[Cite as *Roseman v. Glanz*, 2010-Ohio-680.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93628

DAVID ROSEMAN

PLAINTIFF-APPELLANT

vs.

DAVID GLANZ, EXECUTOR, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas - Probate Division
Case No. 2008 ADV0137995

BEFORE: Jones, J., Blackmon, P.J., and Boyle, J.

RELEASED: February 25, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Kenneth J. Fisher
2100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2204

ATTORNEYS FOR APPELLEES

Steven B. Potter
Dinn, Hochman, Potter & Levy, LLC
5910 Landerbrook Drive
Suite 200
Cleveland, Ohio 44124

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, David Roseman ("David"), appeals the trial court's granting of summary judgment in favor of defendant-appellee, David Glanz, Executor, et al. ("Glanz" or "the estate"). Finding no merit to the appeal, we affirm.

{¶ 2} David and Shirley Roseman ("Shirley") were married in 1989. Prior to their marriage, the couple executed an antenuptial agreement ("Agreement"), which spelled out their individual property interests, and what claims or rights they would have in each other's estate.

{¶ 3} As is pertinent to this appeal, the Agreement stated:

> "4. David agrees that all property of any nature or in any place belonging to Shirley including dividends, interest, rents, profits, or increments in value thereof, at the commencement of the marriage, or acquired by or coming to Shirley by gift or inheritance during the marriage, shall be her separate property, * * *.
>
> "Except as is specifically provided herein, David hereby waives, relinquishes, and releases all right, title and interests in and to said separate property of Shirley accruing to or vesting in him or which he may otherwise be entitled as her spouse upon virtue of or through termination of the forthcoming marriage of the parties by divorce, * * * including by death.
>
> "If David shall survive Shirley, as surviving spouse he shall not present, make or assert any claim or right to share or participate in any manner in Shirley's estate. As surviving spouse, he hereby * * * waives, renounces, and relinquishes any and all other rights, benefits and privileges of whatever kind or nature conferred upon him by law, to share or participate in Shirley's estate. * * *
>
> "Further as surviving spouse, he hereby waives, renounces and relinquishes any right which he may have by way of dower, statutes of descent and

distribution or other applicable laws the same as though no marriage had ever been entered into between them."

* *

"David acknowledges that he understands that, except for this Agreement, property of Shirley acquired by gift or inheritance during the marriage might be deemed marital property, but that by this Agreement such property is made Shirley's said property.

"7. Notwithstanding any of the provisions to the contrary contained in this Agreement, the parties may, during marriage acquire property, or an interest therein, in both names with or without rights of survivorship. Entry into such arrangement shall in no way be deemed a waiver of or abandonment of this Agreement or any parts thereof."

{¶ 4} In 1992, Shirley executed her Last Will and Testament devising her entire residuary estate to her two sons, David and Steven Glanz, and also executed a Codicil to the will in 1994, devising her entire estate to David Glanz.

{¶ 5} In 2002, Shirley suffered a catastrophic injury at a local hospital. Although she survived, she remained incapacitated for the rest of her life. She and David sued the hospital, and the parties settled the case. Shirley received approximately three million dollars in damages. David received $317,000 for loss of consortium.

{¶ 6} In March 2008, Shirley died. Her will was admitted to probate and Glanz acted as the executor. In June of the same year, David elected to take against the will and filed a complaint for declaratory judgment requesting the court declare the antenuptial agreement void, alleging he had not been apprised of the true nature and extent of Shirley's assets and had been placed under severe pressure to execute the Agreement.

{¶ 7} In March 2009, David withdrew his complaint and filed an amended complaint, which no longer alleged that the antenuptial agreement was invalid. Instead, he sought a declaration that the waiver contained in paragraph four of the Agreement was limited to the property Shirley acquired prior to the marriage or acquired by gift or inheritance during the marriage.

{¶ 8} David then moved for summary judgment, arguing that the waiver in the agreement did not apply to property acquired during the marriage, specifically that the waiver did not apply to Shirley's medical negligence award.

{¶ 9} The estate responded with a motion to dismiss, or in the alternative a motion for summary judgment. The magistrate overseeing the case determined that Shirley and David entered into a valid and binding antenuptial agreement, that David failed to assert any fraud, coercion, or duress in executing the agreement or that he was not fully apprised of the extent of Shirley's assets, and that the Agreement's "unequivocal and unambiguous language" barred David from sharing or participating in any part of the probate estate. The magistrate then recommended that the trial court grant the estate's motion for summary judgment.

{¶ 10} David filed objections to the magistrate's decision and the estate sought to supplement the record. The trial court found that the magistrate correctly decided that the language of the antenuptial agreement deprived David of any right to share in the estate or elect to take against the will and "is not limited by the clause 'acquired by gift or inheritance during the marriage.'"

{¶ 11} The court further found that a review of the estate's motion to supplement the record was not necessary to determine that David could not prevail and dismissed the estate's motion as moot.

{¶ 12} David now appeals, raising one assignment of error for our review. In his sole assignment of error, David argues that the trial court erred by construing the Agreement to constitute a waiver of his rights to claim spousal interest in marital property.

Standard of Review

{¶ 13} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 14} An antenuptial agreement is a contract entered into in contemplation of a couple's future marriage whereby the property rights and economic interests of the parties are determined and set forth. *Rowland v. Rowland* (1991), 74 Ohio App.3d 415, 419, 599 N.E.2d 315. In Ohio, public policy allows the enforcement of antenuptial agreements. *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466, 628 N.E.2d 1343; *Gross v. Gross* (1984), 11 Ohio St.3d 99, 464 N.E.2d 500, paragraph one of the syllabus. "Such agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce." *Gross*, at paragraph two of the syllabus.

{¶ 15} Under Ohio law, parties to an antenuptial agreement are permitted to cut one another off entirely from any participation in the other's estate. *Hook v. Hook* (1982), 69 Ohio St.2d 234, 235, 431 N.E.2d 667; *Daniels v. Daniels*, Franklin App. No. 01AP-1146, 2002-Ohio-2767. The law of contracts will generally apply to the application and interpretation of antenuptial agreements; such is a matter of law to be determined by the courts. See *Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262.

{¶ 16} A court should interpret a contract to carry out the intent of the parties as manifested by the language of the contract. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. When

the terms of the contract are clear and unambiguous, courts may not create a new contract by finding intent not expressed by the terms. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146. In analyzing an unambiguous contract, words must be given their plain and ordinary meaning. *Forstner v. Forstner* (1990), 68 Ohio App.3d 367, 372, 588 N.E.2d 285.

{¶ 17} If a contract, or portions of the contract, are found to be ambiguous, then courts must resort to principles of contract construction. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. "All the provisions of a contract must be construed together in determining the meaning and intention of any particular clause or provision therein." *Legler v. United States Fid. & Guar. Co.* (1913), 88 Ohio St. 336, 103 N.E. 897. Thus, courts will seek to harmonize the meaning of an ambiguous provision with the meaning of the agreement as a whole. *Barton v. Aydin* (Nov. 25, 1981), Cuyahoga App. No. 43453. The intention of the parties to the agreement is paramount, and contracts should be interpreted to carry out that intent insofar as it can be ascertained. *Skivolocki*, at 244; *In re Estate of Taris*, Franklin App. No. 04AP-1264, 2005-Ohio-1516.

{¶ 18} With these principles in mind, we proceed to address the assignment of error.

The Antenuptial Agreement

{¶ 19} David argues that he is entitled to elect against Shirley's estate and that the Agreement does not prohibit him from doing so. Specifically, David

proposes that the language in paragraph four of the Agreement limits his waiver, relinquishment, and release solely to the property acquired by Shirley "by gift or inheritance during the marriage." Thus, he claims, he is entitled to share in the medical negligence settlement funds because that money did not come to her by gift or inheritance. David points to paragraph seven to argue that he and Shirley intended to share marital property, such as the settlement proceeds. If his and Shirley's intent had been to exclude all property acquired during the marriage, the clause "except as specifically provided herein" contained in paragraph four would be moot. We disagree.

{¶ 20} In *Troha v. Sneller* (1959), 169 Ohio St. 397, 159 N.E.2d 899, the Ohio Supreme Court found that "strong and unmistakable language in a prenuptial agreement is necessary to deprive a surviving spouse * * * of the special benefits conferred by statute." Id. at 402, 159 N.E.2d 899. In *Troha*, the Court upon the phrase in the antenuptial agreement that stated: "the said second party * * * covenants and agrees to relinquish * * * any and all rights or claims in or to the estate of the said first party which may arise or accrue by virtue of said marriage." Id. at 399-400.

{¶ 21} In this case, paragraph four of the Agreement states that "[a]s surviving spouse, [David] hereby waives * * * rights, benefits, and privileges of whatever kind or nature conferred upon him by law, to share or participate in Shirley's estate." We agree with the trial court that the language in the

Agreement is "strong and unmistakable," akin to that found in the antenuptial agreement in *Troha.*

{¶ 22} A review of the Agreement shows that Shirley and David clearly intended to address all of their respective marital obligations to each other during their lifetimes and to pass their individual assets to their respective heirs at their deaths. They each intended to give up their spousal right to receive property from the deceased spouse's estate. This is evidenced not only by the Agreement itself, but also by the fact that Shirley executed both her Last Will and Testament and a Codicil to the will after she and David married, and specifically excluded her husband from her will each time. We find that any other interpretation of this document is in opposition to what the parties intended and what the whole of the Agreement reveals. See *Taris*, supra.

{¶ 23} David argues that the specific language in paragraph seven should be given deference over the "boilerplate language" used throughout the rest of the Agreement, and specifically in paragraph four. David, however, does not explain why most of the Agreement should be considered "boilerplate," outside of asserting that it is standard language commonly used in drafting antenuptial agreements. As the court stated in *Taris*, "[m]erely because certain provisions are typically included in contracts of a certain nature alone does not render such provisions insignificant boilerplate." Id. at ¶24. With no evidence to the contrary, we find that paragraph four of the Agreement was deliberately included in the Agreement, and the parties meant what they said therein. See id.

{¶ 24} David received his share of the settlement proceeds in the $317,000 he received for loss of consortium and, per the Agreement, is entitled to no more from Shirley's estate.

{¶ 25} Therefore, we overrule the first assignment of error.

{¶ 26} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR