O/a 1-9-85

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,296

IN RE: ESTATE OF RALPH JAMES EDSELL, JR.,
Deceased,
LISA EVERED et al. and JOHN E. EDSELL, as
Co-Personal Representatives,

Petitioners,

v.

MARY JUNE EDSELL,

Respondent.

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PETITIONERS' INITIAL BRIEF ON MERITS

ON ORDER ACCEPTING DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT

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SUMMARY OF ARGUMENT

This case involves the enforceability of an antenuptial agreement in a probate context. The trial judge determined that a presumption of "overreaching" and "unfairness," enunciated in the dissolution of marriage case of Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976), was not available to the surviving spouse in a probate case. The trial judge also determined that, even if the presumption were available, the wife had not adduced sufficient facts to give rise to the presumption. The Third District reversed, holding that the Lutgert presumption was available, and that the wife had adduced sufficient facts to make the presumption operative. This Court accepted jurisdiction based on conflict with the Second District case of Ellis First National Bank of West Pasco v. Downing, 443 So.2d 337 (Fla. 2d DCA 1983), which held that the Lutgert presumption does not apply in a probate context.

Our argument is two-fold: first, that the Lutgert presumption cannot be applied in the probate context because of the effect of §732.702, Fla. Stat. (1983); and second, because the trial judge assumed the applicability of Lutgert and found the evidence insufficient to raise the Lutgert presumption, the district court erred in substituting its view of the facts for that of the trial judge.

STATEMENT OF THE CASE AND OF THE FACTS

Factual Background

Ralph Edsell ("Ralph") and Mary June Drake ("June") met in 1978, when June was a guest at "The Moorings," a small five-unit resort owned and operated by Ralph in Islamorada, Florida. (R. 157-158; TT. 15). Ralph, a retired lawyer from Long Island, New York, had owned and operated The Moorings since 1975. (R. 158).

Both Ralph and June were divorced when they met. (R. 39). Ralph had three adult children, Lisa Evered, John E. Edsell and Ralph J. Edsell, III, from his first marriage. June had four adult children from her first marriage, which ended in divorce in 1975. (TT. 29-33). Her second marriage, of less than a year, ended in 1978. (TT. 30).

A relationship between Ralph and June blossomed, and they lived together at The Moorings for about three years prior to their marriage. (TT. 30-31). During this period, June helped in running the resort by cleaning cottages, attending to guests and doing yard work. (TT. 36). She also supplemented her income by selling handbags which she painted. (TT. 23).

During this period, Ralph and June bought a home in Monson, Maine, for a purchase price of $21,500. (TT. 26). The down payment of $5,000 was paid one-half by each, and they took title as joint tenants. (TT. 16-17). They also purchased a lot as joint tenants in Islamorada for $9,000, with each party paying one-half in cash. (TT. 17).

In addition to her interest in these properties, June's assets as of the date of the marriage in 1981 included a savings account in Islamorada with an approximate balance of $3,000, a savings account in Monson, Maine, with an approximate balance of $1,000, a 1978 Buick with an approximate value of $1,200, a money market fund with a balance of approximately $3,000, and an interest, as a beneficiary, in the "June Drake Fund" created by the will of her father. (TT. 18-19; 24-25). As of the date of the marriage, the approximate principal value of this fund was $82,000. (TT. 25).

At the time of his death in 1982,[1/] Ralph's total estate was valued at approximately $641,000. His estate consists of three cars with an approximate cumulative value of $13,000, furniture with an estimated fair market value of $6,000, two small boats with an approximate cumulative value of $6,000, various stocks and bonds with an approximate value of $92,000, savings held in the Alliance Capital Reserve Fund with an approximate balance of $24,000, and The Moorings property valued at approximately $500,000. (R. 140-142; TT. 45).

Ralph and June were married on February 7, 1981, in Islamorada. (TT. 28). On the day prior to the marriage, Ralph prepared, and June typed and signed, a "Pre-Marital Agreement." (TT. 26). This agreement specifically provides that "neither

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1/ During the course of the trial proceedings, June did not introduce any evidence as to the financial worth of Ralph as of the date of the marriage in 1981.

party shall have any spouses' claim to the estate of the other." (R. 39).[2/]

The marriage in Islamorada was attended by two couples as witnesses. Prior to the signing of the antenuptial agreement, according to June's testimony, these couples had been invited, a wedding cake had been purchased, a church and a minister had been reserved, and flowers had been ordered. (TT. 28-29).

2/ The Pre-Marital Agreement reads in its entirety as follows:

PRE-MARITAL AGREEMENT

WHEREAS Ralph James Edsell, Jr. and Mary June Drake desire to marry and to enter into a PRE-MARITAL AGREEMENT before said marriage and,

WHEREAS each of said parties has been married before and divorced and,

WHEREAS each of said parties has children by virtue of their former marriage and wish to provide for said children,

NOW THEREFORE BE IT RESOLVED that:

(1) neither party in the event of separation or divorce shall have any claim to alimony or other material benefits that might arise out of said marriage now or in the future and,

(2) neither party shall have any spouses' claim to the estate of the other.

That the parties do freely and voluntarily enter into this PRE-MARITAL AGREEMENT having been fully advised of their rights and knowing fully the rights that each has waived and both parties state that in no way was the entering into this PRE-MARITAL AGREEMENT made a condition of marriage.

IN WITNESS WHEREOF the parties have hereinto set their hands and seals this ____ day of February, 1981.

/s/_____
Ralph James Edsell, Jr.

/s/_____
Mary June Drake

[Witnesses]

[Notarial Inscription]

Seven days after the wedding, as previously arranged, Mr. and Mrs. Edsell went on a cruise with June's mother, her sisters and brother, and their spouses. The cruise was paid for entirely by June's mother. (TT. 37).

After the marriage, June's lifestyle and standard of living did not change. (TT. 37). She continued to help run the small resort in Islamorada and to supplement her income by selling hand-painted handbags. (TT. 23; 36-37).

The Edsells had no children together. Ralph died on April 16, 1982, approximately fourteen months after the marriage.

Procedural history

After Ralph's death, his will was admitted to probate in Monroe County, and his children, John Edsell and Lisa Evered, were appointed co-personal representatives. Thereafter, June filed a petition in the estate proceeding, seeking a pretermitted spouse's share pursuant to §732.301, Fla. Stat. (1983).[3/] (R. 34-35). The estate's response admitted that Ralph's will was executed prior to the marriage of the parties and did not make any provision for June, but raised as an affirmative defense the antenuptial agreement between the parties by which, as noted above, each spouse waived any right

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3/ Because Ralph's children are not June's children, her pretermitted spouse's share would be one-half of the estate. §§732.102(1)(c); 732.301, Fla. Stat. (1983). In addition, of course, she had already obtained the ownership of the jointly-held real estate by operation of law.

in the estate of the other. (R. 37-39). June's reply admitted the execution of the agreement prior to the marriage, but sought to avoid the agreement on the ground that it was unfair and the product of overreaching on Ralph's part. (R. 42).

The estate moved for judgment on the pleadings based upon the argument that the allegations contained in June's pleadings, even if proved, were insufficient to invalidate the agreement. (R. 53-56). This motion was denied (R. 59), and the case proceeded to trial on the issue of the enforceability of the antenuptial agreement.

Trial was held before the Honorable Helio Gomez in Key West on January 3, 1983. In the early stages of the trial, Judge Gomez discussed with counsel his view that the estate's previously-denied motion for judgment on the pleadings should have been granted. (R. 159-160). 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. (R. 160-161).

At the conclusion of June's case, Judge Gomez granted the estate's motion to dismiss June's petition. (TT. 50). As set forth in the final judgment, Judge Gomez' ruling was based on two independent grounds: first, in a probate case the defenses of "unfairness" and "overreaching," developed in dissolution cases such as Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976), are not available as grounds upon which an antenuptial agreement may be attacked (R. 160); and second, even

assuming the applicability of Lutgert, June failed to adduce sufficient facts to raise any presumption of unfairness or overreaching. (R. 161).

On appeal, the Third District reversed. In its opinion, reported at 447 So.2d 263 (Fla. 3d DCA 1983), the district court explicitly relied on the Lutgert presumption of undue influence or overreaching which "places on the husband the burden of coming forth with evidence showing that the Wife's execution of the agreement was voluntary." Estate of Edsell, 447 So.2d at 265. Finding (contrary to the trial court's explicit factual findings) that, under the Lutgert standard, June had adduced sufficient facts to raise a presumption of overreaching, the district court remanded for a new trial. 447 So.2d at 266.

The estate timely filed a motion for rehearing on November 23, 1983. While the motion was pending, the Second District decided the case of Ellis First National Bank of West Pasco v. Downing ("Downing") 443 So.2d 337 (Fla. 2d DCA 1983), which held that Lutgert (also a Second District case) was inapplicable to probate cases because of the effect of §732.702, Fla. Stat. (1983). 443 So.2d at 338. Pursuant to Fla.R.App.P. 9.210(g), the estate filed a Notice of Supplemental Authority with the Third District, bringing the Downing decision to the court's attention. Thereafter, the court scheduled oral argument on the motion. Subsequent to argument, the court issued an order denying the motion and adhering to its original opinion. 447 So.2d at 266. Judge Ferguson, however, dissented, noting that the "majority opinion herein squarely conflicts with

Downing" and stating that he "respectfully disagree[s] with the application of Lutgert to aid the widow in proof of her claim by creating a presumption of undue influence, the effect of which is to shift to the estate of the deceased the burden to come forward with proof that the antenuptial agreement was not improperly obtained." 447 So.2d 266-67.

