VALIDITY OF ANTENUPTIAL AND POSTNUPTIAL AGREEMENTS IN MISSOURI

The last fifteen years have been marked by a dramatic shift in the manner in which antenuptial and postnuptial agreements purporting to affect spousal rights upon divorce and at death have been viewed by the Missouri judiciary and legislature. This article attempts to outline the current state of the law in Missouri with regard to the validity of such agreements and suggests certain techniques to increase the likelihood that such agreements will be enforced by a Missouri court.

AN ANTENUPTIAL AGREEMENT is a contract or agreement between a man and a woman entered into before marriage, but in contemplation and generally in consideration of marriage, whereby the property rights and interests of either the prospective husband or wife, or both, are determined or where property is secured to either or both of them.[1] A postnuptial agreement is similar to an antenuptial agreement but, as its name implies, is entered into between a husband and wife subsequent to their marriage.[2]

A form of antenuptial or postnuptial agreement is also sometimes used in order to enforce the terms of a contract to make a will or particular bequest or devise, or not to revoke a will or particular bequest or devise.[3] For example, one spouse may decide to leave all of his or her property to the other spouse on condition that the surviving spouse in turn leave the portion of such property which remains at his or her death to the first spouse's children. Since in Missouri the mere execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills, a written contract between the spouses is generally required.[4]

The last fifteen years have been marked by a dramatic shift in the manner in which such marital agreements have been viewed by the Missouri judiciary and legislature. This article

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will attempt to outline the current state of the law in Missouri with regard to the validity of marital agreements purporting to affect spousal rights upon divorce and at death, and will suggest certain techniques which can be utilized in order to increase the likelihood that such agreements will be enforced by a court.

AGREEMENTS AFFECTING MARITAL RIGHTS UPON DIVORCE OR LEGAL SEPARATION. Antenuptial or postnuptial agreements contingent on divorce or legal separation, which purport to divide marital property or set or eliminate alimony and support payments, have historically been invalidated on the ground that they tended to induce a separation or divorce after marriage and were therefore contrary to public policy.[5] By reason of the enactment of Section 452.325 of the Revised Missouri Statutes in 1973, however, the law in Missouri appears to have been altered substantially by statute.

Section 452.325.1 provides that, "[t]o promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the custody, support and visitation of their children."[6] Section 452.325.2 adds that the terms of such an agreement are generally binding upon a court "unless the court finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable."[7] Finally, Section 452.330.2(4), in defining the term "marital property," specifically excepts property excluded by "valid agreement" of the parties.[8]

As a result of the enactment of Section 452.325, the Missouri courts now appear to be generally of the view that, when confronted with a marital agreement purporting to settle issues of property division and maintenance ancillary to an action for dissolution of the marriage, the divorce court is bound by that agreement "if the provisions are conscionable and if the agreement was fairly made."[9] Such agreements will apparently be enforced as long as they are entered into "freely, fairly, knowingly, understandingly and in good faith and with full disclosure."[10]

Notwithstanding the rule pronounced by the Missouri courts in the preceding paragraph, one disturbing decision remains which has yet to be distinguished or overruled by any subsequent Missouri decision. In *In re Marriage of Bequette*,[11] an agreement was executed six months prior to the separation of the parties, purporting to divide some but not all of the marital property of the parties. It also provided for child custody and support and for maintenance. The trial court had found as a fact that the agreement was not executed in contemplation of dissolution. The St. Louis Court of Appeals invalidated the agreement on the ground that Section 452.325 only applied to agreements entered into "as a preliminary to separation or dissolution of the marriage."[12] In reaching its conclusion, the Court noted that the word "attendant" in Section 452.325, which modifies the phrase "upon their separation or the dissolution of their marriage," is defined in Webster's Third New International Dictionary as "accompanying, connected with, or immediately following," and, as such, does not include agreements which do not accompany, have any connection with, or follow a subsequent divorce or separation:

> It is the intent and purpose of [§452.325] that agreements shall be enforced by the court where they represent arms length negotiations intended to settle the respective rights of two people committed to an imminent separation or dissolution. "Attendant" does

not carry the connotation that an agreement is covered which is made simply because of the possibility of future separation or dissolution.[13]

The *Bequette* decision thus stands alone in Missouri for the proposition that all marital agreements contingent on separation or divorce which are not entered into by two people committed to an *imminent* separation or divorce are invalid *per se*.

In order to increase the likelihood that a marital agreement purporting to affect the rights of the parties upon divorce or legal separation will satisfy the requirement that it be conscionable and fairly made, the factors set out in Sections 452.330 and 452.335, which are for use by the court in dividing marital property and in setting maintenance awards, need to be examined. Although the enforceability of a marital agreement purporting to affect the rights of the parties upon divorce or legal separation can never be fully assured, the chances that the agreement will be upheld by a court can be greatly enhanced through making it a point to consider these factors in finalizing the terms of the agreement.

Absent a valid agreement of the parties, the court is to divide marital property

Section 452.330 provides that, absent a valid agreement of the parties, the court is to divide the marital property of the couple in such proportions as the court deems just after considering all relevant factors including:

(1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(2) The value of the property set apart to each spouse; and

(3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.[14]

In a similar fashion, Section 452.335 provides that, absent a valid agreement of the parties, a maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage.[15]

Left open by the Missouri decisions to date is the question whether an antenuptial or postnuptial agreement, fairly reached when entered into, may later be found to be unconscionable upon separation or dissolution of the marriage where intervening years, acquisition or loss of assets, or changes in income or dependency has brought about significant economic change.[16] Such would appear to be the case, however, based upon the policy underlying Section 452.325.

The agreement in any event does not

become operative without a hearing and a judicial determination that the agreement is conscionable,[17] and agreements regarding child support are never binding upon the court.[18]

Finally, the parties to a marital agreement should each be represented by independent legal counsel. If that is not possible, and if only one party is represented by an attorney, a provision should be included in the agreement to the effect that the non-represented spouse was given the option to seek independent legal counsel but declined to do so.[19]

AGREEMENTS AFFECTING MARITAL RIGHTS UPON DEATH. Section 474.120 provides that the rights of inheritance under Section 474.010 or any other statutory rights (such as exempt property, the one-year support allowance, and the homestead allowance) of a surviving spouse of a decedent who dies intestate may be waived if, prior to or after the marriage such intended spouse or spouse by a written contract agreed to waive such rights "after full disclosure of the nature and extent thereof, including the nature and extent of all property interests of the parties, and if the thing or promise given to the waiving party is a fair consideration under all the circumstances."[20]

Similarly, Section 474.220 provides that the right of a surviving spouse under Section 474.160 to elect to take against the Will "may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of the right, if the thing or the promise given to the waiving party is a fair consideration under all the circumstances."[21]

Estate of Youngblood v. Youngblood[22] is perhaps the leading Missouri case applying Sections 474.120 and 474.220. Citing Section 474.220, the Supreme Court in *Youngblood* stated, in general terms, that the statutory requisites of a valid waiver of the right to elect are (1) that there be a *full disclosure* of the nature and extent of the right being waived, which requires disclosure of the nature and extent of the property interests of the prospective spouses, or knowledge equivalent to such disclosure, and (2) that there be a *fair consideration* under all the circumstances, which not only requires that there be such consideration as would support a simple contract, but further that the consideration moving to the spouse or prospective spouse surrendering marital rights be fair and equitable in the particular circumstances.[23] The *burden of proof* as to the existence of the factors of full disclosure and fair consideration, unless prima evident on the face of the instrument, is on the party seeking to enforce the agreement.[24]

In determining the fairness of the consideration, the court will take into consideration the adequacy of the provisions for the spouse in light of the wealth of the parties, their respective ages and all other circumstances.[25] The adequacy of the provision for the surviving spouse is to be judged as of the time the agreement was made, even though the circumstances changed materially by the time the other spouse died.[26]

Adding to the enforceability of marital agreements contingent upon death is the Supreme Court's statement in *Youngblood* that, "if the surviving spouse had full and actual knowledge of the other's means and the extent of his (or her) property, or knew facts sufficient to charge him with such knowledge, then the contract may not be avoided by the surviving spouse on the ground that the provision for her (or him) is inadequate or less than she would have received in the absence of an agreement."[27] Under this estoppel-type rule, as long as the parties stand in "a relatively equal bargaining position," and the prospective spouse knows or should know facts sufficient to enable him or her to evaluate the agreement, then the contract may be valid "even though the provisions for the survivor

are grossly disproportionate to the deceased spouse's means."[28] In determining whether the parties stand in a "relatively equal bargaining position," the court will consider such factors as (i) educational background, (ii) upbringing, (iii) business experience, (iv) the relative wealth of the parties, and (v) whether either of the spouses' business judgment "was clouded by any notions of romantic love."[29]

If, on the other hand, the parties do not stand in a relatively equal bargaining position and "the prospective spouse surrendering marital rights has been overreached or imposed upon, contractual recitals [of full disclosure and fair consideration] will not save the agreement."[30] Furthermore, a presumption of fraud or overreaching will arise from a lack or inadequacy of provision for the surviving spouse.[31] In order to help counteract the potential assertion by the spouse surrendering marital rights that he or she was overreached or imposed upon, independent legal counsel should always be employed by each party.

A presumption of fraud or overreaching will arise from a lack or inadequacy of provision for the surviving spouse

The *sufficiency of disclosure* of each spouse's property is a subjective matter, depending on all of the facts and circumstances. Although it is "a common practice to list the prospective spouse's property in connection with a marriage settlement, or to itemize and give details of the holdings of each in the body of the agreement to show that each party is cognizant of the value of the other's property," this is not required as long as either (i) the instrument recites in general terms that the parties thereto are fully informed of the property interests held by the other, or (ii) if the instrument does not so recite, the party surrendering marital rights *in fact* knows the nature and amount of the other's property.[32]

In *Estate of Tegeler*,[33] a recent decision of the Missouri Court of Appeals for the Eastern District, the court introduced the concept of "substantial awareness" of the other spouse's property. The postnuptial agreement in *Tegeler* made no representation that it constituted a full disclosure of the assets of either spouse, nor was a financial statement of either spouse attached to the agreement. The surviving spouse was only vaguely aware of the nature and extent of many of her husband's assets at the time she signed the agreement. Nevertheless, at the time she signed the agreement the surviving spouse was free to seek further information to pinpoint her husband's interest in his assets in more detail in order to determine their value. This, according to the court, was sufficient to charge her with constructive knowledge of the nature and extent of her husband's assets. There had been no misrepresentation or overreaching on the husband's part based upon the information he disclosed. The court also appeared to consider it significant that the surviving spouse had retained a competent attorney who was available to assist her in her efforts to comprehend the nature and extent of her husband's assets.

Despite the recent trend in the Missouri courts toward an expansive view of what constitutes full disclosure, an itemized listing of the nature and approximate value of the property belonging to each party is normally advisable in order to combat a claim by the surviving spouse that there was a positive concealment of assets at the time the agreement was entered into.[34] It is also recommended if the agreement is to provide that each spouse shall retain his or her own separate property upon divorce or

legal separation. Full disclosure further requires that the agreement specifically recite that each spouse has been advised of his or her right of election to take against the Will.[35]

Under the Retirement Equity Act of 1984, upon the death of an employee, all benefits under a pension or profit sharing plan must, in general, be payable to the surviving spouse, either as an annuity or outright.[36] However, the plan participant may elect to waive the above requirement if the spouse consents in writing to the election and that consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.[37] Presumably, since the surviving spouse's right to receive the pension or profit sharing plan proceeds is a federally-created right, the spouse may consent to the above election without having to comply with the above-discussed requirements of Sections 474.120 and 474.220. The surviving spouse's only avenue for recourse would then be to somehow formulate an argument that the designation of a third party to receive the plan proceeds was in fraud of his or her marital rights to share in the deceased spouse's estate, notwithstanding his or her consent to the designation.[38] Such an argument has been rejected in the similar context of the designation of a beneficiary to receive the proceeds of a life insurance policy on the insured, on the theory that the proceeds of a life insurance policy payable to a named beneficiary do not belong to the insured's estate.[39]

CONCLUSIONS. The current state of the law in Missouri with regard to the validity of marital agreements contingent upon divorce or legal separation remains, at best, uncertain. As a result of the decision of the St. Louis Court of Appeals in *In re Marriage of Bequette*, it becomes incumbent upon an attorney to advise his client that agreements affecting marital rights upon divorce or legal separation may not be enforceable in Missouri. If the client nevertheless still desires to attempt to establish his or her obligations upon divorce or a legal separation, the attorney should then take the steps discussed in this article which are intended to help insure that the terms of the agreement are conscionable and that it is fairly made, and thus enforceable by a court. The attorney should also advise his client that, notwithstanding the client's attempt to provide fairly for his or her spouse upon divorce or legal separation, there remains no guarantee that a judge will also consider the terms of the agreement to be fair.

There is no guarantee that a judge will also consider the terms of the marital agreement to be fair

The situation in Missouri with regard to the validity of marital agreements affecting marital rights upon death is much more settled. Such agreements will generally be enforced as long as there has been full disclosure of the nature and extent of the rights being waived and fair consideration under all the circumstances. As discussed above, full disclosure requires that the parties to the agreement be fully informed of the property interests held by the other, and also that each spouse be advised of the rights he or she has waived as a result of his or her execution of the agreement. What constitutes fair consideration is a subjective matter; the consideration moving to the spouse or prospective spouse surrendering marital rights must be fair and equitable in the particular circumstances in light of the wealth of the parties, their respective ages and all other circumstances.

As a final precautionary note, especially due to the uncertainty regarding the validity of marital agreements in

Missouri which purport to affect marital rights upon divorce or legal separation, a "severability" clause should be included in every marital agreement which purports to affect marital rights both at death and upon divorce or legal separation. This clause should provide that if any of the provisions contained in the agreement are declared to be invalid, then such provision shall be either (i) reformed by the court to reflect the intent of the parties, or (ii) deleted from the agreement by the court, whichever course of action will best reflect the intent of the parties. □

FOOTNOTES

[1] 41 C.J.S. Husband and Wife §79 (1944).

[2] The Missouri Supreme Court has held that a postnuptial agreement will be considered to be supported by a sufficient consideration. Glauert v. Huning, 290 S.W.2d 126, 131-132 (Mo. 1956); McQuate v. White, 389 S.W.2d 206 (Mo. 1965). *See also* Estate of Murphy, 661 S.W.2d 657 (Mo. App. 1983).

[3] §474.155, RSMo (1978).

[4] §474.155, RSMo (1978).

[5] *See* Comment. *Antenuptial Contracts Determining Property Rights Upon Death or Divorce,* 47 U.M.K.C. L.Rev. 31, 45 (1978).

[6] §452.325.1, RSMo (1978).

[7] §452.325.2, RSMo (1978).

[8] §452.330.2(4), RSMo (1978).

[9] Ferry v. Ferry, 586 S.W.2d 782 at 786 (Mo. App. 1979); §452.325, RSMo (1978). *See also* Whitenton v. Whitenton, 659 S.W.2d 542 at 547 (Mo. App. 1983) (citing *Ferry* with approval); Searcy v. Searcy, 658 S.W.2d 931 at 933 (Mo. App. 1983) (citing both *Ferry* and *Whitenton* with approval); Rogers v. Rogers, 573 S.W.2d 425 (Mo. App. 1978) (implying such agreements will be upheld).

[10] Whitenton v. Whitenton, 659 S.W.2d 542 at 547 (Mo. App. 1983).

[11] In re Marriage of Bequette, 563 S.W.2d 528 (Mo. App. 1978).

[12] 563 S.W.2d at 530.

[13] *Id.* at 531.

[14] §452.330.1, RSMo (1978).

[15] §452.335.2, RSMo (1978).

[16] Ferry v. Ferry, 586 S.W.2d at 787.

[17] Hallmark v. Stillings, 648 S.W.2d 230 at 234 (Mo. App. 1983).

[18] §452.325.2, RSMo (1978); Williams v. Williams, 542 S.W.2d 563 (Mo. App. 1976).

[19] Ferry v. Ferry, 586 S.W.2d at 787.

[20] §474.120, RSMo (1978).

[21] §474.220, RSMo (1978).

[22] 457 S.W.2d 750 (Mo. en banc 1970).

[23] Estate of Youngblood v. Youngblood, 457 S.W.2d 750 at 754-755 (Mo en banc 1970). *See also* Estate of Murphy, 661 S.W.2d 657 (Mo. App. 1983); Hosmer v. Hosmer, 611 S.W.2d 32 (Mo. App. 1980).

[24] Estate of Murphy, 661 S.W.2d 657, 661 (Mo. App. 1983); *See also* Estate of Thrasher, 651 S.W.2d 562, 563 (Mo. App. 1983) (agreement recited full disclosure and fair consideration); Hosmer v. Hosmer, 611 S.W.2d 32, 35-36 (Mo. App. 1980); Matter of Soper's Estate, 598 S.W.2d 528, 537 (Mo. App. 1980); McQuate v. White, 389 S.W.2d 206, 212 (Mo. 1965).

[25] Estate of Youngblood v. Youngblood, 457 S.W.2d 750 at 754-755 (Mo. en banc 1970). *See also* Estate of Murphy, 661 S.W.2d 657 (Mo. App. 1983); Hosmer v. Hosmer, 611 S.W.2d 32 (Mo. App. 1980).

[26] Estate of Youngblood v. Youngblood, 457 S.W.2d at 756.

[27] *Id.* at 756.

[28] *Id.* at 757.

[29] Estate of Youngblood v. Youngblood, 457 S.W.2d at 757. *See also* Roberts v. Estate of Roberts, 664 S.W.2d 634 (Mo. App. 1984); Marshall v. Estate of Marshall, 529 S.W.2d 914, 918 (Mo. App. 1975).

[30] *Id. See also* Hosmer v. Hosmer, 611 S.W.2d 32 (Mo. App. 1980).

[31] Jones v. McGonigle, 37 S.W.2d 892 at 894 (Mo. 1931).

[32] Estate of Youngblood v. Youngblood, 457 S.W.2d at 756-757. *See also* Estate of Thrasher, 651 S.W.2d 562 at 563 (Mo. App. 1983); Roberts v. Estate of Roberts, 664 S.W.2d 634 (Mo. App. 1984); Hosmer v. Hosmer, 611 S.W.2d 32, 35 (Mo. App. 1980); Estate of Tegeler, 688 S.W.2d 794 (Mo. App. 1985).

[33] 688 S.W.2d 794 (Mo. App. 1985).

[34] Estate of Youngblood v. Youngblood, 457 S.W.2d at 757. *See also* Roberts v. Estate of Roberts, 664 S.W.2d 634 (Mo. App. 1984).

[35] Estate of Youngblood v. Youngblood, 457 S.W.2d at 756; Estate of Murphy, 661 S.W.2d 657 at 660-661 (Mo. App. 1983).

[36] I.R.C. §401(a)(11).

[37] I.R.C. §417.

[38] *See* §§474.150, .160, .163 RSMo (1978).

[39] Bishop v. Eckhard, 607 S.W.2d 716 (Mo. App. 1980).