STATE OF MICHIGAN

COURT OF APPEALS

VINCENT P. LIZZIO,

Plaintiff-Appellant,

v

JENNIE D. LIZZIO,

Defendant-Appellee.

UNPUBLISHED
December 14, 1999

No. 203018
Wayne Circuit Court
LC No. 96-608409 DO

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

HOLBROOK, JR., P.J. (dissenting).

I respectfully dissent and would reverse and remand for modification of the judgment of divorce.

Antenuptial agreements are interpreted according to the rules of construction applicable to contracts in general. MCL 557.28; MSA 26.165(8); *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). "'In ascertaining the intention of the parties, the entire agreement, its general scope and purpose and the attendant circumstances at the time of the execution should be considered.'" *In re Hepinstall's Estate, supra* at 328, quoting *Suess v Schukat*, 192 NE 668, 671 (Ill, 1934).

I believe that one of the "attendant circumstances" that sheds light on the parties' intent in the case at hand is the contemporary legal setting that existed when the agreement was drafted and entered into by the parties. As this Court observed in *People v Hart*, 211 Mich App 703; 536 NW2d 605 (1995):

> It is a well-settled legal principle that
>
> > "the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. [*Id.* at 708, n 1, quoting *United States, ex rel Von Hoffman v City of Quincy*, 71 US 535, 550; 18 L Ed 403 (1867).]

I cannot agree with the majority which, in my opinion, disregards the realities of the law as it existed at the time this agreement was entered into. The majority relies on the fact that prior to *Rinvelt v Rinvelt*, 190 Mich App 372; 475 NW2d 478 (1991), no binding precedent existed establishing that an antenuptial agreement entered in contemplation of divorce could not be enforced. The majority notes that while earlier decisions of our Supreme Court observed that antenuptial agreements contemplating divorce were unenforceable as a matter of public policy, such comments were dicta. *Ante,* at ___. I cannot take issue with the accuracy of this observation. However, I do not believe that because the Court's statements are dicta we can turn a blind eye to them. *United States v Bell*, 524 F2d 202, 206 (CA 2, 1975).

Given the relatively few number of cases heard by our Supreme Court, it frequently uses dicta to give guidance on particular issues of law to the lower courts. Cf. *In re Comac*, 402 F Supp 43, 45 (ED Mich, 1975) ("Since docket restraints do not permit the [United States] Supreme Court to pass upon all issues of federal law that arise . . . , the Court frequently paints with a brush somewhat broader than necessary to decide the case immediately before it in order that general guidance may be provided to the court's below."). Indeed, it is an unwise court or practitioner that does not carefully consider the dicta of the State's highest Court, given that such deliberative observations often clearly signal the way the Court will decide an issue when it does come before the court. See Schauer, *Opinions as rules*, 53 U Chi L R 682, 683 (1986) (reviewing Schwartz, The Unpublished Opinions of the Warren Court [1985]) ("[I]t is not what the [United States] Supreme Court held that matters, but what it said. In . . . arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding.").

This is especially so when the dicta at issue is actually a part of the courts reasoning. *Luhman v Beecher*, 424 NW2d 753, 755 (Wis App, 1988). Such dicta is known as judicial dicta, *Johnson v White*, 430 Mich 47, 55, n 2; 420 NW2d 87 (1988), and is arguably as binding on subsequent courts as the precise holding of the case. *Luhman, supra* at 755; Am Jur 2d, § 603, p 299. Cf *Johnson, supra* at 55, n 2 (observing that "unlike obiter dicta, judicial dicta are not excluded from applicability of the doctrine of the law of the case."). At the very least, such judicial dicta should be given considerable weight by this Court, especially when those pronouncements remained unchallenged for decades.

I believe that in at least one of the cases cited by plaintiff, the Court's considered pronouncements on the validity of antenuptial agreements entered into in contemplation of divorce are judicial dicta. In the case *In re Muxlow Estate*, 367 Mich 133; 116 NW2d 43 (1962), the administrator of the estate of Minerva Muxlow appealed the decision of the circuit court upholding the validity of a 1935 antenuptial agreement executed between Minerva and Fred Muxlow. *Id.* at 134. The parties separated in 1937, but never divorced. Fred Muxlow died in 1958, followed a year later by his wife. The lower courts had decided that because the agreement was valid, Minerva's administrator was barred from claiming any interest in Fred's estate. *Id.*

The administrator argued on appeal that the agreement "was entered into in contemplation of a future separation and was, therefore, void because against public policy." *Id.* The *Muxlow* Court then noted that "[t]he general rule is that an 'antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void.'" *Id.*, quoting 70 ALR 826, 827. After reproducing the agreement in the opinion, the *Muxlow*

Court concluded that "there is no language in the agreement which effectively barred either party from claiming an interest in the property of the other had their marital relation terminated prior to the death of one of the parties." *Id.* at 136. The Court then observed:

> Nothing in the agreement can be said to make separation or divorce more attractive to either party, notwithstanding the apparent interpretation given the agreement by the parties themselves following their separation. Had one of the parties to the agreement sought divorce, the chancellor would not have been bound by anything in the agreement in dividing the property of the parties or in awarding alimony and other rights, if in his judgment the equities so required.
>
> Accordingly, since it cannot be held that any effective provision of this agreement provided for, facilitated, or tended to induce a separation or divorce, the agreement was not against public policy, and the judgment of the circuit court affirming its validity is, therefore, affirmed. [*Id.* at 137 (citation omitted).]

I believe the issue of whether an antenuptial agreement entered into in contemplation of a future separation was void as against public policy was squarely before the *Muxlow* Court. In affirming the circuit court, the *Muxlow* Court specifically found that there was nothing in the agreement that barred the legal obligations of the parties had they divorced. Therefore, the Court concluded, the agreement was not against public policy. In essence, this is the reasoning of the *Muxlow* Court:

> 1. Any antenuptial agreement which provides for, facilitates, or tends to induce a separation or divorce is contrary to public policy, and is therefore void.
>
> 2. Any antenuptial agreement that effectively bars either party from claiming an interest in the property of the other upon divorce, by definition provides for, facilitates, or tends to induce a separation or divorce.
>
> 3. The antenuptial agreement at hand does not effectively bar either party from claiming an interest in the property of the other upon divorce, and thus is not presumptively void.
>
> 4. Therefore, because the antenuptial agreement at hand does not provide for, facilitate, or tend to induce a separation or divorce, it is not contrary to public policy, and is not therefore void.

As I read the *Muxlow* Court's decision, I cannot conceive that had they found that the agreement barred either party from claiming an interest in the property of the other upon divorce, that the Court would have not concluded that the agreement was void as against public policy. Therefore, I believe that the issue of the validity of antenuptial agreements made in contemplation of divorce was central to the Court's reasoning and ultimate resolution. Accordingly, and with all due respect to my colleagues, I believe that we cannot ignore this rule of law simply because it does not technically qualify as the holding of the Court.

Although it is a closer question, I also believe that statements found in the case of *Scherba v Scherba*, 340 Mich 228; 65 NW2d 758 (1954), also carry the weight of judicial dicta. The *Scherba* Court was faced with a challenge to the trial court's property settlement. *Id.* at 229. In finding that the trial court did not err in using the parties' antenuptial agreement as a guide for an equitable property division, the Court noted that the lower court's action did not amount to specific performance of the agreement. *Id.* at 231. This judgment was based on the implicit conclusion that by its terms, the agreement was not made in contemplation of divorce. "[N]or would it accord with public policy," the Court observed, "to permit enforcement of an antenuptial agreement if its provisions actually did undertake to govern as to property settlement or alimony in the event of a divorce." *Id.*, citing 70 ALR 826.

At the very least, these cases present a highly persuasive picture of the state of the law on the subject as it used to be. I believe it is a truism that lower courts and practitioners of this State quite often give considerable—if not dispositive—weight to such clearly stated, unequivocal pronouncements of our Supreme Court. Through such dicta, the legal profession can predict and anticipate the direction of the law, and thereby promote uniformity and stability in the application of legal principles. Additionally, for the State's lower courts, the predictive dimension of dicta allows them to avoid the haunting specter of reversal. See Posner, The Problems of Jurisprudence (1990), p 224, n 23 (observing that "most judges are highly sensitive to being reversed, and for them the prediction theory makes good sense to follow.").

Furthermore, I believe our Supreme Court filled in the details of the legal picture sketched in *Muxlow* and *Scerba* by directing readers to the annotation found at 70 ALR 826. The annotation begins by noting "that although marriage is a status depending upon the consent or agreement of the parties, and is in many respects analogous to an ordinary contract, it is a social as well as a private compact, and is affected with a public interest." 70 ALR 826.[1] The annotation further observes:

> It may be stated as a general rule that any antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void.
>
> And the principle that an antenuptial agreement contemplating future separation or divorce is a "bargain about an event which they are not entitled to anticipate," and is void, was recognized by Rigby, L. J., in Marlborough v Marlborough [1901] 1 Ch. (**Eng.**) 165
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> As stated by the court in H. v W. (1857) 3 Kay & J. 382, 69 **Eng.** Reprint, 1157: "By the policy of our law, no state of future separation can ever be contemplated . . . by agreement made either before or after marriage. It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate." [70 ALR at 827-828 (citations omitted).]