The estate timely filed a Notice of Appeal to this Court, pursuant to Fla.R.App.P. 9.120(b), requesting this Court to invoke jurisdiction on the basis that the decision of the Third District expressly and directly conflicted on the same question of law with the decision of the Second District Court of Appeal in Ellis First National Bank of West Pasco v. Downing, cited above, and also with the decision of this Court in Estate of Roberts, 388 So.2d 216 (Fla. 1980).

By order dated September 24, 1984, this Court accepted jurisdiction to review the decision of the Third District.

ARGUMENT

In this section, we address the two issues which, we believe, control this appeal. The first issue is whether the Second District case of Lutgert v. Lutgert, cited above, can properly be applied in a probate context.[4/] The Third District, in the instant case, has held that Lutgert does apply;

4/ As our Brief on Jurisdiction demonstrates, the district court was in error in stating that "[t]he parties agree that the Lutgert standard is applicable." 447 So.2d at 265. We have always taken the position that Lutgert cannot be applied in a probate context.

the Second District, in the virtually identical case of Ellis First National Bank of West Pasco v. Downing, cited above, has held that Lutgert cannot be applied in a probate case.

Our second issue need be determined only if this Court determines that Lutgert does apply to this case.[5/] Judge Gomez' final judgment makes it clear that, while he did not believe Lutgert to be properly applicable in a probate context, he nonetheless assumed, for the purposes of the case, that the Lutgert presumption of overreaching was available to June. He found, however, that June had not adduced sufficient facts to raise the presumption. In our second point, we demonstrate that this factual finding was supported by competent, substantial evidence. Given that, it was error for the Third District to substitute its judgment for that of the trial judge.

There is a third issue which we do not address. In the final judgment, Judge Gomez stated his belief that June's bald pleadings of "unfairness" and "overreaching" were insufficient, in a probate context, to state a legal basis for attacking an antenuptial agreement. However, because he had previously denied the estate's motion for judgment on the pleadings, and because June's counsel asked that the trial proceed, Judge Gomez

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5/ Once jurisdiction is properly invoked, of course, this Court may consider any issue which is properly raised. See Fla.R.App.P. 9.040(a); Committee Notes-1977 Revision, Fla.R.App.P. 9.040.

assumed the pleadings to be sufficient, and assumed the applicability of Lutgert. Thus, Judge Gomez' statements concerning pleading requirements are dicta, and we see no need to address them separately.[6/]

I.

The District Court Erred In Holding That the Lutgert Presumptions of Unfairness and Overreaching Are Applicable In A Probate Setting.

In testing the validity of antenuptial agreements, both he courts and the Florida Legislature have established critical distinctions between antenuptial agreements sought to be enforced in dissolution of marriage proceedings, and those sought to be enforced in probate proceedings. The crucial distinction between the two standards is that the burden of proving the invalidity of an antenuptial agreement in a probate proceeding is always on the attacking, surviving spouse, whereas in the divorce setting, in certain instances, the burden shifts to the proponent of the agreement to prove validity.

Even in dissolution cases this burden shifting is unusual. As stated by this Court in Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962), "[o]rdinarily the burden of proof of invalidity of a prenuptial contract is on the Wife alleging

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6/ We hasten to add that we concur fully with Judge Gomez' analysis and conclusion as to this third point. To the extent the issue has any relevance, we rely upon the legal reasoning contained in the trial court's final judgment.

it." 143 So.2d at 20. However, Del Vecchio created a specific exception to this general rule:

> [I]f, on its face, the contract is unreasonable a presumption of concealment arises, the burden shifts, and it is incumbent upon the husband to prove its validity.
>
> 143 So.2d at 20-21.

Thus, if the antenuptial agreement does not contain fair and reasonable provisions for the contesting spouse, a presumption arises that the proponent of the agreement concealed the true extent of his assets, and the burden shifts to him to prove full disclosure.

This presumption originally applied both in dissolution cases and probate cases. In 1974, however, the Legislature adopted §732.702, which provides as follows:

> (1) The right of election of a surviving spouse, the rights of the surviving spouse as intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead, exempt property, and family allowance, or any of them, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead property, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to either from the other

> by intestate succession or by the provision of any will executed before the waiver or property settlement.
>
> (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.
>
> (3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.
>
> §732.702, Fla. Stat. (1983) (emphasis added).

This statute eliminates the requirement of disclosure of assets as a precondition to the validity of antenuptial contracts in probate proceedings. In Estate of Roberts, 388 So.2d 216 (Fla. 1980), this Court confirmed that the requirement of full disclosure, and the correlative presumption of non-disclosure and shifting of burdens in cases where the antenuptial contract does not contain reasonable provisions for the wife, was legislatively changed by §732.702(2). In upholding the constitutionality of this statute, this Court discussed the consequent limited methods by which an antenuptial agreement can be attacked in a probate setting:

> 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 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.
>
> 388 So.2d at 217 (emphasis added).

This Court's statements in Roberts makes clear that the surviving, attacking spouse must be "able to show" coercion, or some other fact which would invalidate the agreement, in order to void a prenuptial agreement. Neither the "fairness" of the agreement, nor the failure of the husband to disclose his assets prior to the signing of the agreement, are relevant. This is not true in the divorce setting, however, where (if the agreement is unfair) disclosure is still required, and where failure to disclose raises a presumption of concealment sufficient to invalidate the agreement. Weintraub v. Weintraub, 417 So.2d 629 (Fla. 1982).

The case of Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976), does not alter the standards for, or burden of proof associated with, attacking the validity of an antenuptial agreement in probate proceedings. In Lutgert, a dissolution of marriage case, the husband was fabulously wealthy, and the wife was a woman of modest means. The husband first mentioned the antenuptial agreement to the wife within twenty-hours hours of the wedding, by which time the following had already occurred:

> Passage had been booked for a honeymoon cruise to Europe; rings had been bought; a trousseau had been bought; all invitations to family and friends had been given; all arrangements otherwise had been made; an ultimatum had been delivered by the husband: "No agreement, no wedding"; and, obviously, there arose a sudden stark awareness of the potential immediate loss of a future life of enormous grandeur.
>
> 338 So.2d at 1116.

Although the wife in Lutgert was fully aware before the marriage that her husband was a man of great wealth, the district court determined the antenuptial agreement should be voided because of involuntariness on the part of the wife. Drawing upon the device of the presumption and burden shifting developed in Del Vecchio with respect to the issue of disclosure, the Lutgert court created a presumption and shifting of burden device with respect to the issue of voluntariness. The district court reasoned that:

> It is well settled, for example, that with respect to the issue of disclosure of the prospective husband's wealth, a disproportionate benefit to the husband in an antenuptial agreement casts upon him the burden of showing that the wife in fact did have full or sufficient knowledge of the husband's wealth. [citing to Posner v. Posner, 257 So.2d 530, 534 (Fla. 1972), and Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962)].
>
> The presumption which arises in these cases operates against the party receiving such benefit and imposes upon him the burden of coming forth with evidence sufficient to rebut it to the extent necessary to avoid its predonderating on the issue to which it relates. [footnote omitted]. We see no reason why the burden on the part of the husband ought be any less with respect to the issue of voluntariness on the part of the wife in entering into such an agreement, than it is with respect to the issue of full disclosure, when there is a grossly disproportionate benefit to him together with sufficient coercive circumstances surrounding the execution of the agreement as to give rise to a presumption of undue influence or overreaching.
>
> 338 So.2d at 1115 (emphasis of court).

This novel presumption and shifting of burdens with respect to the issue of voluntariness in the execution of an antenuptial agreement was not intended to be extended to and should not be applied in the probate setting. The intent of the Lutgert court to confine the voluntariness presumption rule to dissolution cases is manifested by the Second District's subsequent decision in Ellis First National Bank of West Pasco v. Downing ("Downing"), 443 So.2d 337 (Fla. 2d DCA 1983). In Downing, as here, the wife sought to invalidate an antenuptial agreement in the context of the probate proceedings of her late husband. In Downing, as here, the parties had each been previously married and, two days before their wedding, entered an agreement whereby they released all claims against each other's estates. 443 So.2d at 337. In Downing, as here, the wife was not represented by counsel prior to entering the agreement. 443 So.2d at 338.

The Second District reversed the trial court judgment which had set aside the agreement. The basis of the reversal by the Second District was that "the trial court erred in relying on Lutgert v. Lutgert, which deals solely with an antenuptial agreement in the context of a dissolution of marriage action." 443 So.2d at 338.

The policy reasons for confining the Lutgert rule to dissolution of marriage proceedings are obvious. In a dissolution case, such as Lutgert, the husband is alive and able to rebut, by his testimony, any presumption which may arise. In a probate case, by contrast, the husband obviously cannot

respond, and therefore the effect of a presumption of coercion may be practically to guarantee victory for the attacking, surviving spouse. For how, when the husband is dead, is a presumption of coercion to be overcome? Under the rule adopted by the district court below, the trial court is required, based on the wife's account of the circumstances of the execution of the agreement, to presume coercion. Given that antenuptial agreements are ordinarily discussed confidentially between the principals, the death of the husband in essence makes such a presumption irrebutable, because there is no witness for the estate to call to rebut the presumption. A rule which demands such a result comes dangerously close to denying due process to the beneficiaries named in the decedent's will,[7] and is completely at odds with widely accepted legislative and judicial principles.[8]

7/ This Court has held that in order for a statutory presumption to be constitutional, "there must be a right to rebut in a fair manner." Straughn v. K&K Land Management, Inc., 326 So.2d 421, 424 (Fla. 1976). There is no reason why a judicially-created presumption should be held to a lesser standard.

8/ The equities here are also far different than they are in a will contest, where a presumption of undue influence may arise under Estate of Carpenter, 253 So.2d 697 (Fla. 1971). The Carpenter presumption arises when a beneficiary under a will enjoyed a confidential relationship with the decedent and actively procured the bequest. That beneficiary, who is obviously the real party in interest, by definition actively procured the bequest and so is fully aware of the circumstances surrounding the making of the bequest. Here, by contrast, the real parties in interest are the Edsell children, who were not even present for the marriage, let alone the execution of the antenuptial agreement. Thus in a will contest the person burdened with the presumption has some fair chance to rebut it; here the people burdened have no chance whatsoever.

In adopting §732.702, the Legislature determined that antenuptial agreements are to be favored in the probate context. As stated by Judge Ferguson in his dissent below:

> The legislature apparently intended that a spouse seeking to overturn such an agreement after the death of the other spouse carry a heavy burden in proving the invalidity of the agreement.
>
> Edsell, 447 So.2d at 266.

Other courts have likewise recognized that antenuptial agreements should generally be upheld in the probate context, "particularly in view of the fact that generally, as in this case, the complaining wife awaits until death has sealed the lips of her husband before making an attack on the agreement." Cantor v. Palmer, 166 So.2d 466, 468 (Fla. 3d DCA) cert. denied, 168 So.2d 144 (Fla 1964); see also Potter v. Collin, 321 So.2d 128, 132 n.5 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1160 (Fla. 1976).9/ This Court, in Weintraub v. Weintraub, 417 So.2d 629 (Fla. 1982), stated that §732.702 "makes valid all agreements entered into before marriage, even in the absence of disclosure," 417 So.2d at 630, and approved of this blanket validation because of "the difficulty that the estate may encounter in proving disclosure after the death of the wealthy

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9/ Likewise, the Dead Man's Statute, Section 90.602, Fla. Stat. (1983), prohibits testimony, by an interested person, concerning conversations with a decedent "since there is generally no opposing testimony to meet the allegation of the interested claimant and fraud and hardship could result if the surviving party was permitted to testify concerning the oral communication." Law Revision Council Note-1976.

spouse." 417 So.2d at 631. Similarly, in his dissent below, Judge Ferguson approved of the different approaches in the two contexts, stating:

> The policy reasons are obvious. In most cases the only witness to circumstances surrounding execution of the antenuptial agreement is the other party whose lips are sealed by death.
>
> Edsell, 447 So.2d at 266.

Until now, in virtually every case in which the surviving spouse has attacked an antenuptial agreement in a probate setting, the attack has been unsuccessful. Our research has revealed only three reported cases in which the attacking spouse has prevailed. Two of the three cases were decided before the adoption of §732.702, and were based on the "unfairness" of the antenuptial agreement, coupled with lack of disclosure. See Estate of Reed, 354 So.2d 864 (Fla. 1978) and Reese v. Reese, 212 So.2d 33 (Fla. 3d DCA 1968). In both of these pre-§732.702 cases, the courts specifically relied upon Del Vecchio, which - as noted by this Court in Reed - was "supplanted" by §732.702. Reed, 354 So.2d at 866. The only other reported case in which the surviving spouse has successfully attacked the validity of an antenuptial agreement is Moldofsky v. Stregack, 449 So.2d 918 (Fla. 3d DCA 1984). In Moldofsky, the Third District held that the surviving spouse can challenge an antenuptial agreement on the ground of "fraudulent nondisclosure" -- claiming that the decedent affirmatively

misled her as to his actual assets in obtaining her assent. 449 So.2d at 920.[10/] The Moldofsky case does not, however, suggest that the Del Vecchio presumption and shifting of burdens should be employed, even in a fraudulent nondisclosure challenge, in the context of a probate proceeding.

All other reported cases involving an attack on an antenuptial agreement in a probate proceeding, save the instant case, have resulted in a judgment against the attacking spouse. None has employed any shifting of burdens or presumptions against the defending estate.[11/] The courts in these cases require the spouse seeking to overturn the antenuptial agreement after the death of the other spouse to carry a heavy burden in proving the invalidity of the agreement, and justify this burden "in view of the fact that generally... the complaining wife awaits until death has sealed the lips of her husband before she makes an attack on the agreement." Cantor v. Palmer, 166 So.2d 466, 468 (Fla. 4th DCA 1964).

10/ But cf. Coleman v. Estate of Coleman, 439 So.2d 1016 (Fla. 1st DCA 1983). Coleman decides precisely the same issue against the surviving spouse.

11/ The cases are as follows: Estate of Roberts, 388 So.2d 216 (Fla. 1980); Coleman v. Estate of Coleman, 439 So.2d 1016 (Fla. 1st DCA 1983); Flagship National Bank of Miami v. King, 418 So.2d 275 (Fla. 3d DCA 1982); Estate of Garcia, 399 So.2d 486 (Fla. 3d DCA) pet. for rev. denied, 407 So.2d 1103 (Fla. 1981); Topper v. Stewart, 388 So.2d 1270 (Fla. 3d DCA 1980) pet. for rev. denied, 397 So.2d 779 (Fla. 1981); Potter v. Collin, 321 So.2d 128 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1180 (Fla. 1976); Cantor v. Palmer, 166 So.2d 466 (Fla. 3d DCA), cert. denied, 168 So.2d 144 (Fla. 1964).

The Third District erred by importing a presumption of coercion, created in one unusual divorce case,[12/] into the probate area. Under the law of Florida, as established by this Court and the Florida Legislature, the surviving, attacking spouse has the benefit of no presumptions, and has the burden of proving facts sufficient to sustain her claim of overreaching.

As recognized by Judge Ferguson in his dissent below:

> Mary June Edsell, a competent woman who had some experience in running a business with her husband, and had lived with John [sic] Edsell several years before they married, simply failed in her burden to prove that the antenuptial agreement entered into with her husband was improperly obtained.
>
> Edsell, 447 So.2d at 266.

II.

The District Court Improperly Substituted Its View of the Facts for That of the Trial Court.

For reasons set forth above, it is our position that the rather anomalous case of Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976), whatever its vitality in the dissolution of marriage area, is inapplicable in the probate area. However, even if the legal rationale of Lutgert is applicable to probate cases, June's evidence at trial did not satisfy the criteria set forth in Lutgert to trigger a presumption of overreaching and

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12/ We see no particular reason to discuss whether Lutgert was correctly decided. At least, however, it should be confined to its unique facts.

shift the burden of proving voluntariness to the proponent of the agreement. Judge Gomez, assuming the applicability of Lutgert and weighing the facts presented to him on the Lutgert scale, so held: "even if the standards of such cases as Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976) are applicable to this proceeding, the wife has failed to sustain her burden of showing that the facts here fit within the rule announced in Lutgert." (R. 161). The Third District, in reversing this factual determination, improperly substituted its view of the facts for that of a trial judge. Thus, whether Lutgert applies or not, the judgment below must be reversed.

The Lutgert presumption of involuntariness arises only when it is clear that "there is a grossly disproportionate benefit to him [the dominant party] together with sufficient coercive circumstances surrounding the execution of the agreement as to give rise to a presumption of undue influence or overreaching." Lutgert, 338 So.2d at 1116 (emphasis supplied by court). Comparison of the facts adduced by the wife in Lutgert, with the facts adduced by June in the instant case, vividly reveals that Judge Gomez was eminently justified in factually distinguishing the two cases. There simply was no "grossly disproportionate benefit" to either party under this pre-marital agreement, and the circumstances surrounding the execution of this agreement were in no way "sufficiently coercive" to compel the conclusion that June was deprived of her free will.

In Lutgert, as here, the parties had ample opportunity to observe the other's standard of living for a considerable

period of time prior to their marriage to each other. Unlike Ralph, however, Mr. Lutgert was rich as Croesus, with a personal worth approaching $25 million. 338 So.2d at 1114. This wealth, according to the Second District, permitted Mr. Lutgert such luxuries as a palatial mansion directly on the Gulf of Mexico, three luxury motor yachts, a private turbojet airplane, Rolls Royces and Lincoln Continentals, a collection of classic automobiles, staffs of servants and gardeners, trips to Europe and around the world, and so on. 338 So.2d at 1115. Given this, it is hardly surprising that, when Mr. Lutgert proposed marriage, Mrs. Lutgert "ecstatically" accepted. 338 So.2d at 1113. The happy couple then arranged an extended honeymoon cruise on the SS Constitution,[13/] with the wedding to take place at the "Top Flight Room" at O'Hare Airport late the night before the cruise. 338 So.2d at 1114. They proceeded to buy rings, invite the elite of Chicago as guests, purchase a trousseau, procure a judge to perform the ceremony, and so on. 338 So.2d at 1116.

