

STATE OF MICHIGAN
COURT OF APPEALS

MARJORIE A. CORNING,

Plaintiff/Counter-Defendant-
Appellant,

V

LOWELL O. CORNING,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

January 3, 2003

No. 229683

Muskegon Circuit Court

LC No. 98-002738-DO

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff Marjorie A. Corning appeals by right from a judgment of divorce, challenging the property and spousal support awards made by the trial court after the trial court's determination that the separation agreement between plaintiff and defendant was unenforceable. We reverse.

I. Facts

The parties were married in February 1970 and separated in August or September 1991. In March 1992, the parties signed a postnuptial agreement¹ which purported to divide their marital assets and provided that defendant would pay plaintiff a monthly stipend of \$747.00. Defendant paid the monthly stipend each month until plaintiff filed this action in 1998, after which defendant stopped making the payments on advice of counsel. The trial court ordered and defendant paid interim spousal support of \$600 per month while the case was pending.

At trial, plaintiff asserted that the postnuptial agreement governed the distribution of marital assets and the amount of spousal support she should be awarded. The trial court disagreed, finding that although the agreement was valid on its face, it was unconscionable² and

¹ While the agreement is titled "Division of Assets and *Antenuptial* Agreement," there is no dispute that the agreement was reached after the parties had separated. Therefore, the agreement is more properly characterized as a *postnuptial* agreement.

² The trial court found that the agreement was unconscionable because it concluded that plaintiff persuaded defendant to agree to the terms of the agreement without disclosing that she had sold a
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inequitable in its application. In addition, the trial court concluded that the agreement should not be enforced because the circumstances of the parties had changed since the agreement was executed. On appeal, plaintiff argues that the postnuptial agreement the parties executed was valid and enforceable, and that the trial court erred in finding otherwise. We agree.

II. Standard of Review

Postnuptial agreements are contracts, and therefore the review of such agreements is conducted in accordance with the accepted rules of contract construction. *Kresnak v Kresnak*, 190 Mich App 643, 650; 476 NW2d 650 (1991); *Kull v Losch*, 328 Mich 519, 526; 44 NW2d 169 (1950); *Ransford v Yens*, 374 Mich 110, 113; 132 NW2d 150 (1965). Thus, the function of the court in reviewing a postnuptial agreement is to determine what the agreement is and enforce it. *Kresnak, supra* at 650; *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). “[T]he construction and interpretation of [a] . . . contract is a question of law for a [trial] court that this Court . . . reviews de novo.” *Henderson v State Farm Fire and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). A trial court’s findings of fact in support of its construction and application of the contract are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 804-805.

III. Analysis

A postnuptial agreement is valid if it is fair, equitable, and supported by sufficient legal consideration. *Rockwell v Estate of Rockwell*, 24 Mich App 593, 596; 180 NW2d 498 (1970). The trial court concluded that although valid on its face, the agreement between the parties was unconscionable when it was executed because plaintiff did not advise defendant that she had sold the Marion property. We find that as a matter of law, the trial court erred in finding the agreement unconscionable.

The examination of a contract or a specific provision for unconscionability involves a procedural inquiry and a substantive inquiry. *Northwest Acceptance Corp v Almont Gravel Inc*, 162 Mich App 294, 302; 412 NW2d 719 (1987). Procedural unconscionability concerns the “real and voluntary meeting of the minds” of the parties when the contract was executed and considers factors such as: (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the “weaker” party. *Johnson v Mobil Oil Corp*, 415 F Supp 264, 266-268 (ED Mich 1976). The focus of substantive unconscionability is whether the disputed term is reasonable. *Id.*

The record establishes neither procedural nor substantive unreasonableness, such that the agreement is unconscionable. Procedurally, it is apparent from the record that defendant and

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home she owned, the so-called 110 Marion property, on a land contract. The Marion property had been purchased by plaintiff prior to the marriage, and had remained titled solely in her name throughout the marriage.

plaintiff had freely discussed the terms of the agreement, that defendant knew when they discussed the terms of the agreement that plaintiff considered the Marion home her separate property and did not believe he had any interest in the property, that defendant knew of the land contract and should have known that plaintiff would receive the land contract payments whether they continued monthly or were received in a lump sum, and that defendant did not hire an attorney to examine the proposed agreement because he wanted a quick resolution to the matter and felt a moral obligation to plaintiff. Furthermore, defendant agreed that plaintiff would hire the attorney to draft the agreement and that he would pay half the attorney fees. Defendant also had the opportunity to read the agreement before signing it. The record is clear that there was a real and voluntary meeting of the minds between the parties when they signed the agreement.

The agreement was also substantively reasonable at the time it was executed by the parties. The Marion property was sold on land contract in 1987, during the course of the marriage and well before the agreement was executed by the parties, and defendant admitted being aware of the land contract. While the evidence conflicts as to whether defendant was aware that plaintiff had received the \$41,000 balloon payment on the land contract in 1991, it is clear from the record that defendant knowingly acquiesced in the exclusion of the Marion property from the agreement, and the treatment of the Marion property as a non marital asset. Similarly, plaintiff was aware and agreed that defendant's military pension, against which she could assert a right of survivorship, was excluded from the agreement. In addition, after they separated but before the agreement was signed, defendant voluntarily paid a monthly stipend to plaintiff in an effort to equalize their respective incomes. Moreover, defendant agreed that if he filed for divorce he would provide health insurance coverage to plaintiff until she turned age 65. Substantively, then, the agreement cannot be said to be unreasonable, as it is viewed in light of the overall health of the parties and the parties' respective financial positions at the time the agreement was reached.

The trial court also clearly erred when it concluded that the agreement was inequitable because it lacked sufficient consideration, and that enforcement of the agreement would be unfair and unreasonable because the circumstances of the parties had changed since the agreement was executed. Pursuant to the agreement, defendant kept a Nomad trailer, a pickup truck, just over half of the funds in the joint savings account, any IRA that was in his name, and any asset not specifically listed in the agreement, such as his military pension. Plaintiff's release of her right in and control over these above specified assets, together with defendant's release of his right to specified assets, are mutual promises that constitute sufficient consideration to support the agreement. *Rockwell, supra* at 602.

Finally, the trial court erred by finding that the circumstances of the parties had changed sufficiently to render enforcement of the postnuptial agreement to be unfair and unreasonable. In so finding, the trial court cited to defendant's increased health care costs, plaintiff's purported ability to acquire disability benefits to address her health care cost increases, and plaintiff's improved financial condition relative to defendant. The concept of fairness as it pertains to the enforcement of contract agreements has been equated to foreseeability. *Gant v Gant*, 174 W Va 740, 748; 329 SE2d 106 (W Va 1985). Consistent with this principle, it follows that individuals who bargain with one another and endorse postnuptial agreements should be capable of doing so with certainty that the courts will enforce their expressed intent. Consideration of foreseeability is important because courts cannot make contracts, they can only construe them. *Ruddock v*

Detroit Life Ins Co, 209 Mich 638, 654-655 (1920). As such, it is the court's duty to ascertain and enforce the intent of parties at the time of the agreement. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 63 (2000).

To the extent that the factors noted by the trial court are changes in the parties' circumstances, they are insufficient to make enforcement of the agreement unfair or unreasonable because they were not unforeseeable when the agreement was executed by the parties. First, it is noteworthy that the agreement between the parties was initiated at defendant's determination that he no longer wished to live with plaintiff. Second, the parties stated their intention that the agreement would be the basis for a property and alimony settlement to be incorporated in the final Judgment of Divorce. Third, the structure of the agreement was such that defendant would provide support to plaintiff so that she would not have to deplete her assets to support herself. Fourth, the agreement made clear that defendant had his own health insurance coverage and that he agreed to provide coverage under that insurance policy to plaintiff under specified conditions. Fifth, the trial court found that on its face the agreement appeared valid.

For a change of circumstance to be unanticipated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement. *Warren v Warren*, 147 Wis 2d 704, 708-709; 433 NW2d 295 (Wis App 1988). From these facts, it is apparent that the parties contemplated each of their future health and financial circumstances in fashioning the postnuptial agreement. It was reasonably foreseeable that each party would have health care costs that might need to be mitigated by insurance. It was also reasonably foreseeable that each party might make investments that could improve or weaken their respective financial conditions in the future. Accordingly, there is no basis for failing to enforce the agreement as written.

We hold that the separation agreement was enforceable as written. Accordingly, we do not reach plaintiff's other appeal issues.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra