STATE OF MICHIGAN

COURT OF APPEALS

CHESTER F. KUZIEMKO,

Plaintiff-Appellee,

v

SUZANNE MARIE KUZIEMKO,

Defendant-Appellant.

UNPUBLISHED
December 4, 2001

No. 212377
Oakland Circuit Court
LC No. 97-553519-DO

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's division of property pursuant to an antenuptial agreement. We affirm in part, reverse in part and remand for further action.

I

Plaintiff and defendant were married on October 7, 1995, and divorced eight months later on June 24, 1996. The parties remarried on August 16, 1997, but plaintiff filed for a second divorce on October 28, 1997. The parties each have two children from previous marriages, but no children together.

Prior to their second marriage, the parties reached an antenuptial agreement. Plaintiff and defendant prepared a joint outline of the agreement, and then asked defendant's attorney, who was also her employer, to prepare a final draft. Among other things, the antenuptial agreement contained the following provisions:

> 2. Within thirty (30) days from the date of marriage, SUZANNE shall place her [Royal Oak] residence . . . on the market for sale and shall sell said residence at the highest obtainable price within a reasonable time period, depending upon market conditions. Upon the closing of the sale of the . . . property, SUZANNE shall pay, from her separate estate, the sum of $100,000.00 to Standard Federal Savings Bank to reduce the principal balance on the mortgage on the [West Bloomfield] real property owned by CHET . . . from approximately $360,000.00 to $260,000.00.

3. At the time SUZANNE shall make payment of the $100,000.00 mortgage reduction to Standard Federal Savings Bank, CHET shall convey the [West Bloomfield] property . . . from himself, as a married man, husband of SUZANNE, to himself and SUZANNE, as husband and wife.

4. Within thirty (30) days after the marriage of the parties, CHET shall obtain a life insurance policy upon his life, having a policy face value of $500,000.00, and containing a double indemnity clause in the event of accidental death. SUZANNE shall be the owner of said policy, and CHET shall pay all premiums due thereon. Alternatively, CHET may own the policy, but shall designate SUZANNE as irrevocable beneficiary, and shall pay all premiums thereon.

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22. Each party hereby acknowledges the following:

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(c) There is a significant disparity between the estates of the parties; and the likelihood that the subsequent death of CHET may result in a significant reduction in the wealth and living standards to which SUZANNE may become accustomed during the marriage. As a further consideration for this Agreement, the parties acknowledge that CHET is providing life insurance benefits to SUZANNE, in the event of his death, insuring his life for the sum of $500,000.00, and shall pay all premiums therefor as long as he is living, but only if no Complaint for Divorce is filed or pending and the parties are still married.

(d). In the event of divorce, SUZANNE may experience a significant reduction in income and the standard of living she may have become accustomed to during the marriage, and in consideration thereof, the parties agree that, in addition to an equal division of the marital estate, CHET shall pay SUZANNE the sum of $20,000.00 upon entry of any Judgment of Divorce.

The parties signed the antenuptial agreement on August 14, 1997 and left for Las Vegas the following morning where they were married for the second time. Defendant testified that after returning from Las Vegas she placed a "for sale by owner" sign on her house on September 14, 1997, and that, before she and plaintiff remarried she had discussed the possibility of her neighbor purchasing her home. Despite these steps in furtherance of the agreement, the parties' second marriage began to unravel almost immediately after they were married and plaintiff filed for divorce on October 28, 1997. Defendant filed a counter-complaint for divorce, seeking specific performance of the antenuptial agreement.

At trial, the parties agreed that the antenuptial agreement was not obtained through fraud, duress, mistake or misrepresentation, and was not unconscionable when executed. Thus the only issue before the court was whether the facts and circumstances had changed since the agreement

was executed, making its enforcement unfair and unreasonable. Following a bench trial, the trial court found that the parties' antenuptial agreement was valid, and that plaintiff, the party challenging the validity of the agreement, did not sustain his burden of proof. The trial court noted, however, that it could still consider each term of the agreement and apply equitable principles to determine whether the facts and circumstances had changed such that enforcement of the entire agreement would be unfair and unreasonable. The trial court concluded that, in this case, enforcing every provision of the parties' agreement would be unfair and unreasonable for the following reasons:

> We have two adults that never, ever should have married one another. Maybe not even the first time, but surely not the second time. We had a situation where, within four or five days of the second marriage they were fighting like cats and dogs. This Court feels, if I enforce all of the provisions of that antenuptial agreement, it would be unfair and unreasonable.

The trial court then refused to enforce that part of the agreement that granted defendant 50% of the value of the marital home, so long as she placed her Royal Oak home for sale within 30 days and contributed $100,000 of the sale proceeds toward the equity in the marital home. The trial court found that despite defendant's good faith efforts to comply with the terms of the agreement, enforcement of the agreement provision as written would be inequitable.

The trial court next found that although plaintiff's agreement to pay defendant $20,000 upon entry of any judgment of divorce may have been "a mistake," because plaintiff agreed to the payment that provision would be enforced. Finally, with respect to plaintiff's employment bonus, stocks and stock options acquired during the marriage, the trial court awarded defendant one-third of plaintiff's $58,000 bonus, one-half of the $9,000 stock value, and one-third of plaintiff's stock options, noting that the assets were being valued from the date of the filing of the divorce complaint, not the date of judgment. Defendant appealed.

II

Defendant argues that the trial court erred in failing to strictly enforce all terms of the antenuptial agreement. We agree.

It is well settled that antenuptial agreements governing the division of property in the event of divorce are enforceable in Michigan. *Booth v Booth*, 194 Mich App 284, 288-289; 486 NW2d 116 (1992); *Rinvelt v Rinvelt*, 190 Mich App 372, 379, 382; 475 NW2d 478 (1991). However, while antenuptial agreements are not void ab initio, certain standards of fairness must be satisfied in order to find an antenuptial agreement valid and enforceable. *Rinvelt*, *supra* at 380, quoting *Brooks v Brooks*, 733 P2d 1044, 1049 (Alas, 1987). Thus, in deciding whether an antenuptial agreement is enforceable, a trial court must consider (1) whether the agreement was obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact, (2) whether the agreement was unconscionable when executed, and (3) whether the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. *Rinvelt, supra* at 380, quoting *Brooks, supra* at 1049. See *Booth, supra* at

288-289. The party challenging the validity of the agreement bears the burden of proof and persuasion. *Rinvelt, supra* at 382.

Antenuptial agreements are subject to the rules of construction applicable to contracts in general. *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). 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. *Id.* See *Eghotz v Creech*, 365 Mich 527, 530; 113 NW2d 815 (1962). Clear and unambiguous language may be 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. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). If the agreement fairly admits of but one interpretation, even if inartfully worded or clumsily arranged, it is not unambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

In the instant case, after finding that the antenuptial agreement was valid, the trial court then found that enforcement of paragraphs 2 and 3 of the agreement would be unfair and unreasonable. The trial court failed, however, to identify any particular facts and circumstances that had changed since the parties entered into the agreement to support its decision not to enforce those provisions.

We find nothing in the record to support the conclusion that there was a change in the facts and circumstances after the parties executed the agreement, such that enforcement of the entire agreement would be unfair and unreasonable. Neither party experienced a significant change in financial status after the agreement was executed. Furthermore, neither the short duration of the parties' marriage nor the benefit defendant may receive under the agreement, individually or collectively, would constitute a change in facts or circumstances justifying departure from the parties' agreement. See *Richard v Detroit Trust Co*, 269 Mich 411, 415; 257 NW 725 (1934) (where parties entering into an antenuptial contract are of mature years and have a full understanding of the meaning of the instrument, the agreement, in the absence of fraud, is valid, enforceable and not against public policy). We therefore conclude that the trial court inappropriately substituted its judgment for that of the parties, thereby thwarting the express intent of the parties. As our Supreme Court has recognized:

> 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).]

Courts cannot make contracts. They can only construe them. *Morales v Auto Owners Ins. Co.,* 458 Mich 288, 297, fn 3; 582 NW 2d 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.

See *Karkaria v Karkaria,* 405 Pa Super 176; 592 A2d 64 (1991), in which the court rejected the plaintiff's claim that the antenuptial agreement should be held invalid, stating:

> A court should not ignore the parties' expressed intent by proceeding to determine whether a prenuptial agreement was, in the court's view, reasonable at the time of its inception or the time of divorce. These are exactly the sorts of judicial determinations that such agreements are designed to avoid. [*Id.* at 70, quoting *Simeone v Simeone,* 525 Pa 392; 581 A2d 162 (1990).]

Our determination that the short duration of the marriage and the benefit conferred on defendant by the antenuptial agreement do not constitute the requisite change in circumstances is supported by cases including *Gant v Gant*, 329 SE2d 106, 114-115 (W Va, 1985), which is quoted in *Rinvelt*'s lengthy excerpt from *Brooks, Rinvelt, supra* at 381, and in which the Supreme Court of West Virginia noted:

> The cases 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 are 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.' In the case of [the husband and wife] there is no reason not to honor the parties' prenuptial agreement because circumstances have transpired exactly as the parties foresaw that they might transpire at the time the prenuptial agreement was made. Basically, things did not work out romantically between two middle-aged adults, and that was the exact eventuality about which they had bargained and contracted.

See also *Warren v Warren*, 147 Wis2d 704; 433 NW2d 295 (Wis App, 1988), in which the court similarly noted:

> [F]or 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.

> The standard of unforeseeable changed circumstances appears to be the emerging test in other states as well as Wisconsin. *See, e.g., Gant v. Gant* [*supra* at 114-115]. It used to be that the standard was confined only to the amorphous concept of "fairness." However, fairness, without further elaboration, gives no guidance concerning which agreements should be binding and which should be struck down. *Id.* at 114. Measuring an agreement by an undefined judicial standard of fairness is an invitation to the very wealth redistribution that these agreements are designed to prevent. Our courts should enforce the specific terms of the agreement if the circumstances at the time the marriage ends were what the parties foresaw at the time they entered in the prenuptial agreement. [*Id.* at 709, adopting the rationale of *Gant, supra.*]

We note that the proper application of the provisions regarding the house to the facts as presented at trial is not entirely apparent. The trial court should address the issue on remand.

Defendant also argues that the trial court erred in refusing to enforce paragraph 4 of the agreement relating to life insurance. Defendant's argument is without merit. Paragraph 22(c) of the agreement provided that plaintiff was only required to provide life insurance benefits to defendant if no complaint for divorce was filed or pending. Here, plaintiff filed a complaint for divorce on October 27, 1997. Thus, because the agreement explicitly contemplated that plaintiff's obligation to purchase life insurance would cease upon the filing of a complaint for divorce, the trial court did enforce this provision according to the parties' express intent.

III

Defendant next argues that the trial court improperly limited the marital estate to assets acquired prior to the filing of the complaint for divorce.

> Under the agreement, the marital estate was to include all additions to plaintiff's Ford Motor accounts and stock, and interest, dividends, income and appreciation on the additions to the accounts and stock after marriage, and defendant was to receive an "equal division" of the marital estate, plus $20,000. Although the trial court apparently considered assets acquired after the filing of the complaint, specifically plaintiff's employment benefits, the court should have determined the marital estate and awarded defendant one half. It is not apparent that the court did so, and we therefore remand on this issue as well.

Affirmed in part, reversed in part, and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder