

LOVE, DEATH, AND LITIGATION: ENFORCING PRENUPTIAL AGREEMENTS UPON DEATH

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I. INTRODUCTION

When litigating a prenuptial agreement following someone’s death, the surviving spouse often laments “I never thought the pre-nup did anything when one of us died. I only thought it mattered if we divorced.”

This makes sense when nearly half of all first marriages end in divorce.² If someone has already been married once, the chance of divorce increases to 65%.³ This means couples entering into a prenuptial agreement often are not thinking about Ohio Courts long enforcing these agreements upon death.

Because Ohio attorneys must help their clients plan for a marriage ending in either divorce *or* death, prenuptial—and now post-nuptial agreements—can cause probate litigation when one spouse dies. This can be an unwelcome surprise to a happily married couple who might forget to incorporate the document into their estate plans.

This article will examine the history of prenuptial agreement law in Ohio to show how the focus has shifted from enforcement upon

death to divorce and how this results in probate litigation. The common mistakes estate planners make also will be discussed so attorneys can help their clients avoid litigation over prenuptial/postnuptial agreements upon one party’s death.

II. HISTORY OF PRENUPTIAL AGREEMENTS IN OHIO

While pinning down the exact date when Ohio residents began using prenuptial agreements is difficult, one of the earliest reported cases is *Murphy v. Murphy*, which the Ohio Supreme Court decided in 1861.⁴

In *Murphy*, the husband and wife married later in their lives and had children from prior marriages.⁵ Before marrying, the parties entered into a contract in which they agreed that neither would inherit real property from the other upon death.⁶ In interpreting the Ohio Dower Act of 1824, the Ohio Supreme Court upheld the trial court’s determination that the antenuptial agreement barred the widow’s right to recovery of her dower.⁷

Modern Ohio prenuptial agreement law developed further in 1938 with the Ohio Supreme Court deciding *Juhasz v. Juhasz*.⁸ In this case, the husband and wife entered into an antenuptial agreement in which the wife received one-sixth of the husband’s property instead of her one-third share.⁹

The husband specifically referenced and attached the antenuptial agreement to his last will and testament, which he executed the next day.¹⁰ After the husband died, the executor filed a petition to partition the estate’s real estate.¹¹ The surviving spouse responded to the petition by stating her intention to elect against the will, alleged the prenuptial agreement was procured by fraud, and asserted that she was

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entitled to 1/3 of the real estate under her spousal rights.¹² The surviving spouse was able to show that the prenuptial agreement gave her approximately 5.5% of the decedent's estate, whereas her elective rights under the law gave her 40% of the estate.¹³ Nevertheless, the trial court held that the surviving spouse did not timely challenge the agreement as required by law, and upheld the antenuptial agreement.¹⁴

The court of appeals reversed, holding that the spouse's statements in the estate proceedings timely challenged the agreement, that the agreement was not valid, and that she was entitled to her spousal elective share in the real estate. The case made its way to the Ohio Supreme Court.¹⁵

The Supreme Court held that the decedent did not fully disclose the value of his real property at the time of the preup, and therefore—due to that lack of full disclosure of assets and values—the agreement could have been invalidated because the value was substantial and the wife was not fully informed of all issues.¹⁶ However, the applicable statutes gave the surviving spouse six months from the appointment of the estate fiduciary to commence an action to set aside the preup, or the agreement was “otherwise attacked.”¹⁷ Even though the wife filed an election against the will in which she wrote that she repudiated the preup and that it was procured by fraud within six months, and even though the wife filed exceptions against the estate inventory arguing similarly, she did not answer the petition to partition until more than six months after the executor was appointed.¹⁸ Thus, the Court determined she did not seek to invalidate the agreement.¹⁹ Her actions in the estate proceedings merely raised objections, and did not otherwise give the probate court the ability to adjudicate the prenuptial agreement.²⁰ The Supreme Court enforced the agreement because the wife did not properly attack the

agreement within six months as the applicable statute provided.²¹

Juhasz established that a prenuptial agreement will be upheld if it is fair and reasonable and transparently discloses both parties' assets and values, is not invalidated by fraud or otherwise, and is fully executed.²² Furthermore, the decision created a confidential relationship between engaged parties that requires the “utmost good faith.”²³ If a provision for a spouse is wholly disproportionate to what the spouse would receive under the law, the burden rests upon the party claiming the validity of the contract to show there was full disclosure of the nature, extent, and value of the property, or that the other party had full knowledge thereof when voluntarily entering into the agreement.²⁴

