STATE OF MICHIGAN

COURT OF APPEALS

EARL H. ALLARD, Jr.

Plaintiff/Appellant

Court of Appeals No. 308194
(On remand: S Ct No. 150891)

-v-

CHRISTINE A. ALLARD

Defendant/Appellee

Rebecca Shiemke (P37160)
Gail M. Towne (P61498)
Liisa R. Speaker (P65728)
Anne L. Argiroff (P37150)
Judith A. Curtis (P31978)
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AMICUS CURAE BRIEF OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION

This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws. The position does not necessarily represent the policy position of the State Bar of Michigan. These matters are within the jurisdiction of the Family Law Section.

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STATEMENT OF JURISDICTION

On December 18, 2014, this Court issued its Opinion. *Allard v Allard*, 308 Mich App 536 (2014). Plaintiff-Appellant appealed to the Michigan Supreme Court. The Michigan Supreme Court granted leave to appeal on June 10, 2015 and requested amicus briefs from various sections of the State Bar of Michigan, including the Family Law Section. *Allard v Allard*, 497 Mich 1040 (2015). On May 25, 2016, the Michigan Supreme Court remanded the case to this Court as discussed in this brief. See *Allard v Allard*, 499 Mich 932 (2016). In its June 30, 2016 scheduling order, this Court requested amicus briefs.

STATEMENT OF QUESTIONS PRESENTED

Are parties prohibited from waiving a trial court's statutory authority and discretion to invade separate property under MCL 522.23 and MCL 552.401 and likewise cannot waive a trial court's statutory authority and discretion to award spousal support as deemed appropriate? Even assuming parties could waive such authority, the prenuptial agreement did not contain such waivers.

Amicus answers Yes.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of approximately 3,000 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Council.

The Council provides services to its membership in the form of educational seminars, the monthly *Family Law Journal* (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing amicus curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case involves the interpretation of the antenuptial agreements and whether or not an antenuptial agreement can waive certain statutory rights to separate property and support in a divorce or separate maintenance action. The Family Law Section presents its position on the issues as requested by this Court in its June 30, 2016 Order.

OVERVIEW

On May 25, 2016, the Michigan Supreme Court remanded *Allard v Allard*, 308 Mich App 536, 867 NW2d 866 (2014), to this Court in an order which includes various holdings as well as instructions to address two specific issues concerning prenuptial agreements. In part, the Supreme Court vacated the portion of this Court's decision which held that the invasion statutes, MCL 552.401 and MCL 552.23(1), could not be implemented when there is a prenuptial agreement barring *invasion* of separate property. In addition, the Supreme Court remanded to this Court to determine "whether parties may waive the trial court's discretion under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement… and if so, whether the parties validly waived MCL 552.23(1) and MCL 552.401 in this case." *Allard v Allard*, 499 Mich 932; 878 NW2d 888 (2016).

While the case was pending before the Michigan Supreme Court, amicus submitted a brief on behalf of its membership. Amicus argued that the Court erred when it enforced the prenuptial agreement contrary to express statutory provisions, including MCL 557.28 which permits prenuptial agreements "relating to property," not spousal support or attorney fees. Amicus also questioned whether a prenuptial agreement barring invasion of separate property is proper under MCL 552.23(1) and 552.401 which grants trial courts discretion to invade separate property. Further, amicus argued that even if prenuptial agreements trump the statutory provisions regarding invasion, the prenuptial agreement must explicitly state the parties' express consent to waive their statutory right to invasion of separate property and described elements of a valid waiver.

On June 30, 2016, this Court issued an order permitting the parties to file supplemental

briefs in response to the Supreme Court order and invited the Family Law Section and Business Law Section to file amicus curiae briefs.

STATEMENT OF FACTS

Plaintiff Earl H. Allard, Jr. and Defendant Christine A. Allard were married on September 11, 1993. Approximately ten (10) days prior to the wedding, Earl Allard gave Christine Allard a draft of an antenuptial agreement dated August 25, 1993.

Christine Allard did not consult with an attorney prior to signing the antenuptial agreement. She did discuss the agreement with a lay person, her father, who had signed an antenuptial agreement prior to his second marriage

On September 9, 1993, two days prior to the wedding, the same day as the rehearsal dinner, Earl Allard reminded Christine Allard that there would be no wedding if she did not sign the antenuptial agreement. Earl Allard drove Christine Allard to Attorney Carlisle's office where the agreement was signed. The agreement -- dated September 9, 1993-- was essentially identical to the August 25, 1993 draft except the language "after taking into account the advice of his or her own legal counsel" was deleted.[1]

The prenuptial agreement granted each party sole ownership in their separate property, including the appreciation of separate property during the marriage and property "acquired in either party's individual capacity or name during the marriage." *Id.* at 540. The agreement allowed other property acquired during the marriage to be divided 50/50, in exchange for a complete waiver of claims to "alimony, support, property division, or other rights or claims of any kind, including legal fees incident to a divorce." *Id*. at 541.

