STATE OF MICHIGAN

COURT OF APPEALS

SYNTHIA J. SHARIFF, Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,	UNPUBLISHED September 18, 2014
v	No. 314824 Saginaw Circuit Court Family Court
SHIRAZ H. SHARIFF, Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.	LC No. 09-003865-DM

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's judgment of divorce. Defendant cross-appeals. We affirm.

The parties were married on May 13, 1990. On April 6, 1990, they entered into a prenuptial agreement. The agreement stated that each party was to retain what separate assets he or she brought to the marriage, along with any earnings or property "hereafter acquired," and "the interest income, rents and profits which may accrue therefrom, or result in any manner from increases in value thereof." At issue in the instant appeal is the trial court's finding that the agreement is valid, and its decision to invade a portion of defendant's separate assets for distribution to plaintiff.

Plaintiff first argues that the trial judge should have granted her motions to disqualify, which were based on the fact that the judge and his wife were former patients of defendant's practice, and (as a basis for the second motion) his brother was a current patient of defendant. A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "When this Court reviews a decision on a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion, while the application of the facts to the relevant law is reviewed de novo." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), citing *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 728; 591 NW2d 676 (1998).

A judge is disqualified when he cannot impartially hear a case, which includes when he is biased or prejudiced for or against a party or attorney, when he has a serious risk of actual bias or

has failed to adhere to the appearance of impropriety standard of the Michigan Code of Judicial Conduct. MCR 2.003(C)(1)(a), (b). Here, plaintiff argues that, due to the judge's and his wife's and his brother's relationships with defendant's cardiac practice, the judge violated Canon 2 of the Michigan Code of Judicial Conduct. Specifically plaintiff points to sections (B) and (C), which provide in pertinent part as follows:[1]

> **B**. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.
>
> **C**. A judge should not allow family, social or other relationships to influence judicial conduct or judgment.

MCR 2.003(C)(1)(g) also provides that disqualification is warranted where:

> (g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Plaintiff has not established that the judge abused its discretion in refusing to disqualify himself. There is no evidence that the judge had either an actual or implied bias as a result of the medical relationships. The judge stated that he was a patient at the practice (but not of defendant himself), but found a different cardiologist after essentially being shuffled around to different physicians in the practice. The judge stated that his wife had also not been treated by defendant, and had last been treated at the practice three years ago, while he had last been treated at the practice four years ago. Because there is no evidence that the trial court and his wife had any direct relationship with defendant, and had discontinued any relations with defendant's practice group years earlier, there was no abuse of discretion in denying the first motion for disqualification on those grounds.

As to the judge's brother, plaintiff's counsel again moved for disqualification after allegedly having had a casual conversation with the brother (also a judge in the same county) in

[1] While this provision was amended in 2013, the amendments did not change these sections.

which he indicated to counsel that he was one of defendant's patients. After taking the matter under advisement and holding a separate hearing, the trial court denied the motion, both on the ground that it was not accompanied by an affidavit as required by MCR 2.003(D)(2) and because the motion was without merit. As to this second finding, the court held:

> The court was not made aware of the fact that his brother was a patient of Defendant's until more than six months after the Court's ruling on the issue of the prenuptial agreement in this matter. The court does not have any type of personal relationship with Defendant at all. The court does not socialize or maintain any type of business or professional relationship with Defendant. Therefore, Plaintiff's Motion is properly denied on its merits.

The trial court's decision was not outside the range of reasonable and principled outcomes, and thus was not an abuse of discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). As already concluded, plaintiff did not demonstrate any actual bias and has presented nothing to refute the judge's statements that he did not know that his brother was defendant's patient until after he made the decision to enforce the prenuptial agreement. Nor has plaintiff shown that his brother's relationship with defendant would objectively and reasonably be seen as creating the appearance of impropriety, MCR 2.003(C)(1)(b), especially given the strong presumption that judges can set aside this type of marginal family relationship and impartially decide a case. See *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881-882; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

We now turn to plaintiff's attack on the prenuptial agreement, a document she and defendant signed prior to the marriage. Plaintiff argues that the trial court erred when it found that the prenuptial agreement was valid when the parties entered into it, and when the court decided that changed circumstances did not warrant finding enforcement of that contract unconscionable. We review a trial court's decision whether to enforce a prenuptial agreement for an abuse of discretion. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). Underlying factual determinations are reviewed for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

This Court has addressed the role of prenuptial agreements in distributing property, stating:

> [I]t is now well established that prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan. But such agreements may be voided if certain standards of fairness are not satisfied. A prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable. A party challenging a prenuptial agreement bears the burden of proof and persuasion. [*Reed v Reed*, 265 Mich App 131, 142-143; 693 NW2d 825 (2005) (citations and quotation marks omitted).]

Here, the trial court found that the agreement was not obtained improperly, that it was not unconscionable when executed, and that plaintiff had not demonstrated the facts and circumstances had changed so appreciably as to render enforcing the agreement upon the parties' divorce unfair or unreasonable. Plaintiff has not demonstrated that this decision was based on either clearly erroneous factual determinations or a mistake of law.

With respect to the finding that plaintiff was not tricked or fraudulently induced to sign the agreement, the trial court found that plaintiff's testimony—that she did not know what she was signing or that she had never spoken with defendant's attorney and been urged to obtain her own legal counsel—was not credible. This was not clearly erroneous. Plaintiff's testimony was refuted by the testimony of notary Dawn Maddox. Defendant also introduced written evidence refuting plaintiff's testimony, including letters from his attorney to defendant and his attorney's billing statement of February 2, 1990. No testimony supports a finding of duress. No evidence was presented to show that plaintiff was under any disability that would make it difficult for her to understand the terms of the agreement.

Moreover, absent fraud or mutual mistake, a party who signs a contract cannot seek to invalidate it on the ground that she failed to read it or thought that its terms were different. *Paterek v 6600 Ltd*, 186 Mich App 445, 450; 465 NW2d 342 (1990). Plaintiff demonstrated no fraud or mutual mistake, nor does plaintiff's lack of independent counsel by itself provide her an avenue for relief. "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." *Reed*, 265 Mich App at 149.

The trial court's finding that facts and circumstances had not changed so appreciably as to render enforcing the agreement upon the parties' divorce unfair or unreasonable also did not constitute clear error. Plaintiff cites defendant's large increase in earnings over the course of the marriage as a rationale to refuse to enforce the agreement. However, as to that issue we have previously said:

> In essence, the parties agreed to be captains of their own financial ships and to decide their own destiny. 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 that justifies 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. [*Reed*, 265 Mich App at 146-147 (citations and quotation marks omitted).]

Although when defendant was asked whether he thought that there had been a significant change of circumstances since 1990, given his large increase in income, he replied, "Yes," the trial court did not clearly err when it found that the increase in defendant's earning potential was foreseeable. Plaintiff knew, or at least reasonably should have known, that her future husband

was a cardiologist, with a new business and a potential for meteoric income increases. Defendant's large increase in salary was not an unforeseeable circumstance rendering the agreement so unfair as to render it unenforceable. Given the analysis in *Reed*, as well as the parties' circumstances when they entered the agreement, the trial court's decision to enforce it was not an abuse of discretion.

Both parties take issue with the trial court's subsequent findings and decision to invade a portion of what it found to be defendant's separate assets and award them to plaintiff. For the reasons set forth below, we hold that these assets could be invaded, and that the trial court did not abuse its discretion in the amount of separate assets that it awarded to plaintiff.

This Court reviews for clear error a trial court's findings of fact in regard to the division of a marital estate. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id*. This Court must then decide "whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Id*. at 717-718.

Underlying questions of law are reviewed de novo. See *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). "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." *Reed*, 265 Mich App at 141.

As discussed above, this Court generally recognizes the validity of prenuptial agreements, as they are generally treated as any other contract:

> 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 [sic]. [*Reed*, 265 Mich App at 144-145 (citation omitted; bracketed text in original).]

However, also at play are the statutory provisions and caselaw governing distribution of separate marital assets. *Reed* provided the following summary:

> 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* [*v Korth*, 265 Mich App 286, 291; 662 NW2d 111 (2003)]. The first exception, found in MCL 552.23(1), 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; *Reeves* [*v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997)]. 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." [*Reeves*, 226 Mich App 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. [*Reed*, 265 Mich App at 152-153.]

One of the properties at issue in *Reed*, "as well as the Malcolm X papers," were found to be separate assets excludable from the marital estate by the prenuptial agreement. Nevertheless, the *Reed* Court indicated that these too could be subject to division depending on the findings of the trial court:

> All of the Oakland County property, as well as the Malcolm X papers, is 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. [*Id*. at 156 (citations omitted).]

The prenuptial agreement in *Reed* stated in part, just as the one in the instant case does, that the party "may enjoy and dispose of such property in the same manner as if the marriage had not taken place," see *id*. at 146, yet the Court recognized that the separate assets covered by the agreement could still be subject to division per the two statutory provisions. We conclude that, pursuant to *Reed*, nothing in this prenuptial agreement trumps the trial court's general ability to utilize MCL 552.23 or MCL 552.401 to invade what the prenuptial agreement deems to be separate assets, *Reed*, 265 Mich App at 142-143,

In deciding to invade defendant's separate assets, the trial court held that it had the power to do so under either MCL 552.23(1) or MCL 552.401, but found that MCL 552.23(1) was inapplicable. However, apparently relying at least in part on *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), the trial court found that invasion of the separate property would be equitable under MCL 552.401.

In *Hanaway*, which did not involve a prenuptial agreement, this Court discussed a plaintiff stay-at-home spouse's contribution to the marriage should be considered in whether to award her appreciation of closely held corporation stock held in her spouse's name. *Hanaway*,

208 Mich App at 292-293. The Court ruled that the trial court's finding that the plaintiff did not contribute to the "acquisition, improvement or accumulation" of the stock was clearly erroneous:

> We are unable to agree with the court that plaintiff made no contribution to the company's assets or appreciation. The trial testimony indicates that plaintiff administered the household physically and financially and cared for the children until late in the marriage, while defendant, the company president, devoted himself to the business, working long work weeks. The business clearly prospered during the marriage. While the source of defendant's interest in the company was his father's annual gifts of stock, the financial yield over time from that interest and the increased value of that interest necessarily reflected defendant's investment of time and effort in maintaining and increasing the business, an investment that was facilitated by plaintiff's long-term commitment to remain at home to run the household and care for the children.
>
> Although initially given to defendant by his father, the interest in the business was a major asset of the marriage that defendant was permitted to cultivate and nurture over the years. It is inequitable to deprive plaintiff of any share of the business or its value on the basis that she enjoyed the benefits of defendant's salary over the years. The fruits of defendant's efforts in the business were both the increase in the value of the business since 1968 and the salary he drew over the years. The parties were building an asset as well as enjoying its fruits on an ongoing basis. That plaintiff's contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership. The couple nurtured a business and three children, and watched all four grow. Defendant does not claim that he could have done it all himself. In contrast to *Grotelueschen v Grotelueschen*, 113 Mich App 395; 318 NW2d 227 (1982), cited by the trial court, the asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of defendant's efforts, facilitated by plaintiff's activities at home. See *McNamara v McNamara*, 178 Mich App 382, 391; 443 NW2d 511 (1989). [*Hanaway*, 208 Mich App at 293-294.]

In the case at hand most, if not all, of the accumulation of defendant's assets occurred due to his large salary and his ability to reinvest it in his practice, his building, or his other investments. Although plaintiff did have assistance with her responsibilities at home, the trial court's finding that she was involved in running the parties' households and raising their children was not clearly erroneous. While plaintiff and defendant dispute the amount of time that defendant worked in a week, it is evident that he did little to run the parties' homes or provide significant child rearing assistance in raising three children. Nor did the court clearly err in determining that it would be inappropriate for defendant to argue that plaintiff did not contribute to the growth of the parties' assets when the parties understood that defendant would continue his lucrative employment while plaintiff was to handle the day-to-day living decisions and responsibilities of the marriage. Thus, the trial court did not err when it found that it was equitable to invade defendant's separate assets.

Plaintiff's final argument is that the amount of the invasion of defendant's separate assets was inequitable. MCL 552.401 provides:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

The trial court's invasion of defendant's separate assets in the amount of $274,000, rather than another figure, was equitable. Although plaintiff's assets and income were significantly larger than defendant's and the appreciation of his assets was due to the parties' partnership, not simply passive growth, the trial court properly took into consideration the fact that the parties had entered into a valid prenuptial agreement. In our view, the trial court was attempting to strike an equitable balance in awarding plaintiff some additional property out of defendant's separate assets (reflecting the parties disparate income and earning potential and plaintiff's assistance in allowing defendant to earn as much as he did) while at the same time attempting to adhere to the intent of the parties as reflected by the terms of the agreement. Its decision to do so was not an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

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MURRAY, P.J. (*concurring*).

The majority opinion correctly resolves each issue raised in this appeal. However, I write separately because when the proper case arises we should reevaluate whether that portion of *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005), properly addressed the interplay between (1) enforcement of a valid prenuptial agreement and (2) invocation of the two statutory provisions that allow invasion of separate property, MCL 552.23 and MCL 552.401.

As the majority opinion correctly recognizes, *Reed* stated that property deemed separate pursuant to a valid prenuptial agreement could still be invaded if a trial court found either of the two statutory provisions applicable. *Reed*, 265 Mich App at 156. But the *Reed* Court did not explain why these two provisions would apply to property governed by a prenuptial agreement. Instead, it merely said so. *Id.*

Both statutes, MCL 552.23 and 552.401, clearly allow a court the discretion to invade the separate property of a spouse if the requirements of either statute are met. As noted, the statutes are discretionary, not mandatory. So, on the one hand the Legislature has declared the public policy of this state to be that circuit courts can invade a spouse's separate property when either a spouse contributed to its maintenance and improvements or the spouse's remaining property is not sufficient to meet that person's needs. See MCL 552.23 and 552.407.

On the other hand, the Legislature has also made it clear that prenuptial agreements that are made in contemplation of marriage remain enforceable after the marriage. MCL 557.28. And, starting in at least 1991, our Court has recognized the validity of prenuptial agreements that satisfy a three-part test. *Rinvelt v Rinvelt*, 190 Mich App 372, 380; 475 NW2d 478 (1991).

Indeed, we recently said that a "court should never disregard a valid prenuptial agreement, but should instead enforce its clear and unambiguous terms as written." *Woodington v Shokoohi*, 288 Mich App 352, 372; 792 NW2d 63 (2010).

In many cases there will be a conflict between enforcing a prenuptial agreement pursuant to its plain terms, *id*. at 372, and invading under either statute the property declared separate and off limits by the agreement. It is one thing to invade separate property that one spouse happens to receive through an inheritance, gift or award, while it seems quite another to invade separate property that competent adults have fairly agreed would be off limits to the other, even to the extent of waiving any opportunity to make such a claim.

We have previously held that parties may waive numerous statutory rights, including the right to periodic alimony. *Staple v Staple*, 241 Mich App 562, 568-569; 616 NW2d 219 (2000). They cannot waive rights that directly benefit the children to a marriage, like child support, *Laffin v Laffin*, 280 Mich App 513, 518; 760 NW2d 738 (2008), or child custody, *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), but that is not what the parties were addressing in the agreement. Instead, and similar to *Staple*, the parties were merely agreeing on how their own property would be treated – regardless of the state of the law – in the event of a divorce. And, since the Legislature specifically approves of premarital agreements regarding property, MCL 557.28, an argument could be made that the parties can agree to waive the statutory invasion provisions without violating public policy[1] so long as the agreement otherwise meets the *Rinvelt* test.[2] But *Reed* says that this can be done, and it is binding on us. MCR 7.215(J)(1). As a result, I concur in the majority opinion.

/s/ Christopher M. Murray

[1] In fact, the argument could be made that utilizing either MCL 552.23 or 552.401 to invade property designated as separate and not invadable upon divorce would be contrary to the policy of enforcing these agreements as written, which produces stability in the contracting parties relations. *Rinvelt*, 190 Mich App at 381.

[2] It is also important to remember that for a prenuptial agreement to be valid, the court must find that the circumstances had not so changed as to make enforcement of the agreement unfair or unreasonable. *Woodington*, 288 Mich App at 373. Consequently, if the passage of time has made enforcement of the agreement unfair or unreasonable, the court can do away with the agreement and simply divide all the property held by the parties.