STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KENNETH WALLER.

CRYSTAL WALLER, Personal Representative,

Petitioner-Appellee,

and

KENNETH WALLER, JR.,

Interested Person-Appellee

v

SHARON WALLER,

Respondent-Appellant.

UNPUBLISHED
November 22, 2011

No. 300436
Oakland Probate Court
LC No. 2009-320956-DA

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-appellant, Sharon Waller (hereafter "Waller"), appeals as of right the probate court's order determining that she had no claim or right as a surviving spouse under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., to the distribution of assets held by the Estate of Kenneth Waller (hereafter "decedent"), which was being administered by petitioner-appellee, Crystal Waller, as the personal representative. Waller additionally appeals an earlier order entered by the probate court that required her to pay one-half of the fees and costs charged by a special fiduciary who was appointed by the court to ascertain the extent of the estate's assets and to otherwise investigate issues concerning the assets. We affirm in part and reverse in part and remand.

Underlying the probate court's ruling that disputed assets belonged to heirs of the estate, excluding Waller, was a finding that a handwritten prenuptial agreement executed by decedent and Waller on the day of their marriage several years earlier was valid and enforceable,

effectively creating a waiver of surviving-spouse rights.[1] At the time of decedent's death, he and Waller were separated but remained legally married; decedent died intestate. Crystal Waller and her brother Kenneth Waller, Jr., are decedent's two biological children from a previous marriage. This case arose out of a dispute between decedent's children and Waller over the estate's assets, with the children seeking to enforce the prenuptial agreement and Waller arguing against its validity and enforceability. The prenuptial agreement essentially provided that decedent would retain the rights to all of decedent's property owned by him at the time of marriage in the event of separation or divorce and that decedent's biological children would be entitled to the same property in the event of decedent's death. Waller had reciprocal rights under the agreement to retain the property she brought into the marriage. On appeal, Waller argues that the prenuptial agreement was unenforceable because of an absence of full and fair disclosure of assets at the time of execution, that, assuming the validity of the prenuptial agreement, the children were only entitled to the premarital equity in decedent's house, and that there was a lack of authority and proper cause with respect to the order requiring Waller to pay half of the special fiduciary's fees and costs. Crystal Waller (hereafter "PR") contends that the probate court's rulings and reasoning were legally sound and should be affirmed.

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), citing *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). This Court reviews a trial court's findings of fact in an evidentiary hearing for clear error, although questions and conclusions of law are reviewed de novo. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

A prenuptial agreement is a contract that must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373-374; 792 NW2d 63 (2010). "Under ordinary contract principles if contractual language is clear, construction of the contract

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[1] The prenuptial agreement provided:

> I, Kenneth Waller drafted this contract for both my protection and that of my biological children. All money or properties, accounts, cars, trucks prior to my marriage to Sharon Nettles-Williams belong to myself and biological heirs in the event of divorce, separation, or death. Sharon Nettles-Williams signs this contract without force or pressure placed upon her and has read and understands that in the event of divorce that she will get $5,000.00 each year of marriage to Kenneth Waller and that all money, property, cars that were hers before marriage will continue to be hers after marriage.

is a question of law for the court." *Id.* at 374. Even if inartfully worded or clumsily arranged, a contract is not ambiguous if it fairly admits of but one interpretation. *Id.* "A court may not rewrite clear and unambiguous language under the guise of interpretation." *Id.*

Under EPIC, and specifically MCL 700.2201, a surviving spouse is entitled to a share of an estate as provided in MCL 700.2202, subject to any limitations set forth in MCL 700.2203 to MCL 700.2205. Pursuant to MCL 700.2202(1)(a), a surviving spouse may take an *intestate* share as provided in MCL 700.2102. Under MCL 700.2102(1)(f), the intestate share of a decedent's surviving spouse is "[t]he first $100,000.00, plus 1/2 of any balance of the intestate estate, if none of the decedent's surviving descendants are descendants of the surviving spouse." And again, the surviving-spouse's election and right to an estate share is subject to any limitations enunciated in MCL 700.2203 to MCL 700.2205, with MCL 700.2205 providing as follows:

> The rights of the surviving spouse to a share under intestate succession, homestead allowance, election, dower, exempt property, or family allowance may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separate maintenance is a waiver of all rights to homestead allowance, election, dower, exempt property, and family allowance by the spouse in the property of the other and is an irrevocable renunciation by the spouse of all benefits that would otherwise pass to the spouse from the other spouse by intestate succession or by virtue of a will executed before the waiver or property settlement.[2]

"A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place." MCL 557.28. Prenuptial agreements are generally favored by public policy; however, "there must be fair disclosure of assets by both parties." *In re Benker Estate*, 416 Mich 681, 684; 331 NW2d 193 (1982). In *Benker Estate*, *id.* at 688-689, our Supreme Court observed:

> It is now generally recognized that antenuptial agreements which relate to the parties' rights upon the death of one of the parties are favored by public policy. . . .

