STATE OF MICHIGAN

COURT OF APPEALS

SYNTHIA J. SHARIFF, Plaintiff/Counter- Defendant-Appellant/Cross-Appellee,	UNPUBLISHED September 18, 2014
v	No. 314824 Saginaw Circuit Court Family Court
SHIRAZ H. SHARIFF, Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.	LC No. 09-003865-DM

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

MURRAY, P.J. (*concurring*).

The majority opinion correctly resolves each issue raised in this appeal. However, I write separately because when the proper case arises we should reevaluate whether that portion of *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005), properly addressed the interplay between (1) enforcement of a valid prenuptial agreement and (2) invocation of the two statutory provisions that allow invasion of separate property, MCL 552.23 and MCL 552.401.

As the majority opinion correctly recognizes, *Reed* stated that property deemed separate pursuant to a valid prenuptial agreement could still be invaded if a trial court found either of the two statutory provisions applicable. *Reed*, 265 Mich App at 156. But the *Reed* Court did not explain why these two provisions would apply to property governed by a prenuptial agreement. Instead, it merely said so. *Id.*

Both statutes, MCL 552.23 and 552.401, clearly allow a court the discretion to invade the separate property of a spouse if the requirements of either statute are met. As noted, the statutes are discretionary, not mandatory. So, on the one hand the Legislature has declared the public policy of this state to be that circuit courts can invade a spouse's separate property when either a spouse contributed to its maintenance and improvements or the spouse's remaining property is not sufficient to meet that person's needs. See MCL 552.23 and 552.407.

On the other hand, the Legislature has also made it clear that prenuptial agreements that are made in contemplation of marriage remain enforceable after the marriage. MCL 557.28. And, starting in at least 1991, our Court has recognized the validity of prenuptial agreements that satisfy a three-part test. *Rinvelt v Rinvelt*, 190 Mich App 372, 380; 475 NW2d 478 (1991).

Indeed, we recently said that a "court should never disregard a valid prenuptial agreement, but should instead enforce its clear and unambiguous terms as written." *Woodington v Shokoohi*, 288 Mich App 352, 372; 792 NW2d 63 (2010).

In many cases there will be a conflict between enforcing a prenuptial agreement pursuant to its plain terms, *id*. at 372, and invading under either statute the property declared separate and off limits by the agreement. It is one thing to invade separate property that one spouse happens to receive through an inheritance, gift or award, while it seems quite another to invade separate property that competent adults have fairly agreed would be off limits to the other, even to the extent of waiving any opportunity to make such a claim.

We have previously held that parties may waive numerous statutory rights, including the right to periodic alimony. *Staple v Staple*, 241 Mich App 562, 568-569; 616 NW2d 219 (2000). They cannot waive rights that directly benefit the children to a marriage, like child support, *Laffin v Laffin*, 280 Mich App 513, 518; 760 NW2d 738 (2008), or child custody, *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), but that is not what the parties were addressing in the agreement. Instead, and similar to *Staple*, the parties were merely agreeing on how their own property would be treated – regardless of the state of the law – in the event of a divorce. And, since the Legislature specifically approves of premarital agreements regarding property, MCL 557.28, an argument could be made that the parties can agree to waive the statutory invasion provisions without violating public policy[1] so long as the agreement otherwise meets the *Rinvelt* test.[2] But *Reed* says that this can be done, and it is binding on us. MCR 7.215(J)(1). As a result, I concur in the majority opinion.

/s/ Christopher M. Murray

[1] In fact, the argument could be made that utilizing either MCL 552.23 or 552.401 to invade property designated as separate and not invadable upon divorce would be contrary to the policy of enforcing these agreements as written, which produces stability in the contracting parties relations. *Rinvelt*, 190 Mich App at 381.

[2] It is also important to remember that for a prenuptial agreement to be valid, the court must find that the circumstances had not so changed as to make enforcement of the agreement unfair or unreasonable. *Woodington*, 288 Mich App at 373. Consequently, if the passage of time has made enforcement of the agreement unfair or unreasonable, the court can do away with the agreement and simply divide all the property held by the parties.