[1] The agreement was drafted at the direction of Earl's father by Attorney John Carlisle. Mr. Carlisle had been summoned to the hospital where Earl's father was being treated for lung cancer in August, 1993 and directed to prepare antenuptial agreements for Plaintiff and his brother. Plaintiff's father had informed Plaintiff that while he intended to leave him a substantial inheritance in the event of his death, he would not do so unless an antenuptial agreement was signed prior to the marriage to Christine Allard.

Mrs. Allard worked at two (2) different advertising companies during the first several years of the marriage earning approximately $30,000 per year. She left the workforce in 1999 after becoming pregnant with the parties second child based upon party agreement. The husband acquired property and real estate holdings throughout the marriage. *Id*. at 543. The only asset owned jointly was a single bank account. *Id.*

In July 2010, after more than 16 years of marriage, Earl Allard filed a complaint for divorce. He sought to enforce the prenuptial agreement. *Id*. at 544. Mrs. Allard asked that the trial court invade separate property, relying on MCL 552.19, MCL 552.23, and MCL 552.401. *Id.* The trial court enforced the agreement and declined to invade the husband's "separate" property under either statute, reasoning that "if it allowed such an invasion to take place, then the right to freely contract would be jeopardized." *Id*. at 546. The trial court divided the property based on whose name the property was titled. *Id.* The trial court also denied spousal support based on the prenuptial agreement waiver. *Id.* The effect of the trial court's ruling was to award assets in excess of $900,000.00 to the Husband, and $95,000.00 to the wife.

In a published opinion, the Court of Appeals stated that the only way to set aside a prenuptial agreement is when it is based on fraud, duress, unconscionability, or changed circumstances. *Id*. at 548, citing *Reed v Reed*, 265 Mich App 131, 142-143; 693 NW2d 825 (2005). The Court of Appeals declined to reverse on any of those grounds. The Court of Appeals further rejected the wife's argument that the trial court could invade separate property under MCL 552.23 and MCL 552.401. After reciting Michigan common law about equitable division of marital property, the Court turned its attention to contract law and the overriding principle that "parties who negotiate and ratify antenuptial agreements should do so with the confidence that

their expressed intent will be upheld and enforced by the courts." *Id.* at 556, quoting *Reed*, 265 Mich App at 145. After referencing the two statutory exceptions to the principle of non-invasion of separate estates – MCL 552.23 and MCL 552.401 – the Court of Appeals disagreed that "these statutes allow a party to invade the other spouse's separate estate contrary to the terms of a valid antenuptial agreement." *Id.* at 558. This Court relied on *Reed*, which concluded that the trial court erred by not enforcing a valid prenuptial agreement and by including separate property in the marital estate. *Id.* at 559. The Court of Appeals also rejected the "*obiter dictum*" from *Reed* which suggested the reason the trial court need not consider the invasion statutes embodied in MCL 552.23 and MCL 552.401 was because there were not "factual findings that one of the two statutory exceptions permitting invasion of separate property was applicable." *Id.* at 559. The Court of Appeals, thus, focused on the plain language of the agreement, ostensibly as authorized by MCL 557.28. This Court concluded that the prenuptial agreement in *Allard* was valid and enforceable. *Allard v Allard*, 308 Mich App 536, 594 NW2d 143 (2014).

Plaintiff-Appellant appealed to the Michigan Supreme Court. The Michigan Supreme Court granted leave to appeal on June 10, 2015 and requested amicus briefs from various sections of the State Bar of Michigan, including the Family Law Section. *Allard v Allard*, 497 Mich 1040 (2015). On May 25, 2016, the Michigan Supreme Court remanded the case to this Court as discussed in the Argument portion of the brief. See *Allard v Allard*, 499 Mich 932 (2016). In its June 30, 2016 scheduling order, this Court requested amicus briefs.

ARGUMENT

Parties cannot waive a trial court's statutory authority and discretion to invade separate property under MCL 522.23 and MCL 552.401 and likewise cannot waive a trial court's statutory authority and discretion to award spousal support as deemed appropriate. Even assuming parties could waive such authority, the prenuptial agreement did not contain such waivers.

Standard of Review: Questions of law, including constitutional questions, are reviewed *de novo*. *Burba v Burba*, 461 Mich 637, 647, 610 NW2d 873 (2000). See also *Auto Club v General Motors*, 217 Mich App 594, 598, 552 NW2d 523 (1996) (applying *de novo* review to interpretation of court rules).

A. Parties to a prenuptial agreement cannot waive a trial court's statutory authority and discretion to invade separate property or to award spousal support.

The Supreme Court's remand order asks whether parties have the power to waive the trial court's statutory discretion and authority under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement. This question concerns not just the trial court's discretion and authority to invade separate property when it deems that appropriate under sections 23 and 401, but also its authority and discretion to award spousal support under MCL 552.13 and other provisions of the Divorce Act.

The Supreme Court order also suggests that this Court reconcile any apparent conflict between this Court's decision in *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000), with the Supreme Court's decision in *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305 (1999).

Staple arose from post-divorce litigation over the parties' statutory right to seek modification of alimony under MCL 557.28. The question in *Staple* was whether the parties could agree to waive in a consent judgment of divorce **their continuing statutory right to**

modify spousal support. This Court said "yes," but required that any such waiver meet a test to ensure that the parties were fully informed in forgoing their statutory right:

> Without prescribing any "magic words," we hold that to be enforceable, agreements to waive the statutory right to petition the court for modification of **alimony must clearly and unambiguously set forth that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding, and nonmodifiable.**

Staple, 241 Mich App at 581, emphasis added.

Omne arose from a civil lawsuit and the parties' ability to determine in their lease agreement the venue of later litigation over the contract. The plaintiff later sued in the venue identified in the contract, and defendant sought to move the venue. The trial court denied the defendant's motion, but the Court of Appeals reversed, holding that the "Legislature has the power to establish venue" and that **"contractual venue provisions are not binding on Michigan courts.**" *Omne*, 226 Mich App 397, 407; 573 NW2d 641 (1997) (emphasis added).

The Supreme Court examined the Michigan venue statutes, and concluded that the parties could not usurp the legislature's authority to determine venue and its grant of discretion or authority to the trial courts to determine venue:

> We believe it is unnecessary to look beyond the language of the statutes to address the question whether parties may contractually agree to venue. **Since the Legislature declined to provide that parties may contractually agree to venue in advance, we decline to read into the statute a provision requiring enforcement of such agreements. *Ramsey, supra* at 314 [*In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998)].** Otherwise stated, we need not, and consequently will not, speculate regarding legislative intent beyond the plain words expressed in the statute. *Schnell, supra* at 310 [*In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995)].

Omne, 460 Mich at 311-312.

In *Omne*, although it was unnecessary to look beyond the language of the statutory venue

provisions, the Supreme Court examined the related personal jurisdiction statutes which it found supported its conclusion. The Court relied on the venue and personal jurisdiction statutes being *in pari materia*: and accordingly found:

> Unlike the statutory provision regarding venue, personal jurisdiction statutes expressly permit individuals and corporations to consent to personal jurisdiction. ... Had the Legislature intended to enforce contractual agreements regarding venue, it would have included such a provision in the statutory venue provisions.

Id at 312-314.

The Supreme Court concluded that the trial courts have the power to change venue if the venue becomes improper, MCR 2.223(A)(2), and that **allowing the parties to agree to venue in a contract would improperly abrogate trial court authority to exercise this power and order a change in venue on its "own initiative."** *Omne*, 460 Mich at 314.

Staple and *Omne* differ in a significant way. *Staple* addressed the parties' ability to enter into a divorce settlement to "forgo ***their*** *statutory right to petition* [after judgment] for modification of an agreed-upon alimony provision." *Staple, supra* at 568. *Omne* addresses the inability or lack of power of the parties to abrogate trial court discretion and authority — pursuant to a statute — to issue orders it deems appropriate. *Staple* allowed a waiver of a party's right to seek modifiable spousal support if the waiver was explicit and complied with specific requirements. However, MCL 552.23 and 401 address a court's authority and duty to make an equitable property division and attach separate property as needed. There is a distinction between parties' right to seek affirmative, post-judgment relief granted in a statute versus a court's affirmative statutory duty – and authority – to make an equitable division by attaching separate property, where appropriate.

