

# More Contracts Between Married Persons part 2

by Helen S. Rogers and George D. Spanos

Well, when the romance was hot, there was no thought of a prenuptial or antenuptial agreement. So what happens when the romance cools and one or both parties start wishing they had a prenuptial agreement? Or, what happens if one party has been unfaithful or has squandered assets, and the other party is thinking, "I am willing to stay in this marriage, but want to be protected if it fails or this happens again?" These are just a few of the circumstances that lead clients to call your office and ask about the viability of a post-nuptial agreement. However, post-nuptial agreements are not the only property agreement that parties want to shore up during their marriage. Often times, spouses want to address what happens to property after their death with either mutual or reciprocal wills, or they may co-sign on a debt in order to help a spouse grow a business.

Unlike prenuptial agreements or reconciliation agreements where the marriage can serve as consideration, merely staying in the marriage or continuation of the marriage cannot serve as the consideration for a post-nuptial agreement, and there must be some other real and genuine exchange of consideration. This is perhaps the biggest obstacle in drafting post-nuptial agreements; i.e. coming up with real and significant consideration for entering into the post-nuptial agreement. We have, on occasion, used retirement plans, real estate, or other assets that are significant to furnish consideration for a post-nuptial agreement.

Once you have gotten over the hurdle of what can be consideration for the post-nuptial agreement, then post-nuptial agreements can address all of the same issues as prenuptial agreements, such as appreciation of separate property, dividing marital property on a percentage or some other basis, waiving or specifying alimony and support issues, and modifying the elective share or other spousal share in the event of death.

## POST-NUPTIAL AGREEMENTS

A post-nuptial agreement is an agreement entered into during marriage to define each spouse's property rights in the event of death or divorce. *Black's Law Dictionary* (10th ed. 2014). The Tennessee Supreme Court's seminal 2004 decision of *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004) is illustrative of the current law with regard to interpretation and enforcement of post-nuptial agreements in Tennessee.

Post-nuptial agreements were void and of no effect under common law, under the rationale that the contract only became operative by resorting to the courts in a divorce action, and yet preempted the court from equitably assigning marital property or considering the issue of alimony as provided by

statute. *Bratton* at 600. The Court, in *Bratton*, after reviewing the case law of other states on the issue of the validity of post-nuptial agreements, recognized that post-nuptial agreements can be held as valid in Tennessee:

Although post-nuptial agreements were void and of no effect under the common law, most states to address the issue have now determined such agreements to be valid. These courts have held that generally, spouses may divide their property presently and prospectively by a post-nuptial agreement, even without it being incident to a contemplated separation or divorce, provided that the agreement is free from fraud, coercion or undue influence, that the parties acted with full knowledge of the property involved and their rights therein, and that the settlement was fair and equitable.

Thus to say that a post-nuptial agreement is contrary to public policy due to its invasion into the province of the trial court is inconsistent with the State's acceptance of antenuptial and reconciliation agreements. For these reasons, we adopt the proposition that marital partners may validly contract to divide property or set support in the event of a divorce by post-nuptial agreement, even without it being incident to a contemplated separation or divorce.

*Bratton* at 599-600. (Emphasis added) (Citations Omitted).

After the validity of post-nuptial agreements was established by *Bratton*, the Court went on to discuss the interpretation and enforcement of these agreements, and stated that post-nuptial agreements are interpreted and enforced in accordance with contract law.

Generally, post-nuptial agreements will be treated in the same manner as antenuptial and reconciliation agreements. That is to say, they should be interpreted and enforced as any other contract. All contracts must be supported by adequate consideration, and agreements between spouses or potential spouses are no exception.

*Bratton* at 600. (Emphasis added)

Contracts, as the Court points out, must be supported by adequate consideration in order to be valid and enforceable.



While marriage can be valid consideration for a prenuptial agreement, and reconciliation in the face of an impending divorce or separation can be valid consideration for a reconciliation agreement, the same is not true for a post-nuptial agreement. Preservation of the marriage alone cannot be adequate consideration for a post-nuptial agreement because past consideration may not support a current promise. As a result, each party must supply actual consideration for a post-nuptial agreement to be valid. *Bratton* at 600. Consideration exists when a party does something that he or she is under no legal obligation to do or refrains from doing something which he or she has a legal right to do. *Id.* at 602. One example of adequate consideration for a post-nuptial agreement would be a waiver of each party's statutory rights to the other's estate. *In re Estate of Wiseman*, 889 S.W.2d 217 (Tenn.Ct.App. 1994).

In addition to providing for adequate consideration, another potential pitfall in drafting post-nuptial agreements is that they must be fair and equitable in their terms to be enforceable. As transactions between spouses are not at arm's length, a confidential relationship exists between spouses. *Bratton* at 601. Thus, the terms of the post-nuptial agreement will be subject to close scrutiny by the court, and as such, both parties to the post-nuptial agreement should be represented by independent counsel.

In sum, a well-drafted post-nuptial agreement entered into by married parties is not contrary to public policy in Tennessee, as long as there is adequate consideration for the agreement, it is knowledgeably entered into between the parties, there is no evidence of fraud, coercion or undue influence, and the terms of the post-nuptial agreement are fair and equitable to each party. A drafting tip is to execute the post-nuptial agreement with two disinterested witnesses, as if it were a will, so if there is no will, you can submit the post-nuptial agreement to probate.

## MUTUAL AND RECIPROCAL WILLS

Mutual wills are described as "separate wills of two persons which are reciprocal in their provisions," while a "joint and mutual will, on the other hand, is one executed by two persons with reciprocal provisions, which shows on its face that the devises were made one in consideration of the other." *In re Estate of Hurdle*, 868 S.W.2d 627, 629 (Tenn. App. 1993). Mutual and reciprocal wills do continue to exist in Tennessee under Tenn. Code. Ann. § 32-3-107. This requires that:

- (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by: (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract.
- (b) The execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will.

Nevertheless, the fact that mutual wills contain reciprocal language is not sufficient, standing alone, to establish contractual intent that they be binding on the second to die. To show that a testamentary disposition of property was made pursuant to a contract requires clear and convincing evidence. *In re Estate of Hurdle*, 868 S.W.2d 627, 630 (Tenn. App. 1993).

Of course, the great problem with mutual and reciprocal wills is that they cannot be changed or modified, and thus, if a spouse dies and there is a re-marriage, new wills cannot be drafted for the surviving spouse that include her new husband. However, the new spouse can still dissent from the mutual and reciprocal will. It has been recognized that there are three ways for challenging the validity of a will based upon a contract to make mutual wills: (1) a claim filed against an estate, (2) a will contest, and (3) an action for specific performance. Each procedure may have different statutes of limitations for timely filing. The exchange of promises between the testators is adequate consideration to support the verdict. *In re Estate of Brown*, 402 S.W.3d 193 (Tenn. 2013).

See Jack W. Robinson, Sr., Jeffrey Mobley, and Andra J. Hedrick, *Pitchard on Wills and Administration of Estates*, Vol. I - Wills, Article III, § 25 at I-29-31 (7th ed. 2009).

## OTHER CONTRACTS

Finally, other spouses in family law cases continue to sign or co-sign for debts for the other spouse's business, joint tax returns that they have not sufficiently or carefully reviewed, dragnet clauses, and sometimes credit cards without thinking through the legal consequence or asking for legal advice. Of course, all of the above have legal and financial consequences for the spouse in a divorce situation, and should be reviewed and carefully considered, especially if there is no benefit to the co-signing spouse, other than incurring the debt or liability.

## ABOUT THE AUTHORS

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