At this point, just before the marriage, Mr. Lutgert and his battery of lawyers produced the antenuptial agreement.[14/] Mrs. Lutgert signed, and thereafter "enjoyed a lifestyle reserved only to the fabulously rich." 338 So.2d at 1114. Ten years later, however, her coach turned back into a

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13/ Paid for, presumably, by Mr. Lutgert, rather than (as here) by his fiancee's mother.

14/ Typed, no doubt, in the lawyer's offices, and not by the future Mrs. Lutgert.

pumpkin when, upon the petition of the husband, the marriage was dissolved. 338 So.2d at 1112. Under the terms of the antenuptial agreement, the wife was to receive only $1000 per month, and was even required to pay her own attorney's fees. 338 So.2d at 1112.[15/]

The Lutgert facts are, to say the least, compelling. In contrast, Ralph's total net worth was less than the value of simply Mr. Lutgert's classic car collection. Mr. Lutgert was a mogul worth $25 million, while the Edsells ran a small Mom and Pop resort in the Keys, with Mrs. Edsell supplementing her income by selling hand-painted handbags. (TT. 15; 23; 36-37).

15/ In addition to the vastly different circumstances regarding the execution of the agreement, it is also worth noting the vastly different results of setting aside the agreement in Lutgert, as opposed to the agreement here. In Lutgert, the result of setting aside the agreement is that a trial judge, weighing the contrasting assets and needs of the parties, can award the wife fair and equitable alimony and, if appropriate, her attorney's fees. §§61.08; 61.16, Fla. Stat., (1983). Here, by contrast, if the agreement is set aside, June will automaticaly get half of Ralph's estate. §732.301, Fla. Stat. (1983). Ralph's three children, whom he was specifically trying to protect in the agreement, will get one-sixth of the estate each.

It is, perhaps, a measure of June's avarice that she is seeking the fifty percent share of a pretermitted spouse, rather than the thirty percent elective share pursuant to §732.207, Fla. Stat. (1983). Both the pretermitted spouse statute, and its counterpart, the pretermitted children statute (§732.302), are based upon a legislative presumption that "failure to provide for [the omitted spouse or children] was through inadvertence or mistake rather than from design...." Hatfield's Estate, 153 Fla. 856, 16 So.2d 57, 59 (1943). Here, obviously, Ralph's failure to make a new will providing for June was absolutely intentional, and there is no policy reason whatsoever that she should be entitled to a pretermitted spouse's share.

The parties here each wanted to protect their modest estates for their respective children (R. 39), while Lutgert makes no mention of children by prior marriage.

Furthermore, noticeably missing from this case are the abundance of coercive circumstances that were inherent in Lutgert. In Lutgert, an ultimatum was delivered and the wife had two choices: she could either sign the agreement and become a princess in a castle with Rolls Royces, airplanes, yachts, gardeners, servants and trips to Europe; or she could refuse to sign and go back to living on $600 per month alimony. As the Lutgert court put it, there arose a "sudden stark awareness of the potential immediate loss of a future life of enormous grandeur" if she did not sign the agreement. Lutgert, 338 So.2d at 1116. Mrs. Lutgert objected to signing the agreement, but "finally reluctantly agreed to sign the agreement after the husband insisted that the wedding would otherwise be called off." 338 So.2d at 1114.

Here, on the other hand, there is not an iota of evidence to suggest that signing the agreement was a pre-condition to marriage. Moreover, even if June perceived the agreement as a pre-condition of the marriage, the fact is that the marriage was no boon for her; as she testified, "her life before and after the marriage was precisely the same." (TT. 37). It is difficult to infer coercion from some unsubstantiated fear that, if she refused to sign the agreement,

she might have to give up cleaning cottages or selling her painted handbags.

The district court seems to have assumed that "disparity of wealth," irrespective of the size of the respective parties' estates, is automatic proof of coercion. This mechanistic view is simply not realistic or appropriate. The circumstances in Lutgert were coercive not merely because of the disparity of wealth, but, more importantly, because of the startling enormity of Mr. Lutgert's wealth. He could, literally, make an offer that few people could refuse. Ralph, by contrast, could offer only a modest, working life at a small resort in the Florida Keys. Equating the two cases, as the district court did, is akin to saying there is no difference between apples and rocks. If it is not within the trial judge's discretion to determine, after hearing June's testimony and considering her other evidence, that Ralph's wealth was insufficient to raise a presumption of coercion, we might as well dispense with trial judges and let the district courts decide all issues based upon affidavits.