This distinction is consistent with the decision in other domestic relations cases. In

Harvey v Harvey, 470 Mich 186, 193-194; 680 NW2d 835 (2004), the Supreme Court examined whether the parties could agree to waive the trial court's statutory duty to address the best interests of a child in a custody case. The parties had agreed in their judgment of divorce that the friend of court would determine custody, and that there would not be a trial court review of that decision. When faced with this agreement to waive the trial court's best interest analysis, the Supreme Court stated the following:

> [T]he deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount. MCL 722.24(1).[2] Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated "best interests" factors from the court's deliberations once a custody dispute reaches the court.

Harvey, 470 Mich at 193. Thus, the trial court's statutory duty to ensure the welfare and best interests of children cannot be abrogated by party agreement. See also *Phillips v Jordan*, 241 Mich App 17, 614 NW2d 183 (2000) (trial court properly set aside stipulated custody order; court obligated to make its own determination concerning change of custody under Child Custody Act). Similarly, the court's duty to ensure equity at the time of divorce cannot be circumvented.

In *Brausch v Brausch*, 283 Mich App 339; 770 MW2d 77 (2008), this Court examined MCL 3.211, which governs moving a child's legal residence and MCR 3.211(C), which provides in part that "the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor." In their judgment of divorce, the parties agreed that the prohibition against moving the minor child does not apply to them and the plaintiff was free to move the child's residence without court approval. This Court

[2] MCL 722.24(1) provides: "(1) In all actions involving dispute of a minor child's custody, the court shall declare the child's inherent rights and establish the rights and duties as to the child's

rejected the plaintiff's argument that the parties could waive the requirement for court approval:

> The provision permitting plaintiff to move without prior court approval clearly contravenes MCR 3.211(C)(1). The plain meaning of "MCR 3.211(C)(1) mandates that custody orders contain language requiring the court to approve a proposed interstate move." *Spires, supra* at 439, 741 NW2d 523. The provision was not enforceable and should be stricken. The trial court erred in approving it when it entered the judgment of divorce.

Brausch, 283 Mich. App at 350. Once again, the trial court's discretion and authority, in this case to approve or not approve a change of residence of a child, cannot be waived by agreement of the parties and any such agreement contrary to statute or rule is unenforceable.

Finally, the Michigan Constitution sets out the procedures and processes for establishing the courts and the scope of their authority. Art. 6, §1, "Judicial power in court of justice; divisions," provides that "[t]he judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." Mich Const 1963, art 6 § 5 provides that the Supreme Court shall establish, modify and amend the practice and procedure of all courts of the state.[3] The Michigan Constitution does not provide that the parties may define the scope of authority of the trial courts.

Amicus addresses both the divorce property and support statutes in light of the *Allard* remand order.

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custody, support, and parenting time in accordance with this act."

[3] "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings

1. **Both MCL 552.401 and MCL 552.23 provide a statutory right allowing the Trial Court to invade separate property in order to fulfill its duty to ensure an equitable dissolution.**

The Trial Court incorrectly enforced the prenuptial agreement in *Allard* because the invasion statutes, MCL 552.23 and MCL 522.401, can be read in harmony with MCL 557.28 as it applies to a prenuptial agreement relating to property. Divorce law, as is venue, is controlled by statute. See MCL 552.1, et seq; *Omne, supra* at 309. The divorce statutes rely heavily on a trial court's obligation to ensure an equitable divorce. MCL 552.12 provides:

> 552.12 Suit; conduct, power of court.
> Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases.

The equitable discretion of the trial court is codified within Michigan's statutory scheme concerning division of property upon divorce and the goal of the invasion statutes is to perform equity.

MCL 552.23 provides the following:

> **Upon entry of a judgment of divorce** or separate maintenance, **if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage** who are committed to the care and custody of either party, **the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate,** to be paid to either party in gross or otherwise **as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case**.

MCL 552.23 (emphasis added). This statutory provision addresses the duty and authority of the trial court to perform its function to ensure equity. Thus, when the marital estate is not sufficient

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shall, as far as practicable, be abolished. The office of master in chancery is prohibited."

to support the spouse and children, the trial court may invade the other spouse's separate property, or the other spouse's share of the marital estate, to the extent that the invasion is "just and reasonable." *Pickering v Pickering*, 268 Mich App 1, 9; 706 NW2d 835 (2005).

Similarly, MCL 552.401 allows a trial court invade separate property to do equity, and states the following:

> The circuit court of this state **may include in any decree of divorce** or of separate maintenance entered in the circuit court **appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case,** if it appears from the evidence in the case that **the party contributed to the acquisition, improvement, or accumulation of the property**...

MCL 552.401 (emphasis added). The Legislature requires equity under MCL 552.401 under those circumstances where one spouse has helped the other spouse increase the value of the separate property, and thus all or a portion of that asset can be invaded. *Korth v Korth*, 256 Mich App 286, 293; 662 NW2d 111 (2003).

Both of these provisions provide a basis for a court to invade separate property where needed to make a property division that is equitable under the circumstances of each case. Like the venue statutes and unlike the personal jurisdiction statutes in *Omne*, none of these property division statutes allows for a party agreement to abrogate trial court authority or discretion.

In the instant case, this Court's prior decision affirming the trial court, read the invasion statutes (MCL 552.23 and MCL 552.401) alongside the prenuptial statute (MCL 557.28) and concluded that the statutes all shared the same subject matter and must be read *in pari materia*. *Allard*, 308 Mich App at 560. Applying this doctrine, the panel concluded that all three statutes "relate to the division of property in a divorce action and, therefore, must be read together," such

that the invasion statutes do not apply when there is a prenuptial agreement.[4] *Id.*

That holding was wrong. The purpose of the invasion statutes, like the other codified laws pertaining to divorce, is to ensure equity upon the breakup of the marriage. The purpose of the prenuptial statute is to allow the parties to enter into a contract before marriage that relates to property in the event of divorce.

The prenuptial agreement in *Allard* defines what property will be classified as separate, even to the extent those definitions are inconsistent with the common law. But once the property is defined as separate property of one spouse – regardless of how that is done – that classification does not exempt it from invasion under sections 23 and 401. Rather, the Legislature enacted the invasion statutes to allow separate property to be invaded in limited circumstances, *without* reference to how the classification of separate property came about – whether it be by gift, inheritance, premarital property, or the prenuptial agreement. To wholly disregard the invasion statutes dishonors the legislative intent – both in enacting the invasion statutes, and in enacting MCL 557.28 which was in derogation of common law.

[4] There is an inherent tension between the protections of §23 and §401 which serve to protect a non-moneyed spouse, and MCL 557.28 which validates antenuptial agreements, at least to the extent that the contract is one "relating to property".

2. MCL 557.28 only permits parties to enter into prenuptial agreements "relating to property," not as to spousal support or attorney fees.

The *Allard* Supreme Court remand order did not address the issue of whether prenuptial agreements may include spousal support (specifically the waiver of spousal support). This threshold issue is a matter of first impression.

Early on, prenuptial agreements between parties in contemplation of divorce were against public policy, and thus in contravention of common law. *Rinvelt v Rinvelt*, 190 Mich App 372, 380; 475 NW2d 478 (1991). Although Michigan statute had long-permitted prenuptial agreements, the courts only allowed those prenuptial agreements to relate to the parties' rights upon the death of one of the parties. *In re Estate of Benker*, 416 Mich 681, 688; 331 NW2d 193 (1982); *In re Muxlow Estate*, 367 Mich 133, 134; 116 NW2d 43 (1962).

Rinvelt discusses the fundamental principles behind such agreements, quoting *In re Benker Estate*, *supra*, (voiding an antenuptial agreement addressing property rights upon the death of a spouse):

> It is now generally recognized that antenuptial agreements which relate to the parties' rights upon the death of one of the parties are favored by public policy. MCL 557.28; MSA 26.165(8) recognizes such contracts and provides that:
>
> "A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."
>
> Such agreements, while recognized as valid instruments, are of a special nature because of the fact that they originate between parties contemplating marriage. **This relationship is one of extreme mutual confidence and, thus, presents a unique situation unlike the ordinary commercial contract situation where the parties deal at arm's length**.
>
> **In order for an antenuptial agreement to be valid, it must be fair, equitable, and reasonable in view of the surrounding facts and circumstances. It must be entered into voluntarily by both parties, with each understanding his or**

> **her rights and the extent of the waiver of such rights. *Hockenberry v Donovan*, 170 Mich 370, 380; 136 NW 389 (1912). Antenuptial agreements give rise to a special duty of disclosure not required in ordinary contract relationships so that the parties will be fully informed before entering into such agreements**. [Id., pp 688-689.] (Emphasis added).

Rinvelt expanded application of such agreements relating to property beyond death to divorce - finding them enforceable - but only within certain parameters. By then, Michigan had codified its divorce laws, but the language of the statutory provision regarding prenuptial agreements was expressly limited to contracts relating to property:

> A contract relating to ***property*** made between persons in contemplation of marriage shall remain in full force after the marriage takes place.

MCL 557.28 (emphasis added).

In allowing prenuptial agreements, the Legislature very explicitly directed that those agreements relate to property. The Legislature did not allow a prenuptial agreement relating to spousal support or attorney fees. The rules of statutory construction require courts to "discern the intent of the Legislature" by examining the specific language of the statute and "give every word meaning." *Stand up For Democracy v Secretary of State,* 492 Mich 588, 598; 822 NW2d 159 (2012). Further, under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), when a statute specifies one particular class it excludes all other classes. *Smitter v Thornapple Twp*, 494 Mich. 121, 137 n 34; 833 NW2d 875 (2013). Under this tenet of statutory construction, MCL 557.28 clearly states that it applies to prenuptial agreements relating only to property. It does not allow prenuptial agreements pertaining to spousal support or attorney fees. By specifying property, the Legislature necessarily intended to exclude spousal support and attorney fees.

In construing the language of a statute, courts must also keep in mind that "the

Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation v WDE Electric Co,* 454 Mich 489, 494; 563 NW2d 233 (1997). As noted in *Rinvelt*, prenuptial agreements historically violated public policy and contravened common law. When a statute is in derogation of common law (changes the common law), the courts must strictly and narrowly construe the statute. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). This applies to the Legislature's enactment of MCL 557.28, which addresses only property and does not include support or attorney fees.

There is a fundamental difference between party agreements made upon divorce and prenuptial agreements – made before parties marry. This Court's decision in *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000), addressed what was necessary for parties to waive the statutory right to seek modification of spousal support in a divorce settlement agreement. At the time of divorce, parties have lived together - often for years - and have experienced both the foreseen and unforeseen events of life. An agreement made at the end of a marriage is made with more knowledge and is more fully informed than an agreement made in contemplation of marriage prior to living a life together. *Staple* does not address prenuptial agreements and does not stand for the proposition that a waiver of spousal support may be included in a prenuptial agreement. The waiver of spousal support on divorce is a very different circumstance than the waiver of support on the eve of a marriage. [5]

[5] *Staple* accords with the Michigan Supreme Court's holding in *Rickner v Frederick,* 459 Mich 371, 590 NW2d 288 (1999), finding that the plain language of the spousal support modification statute, MCL §522.28, creates continuing jurisdiction for a trial court to modify a previous alimony award:

> An anchoring principle of our jurisprudence, and the foremost rule of statutory construction, is that we are to effect the intent of the Legislature. In doing so, we begin with the language of the statute — if the Legislature has crafted a clear and unambiguous

The plain language of MCL 557.28 permits only antenuptial agreements concerning property. This statutory limitation is consistent with the unique position of antemarital agreements. See *In re Benker Estate*, 416 Mich 681, 688-689; 331 NW2d 193 (1982). To permit antenuptial agreements to control spousal support and attorney fees is to violate the Legislature's intent.

B. Even if prenuptial agreements trump the statutory provisions embodied in MCL 557.28, 552.23, and 552.401, this Court should require that a prenuptial agreement must explicitly state the parties' express agreement to waive their statutory right to invasion of separate property, to waive equity, and to waive other statutory protections afforded by Michigan's codified divorce laws.

Even assuming arguendo that the Court of Appeals' holding in *Allard* is correct that the prenuptial statute trumps the invasion statutes, in order for a party to validly waive their statutory rights in a prenuptial agreement, the waiver must be a knowing and explicit waiver of those statutory rights. *See, e.g., Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000).

> provision, we assume that the plain meaning was intended, and we enforce the statue as written. [Citations omitted].
>
> In this instance, we are faced with a statute that simply provides that '[o]n petition of either party, after a judgment for alimony . . . the court may revise and alter the judgment, respecting the amount of payment of the alimony . . ., and may make any judgment respecting any of the matters that the court might have made in the original action.' This is a case in which the court originally provided alimony, and thus continuing jurisdiction is plainly provided by the statute.
>
> This conclusion is buttressed by the absence of a prior Michigan appellate decision holding that the statutory power to modify is extinguished if it is once exercised to eliminate alimony. Further, the statutory power to modify is not dependent on triggering language in the judgment." *Butler v Butler*, supra [356 Mich 607 (1959)] at 616-617.
>
> **For these reasons, we are persuaded that the proper reading of the statute is that the Legislature intends, in cases in which alimony is initially ordered, that the court retain the power to make necessary modifications in appropriate circumstances**.

Rickner, 459 Mich at 378-379 (emphasis added).

As discussed above, Michigan's codified divorce law provides a host of methods by which a trial court fulfills its duty to ensure that the marriage partnership dissolves equitably. The invasion statutes offer two such methods. A trial court has the authority to consider the situation of both parties and to ensure an equitable separation of the parties' assets and lives at the time of divorce. The trial court also has the authority to invade separate property under MCL 552.401 and 552.23. In order to harmonize the equity provisions with the prenuptial provision, any waiver of the right to invade separate property, or any waiver of equity assuming such a waiver is even possible, the prenuptial agreement must clearly express the parties' intent to forgo specific statutory rights, analogous to this Court's decision in *Staple*, 241 Mich App at 568.

In *Staple*, the parties entered into a consent judgment of divorce, by which the parties purported to make spousal support non-modifiable. Under MCL 552.28, spousal support is modifiable, so the consent judgment in *Staple* was contrary to the statutory right to modifiability. The Court of Appeals held in *Staple* that "the statutory right to seek modification of alimony may be waived by the parties where they specifically forgo their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and nonmodifiable." *Id.* at 578; *see also id*. at 581. The *Staple* Court went on to "express [its] conviction that it is a waste of precious judicial and client resources for the parties to leave to this court the determination of the parties' intent." *Id.* at 580. *Staple* sought to avoid that situation and stated that "[i]n order to prevent this very type of protracted litigation, the parties' intent should be clearly and unequivocally expressed upon the record and in the ultimate instrument that incorporates the alimony provision." *Id.*

To the extent that the Michigan divorce laws are imbued with equitable provisions, it is

even more compelling that a prenuptial agreement would have to include an express, knowing, voluntary, and clear waiver – even more so than a consent judgment of divorce. This is because the parties are in a very different position, equitably speaking, at the time of the divorce as compared to the time of marriage. At the divorce, the parties know that the marriage did not succeed; they know that perhaps they cannot trust their soon-to-be ex-spouse; and they know that by the divorce the parties are not only dividing their property but also dividing their combined lives. Yet even during this period of division and mistrust, the courts still require that any agreement to make spousal support non-modifiable must be a knowing and express waiver of the specific statutory right to modify spousal support as reflected in MCL 552.28.

At least the same level of knowing and express waiver of statutory rights should be required before the marriage, if not a greater level. Before the marriage, the parties often have rose-colored glasses about their future spouse. They are in love and have not likely faced any major conflicts, hurdles, or tests of their trust in each other. That there is more likely to be a blind trust of a future spouse shortly before marriage – as compared to distrust of a spouse at the time of divorce, compels that any waiver of statutory rights in a prenuptial agreement must be express and knowing.

Yet another reason the knowing and express waiver is more compelling before marriage is because the parties have their whole lives before them. They do not know how many children they will have; or what riches, successes, or other blessings may be bestowed upon them during the marriage. Nor do they know what tragedies may befall them. Any of those occurrences – both good and bad – during the marriage could impact the needs of the parties upon divorce, and alter the vision the parties had set for themselves in the prenuptial agreement. Further, it cannot

be assumed that non-lawyers know the courts' duties and what rights are being waived. Without a knowing and express waiver of each of the statutory rights that the prenuptial agreement purports to waive, the parties cannot be held to forgo those statutory rights. Therefore, in the event this Court allows a prenuptial agreement to trump the parties' statutory rights, then this Court should ensure that parties expressly waive each of their statutory rights addressed in the prenuptial agreement.

C. There should only be a presumption of enforceability to a validly executed antenuptial agreement where (1) each party had access to independent legal counsel at the time of execution of the agreement and (2) the agreement was not executed under circumstances giving rise to duress or fraud, (3) the agreement was neither procedurally nor substantively unconscionable at the time of execution, (4) the agreement was not substantively unconscionable at the time of enforcement, (5) the agreement did not provide for a permanent waiver of future spousal support, and (6) the agreement did not provide for a waiver of the statutory protections of MCL 552.23 and 552.401.

