STATE OF MICHIGAN

COURT OF APPEALS

VERLADIA REED Plaintiff-Appellee, v GREGORY J REED, Defendant-Appellant.	FOR PUBLICATION February 8, 2005 9:05 a.m. No. 248895 Wayne Circuit Court LC No. 00-03452-DM

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

MARKEY, J.

Defendant appeals by right a judgment of divorce entered May 16, 2003 that implemented the trial court's opinion and order following a November 2002 trial. Defendant also appeals the trial court's pretrial order granting partial summary disposition to plaintiff declaring the parties May 1975 prenuptial agreement null and void. We conclude the parties' prenuptial agreement is valid, and the trial court erred by finding changed circumstances justified not enforcing it. This error affected many of the court's other rulings, including its determination of the marital estate, the equitable division of marital property, the appointment of a receiver, and possibly, the trial court's decisions regarding child and spousal support. We therefore reverse in part, affirm in part, and remand this case to the trial court for further proceedings consistent with this opinion.

I. Summary of Facts and Proceedings

Plaintiff and defendant were married on July 5, 1975. On or about May 15, 1975, the parties executed a prenuptial agreement which provided among other things that each party was to have "complete control" of his or her "separate property" acquired "by either of them in an individual capacity," and that, in the event of a divorce, defendant was to be awarded the residence at 2460 Burns Avenue in the Indian Village area of Detroit. At the time of the agreement, plaintiff had been working for three years as an engineer for Detroit automakers, and defendant was a recent law school graduate employed at an entry-level tax analyst position. The parties' combined net worth at the time of their marriage in 1975 was less than $20,000.

Defendant established his own law practice in 1976, which remains viable today. Plaintiff worked for Detroit Edison off and on for a total of 21 years before retiring in 1997.

From 1977 to 2000, the parties' respective total income was nearly identical: plaintiff earned $1,058,318, and defendant earned $1,063,626.

Before retiring from Detroit Edison, plaintiff sued Detroit Edison for discrimination. That lawsuit was settled in 1997. She received a gross cash payment of $773,770 for a total settlement of $1,068,423. According to plaintiff, much of the net cash settlement proceeds, $392,669, was used to pay outstanding debts the parties had accumulated, living expenses, college tuition for their children, and a down payment on a new residence.

Initially, defendant practiced law from the family home, but later he moved into an office at 225 Garfield in Detroit. The Garfield building also housed various other profit and nonprofit entities defendant established. In 1991, the City of Detroit initiated condemnation proceedings against the Garfield property. In March 2001, a consent judgment was entered in the condemnation action, and the City agreed to pay $1,250,000 for the property.

Plaintiff filed this divorce action in October 2000. Defendant, relying upon the 1975 prenuptial agreement, contended that he was entitled to everything he purchased over the course of the parties' lengthy marriage.

Plaintiff moved for partial summary disposition, asserting that the 1975 prenuptial agreement is unenforceable. Plaintiff claimed that defendant failed to fully disclose his assets to plaintiff before she signed the agreement, that the agreement defendant submitted is not the same agreement she signed, and that due to the change in the parties' circumstances between the time the agreement was signed and the time of the divorce, it would be unfair and unconscionable to enforce the agreement as interpreted by defendant.

Defendant responded that the parties voluntarily entered into the prenuptial agreement, that all assets were fully disclosed when the agreement was signed, and that the circumstances of the parties have not changed to an extent that it would be unfair to enforce the agreement. Defendant claimed that the agreement was necessary because plaintiff did not save money. Moreover, the parties had abided by the terms of the agreement during the marriage. Defendant stated that each party maintained separate accounts, purchased property separately, and that plaintiff executed quit claim deeds to defendant to extinguish her dower rights in his property. Defendant also claimed that there has been no change in circumstances that would prevent plaintiff from earning adequate income from her investments and business interests or from working as an engineer should she choose to do so.

The trial court held a hearing on plaintiff's motion on August 23, 2002, and at the conclusion of the hearing, granted plaintiff's motion. On September 23, 2002, the trial court entered its order granting partial summary disposition to plaintiff, declaring the prenuptial agreement "null and void for the reasons stated on the record." At the motion hearing, the trial court noted that the only provision in the agreement that expressly contemplated divorce related to the property on Burns, suggested the agreement was infirm because it was entered when agreements contemplating divorce were not yet valid, and ruled the "real reason . . . why I have to strike down this agreement is . . . that . . . the . . . facts and circumstances have changed since the agreement was executed making its enforcement unfair and unreasonable."

The trial of this case commenced November 6, 2002, and concluded on December 3, 2002. The court issued its opinion and order on April 28, 2003, setting forth its findings of fact and conclusions of law. The trial court determined the marital estate to consist of:

(1) A condominium in Harbor Springs, Michigan valued at $110,595;

(2) defendant's one-half interest in an office building located at 1201 Bagley, Detroit, valued at $175,000;

(3) stocks and other investments valued at $21,856;

(4) net proceeds of condemnation of 225 Garfield valued at $887,117;

(5) Detroit Edison annuities valued at $172,845;

(6) SEP and IRAs: $215,874;

(7) Savings and miscellaneous: $7,900;

(8) 383.92 acres of land located in Springfield Township, Oakland County, with an estimated value between $2,900,000 and $3,000,000 if sold undeveloped, and if developed, between $8,000,000 and $10,000,000;

(9) the marital residence at 2460 Burns, Detroit, valued at $543,449 according to its 2002 state equalized valuation, or $450,000 as appraised;

(10) defendant's law practice estimated at $55,059 because defendant did not provide expert evaluator John Stockdale necessary financial information;

(11) plaintiff's business, VTR Consulting Inc., valued at $950 by Mr. Stockdale;

(12) Malcolm X papers, evaluated by the parties at $125,000; and

(13) plaintiff's incurred debt in the amount of $180,000.

The trial court rejected defendant's claims that much of this property should be excluded from the marital estate. Specifically, the trial court rejected defendant's claims: that plaintiff had deeded away her interest in the Harbor Springs and Garfield properties, that various profit and nonprofit entities should share in the condemnation proceeds, that a partnership owned 227.54 acres of the Oakland County property and defendant held only a partnership interest, that a corporation in which defendant had no interest owned the remaining 156.38 acres of Oakland County property, and that one of defendant's nonprofit entities actually owned the Malcolm X papers. The trial court found defendant owned all of the 227.54 acres and owned at least a one-third interest in the other 156.38 acres. The trial court ordered that the marital estate be divided equally and appointed a receiver to sell all of Oakland County property with 55% of the net proceeds of defendant's interest to be distributed to plaintiff so as to equalize the distribution of the marital estate between the parties.

The trial court also rejected plaintiff's request for an award of $400 a week in spousal support, finding that the division of the marital estate would give each party sufficient assets to maintain a high standard of living.

Plaintiff was awarded custody of the parties' one remaining minor child, and the child support previously set was continued.

Finally, the trial court ordered defendant to pay $150,000 of plaintiff's attorney fees because she had "been forced to incur expenses as a result of the other party's unreasonable conduct in the course of the litigation," citing *Ianitelli v Ianitelli,* 199 Mich App 641; 502 NW2d 691 (1993).

II. The Prenuptial Agreement

A. Preservation and Standard of Review

Plaintiff argues that defendant failed to cite authority to support his position on this issue and, therefore, failed to preserve it. See, e.g., *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003). But, defendant cites *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992), which in turn relies on *Rinvelt v Rinvelt*, 190 Mich App 372; 475 NW2d 478 (1991), and *Brooks v Brooks*, 733 P2d 1044 (Alas, 1987). Defendant also cites *Kuziemko v Kuziemko*, unpublished opinion of the Court of Appeals decided December 4, 2001 (Docket No. 212337). In rendering its decision voiding the prenuptial agreement, the trial court relied on *Rinvelt, Brooks*, and *Kuziemko.* Defendant argues on appeal that the trial court misapplied this case authority. We conclude that defendant has preserved this issue by citing authority in support of his argument and by arguing in the trial court that the parties voluntarily entered into the prenuptial agreement before their marriage, the parties voluntarily complied with its terms during the marriage, and that changed circumstances did not render the agreement either unfair or unreasonable. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The moving party must specifically identify the undisputed factual issues and support its position with evidence. MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party, but may not make findings of fact or weigh credibility in deciding the motion. *Id*.; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with supporting evidence that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4); *Maiden, supra* at 120-121. In the absence of any material fact dispute, summary disposition may be granted to the party so entitled as a matter of law. MCR 2.116(G)(4), (I)(1), (2).

We review de novo a trial court's grant or denial of summary disposition. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Also, the interpretation of a contract is a question of law reviewed de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact. *Id*. at 463,

469, 480. An unambiguous contract must be enforced according to its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

C. Analysis

We find that the parties' prenuptial agreement is clear, unambiguous, and valid. The trial court erred by finding changed circumstances justified not enforcing it.

In addition to voiding the parties' prenuptial agreement because "the facts and circumstances have changed since the agreement was executed making its enforcement unfair and unreasonable," the trial court also suggested the agreement might be invalid because agreements that contemplated divorce were not recognized in Michigan until 1991. Before then, the appellate courts of this state had recognized only prenuptial agreements that governed the division of property upon the death of a spouse. *Rinvelt, supra* at 375. But it does not necessarily follow that the 1975 prenuptial agreement in this case was void ab initio because it governed the disposition of property in the event of divorce. Although our Supreme Court had stated that prenuptial agreements in contemplation of divorce were against public policy, see e.g., *Scherba v Scherba*, 340 Mich 228, 231; 65 NW2d 758 (1954), the *Rinvelt* Court rejected such statements as dicta, finding that the concerns which had led some courts to refuse to enforce such agreements were no longer valid. *Rinvelt, supra* at 379. Further, this Court in *Lizzio v Lizzio*, unpublished opinion per curiam of the Court of Appeals, decided December 14, 1999 (Docket No. 203018), noted "there was no established rule of law in 1975 precluding the enforceability of an antenuptial agreement contemplating divorce." *Id*., slip op at 6. Thus, no clear authority supports the conclusion that the parties' 1975 prenuptial agreement is void merely because it was entered into before *Rinvelt* was decided. The trial court's suggestion to the contrary is wrong.

The trial court correctly recognized, however, that it is now well established that prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan. *Booth, supra* at 288; *Rinvelt, supra* at 382; see, also, MCL 557.28. But such agreements may be voided if certain standards of "fairness" are not satisfied. *Rinvelt, supra* at 380-381, quoting *Brooks, supra* at 1048-1051. A prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if unconscionable when executed or (3) when the facts and circumstances since the agreement was executed are so changed that its enforcement would be unfair and unreasonable. *Rinvelt, supra* at 380, quoting *Brooks, supra* at 1049. A party challenging a prenuptial agreement "bears the burden of proof and persuasion." *Rinvelt, supra* at 382. See, also, *In re Benker Estate*, 416 Mich 681, 684; 331 NW2d 193 (1982), and *Booth, supra* at 289.

In this case, the trial court voided the prenuptial agreement because it found that the facts and circumstances had so changed since the agreement was executed that its enforcement would be unfair and unreasonable. Relying on *Kuziemko,* the trial court reasoned that "foreseeability" was the critical issue in making this determination. Thus, the trial court believed it "should enforce specific terms of the agreement if the circumstances at the time that the marriage ends were what the parties foresaw at the time they entered the prenuptial agreement." The trial court concluded that, "given the duration of this marriage, 26 years, the age and financial status of the parties at the time they signed the agreement, and the significant changes in the financial status

of both parties since that time, I believe it would be both unfair and unconscionable to enforce an agreement executed 26 years earlier under far different facts and circumstances and certainly with a marital estate that could not have possibly been foreseen to have grown to the proportion that it has by these parties." In sum, the trial court found the length of the parties' marriage, and each parties' acquisition of substantial assets during the marriage, were unforeseeable changed circumstances rendering it unfair and unreasonable to enforce the parties' prenuptial agreement.

The trial court properly utilized this Court's decision in *Kuziemko.* Although that case is an unpublished opinion which lacks binding precedence under the rule of stare decisis, MCR 7.215(C)(1), its reasoning is persuasive and instructive on the issue presented in this case. See, e.g., *Slater v Ann Arbor Public Schools Bd of Ed,* 250 Mich App 419, 432; 648 NW2d 205 (2002). The trial court properly determined that the first step in analyzing whether changed circumstances might justify refusing to enforce a prenuptial agreement is to focus on whether the changed circumstances were foreseeable at the time to agreement was made. *Kuziemko, supra*, slip op at 5, quoting *Gant v Gant*, 329 SE2d 106, 114-115 (W Va, 1985). Hence, "'for a change of circumstances to be uncontemplated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement.'" *Kuziemko, supra* slip op at 5, quoting *Warren v Warren,* 147 Wis2d 704, 708-709; 433 NW2d 295 (Wis App, 1988). This approach precludes the judiciary from substituting its own subjective view of "fairness" contrary to an express written agreement.

