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VIRGINIA COMMENTS

BARRING A WIFE'S STATUTORY INTEREST IN
HER HUSBAND'S ESTATE

Virginia recognizes three methods by which a wife's statutory interest in her husband's property may be barred or released: jointure, antenuptial contract, and postnuptial contract. Each of these devices, if fairly and properly employed, have the effect of preventing the operation of the Virginia statutes regulating dower and other interests arising by virtue of the marital status. In a recent case, *Batleman v. Rubin*,¹ the Virginia Supreme Court of Appeals considered some of the troublesome problems inherent in the use of these devices. In this case a husband and wife attempted to settle property rights by an antenuptial contract in which the prospective wife relinquished her statutory interest in her future husband's property for a specified sum of money to be paid upon his death.

These three methods of barring dower have at least one thing in common, namely that they are all connected, either directly or indirectly, with the English Statute of Uses.² Prior to the Statute of Uses, it was common in England to convey land to uses, and under the common law dower did not attach to a use estate because the husband lacked legal seisin. Prudent parents, therefore, required the future husband to make some provision before marriage for the protection of the prospective wife. To accomplish this purpose, the prospective husband usually had some third party convey land to him and his future wife "in joint-tenancy, or jointure," thus assuring her of an estate in the event of his death.³ In 1536 Parliament passed the Statute of Uses, which converted use estates into legal estates, and had no further provision been made in the statute, the wife would have become entitled to dower in the land the husband formerly held to uses, in addition to the jointure estate which had been settled upon her at marriage. To prevent such double portion, the drafters provided that wives upon whom a jointure estate had been settled would be barred thereby from claiming dower in their husbands' real estate.⁴ The statute then proceeded to prescribe the standards to which the jointure must conform in order to bar the

¹199 Va. 156, 98 S.E.2d 519 (1957).

²Statute of Uses, 1536, 27 Hen. 8, c. 10.

³2 Blackstone, Commentaries *137.

⁴Statute of Uses, 1536, 27 Hen. 8, c. 10, § 1.

wife's dower.⁵ If these standards were met, the wife was prevented by operation of the statute from claiming dower. This was termed legal jointure.⁶ Although the law courts construed the requirements for legal jointure strictly, equity was more lenient and, as a result, developed the doctrine of equitable jointure. Thus equity would enforce a settlement made by a husband upon his wife where such settlement was intended to be in lieu of dower and was assented to by the wife prior to the marriage, although such settlement did not conform to the strict standards for legal jointure.⁷

Today, jointure in Virginia is covered by statute and is a curious admixture of legal and equitable jointure. Code section 64-31 sets forth the requirements that must be met in order for jointure to operate as an absolute bar to dower.⁸ The following section describes the conditions under which such a conveyance or devise will operate only to put the widow to an election between jointure and dower.⁹ These statutes establish the following prerequisites for jointure without a right of election:

1. Jointure must be created by conveyance or devise.¹⁰

⁵As the statute was construed by the courts of law in England, there were five requisites for legal jointure: (1) The conveyance had to be before marriage. (2) The provision had to consist of an estate in land for the life of the wife, at least. (3) It had to take effect in possession and profit immediately upon the death of the husband. (4) The estate had to be limited to the wife herself (or to the husband and wife jointly) and not to another in trust for her. (5) The provision had to be in satisfaction of the wife's whole dower and had to so appear in the deed. 1 American Law of Property § 5.39 (Casner ed. 1952).

⁶1 American Law of Property § 5.39 (Casner ed. 1952).

⁷3 Vernier, American Family Laws § 196 (1935).

⁸Va. Code Ann. § 64-31 (1950).

⁹Va. Code Ann. § 64-32 (1950).

¹⁰Virginia allows jointure to be created by devise. At common law jointure could not be created by a will, but only by a conveyance. 1 American Law of Property § 5.41 (Casner ed. 1952). In *Shackleford v. Shackleford*, 181 Va. 869, 27 S.E.2d 354 (1943), the husband bequeathed \$10,000 to a woman whom he subsequently married; it was not proven that she was his intended wife at the time he made the will. The question was whether such a provision would bar dower. At the time of this decision there was a statute providing for revocation of wills by subsequent marriage. Va. Code Ann. § 5232 (1942). The court said that a bequest to a woman whom the testator had no intention of marrying at the time the will was made did not bar her dower in his land, because it was not proven that the woman was an intended wife. Furthermore, the will was revoked by the subsequent marriage. The court expressly left open the question whether a prospective husband could provide for the jointure of the wife, where such was the express understanding and intention, by a devise made to an intended wife in a will executed before the marriage, which instrument would be revoked as a will by the marriage. The question has apparently become moot because of the repeal of the statute under which a will is revoked by a subsequent marriage. Acts of the Assembly 1956, c. 65, repealing Va. Code Ann. § 64-58 (1950).

2. It may be of either real or personal property.¹¹
3. It must take effect immediately upon the death of the husband and continue for the life of the wife at least.¹²
4. It must be before marriage and with the wife's legal assent in writing.¹³
5. Every such conveyance or devise will be deemed to be in lieu of dower unless a contrary intent clearly appears in the instrument, or in some later writing signed by the party making the provision.¹⁴

Unlike jointure, the antenuptial contract does not rest upon a statutory basis, but rather is rooted in the contractual doctrine of equitable jointure.¹⁵ As early as 1791 the Virginia court recognized the antenuptial contract as a means of settling property rights between spouses.¹⁶ The cases would seem to be in agreement that a husband may by an antenuptial contract bar his wife's statutory interest in his estate.¹⁷ However, since the Virginia courts have had but few opportunities to consider such contracts, there is no comprehensive set of principles in Virginia regulating them.

Batleman v. Rubin presents the first opportunity that a Virginia court has had to consider the essential elements of a valid antenuptial contract.¹⁸ In this case the husband induced his prospective wife to execute a contract in which she, in consideration of \$20,000 to be paid upon his death, relinquished her statutory interest in his estate. The court found that this contractual provision was roughly only one-third as valuable as her statutory interest in the property of the hus-

¹¹At common law jointure could only be created by a conveyance of real property. 1 American Law of Property §§ 5.38 and 5.41 (Casner ed. 1952). It is not entirely clear under Virginia law whether a bequest of personal property can constitute jointure. The statute refers to "devises" and not to bequests. *Shackleford v. Shackleford*, 181 Va. 869, 27 S.E.2d 354 (1943), involved a bequest, but the court did not discuss whether a bequest of personal property could constitute jointure.

¹²*Fuller v. Virginia Trust Co.*, 183 Va. 704, 33 S.E.2d 201 (1945), overruling *MacDonald v. MacDonald*, 169 Va. 752, 194 S.E. 709 (1938), which had held that a conveyance to a wife to take effect in praesenti could bar dower.

¹³If the conveyance or devise were made before marriage without the wife's assent in writing or after marriage, or during the infancy of the female, the widow is only put to an election between jointure and dower. Va. Code Ann. § 64-32 (1950).

¹⁴Va. Code Ann. § 64-31 (1950).

¹⁵2 Tiffany, Real Property § 527 (3d ed. 1939).

¹⁶*Roane's Ex'rs v. Hern*, 1 Va. (1 Wash.) *47 (1791).

¹⁷*Findley's Ex'rs v. Findley*, 52 Va. (11 Gratt.) *434 (1854); *Suhor v. Gooch*, 244 Fed. 361 (4th Cir. 1917).

¹⁸"We have been cited to no case in this jurisdiction, and we have found none, setting forth the essential elements of a valid antenuptial contract." 199 Va. 156, 158, 98 S.E.2d 519, 521 (1957).

band as of the time of the marriage.¹⁹ The widow, learning of this disparity, contended that the contract was invalid due to fraud. The court, after examining applicable rules from other jurisdictions, adopted the following standards of conduct for parties executing antenuptial contracts:

1. Parties engaged to be married occupy a confidential relationship. Therefore, in the execution of antenuptial contracts they are under a high duty to make full and fair disclosure of their financial worth.
2. An antenuptial contract must make a fair and reasonable provision for the wife or, in the absence thereof, there must be a full disclosure of her husband's financial worth and she must assent voluntarily after receiving competent, independent advice.
3. If the provision for the wife is not fair and reasonable, a presumption arises that the husband failed to make a full disclosure, and the burden is placed upon those seeking to uphold the validity of the contract to rebut the presumption with affirmative proof.²⁰

Having adopted these principles, the court found that the provision for the wife in the contract was so disproportionate to the statutory interest released as to raise the presumption of nondisclosure on the part of the husband. Since, in the instant case, the heirs of the husband could not sustain the burden of rebutting the presumption, the court held the contract to be invalid.²¹

At common law, a postnuptial contract could not be employed to settle property rights between husband and wife because of the

¹⁹See *Suhor v. Gooch*, 244 Fed. 361 (4th Cir. 1917), which holds that in determining the fairness of the contract, the court does not look to the financial worth of the parties at the time of death, but at the time of the execution of the contract.

²⁰It is submitted that to sustain the validity of such a contract, one would need only to prove that the provision for the wife was fair and reasonable, or that the wife signed the contract voluntarily, with full knowledge of her husband's worth and on independent competent advice. But it is not necessary that both conditions be satisfied.

²¹The avowed purpose of the husband in executing the contract in the instant case was to bar his wife's dower so as to allow him to freely convey land without having her join in the deed. The contract being invalid, the court indicated that the wife could either take under the husband's will, or take her statutory share. If she should elect to take her statutory interest, she would be entitled to dower in all the land the husband owned during coverture. Such an election apparently unsettles titles to all the lands the husband has conveyed in his name alone. Until the legislature or the courts formulate a more certain set of principles governing antenuptial contracts, the validity of each such contract will be doubtful. Therefore, it is advisable that the husband always have his wife join in deeds conveying land in which she might be entitled to dower, irrespective of any antenuptial contract purporting to bar her dower.

incapacity of spouses to contract *inter se*.²² "Today, however, because of legislation making a married woman *sui juris* as to her property, a wife may execute a binding contract nearly everywhere in the United States to release her dower or similar interest, provided the contract is fair and supported by adequate consideration."²³ Like the antenuptial contract, the postnuptial contract has its origin in the Statute of Uses, which provided that if a settlement was made upon the wife during marriage which otherwise met the requirements for legal jointure, the wife, upon the husband's death, would be put to an election between the settlement and dower.²⁴ Courts of equity, carrying this a step further, put the wife to an election even though the settlement did not constitute legal jointure. Thus, even where the wife was not absolutely barred from dower by the settlement, she was, at least, put to an election and not allowed to have both.²⁵

In order to make a final settlement of property rights between husband and wife by means of a postnuptial contract, it is necessary that the wife relinquish her contingent right of dower to the husband. It is doubtful, however, whether a wife can do this in Virginia. A line of authority, beginning in 1855, holds that the wife may release her contingent right of dower.²⁶ This early authority was reaffirmed in 1926 in *Eschner v. Eschner*,²⁷ where the court stated: "It is well settled in Virginia that the relinquishment by the wife of her inchoate right of dower in the husband's real estate constitutes a valuable consideration for a postnuptial settlement in favor of the wife."²⁸

However, these cases are not clear as to whether the wife may relinquish her contingent right of dower directly to the husband so as to allow him to convey land without the necessity of her joining in the deed. *Powell v. Tilson*²⁹ indicates that she cannot. In that case the court was construing a postnuptial contract in which the husband released his right of curtesy in the wife's estate in consideration of the wife's release of dower in his estate. Although the case was not decided on this point, the court stated that such a contract would be invalid for want of consideration on the wife's part since she could

²²1 American Law of Property § 5.40 (Casner ed. 1952).

²³Id. at 723.

²⁴Statute of Uses, 1536, 27 Hen. 8, c. 10, § 9.

²⁵1 American Law of Property § 5.40 (Casner ed. 1952).

²⁶*William and Mary College v. Powell*, 53 Va. (12 Gratt.) *371 (1855); *De Farges v. Ryland and Brooks*, 87 Va. 404, 12 S.E. 805 (1891); *Ficklin's Adm'r v. Rixey*, 89 Va. 832, 17 S.E. 325 (1893).

²⁷146 Va. 417, 131 S.E. 800 (1926).

²⁸*Eschner v. Eschner*, 146 Va. 417, 423, 131 S.E. 800, 802 (1926).

²⁹161 Va. 318, 170 S.E. 750 (1933).

not release her contingent right of dower to her husband. In construing the applicable Code section,³⁰ the court relied upon Burks' Address on the Code of 1919:³¹ "The extent of the power of a married woman over her contingent right of dower is somewhat doubtful under the law now in force. The revision seeks to remove all doubt on this subject, and makes it clear that the wife cannot convey her contingent right of dower to any person whomsoever (which of course includes the husband) while the husband owns the real estate in question."³²

Upon close observation it becomes apparent that there is in Virginia no really satisfactory method of settling property rights between spouses. Jointure may be utilized if one conforms strictly to the statute, but it cannot be used to bar the wife's share in her husband's personal property.³³ The antenuptial contract is available, but the law in that field is so unsettled that it is difficult to draw with certainty a valid contract. Virginia has recognized the postnuptial contract, but the effectiveness of such a contract is doubtful because the wife is apparently precluded by statute from releasing her dower to the husband while he still owns the land. There is no good reason why the husband and wife should not have complete freedom to contract between themselves in reference to the rights of each in the property of the other, either before marriage or after marriage.³⁴ The General Assembly might well consider enacting legislation toward this end.

S. JAMES THOMPSON, JR.

³⁰Va. Code Ann. § 5135 (1919), carried over into the 1950 Code as § 55-40.

³¹5 Va. L. Reg. (N.S.) 97 (1919).

³²Id. at 109. According to the statute, Va. Code Ann. § 55-40 (1950), there are two ways by which the wife may relinquish her dower: (1) join in a deed with the husband, or (2) after the husband has disposed of his interest in the land she may release her dower by a separate deed or contract.

Although the wife cannot release to her husband her contingent right of dower in land that he has not previously disposed of, there would seem to be no objection to a contract in which the wife agrees with the husband to release to some third person (to whom the husband has conveyed or intends to convey the land in question) her contingent right of dower in his land. *Burwell's Ex'r v. Lumsden*, 65 Va. (24 Gratt.) *443 (1874).

³³*Findley's Ex'rs v. Findley*, 52 Va. (11 Gratt.) *434 (1854).

³⁴3 Vernier, American Family Laws § 198 (1935).