

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000198-MR

RUGELEY PIERSON DEVAN, III

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JO ANN WISE, JUDGE  
ACTION NO. 99-CI-03250

SUSAN CLAY CALLAWAY  
(FORMERLY DEVAN)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Rugeley Pierson DeVan, III, (hereinafter "Ruge") appeals from the December 31, 2003, Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered by the Fayette Circuit Court. In the decree, the court incorporated the antenuptial property agreement dated July 18, 1996. Ruge argues the enforcement of the antenuptial agreement was erroneous and as such, that portion of the decree should be reversed. We have thoroughly reviewed this matter and the

applicable case law and, finding no error in the court's determination, we affirm.

Ruge and Susan Clay Callaway (formerly DeVan) (hereinafter "Susan") were married on July 20, 1996. Each had been previously married and had children during those marriages. Susan suggested to Ruge that they should enter into an antenuptial property agreement (hereinafter "the agreement") for the express purpose of protecting Ruge's children. Ruge agreed, and each party consulted an attorney to prepare an agreement. Following negotiations between the parties, an agreement, dated July 18, 1996, was entered. The parties were married on July 20, 1996. At issue is paragraph 12 of the agreement, which states:

12. Notwithstanding any contrary provisions of this agreement, including, but not limited to, all of the provisions of paragraph 3 hereof, the parties expressly agree as follows:

(A) Within thirty (30) days of the marriage of the parties hereto, Mr. DeVan shall deed a one-half (1/2) interest, as tenants in common, to Mrs. Callaway in that certain real property on Fontaine Road recently purchased by Mr. DeVan for the purposes of the parties to live, which one-half (1/2) interest shall be the sole and absolute property of Mrs. Callaway with the exception that Mrs. Callaway recognizes that a mortgage may be placed on the property up to eighty percent (80%) of its value. Mrs. Callaway shall be a party to any such mortgage transaction.

(B) In the event either party files for a divorce or legal separation of the parties, Mr. DeVan agrees that Mrs. Callaway may continue to live in the residence being occupied by the parties (currently the intended residence on Fontaine Road) and he will, from his separate property, make any mortgage payments due on said residence or its substitute for the life of Mrs. Callaway. Mrs. Callaway shall further have the right to select a different residence from the one on Fontaine Road as long as same is located in Central Kentucky but same shall not exceed the value of the Fontaine Road premises. In the event Mrs. Callaway selects a different residence, Mr. DeVan will cooperate in terms of sale of the current residence and repurchase of another residence, within the limits specified herein and in that event Mr. DeVan shall continue to be a one-half (1/2) owner of the new residence, but he shall also be required to make any mortgage payments associated with the new residence. In addition to the right of Mrs. Callaway to continue living in the residence, Mr. DeVan also agrees to pay Mrs. Callaway One Thousand Dollars (\$1,000.00) per month beginning from the date of filing for legal separation or divorce. The residence and the payment of One Thousand Dollars (\$1,000.00) per month to Mrs. Callaway shall be in lieu of all other claims she may make against Mr. DeVan for maintenance or other claims that she may have arising out of the marriage in the event of divorce or legal separation. Anything to the contrary in this subparagraph notwithstanding, it is expressly understood and agreed that the aforementioned rights of Mrs. Callaway under this subparagraph shall terminate upon the death of Mr. DeVan or upon Mrs. Callaway's remarriage or cohabitation with another male.

Ruge contends that the agreement is not enforceable because there was no consideration; it was entered into based upon fraud, duress, mistake, misrepresentation or non-disclosure; it was unconscionable when entered; and/or it was unconscionable at the time of dissolution due to changed circumstances. Susan argues the circuit court correctly ruled that the agreement is enforceable, that it was negotiated by the parties with advice from their respective counsel, and that there was no change of circumstances at the time enforcement was sought. Each party cites to Gentry v. Gentry<sup>1</sup> as establishing the standard for reviewing antenuptial agreements.

In Gentry, the Supreme Court of Kentucky held that antenuptial agreements are permitted, but enforcement of such agreements is subject to these limitations:

[T]he trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable? Scherer v. Scherer, [249 Ga. 635] 292 S.E.2d 662 (1982).<sup>[2]</sup>

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<sup>1</sup> 798 S.W.2d 928 (Ky. 1990).

<sup>2</sup> Gentry, 798 S.W.2d at 936.

In Gentry, as here, the circuit court found the agreement was executed freely, knowingly and voluntarily. Both Courts also rejected all claims of fraud, duress, mistake, misrepresentation and non-disclosure. In this case, the circuit court made the following findings in its March 11, 2002, opinion and order:

The facts of this case are undisputed. The parties were married on July 20, 1996. Both parties had previously been married and each had adult children at the time of their marriage. On July 18, 1996, the parties entered into an Antenuptial Agreement at [Susan's] suggestion. [Susan] believed that the agreement would reassure [Ruge's] children about the marriage and protect their interests. At the time the agreement was executed, each party was represented by counsel. The agreement provided for the disposition of all marital and non-marital property if the marriage was terminated by either death or dissolution, as well as a full disclosure of each party's assets at the time the agreement was made.

In September of 1999, the parties separated after experiencing marital difficulties. [Ruge] moved out of the marital home and on September 15, 1999 [Susan] filed this dissolution proceeding. [Susan] now seeks enforcement of the Antenuptial Agreement.

. . .

In the present case, the antenuptial agreement was entered into freely, knowingly, and voluntarily. Each of the parties read the agreement with the assistance of counsel and both indicated that they understood and acquiesced to its terms. Specifically, clause 18 of the agreement reflects that "[t]he parties hereto stipulate that they have read this

agreement and have had sufficient time to review same with their respective attorneys and that they fully understand the terms, provisions and legal consequences of this agreement." Also, there is no evidence to support [Ruge's] claims that the agreement was procured through fraud, duress or mistake. The Court rejects [Ruge's] argument that [Susan's] infidelity [prior to the marriage] and failure to cook, travel and keep house constitute fraud, misrepresentation and non-disclosure of material facts because they were not express conditions precedent to the enforceability of the agreement. The Court finds that the parties executed the agreement freely, knowingly, and voluntarily and there is no evidence in the record that requires a contrary conclusion.

Additionally, the agreement was not unconscionable at the time of execution, and is not unconscionable at present. All the terms of the agreement applied equally to both parties and it was drafted by well-respected attorneys acting on behalf of each party. The agreement did not limit or deny maintenance to either party when executed. Specifically, in the event of a divorce or legal separation, [Susan] is to receive \$1,000 per month for [Ruge's] lifetime or until [Susan] remarries in lieu of asserting any other claims against [Ruge] which arise from the marriage. The evidence also shows that there was a full and complete disclosure of [each] party's financial status at the time the agreement was executed. Furthermore, after reviewing the (sic) each party's financial situation at the time of the termination of the marriage, it is evident to the Court that the facts and circumstances have not significantly changed to render the enforcement of the agreement unconscionable. During the marriage, [Ruge] earned income from various investments, and he had received a lump sum payment as well as yearly payments of

\$100,000 as a result of the sale of his concrete business in 1995. Conversely, [Susan] worked limited hours during the marriage. At the time the divorce proceedings were initiated, [Ruge] was still receiving \$100,000 a year and his investment earnings had increased while [Susan] worked in part-time, casual labor. Therefore, the Court finds that the facts and circumstances at the time of dissolution had not so changed as to make enforcement of the agreement unconscionable, and the length of the marriage has no effect on this conclusion.

[Ruge] argues that the agreement was not supported by consideration. Clearly, the mutual promises and obligations of each party supply consideration for the agreement.

We have thoroughly reviewed the matter and believe there was no evidence that compels a contrary finding.

Having determined that the agreement entered herein by the parties did not violate the Gentry standards, we next address Ruge's argument relative to changed circumstances. As noted above, the order finding the agreement valid was entered on March 11, 2002, when the Fayette Circuit Court entered a summary judgment to that effect. However, as previously stated, the decree of dissolution incorporating the agreement was not entered until December 31, 2003, some 21 months later. During that time, Ruge alleges he became disabled and began receiving \$1,700 in monthly disability benefits. Ruge cites to Gentry as

well as to Edwardson v. Edwardson<sup>3</sup> and Blue v. Blue<sup>4</sup> for the proposition that determination of conscionability and enforceability of an antenuptial agreement based upon changed circumstances is viewed at the time the marriage is dissolved.

In Gentry, the Court held, “[i]t is, therefore appropriate that the court review such agreements at the time of termination of the marriage, whether by death or by divorce, to insure that facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable.”<sup>5</sup> In Edwardson, rendered the same day as Gentry, the Court set forth two requirements that must be met before an antenuptial agreement may be found valid. First is the limitation that requires full disclosure and “[t]he second limitation to be observed is that the agreement must not be unconscionable at the time enforcement is sought.”<sup>6</sup> Finally, in Blue, this Court stated the following as to when an antenuptial agreement is reviewed for unconscionability:

Rather, a broader and more appropriate test of the substantial fairness of a prenuptial agreement requires a finding that the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the

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<sup>3</sup> 798 S.W.2d 941 (Ky. 1990).

<sup>4</sup> 60 S.W.3d 585 (Ky.App. 2001).

<sup>5</sup> Gentry, 798 S.W.2d at 936.

<sup>6</sup> Edwardson, 798 S.W.2d at 945.



contract was entered into as to cause its enforcement to work an injustice.[<sup>7</sup>]

As we have already pointed out, the petition for dissolution was first filed on September 15, 1999. In Ruge's response filed October 5, 1999, he stated in paragraph three the following:

3. In addition to the accumulation of various marital property and debts which may be subject to division and distribution by the Court, as well as an assignment of certain non-marital property by the Court, there also exists an Antenuptial Property Agreement entered into by the parties which may be applicable to the distribution and disposition of the parties' property.

Thereafter, Susan amended her petition for dissolution to include a statement indicating that "the parties have an antenuptial agreement which governs the disposition of assets and liabilities in this case." On the same date, October 25, 1999, that the amended petition was filed, Susan also filed a verified motion to enforce the terms of the parties' antenuptial agreement, which incorporated a copy of the agreement. On November 5, 1999, Ruge filed his response to the amended petition in which he again conceded that the "antenuptial property agreement entered into by the parties is applicable to the distribution and disposition of the parties' property and liabilities in this case." However, before the court could

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<sup>7</sup> Blue, 60 S.W.3d at 590 (footnote to citations omitted).

address the pending motion to enforce the agreement, Ruge obtained new counsel and on February 4, 2000, filed an amended response in which he alleged the agreement to be "unconscionable and entered into based upon misrepresentations and misstatements designed to induce [Ruge] to enter into such an agreement."

As a result of Ruge's contention that the agreement was unenforceable, the parties engaged in protracted discovery, the taking of depositions and the entry of several agreed orders in an attempt to fully develop this issue. Finally, on November 15, 2001, Susan moved for summary judgment to enforce the antenuptial agreement of the parties. Again, the parties thoroughly briefed and argued the issue that led to the March 11, 2002, order granting summary judgment to Susan and declaring the agreement enforceable. In that order, as previously stated, the circuit court specifically found "that the facts and circumstances at the time of dissolution had not so changed as to make enforcement of the agreement unconscionable, and the length of the marriage has no effect on this conclusion."

Based upon this order, Susan filed a motion on April 2, 2002, to set the matter for a final uncontested hearing. But as was the norm and not the exception in this case, no hearing was timely held and instead, the matter went unresolved until August 6, 2003, (over 16 months later) when Ruge filed a motion to vacate the March 11, 2002, order relative to the agreement

being enforceable. Ruge again argued the agreement was unconscionable due to changed circumstances that had recently occurred, specifically, his being declared disabled. By this time a different judge had taken over the case. The new judge reviewed the record and the agreement presented by the parties and determined that Ruge's motion should be treated as a CR 60.02 motion. The court held that the motion was untimely in that it was filed more than one year after the original order had been entered. However, the court went on to rule that pursuant to Gentry and Edwardson, antenuptial agreements are to be reviewed at the time enforcement is sought. In this case, the court determined that enforcement was sought at the time the amended petition for dissolution and motion to enforce were filed on October 25, 1999. Subsequently, the parties pursued the issue and presented the enforceability of the agreement to the court, which then entered the March 11, 2002, order. Based upon this procedural history, the court found that Ruge's motion was also barred under the doctrine of claim preclusion and equitable estoppel. The court concluded its order by citing Hicks v. Combs<sup>8</sup> and stating, "Now, over a year later, [Ruge] takes a contrary position and it would be unconscionable to allow him a 'second bite of the apple' at this time." Following

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<sup>8</sup> 233 S.W.2d 279 (Ky. 1949).

the court's denial of Ruge's motion to alter, amend or vacate and entry of the decree of dissolution, this appeal was filed.

We agree with the trial court that the test of unconscionability as addressed in Gentry, Edwardson, and Blue takes place at the time enforcement is sought. In this case, it occurred when the parties litigated the matter, resulting in the March 11, 2002, order. To decide otherwise would foreclose finality on such an important issue and subject litigants to continuous, lengthy and expensive litigation. If we were to decide this issue as Ruge argues then parties would be encouraged to delay entry of a final decree and issues of enforceability of antenuptial agreements, property division, maintenance, etc., would be subject to relitigation and possible change.

A review of this case points out several obvious facts: (1) Ruge had his opportunity to litigate the issue as to the enforceability of the agreement; (2) the circuit court thoroughly addressed his arguments and ruled against him; (3) both at the time of the filing of the petition and on the date the decree was entered (some four years later) there had not been a change of circumstances as to make the agreement unconscionable (the fact that he is now disabled and receiving social security disability benefits changes Ruge's financial circumstances only slightly); and (4) there was no valid

argument presented that the agreement was entered into due to fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts.

The last issue raised by Ruge is that he should not have to pay the insurance and property tax on the residence Susan resides in. The agreement stated that he "will, from his separate property, make any mortgage payments due on said residence or its substitute for the life of [Susan]." This issue was first brought to the court's attention in a motion filed by Ruge on June 20, 2002. The parties again briefed this issue and presented the motion to the court. The court entered its order on July 23, 2002. In its order, the court made the following findings:

The Antenuptial Property Agreement between the parties obligates [Ruge] to pay "any mortgage payments due on said residence." Agreement ¶ 12(B). The Agreement does not otherwise define mortgage payments. Under the terms of the mortgage, the parties, as the borrowers, are required to make payments of principal and interest under the Note, plus funds for Escrow Items under Section 3 of the mortgage. The Escrow Items as defined by section 3 essentially include property taxes and assessments, premiums for insurance required by Section 5, and any mortgage insurance. Since the mortgage requires payment of the taxes and insurance as part of the monthly mortgage payment, and since [Ruge] is required to make any mortgage payments due on the residence, this Court's view is that he is required to pay the taxes and insurance in addition to the principal and interest.

Besides the references in the mortgage and note mentioned above in the trial court's order, the record contains a letter to Ruge from the mortgage holder dated the same day as the mortgage and note were entered, which sets forth the following:

A breakdown of your first monthly payment amount is shown below:

Principal and Interest .....	\$ 1,380.71
Taxes and Assessments .....	\$ 129.14
Hazard Insurance Premium .....	\$ 31.84
Mortgage Insurance Premium .....	\$ .00
Other Escrows .....	\$ .00
Buydown Assistance .....	\$ .00
Interest Credit .....	\$ .00
(if applicable, on first payment only)	

Total Monthly Payment .....

	\$ 1,541.69
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The record supports the trial court's finding that payment of property taxes and insurance was to be included in the mortgage payment. Since there is substantial evidence to support the court's order, we find no error as to the court's ruling in this matter.

For the foregoing reasons, the orders and decree of dissolution entered by the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Judy  
Frankfort, KY

BRIEF FOR APPELLEE:

Lisa L. Johnson  
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