In *Kuziemko,* the trial court had refused to enforce the parties' antenuptial or prenuptial agreement, finding it would be unfair and unreasonable to do so because of the short duration of the marriage in that case. *Id*., slip op at 3. This Court disagreed, *id*., slip op at 4, opining:

> Antenuptial agreements are subject to the rules of construction applicable to contracts in general. Antenuptial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. Clear and unambiguous language may be [sic] not rewritten under the guise of interpretation; rather, contract terms must be strictly enforced as written, and unambiguous terms must be construed according to their plain and ordinary meaning. If the agreement fairly admits of but one interpretation, even if inartfully worded or clumsily arranged, it is not unambiguous. [Citations omitted.]

The *Kuziemko* Court continued, *id*., slip op at 4-5:

> Prenuptial agreements . . . provide . . . people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. Moreover, allowing couples to think through the financial aspects of their marriage beforehand can only foster strength and permanency in that relationship. In this day and age, judicial recognition of prenuptial agreements most likely "encourages rather than discourages marriage."
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> In sum, both the realities of our society and policy reasons favor judicial recognition of prenuptial agreements…. [W]e see no logical or compelling reason why public policy should not allow two mature adults to handle their own

> financial affairs. Therefore, we join those courts that have recognized that prenuptial agreements legally procured and ostensibly fair in result are valid and can be enforced. "The reasoning that once found them contrary to public policy has no place in today's matrimonial law." [*Rinvelt, supra* at 382, quoting *Brooks v Brooks*, 733 P2d 1044 (Alas, 1987).]
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> Courts cannot make contracts. They can only construe them. *Morales v Auto Owners Ins. Co.,* 458 Mich 288, 297, fn 3; 582 NW2d 776 (1998) quoting *Ruddock v Detroit Life Ins Co,* 209 Mich 638, 654-655, 177 NW 242 (1920).[] In keeping with this principle, it necessarily follows that parties who negotiate and ratify antenuptial agreements should do so with the confidence that their expressed intent will be upheld and enforced by the courts.

In this case, the trial court erred in its application of the principles stated in *Kuziemko*. First, the trial court erred by finding that the length of the parties' marriage was a change in circumstance justifying voiding the prenuptial agreement. Although, in *Kuziemko,* the parties' were not married long and the parties' financial status had not significantly changed from when the agreement was entered, the Court rejected the idea that the brevity of the marriage justified voiding the parties' agreement. *Kuziemko, supra* slip op at 4, 5. The Court opined, "neither the short duration of the parties' marriage nor the benefit [the] defendant may receive under the agreement, individually or collectively, would constitute a change in facts or circumstances justifying departure from the parties' agreement." *Id*., slip op at 4. Likewise, here, neither the length of the parties' marriage nor the perceived benefit to defendant justifies voiding the parties' prenuptial agreement. A long marriage which is, indeed, the whole idea of marriage, is as easily foreseen as a short marriage. Accordingly, the trial court erred by concluding the length of the parties' marriage justified voiding the parties' agreement.

The trial court also erred by finding that the growth of the parties' assets over the years justified voiding their prenuptial agreement. The heart of the prenuptial agreement is found in paragraph three, which provides that the parties agree to maintain their separate property as if not married. That paragraph reads:

> Separate Property. Except as herein provided, each party shall have complete control of his or her separate property and may enjoy and dispose of such property in the same manner as if the marriage had not taken place. The foregoing shall apply to all property now owned by either of the parties and to all property which may hereafter be acquired by either of them in an individual capacity.

In essence, the parties agreed to be captains of their own financial ship and to "decide their own destiny." *Rinvelt, supra* at 382, quoting *Brooks, supra* at 1050. Having agreed to do so, it was clearly foreseeable at the time the agreement was entered that the parties would acquire separate assets over the course of the marriage. Further, that the parties' separate assets could grow at disparate rates and that one party's assets might grow significantly more than the other party's would have been readily apparent. In sum, the fact that the parties' assets grew significantly over many years can hardly be considered an unforeseeable "changed circumstance" justifying voiding the parties prenuptial agreement. Similarly, the benefit

accruing to one party from the disparate growth of his assets is simply not a changed circumstance rendering the agreement unfair and unreasonable to enforce.

The parties' prenuptial agreement is clear and unambiguous; changed circumstances do not render its enforcement unfair and unreasonable. Accordingly, the agreement should be enforced. Moreover, the trial court incorrectly suggests that the only provision of the agreement mentioning divorce, and therefore applicable in that event, is paragraph two pertaining to the parties' marital home. Although it is true that paragraph two is the only part of the agreement that specifically mentions divorce, we must read the agreement as a whole, and it clearly contemplates more than the parties' marital home. *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000). Indeed, paragraph three, read in the context of the whole agreement, provides that property of each spouse "which may hereafter be acquired by either of them in an individual capacity" will remain the acquiring spouse's separate property.

Of course, the question remains whether defendant rather plaintiff was entitled to partial summary disposition. MCR 2.116(I)(2). For several reasons we concluded the answer to that question is yes. First, as the party challenging the prenuptial agreement, plaintiff "bears the burden of proof and persuasion." *Kuziemko, supra*, slip op at 4, citing *Rinvelt, supra* at 382. Second, plaintiff acknowledged having signed a prenuptial agreement but offered no evidence to call into question the authenticity of the document defendant produced. For the same reason, plaintiff's argument that defendant produced only a copy of the agreement instead of the original, is without merit. MRE 1003. Plaintiff only claimed that the terms of the prenuptial agreement she signed were different from those in the document defendant produced. But the problem with plaintiff's testimony is that a party to a written contract, which is clear and unambiguous, may not vary its terms with parol evidence. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Although parol or other extrinsic evidence may be admitted as an aid to interpret a written agreement that is open to two reasonable constructions, *Klapp, supra* at 469-470, such is not the case here.

At plaintiff's motion for partial summary disposition, she not only bore the burden of persuasion to establish that the prenuptial agreement was void, but also that no genuine issue of material fact existed in that regard. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Plaintiff failed to do so with respect to her claim that changed circumstances rendered the agreement unfair and unreasonable to enforce, and her effort to show that the terms of the parties' agreement was different from the written contract defendant produced also fails.

Plaintiff also argues that the prenuptial agreement was void because: (1) defendant did not fully disclose his assets at the time the agreement was entered, and (2) plaintiff was not represented by counsel. Yet, it is undisputed that at the time the agreement was entered, plaintiff and defendant were both young professionals just starting their careers with combined assets of less than $20,000. Plaintiff conceded the parties started their marriage with virtually no assets. Further, plaintiff does not claim that any alleged discrepancy between defendant's disclosure of assets and the true state of his net worth at the time of the agreement had any effect whatsoever on her entering the prenuptial agreement. So, even if defendant failed to completely disclose all of his assets to plaintiff, any shortfall was immaterial when viewed in light of the parties' relatively small estate when they married. Accordingly, the alleged lack of disclosure cannot

serve as a basis of voiding the prenuptial agreement under the fairness doctrine. See *In re Benker Estate*, *supra* at 689-691.

Plaintiff's lack of counsel before entering the prenuptial agreement also provides no basis for voiding it. As noted above, antenuptial or prenuptial agreements are contracts subject to the rules governing construction of contracts generally. *Kuziemko, supra*, slip op at 4, citing *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). Provided the rules of fairness discussed above are not offended, there is no requirement that one be represented by independent counsel before committing to a binding contract. *Gant, supra* at 112. According to plaintiff's own testimony, her will was not overcome: indeed, she actively negotiated the terms of the agreement. So, plaintiffs' lack of counsel does not require voiding the parties' agreement.

In summary, the parties' prenuptial agreement is valid, and the trial court erred by finding changed circumstances justified not enforcing it. We, therefore, must reverse and remand for further proceedings in the trial court.

III. The Marital Estate

A. Preservation and Standard of Review

No special action was necessary to preserve this issue. MCR 2.517(A)(7). Moreover, defendant preserved this issue by raising it in the trial court. *Fast Air, supra* at 549.

In granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., this Court is left with the definite and firm conviction that a mistake has been made. *Id.*; *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.*; *Draggoo, supra* at 430.

B. Analysis

Because the trial court erred by not enforcing the parties' antenuptial agreement, it also erred in the first step necessary to equitably divide the parties' property: determining what property is included in the marital estate and what property is separate property of a party. "[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The trial court's not enforcing the parties' antenuptial agreement clearly affected the segregation of marital and separate property. Accordingly, we must remand for further proceedings. Nevertheless, because defendant's arguments regarding the marital estate will again arise, we will briefly address them.

The crux of defendant's appeal is that the trial court wrongly included the following as marital assets: (a) proceeds resulting from the City of Detroit's condemnation of 225 Garfield; (b) a condominium in Harbor Springs; (c) property in Springfield Township, Oakland County,

consisting of 227.54 acres (this property was purchased on a land contract by AHR Packaging Consultants, a corporation solely owned by defendant but deeded on payment of the contract to an alleged limited partnership Equestrian Estates, Ltd [EE I]); (d) property in Springfield Township, Oakland County, consisting of 156.38 acres (this property adjacent to the EE I property was purchased on land contract by a Michigan corporation defendant created, Equestrian Estates II, Ltd [EE II]), which defendant claimed was owned by two shareholders: Rick Frazier and O'Neil Swanson; and (e) certain Malcolm X papers, which defendant purchased and purportedly gifted to one of his nonprofit entities.[1]

The distribution of property in a divorce is controlled by statute. *Korth, supra* at 291; *Reeves, supra* at 493. MCL 552.19 provides that upon granting a divorce, "the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof . . . in money." The goal of a court when apportioning a marital estate is to equitably divide it in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The trial court need not achieve mathematical equality, but the trial court must clearly explain divergence from congruence. *Id*. at 114-115.

In general, assets a spouse earns during the marriage are properly considered part of the marital estate, and thus subject to equitable division. And the parties' separate assets may not be invaded unless one of two statutory exceptions is satisfied. *Korth, supra* at 291. The first exception, found in MCL 552.23, permits the trial court to invade a spouse's separate property when after the division of the marital assets, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . ." See, *Korth, supra* at 291, and *Reeves, supra* at 494. In other words, "invasion is allowed when one party demonstrates additional need." *Id*. The second exception, MCL 552.401, permits the trial court to invade a spouse's separate property when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." *Korth, supra* at 291-292; *Reeves, supra* at 494-495. "When one [spouse] significantly assists in the acquisition or growth of [the other] spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Id*. at 495. When this exception applies, the trial court may award to the contributing spouse all or a part of the separate property of the other spouse as the court determines "to be equitable under all the circumstances of the case." MCL 552.401; *Korth, supra* at 292.

First, the parties' prenuptial agreement does not exclude their home on Burns from the marital estate. The agreement provides that "[i]n the event of divorce . . . [defendant] shall be

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[1] Defendant created and operated several profit and nonprofit entities, as well as various assumed names, including, AHR Packaging Consultants, Development Unlimited Inc., Equestrian Estates II Ltd., Equestrian Estates Ltd., GJR Productions, Gregory J. Reed & Associates, Gregory J. Reed Scholarship Foundation, Keeper of the Word Foundation, Mic-Arian Corp., New National Publishing Co., Parks Legacy Mission, Peaceful Enterprises, and Progressive Clergy.

awarded the residence." Thus, the trial court did not err by including the marital home in the marital assets but awarding it to defendant subject to plaintiff's receipt of her share of its equity.

Second, after a careful review of the record, we are convinced that the evidence generally supported the trial court's finding that defendant, his purported partners in the Oakland County property, and the documents defendant produced to support his claims, all lacked credibility. MCR 2.613(C). Defendant's testimony attempting to explain the legal machinations of various purported partnerships, assumed name entities, and corporations, regarding the purchase of the EE I and EE II properties at times bordered on double-talk. For example, defendant asserted that the EE I property was partnership property purchased by AHR because the partnership did not exist and stock certificates in AHR were issued as liens to secure partnership interests. Defendant's testimony explaining why the purported partnership agreement included a defunct assumed name entity as a general partner was equally mystifying.

