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ANTENUPTIAL CONVEYANCE OR AGREEMENT INTENDED TO DEFEAT RIGHT OF ELECTION

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SECTION 18(9)(a) of the Decedent Estate Law provides that a waiver or release of the right of election shall be effective according to its terms whether "executed before or after the marriage of the spouses affected . . . ." Section 18(9)(d) makes it clear such waiver or release may be valid though executed without consideration.

A right is "waived" when, being known or understood. it is voluntarily relinquished.[1] The word "release," as used in Section 18 of the Decedent Estate Law, seems to have substantially the same meaning as the word "waiver." Perhaps the word "release" is more apt than the word "waiver" because, as applied to estates, it means transfer by a releasor of his actual or contingent property rights so that the rights of the releasee are thereby perfected.

Section 18(9), validating a waiver or release executed before marriage without consideration, was not intended to abolish rules of equity protective of each party to a future marriage against fraudulent acts by the other during the period of engagement.

A distinction should be made between prenuptial property transfers and prenuptial waivers or releases. It is the owning spouse who makes transfers which may later be questioned while it is the non-owning spouse who grants a significant release or executes an important waiver.

As a general rule, a voluntary transfer by an intended spouse during the engagement period, made without the knowledge or consent of the other party to the engagement and altering substantially the property holdings of the transferor, is a fraud on marital right and may be set aside.

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[1] Ansorge v. Belfer, 248 N.Y. 145, 150, 161 N.E. 450, 452 (1928).

Strathmore v. Bowes,[2] which was in litigation for many years,[3] is regarded as the leading case on this principle. The Countess of Strathmore, a widow with three children, entered into an engagement to marry Mr. Grey. With Grey's consent, on January 10, 1777, she settled her property in trust for herself and her appointees. By most extraordinary trickery on the part of Bowes she was induced to break off her engagement with Grey and to marry Bowes on January 17, 1777. Bowes did not know of the settlement of January 10. Using duress, he caused his wife to revoke her settlement on May 1, 1777. The act of revocation having been nullified on the ground of duress, the court considered whether the original settlement should be set aside as amounting to a fraud on Bowes. It must be borne in mind of course that under English law of that time the property of a wife became the property of her husband, in many respects, as soon as the marriage occurred. The question of transfers made during an engagement to marry was examined although, on the facts in the case, the settlement by the bride took place before she met Bowes. The rule formulated by Lord Chancellor Thurlow was this:

> A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good; and becomes bad only upon the imputation of fraud. . . . The question which arises upon all the cases, is, whether the evidence is sufficient to raise fraud.[4]

Strathmore v. Bowes and later English decisions were reviewed in 1867 by Chancellor Bates of Delaware in *Chandler v. Hollingsworth,*[5] a case later influential in New York. There, three days before marriage, an intended husband conveyed his real estate in trust for his own benefit for life, remainder over to his three sisters. The intended wife did not know that her prospective husband owned the property. Consequently, she had no expectations of any kind

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[2] 1 Ves. 22, 30 Eng. Rep. 211 (Ch. 1789).
[3] Strathmore v. Bowes, 2 Bro. C.C. 345, 29 Eng. Rep. 194 (Ch. 1789); *id.*, 1 Ves. 22, 30 Eng. Rep. 211 (Ch. 1789), *aff'd sub nom.* Bowes v. Bowes, 6 Bro. Parl. Cas. 427 (H.L. 1797).
[4] Strathmore v. Bowes, 1 Ves. 22, 28, 30 Eng. Rep. 211, 214 (Ch. 1789).
[5] 3 Del. Ch. 99 (1867).

with respect thereto. No misrepresentation of any kind was made to her by the grantor. On such facts, the question was said to be this:

> Will a court of equity relieve against a voluntary conveyance by the husband of all his estate made pending an engagement . . . without any disclosure to the intended wife or knowledge on her part, though without any express misrepresentation or deception practiced by the husband? [6]

Answering affirmatively, Chancellor Bates stated that the true ground of relief afforded the future spouse against such a transfer is, not that the transfer disappoints an expectation, but that such transfer is inherently a fraud upon a marital right. Such a transfer, though made without knowledge on the part of the spouse adversely affected, is a ". . . secret alteration of the circumstances of the parties as they stood at the time of the engagement." [7] When parties are engaged to be married, they are to be considered as standing in particular relationships to property ownership. A secret, willful, voluntary and material modification of such relationships by one party in a manner adverse to the prospective interests of the other should be deemed fraudulent.

The reasoning of Chancellor Bates in the *Chandler* case seems to have affected Special Term in *Youngs v. Carter*.[8] In that case Youngs, fifty-two years old and a widower, asked plaintiff, then twenty-three years old, to become his wife. Youngs had two children by an earlier marriage. At the time of the proposed marriage to the plaintiff, he was seized of real estate in New York City worth $150,000, a fact communicated by him to the plaintiff before the offer of marriage. His proposal of marriage was accepted. Three days before the marriage, Youngs made a voluntary conveyance of his real estate to his two daughters, reserving income to himself for life. It was a secret transfer. Its effect was to deprive the intended wife of any inchoate right of dower after marriage. She sued to set aside the deed. Special Term held

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[6] *Id.* at 105.
[7] *Id.* at 111.
[8] 50 How. Pr. 410 (Sup. Ct. Spec. T. 1875), *aff'd*, 10 Hun 194 (Sup. Ct. Gen. T. 1877).

that it made no difference whether such deed was executed before or after marriage provided it occurred during the engagement. If made after marriage, it could readily be set aside on the authority of *Simar v. Canaday.*[9] Having been made before marriage, it was vulnerable because of the principles reviewed by Chancellor Bates in *Chandler v. Hollingsworth.* The relief granted by Special Term to the plaintiff was not that the deed should be set aside as to the husband's daughters. It was declared void only insofar as the dower rights of plaintiff were concerned. In affirming, the General Term, First Department, said that the transfer was ". . . a fraud upon her contemplated marital rights." [10] Such fraud arises from

> . . . all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[11]

The General Term said that the rule it announced applied only to real estate because, as to personal property, a wife could possess no interest comparable to her interest in the real estate of her husband. On this ground the court in *Youngs v. Carter* distinguished *Holmes v. Holmes.*[12]

In *Bliss v. West,*[13] a husband before his marriage transferred a one-third interest in his real estate to his daughter, reserving the income to himself for life, with remainder over to his children by a prior marriage. This grant took place six months before he proposed marriage to the plaintiff. He stated to his intended wife, however, that he owned the transferred real estate. A suit to set aside the deed as in fraud of such wife was unsuccessful. The conveyance in this instance did not come within the principle of *Youngs v. Carter* because it occurred before the marriage engagement. A declaration by a grantor subsequent to his grant which derogates from the title of a grantee is, of course, inadmissible on general principles of evidence.

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[9] 53 N.Y. 298 (1873).
[10] Youngs v. Carter, 10 Hun 194, 197 (Sup. Ct. Gen. T. 1877).
[11] *Ibid.*
[12] 3 Paige 363 (Ch. 1832).
[13] 58 Hun 71 (Sup. Ct. 1890), *aff'd,* 132 N.Y. 589, 30 N.E. 868 (1892)

In *LeStrange v. LeStrange* [14] and *Rubin v. Myrub Realty Co.*,[15] decided by the Second and First Departments of the Appellate Division, respectively, it was argued that the principle illustrated by *Youngs v. Carter* ceased to be law in New York after 1930 because of the abolition of dower and the creation of new reciprocal rights of husband and wife as fixed by Sections 18 and 83 of the Decedent Estate Law. The contention was that *Youngs v. Carter* was essentially united with the law of dower. This argument was rejected for the reason, as stated in the *Rubin* decision, that the purpose of the 1930 change in law was to strengthen marital property rights.

Perhaps the state of the law today comes to this: distinctions between personal and real property, for present purposes, no longer exist. During the period of an engagement to marry, if either party fraudulently transfers a substantial body of his property, the other party may have the transfer set aside by action brought either during the marriage or after the death of the transferor, subject, perhaps, to a defense of laches.[16]

Fraud is imputable to the transfer if it is made secretly, voluntarily and in contemplation of the marriage. Unlike post-marriage transfers, the transaction need not be *illusory* in order that it may be set aside. It is probably sound to say that the party adversely affected by the transfer need not have had knowledge of ownership of the property by the other party to the engagement. A promise by a bride to have her husband for "richer or poorer" seems to look to the future only. The embrace of an engagement extends beyond the person to include such property as he owns at its inception and, in ordinary course, would own at the marriage.

Property transactions during the period of engagement are to be tested by rules growing naturally from the confidential relationship of the engaged parties. The same is true with respect to waivers or releases of rights or, more comprehensively stated, with respect to antenuptial agreements

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[14] 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep't 1934).

[15] 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935).

[16] Simar v. Canaday, 53 N.Y. 298 (1873); Galewitz v. Walter Peek Paper Corp., 145 N.Y.S.2d 402 (Sup. Ct.), *aff'd*, 3 A.D.2d 741, 161 N.Y.S.2d 566 (1st Dep't 1957); *In re* Ramsey's Estate, 98 N.Y.S.2d 918 (Surr. Ct. 1950).

of which a waiver or release of property rights, partial or total, would seem to be the most important ingredient in the average case.

A waiver or release, to be binding and effective, must be in writing, subscribed by the maker, and either acknowledged or proved in the same manner as a recording of a real property transfer.[17] One party may waive or release his rights in the other party's estate either before marriage or subsequent thereto.[18] A waiver or release may be limited, applying only to a particular will, or general, applying to any will.[19] Furthermore, a surviving spouse may also waive whatever rights he has after the death of the other spouse merely by not exercising his right of election against an improvident will.[20]

Although a premarital waiver or release requires no consideration for its support, the law still is that such waiver or release must be obtained by non-fraudulent means.

In *Pierce v. Pierce*,[21] a future wife, for $500, contracted to forego any claim to dower or any right to share in the personal property of her future husband. In setting aside this agreement the court said:

> The surrender and release of rights to be acquired by the intended wife by the marriage relation must . . . be regarded with the most rigid scrutiny; and courts will not enforce contracts of this nature against the wife where the circumstances establish that she has been over-reached and deceived, or has been induced by false representations to enter into a contract which does not express or carry out the real intention of the parties. The relationship of parties who are about to enter into the married state, is one of mutual confidence, and far different from that of those who are dealing with each other at arms length. This is especially the case on the part of the woman. . . .[22]

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[17] N.Y. DECED. EST. LAW § 18(9).
[18] *Id.* § 18(9)(a).
[19] *Id.* § 18(9).
[20] See Matter of Laney, 274 App. Div. 250, 80 N.Y.S.2d 421 (4th Dep't 1948).
[21] 71 N.Y. 154 (1877).
[22] *Id.* at 157-58.

In *Matter of Liberman,*[23] the Appellate Division said:

. . . [A]t the time the *Pierce* case was decided (1877), antenuptial agreements were presumed invalid unless proven otherwise. Now, however, in view of the expression of public policy by the legislature in amending Section 18 of the Decedent Estate Law, that presumption no longer exists and a prenuptial agreement is presumed to be valid in the absence of proof of fraud, concealment or imposition.[24]

In *Matter of Phillips,*[25] an antenuptial agreement was upheld. The court there said of the agreement that it was ". . . fair and reasonable on its face";[26] there was ". . . no evidence that facts were concealed or misrepresented . . .";[27] there was no evidence of failure by the wife fully to understand the terms of the agreement; there was no evidence that the financial provision for the wife ". . . was disproportionate to the means of her intended husband . . .";[28] and there was no proof of fraud or overreaching by the husband at any time. It had been argued to the Court of Appeals, apparently, that every antenuptial agreement, regardless of its fairness and reasonableness, is burdened with a presumption of fraud arising from the confidential character of the relations of the parties. This argument was rejected. The court said it would not ascribe to such an agreement:

. . . [I]nherent fraud without regard to the fairness of its provisions and the reasonableness of the purpose to be accomplished or to the circumstance in which the agreement was proposed. . . .[29]

The court further said that by reason of the confidential relationship prevailing during the marriage engagement, good faith of a high standard is required in relation to disclosure of all circumstances relevant to the contemplated arrangement between the prospective bride and groom. Then the court added:

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[23] 4 A.D.2d 512, 167 N.Y.S.2d 158 (1st Dep't 1957).
[24] *Id.* at 517, 167 N.Y.S.2d at 164.
[25] 293 N.Y. 483, 58 N.E.2d 504 (1944).
[26] *Id.* at 490, 58 N.E.2d at 507.
[27] *Ibid.*
[28] *Ibid.*
[29] *Id.* at 491, 58 N.E.2d at 507.

. . . [W]here such an agreement becomes the subject of litigation, the courts will exercise rigid scrutiny as those circumstances are examined.[30]

But still there must be some evidence of "overreaching" before an agreement, fair on its face, will be overturned. Such evidence, the court concluded, was present both in the *Pierce* case and in the later case of *Graham v. Graham.*[31]

In *Matter of Nowakowski,*[32] on the question of burden of proof where a waiver had been challenged, it was said:

The Appellate Division has correctly defined the proof requisite to prove prima facie fraud when it is present in transactions taking place between husband and wife.[33]

The definition in question was thus stated:

A presumption of fraud will only arise between persons standing in a mutual relationship of trust and confidence, as in the case of a husband and wife, where there is evidence of some overreaching, misrepresentation or deceit by reason of which there was advantage gained by the one who deceived or detriment to the one who was deceived. In the absence of such evidence, fraud will not be presumed.[34]

Although the *Nowakowski* case deals with a waiver executed by a husband during his marriage, the rule would seem to be the same for premarital waivers and generally for premarital agreements.

When does evidence of overreaching exist? "Overreaching" means ". . . to overdo matters, or get the better of one in a transaction by cunning, cheating or sharp practice." [35] To hold that conduct is either cunning, cheating or sharp practice, a judgment must be reached by consulting standards of "decent and honorable conduct." What facts taken together will show failure to comply with the standards of decent and honorable conduct is a question which, in the nature of things, must vary from one case to another.

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[30] *Id.* at 491, 58 N.E.2d at 508.
[31] 143 N.Y. 573, 38 N.E.2d 722 (1894).
[32] 2 N.Y.2d 618, 142 N.E.2d 198 (1957).
[33] *Id.* at 622, 142 N.E.2d at 200.
[34] Matter of Nowakowski, 284 App. Div. 655, 656, 133 N.Y.S.2d 842, 843 (4th Dep't 1954), *aff'd,* 2 N.Y.2d 618, 142 N.E.2d 198 (1957).
[35] Matter of Baruch, 205 Misc. 1122, 1124, 132 N.Y.S.2d 402, 405 (Surr. Ct. 1954).

CONCLUSION

A spouse during the marriage engagement appears to have no less protection than such spouse gains consequent upon the marriage status itself. Indeed, on the subject of voidable transfers of property, it may be that the rights of a person not yet married but engaged to be married are superior to the rights possessed as against property transactions occurring after marriage.

As to premarital waivers, releases or agreements embracing waivers or releases, the law as it was understood for many years before 1930 seems to be the same today. A waiver, or release or an agreement embodying one or the other or both, though it may be effectual notwithstanding the absence of consideration, must stand the test of fair-dealing by parties occupying a relationship of mutual confidence. That a change has been made in the rules governing burden of proof, where the claim is made that fraud vitiates a particular antenuptial agreement is suggested in the late case of *Matter of Liberman*.[36]

[36] 4 A.D.2d 512, 167 N.Y.S.2d 158 (1st Dep't 1957).