[2] MCL 700.291, which was part of the now-repealed Revised Probate Code (RPC) and the predecessor to MCL 700.2205, closely paralleled MCL 700.2205 and contained the same requirement for fair disclosure. MCL 700.291 was repealed by 1998 PA 386, effective April 1, 2000, with MCL 700.2205 becoming effective on that same date under 1998 PA 386, which brought us EPIC and swept away the RPC. Considering that the prenuptial agreement here was executed in July 1998, MCL 700.291 would have been the applicable statutory provision. Ultimately, it makes no difference which statutory provision applies because we are concerned with fair disclosure, a mandate found in both statutes.

* * *

> Such agreements, while recognized as valid instruments, are of a special nature because of the fact that they originate between parties contemplating marriage. This relationship is one of extreme mutual confidence and, thus, presents a unique situation unlike the ordinary commercial contract situation where the parties deal at arm's length.
>
> In order for an antenuptial agreement to be valid, it must be fair, equitable, and reasonable in view of the surrounding facts and circumstances. It must be entered into voluntarily by both parties, with each understanding his or her rights and the extent of the waiver of such rights. Antenuptial agreements give rise to a special duty of disclosure not required in ordinary contract relationships so that the parties will be fully informed before entering into such agreements. The Legislature has recognized the validity of agreements that provide for the waiver of rights by a surviving spouse in the decedent's estate, but specifically requires fair disclosure[.[3]] [Citations omitted.]

In general, the burden of proof is on the party who seeks to invalidate the prenuptial agreement on the basis of nondisclosure. *Id.* at 691.[4] There are some instances in which there is sufficient evidence to raise a rebuttable presumption of nondisclosure. *Id.* at 692. The Court elaborated:

> We do not here adopt a presumption of non-disclosure based merely on a disproportionately small allowance for the wife, but hold that the presumption is properly invoked when the facts are, in general, as follows. One, the antenuptial agreement provides for a complete waiver of all rights of inheritance and rights of election by the widow and does not make any provision for her upon her husband's death. Two, the husband's estate is very ample in comparison to the wife's. Three, the decedent was shown to be rather secretive about his financial affairs, lived very modestly, and gave no outward appearance of his wealth. Four, the agreement makes no reference whatsoever, in general or specific terms, to whether the parties had been fully informed of the property interests held by each other. Five, the widow was not represented by independent counsel. Six, the attorney who drafted the subject agreement testified in a deposition as to his normal procedure in such a matter and stated that he normally would discuss the assets of the parties, but that he did not press the full disclosure matter. Seven, the

[3] The Court proceeded to quote MCL 700.291 of the RPC.

[4] A prenuptial agreement is subject to being voided where (1) it was obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of material fact, (2) it was unconscionable when executed, or where (3) the facts and circumstances have so changed since the agreement was executed that its enforcement would be unfair and unreasonable. *Woodington*, 288 Mich App at 373.

> scrivener testified that he was not concerned with what the widow would get. These factors support the trial judge's decision to invoke the presumption of non-disclosure. [*Id.* at 692-693.]

Accordingly, fair disclosure is required under statute and caselaw in the context of determining whether a prenuptial agreement can be deemed valid and enforceable. The record indicates that there was no formal disclosure of assets by either decedent or Waller at the time of or before the execution of the prenuptial agreement, such as through the presentation or exchange of written asset lists or through a verbal communication or declaration electronically recorded so as to preserve proof of disclosure. The prenuptial agreement itself did not contain an itemization of assets and values, nor did it indicate that disclosure of assets had taken place. Indeed, there is no evidence of even an informal, off-the-cuff discussion between Waller and decedent regarding the nature, extent, and value of each other's assets prior to the execution of the agreement. The probate court essentially found that Waller was sufficiently familiar with the assets held by decedent, making it unnecessary for decedent to redundantly disclose his assets to Waller before the agreement was signed, where the assets had already been effectively "disclosed" to her simply through the evolution of their relationship in which familiarity with each other's property naturally occurred. We agree with the principle that if a party challenging a prenuptial agreement was fully aware of the other party's assets and their value at the time of execution, an argument that there was a failure to fairly and formally disclose assets should fail; the purpose of a disclosure is to make a party aware of what he or she may be giving up in signing a prenuptial agreement.

With respect to assets owned by decedent and Waller at the time the prenuptial agreement was signed, the record reflects that they both had their own houses, subject to mortgages, that they both had 401(k) plans through their respective employers, and that decedent had stocks and bonds. While there was a discussion of multiple cars during Waller's testimony, the testimony was focused on car payments and repairs made during the marriage, so it cannot even be determined from the testimony that decedent owned a vehicle or vehicles at the time the prenuptial agreement was executed. The prenuptial agreement did refer to cars and trucks owned by decedent and Waller, and it is likely that they owned vehicles when the agreement was executed, but there is no evidence concerning particulars. With respect to the vacant lot owned by decedent at the time of death, the record is unclear when and how decedent came to own that parcel.

We note that the inventory filed in the probate court is of no assistance in determining what assets were owned at execution in 1998, given that the inventoried assets pertained solely to those assets held by decedent at the time of death. No one at the evidentiary hearing made an attempt to elicit testimony that fully set forth the assets owned by decedent on the day the prenuptial agreement was signed. Although some assets were discussed, as noted above, there was no indication whether these were the only assets held at the time by decedent. We fathom a guess that more assets existed, considering the likelihood that decedent had, for example, bank accounts and other miscellaneous personal property; however, there was no specific evidence of any bank accounts presented at the hearing, let alone evidence of the balances in any bank accounts, nor testimony concerning other personal property. The prenuptial agreement referred to decedent's "money," but there was no evidence regarding his net worth or how much money decedent had on the date of marriage, which was also the day the prenuptial agreement was

signed. The prenuptial agreement additionally referred to decedent's "accounts," and while this reference to accounts may have pertained to his 401(k) plan or the stocks and bonds, decedent might also have been alluding to some other unknown accounts.

Assuming that decedent's assets at the time of execution were fully comprised of his house, 401(k) account, a vehicle or vehicles, some stocks and bonds, "money," and perhaps other "accounts," as that was the extent of the assets discussed at the evidentiary hearing and mentioned in the prenuptial agreement, Waller testified that she had no knowledge of the value of decedent's house or his stocks and bonds. The record is silent in regard to whether she knew the value of decedent's vehicle(s) and 401(k) account,[5] and assuming that decedent had money and other accounts, there was no testimony that Waller knew about the money and accounts, let alone the value involved. Even were we to assume that Waller would have had a general idea of the home's value based on its dimensions, characteristics, and appearance, along with consideration of the real estate market, one cannot make a comparable assumption regarding the stocks and bonds, vehicles, 401(k) plan, money, and other accounts. At the time of decedent's death in 2008, the value of stocks and bonds amounted to $5,389, assuming that the inventory filed by the PR was accurate, but there is no way of knowing on this record what the value of decedent's stocks and bonds was in 1998, which stocks and bonds may have been altogether different than those held in 2008. Conceivably, decedent could have had stocks and bonds in 1998 of much greater value and then traded some of them away; we just do not know. There was no proof regarding the value of any vehicles owned at the date of marriage.

Examining the issue regarding the presumption of nondisclosure under the seven factors set forth in *Benker Estate*, (1) there was no provision for Waller in the prenuptial agreement, given that there was a complete waiver of her rights of inheritance and rights of election (favors imposing presumption), (2) we cannot determine one way or the other whether decedent's estate was very ample as compared to Waller's estate, considering the lack of evidence on the subject (does not bode for or against imposing presumption), (3) there was no evidence that decedent was secretive about his financial affairs and tried to give a deceptive impression of having less than he actually owned (favors not imposing the presumption), (4) there was no reference in the prenuptial agreement to disclosure or to specific asset identification and values,[6] there was no proof of any formal or informal disclosure of assets, and the record does not support a conclusion that Waller was fully informed or knowledgeable of decedent's assets and their values (favors imposing presumption), and (5) Waller was not represented by counsel relative to the execution of the prenuptial agreement (favors imposing presumption). *Benker Estate*, 416 Mich at 694-697. Factor six concerns whether the attorney who drafted the prenuptial agreement could only

[5] Waller did testify at the earlier hearing in November 2009 that when she and decedent married they designated each other as the beneficiary of their respective 401(k) plans. Although the 401(k) account was ultimately determined to fall outside the reaches of the prenuptial agreement, its value, if known, could conceivably have affected the decision to execute the prenuptial agreement.

