OA 1-9-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,296

IN RE: Estate of :

RALPH JAMES EDSELL, JR., :

Deceased. :

:

LISA EVERED and JOHN E. EDSELL, as Co-Personal Representatives, :

Petitioners, :

vs. :

MARY JUNE EDSELL, :

Respondent. :

:

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS INVOLVED

STATEMENT OF THE CASE

Because Petitioners have not clearly set forth the statement of the case, Respondent makes the following clarifications.

The widow, MARY JUNE EDSELL (hereinafter "JUNE"), filed a petition to set aside and assign a share of the estate to the pretermitted spouse, by which she sought a share of her deceased husband's estate; to have a life estate in the homestead; and a family allowance as provided for in §§732.102 and 732.301, Fla. Stat. (R.34-35).* By this petition, JUNE alleged, in material part, that her deceased husband, RALPH JAMES EDSELL, JR. (hereinafter "RALPH"), died testate leaving surviving him his spouse, JUNE; that JUNE and RALPH were married February 7, 1981, and were continuously married to and including the date of RALPH's death; that RALPH's Will was admitted to probate and JUNE was not provided for in the Will nor did the Will disclose an intention not to make a provision for her; and that no provision had been made for her by marriage contract (R. 37-39).

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* The record will be referred to as "R" and the testimony as "TT". The exhibits will be referred to as marked in the trial court.

The Personal Representatives answered the petition, admitting these factual allegations and averred by affirmative defenses that RALPH and JUNE had entered into a Pre-Marital Agreement, by which agreement JUNE waived any and all rights to her elective share as the pretermitted spouse, as well as all homestead rights (R. 37-39).

JUNE replied to the affirmative defenses by admitting she signed the Pre-Marital Agreement, but demanded strict proof that the agreement was fair and not the product of overreaching. JUNE further replied to the affirmative defenses by saying that the agreement arose out of a confidential relationship between RALPH and herself and that the dominant party to the agreement, RALPH, possessed superior knowledge and was the greatly disproportionate beneficiary to the transaction.

The trial court ruled, when the case was called for trial, that the burden of proof lay with JUNE. On this state of the pleadings, and after presentment of the evidence by JUNE, the court granted the Personal Representative's motion to dismiss.

In their recitation of the procedural history of the case, Petitioners state that:

> At the request of June's Counsel, however, Judge Gomez did not change his earlier ruling denying the motion, and proceeded to hear testimony and other

evidence offered by June in support of her claim of overreaching and unfairness.

See Page 6 of Petitioners' Initial Brief.

Nowhere in the record is there any statement by JUNE's counsel requesting the trial judge not to change his earlier ruling on the Personal Representatives' motion for judgment on the pleadings, nor does the record disclose any request by JUNE's counsel that she be permitted to continue to present her evidence and witnesses. JUNE's motion requesting that the record be corrected was denied (R. 165-168).

FACTS INVOLVED

Petitioners fail to correctly describe the "June Drake Fund" in their recitation of the facts at Page 3 of the Petitioners' initial Brief. The evidence shows that the "June Drake Fund" is a purely discretionary trust (Petitioners' Composite Exhibit 4), and is not an asset of JUNE's. (See Page 5 of the Last Will and Testament of Perry Rohrer attached to Petitioners' Composite Exhibit 4, R. 175-208).

RALPH's assets at the time of his death as admitted by the parties (TT. 31-45), and as reflected in the inventory (Petitioners' Exhibit 2), were:

Real Property known as The Moorings	$500,000.00
3 automobiles	13,000.00
Furniture	6,000.00
2 boats	6,000.00
Stocks and bonds	92,000.00
Alliance Capital Reserve Fund	24,000.00
	$641,000.00

It should be noted that this inventory does not include RALPH's interest in property jointly held by RALPH and JUNE prior to the marriage.

JUNE's assets, including her interest in property jointly held prior to the marriage, consisted of the following (TT. 16-19):

1978 Buick automobile	$ 1,200.00
Money Market Fund	3,000.00
Savings Account in Florida	3,000.00
Savings Account in Maine	1,000.00
Equity in Maine property	2,500.00
Equity in Florida property	4,500.00
	$15,200.00

The Pre-Marital Agreement, as set forth in Footnote 2 at Page 4 of Petitioners' Brief, is misleading. On the day before the wedding, RALPH wrote out in longhand the Pre-Marital Agreement and gave it to JUNE to type. She did not see RALPH sign the instrument. She signed in his presence, but not before a notary or in the presence of any other witness. She did not see a notary sign the instrument. (TT. 26) JUNE had no opportunity to consult with an attorney nor did any attorney, including RALPH, explain the instrument to her (TT. 27-28). At the time JUNE signed the instrument, she had no knowledge of the law and no experience as a legal secretary (TT. 31-32).

POINTS INVOLVED

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE LUTGERT PRESUMPTIONS OF UNFAIRNESS AND OVERREACHING ARE APPLICABLE IN A PROBATE SETTING

II.

THE DISTRICT COURT IMPROPERLY SUBSTITUTED ITS VIEW OF THE FACTS FOR THAT OF THE TRIAL COURT

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE LUTGERT PRESUMPTIONS OF UNFAIRNESS AND OVERREACHING ARE APPLICABLE IN A PROBATE SETTING

The real question before the court is whether §732.702, Fla. Stat., precludes the surviving spouse from challenging an antenuptial agreement on grounds other than the failure of the deceased spouse to make a fair disclosure of his estate.

§732.702(2), Fla. Stat., provides:

> (2) Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage. (Emphasis added)

The elements to an antenuptial agreement were first addressed by this court in its landmark decision in Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962). The court there had under review the decision of the court of appeal, which failed to follow this court's prior decision in the case of Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940).

In Weeks, this court cited with approval, Murdock v. Murdock, 219 Il. 123, 70 N.E. 57 (1905), which held the rule to be, in part:

> The rule in this state is well settled that a man and woman who contemplate marriage may by an antenuptial contract, if there is full knowledge on the part of the intended spouse of all that materially affects the agreement, settle their property rights in each other's estate. (Emphasis added)
>
> 143 So.2d, at Page 19.

In Del Vecchio, supra, this court held the following principles of law to be applicable:

1. A valid antenuptial agreement contemplates a fair and reasonable provision therein for the wife, or, absent such

provision, a frank disclosure of the husband's worth, or, absent such disclosure, a general and approximate knowledge by her of the husband's property.

2. If the provision made by the agreement is not fair and reasonable, then it should be made to appear that the wife, when she signed, had some understanding of her rights to be waived by the agreement.

3. In any event, she must have signed freely and voluntarily, preferably, but not necessarily a required prerequisite, upon competent and independent advice.

4. Inadequacy of provision for the wife does not in itself vitiate an antenuptial agreement if, when she signed the contract freely and voluntarily, she had some understanding of her rights.

5. The questions of whether she had some understanding of her rights and had a general and approximate knowledge of her future husband's property are matters of fact.

6. In weighing the fairness and reasonableness of the provisions for the wife, the courts will consider, among other things, such factors as tend to show whether the agreement was understandingly made.

7. The basic criterion is the element of fairness between the parties.

8. If, on its face, the contract is unreasonable, a presumption of concealment arises, the burden shifts, and it

is incumbent upon the husband to prove validity.

9. Since the relationship between the parties to an antenuptial agreement is one of mutual trust and confidence and they do not deal at arm's length, they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

10. The test is the adequacy of the knowledge of the woman; she must have had some understanding of her rights and a general and approximate knowledge of his property and resources.

Of all these elements set forth in Del Vecchio, supra, the legislature, by the adoption of §732.702(2), Fla. Stat., changed only the requirement that prior to marriage a spouse must make a full and fair disclosure to the wife of his estate.

JUNE has never made any contention by pleading or otherwise that the Pre-Marital Agreement was invalid on the part of the husband for failure to make a full and fair disclosure of his estate. Her defense to the Pre-Marital Agreement was that it was unfair, that the husband overreached, and that the agreement arose out of a confidential relationship between the parties to which the husband was the dominant party, was possessed of superior knowledge, and was the grossly disproportionate beneficiary of the transaction.

The Personal Representatives would have this Court hold that by the adoption of §732.702,Fla. Stat., a spouse could not attack an antenuptial agreement because the agreement was manifestly unfair or that the spouse overreached in procuring the execution of the instrument. The Personal Representatives argue that the question of fairness is no longer relevant and seem by their Brief to argue that overreaching is not as repugnant as coercion.

In Estate of Roberts, 388 So.2d 216 (Fla. 1980), in which the constitutionality of §732.702, Fla. Stat., was attacked by the widow, this court said:

> The legislature has not abolished the wife's right to sue; it has only altered one of the elements that the court may consider in determining the validity of the antenuptial agreement. Compare Abdin v. Fischer, 374 So.2d 1379 (Fla. 1979). The right to have an antenuptial agreement set aside still exists. For example, if a wife were able to show that her signature on such an agreement had been coerced or otherwise improperly obtained or that she was incompetent at the time she signed, section 732.702(2) would not bar her challenge to the validity of the agreement. (Emphasis added)
>
> 288 So.2d, at Page 217

Is overreaching by an attorney, "otherwise improperly" obtaining the execution of a pre-nuptial agreement?

It is well established that overreaching or abuse of a confidential relationship between prospective spouses makes

an antenuptial agreement voidable. 41 Am.Jur.2d, Husband and Wife, §296, at Page 243; 17 Fla.Jur., Husband and Wife, §47, at Page 109.

Overreaching, particularly on the part of a lawyer such as the decedent RALPH, is at the very least unfair. In a general way, "fraud" is synonymous with "overreaching", and means the taking of an unfair advantage. People v. S. W. Strauss & Co., 285 N.Y.S. 648, 670, 158 Misc. 222.

Whenever independent counsel would be of real assistance to the wife in deciding whether to enter into a transaction with her husband, it is his duty to advise her to seek counsel. 41 Am.Jur.2d, Husband and Wife, §271, at Page 225.

> It is well established in Florida that when a confidential relationship exists and the superior person benefits from that relationship, transfers to or for the benefit of the superior person are presumed to result from the exertion of undue influence. (Citations omitted)
>
> Howland v. Strahan, 219 So.2d 472 (Fla. 3d DCA 1969)

Throughout this court's opinion in Del Vecchio, supra, the word "fairness" predominates.

> Along with public policy considerations this is the very reason why 'fairness' is the polestar in these agreements; and fairness would certainly include an opportunity to seek independent advice and a reasonable time to reflect on the proposed terms.
>
> Lutgert v. Lutgert, 338 So.2d 1111, 1116 (Fla. 2d DCA 1976)

It is true, as the Personal Representatives argue, that Lutgert, supra, deals with an antenuptial agreement in a dissolution of marriage situation, but the court in Lutgert in discussing the substantive unfairness of the agreement concluded:

> . . . the presumption of undue influence and overreaching which we perceive to have been established as a matter of law is not rebutted at all and thus, remaining in the case, it must prevail as though the conclusion to which it points is admitted. The wife is entitled to avoid the agreement.
>
> 338 So.2d, at Page 1117

In determining that a presumption of undue influence or overreaching arises in transactions or contracts between parties in a confidential relationship (that is, parties to an antenuptial agreement), when it is clear that the dominant party thereto is the grossly disproportionate beneficiary of the transaction, the court, in Lutgert, was not making new law. It was merely relying on the principles first enunciated in Weeks, supra.

Here, there can be no doubt but the husband was the disproportionate beneficiary.

As noted by the District Court, the facts in Lutgert, supra, made the finding of disproportionate benefits and coercive circumstances relatively easy. However, the court

said:

> To a lesser degree the benefits to the husband flowing from the agreement in this case were nonetheless grossly disproportionate.
>
> Estate of Edsell, 447 So.2d 263,265 (Fla. 3d DCA 1983)

Here, we have the following elements which require a determination that a presumption of unfairness and overreaching exists.

1. JUNE and RALPH were parties to an antenuptial agreement. All the cases hold that such parties are in a confidential relationship.

2. RALPH is a dominant party.

A. RALPH was a knowledgeable businessman and operated a motel, and JUNE had no business experience.

B. RALPH was an attorney who owed a duty of fair dealing with his unknowledgeable wife, who had no access to an attorney.

> Canon One of the Code of Professional Responsibility; 4 Fla.Jur.(2d), Attorneys at Law, §124, Pages 283-284; Deal v. Migoski, 122 So.2d 415 (Fla. 3d DCA 1960)

3. RALPH received a disproportionate benefit. The record clearly shows that JUNE had no advice or knowledge as to the rights she was giving up (TT. 28). It may be that JUNE was naive in signing this agreement which her attorney husband drew a day before the marriage.

> It seems to be established by the authorities that where it is perfectly plain to the court that one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, that a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness.
>
> Peacock Hotel v. Shipman, 103 Fla. 633, 138 So. 44 (1931)

If, as the Personal Representatives argue, §732.702(2), Fla. Stat., validates all antenuptial agreements, the floodgates for fraud, deceit, overreaching, and duress will be opened.

In the recent case of Moldofsky v. Stregack, 449 So.2d 918 (Fla. 3d DCA 1984), the court, in holding that an antenuptial agreement can be challenged on the grounds of fraudulent nondisclosure, said:

> The legislative purpose in adopting section 732.702(2) was to abrogate the long-established common law rule which required fair disclosure prior to execution of premarital contracts. Estate of Roberts; Weintraub. The legislature could not have intended, however, that the statute preclude a challenge of a contract fraudulently executed. In adopting the nondisclosure provision, the legislature obviously had knowledge of the existing body of law. The law's abhorrence of fraud is so strong that had the legislature intended to abrogate fraudulent nondisclosure as well as simple nondisclosure, it would have done so expressly.

ARGUMENT

II.

THE DISTRICT COURT IMPROPERLY SUBSTITUTED ITS VIEW OF THE FACTS FOR THAT OF THE TRIAL COURT

The Personal Representatives assume by their question that the trial court was correct in dismissing JUNE's case at the conclusion of her evidence. As set forth in the argument to the prior question, there were sufficient facts adduced to raise a presumption of overreaching and that JUNE's signing of the agreement was less than voluntary.

This court has held that a trial judge cannot weigh evidence when ruling on a defendant's Rule 1.420(b), F.R.C.P., motion for voluntary dismissal of a prima facie case by plaintiff. Tillman v. Baskin, 260 So.2d 509 (Fla. 1972).

There can be no doubt that the trial judge here weighed the evidence.

CONCLUSION

The decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was mailed to STEEL HECTOR & DAVIS, 4000 Southeast Financial Center, Miami, FL 33131, and ANDREW M. TOBIN, ESQ., P. O. Box 419, Taverneir, FL 33070, Attorneys for Petitioners, this 1st day of November, 1984.

KIMBRELL, HAMANN, JENNINGS,
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