With respect to the documents defendant produced, we conclude that the purported partnership documents were inconsistent and were not in the proper form or filed according to the revised uniform limited partnership act, MCL 449.1101, et seq. Likewise, copies of "cancelled" checks purportedly representing investments by others in the EE I and EE II properties bear no indicia of having been processed through the banking system. In sum, this record does not establish that the trial court clearly erred in deciding that these documents were not credible. *Sands, supra* at 34.

(a) 225 Garfield (condemnation proceeds). The trial court did not clearly err by including the 225 Garfield condemnation proceeds as a marital asset. The prenuptial agreement does not exclude this property from the marital estate because the parties acquired 225 Garfield as tenants by the entireties. Thus, 225 Garfield does not come within the "separate property" paragraph of the prenuptial agreement because it was not "acquired by either [party] in an individual capacity." Defendant also misplaces his reliance on a May 21, 1991 quit claim deed in which plaintiff purported to grant her interest in 225 Garfield to one of defendant's nonprofit entities. Under MCL 557.101,[2] which governs termination of a tenancy by entirety, the quitclaim deed was invalid. "Neither husband nor wife alone can convey title vested in them as tenants by the entireties." *French v Foster*, 307 Mich 361, 364; 11 NW2d 920 (1943). Further, defendant acknowledged plaintiff's assistance and support regarding the Garfield property.

The trial court also did not clearly err by determining that defendant failed to establish that other entities should share in the condemnation proceeds. Although defendant produced evidence that Charles Brown owned fifty percent of Mic-Arian Corporation stock and that Mic-Arian owned the building to which defendant moved his business activity, defendant provides no evidence that Mic-Arian held any interest in the condemnation proceeds of 225 Garfield. Likewise, other than the fact that many of defendant's profit and nonprofit entities were named

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[2] MCL 557.101 provides: "In all cases where husband and wife own any interest in land as tenants by the entirety, such tenancy by the entirety may be terminated by a conveyance from either one to the other of his or her interest in the land so held."

as defendants in the condemnation case and as payees on the settlement check, defendant offers no argument to establish these other entities held an interest in the condemnation proceeds. On the other hand, this Court held in the condemnation case that defendant was "either an officer or managing agent of every defendant" in that case. *Detroit v Williams*, unpublished decision of the Court of Appeals, issued April 27, 1997 (Docket No. 188458), slip op at 2. Furthermore, Gregory Buss, the attorney representing defendant and the other named entities in the condemnation action and escrow agent of the settlement, testified that defendant either owned or controlled all of the named condemnation defendants. So, the trial court did not clearly err by finding, in essence, that defendant and his various entities were one and the same, and including the 225 Garfield condemnation proceeds in the marital estate.

(b) Harbor Springs condominium. The trial court did not clearly err by including the Harbor Springs condominium as a marital asset. Like the Garfield property, the prenuptial agreement does not exclude the Harbor Springs condominium from the marital estate because the parties also acquired it as tenants by the entireties. A quit claim deed purportedly signed by plaintiff conveying her interest in the property to defendant at most severed the entireties tenancy. MCL 557.101. It did not bring the property within the terms of the prenuptial agreement because the property was still acquired by defendant as a married man, not in his individual capacity. Plaintiff also presented evidence that she directly and indirectly contributed to the maintenance of this property. "In granting a divorce, the court may divide all property that came 'to either party *by reason of the marriage. . . .*'" *Reeves, supra* at 493 (emphasis in *Reeves*), quoting MCL 552.19. Further, property earned by one spouse while married is presumed to be marital property. *Byington supra* at 112. For these reasons, the trial court did not clearly err by including the Harbor Springs condominium as part of the marital estate.

(c) Oakland County property and (d) Malcolm X papers. All of the Oakland County property, as well as the Malcolm X papers, are excluded from the marital estate by the prenuptial agreement. Although the testimony and documents defendant presented regarding this property were less than credible, it is undisputed that defendant acquired this property either in his individual capacity or through one of the entities he controlled. Accordingly, the trial court clearly erred by including this property in the marital estate without factual findings that one of the two statutory exceptions permitting invasion of separate property was applicable. *Korth, supra* at 291-292; *Reeves, supra* at 494-495.

(e) Defendant's debts. Defendant has not established that the trial court clearly erred because his purported debts were not included in the marital estate. The authority defendant cites, *Lesko v Lesko*, 184 Mich App 395, 400-401; 457 NW2d 695 (1990), does not support defendant's argument that the trial court was required to include his debt in the marital estate. *Lesko* did not hold that a trial court has a duty to include the parties' debts when apportioning the marital estate. Instead, the *Lesko* Court held that the trial court, after weighting the credibility of witnesses, could determine that alleged "joint" debts were actually the individual responsibility of one of the parties. Because defendant did not cite authority to support his argument, he has abandoned it. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

III. The Equitable Division of the Marital Assets

Because the trial court erred in the first necessary step to making an equitable division of property, determining what property should be included in the marital estate and what property is separate property of a party, *Reeves, supra* 493-494, it is premature to address this issue.

IV. Adjudicating Rights of Non-Parties

A. Preservation and Standard of Review

Defendant preserved this issue. *Fast Air, supra* at 549. A claim that the lower court lacks jurisdiction is a question of law, which this Court reviews de novo. *Ryan v Ryan*, 260 Mich App 315; 331; 677 NW2d 899 (2004). Also, whether constitutional due process applies, and if so, has been satisfied, are legal questions reviewed de novo. *Thomas v Deputy Warden, State Prison of Southern Michigan*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

B. Analysis

Absent allegations of fraud, the circuit court in a divorce action may only adjudicate the rights of the spouses whose marriage is being dissolved. *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953); *Smela v Smela*, 141 Mich App 602, 605; 367 NW2d 426 (1985). Thus, the trial court's jurisdiction is limited to the dissolution of the marriage, *Ryan, supra* at 332, and to matters ancillary to the marriage's dissolution, such as child support, spousal support, an equitable division of marital assets, and the award to one spouse of the other spouse's property in certain circumstances. See *Korth, supra* at 291-292; *Reeves, supra* at 494-495. So, in a divorce action, the circuit court lacks the authority "'to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties.'" *Hoffman v Hoffman*, 125 Mich App 488, 490; 336 NW2d 34 (1983), quoting *Krueger v Krueger*, 88 Mich App 722, 724-725; 278 NW2d 514 (1979).

But in this case the trial court did not adjudicate the rights of third parties, *Smela, supra*, or order that property be conveyed to third parties, *Hoffman, supra*. To the contrary, the trial court only determined the extent of defendant's interest in various properties for the purpose of adjudicating a fair and equitable division of marital property. The trial court need not ignore reality when defendant obfuscates his various property holdings through a maze of real or non-existent entities. See, e.g., *Gates v Gates*, 256 Mich App 420, 428; 664 NW2d 231 (2003), where the trial court properly "considered the reality of the situation surrounding ownership of [a] house and who made payments on [it] and awarded the property to [the] plaintiff at a zero value, because the $58,559 equity in the home was achieved solely through payments made by [the plaintiff's brother and sister-in-law]."

Defendant's claim that the trial court's actions deprived others of their rights to due process is equally without merit. Both the Michigan and the United States constitutions preclude the government from depriving a person of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, sec 17; *Hinky Dinky Supermarket, Inc v Dep't of Community Health,* 261 Mich App 604, 605; 683 NW2d 759 (2004). But, constitutional rights are personal, and a person generally cannot assert the constitutional rights of others. *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000); *Fieger v Comm'r of Ins*, 174 Mich App 467,

471; 437 NW2d 271 (1988). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Id*.

Moreover, due process is a flexible concept, *Thomas, supra* at 724, the essence of which is to ensure fundamental fairness, *In re Adams Est*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings, and a meaningful opportunity to be heard by an impartial decision maker. *Id*. at 234; *Hinky Dinky Supermarket, supra* at 606. Here, the individuals who defendant asserts were not accorded due process possessed no direct claim to the disputed property. Their claim is only indirect through alleged partnerships with defendant to whom they deferred to manage their investment. Even Rick Frazier, who purportedly owned a majority of the stock of Equestrian Estate II Ltd Corp., asserted his rights were determined by a partnership agreement and that defendant was the managing partner. Likewise, ample evidence supported the trial court's finding that defendant either owned or controlled the various profit and nonprofit entities with purported interests in the disputed property. Accordingly, defendant and the other various interests he represented had notice and opportunity for a meaningful hearing conducted with fundamental fairness.

V. Alleged Evidentiary Error

A. Preservation and Standard of Review

Defendant failed to preserve his claim that the trial court did not timely decide on the admissibility of evidence by properly raising it in the trial court. *Fast Air, supra* at 549. Indeed, by not creating and providing this Court with a record of the trial court's decision, defendant has waived this issue. MCR 7.210(B); *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000); *Nye v Gable, Nelson & Murphy*, 169 Mich App 411; 425 NW2d 797 (1988).

A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion exists if the trial court's decision is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. Thus, ordinarily, the trial court's decision on a close evidentiary question cannot be an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Further, even if the trial court errs in admitting or excluding evidence, reversal is warranted only if a substantial right of a party is affected, and it affirmatively appears that failing to grant relief is inconsistent with substantial justice. MCR 2.613(A); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

B. Analysis

Defendant waived this issue by not presenting a complete record for review. Moreover, defendant failed to establish his substantial rights were affected by the trial court's ruling regarding the documents at issue. The authenticity of the documents depended on the credibility of defendant and his purported partners. But the trial court determined that both the witnesses and the documents lacked credibility. MCR 2.613(C). Accordingly, whether the trial court admitted or excluded the documents did not affect the outcome or defendant's substantial rights.

VI. Appointment of a Receiver

A. Preservation and Standard of Review

Defendant preserved this issue. *Fast Air, supra* at 549. A trial court's order appointing a receiver should be set aside only when the court clearly abuses its discretion. *Burton v May*, 297 Mich 571, 574; 298 NW 286 (1941).

B. Analysis

A circuit court has broad jurisdiction to appoint a receiver in an appropriate case. MCL 600.601, 605, 611, 2926; *Petitpren v Taylor School District*, 104 Mich App 283, 292-296; 304 NW2d 553 (1981). "Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law." MCL 600.2926. This statute has been interpreted as authorizing a circuit court to appoint a receiver where specifically allowed by statute and also when no specific statute applies but "the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction." *Petitpren, supra* at 294. The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court. *Cohen v Cohen*, 125 Mich App 206, 214; 335 NW2d 661 (1982). In general, a receiver should only be appointed in extreme cases. *Petitpren, supra* at 295. But a party's past unimpressive performance may justify the trial court in appointing a receiver. *Francis Martin, Inc v Lomas*, 62 Mich App 706, 710-711; 233 NW2d 702 (1975).

Here, because the trial court erred by finding the Oakland County property was part of the marital estate and because the court made no finding that it was appropriate under a statutory exception to award plaintiff a portion of this property, *Korth, supra* at 291-292; *Reeves, supra* at 494-495, it was unnecessary to appoint a receiver. Accordingly, the trial court abused its discretion.

When a court is without jurisdiction to appoint a receiver, the property inappropriately obtained by the receiver should be restored, as near as possible, to the party from whom it was obtained. *People v Jones*, 33 Mich 302, 304 (1876). In this case, because the trial court possessed jurisdiction to appoint a receiver, its order is voidable, not void. *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 542; 539 NW2d 210 (1995); *Abbott v Howard*, 182 Mich App 243, 248; 451 NW2d 597 (1990). Further, because the receiver has taken steps to sell portions of the disputed property, it will be necessary for the trial court on remand to fashion appropriate orders to terminate the receivership as may be equitable. *Id.*; MCR 2.622(A)(8), (9). See, also, MCL 600.2926, which provides, "The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested." Moreover, on remand, the trial court may make further findings of fact and enter such orders as are thereby supported, including continuing the receivership. *Reed v Newberry,* 292 Mich 476, 483-484; 290 NW 874 (1940).

VII. Child Support

Defendant offers no meaningful argument on this issue, which we considered abandoned. *Eldred v Ziny*, 246 Mich App 142, 154; 631 NW2d 748 (2001).

Moreover, the record establishes that defendant possessed substantial earning capacity and retained substantial assets. A trial court is not limited to considering only a parent's actual income when assessing that parent's ability to pay support. *Good v Armstrong*, 218 Mich App 1, 5; 554 NW2d 14 (1996). Rather, the trial court may consider the parent's voluntarily unexercised earning ability, *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998), and the parent's assets, including those obtained as part of the property division of the divorce, *Nellis v Nellis*, 211 Mich App 226, 230; 535 NW2d 240 (1995), or retained pursuant to an antenuptial agreement, *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 227; 663 NW2d 481 (2003). Accordingly, defendant utterly fails to meet his burden of showing that the trial court abused its discretion. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992).

