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In re Weber's Estate, 170 Ohio St. 567, 167 N.E.2d 98 (Ohio 1960)

170 Ohio St. 567 (Ohio 1960)

167 N.E.2d 98

In re ESTATE of WEBER.

WEBER, Ex'r, Appellant,

v.

WEBER, Appellee.

No. 36165.

Supreme Court of Ohio.

May 4, 1960

[167 N.E.2d 99] Syllabus by the Court.

A written agreement, executed after marriage by a husband and wife, which recites that it was made for the purpose of setting forth in writing an oral antenuptial agreement between the parties and also recites the terms thereof and affirmatively shows that it is a memorandum of such oral antenuptial agreement, constitutes a sufficient 'memorandum or note' of such agreement to comply with the provisions of Section 1335.05, Revised Code, known as the statute of frauds, and is not a contract between a husband and wife to 'alter their legal relations' as prohibited by Section 3103.06, Revised Code.

This cause arose from a decision of the Probate Court of Ashtabula County overruling the exceptions of Christina Weber,

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widow and surviving spouse of Peter Weber, deceased, to the inventory filed in the estate of said decedent. The exceptions were taken because the executor refused to allow the appraisers to set off to the widow property exempt from administration and an allowance for the year's support. She did not otherwise challenge the administration of the estate.

Peter Weber was married to Christina Boldan on the 23rd day of May 1950. Each of the parties had been previously married, and each had children by these former marriages.

On January 9, 1951, about seven and a half months after their marriage, Peter Weber and Christina Weber executed a written agreement which, after stating that each of the parties was at the time of said marriage the owner of certain property in his or her own name, that 'prior to their said marriage, the parties hereto had entered into a verbal agreement as to the division of their said property * * * in the event of the death of either of said parties,' and that 'this agreement is made and executed for the purpose of setting forth in writing the agreement heretofore reached by the parties, verbally,' provided for the equal division between themselves, by quitclaim deeds, of the real estate owned by each party and the placing of all such 'real estate, cash, bank accounts, notes, contracts, mortgages and accounts in joint ownership,' and which provided further 'that neither party shall have any right, interest or claim in or to the property of the other, upon the death of the other,' and that each party was barred from 'any and all rights, interests or claims by way of dower, inheritance,

[167 N.E.2d 100] descent, distribution, allowance for twelve (12) months' support, right to reside in the mansion house, and all rights or claims as widow, widower, heir, distributee, survivor or next of kin.'

The contract also provided that each party relinquished 'to the other, and to the heirs, executors, administrators, devisees and legatees of the other,' the rights above enumerated and 'all other rights or claims whatsoever, which may, in any manner, arise or accrue by virtue of said marriage,' and that upon the death of either party all his or her property not disposed of during life or by last will and testament, should 'descend to, vest in, and be distributed to, such person or persons

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as would be entitled thereto by the statutes of descent and distribution of the state of Ohio then in effect, had the surviving party died during the life of the other party.' The contract was signed by both parties, witnessed and acknowledged Before a notary public.

On the 8th day of February 1951, Peter Weber executed his last will and testament in which he devised all his property, real and personal, to his children, in equal shares. In this instrument, the following appears:

'On January 9th, 1951, my wife, Christina Weber, and I, effected a property settlement and executed an agreement whereby each waived all rights, interests or claims by way of dower, inheritance, descent, distribution, allowance for twelve months support, right to reside in the manor house, and all rights or claims as widow, widower, heir distributee, survivor or next of kin and all other rights or claims whatsoever, in or to the estate of the other, either real or personal and either now owned or hereafter acquired, which may in any manner arise or accrue by virtue of said marriage.'

The exceptions to the inventory filed by Christina Weber were heard by the Probate Court. The widow admitted signing the agreement dated January 9, 1951, but claims that this did not bar her right to exemption or to a year's support for the reason that it was made after she had married Peter Weber, and that a husband and wife could not alter their legal relations in that manner. She did not claim the statutory rights of a surviving spouse otherwise. The executor urged that there had been part performance by the parties sufficient to take the agreement out of the statute of frauds in that

conveyances of property had been made to each other in accord with the agreement, and also contended that the written agreement is enforceable by reason of the fact it is stated in this written agreement that it is in confirmation of a prior oral agreement made by both parties Before their marriage, and thereby became a valid antenuptial agreement.

The Probate Court overruled the exceptions of the widow to the inventory, finding that a preceding oral agreement Before marriage was indicated in the written agreement itself.

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An appeal was prosecuted to the Court of Appeals, which court reversed the judgment of the Probate Court on the following grounds: That the alleged oral agreement was clearly in contemplation of marriage; that when that marriage took place, without any note or memorandum in writing, the consideration for the agreement was eliminated; that the oral agreement could not thereafter be reduced to writing, because of the provisions of what is now Section 3103.06, Revised Code, that 'a husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation'; and that partial performance cannot validate an agreement after marriage when the agreement itself is prohibited.

The cause is Before this court on the allowance of a motion to certify the record.

Oliver W. Bates, Madison, for appellant.

Lyle F. Merritt, Geneva, for appellee.

[167 N.E.2d 101]

HERBERT, Judge.

The first question presented is whether the postnuptial writing of a contract incorporating and confirming the terms and conditions of an antenuptial oral agreement which, standing alone, would be unenforceable under the statute of frauds, validates and takes such antenuptial oral agreement outside the statute.

The section referred to as the statute of frauds is Section 1335.05, Revised Code, which provides as follows:

'No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or

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note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.'

The appellee, as the surviving spouse, relies on the case of *Henry v. Henry*, 1875, 27 Ohio St. 121. The statute of frauds then in effect (see 1 S. & C., 659) was almost identical with Section 1335.05, Revised Code, supra. The syllabus in that case held that 'an antenuptial contract, in parol * * * is void under the fifth section of the statute of frauds * * *'. The court also held that the oral contract was 'an entire one' and held further that there was not sufficient part performance as to take the case out of the statute. The factual situation of that case makes it inapplicable to this one.

Cited also by the appellee are the cases of *Finch v. Finch*, 1860, 10 Ohio St. 501 (referred to in the *Henry* case), *Spangler v. Dukes*, 1884, 39 Ohio St. 642, and *DuBois v. Coen*, 1919, 100 Ohio St. 17, 125 N.E. 121.

In the *Finch* case there was an oral antenuptial agreement and it was held 'that the agreement was one made 'upon consideration of marriage' within the statute of frauds and that there was no such part performance as would in equity put it out of the operation of the statute' and 'such agreement was under the circumstances stated no bar to the claim of dower.'

The *Finch* case is likewise inapplicable here.

In *Spangler v. Dukes*, supra, the husband during coverture conveyed land to the wife in consideration that she release all claims as widow against his estate. This court held that, upon his death intestate having other real estate to which she was entitled to dower under the statute, she could elect to waive the provisions made for her and claim her dower, but she could not claim both. The decision in that case was not based on an antenuptial agreement but mainly upon the question of performance.

Neither was there an antenuptial agreement in *DuBois* case, supra, but rather an interpretation of Section 8000, General Code (now Section 3103.06, Revised Code). The court there held that this statute prevented recovery by the executor of the wife's estate from the husband on a promissory note

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made by him and delivered to the wife during marriage in consideration of a release of all her interest in his estate, including her right of distributive share and inchoate dower therein. In that case it is interesting to observe that four of five notes executed by the husband to the wife had apparently been paid prior to the action on the fifth note.

The statute of frauds as adopted in Ohio is akin to the fourth section of the original English statute of frauds which provided 'that from and after the said four and twentieth of June [1676] no action shall be brought whereby to charge any executor or administrator upon any special promise, to [167 N.E.2d 102] answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any

agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' 8 English Statutes at Large (1763), 405.

Neither the English nor the Ohio statute of frauds contains the words 'void,' 'invalid' or similar language.

In 2 Williston on Contracts (Rev.Ed.), 1517, Section 527, it is stated: 'Under the English statute it has been held that only the enforceability, not the validity, of a bargain depends upon the satisfaction of the statute. It is even said that the only effect of the statute is to require certain evidence in order to prove the bargain.' A like rule obtains in this state. See *Woods v. Dille*, 11 Ohio 455; *Minns v. Morse*, 15 Ohio 568, 45 Am.Dec. 590; *Lefferson v. Dallas*, 20 Ohio St. 68; *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 46 N.E. 638, 60 Am.St.Rep. 737, 36 L.R.A. 817.

In the majority opinion of the Court of Appeals, it is stated, in effect, that the oral antenuptial contract must have

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been reduced to writing Before marriage in order to be valid and that after marriage the agreement dated January 9, 1951, cannot be supported as a note or memorandum of the oral antenuptial agreement because of the provisions of Section 3103.06, Revised Code.

In 2 Williston on Contracts (Rev.Ed.), 1700 Section 590, it is stated:

'It is commonly said that a memorandum may be made at any time subsequent to the making of a contract, and prior to the bringing of an action.' See, also, Restatement of the Law of Contracts, 290.

A general statement applicable to antenuptial contracts is found in Lindey on Separation Agreements and Antenuptial Contracts (Rev.Ed.), 806, Section 90, as follows:

'In most jurisdictions where the statute of frauds requires an agreement made upon consideration of marriage to be in writing, a postnuptial memorandum may validate an oral antenuptial contract. However, some courts have not been too sympathetic to the idea of validation.'

Courts of other states have considered this question of when an oral antenuptial contract must be reduced to writing. The following cases support the validity of antenuptial agreements not reduced to writing until after marriage:

Battin v. Merchants State Bank, 1926, 202 Iowa 976, 208 N.W. 343; *Powell's Adm'r v. Meyers*, 1901, 64 S.W. 428, 23 Ky. Law Rep. 795; *Teel v. Harlan*, 1947, 199 Okl. 268, 185 P.2d 695; *Buffington v. Buffington*, 1898, 151 Ind. 200, 51 N.E. 328; *Koontz v. Koontz*, 1927, 86 Ind.App. 206, 156 N.E. 524; *Haraldson v. Knutson*, 1919, 142 Minn. 109, 171 N.W. 201; *Smith v. Farrington*, 1942, 139 Me. 241, 29 A.2d 163.

Contra, Peterson v. Peterson, 1929, 55 S.D. 457, 226 N.W. 641 (where the postnuptial memorandum was executed eight years after marriage).

For further discussion of the validity or enforceability of postnuptial memoranda of antenuptial agreements see, also, 5 Wisconsin Law Review, 372; 39 Yale Law Review, 293; 28 Michigan Law Review, 215, and 12 Iowa Law Journal, 164.

It would appear from a review of the foregoing-cited cases

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and authorities that the basis upon which such contracts have been upheld is that the reduction to writing [167 N.E.2d 103] after marriage of the oral contract made prior to marriage constitutes a sufficient written memorandum of the premarital agreement to take it out of the statute of frauds and does not constitute a new contract subject to statutes similar to or of the nature of Section 3103.06, Revised Code, prohibiting contracts between husband and wife to alter their legal relationship. It seems to be essential, however, that the written agreement expressly refer to the antenuptial agreement and affirmatively shows that it is a memorandum of the oral antenuptial agreement. See *Frazer v. Andrews*, 1907, 134 Iowa 621, 112 N.W. 92, 11 L.R.A., N.S., 593; *McMinimee v. McMinimee*, 1947, 238 Iowa 1286, 30 N.W.2d 106.

It is our conclusion that the written agreement here executed by Peter and Christina Weber after their marriage, reciting that it was made for the purpose of setting forth in writing an oral antenuptial agreement between the parties and also reciting the terms thereof and affirmatively showing that it is a memorandum of such antenuptial agreement, constitutes a sufficient 'agreement * * * memorandum or note thereof' to comply with the provisions of Section 1335.05, Revised Code, and is not a contract between a husband and wife to 'alter their legal relations' as prohibited by Section 3103.06, Revised Code.

Although there is evidence of full performance of the provisions of the oral antenuptial agreement (so far as such performance could be made prior to the demise of one of the parties), we do not find it necessary, in view of the above conclusion, to consider the question of whether such performance took the agreement out of the statute of frauds.

Accordingly, the judgment of the Court of Appeals is reversed and the judgment of the Probate Court is affirmed.

Judgment reversed.

WEYGANDT, C. J., and ZIMMERMAN, TAFT and BELL, JJ., concur.