[6] "Such a statement is usually included in an antenuptial agreement to avoid a challenge at a later date." *Benker Estate*, 416 Mich at 695.

testify as to his or her normal procedure relative to disclosure without the ability to provide specifics as to what was actually disclosed in the particular case. *Id.* at 697-698. No attorney was involved here, so this factor appears irrelevant, but it would be reasonable to find that it favors imposing the presumption because the factor concerns yet another avenue by which a prospective spouse is provided financial information (disclosure through an attorney) that was not utilized in the case at bar. Factor seven concerns whether the scrivener lacked interest in or cared about whether the spouse challenging the agreement had been given full disclosure, with the lack of interest or caring by the scrivener favoring imposition of the presumption. *Id.* at 698-699. Here, decedent was the scrivener, and the testimony reflected that his main interest was protecting his property for later distribution to his children absent concern or a focus on whether Waller had been fully informed of decedent's assets. Indeed, the prenuptial agreement itself indicated that decedent drafted it "for both my protection and that of my biological children," with no mention of Waller's protection. Factors six and seven, in sum, favor imposing the presumption.

Overall, analysis of the seven factors weighs in favor of imposing the presumption of nondisclosure, and it should have been invoked by the probate court, such that the PR had to overcome or rebut the presumption with proof that Waller had been fully and fairly informed of the nature, extent, and value of decedent's assets. On the record presented, as reviewed above, we conclude that the presumption was clearly not rebutted. With respect to the probate court's ruling, it indicated that there was no showing that decedent was secretive about his financial affairs, nor lived modestly to hide his wealth. We agree with this conclusion, but it is only one of the seven factors to consider in the *Benker Estate* presumption analysis. The probate court also found that Waller testified that she was fully aware of decedent's real property, stocks, bonds, and vehicles at the time of marriage. First, it is simply unclear whether these assets constituted all of decedent's property, especially given the reference to money in the prenuptial agreement. Second, and more importantly, the court failed to acknowledge and consider Waller's testimony that she did not know the value of the house, stocks, and bonds; values were never disclosed to her. And there was no evidence concerning the value of vehicles and the amount of "money" decedent may have had in his possession.[7] The probate court also concluded that decedent was fully aware of Waller's assets; however, the record is not clear regarding what decedent knew relative to Waller's assets, and there was no evidence with respect to what Waller owned beside her house, 401(k), and possibly a car. The probate court pointed out that Waller and decedent continued to pay their respective mortgages and treated their assets separately during the marriage. This is an accurate assessment of the testimony, but we fail to see how it has any bearing on whether there was fair disclosure.

Even if we did not give Waller the benefit of the nondisclosure presumption and instead found that she had the burden of proof to show that the prenuptial agreement was invalid due to an absence of fair disclosure, the record shows that there was no written or oral disclosure of assets, it shows that the prenuptial agreement made no reference to disclosure or to specific asset

[7] In *Benker Estate*, 416 Mich at 692, 695, our Supreme Court spoke of parties being "fully informed as to the value and extent" of property or "fully aware of the value of . . . assets."

identification and values, it shows that Waller had no knowledge regarding the value of decedent's assets, and it shows that Waller simply had no idea of decedent's net worth. Accordingly, Waller established that there was a failure by decedent to make fair disclosure as required by both MCL 700.291 and MCL 700.2205. Additionally, although not argued by Waller on appeal, the testimony reflected that Waller had no understanding and comprehension of her rights as a surviving spouse in the event of the death of her husband-to-be. *Benker Estate*, 416 Mich at 688-689 (prenuptial agreement must be entered into voluntarily by the parties "with each understanding his or her rights and the extent of the waiver of such rights").

On the issue of fair disclosure, we reverse and remand for entry of an order declaring the prenuptial agreement invalid and unenforceable and reinstituting Waller's rights as a surviving spouse to a share of the intestate estate under EPIC.[8]

Waller also argues on appeal that the probate court erred when it imposed legal fees on her absent authority or cause. This argument relates to the special fiduciary's fees and costs, which the court ordered the PR and Waller to pay in equal division. Waller contends that appointing the special fiduciary became necessary after the PR was unable to obtain information on assets, mainly the 401(k), despite being given subpoena power. Waller argues that the estate or county should have borne the whole cost of the special fiduciary's services, as Waller had always complied with the probate court's information requests.[9]

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[8] Given our resolution of this issue, we need not entertain Waller's argument that the prenuptial agreement only permitted decedent's children to receive the equivalent of the premarital equity in decedent's home.

[9] Quoting from Waller's brief, she presents the following seven arguments with respect to why fees and costs should not have been imposed upon her in any amount:

> 1) She had met her burden of proof with regard to the non-estate asset;
>
> 2) She was the winner of the motion and fees should have been awarded to her;
>
> 3) Attorney's fees cannot be imposed unless allowed by law or if they are in the form of sanctions or costs;
>
> 4) Appellant was not empowered under the law to seek information about the affairs of the decedent since she was not the Personal Representative;
>
> 5) Appellant had complied with the court's orders and turned over all of the information in her possession as requested by the Probate Court;
>
> 6) The expense was created on behalf of and for the benefit of the Estate; and
>
> 7) The Special Fiduciary was appointed because the Personal Representative showed that she was unable to perform her obligations on behalf of the Estate.

The probate court had the discretion to appoint a special fiduciary under MCL 700.1309(a). MCL 700.1309(a) provides that "[u]pon reliable information received from an interested person, county or state official, or other informed source, including the court's files, the court may enter an order in a proceeding to . . . [a]ppoint a special fiduciary to perform specified duties." MCR 5.204 additionally provides:

> (A) The court may appoint a special fiduciary or enjoin a person subject to the court's jurisdiction under MCL 700.1309 on its own initiative, on the notice it directs, or without notice in its discretion.
>
> (B) The special fiduciary has all the duties and powers specified in the order of the court appointing the special fiduciary. Appointment of a special fiduciary suspends the powers of the general fiduciary unless the order of appointment provides otherwise. The appointment may be for a specified time and the special fiduciary is an interested person for all purposes in the proceeding until the appointment terminates.

The probate court has jurisdiction "to settle the accounts of a fiduciary" and to determine a party's "liability for the fiduciary's expenses." *In re Shields Estate*, 254 Mich App 367, 369; 656 NW2d 853 (2002).

MCL 700.1309 and MCR 5.204 make clear that the appointment of a special fiduciary is a matter that falls within the realm of a probate court's exercise of discretion. Therefore, questions regarding compensation of a special fiduciary, which would be a necessary part of any appointment, are logically subject to the court's discretion, even though EPIC and the court rule do not expressly address compensation of a special fiduciary. Here, attorney John Yun's appointment as the special fiduciary was made by the probate court primarily because of issues concerning the 401(k) plan and the interplay between the plan and the prenuptial agreement. Even though more competence on the part of the PR may have negated the need for a special fiduciary, the court was also not satisfied with the information presented by Waller. The PR and Waller each had significant interests at stake relative to how the 401(k) would be handled by the court. While both parties had the potential to benefit from the appointment of the special fiduciary, Yun was not specifically appointed for the benefit of either party or to render services on behalf of either party; rather, Yun was appointed to serve and assist the court. See *In re Prichard Estate*, 164 Mich App 82, 86; 416 NW2d 331 (1987) ("To be chargeable against the estate, the attorney [fiduciary] fees must be for services rendered on behalf of and benefitting the estate"). It seems abundantly fair for the probate court to have ordered Waller and the PR to each pay half of Yun's fees and costs, especially given that Yun's work on the case resulted in Waller being awarded the 401(k) account. This is not a case entailing the payment of attorney fees as a sanction or a case where one party was seeking to have his or her attorney fees paid by the other party who lost in litigation. There was no abuse of discretion, as the court's ruling fell within a range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Moreover, Waller's complete lack of citation of relevant authority in support of this argument bodes against her. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

Reversal as to this issue is unwarranted and we affirm the probate court's ruling with respect to the payment of the special fiduciary's fees and costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause