

# Contracts Between Spouses

By Helen S. Rogers and George D. Spanos

As statistics on failed marriages continue to increase, so have the number of contractual relationships between spouses increased. In this issue we will discuss antenuptial (prenuptial) agreements, reconciliation agreements, and planning techniques.

## ANTENUPTIAL AGREEMENTS

While most domestic lawyers thirty years ago occasionally prepared antenuptial or prenuptial agreements for wealthy clients, we now see antenuptial agreements frequently being required under agreed divorce decrees. Requiring an antenuptial agreement in future marriages for one or both divorcing spouses is sometimes necessary to ensure all terms of the present divorce decree are carried out post-divorce. While a trial court could not order that this be done, parties can agree to such a term when they settle a divorce case. An example of this would be requiring a spouse to enter an antenuptial agreement, in the event that they subsequently marry, in order to delineate a large financial account remain separate property. At times this security is necessary to secure an obligor spouse's alimony obligation when the obligor spouse is unable to qualify for adequate life insurance coverage. Without the antenuptial agreement, the account could become marital property upon a subsequent marriage, and the new spouse could dissipate or transfer the funds in that account. The new spouse could not be held in contempt for utilizing marital property as she saw fit because he or she was not a party to the obligor spouse's marital dissolution agreement. Furthermore, the obligor spouse would very likely be able to keep himself or herself out of these transaction to avoid being held in contempt either. A failure to maintain an account under this scenario could potentially create issues with the estate of the obligor spouse as the new spouse would have a claim to the account.

These antenuptial agreements generally have provisions that modify division of assets and liabilities in the event of divorce or death of a spouse, when the parties want to modify the usual provision for division of marital assets or an elective share. Tennessee Code Annotated § 36-3-501 states:

Notwithstanding any other law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage that is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The terms of such agreement shall be en-

forceable by all remedies available for enforcement of contract terms.

Courts enforce antenuptial agreements like any other contract. *Bratton v. Bratton*, 136 S.W.3d 595, 599 (Tenn. 2004). Furthermore, these marital contracts must be "entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching." *Cary v. Cary*, 937 S.W.2d 777, 782 (Tenn. 1996). As the decisions in *Cary v. Cary* and subsequently *Bratton* evidence, contract law ultimately governs the validity of antenuptial agreements.

Due to the nature of such agreements, parties to an antenuptial contract are held to be in a confidential relationship, and provisions are interpreted in favor of unprotected spouses. See *Williams v. Williams*, 868 S.W.2d 616 (Tenn. Ct. App. 1992) *Cert. denied*. As antenuptial agreements are usually entered when one party has significant assets prior to entering marriage, and the other party does not, the drafting attorney may often represent the party with the significant assets. As such, special care in drafting these documents must be taken.

This due care begins by making it clear that the parties determined the terms of agreement freely, knowledgeably, and in good-faith, without exertion of duress or undue influence by either party. *Perkinson v. Perkinson*, 802 S.W.2d 600, 603 (Tenn. 1990). Both parties should have independent legal advice. Furthermore, it was well settled law prior to the enactment of Tenn. Code Ann. § 36-3-501 that a full disclosure of assets and liabilities needed to be made prior to the execution of an antenuptial agreement, yet it is clearly not listed in Tenn. Code Ann. § 36-3-501.

Despite this, the Tennessee Supreme Court has reasoned that such a disclosure is necessary so that both parties may enter an agreement freely, knowledgeably and in good faith, and without exertion of duress or undue influence. *Williams v. Williams*, 868 S.W.2d 616, 618-619 (Tenn. 1992).

However, antenuptial agreements done on the eve of the wedding, suddenly presented to one of the spouses, are more suspect and less likely to be enforceable than those prepared months in advance with each side represented by counsel, but can be, and have been, held valid. In the Tennessee Court of Appeals 1995 decision of *Cary v. Cary*, 1995 WL 30603 (Tenn. Ct. App. 1995), the Court of Appeals found that the parties' antenuptial agreement was enforceable despite Ms. Cary not having the opportunity to seek legal counsel prior to executing the antenuptial agreement. The case was granted permission to appeal to the Tennessee Supreme Court on other grounds. The Tennessee Supreme Court then noted that agreement had been found enforceable despite Ms. Cary being presented with the antenuptial agreement for her consideration and execution a mere four days prior to the wedding. *Cary v. Cary*, 937 S.W.777, 778 (Tenn. 1996).



Despite these technical requirements, it is imperative to keep the circumstances involving the antenuptial agreement and the circumstances surrounding execution of such a contract in perspective. The Tennessee Court of Appeals perhaps said it best when it stated that:

Determining whether the prerequisites to the enforceability of an antenuptial agreement have been met requires an examination of the totality of the circumstances surrounding the negotiation and execution of the agreement.

*Boote v. Shivers*, 198 S.W.3d 732, 745 (Tenn. Ct.App.2005).

While Tennessee Code Annotated §36-3-501 was codified in 1980, the Tennessee Supreme Court recognized antenuptial agreements as valid contracts one hundred years prior to the statute in its decision of *Spurlock v. Brown*, 18 S.W. 868 (Tenn. 1892). In the *Spurlock* decision, the Tennessee Supreme Court firmly stated that the marriage itself is sufficient consideration for the marriage contract. While questions whether antenuptial agreements comported with the public policy in this state arose over time, the Tennessee Supreme Court clearly stated "That antenuptial settlements are favored in law is settled." *Key v. Collins*, 145 Tenn. 106, 236 S.W. 3, 4 (Tenn. 1921). To put any public policy question to rest, the Tennessee Supreme Court later held that "Antenuptial property settlements are favored by public policy." *Hoyt v. Hoyt*, 372 S.W.2d 300, 303 (Tenn. 1963).

"To assess Tennessee's public policy, the courts look to the Constitution of Tennessee, the statutes enacted by the General Assembly, the common law, and prior court decisions." *Baugh v. Novak*, 340 S.W.3d 372, 384 (Tenn. 2011). Since the *Spurlock v. Brown*, *Key v. Collins*, and *Hoyt v. Hoyt* decisions were made, the General Assembly has passed statutes reflecting existing case law in this State, that show that marital contracts are in conformity with the public policy of the State. As previously addressed, Tennessee Code Annotated §36-3-501 was codified after these decisions, which only further evidences the fact that antenuptial agreements are favored in Tennessee. Additionally, two other key statutes also support the validity of a marital contract. Tennessee Code Annotated §36-4-121, which governs the equitable division or assignment of marital property, evidences that marital contracts are favored by public policy through subsection (g), which states:

- (1) Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties regarding the division of property.
  - (2) Nothing in this section shall affect validity of an antenuptial agreement that is enforceable under § 36-3-501.
- Likewise, Tennessee Code Annotated §36-5-121, which governs classes of spousal support for eco-

nomically disadvantaged spouses, also supports marital contracts through subsection (n), wherein it states:

(n) Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties as to support and maintenance of a party.

## PRACTICE TIPS

These modifications to the alimony and asset division statutes provide clear direction as to the enforceability of antenuptial agreements moving forward. As antenuptial agreements have increased, there are opportunities to be creative in finding solutions and compromises for the prospective spouses. Indeed, this is the time that attorneys enjoy, because people tend to be more cooperative and happy, and thus, solutions are more easily found than after the parties have gotten crosswise of each other. For example, where there are children from a prior marriage and the future spouse wants them to inherit the bulk of their estate and the family home, there are compromises that can be made for the spouse. For example a life estate can be provided in the home to the spouse, or at least a year or two when they are allowed to remain in the home, to avoid the children kicking the new spouse out of the home when they return from the funeral. Also in the area of inheritance, it is often a good solution to simply have the spouses buy life insurance where the other spouse is the irrevocable beneficiary as long as the marriage continues, and thus, while the children will inherit, the spouse is not left without, but has the life insurance proceeds.

While waiving alimony is often one of the major purposes of an antenuptial agreement, there can be many compromises and solutions in that area as well. Often, we award a minimum amount of alimony, such as one thousand or five thousand dollars for each year of the marriage, or we may provide that there is no alimony except if the court finds that one of the parties has committed adultery, or we may provide that there is no alimony unless the marriage has lasted a certain minimal number of years. This theory takes into account that marriages more frequently will be unsuccessful in the early years, and thus, if the marriage survives fifteen or twenty years, then the parties are more agreeable to considering alimony in the antenuptial agreement. Thus, while there may be one party that wants or does not want the antenuptial agreement, skilled counsel can help them become comfortable with the concept.

Finally, on the issue of marital assets, antenuptial agreements often simply provide that title will govern, thus, everything held in separate names will continue to be separate property. The key is to determine and allocate what is done with regard to appreciation of separate assets such as retirement or real property in the antenuptial agreement itself. This is also another reason it is so vital to disclose all assets and the value of same before the antenuptial agreement is signed by the parties. An accurate and complete statement of assets and liabilities as an exhibit to the antenuptial agreement is a secret to success. It

continued to page 15



is also wise to attach a year or two of each parties' tax returns so that neither side can later claim they did not know the other parties' income.

## RECONCILIATION AGREEMENTS

Unlike antenuptial agreements, reconciliation agreements were not accepted as valid marital contracts dating back to the 1890s. See *Spurlock v. Brown*, 18 S.W. 868 (Tenn. 1892) which recognized antenuptial agreements as valid contracts. In fact, reconciliation agreements were not held to be valid agreements in Tennessee until 1963. See *Hoyt v. Hoyt*, 372 S.W.2d 300 (Tenn. 1963). While these two marital contracts serve the same purpose of promoting a tranquil marriage between two parties, they do in fact differ from one another. Black's Law Dictionary defines a reconciliation agreement as

A contract between spouses who have had marital difficulties but who now wish to save the marital relationship, usu. by specifying certain economic actions that might ameliorate pressures on the marriage. This type of agreement serves a limited purpose. In fact, many states have statutes prohibiting enforcement of contracts for domestic services, so if the agreement governs anything other than economic behavior, it may be unenforceable (10th ed. 2014).

Ultimately, the purpose of reconciliation agreements is to reunite spouses after marital problems arise, versus antenuptial agreements which are entered into prospective of marriage with the marriage being the consideration of such an agreement. Similar to antenuptial agreements, the marriage may itself be valid consideration in the reconciliation agreement if it is such that reconciling and remaining married are terms of the agreement in the face of an impending divorce or separation. *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004).

Reconciliation agreements were found to be valid agreements under the laws of this State by the Tennessee Supreme Court's 1963 decision of *Hoyt v. Hoyt*, 372 S.W.2d 300 (Tenn. 1963). The Tennessee Supreme Court reasoned that if an agreement would be valid, enforceable, and found to comport with the public policy of this state if it was signed prior to a marriage, there was no reason for it to be found otherwise simply due to the marital agreement being entered after the marriage. The purpose of both agreements is for a marriage to continue, and although it may consider a future divorce, it still comports with the public policy of this state if the ultimate purpose is the continuation of marriage and not to induce separation. *Hoyt v. Hoyt* at 303-304. Furthermore, reconciliation agreements are to be treated as any other contract, just as antenuptial agreements are. *Bratton v. Bratton* at 599.

While the transfer of assets, waiver of estate rights or alimony, and the promise of future support may be valid consideration in reconciliation agreements, the promise to remain in the marriage and not seek a divorce when grounds exist is considered a

meaningful act and constitutes valid consideration, at least on the part of the aggrieved spouse. See *Hoyt v. Hoyt & Bratton v. Bratton* at 603. Proving that marital problems exist can be fact sensitive, although it is somewhat conclusive that problems exist in the marriage if a divorce is pending. If the divorce is later dismissed as a result and or terms of the parties' reconciliation agreement, the dismissal of the properly filed divorce complaint should evidence consideration on the part of the spouse who filed and subsequently dismissed said complaint

Two important cases regarding reconciliation are *Gilley v. Gilley*, 778 S.W.2d 862 (Tenn. Ct. App. 1989) and *Minor v. Minor*, 863 S.W.2d 51 (Tenn. Ct. App. 1993). In each case, the Tennessee Court of Appeals made it clear that reconciliation agreements would be treated as any other contract. In *Gilley*, the Court of Appeals found that Ms. Gilley's consideration was that she dismissed her divorce, despite having numerous grounds upon which she could file. *Gilley v. Gilley* at 863-864. The Court of Appeals further held that Mr. Gilley agreeing to pay twenty percent of his monthly income as alimony *in futuro* in exchange for \$74,000 in assets and Wife's assumption of joint debts, in the event that the parties divorced, did not encourage divorce. Wife dismissed her cause of action and, ultimately, the divorce which was later sought and received by Ms. Gilley came at no fault of her own. *Id.*

In the Court of Appeals 1993 decision in *Minor v. Minor*, the Court of Appeals was asked to determine what what was a reasonable duration for the reconciliation agreement, as no time frame was specified in the agreement itself. The Court of Appeals agreed that reasonableness was essentially an implicit term in all contracts, and thus should be read into the Minors' reconciliation agreement. Thus, the duration of the Agreement was to be a reasonable time. *Minor v. Minor* at 53-54. The Minors' reconciliation agreement happened to be twelve (12) years old, and the Court of Appeals had to determine if a period in excess of twelve (12) years was a reasonable time to enforce a reconciliation agreement. The Court determined that it was not. *Minor v. Minor* at 54.

Essentially, the reconciliation contemplated and desired in the Minors' reconciliation agreement had been reached and new circumstances now existed between the parties after twelve (12) years had passed. The Court stated that "Wife's needs and Husband's ability to pay alimony, if deemed appropriate, must be considered in light of the parties' present circumstances, not as they were twelve to thirteen years ago when the agreement was executed. Despite the Supreme Court holding that substantial performance from one party would require performance by the other party in a marital contract, the Court of Appeals clearly did not follow that holding in this case, and justified their rationale by stating:

Also, the law does not favor the destruction of contracts for uncertainty, particularly where one of the parties has performed his part of the contract. However, we are of the opinion that a more disadvantaged spouse should not be required to refuse benefits which may be needed for living expenses



**continued from page 15**

and/or a place to live while contesting the validity of a reconciliation agreement executed several years before.

We do not intend to convey that a reconciliation agreement must set out an expiration date. To the contrary, the added pressure of meeting a specific deadline could conceivably be a detriment to reconciliation and therefore, contrary to the public policy of this state. Nevertheless, a reasonable time is implied in such an agreement.

*Minor v. Minor* at 54-55 (citations omitted).

The *Minor v. Minor* decision essentially held that the purpose of the agreement had been fulfilled, so strict adherence to the terms after an extended passage of time and change of circumstances was not appropriate. See also *Atkins v. Atkins*, 105 S.W.3d 591 (Tenn. Ct. App. 2002) (Finding the purpose of a reconciliation agreement had been reached after nine (9) years passed since its execution.).

## **PRACTICE TIPS**

While reconciliation agreements are to be treated as any other contract, in particular, antenuptial agreements, it is important to note that the passage of time and a change of circumstances after such a passage can affect reconciliation agreements, where as the terms would not usually affect antenuptial

agreements. Regardless, it appears that the passage of time is a term that should be addressed by the parties so as to remove any doubt and prevent the Court from having to determine what is reasonable.

Reconciliation agreements provide the same planning opportunity as antenuptial agreements with the caveat that most courts will also consider the time that the marriage continues and changes in circumstances. Thus, in a reconciliation agreement, going ahead changing title to big assets can be a huge plus to help keep the finality of the agreement over time. In the next Journal issue we will discuss postnuptial agreements and other contract obligations of spouses.

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