For all the reasons discussed above and as a matter of best legal practices, an antenuptial agreement would only be presumed valid where: both parties were represented by independent counsel, there was no duress or fraud at the time of execution, the agreement was not unconscionable at the time of execution nor at the time of enforcement, the agreement does not include a waiver of spousal support (consistent with MCL 557.28), and the agreement does not include a waiver of the statutory protections of MCL 552.23 and 401.[6]

Rinvelt and its progeny have affirmed the right of consenting adults to enter into binding contracts. But a marriage and a family is not a business, and attempts to apply pure commercial

[6] *Staple*, *supra*, allowed a waiver of a party's right to seek modifiable spousal support if explicit and compliant with specific requirements. However, MCL 552.23 and 401 address a court's authority and duty to make an equitable property division and attach separate property as needed to do so. There is a distinction between parties' right to seek affirmative post-judgment relief granted in a statute versus a court's affirmative statutory duty - and authority - here, to attach separate property in order to make an equitable division at the time of the marriage dissolution.

contract principles to a marriage relationship, are doomed to violate the legislative policies embodied in the equitable divorce statutes. The legal effect of the antenuptial agreement in the *Allard* case was to create "Super Separate Property" beyond the reach intended by the Michigan Legislature in MCL 552.23 and MCL 552.401, albeit without reference to the invasion statutes.

As discussed, marriages in Michigan are not "commercial contracts." There is no independent consideration for a marital contract, other than the fact of the marriage itself. *Rinvelt supra,* clearly recognized this and affirmed the holding of *In te Benker* regarding the "special nature" of marriage contracts which involve "extreme mutual confidence:" *Rinvelt, supra,* p. 378 citing *In Re Benker.* Insofar as marriage contracts are <u>not</u> "arm's length commercial contracts," they should be subject to a different level of judicial scrutiny than commercial transactions such as mortgages, leases, merger agreements, secured transactions, and the like. *In re Benker, supra.*

The effect of an antenuptial agreement is that a moneyed spouse, with substantial premarital assets, may not face any consequences for dysfunctional behavior, gambling or substance abuse, domestic violence or other destructive behaviors. Accordingly, the public policy favoring antenuptial agreements to address the death of a party is <u>not</u> in accord with the public policy associated with antenuptial agreements encouraging divorce because there is no downside to a party's behavior during a marriage no matter how outrageous the behavior may be.

In the instant case, Mrs. Allard's allegations of duress and unconscionability based on domestic violence were essentially ignored. Mr. Allard was free to behave as he chose, secure in the knowledge that he would end up a millionaire and his wife would receive an estate barely worth $95,000.00. Mr. Allard was free to act without consequence, enabled by a complex

contract executed by a spouse without the benefit of legal counsel, presented to her at a rehearsal dinner attended by friends and family; this agreement purported to forever free him from an alimony exposure and preserved his premarital and marital estate from any claim arising during the marriage. Viewing antenuptial documents in the same light as commercial contracts permits this injustice to survive and flourish.

Antenuptial agreements can be enforceable within certain parameters. The core concept is a "knowing waiver" -- each party having a full understanding of his or her rights, as *In re Benker's Estate*, *supra*, makes clear:

> It must be entered into voluntarily by both parties, with each understanding his or her rights, and the extent of the waiver of those rights.

It is a complicated area and each party should have the benefit of independent legal counsel. In the present case, Mrs. Allard had been out of the work force for a decade and had assumed the position of full time homemaker, presumably with the agreement of her husband. At the time of signing the antenuptial agreement she was not represented by legal counsel, and her husband was.

In Re Benker's Estate, supra is illuminating here; it employed a "presumption of non-disclosure" involving a number of factors, one of which was whether a party was represented by legal counsel:

> There is no indication whether such disclosure was made, or whether the wife was fully informed as to the exact extent of the rights she was waiving, which were far greater than the rights waived by her husband. The fact that she did not have independent counsel before signing an antenuptial agreement that totally eliminated any right in her husband's estate, along with other factors in this case, supports the application of the provision of non-disclosure.

Allison v Stevens, 269 Ala 288; 112 So. 2d 451 (1959).

In the absence of legal counsel, it would be impossible for Mrs. Allard (and most attorneys themselves) to understand the complexities and nuances of section 23 claims, section 401 entitlements, waivers of dower, waivers of spousal support, and the myriad of technical provisions in a complex document, intended and drafted with the intent of preserving the assets of the moneyed spouse.

The consequences of the failure of a party to be represented by counsel should remove the presumption of validity of an antenuptial agreement, unless the party knowingly declined the opportunity for this representation.

CONCLUSION:

The trial court had the authority and discretion to award spousal support and invade and attach the separate property or grant other relief pursuant to MCL 552.23, MCL 552.401, MCL 552.13 and MCL 552.12 regardless of the agreement.The parties do not have the power to abrogate trial court authority under the statutes as discussed.

RELIEF REQUESTED

The Family Law Section requests that this Court consider the arguments presented in this brief.

Respectfully submitted,

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/s/ Liisa Speaker

/s/ Gail Towne

/s/ Judith Curtis

THE FAMILY LAW SECTION OF THE
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