should expressly state which rights are not waived.

C. Provisions specific to the parties.

1. Income.

If the parties intend earned income to be treated as separate property, the Agreement should expressly state this. The same is true for either action or passive income earned on a separate/non-marital asset.

2. Value.

There are several issues regarding values. The Agreement should include a statement that each party has had an opportunity to educate themselves regarding the value of property owned by the other party, and either has pursued that opportunity or declined to do so. It further should include a statement that the party holding the asset has made his/her best estimate regarding the value but cannot be certain of the accuracy. Last, it should address whether any increase in value during the marriage will be separate or joint "property."

3. Joint assets.

If the parties wish to allow for joint assets to accumulate, the Agreement should specify how those will be distributed upon death or divorce.

4. Personal property or the marital residence.

If the parties wish to pre-determine the distribution of personal property or the marital residence, the Agreement should specify how those will be distributed upon death or divorce.

5. Maintenance.

If the parties wish to pre-determine the support rights, those should be detailed.

6. Income tax returns.

If the parties wish to pre-determine the method for filing, or the disposition of refunds or liabilities, the Agreement should detail those decisions.

7. Waiver of attorney fees.

If the parties wish to waive (or limit) the right to attorney fees upon divorce, the Agreement should detail their intentions.

D. Miscellaneous.

1. No obligation to enter into Agreement.

The Agreement should include a representation that each party is entering into it voluntarily, and an acknowledgement that neither has an obligation to enter into the Agreement.

2. Waiver of retirement beneficiary designations.

The Agreement should include a statement that each waives the right to be named as beneficiary of the other's retirement plans (now or in the future), and that each will sign any appropriate forms needed to accomplish the waiver.

3. Severance provisions.

The Agreement might include a statement that if any portion of it is found to be invalid or void, the remaining provisions remain enforceable.

4. Choice of law.

The Agreement should acknowledge that, at the time enforcement is sought, the parties might not reside in the State in which the Agreement is executed; and identify which State's law should govern interpretation of the Agreement.

5. Commingling of assets.

The Agreement should acknowledge (if desired) that although each party has the right to keep his or her assets separate from those of the other party, there is no obligation to do so; any commingling of the assets shall not be considered abandonment of the rights established by the Agreement.

6. Gifts and voluntary transfers.

The Agreement should acknowledge the right of each party to make gifts or voluntary transfers to the other (either during their lifetimes or upon death), and may also include a statement limiting the value of the gifts unless there is a writing to evidence the intent to make a gift which exceeds the value limits established by the Agreement.

7. Entire understanding of the parties.

The Agreement should represent that it contains the entire Agreement of the parties, and that neither is relying upon promises or representations made which are not reflected in the Agreement.

8. Amendments or modifications.

The Agreement should provide that no amendment or modification will be effective unless made in writing executed by both parties, with the same formalities as the Agreement.

9. Confidentiality.

If the parties wish for their financial information or the terms of the Agreement to be maintained as confidential, the Agreement should so state.

E. Schedule of Assets/Liabilities and Income.

It is critical that there has been a full disclosure of all assets, liabilities and income. Where possible, the values of assets should be detailed. This information should be set forth on a Schedule for each party, and included at the end of the Agreement. They should be signed by both parties.

F. Signatures and initials.

The Agreement should be signed by both parties, and all counsel involved. Ideally, the signatures of the parties should be notarized. Also ideally, each and every page of the Agreement, as well as the Schedules, should be initialed. Any hand-written changes to any page should be initialed as well.



## NOTES