That these legal principles had been adopted and spread throughout American jurisprudence is clearly evidenced by the cases cited in the annotation (cited by *Muxlow, supra* at 134). For example, in *Oliphant v Olipanht*, 7 SW2d 783 (Ark, 1928), the court observed:

> "Antenuptial contracts, to be valid, must be made in contemplation of the marriage relation subsisting until the parties are separated by death. . . . If such an agreement is made in contemplation, at the time of its execution, that the parties, or either of them, expect to be divorced, then such an agreement is void ab initio." [70 ALR at 828, quoting *Oliphant, supra* at 788.]

Paraphrasing *Neddo v Neddo*, 441 Pac 1 (Kan, 1896), the annotation observes:

> [A]n antenuptial contract providing that if the parties should separate by abandonment or divorce, the property should belong to the party who owned it before marriage or acquired it thereafter, and waiving any claims of alimony or other rights acquired or liabilities incurred by reason of the marriage, in the event of such separation or divorce, was held to be invalid as contrary to public policy, as inviting disagreements and abandonment, and encouraging a violation of the marriage vow, by making divorce or separation productive of profit to the party having the greater amount of property. [70 ALR at 829.]

Citing Muxlow as authority, *Rinvelt* itself acknowledges that prior Michigan case law established as a "general principle" that antenuptial "agreements are not enforceable if they provide for, facilitate, or tend to induce a separation or divorce." *Rinvelt, supra* at 378. *Rinvelt* also acknowledges that policy concerns once led courts to refuse to enforce antenuptial agreements made in contemplation of divorce. *Id.* at 379. Indeed, *Rinvelt* cites as "well-reasoned" the following statements by the Alaska Supreme Court:

> "Courts uniformly viewed these agreements as inherently conducive to divorce and as allowing a husband to circumvent his legal duty to support his wife . . . .
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> ***
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> [T]he idea that prenuptial agreements induce divorce is anachronistic." [*Id.* at 380, quoting *Brooks v Brooks*, 733 P2d 1044, 1048, 1050 (Alas, 1987).][2]

I read all of this foregoing authority as establishing the following principles, which I believe were strictly adhered to by courts of this State: (1) Any antenuptial agreement that provides for, facilitates, or tends to induce a separation or divorce is void at its inception; (2) antenuptial agreements made in contemplation of death are not void unless they violate the first principle; (3) by definition, antenuptial agreements made in contemplation of divorce violate the first principle, and are thus void.[3] As of today, however, the validity of the third principle has been completely discounted as being, to use a term, "anachronistic."

After carefully reviewing the antenuptial agreement in the context of the above mentioned principles, I conclude that the trial court erred when it ruled that the property settlement was to be governed by the provisions of the antenuptial agreement. Attributing to the parties the knowledge of the law as it existed at the time, I believe the language of the document makes clear that the purpose of the agreement was to secure the inheritance rights of the parties' children in the event of the death of either party during the course of their marriage. See *Muxlow, supra* at 136;[4] *Kennet v McKay*, 336 Mich 28, 34; 57 NW2d 316 (1953). For example, in paragraph four of the above quoted excerpt, *ante,* at ___, the agreement states that it is the parties' "desire to secure to [defendant] . . . the right to make disposition of [her property] . . . according to her will and pleasure so that said property *shall descend to her said children or to the issue of her said children in the manner which she shall designate.*" (Emphasis added.) No where does the agreement make reference to "separation," "divorce," "divorce proceedings," or "property settlement." It was therefore improper for the trial court to base the property settlement on the agreement. *Devault v Devault*, 609 NE2d 214, 216 (Ohio App, 1992) ("If the parties to an antenuptial agreement wish to have it apply in the event of a divorce, they should do so by express agreement."); *Levy v Levy*, 388 NW2d 170, 174-175 (Wis, 1986).

If I were to conclude that it was the parties' intent that the agreement should govern any future property settlement in the event of divorce, I would conclude that to the extent that the agreement implicates such a settlement, it should not be enforced. See *Muxlow, supra* at 137; *Scherba, supra* at 231; 70 ALR at 831 (paraphrasing several cases where only the offending provisions of the agreement were held void); Restatement Contracts, 2d, §§ 178(1), 190(2), pp 6, 54. Because any provision of the agreement that might pertain to divorce was void at its inception, I conclude we cannot now resurrect it because of an ensuing change in the common law. *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 40-41, n 1; 466 NW2d 325 (1991); *Burns Clinic Medical Center, PC v Vorenkamp*, 165 Mich App 224, 227; 418 NW2d 393 (1987) (observing that because a contract was "void as against public policy" at the time it was signed, a subsequent change in the state of the law did not serve to validate the contract). See also Restatement Contracts, 2d, § 179, comment d, p 18 ("Whether a promise is unenforceable on the grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law.").

The majority reasons that because the antenuptial agreement at issue in *Rinvelt* was issued prior to the release of that opinion, we cannot now refuse to enforce the agreement before us on the ground that at the time it was entered into it was contrary to the existing law. *Ante,* at ___. I disagree. The social and policy based underpinnings of the traditional rules against such agreements have undoubtedly changed, and according to *Rinvelt*, had changed as of 1983. However, I am not convinced that the traditional rule that antenuptial agreements made in contemplation of divorce were void ab initio had been so widely discredited as of 1975 that this Court must now affirm the trial court's reliance on the parties' agreement with respect to their property settlement. For example, the *Brooks* Court noted that it was "join[ing] those courts that have recognized" the validity of such antenuptial agreements. *Brooks, supra* at 1050. Of the twenty cases cited by *Brooks* as evidence of this trend,[5] only two, *Posner v Posner*, 233 So2d 381 (Fla, 1970),[6] and *Volid v Volid*, 286 NE2d 42 (1972),[7] predated the year in which the agreement at issue in the case before us was entered into by the parties. The one cited case

that was decided in the same year, *Dingledine v Dingledine*, 523 SW2d 189 (1975), was not released until two months after the parties' signed the agreement at issue. The other seventeen cases were all decided post-1975, with the majority having been decided in the early 1980's. Therefore, without commenting on the propriety of the *Rinvelt* Court's decision to apply its holding to an antenuptial agreement written eight years prior, I believe this Court is not bound by either propriety or authority to now reach back nearly a quarter of a century to validate an antenuptial agreement written eight years before the agreement at issue in *Rinvelt*.

Accordingly, I would reverse and remand for modification of the judgment of divorce.

/s/ Donald E. Holbrook, Jr.

[1] The annotation is preceded by a reproduction of *In re Duncan's Estate*, 285 P 757 (Colo, 1930). The *Duncan's* Court concluded its opinion with the following strongly worded denunciation:

> The marriage relation lies at the foundation of our civilization. Marriage promotes public and private morals, and advances the well-being of society and social order. The sacred character of the marriage relation is indissoluble, except as authorized by legislative will and by the solemn judgment of a court. It cannot be annulled by contract, or at the pleasure of the parities. [*Id.* at 785.]

[2] Referring to the *Brooks* decision, the *Rinvelt* Court observed:

> We agree with this well-reasoned analysis and hold that antenuptial agreements governing the division of property in the event of divorce are enforceable in Michigan. . . . Further, we view the limitations with regard to such agreements as set forth in *Brooks* to be consistent with prior Michigan law governing antenuptial agreements after death. Accordingly, we now apply these principles and limitations to antenuptial agreements governing the division of property in the event of divorce. [*Rinvelt, supra* at 382.]

I note that the entire discussion from *Brooks* that is quoted and relied upon by the *Rinvelt* Court was not raised by the parties in *Brooks*, *Brooks, supra* at 1048, and thus does not even meet this jurisdiction's definition of judicial dictum. *White, supra* at 55, n 2.

[3] In *Brooks*, the Alaska Supreme Court observed that antenuptial agreements made in contemplation of divorce were "*until recently, . . . held to be presumptively invalid*." *Brooks, supra* at 1048, n 4 (emphasis added).

[4] The antenuptial agreement in *Muxlow*, included the following language, which is similar to language found in paragraph three of the excerpt of the agreement in the case at hand:

> THEREFORE, in consideration of the mutual agreement of said parties . . . it is hereby mutually agreed . . . that each of them shall release and relinquish and do hereby release and relinquish to the other any and all claims of any kind and nature in and to the property, both real and personal, of the other party which includes any claim of dower

> or courtesy and any right or claim which might accrue to them upon death of the other . . . and includes any claim against any property now held by said parties or which they may hereafter acquire. [*Muxlow, supra* at 135.]

[5] *Brooks, supra* at 1050, n 16.

[6] *Brook* observes that *Posner* is "[t]he case generally considered to mark the judicial watershed on prenuptial agreements." *Id.* at 1049, n 7. The first and only time *Posner* was cited in a published opinion of this Court or the Michigan Supreme Court was in *Rinvelt*, where it appears in the *Brooks* excerpt. *Rinvelt, supra* at 381.

[7] This decision has never been cited by a published opinion of Michigan's appellate courts.