VIII. Attorney Fees

A. Preservation and Standard of Review

Because this issue was addressed and decided by the trial court, no further action was necessary to preserve it for appellate review. MCR 2.517(A)(7).

We review a trial court's grant or denial of attorney fees for an abuse of discretion. *Gates, supra* at 437-438. Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002), but questions of law are reviewed de novo, *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 429; 670 NW2d 729 (2003).

B. Analysis

We conclude that the trial court abused its discretion by awarding attorney fees without finding defendant's conduct to be unreasonable and a causal connection between fees actually incurred and that conduct, or that the fees so incurred were reasonable.

Under the "American rule," attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, judicial exception, or contract. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004); *Grace v Grace,* 253 Mich App 357, 370-371; 655 NW2d 595 (2002). In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and by court rule, MCR 3.206(C).

Nevertheless, attorney fees are not recoverable as of right in divorce actions. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit. *Gates, supra* at 437; *Stackhouse*, *supra* at 445. Here, the trial court did not justify its award of attorney fees on the basis of plaintiff's financial need. Instead, the court relied on the judicial exception to the American rule "that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id*.

Under the exception to the American rule the trial court used, the attorney fees awarded must have been incurred because of misconduct. *Stackhouse*, *supra* at 445; *Grace, supra* at 371

(the focus is on whether the wrongful conduct of one party caused the other party to incur the legal fees). The trial court abused its discretion by awarding attorney fees on the basis of defendant's unreasonable conduct without finding that defendant's misconduct caused the fees awarded. Without a specific finding of misconduct, or finding a violation of a court order, the trial court broadly asserted that defendant "caused this litigation to continue for two and one-half years." This statement is too general to permit meaningful review. Further, the fact that litigation has been lengthy is not by itself reason to conclude misconduct has occurred. Although failing to comply with a discovery order constitutes misconduct, plaintiff did not establish what fees she incurred as a result. Finally, presenting evidence at trial made relevant by the court's rulings, which the other party determines should be countered with rebuttal evidence, is not misconduct. See, e.g., *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), "misconduct cannot be predicated on good-faith efforts to admit evidence."

Moreover, the trial court further erred by not conducting a hearing or finding facts regarding the reasonableness of the fees incurred. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996); *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). The party requesting attorney fees bears the burden of proving they were incurred, *id*.; MCR 3.206(C)(2), and that they are reasonable, *Solution Source, supra* at 382, citing *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 61; 604 NW2d 745 (1999). When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services. *Miller, supra* at 479-480; *Petterman, supra* at 33. The trial court may not award attorney fees, as apparently occurred here, solely on the basis of what it perceives to be fair or on equitable principles. *In re Adams Est*, 257 Mich App 230, 237; 667 NW2d 904 (2003).

In the instant case, the only evidence pertaining to attorney fees was plaintiff's testimony that before trial she had received a statement for $100,000 from her current attorney and that she had paid a prior law firm a $6,000 retainer. In addition, plaintiff's counsel asserted in opening statement that plaintiff's attorney fees were then in excess of $140,000, and counsel stated in closing argument that plaintiff's legal fees had increased by $80,000 for 12 days of trial. But plaintiff submitted no evidence as to what fees were actually caused by defendant's misconduct, and the trial court made no finding in that regard or as to the reasonableness of the fees incurred because of misconduct. Accordingly, the trial court abused its discretion.

IX. Conclusion and Summary

The parties' prenuptial agreement is valid, and the trial court erred by finding changed circumstances justified not enforcing it. This error affected many of the trial court's other rulings, including the court's determination of the marital estate, the equitable division of marital property, appointment of a receiver, and possibly the trial court's decisions regarding child and spousal support. Although it is premature to address whether the trial court equitably divided the marital estate, the record is sufficient to address the heart of defendant's arguments that certain assets were wrongly included as part of the marital estate. The proceeds resulting from the City of Detroit's condemnation of 225 Garfield, the marital residence and the Harbor Springs condominium were properly included as marital assets. The real property in Oakland County and the Malcolm X papers should be excluded from the marital estate. Further, we hold that the trial court had jurisdiction to determine defendant's interest in the disputed property, and that

defendant's claim that other individuals and entities with claims to disputed property were denied due process is without merit.

Because the trial court erred by including the Oakland County property in the marital estate and made no finding that it was appropriate under a statutory exception to award plaintiff a portion of this property, it was unnecessary to appoint a receiver. On remand the trial court must enter such orders to terminate the receivership as may be equitable. But remand is without prejudice to continue the receivership if the trial court makes further findings of fact to justify such a decision, and it is equitable to do so.

Finally, the trial court abused its discretion by awarding plaintiff attorney fees without first finding a causal connection between fees actually incurred and any unreasonable conduct of defendant, and finding that attorney fees so incurred were reasonable.

Accordingly, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion. Neither party having completely prevailed, no costs are awarded. MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald S. Owens

S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

VERLADIA REED, Plaintiff-Appellee,	FOR PUBLICATION February 8, 2005
v GREGORY J. REED, Defendant-Appellant.	No. 248895 Wayne Circuit Court LC No. 00-03452-DM

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

FITZGERALD, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that the trial court erred by declaring the parties May 1975 prenuptial agreement null and void and that the error affected many of the trial court's other rulings. Thus, I would affirm the pretrial order granting partial summary disposition to plaintiff. I would also affirm the judgment of divorce because the trial court's findings of fact regarding the marital estate are not clearly erroneous and because the distribution of the marital property was fair and equitable.

The May 15, 1975, prenuptial agreement was entered into at a time when prenuptial agreements in contemplation of divorce were considered to be against public policy. See *Scherba v Scherba,* 340 Mich 228, 231; 65 NW2d 758 (1954).[1] The prenuptial agreement at issue in this case stated in its entirety:

> 1. Release of dower. Gregory J. Reed shall hold all real and personal property which he now owns or may hereinafter acquire free from any claims of dower, inchoate or otherwise, on the part of Verladia Thomas and this agreement shall evidence the right of Gregory J. Reed to convey any of his real estate owned or acquired hereinafter free from any claims of dower. At the request of Gregory J. Reed, Verladia Thomas shall execute, acknowledge and deliver such other instruments as may be reasonably required to accomplish the transfer of property

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[1] Agreements that contemplated divorce were not recognized in Michigan until 1991. *Rinvelt v Rinvelt,* 190 Mich App 372; 475 NW2d 478 (1991).

by Gregory J. Reed of any real property free from any such claims of dower and to divest any claim of dower in such property.

