The Postnuptial Conundrum:

Is there a difference between a postnuptial agreement, a separation agreement, and a settlement agreement executed prior to the filing of a divorce action?

by

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Introduction: Until the last two decades, the notion that couples (married or about to be married) could enter into binding contracts was suspect, at least to the extent those agreements said anything about a divorce.

Then, in the early 1990's, thanks to an independent thinking circuit judge in Kent County, the Hon. Dennis Kolenda, the dark skies opened and rays of sunshine burst through. Judge Kolenda looked closely at the same Michigan case law that other judges relied on to declare prenuptial agreements invalid to the extent that they attempted to settle financial issues upon divorce - and said "bunk." He was right!

In *Rinvelt v Rinvelt*, 190 Mich App 372, 475 NW2d 478 (1991), the Michigan Court of Appeals agreed with Judge Kolenda. The *Rinvelt* panel enforced the prenuptial agreement signed by Donna and Arnold Rinvelt three days before their wedding in 1983. The agreement as prepared by Arnold's attorney at Arnold's request.

One of the ironies of *Rinvelt* is that it was Arnold who appealed Judge Kolenda's decision to enforce the prenuptial agreement - the very agreement Arnold asked his attorney to prepare. On appeal, Arnold argued that the agreement, indeed any agreement governing distribution of the marital estate in the event of divorce, was void as contrary to public policy.

Given its earthshattering impact on Michigan domestic relations law, the Rinvelt prenuptial agreement was ordinary. Each party retained their own separate property and, in the event of a divorce, each party would keep their own property - except that Arnold would get 10% of Donna's separate estate and Donna would get 10% of Arnold's separate estate.

The agreement also contained a severability clause. The parties acknowledged the then-existing state of the law in Michigan that "contractual provisions which attempt to deal with the event of divorce prior to the contemplation of divorce are often deemed to be in contravention of public policy." If the divorce-related provisions were invalidated as contrary to public policy, the rest of the agreement would remain in effect. Pre-

Rinvelt, most prenuptial agreements that addressed divorce contained this type of severability clause.[1]

When Donna filed for divorce in late 1987, Arnold realized that because his estate was substantially larger than Donna's, he would owe her quite a bit of money under the "10%" clause noted above. As it turned out, that figure was $228,584.79. In an effort to avoid paying, he contested the validity of the prenuptial agreement during the parties' four-day divorce trial before Judge Kolenda. The judgment was entered at the end of 1989. Around that time, I recall receiving from the late Jon Ferrier, then a Kent County Referee, a copy of Judge Kolenda's opinion. Then I received a telephone call directly from Judge Kolenda asking me to mention his decision in the Michigan Family Law Journal. He was confident in his research reasoning. He felt certain his decision would be affirmed by the Court of Appeals.

He was, of course, correct. In an opinion by Judge Richard A Griffin, joined by Judges Roman S. Gribbs and Harold Hood, the Court of Appeals started Michigan family law down the path toward recognition of marital agreements. But it has been a rocky path indeed. While *Rinvelt* established for all time (or at least our time) that prenuptial agreements are enforceable even when they address the parties' financial issues in the event of divorce, the fate of postnuptial agreements has not been nearly so certain. That rocky path is the topic of these materials.

What is a Postnuptial Agreement?: That is both a simple and complex question to answer. First, it should be obvious that if a prenuptial agreement is a contract between a couple *before* they marry, a postnuptial agreement is a contract between a couple *after* they marry. As with prenuptial agreement, postnuptial agreements are created for the purpose of governing the disposition of the parties' financial interests (property, spousal support, etc.) in the event of either death or divorce. But there are several distinct types of postnuptial agreements depending on when and under what circumstances they are entered into. These materials are devoted to a

[1] Post-*Rinvelt*, such as clause is not absolutely necessary, but many lawyers continue to include severability clauses in their prenuptial agreements simply as a matter of prudent contract drafting.

discussion of the different type of postnuptial agreements and their treatment under Michigan law.

What are the types of Postnuptial Agreements?: Postnuptial agreements come in many types. The variations are almost endless. It is difficult to define precise categories. However, certain patterns emerge. The patterns are often defined by when during the course of a marriage the postnuptial agreement is signed.

1. The Late Prenuptial Agreement: Marriages have many different phases. The first is the immediate post-wedding period when (hopefully) all is going well. No separation or divorce looms on the horizon. Spouses might want a postnuptial agreement at that stage of the marriage for a variety of reasons. Perhaps they forgot to do a prenuptial agreement prior to the wedding. Or maybe there wasn't enough time to have one prepared by counsel for one prospective spouse and then reviewed by counsel for the other prospective spouse. It is also possible that they simply didn't want to do anything to spoil the romance of the event by bringing contract law into the nuptials. Whatever the reason a prenuptial agreement was not signed, after the successful wedding, the happy couple decides that a bit of long-range planning might be in order. They want what is essentially a "late" prenuptial agreement. In a rational legal system, the desire to plan ahead for the sake of minimizing uncertainty and cost if the marriage fails would be rewarded - whether done the day before the wedding or the day after. On this question, our legal system is not rational.

It is perverse, but nonetheless true, that identical agreements entered into the day before the wedding (the classic prenuptial agreement) and the day after the wedding (a "late prenup" type of postnuptial agreement) may receive opposite treatment under Michigan law. Assuming the basic *Rinvelt* requirements[2] are met, the *prenuptial* agreement will be enforced. The *postnuptial* agreement signed 24 hours later may not fare well in court. Go

[2] A. No fraud, duress or mistake, or misrepresentation or nondisclosure of material fact; B. Not unconscionable when executed; and C. No change of circumstances sufficient to make the agreement unfair and unreasonable when enforced.

figure. We need Judge Kolenda to come out of retirement and decide a case enforcing a "late prenup" type of postnuptial agreement.

2. The Reconciliation Agreement: In the next phase of marriage, things are not going so well. In some cases, the parties' relationship is so bad that they are separated, other times not. Some cases hold that the fact of separation prior to entering into a postnuptial agreement is important when determining whether the agreement will be enforced. The view is that you can't "reconcile" until after you are "separated." Whether this is a proper use of the term "reconcile" is open to debate. But there is some logic to it.

We know from *Rinvelt* and subsequent cases that marriage itself is sufficient consideration to support a prenuptial agreement. With a postnuptial agreement, the parties are already married. Therefore, marriage cannot be sufficient consideration for a postnuptial agreement. But if the marriage is on the rocks and the parties have separated (separated to what extent is not precisely defined in our case law – could it be as little as the proverbial sleeping on the sofa?), then the act of reconciling is sufficient consideration to support this type of postnuptial agreement.[3]

In this type of agreement, one party makes financial or other concessions, either immediately or in the event of a subsequent divorce, in order to persuade the other party to reconcile. Because this type of agreement, even if it addressed divorce-related financial issues, supports the preservation of marriage, it is usually enforced by our courts. The most recent example of a case enforcing a "reconciliation" postnuptial agreement is the published decision in *Hodge v Parks*, ___ Mich App ___, ___ NW2d ___ (Court of Appeals No. 308726, 01/02/2014 – a happy New Year to all!).

In *Hodge v Parks*, the couple was married in 1998, but the wife filed for divorce in 2004. As consideration for reconciling and dismissing the divorce case, the parties agreed to a number of non-financial things including marriage counseling, doing a joint household budget, treating one another

[3] See *In re Berner's Estate*, 217 Mich 612, 187 NW 377 (1922), and *Randall v. Randall*, 37 Mich 563 (1877).

with respect, and not letting their respective children interfere in the marital relationship.
They also included a number of financial items in their reconciliation agreement. Several items (the marital home, a sailboat, and a truck) were placed in joint names to be owned equally by each party.

When the reconciliation didn't last and the wife again filed for divorce in 2009, the trial court (likely relying on *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008)) invalidated the postnuptial agreement and declared the sailboat the husband's separate property. The Court of Appeals reversed, finding the reconciliation agreement here to be like that in *Rockwell v Estate of Rockwell*, 24 Mich App 593, 596–597; 180 NW2d 498 (1970).

Rockwell is an odd choice to cite in support of the decision in *Hodge v Parks*, however. The parties in *Rockwell* were not separated when their postnuptial agreement was signed. Nor did the agreement made any provisions for divorce. Instead, 8 years into an 18 year marriage that ended with the husband's death, the parties signed an agreement in which each agreed not to claim any part of the other's estate. As stated by the appellate panel in *Rockwell*:

> The instant agreement did not undertake to provide for a separation. There is nothing in this record to suggest that the agreement was calculated to bring about a separation. Nor is there anything in this record to suggest that a separation was contemplated by the parties. To the contrary is the statement in the agreed facts that 'at all times during this marriage * * * the parties lived together amicably and peaceably without dispute or controversy'. The fact is that the parties lived as husband and wife for 10 years after the agreement was executed and until the husband's death.

Rockwell, *supra*, at 597-598. For this reason, *Rockwell* is not at all like *Hodge v Parks*. It was not a reconciliation type of postnuptial agreement. Instead, it was more like a "late" prenuptial agreement. Still, the view that postnuptial agreements designed to preserve an otherwise failing marriage

by attempting to resolve future divorce-related financial disputes would seem to be consistent with sound public policy. So the *Hodge v Parks* panel got it right even if their decision was as well supported as it could have been.

3. The Separation or Settlement Agreement: This type of agreement is signed when all hope of preserving the marriage is gone. The parties have decided to live apart. A central question that our case law has thoroughly mucked up is whether separation is a condition precedent to a valid agreement of this type? If so, what constitutes separation?

In some cases, there is no immediate plan to file for divorce although both parties recognize that a divorce is likely in the future with no divorce pending or contemplated in the immediate future. However, in the event a divorce case is filed at a later date, the parties agree on the disposition of their financial affairs, including property, support, etc. This type of agreement is typically called a separation agreement. The best example of this in Michigan case law is *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006).

In *Lentz*, the parties were having extreme marital difficulties, but were not quite ready to pull the trigger on a divorce. The wife had a boyfriend in Florida and spent much of her time at the parties' vacation home there. The husband was a residential home builder in SE Michigan.

As stated in their "Separation Agreement," Dale and Judith Lentz "both agree that they no longer desire to live together as husband and wife" and they "desire to divide the marital assets and thereafter maintain separate households." Further, the agreement was entered into for the purpose of:

> [D]efining their respective rights and obligations in the marital assets and to one another. The terms and provisions of this Separation Agreement shall be incorporated into any legal action for Separate Maintenance, Divorce or any other action which is filed to determine the relative rights and responsibilities of the parties.

At the time the agreement was negotiated and signed, no legal action for divorce or separate maintenance was pending. In fact, the parties were both living in the marital home while they negotiated the terms of the agreement at the kitchen table over a six week period of time. When they had an agreement on all key terms, they took it to a lawyer known to both of them and asked him serve solely as a scrivener to restate the agreement in the proper form for the parties' signatures. When the final document was done, each party picked up a copy, but neither chose to review it with independent legal counsel. Each party signed the agreement during separate visits to the scrivener/attorney's office.

Two years later, Dale Lentz filed a divorce action and sought enforcement of the separation agreement. The trial court found the agreement to be binding and enforced its terms. The Court of Appeals agreed, holding that separation agreements, as opposed to prenuptial agreements, are governed by ordinary contract law. "Absent fraud, coercion, or duress, the adults to the marriage have the right and the freedom to decide what is a fair and appropriate division of the marital assets, and our courts should not rewrite such agreements."

The *Lentz* panel further ruled:

> We note, for clarification, that separation agreements, though postnuptial, differ from those postnuptial agreements in which parties intend to remain married, but who wish to clarify or waive their rights of inheritance in a spouse's estate.
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> We hold that the standard of review traditionally applied to antenuptial agreements is not applicable to a postnuptial separation agreement wherein the parties divide their marital assets. Clearly, public policy favors upholding a property agreement negotiated by the parties when divorce or separate maintenance is clearly imminent. Such agreements undoubtedly promote judicial efficiency and best effectuate the intent and needs of the parties.

What *Lentz* did not say is that the parties must be separated before they negotiate and sign this type of postnuptial agreement. In fact, separation was not mentioned at all, no could it have been a determinative factor. The Lentz's, although clearly at loggerheads, were not separated when the agreement was negotiated or signed. The deal was brokered at the kitchen table at the marital home over a six-week period while both parties were living there.

Instead, per *Lentz*, the prerequisite for a valid postnuptial agreement of the separation type is a "clearly imminent" divorce or separate maintenance action. This is a point apparently missed by a subsequent Court of Appeals panel in *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008), which remains a great example of how hard facts make bad law.

In *Wright*, as in *Lentz*, the parties' marriage was in serious trouble. Although the parties were not separated (also as in *Lentz*), the husband had his attorney draw up a postnuptial agreement that protected all his rights to his premarital property, his retirement accounts, the marital home, and every other article of marital property requiring a substantial financial investment from him. The agreement provided that it would be binding in the event the marriage terminated by death or divorce. Both parties signed the agreement.

Eight months later, the husband filed for divorce. He also engaged in other activities that both the trial court and the Court of Appeals found repugnant, but which did not bear directly on the validity of the postnuptial agreement. The Court of Appeals held that "under Michigan law, a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce."[4] I think the *Wright* panel got it wrong in two ways.

First, the panel conflated the notion that a postnuptial agreement may provide for an unequal division of property (which is permissible) with the

[4] Relying on *Day v Chamberlain*, 223 Mich 278; 193 NW 824 (1923), and *Randall v Randall*, 37 Mich 563, 571 (1877)

notion that such an agreement, because it provides for an unequal division, inherently encourages divorce. It just isn't true. The division provided for in the agreement and whether it encourages divorce are separate issues.

The panel should have applied ordinary contract law, as did the panel in *Lentz*, and assessed whether the *Wright* agreement was void due to fraud, duress, or unconscionability. Invalidating it based on contract law principles would have been more supportable (and probably the right thing to do on these facts). The panel also assumed, as our law on prenuptial agreements did before *Rinvelt*, that any postnuptial agreement entered into while the parties were "maintaining a marital relationship" inherently "encourages a future separation or divorce." Again, there is no basis for this antiquated view.

Second, the *Wright* panel attempted to distinguish *Lentz* and in the process botched its recitation of the facts in *Lentz*. The Wright panel stated (inaccurately):

> The Court in *Lentz* specifically distinguished cases that involved postnuptial agreements that were not entered into by separated parties, and it specifically recognized that those cases met with much stricter legal scrutiny than postnuptial, post-separation agreements that essentially settled property issues arising in ongoing or imminent divorce litigation.

THE PARTIES IN *LENTZ* WERE NOT SEPARATED!. Although the facts surrounding the drafting and signing of the *Lentz* postnuptial agreement were more palatable to both the trial and appellate courts than those in *Wright*, the simple truth is that the parties were living in the same house (do we really want to inquired into sleeping arrangements?) when the *Lentz* agreement was signed Furthermore, no divorce was imminent. In fact, more than two years lapsed before an action was filed in *Lentz*, far beyond the eight months in *Wright*. Not only that, the *Lentz* agreement expressly stated that "neither party desires to dissolve the marriage at this time."

There is no way to resolve the differences between *Lentz* and *Wright* except that the facts in Wright suggested that the husband was a bad guy. So

what? Don't we enforce contracts for bad guys as well as good guys? As the old adage goes, bad facts make bad law. *Wright* is proof.

Conclusion: So where does this leave us? Right (*Wright*?) or wrong, here are some guiding principles:

1. Prenuptial agreements are valid in Michigan, so long as the standards set forth in *Rinvelt* are met.

2. Postnuptial agreements that are essentially "late prenuptial agreements" entered into when everything is going along fine in the marriage will probably be declared invalid (which is truly stupid).

3. Postnuptial agreements designed to reconcile a broken marriage, if the parties are separated or if a divorce action has been filed, will be enforced because they are consisted with the public policy of preserving marriage.

4. Separation or settlement postnuptial agreements designed to divide the parties' property and settle spousal support issues in a subsequent divorce action will be enforced, but only if the parties are separated or if a divorce is imminent. *Practice tip*: Have one spouse move out of the marital home before one of these agreements is signed, even if he or she later moves back in before a divorce action is filed.

A Call for Reform: All of this confusion could be cleared up if Michigan would adopt the Uniform Premarital and Marital Agreements Act (UPMAA). Find it here: **http://bit.ly/1cSM52R**