Based on the evidence presented at trial, reviewing it in the light most favorable to June, (R. 161), and assuming the applicability of Lutgert, Judge Gomez found that:

> Lutgert is clearly factually distinguishable from the instant case. There is simply not the aura of fabulous wealth hanging over the proceeding here. Rather, in this case both parties were mature adults, with children born

> of prior marriages, and assets of only relatively modest size. They had lived together for three years, and so were under no delusions about each other's wealth. They were planning a modest wedding with only four invited guests. As the Petitioner testified on cross-examination, her life before and after the marriage was precisely the same. In short, the overreaching inherent in the unique facts of Lutgert is simply not present here.
>
> Therefore, even taking the testimony and documentary evidence in the light most favorable to the Wife, the Court finds that the wife has failed to adduce sufficient facts to raise any presumption of overreaching on the part of the husband.
>
> R. 161-162.

A trial court's finding of facts "are entitled to the weight of a jury verdict," Reese v. Reese, 212 So.2d 33, 34 (Fla. 3d DCA 1968), and should have been so treated by the district court. This is as true in deciding whether a presumption arises in an antenuptial contest proceeding as it is in any other area. In Estate of Carpenter, 253 So.2d 697 (Fla. 1971), this Court considered a will contest which involved the presumption of undue influence which arises where the proponent of a will under attack is shown to have actively procured the will and to have enjoyed a confidential relationship with the testator. This Court held that the question whether the presumption arises in a particular case is a factual determination which cannot easily be disregarded or

second-guessed by the appellate courts:

> "Active procurement" and "confidential relationship" are legal concepts operating within a broad sphere of factual situations. Within this sphere, the trier of fact is vested with discretion to determine whether or not the facts show active procurement and/or a confidential relationship. Outside this sphere, the question becomes one to be decided by the trier of law in accord with established rules. The problem posed for our consideration is whether the facts in this case permitted any inference of a confidential relationship and active procurement; if so, we are bound to uphold the finding of the trier of fact; if not, we must conclude that he erred.
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> 253 So.2d at 701.

Similarly, in Del Vecchio v. Del Vecchio, cited above, this Court made it clear that the totality of the circumstances surrounding the execution of the agreement should be considered in determining whether the presumption should be applied:

> If, when the contract is made, the prospective husband was a man of the world and the prospective bride relatively inexperienced then clearly such presumption is indicated. But if, on the other hand, the prospective husband is a commonplace and elderly drab and the prospective bride a worldly-wise and winsome young woman the rule should be applied, if at all, with caution.
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> 143 So.2d at 21.

Here, the same rule requires appellate deference to Judge Gomez' determination that the facts adduced at trial did not give rise to a presumption of coercion. Because the very

existence of the presumption depended upon the trial judge's view of the evidence, and because he viewed the evidence as insufficient to give rise to the presumption, dismissal of June's claim was proper:

> Before the Presumption will arise, the Basic Fact from which the presumption derives must first be proved, or otherwise established in the case.
>
> * * *
>
> If the Basic Fact is in dispute, then the proponent of that fact has the burden of persuading the fact-finder with respect to that fact, if the presumption is to become viable....
>
> Hughes, Florida Evidence Manual, section 55 p. 123 (1st ed.).

Judge Gomez reviewed the facts presented at trial in accordance with the Lutgert standard and found Lutgert to be "clearly factually distinguishable from the instant case." (R. 161). Judge Gomez reached this conclusion after hearing June's testimony and observing her demeanor, after considering all of the evidence submitted by her, and giving her the benefit of every permissible inference. (R. 161). In reversing that determination, the Third District impermissibly substituted its view of the facts for that of the trial judge.

As noted in part I above, the effect of the presumption created by the District Court here is practically to guarantee victory for the wife, because the husband is not alive to rebut the presumption. Given this harsh result, the trial judge

should certainly be given broad leeway in determining whether, on the facts presented to him, any presumption of coercion should arise. Judge Gomez, having heard June's testimony and observed her demeanor, found no legal basis for invoking a presumption of overreaching. That determination is "entitled to the weight of a jury verdict," Reese, 212 So.2d at 34, and should not have been set aside by the district court.

CONCLUSION

The opinion and judgment of the Third District Court of Appeal should be quashed with directions that the cause be remanded to the trial court for reinstatement of the trial court's final judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief on Merit was mailed this 15th day of October, 1984 to Joseph Jennings, Esq., Suite 900, Brickell Center, 799 Brickell Place, Miami, Florida 33131.

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