



1948

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Recommended Citation

Inman, Doyle B. (1948) "Inadequacy of Consideration in Contracts Between Husband and Wife," *Kentucky Law Journal*: Vol. 36 : Iss. 2 , Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol36/iss2/5>

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STUDENT NOTES AND COMMENTS

INADEQUACY OF CONSIDERATION IN CONTRACTS BETWEEN HUSBAND AND WIFE

Fairness in contracts entered into during coverture by husband and wife may be a subject of consideration for two reasons. It may first arise because the relationship of the contracting parties is a fiduciary one. It may additionally be involved because the contract concerns the duty of support. The subject of this note is the former, i.e., fairness as derived from the confidential relationship of the parties.

Inasmuch as the ability of the husband and wife to contract with one another is the basis of this note, what is the history and present status of such a contract?

"At common law a married woman's contracts were void, and her agreement with her husband was no exception."¹ In fact, the fictional merger of her legal identity with that of her spouse nullified any possibility of a direct contract between the two. It has been said that there are three means by which the law grows: legislation, fictions and equity. In this case, it was not long before the paternal hand of equity reached out to help avoid manifest injustice. The injustice arose when the wife sued to enforce the contract and her action was summarily dismissed. Since the contract was a nullity, no suit could be maintained thereon. The equities of the case were with the wife, and the courts of equity came to her aid. If the contract was made through the intervention of a trustee, the unity argument failed. In other words, the husband's covenant ran to the trustee for the wife's use and benefit thus circuiting the inflexible rule of the common law.³

This necessity of the intervention of a trustee continued for almost the whole of the 19th century, and it was only with the advent of the so-called "enabling" statutes that it was discontinued.⁴ But today it is the rule in most jurisdictions that the husband and wife may deal with each other as they see fit, regarding their real and personal property, and such agreements are only subject to

¹ LINDEY, SEPARATION AGREEMENTS (1937) 22.

² 3 VERNIER, AMERICAN FAMILY LAWS (1935) 65.

³ *Sims v Rickets*, 35 Ind. 181, 9 Am. Rep. 679 (1871) *Aitchison v. Chamberlain*, 243 Mass. 16, 136 N.E. 818 (1922).

⁴ However, in *McGregor v. McGregor*, L. R. 20 Q. B. D. 529 (1888), which involved an agreement entered into between husband and wife without intervention of a trustee, the court upheld the agreement, saying that its validity was not based on statute but upon the common law.

the rules applied to other contracts made between persons occupying fiduciary relations.⁵

To see that these rules have been observed, contracts between husband and wife are the subject of close scrutiny by a court of equity. While no exact rule can be given by which the validity or voidness can be assured, a number of factors enter into the court's process of inspection. First, there are those elements that apply to all contracts generally; fraud, misrepresentation and duress. Secondly, because of the peculiar nature of the contracting parties, the following assume importance: a full disclosure of all relevant facts, independent counsel, lack of undue influence or coercion, and lastly, adequacy of consideration, which is the criterion by which overreaching, unfairness and unreasonableness are determined.

The presence of fraud, duress, misrepresentation, lack of full disclosure, and undue influence or coercion will cause the contract to be void. There is dissension in the cases as to the necessity of independent advice, but the weight of authority probably holds it an essential element.⁶

Some cases have stated that inadequacy of consideration, called variously as overreaching, unfairness and unreasonableness, would void a contract made between husband and wife.⁷ But this is not strictly true and it would be better to say, as other courts do, that inadequacy of consideration only raises a presumption against the validity of the contract which is rebuttable and may be overcome by proof of a full disclosure of all that the wife should know for her benefit concerning the nature and effect of the transaction.⁸

Of course, all too often, the husband is unable to rebut the presumption with satisfactory evidence, and is defeated, not by the inadequacy of the consideration, but because he cannot prove that such inadequacy was induced without misrepresentation, coercion, etc.⁹

That inadequacy of consideration alone, unaccompanied by other voiding factors is sufficient for voidness, is doubtful. One of the most recent cases on this problem is that of *In re Nickolay's*

⁵ LINDEY, SEPARATION AGREEMENTS (1937) 31, 3 VERNIER, AMERICAN FAMILY LAWS (1935) sec. 156; See *Sanborn v Sanborn*, 3 Cal. App. 2d 437, 39 P 2d 830, 832 (1934).

⁶ *Peyton v. Peyton Corporation*, —Del.—, 7 A. 2d 737, 123 A. L. R. 1482 (1939), *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907 (1894) *But see In re Brimhall's Estate*, 62 Cal. App. 2d 30, 143 P 2d 981 (1943).

⁷ *Cooper v Cooper*, 35 A. 2d 921 (D. C. 1944) *Washburn v. Gray* 49 Ind. 271, 97 N. E. 190 (1912), *Leimgruber v. Leimgruber*, —Ind.— 86 N.E. 73 (1908), *Fidelity Title & Trust Co. of Pittsburg v Graham*, 262 Pa. 273, 105 Atl. 295 (1918).

⁸ *In re Cover's Estate*, 188 Cal. 123, 204 Pac. 583 (1922), *Peyton v. Peyton Corporation*, —Del.— 7 A. 2d 737 (1939).

⁹ *Charlson v. Charlson*, 50 N. D. 677, 197 N. W 778 (1924), *Mann v. Mann*, 135 Okla. 211, 275 Pac. 348 (1929)

Estate.²⁰ In it a wife by post-nuptial contract accepted \$500 in settlement of all her rights in her husband's estate, which amounted to about \$60,000 when he died, in return for his agreement to release all his rights in his wife's estate. Upon his death, she brought this action to set aside the contract, alleging want of consideration, fraud and that it was violative of public policy. In affirming the judgment of the trial court in sustaining the validity of the contract, the appellate court found that the record disclosed no duress, coercion or overt acts establishing fraud. On the subject of the adequacy of consideration this was said, "Anything of value agreed upon by the parties, where there is no fraud is a sufficient consideration. Both parties to this contract regarded the consideration for the contract adequate and this is a matter for the parties to judge for themselves."²¹

In a recent California case, *In re Brimhall's Estate*,²² in a contract of property settlement the wife accepted an automobile as her share of the property being divided, the husband taking the real property and home furnishings. Said the court, "If there is a finding supported by substantial evidence that a just and fair disclosure of all that the wife should know for her benefit concerning the nature of the transaction has been made to her, such finding dispels the presumption of undue influence which arises when the husband gains an advantage in a transaction with his wife."²³

In an older case, *In re Slagles Estate*²⁴ by post-nuptial contract the wife agreed in consideration of \$4,000 to release in full all right against the husband's estate which aggregated some \$50,000. The court supported the contract, saying that though the provision for the wife was in great disproportion to the means of the husband, those claiming the husband's estate had sufficiently rebutted the presumption of invalidity by evidence which showed the wife entered into it without coercion and with full knowledge of the value of the husband's estate and of her rights and was hence precluded from repudiating the agreement.

In conclusion it is stated that fairness as evidenced by adequacy of consideration is not a prerequisite to the validity of the contract. Its absence is only presumptive evidence of invalidity which is rebuttable by sufficient proof to the contrary; and though the rule as to confidential relations will impose some limitations as to freedom and liberty of contract, it is still possible that if intended by the parties, the terms of the contract can be as they please, restricted only by the laws that govern contracts generally.

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²⁰ —Wis.— 25 N. W. 2d 451 (1946).

²¹ —Wis.—, —, 25 N. W. 2d 451, 453 (1946).

²² 62 Cal. App. 2d 30, 143 P. 2d 981 (1943).

²³ 62 Cal. App. 2d 30, —, 143 P. 981, 983 (1943).

²⁴ 294 Pa. 442, 144 Atl. 426 (1928).