2. In the event of divorce between Gregory J. Reed and Verladia Thomas, Gregory J. Reed shall be awarded the residence at 2460 Burns Ave., Detroit, Michigan.

3. Separate Property. Except as provided herein, each party shall have complete control of his or her separate property, and may enjoy and dispose of such property in the same manner as if the marriage had not taken place. The foregoing shall apply to all property now owned by either of the parties and to all property which may hereafter be acquired by either of them in an individual capacity.

4. Consideration. The consideration for this agreement is the mutual promises herein contained and marriage which is expected to take place between the parties.

5. Effective date. This agreement is effective from the date hereon and inures to the benefit of the parties, heirs, executors, and administrators.

At the time of the agreement, plaintiff had been working for three years as an engineer, and defendant was a recent law school graduate. Their net worth at the time of the 1975 marriage was less than $20,000.

Over the course of the twenty-five year marriage the parties raised two children and accumulated assets in excess of $5,000,000. Plaintiff filed this divorce action in October 2000. Defendant, relying on the 1975 prenuptial agreement, contended that he was entitled to everything he purchased over the course of the parties' marriage. The trial court determined the marital estate to consist of:

(1) A condominium in Harbor Springs, Michigan, valued at $110,595;

(2) defendant's one-half interest in an office building located at 1201 Bagley, Detroit, valued at $175,000;

(3) stocks and other investments valued at $21,856;

(4) net proceeds of condemnation of 225 Garfield valued at $887,117;

(5) Detroit Edison annuities valued at $172,845;

(6) SEP and IRAs: $215,874;

(7) Savings and miscellaneous: $7,900;

(8) 383.92 acres of land located in Springfield Township, Oakland County, with an estimated value between $2,900,000 and $3,000,00 if sold undeveloped, and if developed, between $8,000,000 and $10,000,000;

> (9) the marital residence at 2460 Burns, Detroit, valued at $543,449, according to its 2002 state equalized valuation, or $450,000 as appraised;
>
> (10) defendant's law practice estimated at $55,059 because defendant did not provide expert evaluator John Stockdale necessary financial information;
>
> (11) plaintiff's business, VTR Consulting, Inc., valued at $950 by Mr. Stockdale;
>
> (12) Malcolm X papers, evaluated by the parties at $125,000; and
>
> (13) plaintiff's incurred debt in the amount of $180,000

Defendant maintained that the assets identified above, with the exception of items 5 and 11, were acquired by him as his separate property.

Plaintiff moved for partial summary disposition, contending that the prenuptial agreement was unenforceable, due in part to the change in the parties' circumstances between the time the agreement was signed and the time of the divorce. She maintained that it would be unfair and unconscionable to enforce the agreement as interpreted by defendant.

Following a hearing, the trial court granted plaintiff's motion, stating in part:

> However, I think the real reason why I have to strike down this agreement is the criteria, the third criteria mentioned and that is that in determining the fairness of [the] antenuptial agreement, the issue is whether the facts and circumstances have changed since the agreement was executed making its enforcement unfair and unreasonable and that's from *Brooks v Brooks*, 733 P2d 1044 (Alaska, 1987).
>
> Under *Brooks* analysis, the issue is not the fairness of the agreement when it was signed but on whether the facts and circumstances have changed since the agreement was executed. And I think there's an unpublished case that discussed this very well and that's *Kuziemko* [unpublished opinion of the Court of Appeals, decided December 4, 2001 (Docket No. 212337)], . . . the Court refers to cases from other jurisdiction[s] and it states the case[s] that discuss prenuptial agreements in other jurisdictions lead to the conclusion that when Courts talk about fairness in the setting of a prenuptial agreement, they're usually not talking about an entirely subjective open-ended concept that allows Judges to renegotiate contracts and substitute their own judgment for the agreement of the parties. Rather, what other Courts are really concerned about is foreseeability.
>
> Continuing, for the change of circumstances to be uncontemplated, the event must not have been reasonably foreseen by the parties prior to or at the time of making the agreements. The Court went on to state our Court should enforce specific terms of the agreement if the circumstances at the time that the marriage ends were what the parties foresaw at the time they entered the prenuptial agreement. And in this case, given the duration of the marriage, 26 years, the age

> and financial status of the parties at the time they signed the agreement, and the significant changes in the financial status of both parties since that time, I believe it would be both unfair and unconscionable to enforce an agreement executed 26 years earlier under far different facts and circumstances and certainly with a marital estate that could not have possibly been foreseen to have grown to the proportion that it has by these parties

Defendant argues that the trial court improperly invalidated the prenuptial agreement on the ground that circumstances have changed so that it is unfair and unreasonable at the time of divorce. *Booth v Booth,* 194 Mich App 284, 288; 486 NW2d 116 (1992). I disagree.

Evidence was presented that the parties earned similar incomes during the duration of the marriage. Both parties worked full-time, but plaintiff was the primary caregiver for the parties' two children and had primary responsibility for running the household. In the evenings, plaintiff would work at home for defendant's law practice. The parties acquired various business interests that grew significantly over the years. One of the most valuable assets is the proceeds from a condemnation lawsuit involving the building that was purchased when defendant moved his law practice out of the marital home. The parties renovated the building to house the law practice as well as other entities defendant formed. Plaintiff assisted in the renovation by painting, installing flooring, stripping and staining paneling, upholstering furniture, making curtains, and laying bricks in the walk and driveway. The building was later the subject of an eminent domain action by the City of Detroit. Ultimately, the action was settled and the City agreed to pay the combined sum of $1,250,000 to the named defendants in the suit and lien holders, including both plaintiff and defendant. The net proceeds to the parties were $887,117.

This Court must consider the prenuptial agreement at the time it is to be enforced to determine whether the agreement is unfair and unreasonable as a result of unforeseeable changed circumstances. This case does not involve the typical situation where one party brings significantly greater assets into the marriage. It would be unfair and inequitable to allow a party to leave a lengthy marriage with assets in excess of $5,000,000, all of which were acquired during the marriage as a result of the family's labor, and to leave the other spouse, who not only contributed equally to the family income but also had responsibility for the children, with significantly less. The circumstances of the parties at the time of dissolution are so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice.

/s/ E. Thomas Fitzgerald