

**STATE OF MICHIGAN
IN THE SUPREME COURT**

(On Leave Granted from the Court of Appeals, M.J. Kelly, P.J., Wilder and Fort Hood, J.J.)

EARL H. ALLARD, JR.,
Plaintiff-Appellant,

Supreme Court No.: 150891
Court of Appeals No: 308194
Circuit Court No.: 10-110358-DM

-vs-

CHRISTINE A. ALLARD,
Defendant-Appellee,

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: November 30, 2015

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STATEMENT OF JURISDICTION

The Wayne County Circuit Court's Judgment of Divorce, dated January 13, 2012, was a final order within the definition of MCR 7.202(6)(a)(i) as it was the first judgment that disposed of all claims and adjudicated the rights and liabilities of all parties. Defendant timely claimed her appeal on January 21, 2012. This Court of Appeals thus had jurisdiction pursuant to MCR 7.203(A)(1). Following the Court of Appeals decision Plaintiff timely sought leave to appeal and thus this Court has jurisdiction pursuant to MCR 7.301(A)(2). This Court granted leave to appeal on June 10, 2015.

ISSUES PRESENTED

Issue I

WHETHER MCL 552.23 AND MCL 552.401 ARE INAPPLICABLE WHEN THE PARTIES ENTERED INTO AN ANTENUPTIAL AGREEMENT?

The trial court answered this question: Yes.

The Court of Appeals answered this question: Yes.

The Plaintiff-Appellant answers this question: Yes.

The Defendant-Appellee answers this question: No.

Issue II

WHETHER THE REAL ESTATE HELD BY THE PLAINTIFF'S LIMITED LIABILITY COMPANIES, INCLUDING THE MARITAL HOME, AND ANY INCOME GENERATED BY THESE PROPERTIES, COULD BE TREATED AS MARITAL ASSETS AND, IF SO, UNDER WHAT CONDITIONS?

The trial court answered this question: No.

The Court of Appeals answered this question: Yes.

The Plaintiff-Appellant answers this question: No.

The Defendant-Appellee answers this question: Yes.

~~Issue III~~

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~~**DID THE TRIAL COURT ERR IN GRANTING SUMMARY DISPOSITION IN REGARDS TO THE ENFORCEABILITY OF THE ANTENUPTIAL AGREEMENT WHERE THERE WERE QUESTIONS OF FACT IN REGARDS TO THE AGREEMENT'S EXECUTION, A CHANGE OF CIRCUMSTANCES THEREAFTER AND ITS OVERALL UNCONSCIONABILITY?**~~

The trial court answered this question: No.

The Court of Appeals answered this question: No.

Plaintiff-Appellant would answer this question: No.

Defendant-Appellee answers this question: Yes.

INTRODUCTION

This is an antenuptial agreement case where there was zero marital estate, or at least that has been Plaintiff-Appellant's argument, zero, none at all. Judge Wilder below specifically took issue with this at oral argument and Plaintiff-Appellant held firm. Whether or not it is even possible to have a marital estate of zero in Michigan is, at some level, one of the implicit questions herein.

The trial court held the antenuptial agreement was valid and enforceable and Defendant-Appellee disputes this in her last issue. Before getting to that point, however, Defendant-Appellee suggests that, contrary to the Court of Appeals in this case, MCL 552.401(1) and MCL 552.23(1) are necessary considerations for the trial court in addressing the marital estate in the context of an antenuptial agreement unless they are specifically and unambiguously waived, *a la Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000). Defendant-Appellee next suggests that the Court of Appeals holding as to the inclusion of the LLCs and marital income into the marital estate was proper, and that the Plaintiff-Appellant's focus on titling and the separate character of the LLCs is actually a bit of a red herring, as the Court of Appeals agreed with that point, and its holding is properly read as including the value and income of the LLCs in the marital estate, though a piercing of the corporate veil is likely appropriate here and certainly at least a consideration for the trial court in this case.

The divergence here is substantial, with Plaintiff-Appellant earning comfortably over a quarter million dollars a year, and leaving the marriage with over \$900,000 in assets, while the Defendant-Appellee's assets are in five figures and non-liquid and her income has been zero for years.

Plaintiff-Appellant will no doubt harp on the parties' freedom to contract and, indeed, such freedom exists and must be respected. But it is Plaintiff-Appellant who is asking the Courts to enforce that agreement, and to ignore the Court of Appeals decision in *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005). Even more importantly, all Courts must respect the Legislature's statutory mandates and policy determinations. Here Plaintiff-Appellant only succeeds if those duties are forgotten, while Defendant-Appellee suggests a means by which all can be respected and harmonized in both this and future cases.

STATEMENT OF FACTS AND PROCEEDINGS

A Note on the Record

The record in this case is of a respectable length, running some 748 pages just as to transcripts, including four days of trial. The pleadings herein, involving partial summary disposition, are also voluminous. Defendant-Appellee has included the most relevant transcripts containing the summary disposition arguments and trial court's rulings in her appendix.

Background

Largely as a result of the unusual manner in which this case proceeded, and the trial court's limitations regarding what could be testified to, the parties' factual disputes center on just two areas, the first surrounding the signing and validity of the prenuptial agreement and the second addressing whether or not there was *any* marital estate here beyond some items of personal property. While the Defendant-Appellee disagrees strongly with the trial court's findings on both matters, such were largely made as a matter of law and excerpts of the trial court's opinion (Appx 34a-55a) may thus be usefully offered here as a backdrop for discussing the legal questions herein, as Defendant-Appellee takes issue with the trial court's legal

determinations, not its assessment of the background facts.

Procedural History

The trial court's opinion, Appx 35a-37a, offers a concise summation of the procedural travels of this case.

At trial, this Court took judicial notice of the court file, On July 28, 2010, plaintiff his complaint for divorce, On July 30, 2010, this Court entered an ex parte order for marital asset protection.

On October 14, 2010, plaintiff filed a motion for partial summary disposition regarding the parties' antenuptial agreement. On December 15, 2010, this Court entered [sic] management order, consent order preserving the financial status quo and compelling discovery, and also conducted a hearing on plaintiff's summary disposition motion.

On January 7, 2011, this Court entered an order denying without prejudice plaintiff's motion for partial summary disposition, finding that it lacked supporting affidavits, depositions, admissions, or other documentary evidence establishing that no material factual issues regarding the validity of the parties' antenuptial agreement. On January 21, 2011, plaintiff a motion for reconsideration, which was denied on February 7, 2011.

On February 16, 2011, the Court entered a consent order for substitution of plaintiff's counsel. On March 4, 2011, defendant filed a motion for order to show cause alleging plaintiff violated the mutual restraining order, status quo order, and case management Defendant also filed a motion for attorney fees.

At the March 30, 2011 show cause hearing, this Court found plaintiff in contempt purchasing a home and boat in violation of the mutual restraining order and ordered plaintiff pay \$2,000.00 in sanctions. The Court dismissed the show cause against plaintiff for the violation of the financial status quo order, finding that the order was too vague to enforce. Court also dismissed the show cause as to the alleged violation of the case management regarding mediation. The Court awarded defendant \$10,000.00 in attorney fees.

On April 1, 2011, defendant filed a motion to disqualify plaintiff's second attorney, which was granted by this Court on April 8, 2011. On April 27, 2011, plaintiff's third and current attorney filed her appearance in this case.

On July 13, 2011, plaintiff filed a second motion for partial summary disposition regarding the antenuptial agreement. At a hearing held August 8, 2011, this Court granted plaintiff's motion, finding the parties' antenuptial agreement enforceable as a matter of law. On that same date, this Court denied defendant's motion to compel and extend discovery, but granted an extension of time for filing witness and exhibit lists and trial briefs.

On August 15, 2011, plaintiff filed a motion in limine seeking to restrict trial testimony as a result of this court's summary disposition ruling. On August 17, 2011, the Court granted plaintiff's motion in part. The trial was conducted on August 17, August 18, September 8, and September 14, 2011. On October 12, 2011, the parties filed closing statements and proposed findings of fact and conclusions of law. Opinion, Appx 35a-37a.

Background Facts

The trial court's findings as to the background facts here are not disputed:

The parties were married on September 11, 1993 in Grosse Pointe Farms, Michigan, and are the parents of two minor children born during the marriage: Earl Allard HI (DOB 12-05-1997) and Michael Allard (DOB 09-15-1999).

Plaintiff filed a complaint for divorce on July 28, 2010.

Plaintiff currently resides at 597 Perrien Place, Grosse Pointe Woods, Michigan 48236, a home that he purchased and moved into during the pendency of this divorce case, and in violation of a mutual asset restraining order.

Defendant and the two minor children currently reside at 1036 Bedford, Grosse Pointe Park, Michigan 48230, a home, which plaintiff had purchased before the marriage, but which the parties shared with their children throughout the marriage.

Plaintiff is forty-nine years old, college-educated, and in good health. Plaintiff is self-employed, operating six Michigan single-member limited liability corporations:

- Eastpointe Transitional Living LLC
- Grosse Pointe Properties LLC
- Eastpointe Transportation LLC
- Grosse Pointe Homecare LLC
- Eastpointe Apartment Group LLC
- New Detroit REO LLC

Each of these LLCs were formed and established during the marriage.

Plaintiff's main occupation is operating a home care business, Eastpointe

Transitional Living LLC. According to the undisputed testimony of plaintiff's certified public accountant and qualified expert, James R. Graves, all of plaintiff's earned income, including the pass-through income from the LLCs, is reported on his personal tax returns. Plaintiff's total income reported in his 2010 federal tax return was \$276,661.00.

Defendant is forty-six years old, college-educated, and in good health. Until 1999, defendant worked full-time for an advertising firm. She earned an annual salary of approximately \$35,000.00 in her last year of employment. Defendant left the workforce in 1999 when she became pregnant with the couple's second child. Since that time, defendant has not worked outside of the home and has not sought employment. Defendant testified that she plans to return to the workforce in the near future.

Since defendant left the workforce in 1999 to care for the children and household, plaintiff has been the sole provider for the family.

Opinion, Appx 36a-37a.

The Antenuptial Agreement Here

There is an antenuptial agreement at the center of this dispute. It can be found at Appx, 20a. It is dated 9/9/93, two days before the parties' wedding. *Id.*, 25a; Opinion, Appx, 37a. Everyone agrees Defendant-Appellee did sign it. It is also not disputed that, immediately before signing it, she asked whether she could write "under duress," underneath her signature, which might be the most contemporaneous statement regarding such a signing this Court has ever addressed, and was something the trial court itself found to have occurred. Appx, 24b. The trial

court also found that “it’s clear that there would have been no marriage unless she signed.” Appx, 41b. The agreement was prepared by Attorney John Carlisle and notarized by Plaintiff-Appellant’s second counsel in this matter, with a notary’s statement as to it being voluntary and of Defendant-Appellee’s own free act (Appx, 23b). This attorney, Brian Carrier, was however unable to offer any evidence regarding the supposed voluntariness he noted (Appx, 26b-27b) and he admitted he did not actually swear anyone in, inquire as to voluntariness or take or administer the oath he inscribed as notary. Mr. Carrier did very much want to stay on the case here representing Plaintiff-Appellant despite his role in witnessing both the signing and the supposed voluntariness. Appx, 25b-27b. The trial court disqualified Mr. Carrier as counsel due to his being a necessary witness. Appx, 32b-33b.

Most readers who have not already done so will likely benefit from turning to the antenuptial agreement found at Appx 20a at this point. The most operative paragraphs to this dispute are likely paragraphs 3-5 though, of course, the entire document should be visited by the readers:

3. Each party hereby waives and releases any and all rights and claims of every kind, nature, and description that he or she may acquire in the pre-marital estate or property of the other party as a result of the death of the other party, including (but not by way of limitation) any and all rights of intestacy, rights to dower, rights of election (including the right to elect against the decedent's will), rights to spouse's allowance, rights to maintenance, rights to homestead or allowance, rights to exempt property allowance, and rights to use of a dwelling house, under the present or future statutes and laws or common law of the state of Michigan or any other jurisdiction.

4. Each party shall during his or her lifetime keep and retain sole ownership, control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party. However, provided that nothing herein contained shall be construed to prohibit the parties from at any time creating interests in real estate as tenants by the entireties or in personal

property as joint tenants with rights of survivorship and to the extent that said interest is created, it shall, in the event of divorce, be divided equally between the parties. At the death of the first of the parties hereto, any property held by the parties as such tenants by the entireties or joint tenants with rights of survivorship shall pass to the surviving party.

5. In the event that the marriage of EARL H. ALLARD JR. and CHRISTINE A. BERTANI shall terminate as a result of divorce, then, in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released), the parties agree that all property acquired after the marriage between the parties shall be divided between the parties with each party receiving 50 percent of the said property. However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

- a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.
 - b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.
- If the provisions of this paragraph or any other provision of this agreement shall be determined to be unenforceable by a court of competent jurisdiction, then such provisions shall be deemed separate and severable from all other provisions of this agreement, and all of the remaining provisions of this agreement shall continue in full force and effect.

Appx 20a-23a.

Plaintiff-Appellee moved twice for summary disposition on the issue of the applicability of the antenuptial agreement, the first of which was taken under advisement by the trial on December 15, 2010 and later denied on January 7, 2011. Appx, 35a. The second motion was heard on 8/8/11 and the transcript thereof is found at Appx, 37b. The trial court's ruling, running

8 pages, is too lengthy to excerpt but many readers may wish to visit it here, and it may be found at Appx, 73b-81b. In essence, the trial court found the agreement to be valid and enforceable.

Id.

Motion in Limine

The first day of the trial, 8/17/11, saw the first forty pages of transcript consumed with Plaintiff-Appellee's motion in limine, Appx 99b-140b arguing that the only issue for the court was "the amount of income available for child support," since the agreement precluded spousal support and it was Plaintiff-Appellee's position that, save for a few items of undisputed personal property, there was no marital estate to be divided. Appx, 101b-105b. Following extensive argument and a recess, the trial court ruled as follows:

THE COURT: Okay. Thank you. And both parties are present. I'd like to first thank the attorneys for their -- the hard work they put into the motion in limine and the response, and the trial brief, they were well written, well argued, and I appreciate the time that they spent on it, on both of those efforts.

So with respect to the plaintiff's motion in limine, the court will grant in part and deny in part that motion. I do agree with plaintiff's attorney, that the existence of this valid prenuptial agreement does effect and govern the distribution of the properties in this case. However, I disagree that the testimony at trial should be limited only to the distribution of personal property and the calculation of child support. Like any other divorce case, one which would not involve a antenuptial agreement, this court must first identify, through testimony and

documentary evidence, the separate and marital properties of the parties.

However, because we have a valid antenuptial contract here, the scope of that direct testimony and cross-examination will be limited, in terms of relevancy, by the terms of the contract. So, we'll proceed in that fashion. I hope you understand what I just ruled.

Appx, 133b-135b.

The Trial Court's Holdings

The trial court made several legal rulings which led to its eventual determinations. It found that the agreement usurped MCL 552.19. Opinion, Appx 39a. It also found, and this relates to issues raised *infra*, that the agreement precluded the application of MCL 552.23 and MCL 552.401. Opinion, Appx 48a. Spousal support was barred by the agreement and the parties reached consent, which the trial court adopted and which is not disputed by either party here, in regards to custody and parenting time of the minor children. Opinion, Appx 48a-50a.

On child support, based on a finding of \$276,661 and \$0 for Plaintiff and Defendant respectively for 2010, and with a consent as to 84 overnights, the trial court found that the Michigan Child Support Formula (MCSF or "Formula") would result in support of \$3,041/month for two children and \$1,995/month for one child. Opinion, Appx 50a-51a. In electing to deviate upwards, by \$1,000 per month in child support, the trial court made findings that concisely summarize the positions of the parties at the conclusion of its rulings in this case:

In distributing the couple's property pursuant to the antenuptial agreement, the net value plaintiff's separate estate exceeds \$900,000.006 while defendant's is approximately 95,000.00, virtually all of which are nondisposable funds.⁷ Further,

under the contract, plaintiff awarded all of the real and business property acquired during this marriage, as well as the pre-marital home on Bedford, in which the parties have lived and shared with their children throughout the marriage. In fact, defendant has been living in the Bedford home with the children during the pendency of this divorce case. Because defendant will retain (by consent) sole physical custody of the minor children, it is undisputed that defendant will have to move and provide a new home for the children after the divorce. Based upon the uncontroverted evidence and property distribution in this case, defendant has limited available resources from which to finance and maintain her children's relocation. Thus, this Court will deviate from the child support formula and increase the amount of monthly child support by \$1,000.00, which represents the amount of the current monthly mortgage payment on the Bedford home.

Opinion, Appx 52a-54a.

The judgment found at Appx, 55a, followed on January 13, 2012 and Defendant thereafter claimed her appeal.

The Court of Appeals Decision

The Court of Appeals opinion is found at Appx, 67a. The Court of Appeals first determined that the antenuptial agreement was valid. Appx, 73a. The Court addressed Defendant's arguments as to change of circumstances, Appx, 73a-75a, duress, Appx 75a-76a, and unconscionability, Appx 76a-77a, finding each to be insufficient to void the antenuptial agreement. *Id.* The Court then found that its prior discussion of the applicability of MCL 522.23

and MCL 552.401 to antenuptial agreements in *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005) was dicta and departed from that, instead finding that these statutes must be read *in pari materia* with MCL 557.28, which preserves the validity of agreements in contemplation of marriage. Appx, 79a-80a. Finally, the Court found that the antenuptial agreement, by its terms, applied only to property acquired by Plaintiff in his own name. Appx, 82a. The Court also found that the agreement did not define income earned by the parties during the marriage as separate property. *Id.* The Court then remanded for further proceedings regarding Plaintiff's earnings and to address the issue of whether the LLCs or their assets, by being purchased with marital earnings, had been commingled, as well as consideration of whether or not piercing the corporate veil might be appropriate. Appx, 83a-84a.

Following the Plaintiff's application for leave to appeal from that decision this Court granted leave in its June 10, 2015 order, setting forth specific issues to be addressed and inviting amici.

ARGUMENT

Issue I

WHETHER MCL 552.23 AND MCL 552.401 ARE INAPPLICABLE WHEN THE PARTIES ENTERED INTO AN ANTENUPTIAL AGREEMENT?

The trial court answered this question: Yes.

The Court of Appeals answered this question: Yes.

The Plaintiff-Appellant answers this question: Yes.

The Defendant-Appellee answers this question: No.

Standard of Review

The interpretation of a prenuptial agreement, including whether the language of

the agreement is ambiguous and requires resolution by the trier of fact, is reviewed *de novo* on appeal. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005).

* * *

The Court reviews property distributions in divorce by first reviewing the trial court's factual findings for clear error, and then determining "whether the dispositional ruling was fair and equitable in light of the facts." *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

* * *

Questions of law and statutory construction are reviewed *de novo*. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75; 467 NW2d 21 (1991).

The Basic Framework Here

No sensible observer of Michigan law would deny that Court of Appeals cases have, over the last several years, moved more toward a contractual law framework in addressing many different family law matters involving both antenuptial and postnuptial agreements. While there is a legitimate issue concerning the validity of this agreement which will be addressed separately *infra*, in the first two issues presented (the ones this Court directed the parties to address) Defendant-Appellee will, for purposes of argument, presume the agreement's validity, not because she agrees with it or concedes it but simply to demonstrate that even if the trial court was correct on that point it still reversibly erred. Where Defendant-Appellee parts ways with the trial court and Plaintiff-Appellant in these first issues is that even if, and again for purposes of

argument only, the agreement is upheld, the agreement's terms do not, contrary to the argument advanced by Plaintiff-Appellant and largely accepted by the trial court and Court of Appeals below, completely usurp the applicable statutory mandates nor presumptively and definitively define the scope of the necessary decisions of the trial court in this case. Here the trial court, on the one hand, recognized its duty to determine separate property from marital property, *Reeves v Reeves*, 226 Mich App 490, 493-494, 575 NW2d (1997), *Reed v Reed*, 265 Mich App 131, 693 NW2d 825 (2005), but, on the other, accepted unquestioningly Plaintiff-Appellant's titling of a multitude of post-marital acquired properties in his own name as determinative not just of their character, but also whether their value could be considered in the marital estate, something neither the agreement nor Michigan law readily supports. That question will be addressed *infra*, while the question of whether or not MCL 552.401(1) and MCL 552.23 can be ignored where an antenuptial agreement exists will be addressed first here.

Preliminary Considerations

The arrival of the Court of Appeals decisions in *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992) and *Rinvelt v Rinvelt*, 190 Mich App 372; 475 NW2d 478 (1991), effectively altered the course of Michigan law on antenuptial agreements, which previously were less than favored. The *Rinvelt* Court adopted the three part test of *Brooks v Brooks*, 733 P2d 1044 (Alaska, 1987), for Courts to assess the validity of such agreements:

1. Was the agreement obtained through fraud, duress, mistake, or misrepresentation, or nondisclosure of material fact?
2. Was the agreement unconscionable when executed?
3. Have the facts and circumstances changed since the agreement was executed?

Brooks at 1049.

Subsequent to *Rinvelt*, the Court of Appeals has repeatedly held the prenuptial agreements that survive the *Rinvelt/Brooks* test are to be enforced, even if they were entered into prior to the arrival of *Rinvelt*. *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005). The Court's decision in *Reed* again reiterated that the proper role of a court when assessing a prenuptial agreement is *not* to determine whether it is "fair" or "equitable" but, rather, whether it is valid, as the test for validity in *Rinvelt* incorporates the necessary questions of fairness, *Reed* at 143, and further judicial alteration of the agreement of the parties is impermissible. *Id.*

Reed

The trial court and parties all essentially agreed below (though perhaps not so much now) that the Court's decision in *Reed* was controlling here but differed in its application. *Reed* involved a long term marriage, like here, and similar language in the agreement regarding the titling of property:

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.

Reed at 146.

Significant distinctions between *Reed* and the instant matter include the fact that the *Reed* wife's total income throughout the marriage was essentially identical to the husband's (both into

seven figures) and the fact that the major dispute in *Reed* seemed to be an argument regarding change of circumstances rather than improprieties in the agreement's execution. *Reed* at 134-140. Perhaps most interestingly, one property, the "Oakland County" property (which was actually separate but contiguous parcels in *Reed*) bore a strong resemblance to Plaintiff-Appellee's real estate portfolio here, in that it was acquired post-marriage and was titled in the name of various corporate entities. *Reed* at 151-153. It did appear as though many of the *Reed* companies were charades and there were credibility findings against the husband in that regard, *id.*, but, even so, the properties were held to be, under the agreement, separate properties from the marital estate. *Id.* at 156. While all of that, of course, would seem to bode very well for Plaintiff-Appellant here, there is one thing the *Reed* Court held that is totally inconsistent with the approach of the trial court and Plaintiff-Appellant here, and which the Court of Appeals here elected to disregard as dicta, which now forms the crux of this issue.

This trial court here plainly (and accurately) acknowledged that it still had a duty to determine separate from marital property and the *Reed* Court offered ample instruction how to do so in this antenuptial agreement context:

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, 256 Mich App 286, 294; 662 NW2d 111 (2003)]* at 291. 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, 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.

Reed at 152-153.

As noted *supra*, the trial court here specifically held that it could not consider either MCL 552.23 or MCL 552.401. Appx, 48a. As the trial court put it, "As stated previously, by entering into a contract here, the parties have opted out of the otherwise applicable statutory scheme and created their own set of rules governing their property distribution." *Id.*

While that could well sound reasonable enough on first blush, it is not consistent with the Court's holding in *Reed*:

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. *Korth, supra* at 291-292; *Reeves, supra* at 494-495. *Reed* at 156.

In other words, *Reed* requires that even in an antenuptial property case, the trial court's first duty, determining the separate versus marital character of all property arguably in the marital estate, *Reed*, 142-143, requires consideration of MCL 552.401(1) and MCL 552.23(1). This is exactly what the trial court refused to do here. Appx., 48a.

Pointedly, the Court of Appeals, in avoiding *Reed*, did not invoke MCL 7.215(J). Rather, the Court held that this entire discussion in *Reed* was dicta. To the contrary, this discussion was indeed essential to the trial court's holding as to what was and was not to be included in the marital estate, as well as whether or not a receiver was appropriate. Without this section the remand ordered by the Court would have been both impossible and incomplete, meaning that this holding of the *Reed* Court was not dicta.

This Case Has a *Reed-like* Agreement

There is not much daylight to be found between the applicable provisions of the antenuptial agreement in *Reed* and those that are seen here:

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. *Reed* at 146.

* * *

However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

- a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.
- b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name. Agreement [Attached Exhibit 5], paragraph 5; Opinion, p 7.

Both agreements state that property acquired by the individuals during the marriage in their individual capacity will remain separate property. There is nothing in the record to suggest that the trial court found the agreement herein to be particularly different or more expansive than that seen in *Reed* and, indeed, the operative language is largely similar across both. It appears that the trial court simply believed that the *existence* of an antenuptial agreement mandated that it look solely to that agreement, and not to MCL 552.23(1) or MCL 552.401(1). *Reed*, however, teaches exactly the opposite at page 156.

The Statutory Exceptions

This Court is amply familiar with both of the statutes¹ at issue herein. MCL 552.401(1)

¹ This Court, of course, is well familiar with the mandates surrounding statutory construction. “The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent.” *Chop v Zielinski*, 244 Mich App 677, 679; 624 NW2d 539 (2001), citing *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d

reads²:

(1) 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. . . .
MCL 552.401(1).

MCL 552.23 reads:

(1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.
MCL 552.23(1).

The Court of Appeals also held that MCL 557.28 was relevant:

A contract relating to property made between persons in contemplation of marriage shall remain in full force after the marriage takes place.

611 (1998). It is the precise language of the statute that is controlling. *People v Borchard-Ruhland*, 460 Mich 278; 597 NW2d 1 (1999). "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Where the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000). In such cases, Courts will not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995).

² The starting point for any issue of statutory construction must be the statute's text. *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d 164 (1999).

MCL 557.28³

At the outset, while it is certainly true that statutes relating to the same subject matter should, in general, be read, construed, and applied together, *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 427; 565 NW2d 844 (1997), this requirement does not and cannot trump the plain language of the statutes themselves. *In re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). There is exactly nothing in MCL 557.28 that refers to “a judgment of divorce or separate maintenance,” MCL 552.23(1) or “a decree of divorce or separate maintenance,” MCL 552.401(1) and thus, in reality, these two statutes, which refer to *divorce*, and MCL 557.28, which refers to an agreement being preserved “after the marriage takes place,” address entirely different things in the first place, making *Empire Iron’s* teaching inapplicable. Moreover, MCL 557.28 does not include any language which would limit or constrain MCL 552.23(1) and MCL 552.401(1) and, thus, it is entirely inappropriate to read such language into the statute. *In re MCI* at 414-415.

Freedom to Contract vs Statutory Language

What this case actually consists of, as this Court has posited it in the issue presented, is a question of whether or not the parties’ freedom to contract can overcome applicable statutory language. Of course, as the Legislature makes public policy for this State, its mandates cannot

³ Note that MCL 557.28 refers only to “a contract relating to property.” There is thus a very real question, likely with a negative answer, as to whether there is any statutory basis *at all* for antenuptial agreements that limit the trial court’s power to award spousal support under MCL 552.13. This issue is not preserved for review here but if the Court were inclined to address it, and it would matter here as the agreement at bar included a provision as to spousal support, the Bench and Bar would benefit from such a discussion.

simply be voided by agreement of the parties. Statutes' provisions can, however, in certain instances be waived, as the conflict panel of the Court of Appeals held in *Staple v Staple*, 241 Mich App 562, 574-575; 616 NW2d 219 (2000).⁴

Staple involved the question of whether the statutory provision allowing for modification of any judgment of alimony, MCL 552.28⁵, overcame the parties' agreement that alimony would be non-modifiable. Because the underlying question here is inherently the same, whether or not an agreement of the parties, in the context or contemplation of a divorce, can render impotent a statutory mandate, save for the specific statute involved, *Staple* provides a useful framework to addressing the question this Court has raised here.

The first step of the *Staple* analysis is to determine whether or not the statute's plain language prohibits a waiver of the statutory right. *Id.* at 574-575. Some statutes do, and *Staple* cited several specific examples of how and where the Legislature elected to preclude parties from waiving statutory rights, *e.g.*, MCL 418.815; MCL 421.31; MCL 38.172. A complete exploration of these statutes is unnecessary because here it is clear that the plain language of MCL 552.401(1) and MCL 552.23(1) contain no such prohibition. Thus waiver of the statutory

⁴ *Staple* cited *Russo v Wolbers*, 116 Mich App 327, 340; 323 NW2d 385 (1982) as a previous example of the Court permitting waiver of a statutory right.

⁵ MCL 552.28: On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to section 17, the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

mandates is, under *Staple*, possible in the situations before the Court.

Next the question under *Staple* is whether the parties, in their agreement, demonstrated an intent to “specifically forgo their statutory right.” *Id.* at 579. *Staple* requires that “to be enforceable, agreements to waive the statutory right . . . must clearly and unambiguously set forth that the parties forgo their statutory right” in the body of said agreement *Id.* at 581.

Here, of course, there is nothing in the antenuptial agreement that would meet *Staple*'s expectation. Neither MCL 552.401(1), MCL 552.23(1), or any of either statutes' actual mandates or underlying factors is mentioned at all. There is, undisputably, no clear and unambiguous, or even an unclear, middling and ambiguous, agreement to waive either statute's applicability in the antenuptial agreement at issue here, other than a general reference to “present or future statutes” in paragraph 5. This does not meet *Staple*'s requirement of specificity.

***Staple* Simply Reiterated Existing Law**

There is, of course, a question to be asked as to why *Staple* should be applied to an antenuptial agreement that predates it and concerns different statutes than *Staple* addressed. The reason is quite simple - the statutes predated, by decades, the agreement at issue here. *Staple* itself applied to agreements to waive the ability to modify spousal support that predated its decision, and this was so not just because it was handed down by the Court but rather because the Court was simply recognizing what the parties should have - there was an applicable statute and, if the parties were going to be said to have waived it in a contract, for that contract to be enforced as written on that point it would have to be clear and unambiguous.⁶

⁶ It is worth noting that the Plaintiff's counsel was undisputedly the drafter of the agreement at issue here.

Similarly here, no even slightly knowledgeable practitioner could claim to be unaware of MCL 552.401(1) and MCL 552.23(1) at the time this agreement was drafted (1993). To be sure, *Reeves* and its progeny had not yet appeared, nor had *Korth*, but the statutes themselves were there for the reading. As *Staple* clearly held, in a case where the agreement likewise obviously predated its holding, it is not too much to ask of the parties, if they are to substitute their judgment for that of the Legislature in a matter the Legislature has specifically spoken to, that they likewise specifically acknowledge the statutory mandates they are choosing to waive.

A Court of Equity

In Michigan divorce actions the authority of the court to act is purely statutory. *Flynn v Flynn*, 367 Mich 625; 116 NW2d 907 (1962). That said, the divorce court is one of equity. *St Clair Commercial & Savings Bank v Macauley*, 66 Mich App 210; 238 NW2d 806 (1975). A circuit court presiding over divorce matters does not wield all the general powers of equity but is granted those equitable powers specifically granted by statute. *Kasper v Metropolitan Life Ins Co*, 412 Mich 232; 313 NW2d 904 (1981). A divorce case is thus equitable in nature, and a court of equity molds its relief according to the character of the case. *Wiand v Wiand*, 178 Mich App 137, 144; 443 NW2d 464 (1989).

Importantly, the Legislature has granted the circuit courts the power and authority to avoid an inequitable result that would otherwise occur when a party is impoverished by a judgment of the court (MCL 552.23(1)) or sees property to which it has contributed adjudicated solely to the other party (MCL 552.401(1)). Simply put, the Legislature has determined that in neither case is the circuit court required to turn its back on equity in favor of statutory mandates. Indeed, quite the contrary, the statutes themselves mandate that the circuit court at least consider

equity in applying its sound discretion to the cases before it. Michigan law has repeatedly recognized these principles. *E.g.*, *Pickering v Pickering*, 268 Mich App 1, 9; 706 NW2d 835 (2005); *Korth v Korth*, 256 Mich App 286, 293; 662 NW2d 111 (2003).

An Argument Entirely in the Alternative -

The Parties Intent Cannot Entirely Usurp the Legislature's Mandates

Defendant-Appellee first posits that the holding of *Staple* should apply in this situation and, if she had to guess, there will probably be amici support for this position, as it provides a credible balance between the parties' freedom to contract and the Legislature's authority to set policy. Entirely in the alternative, however, she recognizes that under one of this Court's prior holdings even that may be a step too far into the Legislature's purview, and this section sets forth that argument in the alternative. In *Omni Financial Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999), this Court found that the parties' freedom to contract did not extend so far as to undermine or waive the Legislature's unambiguous mandates regarding venue. *Id.* at 311-312. The rationale behind the Court's holding was exceedingly simple:

We believe it is unnecessary to look beyond the language of the statutes to address the question whether parties may contractually agree to venue. Since the Legislature declined to provide that parties may contractually agree to venue in advance, we decline to read into the statute a provision requiring enforcement of such agreements. [*In re*] *Ramsey*, [229 Mich App 310,] 314; 581 NW2d 291 (1998)]. Otherwise stated, we need not, and consequently will not, speculate regarding legislative intent beyond the plain words expressed in the statute. *Schnell, supra* at 310.

Omni Financial at 311-312 [footnote omitted].

Here, of course, MCL 552.401(1) and MCL 552.23(1) lack exactly what MCL 600.1605 and MCL 600.1621 lacked in *Omni Financial*, an authorization for parties to contract away applicable statutory mandates. While there has certainly been a move toward more enforceability of antenuptial agreements in recent years, this has been entirely Judge-made and not something our Legislature has spoken to. While our Courts certainly can, and obviously have, chosen to walk back from judicially crafted limitations on antenuptial agreements such as those seen with *In re Muxlow Estate*, 367 Mich 133; 116 NW2d 43 (1962) it is quite another proposition altogether for the Courts to invade the province of the Legislature and judicially undo what the Legislature has mandated. Indeed, Courts properly can do no such thing. *Omni Financial, supra; In re MCI, supra.*

Here, to be sure, Plaintiff-Appellant, and for that matter some commentators, are apt to ask why parties could not waive MCL 552.401 and MCL 552.23 at all. If *Omni Financial*, rather than *Staple*, is to control the answer must be as obvious here as it was in *Omni Financial*, because the Legislature has not stated that it would allow these mandates to be waived. If Plaintiff-Appellant, or anyone else (likely including some number of family law practitioners who make part of their living writing antenuptial agreements) believe parties should be able to waive MCL 552.401 and MCL 552.23, then under *Omni Financial* they must direct their arguments to the body responsible for those enactments, rather than ask this Court to retroactively amend them by judicial fiat. Indeed, the Court's decision in *Reed* essentially warned of this and the Legislature has shown no mind to alter its requirements. The suggestion

of the trial court that these statutes do not apply because the parties agreed otherwise misses the teaching of *Omni Financial* completely. A contract is nothing more than an agreement the law will enforce and, as the *Omni Financial* Court made clear, the law will not enforce, or even permit, an agreement of parties to ignore duly enacted legislation⁷ unless and until the Legislature authorizes such an agreement and waiver.

Moreover, while the Legislature can do whatever it wants within the Constitution's limits its silence here is well-grounded. Michigan divorce jurisdiction is entirely a creature of statute but the Legislature has also elected to inject it was a dose of equity, essentially insuring that there is a certain level of fundamental fairness and equality that divorcing parties will leave Michigan courtrooms with. No doubt the Legislature is as aware as this Court that divorces are very often brutally vicious endeavors full of rancor and emotion. That will probably never change, but the Legislature has mandated that, for so long as such contests occur in Michigan courtrooms, some holds *will* be barred.

Parties who truly wish to abandon *every* protection of Michigan law as to divorce (save for those shielding the best interests of children, which can never yield⁸) plainly have the option of including in their antenuptial agreement a provision to arbitrate under the Domestic Relations Arbitration Act, MCL 600.5070-600.5082, where, of course, MCL 600.5081(3) specifically

⁷ There is, of course, a term for contracts that contain agreements to violate the law, void against public policy. *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997). *Omni Financial* elected to simply ban the practice, and rightly so, but it is one thing to waive a particular right, quite another to agree that a court of this state will be required to violate statutory law in the course of completing its duties. Both the parties and the court are powerless to make or enforce such an agreement.

⁸ See, *Harvey v Harvey*, 257 Mich App 278; 668 NW2d 187 (2003).

allows arbitrators to disregard all statutory constraints placed on Michigan Courts.⁹ Here *even if* the parties are said, as the trial court thought, to have agreed to abandon every Michigan statutory mandate surrounding divorce actions, both *Reed* and *Omni Financial* teach they cannot, for the simple reason that the Legislature has never adopted any language in MCL 552.401 or MCL 552.23, which evidences any intent to permit such a waiver.¹⁰ As can be seen from MCL 600.5081(3), the Legislature knows exactly how to enact such permission, if it so chooses, but the plain language of the statutes at issue here evidence no such intent, and it is respectfully not the place of the Courts to insert it.

Contribution

The following sections address the applicability of MCL 552.401(1) and MCL 552.23(1) to the facts of this case. This may well, of course, be grounds for a remand, as opposed to being decided here, but the following is offered so that the Court is aware of the magnitude of the issues at stake and the fact that the questions are anything but moot.

⁹ (3) The fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award. MCL 600.5081(3).

¹⁰ In reality, Mr. Carrier, the draft of this agreement, appears to have known he was drawing outside the lines with paragraph 5 as he included, at the end of that paragraph specifically, the following severability language:

If the provisions of this paragraph or any other provision of this agreement shall be determined to be unenforceable by a court of competent jurisdiction, then such provisions shall be deemed separate and severable from all other provisions of this agreement, and all of the remaining provisions of this agreement shall continue in full force and effect.

Appx, 23a.

While severability provisions are quite common in contracts, the inclusion of this provision here at the end of paragraph 5, instead of at the end of the agreement where such things usually appear, suggests even he was aware he was running into legislative boundaries as he wrote this.

As a matter of Michigan law, MCL 552.401(1) contribution towards particular property can be achieved two ways, 1) by directly contributing (*i.e.*, chipping in money to buy or labor to earn or improve X) or 2) when the property involves something that has been built or appreciated over time, “activities at home” if they are of a sufficient character and duration that they allowed the other party to focus on the acquisition or growth of the property. *Hanaway* at 294.

The holding of *Hanaway* is familiar enough to most readers and requires only a brief recap. Therein the Court made clear that when the value of corporate stock, owned prior to the marriage, has appreciated over the course of the marriage due to the efforts of *either* party, the appreciation is properly marital property and subject to division. In *Hanaway, supra*, the defendant's father gifted stock in the family's close corporation business to the defendant. *Id.* at 281, 283. The Court found that because the plaintiff managed the household and cared for the parties' children, enabling the defendant to invest long hours and efforts in the business of the close corporation, the defendant's stock in the business¹¹ was a marital asset, rather than separate property. *Id.* at 293-294. The *Hanaway* Court concluded that the business "appreciated because of defendant's efforts, facilitated by plaintiff's activities at home." *Id.* at 294. This case, along with *Reeves v Reeves*, 226 Mich. App. 490; 575 N.W.2d 1 (1997), and more recently, *McNamara v Horner*, 249 Mich. App 177; 642 N.W.2d 385 (2002) and *Cunningham v Cunningham*, 289 Mich App 195; 795 NW2d 826 (2010), clearly indicate that appreciation of property that requires tending to by the parties during the course of the marriage, when facilitated in any way by marital endeavors, is properly included in the marital estate.

¹¹ Consider for a moment what the difference would be if the stock was in a corporation (as in *Hanaway*) or an LLC. The answer, none, foreshadows the ultimate answer to Issue II herein.

At this point it would be difficult for this Court to actually reach the issue of MCL 552.401(1) contribution, as *Reed* instructs it should, given the trial court's diligent preclusion of any evidence on this point from entering the record at trial. Accordingly, while the basic existence of a *Hanaway*-like situation is undisputed here (Plaintiff worked outside the home for long hours, doing very well for himself, Defendant was a homemaker who raised the children and tended to the marital home endeavors and Plaintiff really only disputes the applicability of *Hanaway*, not (yet, at least) the factual analogies), the actual record is so thin on this point that a remand might well be required, though, obviously enough, sufficient instructions as to MCL 552.401(1) would likely be appropriate. Still, unless this Court elects to repudiate both *Reed* and the entirety MCL 552.401(1)'s applicability here, this error is plain from the face of the trial court's opinion in this case, the Court's opinion in *Reed*, and the mandates of MCL 552.401(1).

Need

The trial court's own opinion notes the disparity between the parties and the reality that enforcement of this agreement has resulted in a situation contemplated by MCL 552.23(1) where "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party." The court's findings make this amply clear:

In distributing the couple's property pursuant to the antenuptial agreement, the net value plaintiff's separate estate exceeds \$900,000.006 while defendant's is approximately 95,000.00, virtually all of which are nondisposable funds.⁷ Further, under the contract, plaintiff awarded all of the real and business property acquired during this marriage, as well as the pre-marital home on Bedford, in which the parties

have lived and shared with their children throughout the marriage. In fact, defendant has been living in the Bedford home with the children during the pendency of this divorce case. Because defendant will retain (by consent) sole physical custody of the minor children, it is undisputed that defendant will have to move and provide a new home for the children after the divorce. Based upon the uncontroverted evidence and property distribution in this case, defendant has limited available resources from which to finance and maintain her children's relocation.

Opinion, Appx 52a-54a

In the face of this, and its self-imposed handicapping of its decision by finding MCL 552.23(1) consideration to be foreclosed by the parties' agreement, when *Reed* in fact held the opposite, the trial court decided to deviate as to child support and award an additional \$1,000 per month, which it found was the mortgage amount on the current marital home on Bedford (though the record indicates that the mortgage was actually not a financing tool for the home, which had been in Plaintiff-Appellant's family for generations but rather was essentially a home equity tool Plaintiff-Appellant borrowed with to fund other investments). The parties and even the trial court undisputably intended for the children to continue in their current school and in something approaching the standard of living they have come to expect. Whether or not this offering finds its way to readers who happen to live in the Grosse Pointes themselves, few are apt to expect that \$1,000 per month would amount to a realistic mortgage or rental payment in that area, even if combined with other amounts from the child support. On this record Defendant-Appellee's best hope seems to be \$8/hour work as while she is college educated a decade out of the workforce

makes her credentials and experience obsolete in her former field (advertising), particularly where that whole field itself has contracted substantially in the interim.

Essentially Defendant-Appellee and the children, who are primarily (and by consent) to be in her custody have been reduced from a comfortable mid-six figure income to a low five figure one, well below not just their accustomed standard of living but anything reasonably possible in the community the children have called home for their entire lives. The trial court found MCL 522.23(1) to be inapplicable here but, as noted above, *Reed* would disagree. Realistically, this is not a close question once MCL 552.23(1) is found to be as applicable here.

As those readers who have paid much attention to issues surrounding pro bono efforts and legal aid will likely recall off-hand, the eligibility cut-off of legal aid is double the federal poverty guidelines. Keith, D.J. The power of pro bono: A call to pro bono. *Michigan Bar Journal*, 90, 30 (2011). The Department of Health and Human Services sets that figure for 2012, for a family of three, at \$19,090 or \$1590.83 per month. *2012 Poverty Guidelines*, Federal Register Volume 77, Number 17 (Thursday, January 26, 2012). Doubling that is \$38,180.00 or \$3,181.66 per month. The child support figure awarded by the trial court was \$3,041.00 under the Formula, and the trial court tacked on \$1,000 per month in deviation. Had it not added the deviation, Defendant-Appellee would actually have walked out of a 17 ½ year marriage, with two children, legal aid eligible (while hoping to find the children a home in their school district), while Plaintiff-Appellant left with an income in the quarter million per year range and assets in excess of \$900,000.00. Opinion, Appx, 50a-51a. There is an MCL 552.23(1) level of need here.

Issue II

**WHETHER THE REAL ESTATE HELD BY THE
PLAINTIFF’S LIMITED LIABILITY COMPANIES,
INCLUDING THE MARITAL HOME, AND ANY INCOME
GENERATED BY THESE PROPERTIES, COULD BE
TREATED AS MARITAL ASSETS AND, IF SO, UNDER
WHAT CONDITIONS?**

The trial court answered this question: No.

The Court of Appeals answered this question: Yes.

The Plaintiff-Appellant answers this question: No.

The Defendant-Appellee answers this question: Yes.

Standard of Review

The interpretation of a prenuptial agreement, including whether the language of the agreement is ambiguous and requires resolution by the trier of fact, is reviewed *de novo* on appeal. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005).

* * *

This Court reviews property distributions in divorce by first reviewing the trial court’s factual findings for clear error, and then determining “whether the dispositional ruling was fair and equitable in light of the facts.” *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). Questions of law and statutory construction are reviewed *de novo*. *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75; 467 NW2d 21 (1991).

Preliminary Considerations

The trial court, of course, found that it need do nothing here but determine 1) whether there was any marital property and 2) do so only by looking at the parties' agreement. Before moving on to that specific approach, it is useful to consider what the trial court elected not to do here, namely follow the traditional approach of Michigan Courts.

Generally, of course, the trial court is entrusted with broad discretion to fashion property settlements that are fair and equitable under all of the circumstances. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Kendall v Kendall*, 106 Mich App 240; 307 NW2d 457 (1981). Precise equality is not necessary, but fairness is required. *Nalevayko v Nalevayko*, 198 Mich App 163; 497 NW2d 533 (1993). In addressing a property settlement in a divorce action, the underlying factual findings are reviewed for clear error. *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991). A finding is clear erroneous if review of the record evidence leaves this Court with a firm and definite conviction that a mistake has been made. *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). If the trial court's underlying facts were not clearly erroneous, then the dispositional ruling is reviewed for fairness and equitableness. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995)¹²; *Ianitelli v Ianitelli*, 199 Mich App 641; 502 NW2d 691 (1993). The appellant bears the burden of

¹² In determining whether a property division was fair and equitable, Courts traditionally looks to a number of factors:

[The] source of the property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity ... [as well as] the interruption of the personal career or education of either party.

Hanaway at 292-293; 527 NW2d 792 (1995).

showing the incorrectness of a trial court's factual findings. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).

Where questions of separate property exist, this Court is likewise familiar enough with the background concerns:

“Assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998); *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App. 490, 494; 575 NW2d 1 (1997).”

McNamara v Horner, 249 Mich App 177, 183; 642 NW2d 385, 389 (2002).

The Facts are Actually Undisputed

Here there is no question, as the trial court itself found in regards to the LLCs that both provide Plaintiff-Appellant income and serve as holding companies for all of the real property assets titled in his name, that “[e]ach of these LLCs were formed and established during the marriage.” Opinion, Appx, 38a. Moreover, as the trial court noted on page 10 of its opinion (Appx, 44a), the only realty Plaintiff-Appellee claimed in the disclosure appended to this agreement was the Bedford home and a Florida condominium. Opinion, Appx, 44a; Antenuptial Agreement, Appx, 26a. All of the remaining properties were acquired during the marriage:

15525 East 10 Mile Road, Eastpointe, Michigan 48066

20919 Anita, Harper Woods, Michigan 48225

25039 Groves, Eastpointe, Michigan 48066

2122 Sloan Drive, Harper Woods, Michigan 48225

21237 Newcastle, Harper Woods, Michigan 48225

21440 Newcastle, Harper Woods, Michigan 48225

21222 Manchester, Harper Woods, Michigan 48225

597 Perrien Place, Grosse Pointe Woods, Michigan 48236

24900 Schroeder Avenue, Eastpointe, Michigan 48021

Opinion, Appx, 46a.

As noted *supra*, under *Byington* and *McNamara*, because these properties arrived during the marriage they inherently have a marital character unless they arrived at entirely via separate funds (as would be the case if, for example, they were inherited and kept separate. *See, e.g., Deyo v Deyo*, 474 Mich 952; 707 NW2d 339 (2005)). Here the trial court, relying on paragraph 5b of the agreement, found that all property titled in Plaintiff-Appellant's name was presumptively separate property unless and until the Defendant-Appellee could show otherwise. Paragraph 5b of the agreement reads:

b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.

Paragraph 4 of the agreement, however, reads:

4. Each party shall during his or her lifetime keep and retain sole ownership control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party, However, provided that nothing herein contained shall be construed to prohibit the parties from at any time creating interests in real estate as tenants by the entirety or in personal property as joint tenants with rights of survivorship and to the extent that said interest is created, it shall, in the event of divorce, be divided equally between the parties. At the death of the first of the parties hereto, any property held by the parties as such tenants by the entirety or joint tenants with rights of survivorship shall pass to the surviving party.

Defendant-Appellee plainly anticipated that there would be marital property to divide but the trial court bought into Plaintiff-Appellant's argument that he "lived the agreement" and kept all property separate. There is, of course, a problem with that, beginning with MCL 552.401(1) and continuing on through *Byington*. The disclosure to the agreement lists Plaintiff-Appellant as having assets that, while not minuscule, were also dwarfed by his earnings during the marriage which, contrary to his initial testimony, were clearly well into six figures for many years prior to the parties' divorce.

Here the trial court, apparently because of the existence of the agreement, flipped *Byington* on its head and required Defendant-Appellee to somehow rebut a presumption of

separate property because of the titling, despite the fact that most of the supposedly separate properties arrived during the marriage and appear to have been acquired, at least in part, with funds arriving during the marriage and from the work endeavors of Plaintiff-Appellant during that time, as opposed to just via income from his prior assets. There are all sorts of issues with this, including, *inter alia*, *Reeves* and *Hanaway* problems, as well as a disregard of *Byington*. Moreover, though this occurred at trial it appears that the trial court was largely operating as a matter of its summary disposition holding or, to put it more precisely, seems to have used its summary disposition holding to reorder the presumption regarding property acquired during the marriage.

Quite frankly, the Plaintiff-Appellant earned well into six-figures every year and that money went somewhere. He was not, contrary to his claims “living the agreement,” but rather living paragraph 5b at the expense of paragraph 4. Substantial funds, namely wages/draws/income, all from LLCs created after the marriage, arrived during the marriage, and it appears a decent amount of them went into Plaintiff-Appellant’s real property investments. When the parties clearly anticipated the creation of a marital estate in paragraph 4 Plaintiff-Appellant should not no be able to claim, both presumptively and really conclusively as far as the trial court was concerned, that everything he bought with martial funds became his separate property the moment he titled it as that.¹³

¹³ In several instances deeds were introduced wherein Defendant-Appellee had apparently been asked to sign over her interest in various properties. While Plaintiff-Appellant claims that such things were just for dower and closing purposes, obviously enough, the properties involved were not in his name alone when he required Defendant-Appellee to sign warranty (not quit claim) deeds thereon.

The Question of Titling¹⁴

There are at least two parts to this question. The first, a factual issue for the trial court, involved deeds Defendant-Appellee was asked to sign, apparently to transfer properties to the LLCs. Thus there is a real question as to whether or not the Plaintiff-Appellant, prior to transferring the properties to the LLCs, owned the properties in his own name, which would, under *Byington*, likely moot this entire discussion. The trial court never reached this question, due to its erroneous summary disposition holding, and that alone may be enough of a factual ambiguity to require a remand and preclude resolution of this case at least on its facts.

As to the broader question this Court has posed, with due respect to the Court, it may well be something of a red herring raised by Plaintiff-Appellant. The actual Court of Appeals holding was:

Michigan courts generally recognize the principle that separate entities will be respected. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d

¹⁴ Plaintiff-Appellant suggests that the Court of Appeals has raised the LLC properties and income questions of its own accord, and that these entire questions are not preserved. Plaintiff-Appellant's Brief on Appeal, p 27, 32. To the contrary, while Plaintiff-Appellant may have neglected to give it much weight in his argument below, Defendant-Appellee's issues presented below plainly included this question:

DID THE TRIAL COURT ERR WHEN, AFTER FINDING THE ANTENUPTIAL AGREEMENT BETWEEN THE PARTIES VALID, IT ACCEPTED PLAINTIFF'S POSITION THAT THERE WAS NO MARITAL ESTATE DESPITE THE FACT THAT THE AGREEMENT PLAINLY CONTEMPLATED CREATION OF A MARITAL ESTATE VIA ACQUISITION OF PROPERTY DURING THE MARRIAGE AND WHERE PLAINTIFF UNDISPUTEDLY ACQUIRED MULTIPLE PROPERTIES DURING THE MARRIAGE AND YET TITLED THEM AS SEPARATE PROPERTY?

Defendant-Appellee's Brief in the Court of Appeals (as Appellant), p x.

670 (1984). We conclude, therefore, that as a matter of law, the LLCs created during the course of the marriage are separate legal entities and not to be construed, for purposes of interpreting and applying the plain and unambiguous terms of this antenuptial agreement, as being the same as plaintiff “in his individual capacity or name.” Thus, to the extent any real estate properties or other assets were acquired during the course of the marriage by the various LLCs created during the marriage, we find that their disposition in this divorce action is not governed by the antenuptial agreement.

Court of Appeals Opinion, Appx, 82a.

Thus the Court of Appeals *agreed* with what Plaintiff-Appellant is essentially arguing here, that the LLCs were, as a matter of law, separate entities. It simply held that their distribution was not governed by the antenuptial agreement. Plaintiff-Appellant really wants this Court to believe that the Court of Appeals held that the properties themselves could thus be divided, regardless of titling. This does not, however, appear anywhere in the text of the Court’s Opinion. Rather, what seems to be being held here is that the LLCs are properly part of the

marital estate, because they do not hold property in Plaintiff-Appellant's own name, as envisioned by the agreement.¹⁵

The solution to this conundrum is a lot easier that Plaintiff-Appellant wants anyone to believe. The *value* of the LLCs is part of the marital estate and, thus, can be divided as any other asset, exactly as the Steel Tex stock was in *Hanaway*. This is really a question of math, not titling, as the LLCs have some particular values, based on their assets, the properties at issue, and these are properly part of the marital estate. The precise mechanics of how that is to be divided is, of course, a question for the trial court. *Sparks*, 151-152.

That said, this Court does want to specifically know how the properties themselves may be divided and, of course, Defendant-Appellee must answer that question. The Court of Appeals has already provided the initial answer, namely that the first and most appropriate route to overcome the separate titling of the LLCs assets would be by piercing the corporate veil. Appx., 83a; *Florence Cement Co v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011), *see also*, *Lakeview Commons Limited Partnership v Empower Yourself, LLC*, 290 Mich App 503, 510, n 1; 802 NW2d 712 (2010). The standard factors, evidence of the use of the LLC as a mere instrumentality, to commit a wrong, causing unjust loss, would apply. *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004). The Court's citation to *Florence* is telling because the question of whether or not the factors were met was therein one for the trial court,

¹⁵ About here Plaintiff-Appellant is apt to argue that wait, the LLCs *are* held in his name only. The problem with that becomes that the *properties* therein are not, and he cannot both have that cake and eat it too. Just as importantly, the LLCs themselves, as Plaintiff-Appellant has just spent a lot of time arguing, are separate entities, and the parties' agreement contemplates what Plaintiff in his own name owns, not what other entities own. Moreover, if these entities are said to be nothing but a mere instrumentality of Plaintiff-Appellant than, of course, piercing the corporate veil becomes a real possibility.

reviewed for clear error on appeal, rather than for the Appellate Court in the first instance. The Court of Appeals here was not holding that piercing the corporate veil was appropriate but rather, that it *might* be, and advising the trial court that it could consider same in its sound discretion. This was not, at all, error, or even a holding so much as it was raising a question for the trial court to consider.¹⁶

Income

Additionally, as Defendant also pointed out to the Court of Appeals, and as Plaintiff freely stated at the oral argument below, Plaintiff-Appellant's position was that there was zero marital estate, meaning that all of the income earned during the marriage was somehow, and contrary to *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), never part of the marital estate. Once again, this was beyond the prenuptial agreement in this matter, which referred only to "property," not "income." Even though Plaintiff claimed essentially all income (in some years claiming no salary at all) as attributable to the LLCs, besides the LLCs themselves being excluded from the marital estate, *supra*, it is readily apparent that LLC income was effectively brought into the marriage and commingled, as well as being actively managed and thus subject to division under *Reeves*.

More importantly, money from the marital estate, including even what meager income Plaintiff himself claimed, was used to fund the LLCs' purchase of various real properties, meaning that there was a commingling of marital and supposedly separate funds, leading to both

¹⁶ Defendant-Appellee could argue (guess) about just how little corporate formalities were followed here, and argue about how avoidance of the statute was itself a wrong causing injury, but these are really factual questions for the trial court and, on a record that did not even approach them, not ripe for review here.

an inability to separate same in the eventual division, *McNamara v Horner*, 249 Mich App 177; 642 NW2d 385 (2002) and subjecting them to division as part of the marital estate. *Cunningham v Cunningham*, 289 Mich App 195; 795 NW2d 826 (2010).

Third Parties

Beyond piercing the corporate veil there is another similar, though less demanding, route to bringing the LLCs in this matter into the case (though, once again, having erroneously granted summary disposition the trial court did not allow the parties to get this far):

Generally, a court has no authority to adjudicate the rights of third parties in divorce actions. [*Wiand v Wiand*, 178 Mich App 137, 144; 443 NW2d 464 (1989)], p 146. An exception to the general rule exists when it is claimed that a third party has conspired with one spouse to deprive the other spouse of an interest in the marital estate. *Id.* See also anno: Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation, 63 ALR3d 373. The court, therefore, has authority to find that assets were fraudulently transferred to a third party to deprive a spouse of an interest in marital property. It follows that another exception exists for situations like the one before us. One spouse cannot deprive the other of an interest in the marital estate by transferring marital property into a trust for the benefit of a third party.

Thames v Thames, 191 Mich App 299, 302; 477 NW2d 496 (1991).

Similarly here, a party cannot transfer funds (marital income) to third parties (the LLCs) for the benefit of those parties and, if that is done, the trial court gains authority to adjudicate the

interests of those parties due to the fraud. It would not be hard to show conspiracy here between Plaintiff-Appellant and his single member LLCs. Plaintiff-Appellant has suggested that the proper adjudication of this matter would involve allowing the LLCs to be heard from. Plaintiff-Appellant's Brief, p 30. In doing so Plaintiff-Appellant has really nearly acknowledged that *Wiand* and *Thames* apply, meaning the LLCs' properties can be brought into this case due to his (fraudulent) actions in divesting the marital estate of income in their favor.

The Marital Home

As to the Court's question regarding the marital home, the Plaintiff-Appellant admits that the home is owned in his name alone. Plaintiff-Appellant's Brief, p 32. Thus the question of the LLCs does not affect it at all. Moreover, a marital home is always commingled under *Reeves v Reeves*, 226 Mich App. 490, 494; 575 NW2d 1 (1997), meaning that the appreciation it gained during this rather long marriage is properly part of the marital estate. Defendant-Appellee thus makes her claim as to that, the appreciation, under MCL 552.401(1), but not to the premarital value of the home, which was excluded by the antenuptial agreement. *Reeves*.

Issue III

Issue III stricken by
Court order of
12/18/2015.

~~**DID THE TRIAL COURT ERR IN GRANTING SUMMARY DISPOSITION IN REGARDS TO THE ENFORCEABILITY OF THE ANTENUPTIAL AGREEMENT WHERE THERE WERE QUESTIONS OF FACT IN REGARDS TO THE AGREEMENT'S EXECUTION, A CHANGE OF CIRCUMSTANCES THEREAFTER AND ITS OVERALL UNCONSCIONABILITY?**~~

The trial court answered this question: No.

The Court of Appeals answered this question: No.

Plaintiff-Appellant would answer this question: No.

Defendant-Appellee answers this question: Yes.

Standard of Review

The interpretation of a prenuptial agreement, including whether the language of the agreement is ambiguous and requires resolution by the trier of fact, is reviewed *de novo* on appeal. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005).

This Court reviews a trial court's decision relative to summary disposition *de novo*. *Village of Diamondale v Grable*, 240 Mich App 553, 563; 618 NW2d 23 (2000).

A Note on Preservation

"It is well established that an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by the lower court." *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994).

Preliminary Considerations

Plaintiff's motion was filed under MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) tests the factual basis for a claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In reviewing the motion, the trial court must consider the pleadings, affidavit, depositions, admissions, and any other admissible evidence in favor of the non-moving party, granting it the benefit of any reasonable doubt. MCR 2.116(G)(5); *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). A court deciding such a motion may not make factual findings or weigh credibility. *Manning v City of Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

Change of Circumstances

Post-*Reed* the type of change of circumstances sufficient to support non-enforcement of an otherwise valid (something not conceded here, but mentioned for purposes of argument) antenuptial agreement is limited. Here the change of circumstances proffered by Defendant-Appellee involved the infliction of domestic abuse during the marriage, something that can hardly be anticipated by most anyone entering a marriage (unless, of course, premarital abuse was already occurring). The trial court thought that this issue, because it was late arriving, was not sufficiently believable. That, of course, is an obvious *Manning* error, as summary disposition is *not* the place for credibility determinations. Quite frankly, probably because it was going to be the trier of fact, the trial court got a bit sloppy here, and prematurely ruled against Defendant-Appellee on a fact and credibility question on summary disposition.

While the same court was indeed going to be trying the case soon enough, even for it, the difference between summary disposition and trial is obvious; at summary disposition the trial court had not yet *heard* either party as to this issue, but merely seen their written pleadings. Trial courts get ample deference regarding credibility determinations, and rightly so, because they get to *see* and *hear* the parties testify. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Whatever the trial court thought about the domestic violence issue on the pleadings, it could have, and Defendant-Appellee believes surely would have, changed once the trial court had a chance to assess the demeanor of the parties in testifying on this issue.

This issue is relevant here because, obviously enough, Courts should not allow themselves to become involuntary parties to abusive situations. Defendant-Appellee's essential contention was that she was abused during the marriage and that a part of this (beyond the

violence and mental anguish) included her being precluded by Plaintiff-Appellant from working outside the home. To the extent this might have been true, it would have affected the marital estate under the agreement and also whether or not the agreement's enforcement would today be unconscionable. This Court need not determine who is telling the truth here, and, indeed, is poorly positioned to do so, but cannot avoid the fact that there *was* a dispute on this material issue, one the trial court elected to resolve, on credibility grounds, on summary disposition. This was simply error.

Unconscionability

While *Rinvelt* was not specific as to how unconscionability is to be determined, in other contractual contexts Michigan uses the following test: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" *Husbacher & Son, Inc, v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998). Reasonableness is the primary consideration. *Id.*

Michigan law is largely silent as to what *Rinvelt/Brooks* duress is and, indeed, most Michigan cases on unconscionability are, as one might guess, fact specific and focused on a particular clause. *E.g., Mallory v Conida Warehouses, Inc*, 134 Mich App 28, 350 NW2d 825 (1984) . The Court of Appeals has expanded on the idea of unconscionability in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005);

In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294, 302; 412 NW2d 719

(1987). Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. *Allen v Michigan Bell Tel Co*, 18 Mich App 632, 637; 171 NW2d 689 (1969). If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. *Id.* Substantive unconscionability exists where the challenged term is not substantively reasonable. *Id.* at 637-638. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. *Gillam v Michigan Mortgage-Investment Corp*, 224 Mich 405, 409; 194 NW 981 (1923). Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. *Id.*

Clark at 143-144.

By now every reader knows what Defendant-Appellee is going to say. Procedurally, as discussed *supra*, Plaintiff-Appellant and his bevy of lawyers timed the presentation of this agreement perfectly. The rehearsal was about to begin, and the rehearsal dinner was already being prepared. Appx, 67a-68a. The wedding was the day after the next and the gifts had already arrived. *Id.*¹⁷ Substantively, the numbers are completely lopsided, near millionaire to near poverty, with two children. So too is a quarter million to zero annual income differential. In reality, these concerns are likely most properly addressed under MCL 552.23 but, in the absence thereof, once again, if one is to seek a divorce from a court that our Legislature has

¹⁷ Defendant-Appellant also suggests there is duress on these facts under *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 681; 591 NW2d 438 (1998).

statutorily required to consider equity, there is a certain basic level of admittance and exit criteria. All of Plaintiff-Appellant's claims about "living the contract" ignore the fact that he only lived half of it. Paragraph 4 envisioned the creation of a marital estate which, through his own efforts, he managed to, at least in name only, entire avoid.

Plaintiff-Appellant made a great deal of money during the marriage, and used it to buy a great deal of property. He now claims that because he titled it in his name (though not really, as the Court of Appeals found) it is all separate, regardless of when and how it arrived. This is not, in any way, shape or form, just an antenuptial agreement preserving marital assets case. Rather it is a case that asks whether an antenuptial agreement can both overturn (and direct a court to ignore) any number of legislative mandates and also somehow automatically convert clearly marital assets to separate ones. Such an agreement should properly not be able to do either. If it somehow can, however, it ignores law, equity and 17 plus years of actual fact to create a result that appears to be more lopsided than any such case that has made its way to this Court. This case is an outlier and fails to display the level of reasonableness required to avoid a finding of unconscionability.

Conclusion

The trial court here thought the agreement, instead of just defining the questions, presumptively or often definitively answered them. There are issues with the validity of this agreement, to be sure, both in its execution and terms, but even if it is upheld the trial court plainly erred to ignoring both the Legislature's plain mandates of MCL 552.401(1) and MCL 552.23(1) as well as the Court of Appeals decision in *Reed*. Moreover, if the agreement is to be applied, it must be applied fully, and Plaintiff-Appellee's transparent diversion of martial funds

into supposedly separate properties is a charade unworthy of the respect it received below and, more importantly, does nothing to preclude the division of the value of the LLCs, which were not encompassed in the antenuptial agreement. Finally, it is impossible, under this agreement, and quite possibly under *Hanaway*, to have a marital estate of zero dollars. That is, however, exactly what the Plaintiff-Appellant has argued below. That is a bridge too far as, regardless of all of the other questions in this matter, there was undisputedly income, and massive amounts of it, in this marriage, and such should plainly be divided, as it was not encompassed by the language of the parties' antenuptial agreement.

RELIEF REQUESTED

Wherefore, Defendant-Appellant **CHRISTINE A. ALLARD**, respectfully requests that this Honorable Court reverse the Wayne Circuit Court's Judgment of January 13, 2012 and Orders of November 18, 2011, reverse the Court of Appeals Opinion of December 18, 2014 as to the applicability of MCL 552.401(1) and MCL 552.23(1) to antenuptial agreements, affirm the Court of Appeals as to its holdings regarding the LLCs and income being included in the marital estate and grant her such other relief as is consistent with equity and good conscience.

Respectfully Submitted:
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