

STATE OF MICHIGAN
COURT OF APPEALS

LINDA CAROL VANHEUSDEN,
Plaintiff-Appellant,

UNPUBLISHED
March 10, 2005

v

PETER GERARD VANHEUSDEN,
Defendant-Appellee.

No. 251644
Oakland Circuit Court
Family Division
LC No. 02-662323-DM

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm.

Plaintiff first argues that the trial court erred when it granted defendant's partial motion for summary disposition, finding that the premarital agreement was valid and enforceable. She contends that she signed the agreement under duress and that its language was ambiguous. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) is properly granted when the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the non-moving party and finds no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Whether contract language is ambiguous is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The primary goal in the construction of a contract is to honor the intent of the parties. *Klapp, supra* at 475. A trial court may grant summary disposition on a contract if its terms are unambiguous, and there is no evidence creating any other issue of fact. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003); *Workers' Disability Compensation Bureau Director v Durant Enterprises, Inc*, 195 Mich App 626, 628-629; 491 NW2d 584 (1992). A contract is ambiguous when its provisions are capable of conflicting interpretations. *Klapp, supra* at 467.

This Court has specifically found that premarital agreements governing the disposition of property upon divorce are generally enforceable, unless (1) the agreement was obtained through

fraud, duress or mistake, or misrepresentation or nondisclosure of a material fact; (2) the agreement was unconscionable when executed; or (3) the facts and circumstances have changed so as to make enforcement of the agreement unfair and unreasonable. *Booth v Booth*, 194 Mich App 284, 288-289; 486 NW2d 116 (1992). The party seeking to avoid enforcement of the agreement has the burden of proof. *Id.* Premarital agreements are subject to the rules of construction applicable to contracts in general. *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948).

To establish the defense of duress, a plaintiff must show that she was illegally compelled or coerced to act by fear of serious injury to her person. *Farm Credit Services of Michigan's Heartland, PCA, v Weldon*, 232 Mich App 662, 681; 591 NW2d 438 (1998). Here, plaintiff has not established that she signed the contract under duress. She alleged that her duress arose from the stress of a 350-person wedding the day following the signing. However, she offered no evidence that when she signed, she feared injury to her person, reputation, or fortune or even that the marriage was contingent on the signing. Further, she was represented by counsel and had five days to review the agreement. In signing the Premarital Agreement, plaintiff acknowledged that she fully understood its contents and that she had signed freely and willingly.

Plaintiff also failed to establish that the Premarital Agreement was unconscionable. When determining whether a contract is unenforceable because it is unconscionable, the court applies a two-prong test, which is stated as follows: "(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.*

At the time that the contract was signed, the parties' bargaining power differed because defendant owned a multi-million dollar business while plaintiff's sole major asset was a condominium. However, plaintiff, as controller and then operations manager of defendant's multi-million dollar corporation, had a sophisticated understanding of financial matters and possessed highly marketable skills. Further, because the agreement did not preclude plaintiff from seeking spousal support and equitable property division, the terms of the agreement were substantively reasonable.

This Court must next consider whether any facts and circumstances have changed since the premarital agreement was signed that would make its enforcement unfair and unreasonable. *Booth, supra*. After the agreement was signed, plaintiff became a full-time mother to the parties' children, who were born after the agreement was signed. However, defendant's employment expert testified that plaintiff's considerable job skills were marketable. Plaintiff did not present contradicting evidence. Additionally, while the value of P.G. Design increased several fold after the parties signed the premarital agreement, the increase in value was foreseeable. These changes do not render enforcement of the agreement unfair and unreasonable.

Plaintiff also argues that because the terms of the agreement were ambiguous, partial summary disposition in favor of defendant was inappropriate. We disagree. Here, the clear intent of the Premarital Agreement was to protect defendant's 83.33 percent interest in P.G. Design, its assets and proceeds from any claim by plaintiff in case of divorce:

This Premarital Agreement sets forth the parties' understanding of how PETER is to retain his interest in P.G. DESIGN, free from any claim of LINDA in the event of a divorce.

* * *

This Premarital Agreement applies only to PETER'S 83.33% ownership interest in P.G. DESIGN ELECTRONICS, INC., . . . which PETER owned before the marriage as well as the assets of that company including any appreciation thereof. This Agreement also applies to property acquired after the marriage if it is acquired from the proceeds from the of all or a part of PETER'S interest in P.G. DESIGN. Neither party is waiving any rights to other earned income or property, either earned or acquired by either party before or during their marriage.

The term "proceeds" unambiguously refers to the "total amount or profit derived from a sale or other transaction." *Random House Webster's College Dictionary* (1997). Because the language of the agreement and the intent of the parties was clear and unambiguous, the trial court properly granted defendant's partial motion for summary disposition.

Plaintiff next claims that the trial court erred when it determined that all monies flowing from the sale of P.G. Design, including \$5 million from a covenant not-to-compete, were proceeds of the sale rather than income. We disagree.

In a divorce action, this Court reviews a trial court's factual findings for clear error. *McNamara v Horner (After Rem)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). A finding is clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that the trial court made a mistake. *Id.* This Court gives special deference to a trial court's findings when based on the credibility of the witnesses, *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

Plaintiff specifically argues that the covenant not-to-compete monies were income because they replaced monies defendant would otherwise have earned over the five years of the non-compete agreement, and that defendant declared to the IRS that the monies were income. Here, the trial court carefully weighed the testimony of expert witnesses from both sides, but found defendant's expert, Charles Esser, "more compelling and persuasive." Esser opined that the economic reality test indicated that the monies were proceeds, and that allocation of the covenant not-to-compete agreement monies as part of the sale of P.G. Design for tax savings did not alter his opinion. Esser noted that defendant's father was paid a share of the non-compete monies, which, in his opinion, indicates that the non-compete monies were actually proceeds of the sale, not defendant's replacement income. Further, that during the non-compete period, defendant earned a salary from his employer, successor to P.G. Design. The trial court did not err in agreeing with Esser that the non-compete monies were proceeds of the sale of P.G. Design and subject to the protection of the Premarital Agreement. Therefore, the trial court's finding that these monies were proceeds was not clear error.

Plaintiff next argues that interest flowing from the non-compete monies was marital property and subject to division. We disagree. The trial court determined that the Premarital Agreement protects defendant's interest in the assets, appreciation and sale proceeds of P.G.

Design, including the monies from the covenant not-to-compete. Interest accruing from that money is also protected under the agreement because it is an asset acquired with the proceeds from the sale of P.G. Design. The trial court considered interest income when it determined defendant's income for purposes of property distribution and spousal support. After considering their earning potentials and standard of living, the trial court awarded plaintiff fifty-five percent of marital property and \$910 per month for four years of spousal support. See *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).

Finally, plaintiff claims the trial court erred when it determined that the Instinet/InstiPro IRA was a pre-marital asset to be awarded solely to defendant. We disagree. The distribution of property in a divorce is controlled by statute. MCL 552.1 *et seq.*; *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). Assets earned by a spouse during the marriage, whether they are received during the marriage or after the judgment of divorce, are properly considered part of the marital estate, and the appreciation of a premarital asset during the marriage is subject to division as part of the marital estate unless the appreciation was wholly passive. *McNamara v Horner*, 249 Mich App 177, 183-184; 642 NW2d 385 (2002). Generally, marital assets are subject to division, but separate assets may not be invaded. *Id.*

Here, the trial court properly determined that the Instinet/InstiPro IRA was defendant's separate property because he owned the IRA before the marriage. The trial court properly awarded plaintiff her share of its appreciation during the marriage.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh