

The bank must balance the need to ensure the validity of the document itself, as well as the authority and appropriateness of the agent's actions against the public's need to act expeditiously when presented with a POA document.

Banks often operate in multiple jurisdictions and must address differences in states' laws. In addition, the dynamics of each family situation vary and may be known to some degree by bank personnel who may be required to consider this information in evaluating the actions of the POA agent.

To some extent individuals and their attorneys can assist in the review process by providing copies of POA documents, drafted while the principal is alive and competent, to the bank's wealth management division at which the principal has accounts.

An internal review can then be undertaken when it is still possible to make changes to the POA document if necessary.

## ENDNOTES:

<sup>1</sup>*Tennessee Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743 (Tenn. 2007).

<sup>2</sup>*West ex rel. Harvey v. Regions Bank*, 75 U.C.C. Rep. Serv. 2d 181 (Tenn. Ct. App. 2011)<.

## THE POSTNUPTIAL AGREEMENT RENAISSANCE—CAN OHIO EMERGE FROM THE DARK AGES?

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## OHIO REVISED CODE 3103.06: OHIO'S PROHIBITION ON POSTNUPTIAL AGREEMENTS

*A husband and wife cannot, by any contract with each other, alter their legal relations,<sup>1</sup> 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.<sup>2</sup> [Emphasis added.]*

Ohio's strict prohibition on postnuptial agreements (agreements made *after* entering marriage) is quite simply a relic of a bygone era. No matter how fair or reasonable an agreement is, how free it is from undue influence, fraud, mistake, or duress, or how much it could benefit a family or relationship, if the agreement is entered into by spouses while they are married and alters their legal relations, it is invalid.<sup>3</sup> Ohio also prohibits spouses from amending an existing premarital agreement after entering marriage, regardless of how stale it is in light of changed circumstances, how ambiguous its provisions are, or how many errors it contains. Instead, spouses are stuck with outdated agreements and the uncertainty that a court may not honor them. In this regard, premarital agreements are the last true irrevocable documents in Ohio. Even irrevocable trust agreements can be modified by a private settlement agreement or decanting—two concepts that have been game-changers for Ohio estate planners in assisting clients in improving outdated trust agreements. Despite this progress, Ohio's laws on marital agreements have been stuck in the dark ages.

Tracing its roots back to 1887,<sup>4</sup> R.C. § 3103.06 is unique. In fact, only four other states—Iowa, Maine, Nebraska, and New Jersey—currently disallow postnuptial agreements. The obvious trend among states in recent years has been to permit postnuptial agreements, which has been driven by the surge of second (or third) marriages, the strive for gender equality, and the concept of freedom to contract with respect to property rights, among many other factors. Ohio, which has been a front-runner in modernizing its laws in many areas (e.g., asset protection, the trust code, trust decanting, private settlement agreements, transfer on death designations for property, planning for digital assets, etc.), now needs to join the postnuptial agreement renaissance.

## CHANGES TO OHIO LAW ARE IN MOTION

Ohio's prohibition on postnuptial agreements, and the prospect of creating new laws to allow them, have recently been the focus of the OSBA Estate Planning, Trust, and Probate Law Section Postnuptial Committee ("Postnuptial Committee"). The Postnuptial Committee is a collaboration of estate planning and family law attorneys who have spent months reviewing existing laws on marital agreements in other states, and engaging in lively discussion and debate on whether change is appropriate, and if so, how it should be accomplished. Consistent with the methodology in other states which now permit postnuptial agreements, the Postnuptial Committee has determined that Ohio law should permit postnuptial agreements (including amendments to existing premarital agreements) as soon as practical, and have begun drafting proposed language to be incorporated into the Ohio Revised Code to effectuate the change. The following have been identified as significant reasons supporting the Postnuptial Committee's determination:

1. To promote each spouse's ability to freely contract and agree to the financial aspects of their marriage;
2. To create certainty between spouses as to their rights and legal obligations;
3. To provide the ability to enter into or modify agreements to fit the spouses' current situation;
4. To allow outdated and stale premarital agreements to be updated; and
5. To address issues with existing agreements such as errors and ambiguities.

The discussion, debate, and development of the law has now reached the action stage of the process—specifically, determining what to change and how. In order to do so, understanding the current state of premarital agreements in Ohio, including the issues affecting their application and enforceability, is essential.

## PREMARITAL AGREEMENTS IN OHIO AND THE ISSUE OF FORESIGHT

A premarital agreement is a contract entered into prior to marriage in order to address the identification, separation, and/or division of property and support in the event of the termination of the marriage by death or failure of the marriage, such as divorce. Premarital agreements may also affect "legal relations" other than property rights, such as the right to serve as guardian, executor, or personal representative of a spouse's estate, the right to make end-of-life decisions, or the right to make decisions on final arrangements and disposition of remains. The laws governing premarital agreements in Ohio are set forth by case law.<sup>5</sup> Generally, in order for a premarital agreement to be valid, the agreement must satisfy the following conditions:

1. It must be in writing, signed by both parties, and must be notarized if it affects interests in real property;<sup>6</sup>
2. It must be entered into freely without fraud, duress, coercion, or overreaching;<sup>7</sup>
3. There must be a full disclosure and understanding of the nature, value, and extent of the prospective spouse's property;<sup>8</sup> and
4. The terms cannot promote or encourage divorce or profiteering of divorce.<sup>9</sup>

For a comprehensive article on premarital agreements in Ohio, see Alan S. Acker, Esq., *Prenuptial Agreements for the Estate Planning Attorney*, Ohio Probate Law Journal, Volume 21, Issue 1 (Sept./Oct. 2016).

Although premarital agreement affecting legal relations between spouses may be entered into prior to marriage, the same agreement cannot be changed after the marriage begins.<sup>10</sup> Also, the ability to revoke or rescind a premarital agreement is very limited.<sup>11</sup> This inability to make post-marital changes to a premarital agreement in order to allow the agreement to evolve with the marriage has caused uncertainty as to whether the terms of the agreement will be enforced. The uncertainties described below can be alleviated by allowing spouses to enter into postnuptial agreements and amend existing premarital agreements.

### (I.) UNCERTAINTY AS TO THE ENFORCEABILITY OF SPOUSAL SUPPORT PROVISIONS

In *Gross v. Gross*, the Ohio Supreme Court held that although the provisions of a premarital agreement regarding spousal support may generally be considered valid by meeting all of the good faith tests at the time the agreement was entered into, the provisions relating to spousal support may lose their validity by reason of changed circumstances which render the provisions unconscionable at the time of the divorce. Further, in *Vanderbilt v. Vanderbilt*,<sup>12</sup> the Court of Appeals for the Ninth Judicial District held that the changed circumstances that will render provisions unconscionable at the time of a divorce must not have been contemplated at the time spouses entered into the agreement.

Simply, Ohio law permits courts to change a validly executed premarital agreement with respect to the provisions for spousal support if the court finds the provisions to be unconscionable due to changed circumstances that were not contemplated at the time the agreement was made. In a way, Ohio law places engaged couples in the impossible position of having to predict the future and anticipate all potential scenarios that can occur during a marriage that may affect their property and legal rights in order to boost the future enforceability of the agreement. However, without a crystal ball, a couple is unable to foresee the challenges and changes that await them in marriage, and they often have yet to experience the scenarios that should be addressed in their premarital agreement.

### (II.) UNCERTAINTY AS TO A POTENTIAL DISTRIBUTIVE AWARD IN A DIVORCE

Another factor that creates uncertainty for couples with or without existing premarital agreements in a divorce is an Ohio court's power to make a distributive award to one spouse from the other spouse's separate property or income.<sup>13</sup> This is a different concept from spousal support (i.e., alimony). An Ohio court may make a distributive award of separate property to (a) facilitate, effectuate, or supplement a division of marital property, or (b) in lieu of a division of marital property to achieve equity between the spouses, if the court

determines that a division of the marital property in kind or in money would be impractical or burdensome.<sup>14</sup> Several Ohio courts have held that distributive awards may not violate an existing premarital agreement;<sup>15</sup> however, the concern is that if equity so requires, a court will find a way to avoid concluding that the distributive award violates the agreement.

### (III.) POSTNUPTIAL AGREEMENTS (AND AMENDMENTS TO PREMARITAL AGREEMENTS) CAN REMOVE THESE UNCERTAINTIES

By allowing married couples to enter into postnuptial agreements or amend their existing premarital agreements from time to time to adjust to their current circumstances, a couple can determine for themselves what is fair and equitable, as opposed to a court. In addition, the more recent that a marital agreement has been entered into prior to the failure of the marriage, the more likely that a court will not find an unanticipated change in circumstances that justifies a court determination that the agreement has lost its validity as to spousal support or that a distributive award will not violate the agreement.

## PROPOSED LAW PERMITTING POSTNUPTIAL AGREEMENTS IN OHIO

Currently, two sections of Title 31 of the Ohio Revised Code address a husband and wife's ability to contract with each other. As previously discussed, R.C. § 3103.06 specifically prohibits a husband and wife from entering into a contract with the other that alters their legal relations, including amending existing premarital agreements. On the other hand, R.C. § 3103.05 does permit a husband or wife to enter into an agreement with each other for purposes other than altering their legal relations, for example, allowing one spouse to sell a car to the other spouse.

The EPTPL Section Postnuptial Committee has determined that change is needed and Ohio law should be changed to permit spouses to contract with each other to alter their legal relations in the event of death and/or divorce, including permitting spouses to amend existing premarital agreements.

Like premarital agreements, postnuptial agreements would be required to be in writing and subject to a higher degree of good faith negotiations and disclosure to be valid. As of June, 2019, the Committee has drafted the following proposed revisions to R.C. § 3103.06 and R.C. § 3103.05 to effectuate such change:

Proposed R.C. § 3103.05. Contracts. Spouses may enter into any agreement or transaction with each other, or with any other person, which either might if unmarried; subject, in agreements or transactions between spouses, to the general rules which control the actions of persons occupying confidential relations with each other; and to the extent an agreement alters the legal relations between the spouses, such agreement shall comply with requirements of section 3103.06.

Proposed R.C. § 3103.06. Contracts Affecting Marriage. Spouses may by agreement do one or more of the following:

- (A) Alter their legal relations with each other;
- (B) Modify or terminate any written agreement affecting their legal relations with each other, whether such agreement was entered into by the parties prior to or during the marriage; and
- (C) Agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

An agreement entered into pursuant to this section shall be in writing.

## YOUR INPUT CAN MAKE A DIFFERENCE

Your input (whether you are in favor of change or not) is not only encouraged, but also critical to determining whether Ohio law should be changed, and if so, how. If you have comments or questions, please contact Susan L. Racey, chair of the Postnuptial Committee, at [sracey@tuckerellis.com](mailto:sracey@tuckerellis.com) or (216) 696-3651.

## ENDNOTES:

<sup>1</sup>Spouses alter their legal relations by either restricting or expanding their legal rights and obligations. Although there are many, a few examples of a spouse's rights and obligations include the duty to support; dower rights; the right to elect against the will, take an intestate share, and administer the estate of a deceased spouse; and rights upon divorce, annulment, dissolution, or legal separation such as an equitable division of marital property, spousal support, and distributive award.

<sup>2</sup>RC 3103.06.

<sup>3</sup>Except that, under RC 3103.06, spouses may enter into an agreement immediately prior to their separation for the support of either of them and their children during such separation, and a writing after marriage is valid if shown to be a memorandum of an oral agreement reached prior to marriage. *In re Weber's Estate*, 170 Ohio St. 567, 11 Ohio Op. 2d 415, 167 N.E.2d 98 (1960).

<sup>4</sup>Revised Statutes of Ohio § 3113 (1887).

<sup>5</sup>See *Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938) (holding that an agreement voluntarily entered into is valid when the provisions are fair and reasonable under all surrounding facts and circumstances, and although the provisions for one spouse may be wholly disproportionate, such spouse will be bound by voluntarily entering into the contract after full disclosure or with full knowledge); *Hook v. Hook*, 69 Ohio St. 2d 234, 23 Ohio Op. 3d 239, 431 N.E.2d 667 (1982) (holding that an agreement must meet certain minimum levels of good faith and will be set aside as invalid if it is not fair and reasonable under the circumstances).

<sup>6</sup>RC 1335.05.

<sup>7</sup>*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

<sup>8</sup>*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

<sup>9</sup>*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

<sup>10</sup>See, e.g., *Hoffman v. Dobbins*, 2009-Ohio-5157, 2009 WL 3119635 (Ohio Ct. App. 9th Dist. Summit County 2009).

<sup>11</sup>See, e.g., *Dalgarn v. Leonard*, 41 Ohio Op. 506, 55 Ohio L. Abs. 149, 87 N.E.2d 728 (Prob. Ct. 1948), judgment aff'd, 55 Ohio L. Abs. 405, 90 N.E.2d 159 (Ct. App. 2d Dist. Franklin County 1949)

<sup>12</sup>*Vanderbilt v. Vanderbilt*, 2014-Ohio-3652, 2014 WL 4179486 (Ohio Ct. App. 9th Dist. Medina County 2014).

<sup>13</sup>RC 3105.71(A)(1).

<sup>14</sup>RC 3105.71(E).

<sup>15</sup>See, e.g., *Calloway v. Calloway*, 2003-Ohio-267, 2003 WL 152850 (Ohio Ct. App. 5th Dist. Stark County 2003) (finding that a premarital agreement would have been a valid defense to any award requested); *Carmen v. Carmen*, 2012-Ohio-3255, 2012 WL 2928563 (Ohio Ct. App. 8th Dist. Cuyahoga County 2012) (finding that the premarital agreement specifically addressed how to handle separate property and supplants the statute for distributive awards); and *Radcliffe v. Radcliffe*, 1994 WL 151679 (Ohio Ct. App. 2d Dist. Montgomery County 1994) (reversing a trust court's granting of a distributive award because the premarital agreement contained an "expression of intent to

supersede” the statute for distributive awards).

## ESTATE PLANNING BEFORE, DURING AND AFTER DIVORCE

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“Marriages come and go, but divorces are forever.”

Nora Ephron

Legal advisors are trained to be logical and methodical, setting aside emotion to solve problems. Marriage and divorce are neither logical nor methodical. On the contrary, entering into marriage and ending a union are based primarily on emotion, which is usually the antithesis of logic. The drama associated with divorce often overshadows essential estate planning that must be timely addressed to ensure our clients are protected. Waiting until the emotion stabilizes and logic returns is waiting too long.

### MARRIED CLIENTS: WHOM DO YOU REPRESENT?

When you represent spouses jointly, all communications between either husband or wife are confidential as to third parties but not as between husband and wife. Rule 1.6(a) of the Ohio Rules of Professional Conduct states:

A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.<sup>1</sup>

Consider the ACTEC Commentary on rule 1.7 of the Model Rules of Professional Conduct: *Joint or Separate Representation*. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer’s duty of

loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters. Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). The writing may be contained in an engagement letter that covers other subjects as well.

Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* their estate planning goals and the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent a husband and wife as joint clients. Before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).<sup>2</sup>

When representing spouses, you should clearly address the conflict in the engagement letter and ask spouses to waive the conflict at the time of engagement. The *ACTEC Engagement Letters: A Guide for Practitioners* provides as follows:

Waiver of Potential Conflicts of Interest. It is common for spouses to employ the same firm to assist them in planning their estates, as you have requested us to do. Please understand that, because we will represent the two of you jointly, it would be unethical for us to withhold information from either of you that is relevant and material to the subject matter of the engagement. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the other information that one of you shares with us or that we acquire from another source which, in our judgment, falls into this category.

We will not take any action or refrain from taking an action (pertaining to the subject matter of our