The law governing the enforcement of prenuptial agreements upon death was further developed with the Ohio Supreme Court deciding *Troha v. Sneller* in 1959.²⁵ In this case, the husband and wife entered into an agreement in which both relinquished all rights in the property of the other, including their statutory rights upon the death of a spouse.²⁶ The Ohio Supreme Court held that, as long as there is “strong and unmistakable language” to deprive a widow of her statutory rights, such prenups would be enforceable.²⁷ The Supreme Court upheld this analysis in 1982 with its decision in *Hook v. Hook*.²⁸

The *Hook* decision came during a time of cultural shift in America as it pertained to perceptions of divorce. California became the first state to allow no-fault divorce in 1969.²⁹ Ohio became a no-fault divorce state with the passage of the Divorce Reform Act in 1974.³⁰

The Ohio Supreme Court's landmark *Gross v. Gross* decision in 1984³¹ was the first to cement that prenups absolutely were enforceable upon divorce. In *Gross*, the critical question was the amount of spousal support a

divorcee was entitled to under the law.³² The Ohio Supreme Court held that provisions contained within antenuptial agreements providing for the disposition of property and awarding of alimony upon divorce are valid only if the agreement meets three conditions.³³ First, the agreement must be entered into freely without fraud, duress, coercion, or overreaching.³⁴ Second, there needed to be full disclosure, or full knowledge and understanding, of the nature, value, and extent of each prospective spouse's property.³⁵ And finally third, the terms of the agreement cannot promote or encourage divorce or profiteering by divorce.³⁶ The decision acknowledged the concepts from the 19th Century, expanded upon *Juhasz* and its progeny, and outwardly enforced a prenuptial agreement's application at divorce.³⁷ The decision paved the way for the examining courts to focus on what happens when parties divorce more than what happens when they die.³⁸ Ohio courts adopted this test, which was codified as R.C. 3103.061 on March 23, 2023.³⁹

In deciding *Gross*, the Ohio Supreme Court held that property division rights should be viewed as of the date of the contract, but spousal support should be viewed at the time of divorce with a conscionability test being used for support.⁴⁰ Unconscionable spousal-support provisions could be modified or refused enforcement even if the property-division terms were honored.⁴¹

At the same time, Ohio was—and remained for nearly 42 years thereafter—one of the few states that prohibited postnuptial agreements.⁴² In other words, even after *Gross*, parties were stuck with their prenuptial agreements, and the uncertainty of how their obligations could be construed at divorce. For four decades after the *Gross* decision, Ohio attorneys were forced into the difficult situation of creating enforceable agreements that were fair upon both divorce and death without the

ability to amend after the marriage—and the parties' assets—changed over time. Ohio only recently legalized postnuptial agreement planning in Ohio on March 23, 2023.⁴³ While this change will help clients avoid potential litigation upon death, potential issues remain.

III. ENFORCING PRENUPTIAL/ POSTNUPTIAL AGREEMENTS UPON DEATH

A critical issue for a surviving spouse to understand if there is a prenuptial/postnuptial agreement is the tight statute of limitations to contest the document.

Pursuant to R.C. 2106.22, such an agreement will be “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.” As many surviving spouses might forget about their prenuptial agreement being relevant upon death, attorneys should not forget to inquire, especially if the parties have children from previous marriages.

Two cases that are relevant to the requirement to challenge are *Roseman v. Glanz*⁴⁴ and *Reid v. Daniel*.⁴⁵ In *Roseman*, the decedent entered into a prenup with her husband whereby both parties waived any statutory inheritance rights from the other's estate, and executed a will leaving everything to her children from a previous marriage.⁴⁶ Prior to her death, the decedent suffered a catastrophic hospital injury that resulted in her receiving \$3 million in damages.⁴⁷ The surviving spouse elected against the will and challenged the prenuptial agreement, claiming he had not been apprised of the full extent of the spouse's assets.⁴⁸ In other words, he argued that his wife did not disclose this settlement at the time of the prenuptial planning, and he therefore did not waive his rights to the same.⁴⁹

The surviving spouse, however, amended his complaint to seek a determination that the waiver of inheritance rights was limited to only the property the decedent acquired prior to marriage or through gift or inheritance.⁵⁰ He sought instead to construe the prenuptial agreement.⁵¹ With the prenuptial agreement no longer challenged, the appellate court determined the surviving spouse was not entitled to further assets because he had relinquished all claim to share in her estate under the agreement.⁵² Still, the surviving spouse received \$317,000 for his loss of consortium claim while the wife was alive.⁵³ The main lesson is that the surviving spouse's decision not to challenge the document and only ask for it to be construed likely was fatal to his legal goals.

In *Reid*, the spouses entered into a prenuptial agreement that allowed revocation pursuant to its terms, but the revocation actions were not taken prior to death.⁵⁴ After one spouse died, the other spouse filed a "Notice of Intent to Contest Premarital Agreement" in the Estate more than a month after the R.C. 2106.22 statute of limitations expired.⁵⁵ While the surviving spouse claimed she was not served notice of her rights to challenge (which is not required currently), the appellate court upheld the trial court's determination that the citation did not trigger nor toll the statute of limitations.⁵⁶ With the claim brought outside of the statute of limitations, the dismissal was upheld.⁵⁷

In addition to protecting the strict statute of limitation, attorneys dealing with a prenuptial agreement after death need to evaluate how the document could affect even non-probate assets via beneficiary designation. In *Kinkle v. Kinkle*, the decedent opened an IRA in 1992 and did not designate a beneficiary.⁵⁸ Pursuant to the IRA application, if no beneficiary was designated, the beneficiary was the surviving spouse, or, if there is no surviving spouse, the decedent's estate was the beneficiary.⁵⁹

The decedent married in 1994, and the prenup provided that each party released all rights to the other's separate property, including the IRA.⁶⁰ Yet after the decedent died, the bank paid the IRA to the wife pursuant to the IRA application.⁶¹ The decedent's children sought to recover the IRA funds and obtained summary judgment, which the Ohio Supreme Court upheld in stating the prenup controls over the IRA application entered into prior to the agreement.⁶²

In re: Estate of Taris reinforced that attorneys assisting with prenuptial agreements need to be well versed in contractual law.⁶³ In this case, the husband and wife executed a prenup before their marriage, but the wife filed an election of surviving spouse to take against the will and exceptions to the estate inventory when the husband died three years later.⁶⁴

While the agreement in *Taris* specifically identified property that would be free and clear of any claim of the other, the prenup also allowed them to dispose of their own property in any manner they chose upon death.⁶⁵ Pursuant to this language, the surviving spouse argued she did not relinquish her spousal rights upon death. The decedent's estate countered that the language only allowed the parties to make wills or other bequests upon death, and the surviving spouse had given up her spousal rights.

The appellate court agreed with the estate in applying a secondary rule of contractual law that requires strict construction against the drafter.⁶⁶ While the court determined the agreement's language was ambiguous, the parol evidence established that the surviving spouse had the advice of counsel when she signed the agreement.⁶⁷ With no evidence presented to demonstrate she did not understand what she was giving up, the court construed the terms of the ambiguous provision strictly against the surviving spouse.⁶⁸

IV. COMMON PRENUPTIAL AGREEMENT MISTAKES

While the above legal history of prenuptial agreements will help attorneys spot issues when assisting clients with prenups, there are some common mistakes that occur.

One of the most frequent issues is the contracting parties do not provide themselves with enough time to prepare the agreement. If the parties are signing on the morning of the wedding with hundreds of guests in town, arguments of duress can easily occur. And in the rush to get everything done, drafting errors or inadequate asset disclosures can happen that might render the agreement unenforceable. Attorneys should insist their clients provide detailed schedules of assets and liabilities with reference to tax returns, appraisals, and account statements to ensure full disclosure transpires.

Another problem is both sides might not want to obtain their own respective counsel. Estate planners often represent a husband and wife because their interests are aligned regarding the disposition of their assets upon death. In a prenup, the two sides are adverse to each other and create current client conflicts of interest pursuant to the Ohio Rules of Professional Conduct. If the goal is to have an enforceable agreement, the couple's estate planner should ensure each spouse has his or her own counsel.

Because prenuptial/postnuptial agreements can be enforced upon divorce or death, attorneys should make sure that each party is properly prepared for either scenario. Estate-planning and domestic-relations attorneys often work together to spot issues. For example, a divorce attorney might include formulas that factor the length of the marriage, the number of children, and other economic issues to avoid unconscionability arguments regarding support upon divorce. An estate planner can help the parties evaluate whether both

sides really want to waive any and all rights in each other's estate upon death if the marriage is successful as such blanket language might prevent the surviving spouse from doing anything in the decedent's estate.

Ohio's allowance of postnuptial agreements now permits parties to revisit terms, and prenuptial agreements can explicitly allow this to occur after the birth of a child, the purchase/sale of a business, or a significant wealth change. But one widespread problem that leads to litigation is estate planners often forget to ask their clients about whether they have prenuptial/postnuptial agreements when helping them plan for death. As clients often overlook these documents thinking they need their prenups/postnups only upon divorce, estate planners should ask about these documents during their initial intake meetings or in their new client questionnaires.

V. CONCLUSION

While the allowance of postnuptial agreements better allows Ohio attorneys to address issues and avoid litigation upon death, prenuptial agreements remain difficult documents to prepare given the various issues that occur when parties attempt to enforce these agreements upon divorce or death. Attorneys need to help clients understand that prenups/postnups are not only enforced upon divorce, and that these documents are part of their estate plans. Otherwise, clients risk being surprised by unexpected probate litigation when one spouse dies.

ENDNOTES:

²Anna Miller, *Can this marriage be saved?*, American Psychological Association (April 2013), <https://www.apa.org/monitor/2013/04/marriage#:~:text=Although%20the%20rate%20of%20divorce,today%20will%20end%20in%20divorce>.

³Larry F. Waldman, *Five Reasons Why Second Marriages Might Fail at a High Rate*,

National Register of Health Service Psychologists, <https://www.findapsychologist.org/five-reasons-why-second-marriages-might-fail-at-a-high-rate-by-dr-larry-waldman>.

⁴*Murphy v. Murphy*, 12 Ohio St. 407, 1861 WL 46 (1861).

⁵*Murphy v. Murphy*, 12 Ohio St. 407, 1861 WL 46 (1861).

⁶*Murphy v. Murphy*, 12 Ohio St. 407, 1861 WL 46 (1861).

⁷*Murphy v. Murphy*, 12 Ohio St. 407, 1861 WL 46 (1861).

⁸*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

⁹*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁰*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹¹*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹²*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹³*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁴*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁵*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁶*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁷*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁸*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

¹⁹*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

²⁰*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993

(1938).

²¹*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

²²*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

²³*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

²⁴*Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938).

²⁵*Troha v. Sneller*, 169 Ohio St. 397, 8 Ohio Op. 2d 435, 159 N.E.2d 899 (1959).

²⁶*Troha v. Sneller*, 169 Ohio St. 397, 8 Ohio Op. 2d 435, 159 N.E.2d 899 (1959).

²⁷*Troha v. Sneller*, 169 Ohio St. 397, 8 Ohio Op. 2d 435, 159 N.E.2d 899 (1959).

²⁸*Hook v. Hook*, 69 Ohio St. 2d 234, 23 Ohio Op. 3d 239, 431 N.E.2d 667 (1982).

²⁹Envision Family Law, *A brief history of no-fault divorce in California*, (April 12, 2023), <https://www.envisionfamilylaw.com/a-brief-history-of-no-fault-divorce-in-california>.

³⁰Cameron Monachina, *My Fault, Your Fault, Nobody's Fault*, Cleveland Metropolitan Bar Association (Nov. 1, 2023), <https://www.clemetrobar.org/?pg=CMBABlog&b1Action=showEntry&blogEntry=98645>.

³¹*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³²*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³³*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁴*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁵*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁶*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁷*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁸*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

³⁹2022 Ohio Laws File 137 (Am. Sub. S.B. 210).

⁴⁰*Gross v. Gross*, 11 Ohio St. 3d 99, 464

